1-1-2002

Too Young to Vote, Old Enough to Be Executed

J. Michael Isom

Follow this and additional works at: https://scholarsarchive.byu.edu/byuplr

BYU ScholarsArchive Citation

Available at: https://scholarsarchive.byu.edu/byuplr/vol16/iss1/10

This Article is brought to you for free and open access by the All Journals at BYU ScholarsArchive. It has been accepted for inclusion in Brigham Young University Prelaw Review by an authorized editor of BYU ScholarsArchive. For more information, please contact scholarsarchive@byu.edu, ellen_amatangelo@byu.edu.
Too Young to Vote,  
Old Enough to Be Executed

J. Michael Isom

The United States has executed more juvenile offenders in the last twelve months than the rest of the world combined in the last twelve years.

In this era of patriotism and defense of liberty, it may surprise many to know that in addition to leading the world in a war against terrorism, the United States also leads the world in a far less prestigious arena. Deep within the halls of justice dotting the land from sea to shining sea, many people may be surprised to learn that not only is the United States among the top countries in the world in the number of executions of its inmates, it in fact has executed more juvenile offenders than any other country in the world. By analyzing the opinions and reactions of the United States regarding the various international laws, treaties, and conventions dealing with the sentencing and execution of juveniles, and by discussing the political implications of such decisions, it is apparent that the United States' current attitude toward the execution of juvenile offenders will continue to strain its relationship with other nations in the creation of a global human rights policy.

Juvenile Execution: A Costly Decision for the United States

It is the attitude of many Americans that as a nation we hold the right to judge others around the world. When we find the actions of other countries to be contrary to our own social values, it becomes our "duty" to take action and help correct the wrongs committed by such "less-developed" countries. However, such arrogance does not come without its price. By acting contrary

---

1 Isom is a senior from Warner Robins, Georgia, majoring in Chinese. He plans to attend law school in the fall 2003. He currently works for the Utah National Guard and is married with three children. He would like to work for the government on issues of international law.

1 Amnesty International Report, ACT 53 (January 1998).
to world opinion on juvenile execution, the United States loses credibility, prestige, and bargaining power at the international trading table. Commenting on the dichotomy of the U.S. attitude in regards to international law, constitutional law expert David Cole states,

When it comes to Cuba's record on human rights, Japan's trade practices, or Iraq's compliance with treaties on chemical weapons, the U.S. is a staunch proponent of international law. But when the tables are turned and we are accused of violating international law, we could not care less. Nowhere is this more apparent than with respect to the death penalty.²

Meanwhile, the U.S. disregard for international law by executing juvenile offenders continues to draw global criticism and polarizes human rights discussions between the United States and other countries.

In America the execution of juveniles began in 1642 when young Thomas Graunger, only sixteen years of age, was sentenced and executed in Plymouth Colony.³ In the 359 years since that time, over 360 juveniles and juvenile offenders have been executed, constituting approximately two percent of the nearly 20,000 confirmed American executions since 1608.⁴ In the past, scores of countries have chosen to put juvenile offenders to death, in recent years however, the execution of juveniles has become a uniquely American practice. The only other countries that have executed juveniles in the last decade are the Democratic Republic of Congo, Nigeria, Iran, Pakistan, Yemen, and Saudi Arabia. However, none of these countries has sentenced a minor to death since Iran in 1999.⁵

Since its foundation the United Nations has drafted resolutions on many different issues regarding the countries of the world as a whole. As it pertains to the issue of human rights, the United Nations regards the

---

³ Thomas Graunger was sentenced to death for sexual relations with a horse.
⁵ Amnesty International, Children and the Death Penalty: Executions Worldwide since 1990, ACT 50 (14 December 2000). Pakistan and Yemen have removed themselves from this list by passing new model penal codes that raised the minimum age for death penalty eligibility to persons who were at least eighteen years of age at the time of their offense.
International Covenant on Civil and Political Rights (ICCPR) as the standard for its members. In the thirty-five years since the drafting of the ICCPR, many nations have been moving closer to completely abolishing the use of the death penalty. While some countries have been slow to ban this controversial practice, most nations have agreed executing juveniles, pregnant women, and those who are mentally handicapped goes contrary to human decency. The United States, however, has continued to execute juveniles and those that are mentally retarded even as recently as the execution of Gerald Mitchell on 22 October 2001, who was sentenced at age sixteen.

Although the U.S. State Department regards the ICCPR as “the most complete and authoritative articulation of international human rights that has emerged since World War II,” the U.S. remains the only country with reservations to Article 6, which pertains to the death penalty. Regarding Article 6 the United States made an official exclusion to the rule by stating that it “reserved the right, subject to its Constitutional constraints, to impose capital punishment on any person (other than a pregnant woman) ... including [capital] punishment for crimes committed by persons below the ages of eighteen years of age.”

