

December 2014

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Recommended Citation

Mishali, Jessica (2014) "Roper v. Simmons - Supreme Court's Reliance on International Law in Constitutional Decision-Making," *Touro Law Review*: Vol. 21: No. 4, Article 15.
Available at: <https://digitalcommons.tourolaw.edu/lawreview/vol21/iss4/15>

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ROPER V. SIMMONS—SUPREME COURT’S RELIANCE ON INTERNATIONAL LAW IN CONSTITUTIONAL DECISION-MAKING

*Jessica Mishali**

I. INTRODUCTION

In 1981, Kevin Stanford raped, sodomized and murdered a woman during a gas station robbery.¹ Stanford was seventeen years old at the time he committed this terrible crime and he argued that imposition of the death penalty would constitute cruel and unusual punishment,² in violation of the Eighth Amendment.³ In 1989, in *Stanford v. Kentucky*, the Court held that the juvenile death penalty,⁴ as imposed on individuals who were sixteen or seventeen years of age when their crimes were committed, did not constitute cruel and unusual punishment and affirmed the petitioner’s death sentence.⁵ In determining whether Stanford’s sentence violated the Eighth

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¹ *Stanford v. Kentucky*, 492 U.S. 361, 365 (1989).

² *Id.*

³ U.S. CONST. amend. VIII, which states in pertinent part “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”

⁴ The juvenile death penalty is the imposition of capital punishment for a crime that was committed before the age of eighteen.

⁵ *Stanford*, 492 U.S. at 380.

Amendment, the Court looked to whether the sentence would have been considered cruel and unusual at the time that the Bill of Rights was adopted or if it was contrary to the “evolving standards of decency that mark the progress of a maturing society.”⁶ In this opinion, the Court was clear about its unwillingness to consider international law as a factor. Justice Scalia wrote the following in a footnote: “We emphasize that it is *American* conceptions of decency that are dispositive, rejecting the contention of petitioners and their various *amici* that the sentencing practices of other countries are relevant.”⁷

On March 1, 2005, the United States Supreme Court revisited the issue from *Stanford* and held, in *Roper v. Simmons*⁸, that the imposition of the death penalty on individuals who were under the age of eighteen when their crimes were committed constitutes cruel and unusual punishment and is forbidden by the Eighth and Fourteenth Amendments.⁹ In *Simmons*, the Supreme Court affirmed the decision of the Missouri Supreme Court to set aside Simmons’ death sentence due to a national consensus, which has caused the juvenile death penalty to become “truly unusual over the last decade.”¹⁰ This decision represents a departure from the Court’s analysis in *Stanford*, where the practices of other countries were patently rejected as a factor,¹¹ in that here the Court gave substantial

⁶ *Id.* at 368-69 (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

⁷ *Stanford*, 492 U.S. at 370 n.1.

⁸ 543 U.S. 551 (2005).

⁹ *Id.* at 578.

¹⁰ *Id.* at 560.

¹¹ *Stanford*, 492 U.S. at 370 n.1.

consideration to international opinion.¹²

A lot can change in fifteen years, and changes in the individual states' practices can account for the national consensus that did not exist when *Stanford* was decided. But how is the inconsistency regarding the consideration of foreign law reconciled? This inconsistency raises the issue of when is it appropriate for the Court to consider foreign law. Furthermore, what is the basis for the trend to do so now, when it failed to do the same just fifteen years ago? The purpose of this Note is to examine the divergence in *Simmons* and to suggest an explanation for the apparent movement toward concern with international law. More and more, courts of different countries are dealing with the same basic issues, particularly in the area of human rights.¹³ This fact has surely contributed to the United States Supreme Court's newfound eagerness to consult these courts in the process of decision-making. Moreover, considering foreign opinion will help "create that all-important good impression" which the United States is sorely in need of.¹⁴

Because a closer look at *Simmons* is key in the effort to analyze the Supreme Court's use of international law in its own decisions, Part II takes an in-depth look at *Simmons*, and provides an analysis of the Court's rationale and use of international views. In Part III, "evolving standards of decency," which the Court focuses on

¹² See *Simmons*, 543 U.S. at 574-78.

¹³ See *infra* note 64.

¹⁴ See *infra* note 140; see also Richard H. Curtiss, *Pew Pole Reveals What the World Thinks in 2002*, WASHINGTON REPORT ON MIDDLE EAST AFFAIRS, Jan. 2003, at 20, available at <http://www.wrmea.com> (discussing the poor opinion of America in Europe and the Middle East).

in its opinion in *Simmons*, are examined. The arguments for and against the Supreme Court considering international law are presented in Part IV, along with the conclusion that it should. Subsequently, in Part V, the discussion is then broadened with an examination of the Supreme Court's consideration of foreign law beyond the death penalty. Finally, Part VI explores the individual Justices and their ability to affect the international perception of the United States. This Note concludes that the Court's apparent trend to consider international law and opinion is a positive one, and should continue.

II. ROPER V. SIMMONS: THE SUPREME COURT'S OPINION

Christopher Simmons was seventeen years old and still in high school when he committed the "outrageously and wantonly vile, horrible, and inhuman" murder, for which he was sentenced to death.¹⁵ In the middle of the night, Simmons and his accomplice entered the home of the victim with the intention to rob and murder someone.¹⁶ Simmons had a previous car accident with the victim and recognized her right away. This only strengthened his desire to kill her.¹⁷ The two perpetrators covered the victim's face and hands in duct tape and drove her to a park, where they tied her hands and feet with electrical wire and threw her off a bridge.¹⁸ She drowned in the waters below.¹⁹ Simmons bragged about this crime to his friends,

¹⁵ *Simmons*, 543 U.S. at 557.

