

INTERNATIONAL MATERIALS AND THE EIGHTH AMENDMENT: SOME THOUGHTS ON METHOD AFTER *GRAHAM V. FLORIDA*

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INTRODUCTION

In *Graham v. Florida*,¹ the Supreme Court of the United States decided that imposition of a life without parole sentence (“LWOP”) on offenders who committed non-homicide offenses as juveniles² violates the Eighth Amendment’s prohibition on cruel and unusual punishment.³ The petitioner briefs in two cases raising this issue—*Graham* and *Sullivan v. Florida*—focused on convincing the Court that the LWOP sentence in these circumstances contravened the proportionality requirement embedded in the Eighth Amendment.⁴ Moreover, the briefs invoked the Court’s recent decision in *Roper v. Simmons*,⁵ which held the death penalty for juvenile offenders unconstitutional.⁶ Each brief also contained a fleeting reference to how international materials have treated the juvenile LWOP sentence—three paragraphs in *Graham*,⁷ and only one in *Sullivan*.⁸ An amicus curiae brief submitted by Amnesty International presented a more fully developed argument that the Court should look to international materials, and in so

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1. 130 S. Ct. 2011 (2010).

2. The Court also heard argument in *Sullivan v. Florida*, No. 08-7621 (argued Nov. 9, 2009), which posed the same question, but then dismissed the case as improvidently granted. *See Sullivan v. Florida*, 130 S. Ct. 2059 (2010).

3. U.S. CONST. amend. VIII.

4. *See infra* Part II for a discussion of the proportionality analysis in the Court’s Eighth Amendment capital punishment jurisprudence.

5. 543 U.S. 551 (2005).

6. In fact, *Roper* held the death penalty unconstitutional as applied to sixteen and seventeen year-olds. The Court had already proscribed the use of capital punishment for offenders aged fifteen and younger in *Thompson v. Oklahoma*. 487 U.S. 815 (1988).

7. Brief for Petitioner at 64-66 *Graham v. Florida*, No. 08-7412 (July 16, 2009).

8. Brief for Petitioner at 55-56 *Sullivan v. Florida*, No. 08-7621 (July 16, 2009).

doing, should hold the juvenile LWOP sentence unconstitutional under the Eighth Amendment.⁹

Recent years have seen considerable scholarly controversy over whether the Supreme Court of the United States, or indeed any American court, should use international and foreign law when interpreting the U.S. Constitution.¹⁰ Much of the controversy followed the Court's decisions in *Atkins v. Virginia*,¹¹ *Lawrence v. Texas*,¹² and, most recently, *Roper*.¹³ The justices themselves, perhaps most notably Justice Breyer and Justice Scalia, have entered the fray by addressing the issue outside the courtroom in debates and public addresses.¹⁴ A couple of bills addressing the issue

9. See Brief for Amnesty International, et al. as Amici Curiae in Support of Petitioners, *Graham v. Florida* (No. 08-7412), *Sullivan v. Florida* (No. 08-7612).

10. See, e.g., Roger P. Alford, *Misusing International Sources to Interpret the Constitution*, 98 AM. J. INT'L L. 57 (2004); Steven G. Calabresi & Stephanie Dotson Zimdahl, *The Supreme Court and Foreign Sources of Law: Two Hundred Years of Practice and the Juvenile Death Penalty Decision*, 47 WM. & MARY L. REV. 743 (2005); Sarah H. Cleveland, *Our International Constitution*, 31 YALE J. INT'L L. 1, (2006); Vicki C. Jackson, *Constitutional Comparisons: Convergence, Resistance, Engagement*, 119 HARV. L. REV. 109 (2005); Harold Hongju Koh, *International Law as Part of Our Law*, 98 AM. J. INT'L L. 43 (2004); Joan L. Larsen, *Importing Constitutional Norms from a "Wider Civilization": Lawrence and the Rehnquist's Court's Use of Foreign and International Law in Domestic Constitutional Interpretation*, 65 OHIO ST. L.J. 1283 (2004); Youngjae Lee, *International Consensus as Persuasive Authority in the Eighth Amendment*, 156 U. PA. L. REV. 63 (2007); Michael D. Ramsey, *International Materials and Domestic Rights: Reflections on Atkins and Lawrence*, 98 AM. J. INT'L L. 69 (2004); Ganesh Sitaraman, *The Use and Abuse of Foreign Law in Constitutional Interpretation*, 32 HARV. J.L. & PUB. POL'Y 653 (2009); Mark Tushnet, *When is Knowing Less Better than Knowing More? Unpacking the Controversy over Supreme Court References to Non-U.S. Law*, 90 MINN. L. REV. 1275 (2006); Jeremy Waldron, *Foreign Law and the Modern Ius Gentium*, 119 HARV. L. REV. 129 (2005); Ernest A. Young, *Foreign Law and the Denominator Problem*, 119 HARV. L. REV. 148 (2005).

11. 536 U.S. 304 (2002).

12. 539 U.S. 558 (2003).

13. 543 U.S. 551 (2005).