In each international human rights agreement since the ICCPR, the United States has consistently made exceptions similar to those made in the ICCPR. Other such pieces of international legislation include the American Convention on Human Rights, the Convention on the Rights of the Child, and the United Nations Universal Declaration of Human Rights, to each of which the U.S. has either made reservations or, in the case of the Convention on the Rights of the Child, the United States was one of only two countries that refused to ratify the document.

As to whether or not the reservations the U.S. has made are valid, the Vienna Convention on the Law of Treaties states that reservations are indeed permitted unless the treaty expressly prohibits the reservation or the

1 UN General Assembly, Twenty-first Session, resolution 2200A, 1966.
4 Somalia was the other country not to ratify the document.
reservation is incompatible with the purpose and object of the treaty. In other words a country may make reservations to procedural provisions of a human rights treaty but despite such objections, the country would still be bound to adhere to the substantive treaty provisions.

Numerous countries, international organizations, and scholars have heavily criticized the United States’ reservations. Its reservation to Article 6 has provoked official objections from over a dozen countries including France and Sweden, who have condemned these reservations as invalid. Additionally, the United Nations Human Rights Committee, which is responsible for receiving reports from parties to the ICCPR concerning their progress in fulfilling its obligations, considers the reservations to Article 6 and to Article 7 to be invalid because they are “incompatible with the object and purpose of the Covenant.”

INTERNATIONAL LAW IN DOMESTIC COURTS

Since the decision of sentencing individuals ultimately lies with judges of the various states, it is important to point out that in accordance with the supremacy clause of the Constitution, state judges are in fact obligated to comply with a fully ratified treaty. As long as the treaty provisions do not conflict with the Constitution, “they are equal in status to congressional legislation.” A United States court can turn to several sources of law to determine if a death sentence can be considered legal in light of the offender’s age. First, a court may consider whether executing a child or teenager conforms with the Eighth Amendment, or a similar provision in the state’s constitution, which prohibits cruel and unusual punishment. The Eighth Amendment, made applicable to the states by the Fourteenth Amendment, prohibits the execution of a person who was under sixteen years of age at the

---

time of his or her offense. In determining whether the amendment categorically applies, the Supreme Court has decided it must be guided by the "evolving standards of decency that mark the progress of a maturing society." In so doing the Court must review relevant legislative enactments and jury determinations as well as consider the reasons why a civilized society may accept or reject the death penalty for a person less than sixteen years old at the time of the crime. Second, they may turn to international law prohibitions against juvenile executions to provide another independent source of binding law in domestic courts.

Under the Restatement (Third) of Foreign Relations Law of the United States § 102, customary international law is defined as law derived from the uniform and consistent practices countries follow out of a sense of legal obligation. The customary international law prohibition on executing juvenile offenders is established through the significant number of countries that refuse to engage in what they view as an illegal act under international law and, by the many treaties, and United Nations' resolutions codifying the inalienable right to life for juveniles. Currently there are 144 participating United Nations member countries that subscribe to the ICCPR. Such a high number of participants far exceeds the threshold for establishing a customary international law norm. As a result, the United Nations General Assembly and the Human Rights Commission resolutions indicate that the prohibition on the execution of juvenile offenders is thereby customary international law.

In addressing the issue of executing juvenile offenders, a United Nations General Assembly resolution in 1980 recognized that Article 6 of the International Covenant constitutes a "minimum standard" for all member states, not only those states ratifying the ICCPR. This resolution means that even though a member state of the United Nations might not ratify or

---

17 Filartiga v. Pena-Irala, 630 F2d 876 (2d Cir. 1980). Finding customary international law prohibition against torture reflected in torture convention to which only 95 countries were state parties.
18 UN General Assembly, Thirty-fifth Session, resolution 172-95, 1980.
accept Article 6 (namely the United States), such a country is still bound by its provisions by virtue of being a member of the body that overwhelmingly supports the measure. Other applications of such a policy could ensure that although a country had not necessarily adopted an international treaty the rest of the world subscribed to, it would still be subject to its provisions. Such stipulations help prevent recurrences of genocide, slavery, and torture done under the excuse of not being bound by a treaty because the offender had refused to agree to the terms of the agreement. Such prohibitions can also be considered *jus cogens* norms, or norms that are universally accepted.

In order to invalidate a death sentence under Article 6 of the ICCPR, a juvenile defendant would need to argue the following: First, a juvenile defendant must establish that the United States has signed and ratified the ICCPR. Second, the defendant must show that the Senate reservation to Article 6 is invalid as a matter of domestic law. Finally, because the reservation is invalid, Article 6 would then be considered binding upon state courts under the supremacy clause. A defendant may also argue that international customary law is an independent source of law, binding countries in addition to their treaty obligations.