¹⁶ *Id.* at 556.

¹⁷ *Id.*

¹⁸ *Id.* at 557.

¹⁹ *Id.*

which ultimately got him arrested and convicted.²⁰

After the Supreme Court's holding in *Atkins v. Virginia*,²¹ "Simmons filed a new petition for state postconviction relief."²² In *Atkins*, the Court held that imposition of the death penalty on a mentally retarded individual is prohibited by the Eighth Amendment due to a national consensus against it.²³ Simmons' attorney argued that the reasoning in *Atkins* should also apply to the juvenile death penalty, thereby rendering it unconstitutional.²⁴ The Missouri Supreme Court agreed and set aside Simmons' death sentence and re-sentenced him to life in prison without parole.²⁵ The court reasoned that:

[A] national consensus has developed against the execution of juvenile offenders, as demonstrated by the fact that eighteen states now bar such executions for juveniles, that twelve other states bar executions altogether, that no state has lowered its age of execution below 18 since *Stanford*, that five states have legislatively or by case law raised or established the minimum age at 18, and that the imposition of the juvenile death penalty has become truly unusual over the last decade.²⁶

The United States Supreme Court subsequently granted certiorari²⁷ and affirmed.²⁸

²⁰ *Simmons*, 543 U.S. at 557.

²¹ 536 U.S. 304 (2002).

²² *Simmons*, 543 U.S. at 559.

²³ *Atkins*, 536 U.S. at 311-12.

²⁴ *Simmons*, 543 U.S. at 559.

²⁵ *Id.* at 559-60.

²⁶ *Simmons v. Roper*, 112 S.W.3d 397, 399 (2003), *aff'd*, 543 U.S. 551 (2005).

²⁷ *Simmons*, 543 U.S. at 560.

III. EVOLVING STANDARDS OF DECENCY

In its opinion, the *Simmons* Court utilized a two-step process.²⁹ First, the Court looked to whether a national consensus had formed.³⁰ Second, the Court exercised its own independent judgment regarding whether the death penalty is a disproportionate punishment when imposed on juvenile offenders.³¹ The Court used these two factors to determine whether “evolving standards of decency” render the juvenile death penalty to be cruel and unusual punishment in violation of the Eighth Amendment.³² The majority’s analysis as to national consensus is in line with the Missouri Supreme Court’s finding. The Court agreed that a national consensus does exist because of

[T]he rejection of the juvenile death penalty in the majority of States; the infrequency of its use even where it remains on the books; and the consistency of the trend toward abolition of the practice – provide sufficient evidence that today our society views juveniles, in the words *Atkins* used respecting the mentally retarded, as “categorically less culpable than the average criminal.”³³

After evaluating the national consensus, the Court looked to its own independent judgment on whether the juvenile death penalty

²⁸ *Id.*

²⁹ *Id.* at 564.

³⁰ *Id.* (indicating that determination of whether or not a national consensus exists requires an examination legislative enactments).

³¹ *Id.* (explaining that the Court “then must determine, in the exercise of our own independent judgment, whether the death penalty is a disproportionate penalty for juveniles”).

³² *Simmons*, 543 U.S. at 561.

³³ *Id.* at 567 (quoting *Atkins*, 536 U.S. at 316).

is a violation of cruel and unusual punishment. The Court based this independent judgment on two distinct factors: (1) the general differences between juveniles and adults; and (2) international law regarding the juvenile death penalty.³⁴ The Court considered the following three general differences between juveniles and adults: (1) maturity and sense of responsibility; (2) vulnerability to negative influence; and (3) character formation.³⁵ Since juveniles are understandably less mature, highly vulnerable to outside pressure and have transitory personality traits, the Court determined that “their irresponsible conduct is not as morally reprehensible as that of an adult.”³⁶ For these reasons, the Court concluded “that neither retribution nor deterrence provides adequate justification for imposing the death penalty on juvenile offenders”³⁷

The Court next looked to foreign law and opinion in forming its independent judgment. While the Court was clear that foreign law “does not become controlling,”³⁸ it did state that international authorities are “instructive.”³⁹ The Court made reference to several human rights treaties that bar the juvenile death penalty.⁴⁰ It also recognized that “only seven countries other than the United States have executed juvenile offenders since 1990: Iran, Pakistan, Saudi Arabia, Yemen, Nigeria, the Democratic Republic of the Congo, and

³⁴ *Id.* at 567-78.

³⁵ *Id.* at 569.

³⁶ *Id.* at 570 (quoting *Thompson v. Oklahoma*, 487 U.S. 815, 835 (1988)).

³⁷ *Simmons*, 543 U.S. at 572.

³⁸ *Id.* at 575.

³⁹ *Id.*

⁴⁰ *Id.* at 576; *see also* text accompanying notes 52-62.