14. Justices Breyer and Scalia famously debated the merits of using foreign and comparative law in January 2005 at American University, Washington College of Law. *Full Written Transcript of Scalia-Breyer Debate on Foreign Law*, AM. UNI. (Jan. 13, 2005) <http://www.freerepublic.com/focus/news/1352357/posts>. [hereinafter Breyer-Scalia Debate]. Other justices have also weighed in. See *Foster v. Florida*, 537 U.S. 990, 990 n* (2002) (Thomas, J., concurring in denial of *certiorari*) ("While Congress, as a legislature, may wish to consider the actions of other nations on any issues it likes, this Court's Eighth Amendment jurisprudence should not impose foreign moods, fads, or fashions on Americans.") (emphasis in original); *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States Before the S. Comm. on the Judiciary*, 109th CONG. 199-201, 292-93 (2005); *Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to be Associate Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary*, 109th CONG. 370-71, 470-72 (2005); Ruth Bader Ginsburg, Assoc. Justice, U.S. Supreme Court, Keynote Address at the Ninety-Ninth Annual Meeting of the American Society of International Law: A Decent Respect to the Opinions of Humankind: The Value of a Comparative Perspective in Constitutional Interpretation (Apr. 1, 2005), in 99 AM. SOC'Y INT'L L. PROC. 351 (2005); Julia Salvatore et al., Comment, *Sotomayor and the Future of International Law*, 47 TEX. INT'L L.J. 487 (2009) (surveying Justice Sotomayor's

briefly appeared in Congress, although neither secured enough votes for passage.¹⁵

Rather than engage in wide-ranging debate about the place of international materials¹⁶ in constitutional interpretation, this Note focuses on the narrower question of how courts could consider international and comparative law in the analysis of cruel and unusual punishment under the Eighth Amendment.¹⁷ *Could* is a purposefully chosen word. In a debate marked by strong—and conflicting—normative claims as to the propriety of using international materials in constitutional interpretation,¹⁸ the focus here is on method, not appropriateness. To the extent this Note makes a normative claim, it is this: if American courts are to consider international materials when deciding the constitutionality of a given punishment under the Eighth Amendment, they should do so in a principled manner, or not at all. Developing such a principled manner—and applying it to the *Graham* case—is this Note’s contribution to the ongoing debate about the use of international materials in American constitutional interpretation.

In the spirit of moving the debate beyond generalities about foreign law and American constitutional interpretation,¹⁹ this Note focuses narrowly on the Eighth Amendment. The decision to focus on the analysis of cruel and unusual punishment under the Eighth Amendment is not arbitrary. Looking in particular at the Court’s death penalty jurisprudence, Part I justifies reference to international materials as part of the Eighth Amendment analysis on two grounds. First, both the relevant constitutional text and the text of the standard most commonly applied to such analysis permit—and arguably envision—consideration of international materials. Second, the Court has now developed a body of Eighth Amendment

speeches, decisions and confirmation hearing statements about the use of foreign law in domestic interpretation).

15. See H.R. RES. 568, 108th CONG. (2004); S. RES. 92, 109th CONG. (2005) (arguing that reliance on foreign judgment and judicial interpretations is inappropriate).

16. “International materials” is used here and throughout the Note as shorthand for both international and comparative law. Part IV *infra* discusses such materials in greater detail.

17. For an exhaustive typology of how international materials are used in constitutional interpretation, see generally Sitaraman, *supra* note 10 (dividing different uses of foreign law in constitutional interpretation into “unproblematic,” “potentially problematic,” and “troublesome”).

18. For a useful overview of the positions in the normative debate, see Sitaraman, *supra* note 10, at 658-64 (identifying arguments supporting and opposing the use of international materials in American constitutional interpretation rooted in the theory of liberal democracy and in concerns about accuracy).

19. Cf. Lee, *supra* note 10, at 67 (“We have reached a point in the debate where no further advance seems likely so long as we continue to speak in general terms about the desirability of citing foreign laws.”).

precedent in which international materials have played some, even if not a clearly identifiable, role.

Part II addresses what is arguably the most difficult problem: how to incorporate international materials into Eighth Amendment analysis. Again focusing on the line of death penalty cases, this Part discusses three ways that consideration of international materials can enter the analysis. First, such materials can be considered as part of the Court's inquiry into the "objective indicia of consensus."²⁰ Second, the Court can consider the relevance of international materials as part of "the exercise of [its] independent judgment" as to the appropriateness of the punishment in the context.²¹ Finally, international materials can be used to confirm a domestic consensus.²² This Part also briefly considers advantages and shortcomings to these different approaches. Ultimately, this Part concludes that the most appropriate point in the analysis for consideration of international materials is the Court's independent judgment.

Because this conclusion raises the troubling specter of judges cherry-picking their favorite international materials (and avoiding those they do not like), Part III borrows from recent scholarship to propose two principles for use of international materials in Eighth Amendment analysis of cruel and unusual punishment.²³ Most basically, this part argues that the Court should focus on both the law and practice surrounding a given norm in a foreign jurisdiction and then examine if and how the United States has responded to such a norm. This argument implicates institutional competence and ultimately suggests that the Court should either use international materials well, or not use them at all. By way of example, this Part analyzes—and finds wanting—the Court's use of international materials in *Roper*.

Part IV then discusses how the approach outlined in Part III should have been applied to the juvenile LWOP sentences as presented in the *Graham* case. This application shows that while foreign jurisdictions have overwhelmingly rejected the juvenile LWOP sentence, the United States has regularly lodged its intention to opt-out of international treaties or

20. See *Roper v. Simmons*, 543 U.S. at 564.

21. *Id.*

22. This is how Justice O'Connor's dissenting opinion in *Roper* described the role of international materials. See *id.* at 605 (O'Connor, J., dissenting) ("... [T]he existence of an international consensus of this nature can serve to confirm the reasonableness of a consonant and genuine American consensus."); The majority's invocation of the confirmatory role of international materials is less clear. See *infra* note 103.

23. See *Cleveland*, *supra* note 10, at 104-24.

treaty provisions that proscribe the juvenile LWOP sentence.²⁴ Accordingly, a principled consideration of international materials in these cases should in fact not sway the Court towards or away from upholding the constitutionality of the juvenile LWOP sentence. However, such a consideration, while not affecting the result in *Graham*, would have lent clarity to the Court's treatment of international materials for the analysis of what constitutes cruel and unusual punishment under the Eighth Amendment.