In *The Paquette Habana*, the Supreme Court declared that “international law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination.”19 This declaration made the Senate's reservations to various treaties nonbinding upon courts, since they can choose whether to follow the Senate's reservation or the Supreme Court's ruling in this matter.

While the provisions of such international precedents might seem convincing, the government is likely to point out several of the limitations to this approach in juvenile capital cases. Typically, domestic courts will turn to customary international law only as part of federal common law in the absence of statutory or federal case law. Regarding juvenile executions the Supreme Court's decision in *Thompson v. Oklahoma*20 and *Stanford v. Kentucky*21 may take precedence over the applicability of customary international law.

---

19 175 US 677, 700 (1900).
standards. In Thompson's case the defendant was fifteen years old when he actively participated in a brutal murder. Because the petitioner was a child as a matter of Oklahoma law, the District Attorney filed a statutory petition seeking to have him tried as an adult, which the trial court granted. He was then convicted and sentenced to death. The Court of Criminal Appeals of Oklahoma affirmed the decision.

In Stanford's case the defendant was approximately seventeen years and four months old at the time he committed murder in Kentucky. A juvenile court, after conducting hearings, transferred him for trial as an adult. The court did so under a state statute permitting such action as to offenders who are either charged with a Class A felony, capital crime, or who are charged with a felony and over the age of sixteen. The petitioner was convicted and sentenced to death. The Kentucky Supreme Court affirmed the death sentence, rejecting the petitioner's contention that he had a constitutional right to treatment in the juvenile justice system, declaring that his age and the possibility that he might be rehabilitated were mitigating factors properly left to the jury.

The United States has recently asserted that it is a persistent objector to the prohibition on juvenile offender executions. A persistent objector in this context refers to a country that is not necessarily bound by an emerging rule of customary international law because that country has persistently objected to the rule during its formation. However, many argue that the United States cannot be considered a persistent objector to the prohibition on the execution of juvenile offenders, since a country cannot invoke the persistent objector doctrine to "make reservations to a treaty with which it suddenly disagrees."\(^2\)

The nature of the persistent objector principle is to allow a state to avoid being involuntarily subjected to a rule it finds unacceptable, not to allow a state to reap the benefits of being a party to a treaty without having to conform to its terms and undergo domestic change.\(^3\) The reason the United States cannot use the persistent objector principle in its defense is that at the

---


time of the negotiation, drafting, and opening for signature of the ICCPR, the Geneva Protocols, the American Covenant on Human Rights, and the Security Council Resolutions, the United States had already discontinued its use of the death penalty on juvenile offenders and therefore could not claim that they considered the international standards to be unacceptable.\textsuperscript{24} Simply stated, since the United States did not object persistently to the prohibition at the time of the annunciation of the norm, it cannot now use the persistent objector doctrine to avoid its obligations under Article 6.

**U.S. v. Them: Two Case Studies in Defying International Law**

With international standards clearly stated and their implications outlined, we must ask why domestic courts have failed to recognize their import in decisions regarding juvenile executions. One reason may be that no state or federal court to date has evaluated the use of international law as an independent source of law in domestic courts. Although the Nevada and Alabama Supreme Courts have rejected the relevance of international law, particularly the ICCPR, for determining evolving standards of decency under the Eighth Amendment, no courts have either challenged or accepted the validity of international law outright. Some of the landmark cases on this issue are discussed below, the leading case being *Domingues v. Nevada*.\textsuperscript{25}

On 7 November 1999, juvenile capital offender Michael Domingues filed a motion for correction of an illegal sentence, thereby questioning whether Article 6 of the ICCPR (which prohibits the execution of criminals who committed offenses while under the age of eighteen) supercedes Nevada Revised Statute 176.025 (which allows the state to issue a death sentence to an offender who is over age sixteen). *Domingues v. Nevada* was the first decision by a United States court, which addressed the impact of Article 6 upon domestic courts reviewing death sentences for juvenile offenders. In its opinion the Nevada Supreme Court noted the Senate’s reservation and declaration. The court understood Domingues to be arguing that the U.S. reservation was invalid and that Article 6 was consequently the relevant

\textsuperscript{24} From 1964 to 1983, due to Executive Order, the United States did not execute any juvenile offenders.

law under the supremacy clause. However, the Nevada Supreme Court summarily dismissed Domingues's claim with a two-sentence response that served to negate the issue of international law as an independent source of law in domestic courts. The Nevada Supreme Court announced,

We conclude that the Senate's express reservation of the United States' rights to impose a penalty of death on juvenile offenders negates Domingues' claim that he was illegally sentenced. Many of our sister jurisdictions have laws authorizing the death penalty for criminal offenders under the age of eighteen, and such laws have withstood Constitutional scrutiny.\(^{26}\)