China.”⁴¹ In fact, these seven countries have discontinued the juvenile death penalty, and until *Simmons* was decided, the United States stood alone in its adamant refusal to cease executing juveniles.⁴² The Court concluded by emphasizing that “[i]t does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom.”⁴³ In short, the Court gave serious and lengthy consideration to international law, reinforcing its current and proper trend to do so.⁴⁴

IV. SHOULD INTERNATIONAL LAW BE A FACTOR CONSIDERED BY THE SUPREME COURT?

A. The Arguments in Favor of the United States Supreme Court’s Consideration of Foreign Law

While some see the apparent trend toward the consideration of international law and opinion as a positive step toward recognition of the rest of the world’s practices regarding fundamental rights, others insist that it is inappropriate to look beyond America’s history and views when interpreting the United States Constitution.⁴⁵ Notably, Justice Scalia expressed his adamant opinion that it is only “American conceptions of decency that are dispositive” in

⁴¹ *Id.* at 577.

⁴² *Simmons*, 543 U.S. at 577.

⁴³ *Id.* at 578.

⁴⁴ *Id.* at 575-78.

⁴⁵ See, e.g., *Stanford*, 392 U.S. at 370 n.1.

determining whether a particular punishment is cruel and unusual.⁴⁶

The arguments in favor of eliminating the juvenile death penalty are many and strong. There is a current world movement to abolish the death penalty. Beyond that, there is an even stronger intolerance for the juvenile death penalty.⁴⁷ Apart from the United States,⁴⁸ which until the decision in *Simmons* allowed a defendant who committed a crime at age seventeen to be sentenced to death,⁴⁹ there are few countries that still impose death for a crime committed by a defendant who was less than eighteen years old at the time that the crime was committed.⁵⁰ Since 1990, Amnesty International has recorded juvenile executions in only eight countries: China, the Democratic Republic of the Congo, Iran, Pakistan, Yemen, Nigeria, Saudi Arabia and the United States.⁵¹

Furthermore, some argue that allowing juvenile offenders to be executed in the United States is a violation of customary international law.⁵² Customary international law is defined as law that “results from a general and consistent practice of states [which is] followed by them from a sense of legal obligation.”⁵³ In other

⁴⁶ *Id.*

⁴⁷ *See infra* note 52.

⁴⁸ Until the recent decision in *Simmons*, the Federal Constitution allowed for the juvenile death penalty. Nevertheless, many states prohibited it or simply did not practice it.

⁴⁹ *See Stanford*, 392 U.S. at 380.

⁵⁰ *See infra* note 52.

⁵¹ *See* Amnesty International, *Juveniles and the Death Penalty: Executions Worldwide since 1990*, November 1, 1998, at <http://web.amnesty.org/library/index/ENGACT500111998>.

⁵² *See generally* Allyssa D. Wheaton-Rodriguez, *The United States' Choice to Violate International Law by Allowing the Juvenile Death Penalty*, 24 Hous. J. Int'l L. 209, 218 (2001).

⁵³ *Id.* (quoting RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES 102(2) (1987)).

words, the two elements that must be satisfied, in order for customary international law to exist, are state practice and the belief that the practice is actually required by international law. The first element is clearly fulfilled, since only seven countries impose the death penalty on juveniles and all other countries have either abolished it or enacted legislation to prohibit it.⁵⁴

In order to meet the second element, the nations that prohibit the juvenile death penalty must do so because they believe that they must in order to comply with international law.⁵⁵ In light of the four international agreements that prohibit the juvenile death penalty, it is arguable that the conforming nations believe that they are required to prohibit the juvenile death penalty by customary international law.⁵⁶ The International Covenant on Civil and Political Rights (“ICCPR”), Article 6,⁵⁷ Convention on the Rights of the Child, Article 37,⁵⁸ Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Article 68⁵⁹ and American Convention on Human Rights, Chapter 2, Article 4, Section 5⁶⁰ all prohibit the juvenile death penalty. Since most nations have signed at least one of the above-mentioned treaties, the prohibition of the juvenile death penalty in these nations may be based, at least in part, on their belief

⁵⁴ *Id.* at 218-19.

⁵⁵ *Id.*

⁵⁶ *See infra* notes 57-60.

⁵⁷ *See* International Covenant on Civil and Political Rights, Dec. 19, 1966, art. 6, para 2, 999 U.N.T.S. 171, 175.

⁵⁸ *See* Convention on the Rights of the Child, G.A. Res. 44/25, U.N. GAOR, 44th Sess., Supp. No. 49, art. 37, at 171, U.N. Doc. A/44/49 (Nov. 20, 1989).

⁵⁹ *See* Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 68, 75 U.N.T.S. 287, 330.

⁶⁰ *See* American Convention on Human Rights, O.A.S. Official Records, OEA/Ser.

that it is a violation of customary international law.⁶¹ These treaties reveal that the United States may be in violation of customary international law. Even more fundamentally, according to some, it reveals that the majority of the civilized world has taken a stance that the United States has thus far refused to adhere to.

Perhaps, it is important for the United States to recognize international opinion in order to maintain a positive relationship with the rest of the world. Its reluctance to do so, regarding the juvenile death penalty, prevents alignment with the bulk of the nations in the world, and may foster an arrogant impression, particularly due to the United States Supreme Court's refusal to even consider foreign law in its decision-making process. Human rights activists have long criticized the United States for a standard that is not up to par with "the standard of decency of almost every other country in the world . . . when it comes to the death penalty."⁶² Perhaps the Supreme Court's consideration of foreign law, even if the Court ultimately disagrees with the relevant foreign law, would be helpful in improving the United States' relationship with the international community. Justice Breyer has said:

[I]n some of these countries there are institutions, courts that are trying to make their way in societies that didn't used to be democratic, and they are trying

K/XVI/1.1 doc. 65 rev. 1 corr. 2, ch. 2, art.4, para. 5 (Jan. 7, 1970).