Finally, in examining the Court's recent use of international materials in *Graham*, Part V concludes that the Court missed an opportunity to clarify the proper role of such materials under the Eighth Amendment cruel and unusual punishment analysis. Indeed, the dissent's response to the majority's use of international materials illustrates the ongoing confusion.²⁵ More specifically, this Part notes that while the Court did briefly attempt to consider both the law and practice of the juvenile LWOP sentence in foreign jurisdictions, it almost entirely ignored the United States' response to the "global consensus"²⁶ regarding the juvenile LWOP sentence. This approach not only opens the Court to further criticism regarding the selective use of international materials, it also fails to provide guidance on a contentious methodological question.

I. TEXT AND HISTORICAL METHOD: INTERNATIONAL MATERIALS AND EIGHTH AMENDMENT ANALYSIS

Because the "basic concept underlying the Eighth Amendment is nothing less than the dignity of man,"²⁷ courts need not feel uncomfortable in looking further afield to understand the parameters of cruel and unusual punishment as compared to other areas of constitutional law. Justice Blackmun, shortly before his retirement, argued that "[i]nternational law can and should inform the interpretation of various clauses of the Constitution, notably the Due Process Clause and the Eighth Amendment prohibition against cruel and unusual punishments."²⁸ While some scholars have argued that international and foreign law has informed constitutional

24. This is analogous to, though not the same as, the claim that the United States has been a persistent objector under customary international law. For a further discussion of customary international law, see *infra* Part IV.B.

25. See *Graham v. Florida*, 130 S. Ct. 2011, 2045-46 (Thomas, J. dissenting).

26. *Id.* at 2033 (majority opinion).

27. *Trop v. Dulles*, 356 U.S. 86, 100 (1958).

28. Harry A. Blackmun, *The Supreme Court and the Law of Nations*, 104 *YALE L.J.* 39, 45 (1995).

interpretation since the founding and should continue to do so,²⁹ others, including notably Justice Scalia, take issue with this approach.³⁰

This Part briefly suggests two reasons why consideration of international practice is reasonable in Eighth Amendment analysis. In doing so, it makes no larger claims about the appropriateness of applying international materials more generally in constitutional interpretation.³¹ First, the relevant constitutional text does not cabin inquiry to specifically domestic sources and, given its deep historical resonance, arguably envisions a more expansive construction. Moreover, not only the language of the Eighth Amendment itself, but also the language of the standard most frequently applied to it in constitutional analysis—namely, that it inquires into the “the evolving standards of decency that mark the progress of a maturing society”³²—similarly suggests a broad interpretation. Second, the Court has, since its decision in *Trop v. Dulles*, consistently looked to international materials to interpret the Eighth Amendment’s prohibition on cruel and unusual punishment. Thus, through its consistent inquiry into international materials in Eighth Amendment cases, the Court has arguably developed such inquiry into a methodological precedent. At the very least, it has suggested that such inquiry can be appropriate.

A. Constitutional Texts

The Eighth Amendment’s command is succinct: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”³³ The Court has long recognized that the Amendment’s broad language does not lend itself to easy interpretation,³⁴ and that such language does arguably suggest a broad inquiry.³⁵ Indeed,

29. See generally Cleveland, *supra* note 10.

30. See, e.g., Breyer-Scalia Debate, *supra* note 14 (Justice Scalia noting that he “do[es] not use foreign law in the interpretation of the United States Constitution”).

31. This is not to say that the use of international materials in constitutional analysis may not be appropriate. Indeed, in certain cases, such materials are not only appropriate, but necessary. See, e.g., *Medellin v. Texas*, 552 U.S. 491(2008) (interpreting whether a judgment of the International Court of Justice is directly enforceable as domestic law). The argument here is that the appropriateness of applying international materials in a given area of constitutional law is best assessed on a case-by-case basis, focusing, as *Roper* suggests, on text, history, tradition, precedent and “due regard for . . . purpose and function in the constitutional design.” See *Roper*, 543 U.S. at 560.

32. *Trop*, 356 U.S. at 101.

33. U.S. CONST. amend. VIII.

34. See *Weems v. United States*, 217 U.S. 349, 368 (1910) (“What constitutes a cruel and unusual punishment has not been exactly decided.”); see also *Trop*, 356 U.S. at 99 (“The exact scope of the constitutional phrase ‘cruel and unusual’ has not been detailed by this Court.”).

35. Cleveland, *supra* note 10, at 70 (“The constitutional text . . . is reasonably read as inviting consideration of international values.”).

understanding what constitutes “cruel” or “unusual” under the Eight Amendment “may warrant consideration of what practices have been outlawed under international treaties and customary law” as well as “consideration of how common, or uncommon, a particular practice is.”³⁶

The Court in *Trop* suggested in part that a broad reading of cruel and unusual punishment can be attributed to its deep historical roots. Noting that the principle is drawn specifically from the English Declaration of Rights of 1688 and more generally from the Magna Carta, the Court underscored the Amendment’s role in ensuring that the State’s power to punish “be exercised within the limits of civilized standards.”³⁷ Whether intentionally or not, this formulation evokes the third source of law recognized under the International Court of Justice’s Statute: “the general principles of law recognized by civilized nations.”³⁸

Beyond the Eighth Amendment’s text, the Court’s holding in *Trop* that the “Amendment must draw its meaning from the evolving standards of a decency that mark the progress of a maturing society”³⁹ articulated a standard that has become, arguably, a subsidiary constitutional text.⁴⁰ As with the actual constitutional text, this standard speaks expansively, and can be seen to invite consideration of international law and practice.⁴¹ The fact that the Court in *Trop* promptly applied this standard by looking at international materials buttresses the argument that such international inquiry is appropriate.⁴²

36. *Id.* at 70-71.

37. *See Trop*, 356 U.S. at 100. Justice O’Connor noted similar language in *Roper* when discussing the role of international materials in Eighth Amendment analysis. *See Roper*, 543 U.S. at 604-05 (O’Connor, J., dissenting) (“This inquiry [into international and foreign law] reflects the special character of the Eighth Amendment, which, as the Court has long held, draws its meaning directly from the maturing values of *civilized* society.”) (emphasis added).