Justice Rose, the sole dissenter, identified a number of issues the Nevada Supreme Court had failed to address, including whether the Senate reservation is valid, whether the United States is still a party to ICCPR if the reservation is invalid, and the effect of the ratification of ICCPR upon the execution of juvenile offenders by states. It is also important to note that the U.S. Supreme Court denied Domingues's petition for writ of certiorari without comment, leading to much speculation about the correctness of the state court's decision.\(^{27}\)

A second case is that of sixteen-year-old Marcus Pressley who based his appeal of his capital sentence on the question of whether the ICCPR prohibits the execution of juvenile offenders.\(^{28}\) The court began its analysis by noting the same reservation and declaration at issue in the Domingues case. The Alabama Supreme Court understood Pressley's appeal to contend that the U.S. reservation was invalid because it is incompatible with the object and purpose of the treaty and therefore rejected his appeal. In rejecting Pressley's contentions, the lower court committed errors of reasoning similar to those made by the Nevada Supreme Court in the Domingues case. Instead of addressing whether the ICCPR could be considered an independent source of law, the Alabama Supreme Court examined the ICCPR in the context of an Eighth Amendment constitutional analysis. Since the Supreme Court had ruled that the executions of juvenile offenders is constitutional in

\(^{26}\) Domingues, 961 P.2d 1280.

\(^{27}\) 525 US 1067 (1999).

\(^{28}\) Pressley v. State, 10 AL 23 LEXIS (1999).
the Thompson and Stanford cases, the Alabama Supreme Court similarly concluded that Pressley's sentence was also constitutional. The Court rejected the relevance of international law based upon the Supreme Court's rejection in the Stanford case of international standards for determining the evolving standards of decency under the Eighth Amendment. Shortly after the Court decided Pressley's case, two other juvenile capital offenders raised similar claims and were summarily dismissed by courts relying upon Pressley.29

In a dissenting opinion, Justice Houston of the Alabama Supreme Court raised the concern that federalism binds state judges to uphold treaty provisions under the supremacy clause. He stated, "Federalism is alive and well. The United States Constitution binds me as a Supreme Court Justice of the State of Alabama to abide by the ICCPR, Article 6, and not to impose the sentence of death on Pressley."30 His argument was that "the Senate's reservation did not free him as a state justice, as opposed to a federal justice or judge, from the treaty's restriction against the imposition of a sentence of death upon a juvenile offender."31

CONCLUSION: LEGAL OR NOT, IS IT ETHICAL?

Having thoroughly reviewed the legal precedents for sentencing (or not sentencing) a juvenile to death, it is appropriate to conclude by addressing the moral issue of juvenile execution. While morality by its very nature is subjective, the experience of humankind, as well as the long history of our law, recognizes that there are differences that must be accommodated in determining the rights and duties of children as compared with those of adults. Examples of these distinctions abound in our law: in contracts, in torts, in criminal law and procedure, in criminal sanctions and rehabilitation, and in the privileges afforded to adults. It is generally agreed "that punishment should be directly related to the personal culpability of the criminal defendant."32 There is also broad agreement on the proposition that adolescents, as a class, are less mature and responsible than adults. Particularly "during the formative years

31 Ibid.
of childhood and adolescence, minors often lack the experience, perspective and judgment expected of adults. While it is clear that the various states draw the line between childhood and adulthood in different ways, in no state may a juvenile, an individual under the age of eighteen, sit on a jury to sentence others to death, nor can he or she vote on law regarding the death penalty. A juvenile cannot even join the military to exercise death upon our enemies. According to the standards established by the courts however, he or she can be tried and sentenced to death in a system of justice in which the juvenile has no voice.

The 1978 Report of the Twentieth-Century Fund Task Force on Sentencing Policy Toward Young Offenders states that adolescents, particularly in the early and middle teen years, are more vulnerable, more impulsive and less self-disciplined than adults. Crimes committed by youths may be just as harmful to victims as those committed by other persons, but they deserve less punishment, because adolescents have less capacity to control their conduct, and to think in long-range terms, than adults. Moreover, youth crime as such is not exclusively the offender's fault; offenses by the young also represent a failure of family, school, and the social system, which share responsibility for the development of America's youth.

By ignoring our culpability and imposing sentences of death on those who are still struggling to understand life, we are neglecting the trust youth inherently place in adults. Over the last fifty years, the global community has come to an increased understanding of juvenile rights and the negative implications of holding youth to the same legal standards as adults. As the number of international treaties and agreements against the execution of juveniles continues to grow, the United States will need to either change its policy in this area or face increasing criticism and isolation on matters of human rights. By assuming greater responsibility for the nurturing and raising of our youth, we will thereby be working to build the future of our

---

country. Moreover, by conforming to international rules and regulations, the United States will maintain the ability to help shape world policy regarding human rights.