⁶¹ See Wheaton-Rodriguez, *supra* note 52, at 219 (explaining that countries that have signed treaties that prohibit the juvenile death penalty surely believe that they are required, by customary international law, to refrain from imposing the juvenile death penalty).

⁶² Lisa Odom, *Jumping on the Bandwagon: The United States Supreme Court Prohibits the Execution of Mentally Retarded Persons in Atkins v. Virginia*, 31 PEPP. L. REV. 875, 883 (2004) (citing Jamie Fellner, *Mentally Retarded Don't Belong on Death Row*, S.F. CHRON., Jan. 4, 2000, at A19, available at <http://www.hrw.org/editorials/2000/death-0105-cron.htm>).

to protect human rights, they are trying to protect democracy. They're having a document called the constitution and they want to be independent judges. And for years people all over the world have cited to the Supreme Court, why don't we cite to them occasionally? They will then go to some of their legislators and others and say, 'See, the Supreme Court of the United States cites us.' That might give them a leg up, even if we just say it's an interesting example. So, you see, it shows we read their opinions. That's important.⁶³

B. Arguments Against the United States Supreme Court's Consideration of Foreign Law

On the other hand, there is a valid point of view that urges the Supreme Court to refuse to consider international law and opinion. Chief Justice Rehnquist, as well as Justices Scalia and Thomas, have continuously rejected the views of other countries as factors to be considered in the Supreme Court's decision-making.⁶⁴ Justice Scalia, in his dissent in *Thompson v. Oklahoma*, opined that "[t]he plurality's reliance upon Amnesty International's account of what it pronounces to be civilized standards of decency in other countries is totally inappropriate as a means of establishing the fundamental beliefs of this Nation."⁶⁵ In his dissent in *Atkins v. Virginia*, Chief Justice

⁶³ Justice Stephen Breyer, U.S. Association of Constitutional Law Discussion: Constitutional Relevance of Foreign Court Decisions (Jan 13, 2005) (transcript available by Federal News Service).

⁶⁴ See *Simmons*, 543 U.S. at 624 (Scalia, J., dissenting) ("More fundamentally, however, the basic premise of the Court's argument—that American law should conform to the laws of the rest of the world—ought to be rejected out of hand."); *Atkins*, 536 U.S. at 324-25 (Rehnquist, C.J., dissenting) ("I fail to see, however, how the views of other countries regarding the punishment of their citizens provide any support for the Court's ultimate determination."); *Stanford*, 492 U.S. at 370 n.1 ("We emphasize that it is *American* conceptions of decency that are dispositive . . .").

⁶⁵ *Thompson*, 487 U.S. at 869 n.4 (Scalia, J., dissenting).

Rehnquist wrote: “I fail to see, however, how the views of other countries regarding the punishment of their citizens provide any support for the Court’s ultimate determination.”⁶⁶ These Justices have repeatedly insisted that “the viewpoints of other countries simply are not relevant” when a national consensus is sought.⁶⁷ They believe that a national consensus will determine the “evolving standards of decency.”

C. International Law Should Be Considered by the United States Supreme Court

In this section, it will be argued that the Supreme Court should in fact consider international law, as it did in *Simmons*. In so doing, an explanation of why this consideration is valid, and quite important will be presented.

First, in response to the argument that the United States is in violation of customary international law, there are scholars who argue that the conception of customary international law is simply misguided.⁶⁸ These opponents suppose that allowing the majority of nations to dictate how other nations must act would usurp the power of each country to legislate their own matters.⁶⁹ To imagine that the United States should be required to yield to any and every law that the majority of nations agreed on is quite an alarming notion.⁷⁰

⁶⁶ *Atkins*, 536 U.S. at 324-25 (Scalia, J., dissenting).

⁶⁷ *Id.* at 325.

⁶⁸ See Cele Hancock, *The Incompatibility of the Juvenile Death Penalty and the United Nation's Convention on the Rights of the Child: Domestic and International Concerns*, 12 ARIZ. J. INT'L & COMP. L. 699, 720-22 (1995) (describing the hesitation of United States courts to use customary international law as a foundation for deciding domestic issues).

⁶⁹ See Wheaton-Rodriguez, *supra* note 52, at 220-21.

⁷⁰ See *infra* note 78.

Moreover, some argue that since the United States is a “persistent objector,” concerning the international opinion toward the juvenile death penalty,⁷¹ it should not be held to customary international law in this arena.⁷² A persistent objector is a label given to a nation that objects to the international norm and is thereby not bound by it.⁷³ The contention that the United States is, in fact, a persistent objector is based on the United States’ reaction to the ICCPR.⁷⁴ Article 6 of the ICCPR states that the death penalty “shall not be imposed for crimes committed by persons below eighteen years of age.”⁷⁵ The United States did ratify this treaty, but it also reserved the right “subject to its constitutional constraints, to impose capital punishment on any person . . . including such punishment for crimes committed by persons below eighteen years of age.”⁷⁶ Nations that have steadily objected to the international norm are labeled persistent objectors and are not bound by the customary international law.⁷⁷

In addition, if the United States Supreme Court were to be consistent in conforming to the majority of foreign nations, then we would have to “take the bitter with the sweet,” as one scholar has put

⁷¹ See Wheaton-Rodriguez, *supra* note 52, at 221.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.* at 211 (explaining that the United States became a party to the treaty and ratified it, but reserved the right to impose capital punishment on any person within the bounds of the Constitution).