38. Statute of the International Court of Justice art. 38(1)(c), June 26, 1945, 59 Stat. 1031, 3 Bevans 1179.

39. *Trop*, 356 U.S. at 101.

40. Certainly not all the justices would agree that the *Trop* standard deserves to be described as a subsidiary constitutional text. Justice Scalia has expressed that he detests the “evolving standards” phrase. *See Breyer-Scalia Debate*, *supra* note 14. The description of the phrase as a subsidiary constitutional text is meant as an indication of how deeply embedded in constitutional interpretation the phrase has become, not a normative claim as to whether the standard should be used.

41. *Cf.* Cleveland, *supra* note 10, at 70. *But see Breyer-Scalia Debate*, *supra* note 14 (Justice Scalia arguing that this should apply to “[t]he standards of decency of American society—not the standards of decency of the world, not the standards of decency of other countries that don’t have our background, that don’t have our culture, that don’t have our moral views”).

42. Another reading is of course possible. Unlike in the later death penalty cases in which the “evolving standards” test has been applied, *Trop* considered whether denationalization, as imposed by the federal government, constituted cruel and unusual punishment. *See Trop*, 356 U.S. at 99. Because individual states cannot “make or enforce any law which shall abridge the privileges or immunities of citizens of the United States,” U.S. CONST., amend XIV, § 1, the Court, with no relevant state-level

B. Methodological Precedents: International Materials in Eighth Amendment Analysis

In addition to providing the standard most frequently used in Eighth Amendment analysis, *Trop v. Dulles* also inaugurated the practice of consulting international materials. Although the decision in *Trop* holding denationalization a cruel and unusual punishment under the Eighth Amendment only captured five votes, the more relevant metric for this Note is the fact that eight of the nine justices felt it appropriate to refer to international materials.⁴³ Writing for a plurality, Chief Justice Warren noted that the “civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for a crime,” and later cited a United Nations Survey indicating that only two countries, the Philippines and Turkey, used denationalization as punishment for desertion.⁴⁴ In dissent, Justice Frankfurter argued that “[m]any nations impose loss of citizenship for indulgence in designated prohibited activities”—although he conceded that the laws mostly applied only to naturalized citizens.⁴⁵

In subsequent Eighth Amendment cases, and particularly in cases deciding whether the application of the death penalty constituted cruel and unusual punishment, the Court followed the example set by the *Trop* Court’s lead.⁴⁶ In *Coker v. Georgia*,⁴⁷ the Court held the death penalty as a punishment for the rape of an adult woman unconstitutional and noted, referring to *Trop*, that “[i]t is thus not irrelevant here 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.”⁴⁸ Five years later, the Court held the death penalty unconstitutional for felony murder *simpliciter* in *Enmund v. Florida*,⁴⁹ referring to the fact that capital punishment for felony murder had been abolished or restricted in Commonwealth countries and continental Europe.⁵⁰ More recently, in deciding the constitutionality of the

legislative enactments, had perforce to look at international materials. By contrast, when the punishment in question—the death penalty—is inflicted by the states, the Court appropriately focuses its inquiry only on the American standards of decency. Whatever the merits of such a reading, the Court has not in fact limited its inquiry in this way. *See infra* Part II.B.

43. *See Trop* 356 U.S. at 102-03; *see also id.* at 126 (Frankfurter, J., dissenting).

44. *Id.* at 102-03 (majority opinion).

45. *Id.* at 126 (Frankfurter, J., dissenting).

46. In *Roper*, both the majority and Justice O’Connor in dissent note this line of cases. *See Roper*, 543 U.S. at 575-76 and *id.* at 604 (O’Connor, J., dissenting).

47. 433 U.S. 584 (1977).

48. *Id.* at 596 n.10 (citation omitted).

49. 458 U.S. 782 (1982).

50. *Id.* at 796-97 n.22.

death penalty as applied to mentally retarded defendants, the Court in *Atkins v. Virginia*⁵¹ noted that “within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved.”⁵²

The Court’s reference to international materials in juvenile offender death penalty cases was, until *Roper*, somewhat less clear. In *Thompson v. Oklahoma*,⁵³ the Court emphasized that its decision that the execution of a person less than sixteen at the time of the offense violated the Eighth Amendment was “consistent with the views that have been expressed by . . . other nations that share our Anglo-American heritage, and by leading members of the Western European community.”⁵⁴ It then surveyed these countries in more detail.⁵⁵ By contrast, the Court’s decision a year later in *Stanford v. Kentucky*⁵⁶ that permitted the death penalty for individuals between ages sixteen and eighteen at the time of the offense noted that while international materials could be used to show “‘whether a practice uniform among our people is not merely a historical accident,’ . . . they cannot serve to establish the first Eighth Amendment prerequisite, that the practice is accepted among our people.”⁵⁷ The *Stanford* Court did not refer to international materials in the rest of the opinion.⁵⁸ Most recently, the Court returned to considering international materials in *Roper*, where it devoted an entire section of the opinion to such consideration.⁵⁹

Without claiming that the Court—and American courts more generally—should use international materials in construing the Eighth Amendment’s prohibition on cruel and unusual punishment, this Part has argued that such use is justifiably based in constitutional text and has in fact been a part of the Court’s analysis for half a century. Given that international materials have thus played a role in constitutional interpretation in this area, the next two Parts examine, from different perspectives, how they have been and can be used.

51. 536 U.S. 304 (2002).

52. *Id.* at 317 n.21 (citation omitted).

53. 487 U.S. 815 (1988).

54. *Id.* at 830.

55. *Id.* at 830-31.

56. 492 U.S. 361 (1989).

57. *Id.* at 369 n.1 (quoting *Thompson*, 487 U.S. at 868-69 n.4 (Scalia, J., dissenting)).

58. The dissent did call attention to international materials. *See id.* at 389-90 (Brennan, J., dissenting).

59. *See Roper v. Simmons*, 543 U.S. 551, 575-78 (2005).

II. METHOD I: INCORPORATION OF INTERNATIONAL MATERIALS IN EIGHTH AMENDMENT ANALYSIS

This Part explores how consideration of international materials has been incorporated, and how it might be incorporated differently, in analysis of cruel and unusual punishment under the Eighth Amendment. The focus here—again on death penalty cases—is on the way the Court has set out the relevant inquiries and where, within these inquiries, it has considered international materials. In examining how the Court has incorporated international materials into its Eighth Amendment analysis and how it might do so differently, this Part flags advantages and disadvantages to the different approaches. The inquiry here is above all methodological.

Before delving into how the Court has considered international materials in death penalty cases, a word about how the Court decides the constitutionality of punishments under the Eighth Amendment is appropriate. The basic test is one of proportionality, in which the Court has been guided by the principles “that the harshness of punishment should not exceed the gravity of the crime and that one should not be punished more harshly than one deserves.”⁶⁰ In undertaking this proportionality review, the Court engages in a two-part analysis. First, it looks for “objective indicia of consensus”⁶¹ as to the punishment under consideration. Second, it then exercises its “own independent judgment”⁶² as to the propriety of the punishment in light of other factors the Court determines relevant. By consulting consensus as well as its own judgment, the Court decides whether a given punishment passes constitutional muster under its proportionality review.⁶³

A. International Materials and the Objective Indicia of Consensus

In all of the post-*Trop* cases discussed above, the Court has identified as part of the Eighth Amendment analysis an inquiry into “objective indicia of consensus”⁶⁴ regarding the punishment at issue. The Court, however, has not been consistent on what is appropriately considered as part of these objective indicia. As explained below, in some cases the Court has stated that only *domestic* indicia—in the form of state-level legislative enactments and jury decisions—are relevant, but has nonetheless considered

60. Lee, *supra* note 10, at 72.

61. *Roper*, 543 U.S. at 564.

62. *Id.*

63. The Court reiterated the importance of proportionality in *Graham*. See *Graham v. Florida*, 130 S. Ct. 2011, 2021 (“The concept of proportionality is central to the Eighth Amendment.”).

64. *Roper*, 543 U.S. at 564.

international materials as part of the inquiry. In other cases, the Court has suggested a role for international materials in determining a consensus, but in one of these cases in particular, it did not in fact appear to consider international materials in this way. Nonetheless, where international materials have been part of the analysis, they have overwhelmingly been considered as part of the Court's inquiry into the objective indicia of consensus on application of the death penalty.

In three death penalty cases the Court has indicated that the consensus inquiry should rely on *domestic* factors—and then included analysis of international materials nonetheless. In *Coker*, the Court identified as the appropriate sources for consideration “history” and the “the objective evidence of the country’s present judgment concerning the acceptability of death as a penalty for rape for an adult woman.”⁶⁵ Yet after deciding that the “current judgment . . . obviously weighs very heavily on the side of rejecting capital punishment” for the rape of an adult woman, the Court added a footnote to include a brief consideration of international materials as well.⁶⁶ Similarly, the Court in *Thompson* described the consensus inquiry as including only state legislative enactments and jury determinations,⁶⁷ and yet devoted a paragraph and a long footnote as part of this inquiry to a consideration of international materials.⁶⁸ Finally, writing for the majority in *Atkins*, Justice Stevens identified “the country’s legislatures” as the most appropriate source of consensus,⁶⁹ and then buttressed the conclusion that consensus had developed against the death penalty for mentally retarded offenders by noting that “this legislative judgment reflects a much broader social and professional consensus,” including “within the world community.”⁷⁰

By contrast, two cases suggest that consideration of international materials is appropriate to determining objective indicia of consensus. The Court in *Enmund* said so specifically when it included among the relevant factors “the historical development of the punishment, legislative judgments, *international opinion*, and the sentencing decisions juries have made.”⁷¹ It then proceeded to consider the existence and use of capital

65. *Coker v. Georgia*, 433 U.S. 584, 593 (1977).

66. *Id.* at 596 & n.10 (noting that only three out of 60 nations surveyed by the United Nations retained the death penalty for rape where death did not ensue).

67. *See Thompson v. Oklahoma*, 487 U.S. 815, 822-23 (1998).

68. *Id.* at 830-31 & n.34 (discussing the use of the death penalty in “nations that share our Anglo-American heritage” and other “leading members of the Western European community”).

69. *Atkins v. Virginia*, 536 U.S. 204, 312 (2002).

70. *Id.* at 116-17 n.21.

71. *Enmund v. Florida*, 458 U.S. 782, 788 (1982) (emphasis added).

punishment for felony murder in England, India, Canada as well as other Commonwealth countries and continental Europe.⁷² In *Roper*, the Court's indication that consideration of international materials may be appropriate as part of determining consensus is, at best, implicit: "The beginning point is a review of objective indicia of consensus, as expressed *in particular* by the enactments of legislatures that have addressed the question."⁷³ In giving state legislative enactments the lead role in the analysis, Justice Kennedy suggested that such consensus may also be expressed elsewhere—including abroad. As noted below,⁷⁴ however, the Court in *Roper* used international materials to confirm, rather than to determine, its conclusion that the death penalty as applied to juvenile offenders was unconstitutional.