⁷⁵ *Id.*

⁷⁶ See Wheaton-Rodriguez, *supra* note 52, at 221 (quoting 138 Cong. Rec. S4781, S4783 (daily ed. Apr. 1992)).

⁷⁷ See *id.* “Critics also argue the United States, as a persistent objector, should not be held to customary international law concerning the death penalty and juvenile offenders. Nations who have consistently objected to the norm are labeled persistent objectors and are not

it.⁷⁸ This would mean that international sources would not be used only to increase rights, but to limit them as well.⁷⁹ The United States protects rights that few other nations deem so worthy.⁸⁰ Debatably, the Supreme Court would have to take the good with the bad if it were to consider the international majority in its decisions. The negative effect of this could possibly outweigh the positive. For example, the extent to which Americans enjoy free speech is exceptional in comparison to other countries.⁸¹ Free speech is just one illustration of a right that Americans hold dear and would not want diminished by other countries' views. If the United States Supreme Court were to strictly adhere to foreign law, we may be required to curtail free speech.

However, our rights are guaranteed by the Constitution. The United States Constitution prevents the Court from taking away rights simply because other countries do not afford their citizens the same rights. This is analogous to the individual states, which are permitted to grant their citizens more rights than the federal constitution, but not less. So too, consideration of international opinion might only bring Americans greater rights than we already enjoy. Because the Court cannot divest citizens of fundamental rights afforded by the Constitution, the Supreme Court could consider

bound by customary international laws." *Id.*

⁷⁸ See Michael D. Ramsey, *Agora: The United States Constitution and International Law: International Materials and Domestic Rights: Reflections on Atkins and Lawrence*, 98 AM. J. INT'L L. 69, 76 (2004).

⁷⁹ *Id.*

⁸⁰ *Id.* at 77 (listing free speech and procedural protections for criminal defendants as some examples).

⁸¹ *Id.*

international law without the risk of depriving citizens of their fundamental rights. In a recent public discussion on the subject of the relevance of foreign court decisions, Justice Scalia said “take our abortion jurisprudence, we are one of only six countries in the world that allows abortion on demand at any time prior to viability. Should we change that because other countries feel differently?”⁸² The answer to that question is the United States Constitution. The Court may reinterpret the Constitution, but it may not void constitutionally granted rights.

Finally, it is necessary to consider the role of public opinion on the United States Supreme Court.⁸³ In *Furman v. Georgia*, the Supreme Court stated that the definition of cruel and unusual punishment “is not fastened to the obsolete, but may acquire meaning as public opinion becomes enlightened”⁸⁴ In other words, what may not have been considered cruel and unusual ten years ago, may very well be cruel and unusual according to the American citizens’ feelings today. Therefore, public opinion is particularly important in relation to the death penalty.⁸⁵ As Justice Scalia emphasized, the Court looks to an American consensus of what constitutes cruel and unusual punishment, allowing the American people to decide how to punish their citizens.⁸⁶ In contrast, countries such as Britain, France,

⁸² Justice Antonin Scalia, U.S. Association of Constitutional Law Discussion: Constitutional Relevance of Foreign Court Decisions (Jan 13, 2005) (transcript available by Federal News Service).

⁸³ See Kristi Tumminello Prinzo, *The United States-“Capital” of the World: An Analysis of Why the United States Practices Capital Punishment While the International Trend is Toward its Abolition*, 24 BROOK. J. INT’L L. 855 (1999).

⁸⁴ *Furman v. Georgia*, 408 U.S. 238, 242 (1972) (Douglas, J., concurring).

⁸⁵ See Prinzo, *supra* note 83, at 886-88.

⁸⁶ *Stanford*, 492 U.S. at 370 n.1.

Germany and Austria have abolished the death penalty altogether, despite the fact that the citizens favored it.⁸⁷

If the Supreme Court were to focus on the world's view of the juvenile death penalty instead of the American populace's perspective of the sanction, Americans might cease to enjoy Eighth Amendment interpretation that is in line with American beliefs. In summary, it is clear that the Eighth Amendment⁸⁸ requires an analysis as to "evolving standards of decency," but the dispute rests on whether the Court should look only to American decency or to the international community's standard as well. A broader look at the Supreme Court's consideration of foreign law will further reveal its trend to do so, and the reasons behind it.

V. THE SUPREME COURT'S CONSIDERATION OF FOREIGN LAW AND OPINION IN DEATH PENALTY CASES AND BEYOND

Aside from *Stanford* and *Simmons*, there are three relatively recent Supreme Court decisions involving death penalty issues: *Coker v. Georgia*, *Thompson v. Oklahoma* and *Atkins v. Virginia*.⁸⁹ In each of these cases, the Court interpreted the Eighth Amendment in order to determine if, under the circumstances, the specific implementation of the death penalty constituted cruel and unusual punishment.⁹⁰ An examination of these cases, in addition to cases not relating to the death penalty, will broaden an understanding of the

⁸⁷ See Prinzo, *supra* note 83, at 887-88.