Including consideration of international materials in the "objective indicia of consensus" inquiry has a number of advantages. First, and most basically, it is where the Court has most frequently incorporated its consideration of such materials in past cases.⁷⁵ Thus, continuing to incorporate consideration of international materials at this point in the analysis is appropriate as a matter of methodological consistency. Second and related to methodological consistency, consideration of international materials as part of the consensus inquiry allows litigants to know the role such consideration will play in Eighth Amendment cases. Third, because determining objective indicia of consensus under the Eighth Amendment largely involves what one scholar has called "nose-counting"⁷⁶—that is, determining whether a jurisdiction does or does not permit or use a given punishment—it is relatively easy to incorporate such materials by tallying up jurisdictions. Finally, including consideration of such materials as part of the objective indicia of consensus is both transparent and, as the inquiry suggests, objective.

It is important to underscore shortcomings with incorporating consideration of international materials as part of the consensus inquiry as well. First, the Court has not been entirely clear as to whether consideration of international materials is appropriately part of the consensus inquiry. Even in those cases where it has considered such materials, the Court's

72. *Id.* at 796-97 n.22.

73. *Roper v. Simmons*, 543 U.S. 551, 564 (2005) (emphasis added).

74. *See infra* Part II.C.

75. At least the Court has included such consideration in the section of its opinion addressing consensus. In both *Coker* and *Atkins*, however, the Court appeared to have concluded that such consensus existed and then, in a footnote, indicated that international materials confirmed this conclusion. Part III.C, *infra*, discusses this in more detail.

76. *See Young, supra* note 10, at 153. For a more detailed description of this "aggregation" problem, see also Sitaraman, *supra* note 10, at 681-90.

articulation of the appropriate inquiry suggests that only domestic factors are relevant.⁷⁷ Second, looking for objective indicia of consensus outside the country is arguably undemocratic as it counts noses unaffected by the Court's ruling. On a related point, adding foreign jurisdictions skews the proper inquiry and mostly leads to "denominator swelling"—giving the impression that greater consensus exists than is actually the case.⁷⁸

B. International Materials and the Exercise of Independent Judgment

In Eighth Amendment analysis, the second inquiry after looking at objective indicia of consensus has the Court "determine, in the exercise of [its] own . . . judgment"⁷⁹ whether a given punishment is disproportionate in the circumstances. Although the Court is not fully in agreement as to whether this inquiry is appropriate,⁸⁰ the majority of cases, including one of the Court's most recent Eighth Amendment decisions,⁸¹ confirm its place in the analysis. Indeed, since the Court determined in *Coker* that "the Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment,"⁸² the Court has, with the exception of *Stanford*, consistently seen fit to assess whether "there is reason to disagree with the judgment reached by the citizenry and its legislators."⁸³

To be sure, the Court has never suggested that consideration of international materials falls within its independent judgment. Instead, the Court has used this part of the analysis to examine the specific facts of the case at hand,⁸⁴ statistics,⁸⁵ various social science studies,⁸⁶ and the social

77. See *Atkins v. Virginia*, 536 U.S. 204, 312 (2002); *Thompson v. Oklahoma*, 487 U.S. 815, 822-23 (1998); *Coker v. Georgia*, 433 U.S. 584, 593 (1977).

78. See Young, *supra* note 10, at 158-60.

79. *Roper v. Simmons*, 543 U.S. 551, 564 (2005).

80. See *Stanford v. Kentucky*, 492 U.S. 361, 378 (1989) ("We have no power under the Eighth Amendment to substitute our belief in the scientific evidence for the society's apparent skepticism. In short, we emphatically reject . . . that the issues in this case permit us to apply our 'own informed judgment.'").

81. See *Kennedy v. Louisiana*, 128 S.Ct. 2641, 2650 (2008) ("Whether the death penalty is disproportionate to the crime committed depends as well upon the standards elaborated by controlling precedents and by the Court's own understanding and interpretation of the Eighth Amendment's text, history, meaning and purpose.") (emphasis added).

82. *Coker v. Georgia*, 433 U.S. 584, 597 (1977).

83. *Atkins v. Virginia*, 536 U.S. 304, 313 (2002). See also *Roper*, 543 U.S. at 564; *Thompson v. Oklahoma*, 487 U.S. 815, 823 (1988); *Enmund v. Florida*, 458 U.S. 782, 797 (1982).

84. See *Coker*, 433 U.S. at 597-99; *Enmund*, 458 U.S. at 797-98.

85. See *Thompson*, 487 U.S. at 837; *Enmund*, 458 U.S. at 798-99.

86. See *Roper*, 543 U.S. at 568-74; *Atkins*, 536 U.S. at 318-21; *Thompson*, 487 U.S. at 834-36.

purposes of capital punishment.⁸⁷ But if this inquiry is to remain part of the Eighth Amendment analysis, it may be a more sensible place, methodologically speaking, for consideration of international materials to occur. If the Court is to treat such materials as persuasive, and not binding, it can arguably engage in a more nuanced assessment of how foreign jurisdictions have considered the punishment than it otherwise would as part of the “nose-counting”⁸⁸ under the consensus inquiry. Given the specific discretionary grant to the Court to inquire whether “there is reason to disagree with the judgment reached by the citizenry and its legislators,”⁸⁹ perhaps a thorough-going consideration of international materials may provide such a reason. As long as the Court—or any court—is transparent in its use of international materials in this part of the analysis, it is unclear why such consideration would be less objectionable than reference to social science studies and statistics or philosophical inquiries into the larger purposes of the criminal sanction.⁹⁰

The most troubling aspect of incorporating consideration of international materials into the Court’s exercise of its independent judgment reflects the controversy this exercise of judgment has engendered. Precisely because the Court has not articulated what properly falls within the scope of this inquiry, litigants are left guessing what the Court may find relevant when exercising its independent judgment in resolving a case. As Justice Scalia has emphasized throughout this line of cases, this inquiry leaves seemingly unbounded discretion to the nine justices.⁹¹ Of course, this critique—which has only carried the Court once⁹²—applies to the inquiry as a whole, and not more specifically to the consideration of international materials.

87. *Atkins*, 536 U.S. at 318-20; *Thompson*, 487 U.S. at 836-38.

88. *See Young*, *supra* note 10, at 153.

89. *Atkins*, 536 U.S. at 313.

90. Justice Scalia argues in dissent in *Roper* that the Court considers international materials in precisely this way and yet fails to be forthcoming about it: “‘Acknowledgement’ of foreign approval has no place in the legal opinion of this Court *unless it is part of the basis for the Court’s judgment*—which is surely what it parades as today.” *Roper*, 543 U.S. at 628 (Scalia, J., dissenting) (emphasis in original). The argument in this Note agrees with Justice Scalia insofar as he can be understood to suggest that if the Court is going to make consideration of international materials a part of its independent judgment, it should do so transparently.

91. *See Stanford v. Kentucky*, 492 U.S. 361, 378 (1989). *See also Thompson*, 487 U.S. at 873 (Scalia, J., dissenting); *Atkins*, 536 U.S. at 348-49 (Scalia, J., dissenting); *Roper*, 543 U.S. at 616 (Scalia, J., dissenting).

92. *See Stanford*, 492 U.S. at 378.

C. The Confirmatory Role of International Materials

The Court's articulation in *Roper* of the proper role for international materials differed from any previous explanation. The Court devoted the entire final section of its opinion to a consideration of international materials and did so to *confirm* its "determination that the death penalty is disproportionate punishment for offenders under 18."⁹³ Justice O'Connor dissented because she disagreed that a national consensus against the death penalty had formed and disagreed with the imposition of a categorical rule, but acknowledged the "confirmatory role" that international materials can play in constitutional analysis.⁹⁴ Thus, *Roper* arguably initiated a third possible way in which international materials can enter the Eighth Amendment analysis: as a confirmation of the Court's conclusion on either the consensus or the independent judgment inquiries—or perhaps as confirmation of both.⁹⁵

At the same time, two of the cases that considered international materials as part of the consensus inquiry essentially relegated such materials to a confirmatory role, even though the Court did not say this explicitly. In *Coker*, the Court had concluded that while states had not unanimously proscribed the death penalty as a punishment for the rape of an adult woman, an overwhelming number had "obviously weigh[ed] very heavily on the side of rejecting capital punishment."⁹⁶ It then added a footnote that in essence confirmed the Court's conclusion.⁹⁷ Similarly, the Court in *Atkins* concluded that "[t]he practice [of executing offenders with IQs less than 70] . . . has become truly unusual, and it is fair to say that a national consensus has developed against it."⁹⁸ Only then—and also in a footnote—did the Court briefly consider how international materials confirmed its conclusion.⁹⁹ Thus, although the *Roper* Court was the first to articulate the confirmatory role for international materials explicitly, the Court's decisions in *Coker* and *Atkins* largely adopted this approach in practice.

93. *Roper*, 543 U.S. at 575.

94. *Id.* at 605 (O'Connor, J., dissenting) ("At least, the existence of an international consensus of this nature can serve to confirm the reasonableness of a consonant and genuine American consensus.").

95. As noted, Justice Scalia disagreed with the Court's characterization of how international materials were used in *Roper*. See *id.* at 628 (Scalia, J., dissenting); see also *Atkins*, 536 U.S. at 313.

96. *Coker v. Georgia*, 433 U.S. 584, 596 (1977).

97. *Id.* at 596 n.10 (noting that only three out of sixty countries surveyed by the United Nations imposed the death penalty where death did not ensue).

98. *Atkins*, 536 U.S. at 316.

99. *Id.* at 317 n.21 ("[W]ithin the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved.") (citation omitted).

Consideration of international materials as a confirmation of the Court's decision has some advantages. First, there is a strong argument that by explicitly relegating such consideration to a subsidiary role, the Court properly focuses its inquiries on the treatment of the punishment in the United States. On a related note, by not introducing consideration of international materials into either of the other two inquiries, the Court does not "swell the denominator"¹⁰⁰ in the consensus inquiry nor does it have its independent judgment improperly swayed by "like-minded foreigners."¹⁰¹ Finally, by only consulting international materials when they confirm a Court's decision, there should be no possibility that the Court contravenes national views on the punishment at issue.

The disadvantages, however, largely outweigh the advantages a confirmatory approach offers. First, there is a basic question of how much work such an inquiry actually does. As Professor Ernest A. Young has asked, "[w]ould a domestic conclusion that is *not* confirmed by foreign practice be insufficient to strike down a state law?"¹⁰² It seems unlikely that the Court would find a national consensus against a punishment, see no reason to uphold the punishment when exercising its independent judgment, and yet choose not to strike it down because international materials do not confirm the first two inquiries. Second, what precisely do international materials confirm under this approach? That is, this approach leaves open whether the Court should consider international materials to confirm objective indicia of consensus or its own exercise of independent judgment—or perhaps both.¹⁰³ Finally, the Court arguably stacks the international deck if it is only to look to international materials when such materials confirm its decision. Justice Scalia has made this point repeatedly, by noting that in other areas of international and comparative

100. See Young, *supra* note 10, at 158-60.

101. *Roper v. Simmons*, 543 U.S. 551, 608 (2005) (Scalia, J., dissenting).

102. Young, *supra* note 10, at 154 (emphasis in original).

103. Indeed, the Court's two references to the confirmatory role of international materials in *Roper* do not make clear whether such materials confirm the consensus inquiry or the Court's own independent judgment. See *Roper*, 543 U.S. at 575 ("Our determination that the death penalty is disproportionate punishment for offenders under 18 finds confirmation in the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty.") and *id.* at 578 ("The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions."). The first statement suggests that international materials explicitly contradict the U.S. position. The second does not indicate which conclusions—is it all of them?—international materials confirm.

law, consideration of international materials would explicitly disconfirm the Court's conclusions.¹⁰⁴

In examining the ways international materials have been and can be incorporated into Eighth Amendment analysis, this Part has aimed at a clearer methodological understanding of how the Court can and does consider such materials. It starts from the assumption—admittedly controversial—that there is a place for such consideration in the analysis, and focuses on advantages and disadvantages inherent in the approaches the Court has taken and seems most likely to take in the future. Indeed, the methodological difficulties discussed here arguably provide a more concrete forum to debate the larger normative question on the role of international materials in American constitutional interpretation.