⁸⁸ *Id.*

⁸⁹ *Coker v. Georgia*, 433 U.S. 584 (1997); *Thompson*, 487 U.S. 815; *Atkins*, 536 U.S. 302.

⁹⁰ See *Atkins*, 536 U.S. 304; *Stanford*, 492 U.S. 361; *Thompson*, 487 U.S. 815; *Coker*, 433

Court's stance as of now.

The Eighth Amendment states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."⁹¹ Hence, the issue in death penalty cases is whether a specific punishment constitutes cruel and unusual punishment.⁹² The Court must first define "cruel and unusual." Since *Trop v. Dulles*, in 1958, the Court has looked to the "evolving standards of decency that mark the progress of a maturing society," in resolving whether a particular punishment constitutes cruel and unusual punishment in violation of the Eighth Amendment.⁹³ This analysis has played out differently in the various cases, but one thing is clear: the standard changes with society's values.⁹⁴

In *Coker*, where the Court held that imposing the death penalty on a defendant who committed rape was cruel and unusual, the Court relied on international opinion.⁹⁵ This holding was based on the fact that the Eighth Amendment bars excessive punishments as well as barbaric ones.⁹⁶ In the majority's opinion, Justice White pointed out that "out of 60 major nations in the world surveyed in 1965, only 3 retained the death penalty for rape where death did not ensue."⁹⁷ He justified the mention of international opinion on the

U.S. 584.

⁹¹ U.S. CONST. amend. VIII.

⁹² See generally *Atkins*, 536 U.S. 304; *Stanford*, 492 U.S. 361; *Thompson*, 487 U.S. 815; *Coker*, 433 U.S. 584.

⁹³ See *Trop*, 356 U.S. at 101.

⁹⁴ See *Simmons*, 543 U.S. at 560; *Stanford*, 492 U.S. at 368-69; *Trop*, 356 U.S. at 101.

⁹⁵ *Coker*, 433 U.S. at 592 n.4.

⁹⁶ *Id.* at 592.

⁹⁷ *Id.* at 596 n.10.

Trop case: “In *Trop v. Dulles*, the plurality took pains to note the climate of international opinion concerning the acceptability of a particular punishment.”⁹⁸ In *Coker*, the Court did consider international law and opinion and did so under the authority of *Trop*.⁹⁹ *Coker* was decided more than ten years before *Stanford*, and yet, the majority in *Stanford* expressly rejected the use of international opinion as a factor in deciding what constitutes cruel and unusual punishment.¹⁰⁰

Again, in *Thompson*, the Court looked to international law when it directly addressed the juvenile death penalty.¹⁰¹ However, in *Thompson*, the Court considered whether it was cruel and unusual to impose death on a defendant who, at the time of the crime, was less than sixteen years of age.¹⁰² The Court held that executing a defendant who was less than sixteen years old when he committed the crime constitutes cruel and unusual punishment and violates the Eighth Amendment.¹⁰³ Justice Stevens, writing for the majority, cited the opinions of several countries on the matter and emphasized that the Court’s holding was “consistent with the views that have been expressed . . . by other nations that share our Anglo-American heritage, and by the leading members of the Western European community.”¹⁰⁴ Justice Scalia disagreed with this aspect of the

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *See Stanford*, 492 U.S. at 370 n.1.

¹⁰¹ *See Thompson*, 487 U.S. at 815.

¹⁰² *Id.*

¹⁰³ *Id.* at 838.

¹⁰⁴ *Id.* at 830.

majority's analysis.¹⁰⁵ In his dissent, Justice Scalia stated, "where there is not first a settled consensus among our own people, the views of other nations, however enlightened the Justices of this Court may think them to be, cannot be imposed upon Americans through the Constitution."¹⁰⁶ Astonishingly, this case was decided just one year before *Stanford*. In one year, the majority of the Court went from considering international law in *Thompson* to blatantly rejecting it in *Stanford*.¹⁰⁷

Once again, in *Atkins*, the Court considered international law in its holding that imposing the death penalty on a mentally retarded defendant was cruel and unusual.¹⁰⁸ The Court's decision was based on a four-step analysis.¹⁰⁹ The Court considered the following factors: (1) evidence of legislative intent provided by state legislation; (2) frequency with which mentally retarded defendants were actually sentenced to death; (3) opinions of professional, religious and social organizations and the approach of other countries; (4) independent examination of today's standard of decency.¹¹⁰ In the third step of its breakdown, the Court recognized that "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is

¹⁰⁵ *Id.* at 869 n.4.

¹⁰⁶ *Thompson*, 487 U.S. at 869 n.4.

¹⁰⁷ Compare *Thompson*, 487 U.S. at 830-31 with *Stanford*, 492 U.S. 370 n.1. Justice Scalia is very clear, in *Stanford*, that foreign law is not to be a factor considered, whereas, one year earlier, in *Thompson*, the Court does discuss foreign practice regarding the juvenile death penalty. See *id.*

¹⁰⁸ See *Atkins*, 536 U.S. at 321.

¹⁰⁹ *Id.* at 313-20.

¹¹⁰ *Id.*

overwhelmingly disapproved.”¹¹¹ The Court’s analysis in *Atkins* bears a resemblance to *Thompson*, certainly more so than it does to *Stanford*.

Read in conjunction, *Coker*, *Thompson* and *Atkins* suggest that the refusal of the Court to consider international law and opinion in *Stanford* is an anomaly. Only in *Stanford* did the majority plainly reject consideration of international opinion.¹¹² In each of the other death penalty cases discussed, the Court did consider international law.

Furthermore, there is a growing trend toward considering international opinion in a variety of non-death penalty related cases. For example, in *Lawrence v. Texas*, the Supreme Court held that the Texas statute making it a crime to engage in consensual homosexual sodomy violates the Due Process Clause.¹¹³ This decision reversed *Bowers v. Hardwick*.¹¹⁴ Justice Kennedy, writing for the majority in *Lawrence*, cited a related ruling of the European Court of Human Rights,¹¹⁵ and noted that the several nations have conformed to that decision.¹¹⁶ Similarly, in *Washington v. Glucksberg*, the Court recognized the opinions and practices of other countries.¹¹⁷ In *Glucksberg*, the Court held that a states’ ban on physician-assisted

¹¹¹ *Id.* at 316 n.21.

¹¹² *See Stanford*, 492 U.S. at 370 n.1.

¹¹³ *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

¹¹⁴ 478 U.S. 186 (1986).

¹¹⁵ *Lawrence*, 539 U.S. at 576 (quoting *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (1981)) (holding that there is a right for homosexual adults to engage in consensual intimate conduct).

¹¹⁶ *Id.*

¹¹⁷ *Washington v. Glucksberg*, 521 U.S. 702, 718 n.16 (1997).

suicide is rationally related to a legitimate state interest and therefore does not violate the Fourteenth Amendment.¹¹⁸ In its analysis of the subject, the Court examined how other countries treat the issue.¹¹⁹ The opinion listed the many countries that, like the United States, prohibit physician-assisted suicide.¹²⁰ In *Glucksberg*, the Court regarded foreign law as relevant and looked to it for support of its own decision.¹²¹

The argument in favor of consideration of foreign opinion is not an argument that the practices of other countries should be binding on the United States Supreme Court. Rather, it is an argument in support of the consideration itself. Justice Breyer put it well when he said “these are human beings . . . called judges, who have problems that often, more and more, are similar to our own . . . what I see in doing this is what I call opening your eyes, opening your eyes to things that are going on elsewhere, use it for what it’s worth.”¹²² Consideration of foreign law creates a broader understanding of specific issues for the Justices. It is a method that will only help to increase and strengthen the rights of Americans. The Court is not bound by foreign law, and the Constitution ensures that consideration of international law will not decrease our rights. The Court ignored its own trend when it rejected international

¹¹⁸ *Id.* at 735.

¹¹⁹ *Id.* at 718 n.16.

¹²⁰ *Id.* (noting that Canada, Great Britain and New Zealand have not permitted physician-assisted suicide, while Australia and Columbia have legalized it).

¹²¹ *Id.*

¹²² Justice Stephen Breyer, U.S. Association of Constitutional Law Discussion: Constitutional Relevance of Foreign Court Decisions (Jan 13, 2005) (transcript available by Federal News Service).

opinion as a factor in *Stanford*. In *Simmons*, the Court reinforced and strengthened this trend.

VI. IMPROVING INTERNATIONAL OPINION OF THE UNITED STATES: THE INDIVIDUAL JUSTICES AND THE ADDED PRESSURE OF THE INTERNATIONAL COMMUNITY'S ASSESSMENT OF THE UNITED STATES

Before *Simmons*, some of the Supreme Court Justices had made their stances on consideration of international opinion clear, and others had not. There can be no doubt about how Justice Scalia feels about the matter; one need only to refer to his opinion in *Stanford*¹²³ and his several likeminded dissents.¹²⁴ So too, it is quite obvious that Chief Justice Rehnquist¹²⁵ and Justice Thomas agree with Justice Scalia's contention.¹²⁶ To counter the above Justices, Justice Breyer, Justice Souter, Justice Ginsberg and Justice Stevens seemed to holdfast to the opposite view.¹²⁷ Consequently, the swing votes that everyone was waiting for while the Court deliberated on *Simmons* were those of Justice Kennedy and Justice O'Connor, who were both part of the majority in *Stanford*.¹²⁸

Now that *Simmons* has been decided, it may seem that the

¹²³ See *Stanford*, 492 U.S. at 370 n.1. Scalia writes: "We emphasize that it is *American* conceptions of decency that are dispositive . . ." *Id.*

¹²⁴ See *supra* note 65.

¹²⁵ But see *Glucksberg*, 512 U.S. at 710, 718 n.16, 785-87. In this case, Chief Justice Rehnquist did consider the law of several countries concerning physician-assisted suicide. *Id.*

¹²⁶ See *supra* note 65.

¹²⁷ See *Atkins*, 536 U.S. at 316 n.21 (noting the relevant practices of foreign countries); *Thompson*, 487 U.S. at 830 (listing other countries that have abolished the death penalty).

¹²⁸ Linda Greenhouse, *Justices Consider Executions of Young Killers*, N.Y. TIMES, Oct. 5, 2004.

outcome, which is the opposite result of *Stanford*, is simply a new holding by a new Court. After all, the Court is comprised of nine justices, four of which were not a part of the Court fifteen years ago. However, such an assumption would be a superficial understanding indeed. The justices that *Stanford* and *Simmons* have in common are Justice Scalia, Justice O'Connor, Justice Rehnquist, Justice Kennedy and Justice Stevens; of whom, only Justice Stevens did not join the majority in *Stanford*.¹²⁹ Justice White, who joined the majority in *Stanford* and Justice Brennan, Justice Marshall and Justice Blackmun, who did not, are no longer members of the Supreme Court. Justice Thomas, who dissented in *Simmons* and Justice Ginsberg, Justice Breyer and Justice Souter who joined the majority in *Simmons*, have replaced them.¹³⁰ Therefore, despite the four new justices, the decision in *Simmons* still turned on whether Justice O'Connor or Justice Kennedy would effectively switch sides and tilt the scale. In the end, it was Justice Kennedy who changed his mind during the fifteen-year interim and not only joined the majority in *Simmons*, but wrote the opinion himself.¹³¹ Although Justice O'Connor dissented in *Simmons*, she did so because she did not agree with the majority's finding of a national consensus.¹³² However, she made it very clear that she does support the majority's position as to the significance of international opinion.¹³³

Even before *Simmons*, Justice O'Connor had made public

¹²⁹ *Stanford*, 492 U.S. at 363.

¹³⁰ *Simmons*, 543 U.S. at 554.

¹³¹ *Id.*

¹³² *Id.* at 587.

¹³³ *Id.* at 604.

statements affirming the importance of the United States creating a good impression around the world.¹³⁴ Her current position is clear; she believes that the Supreme Court should consider international opinion.¹³⁵ At a recent award dinner, Justice O'Connor put it in plain words: "I suspect that over time we will rely increasingly, or at least take notice increasingly, on international and foreign courts in examining domestic issues."¹³⁶ She added that part of the reason for this was that it "may not only enrich our own country's decisions, I think it may create that all important good impression."¹³⁷ Justice O'Connor feels that "[t]he impressions we make in this world are important, and they can leave their mark."¹³⁸ These words imply that Supreme Court decisions affect the way the world views the United States. Now, more than ever, this country is in need of improving the world's impression of it.¹³⁹ In the words of Justice Ginsburg, "[e]ven more today, the United States is subject to the scrutiny of a candid world . . . [w]hat the United States does, for good or for ill, continues to be watched by the international community . . ."¹⁴⁰ The world is watching and judging, and if the Supreme Court were to give credence to foreign law, other countries may perceive that as a sign of solidarity. It is, therefore, possible that Supreme Court recognition of international law and opinion would be a means of improving the

¹³⁴ WORLDNET DAILY, *O'Connor: U.S. Must Rely on Foreign Law*, Oct. 31, 2003.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ See *supra* note 14.

¹⁴⁰ Anne E. Kornblut, *Justice Ginsburg Backs Value of Foreign Law*, N.Y. TIMES, Apr. 2, 2005, at A10.

international community's perception of the United States.

Arguably, it is not the judiciary's role to improve the world's view of the United States. The Supreme Court is not intended to be a political entity; policy and politics are supposed to be left to the legislative and executive branches of the federal government. But in reality, the Supreme Court does have a major policy setting function. It interprets the Federal Constitution in making decisions, and those decisions are binding on the entire country. Hence, the judiciary may be technically non-political, but inherent in the powers of the Court is the ability to have a serious effect on policy. The Court's opinions are also studied by the rest of the world, and represent, to the international community, American laws and views. The Supreme Court should not ignore that reality and should recognize its part in creating the international opinion of the United States.

VII. CONCLUSION

In his opinion in *Trop*, Chief Justice Warren explained: "The basic concept underlying the Eighth Amendment is nothing less than the dignity of man."¹⁴¹ When dealing with something as sacred as "the dignity of man" it would be proper for the Supreme Court Justices to be careful in their decisions and to consider extensive factors. "Evolving standards of decency that mark the progress of a maturing society" surely are not exclusively American standards. Much of the world is concerned with human rights and "the dignity of man," and those opinions are crucial in determining the "evolving

¹⁴¹ *Trop*, 356 U.S. at 100.

standard.”

The United States Supreme Court should give some consideration to international law and international opinion in its decisions. The Court’s failure to do so in *Stanford* caused an inconsistency in the Court’s analysis of death penalty cases. The Court removed that inconsistency by giving consideration to foreign law in *Simmons*. To avoid consideration of international law and opinion is, at best, a sure way to alienate America from the rest of the world and, at worst, an arguable violation of several treaties and customary international law.¹⁴² Moreover, the Supreme Court should not ignore the currently poor international opinion of the United States.¹⁴³ Aligning with other countries, by giving their opinions credit, may be a step toward creation of a better international impression of America.¹⁴⁴ The Court chose to consider foreign law in *Simmons*, in contrast to its prior opinion, in *Stanford*, on the juvenile death penalty issue. It seems clear that this consideration is consistent with the Court’s current trend. This movement is sure to improve foreign perception of the United States and help “to secure individual freedom and preserve human dignity.”¹⁴⁵ However, it is unknown whether this trend will carry-over to the current Court, which includes two new justices. It will be interesting to learn of their respective takes on the role of foreign law in the Supreme Court’s decisions, and how they will help shape American law.

¹⁴² See *supra* notes 52-62.

¹⁴³ See *supra* note 14.

¹⁴⁴ See Erica Templeton, *The Impact of Domingues v. Nevada on the Juvenile Death Penalty as a Violation of International Law*, 41 B.C. L. REV. 1175, 1177.

¹⁴⁵ *Simmons*, 543 U.S. at 578.