In examining the three ways in which the Court has considered international materials, this Part arrives at the tentative conclusion that incorporating such materials as part of the exercise of its own independent judgment is the most defensible approach. Incorporating consideration of international materials in the exercise of the Court's independent judgment allows for a nuanced inquiry that simply cannot be done under either the “objective indicia consensus” analysis or the “confirmatory” approach. Consideration of international materials in the “objective indicia of consensus” analysis risks aggregation and “denominator-swelling” problems whereas using such materials only to confirm a previous judgment adds little, if anything, to the overall inquiry. The most troublesome objection to considering international materials as part of the exercise of independent judgment is the concern with judicial cherry-picking.¹⁰⁵ The response to this objection is to develop a principled approach to how the Court—and courts—should consider international materials as part of the Eighth Amendment cruel and unusual punishment analysis. The next two Parts take up this task.

104. See, e.g., *Roper*, 543 U.S. at 624-26 (Scalia, J., dissenting) (noting that international practice does not confirm U.S. constitutional law in Fourth Amendment, Establishment Clause and abortion cases).

105. This critique of the selective use of international materials is analogous to that made of the selective use of legislative history. In both cases, an unprincipled judge can simply “look over the heads of the crowd and pick out . . . friends.” ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 36 (1997) (attributing quotation to Judge Harold Leventhal). There is a similar critique regarding the selective use of dictionaries to define terms. See generally Ellen P. Aprill, *The Law of the Word: Dictionary Shopping in the Supreme Court*, 30 ARIZ. ST. L. J. 275 (1998); Rickie Sonpal, *Old Dictionaries and New Textualists*, 71 FORDHAM L. REV. 2177 (2003).

III. METHOD II: TOWARDS A PRINCIPLED USE OF INTERNATIONAL MATERIALS IN EIGHTH AMENDMENT ANALYSIS

The question unaddressed in Part II and taken up here centers on another methodological inquiry: assuming the Court will incorporate consideration of international materials into its analysis of the Eighth Amendment's prohibition on cruel and unusual punishment, can it use such materials in a principled way? This Part borrows two proposals from recent scholarship to suggest a more principled way for the Court to use international materials in Eighth Amendment analysis. Finally, it closes by measuring the Court's use of international materials in *Roper* against these principles.

An initial caveat is important. Using international materials—that is, engaging in a close and thoughtful study of international and comparative legal documents—is very difficult to do well.¹⁰⁶ Such difficulty should not necessarily dissuade the Court, but it should counsel caution in the use of such materials. Indeed, one scholar has argued that both decision costs—“the time, effort, and expense involved in deciding cases in a particular way”—and error costs—“the likelihood of making mistakes by pursuing a particular method”—seem likely to plague American courts trying to make sense of international materials.¹⁰⁷ This need not be the case, and the principles articulated here do not require courts to engage in the kind of complicated comparative work that some scholars have called for.¹⁰⁸ However, if the Court—and courts more generally—are unable to engage in a more thorough, principled consideration of international materials, there is a strong institutional competence argument weighing against such consideration. This Part briefly begins to sketch out what consideration of international materials might look like in the context of Eighth Amendment cases.

A. International Acceptance in Law and Practice

If courts assessing whether a given punishment in the U.S. is cruel and unusual look at both legislative enactments and—in the case of the death

106. For a sense of the difficulties involved in effectively understanding “global law,” see generally WILLIAM TWINING, *GENERAL JURISPRUDENCE: UNDERSTANDING LAW FROM A GLOBAL PERSPECTIVE* (2009); WILLIAM TWINING, *GLOBALISATION AND LEGAL THEORY* (2000).

107. See Young, *supra* note 10, at 165-66.

108. Cf. Lee, *supra* note 10, at 114 (“[T]he Court is unlikely to become the kind of thoughtful, sophisticated comparativist that engages with other legal systems envisioned by some scholars.”). Lee cites Vicki C. Jackson as an example of one such scholar. *Id.*

penalty—the actual practice of juries,¹⁰⁹ foreign jurisdictions should be subject to the same scrutiny. Translated into a methodology for assessing international materials, the guidance for American courts is straightforward: courts should look both at how well-defined and accepted a given norm is in a foreign jurisdiction *and* the extent to which state practice in that jurisdiction actually conforms to the expressed legal commitment.¹¹⁰ Such an approach enriches the Court’s current “[n]ose-counting”¹¹¹ by delving more deeply into whether a given jurisdiction in fact adheres to the practice that it otherwise espouses.

Nor should the research difficulties associated with determining state practice necessarily prove insurmountable. In addition to a rich body of comparative law scholarship,¹¹² a number of organizations, including, Freedom House, Human Rights Watch and Amnesty International, focus considerable attention on state practice in areas of individual rights. These organizations have managed to collect data from jurisdictions whose own statistics do not inspire high degrees of confidence.¹¹³ In short, resources exist that allow courts to understand both law on the books in foreign jurisdictions and the extent to which such jurisdictions comply with these laws. If international materials are to be used in Eighth Amendment analysis, the Court should utilize these resources to look at both law and practice. It has, up to this point, focused on the former and largely—if not entirely—ignored the latter.

B. United States’ Response to the International Norm

A second step toward ensuring a principled use of international materials is for the Court to inquire more closely into whether the United States has accepted the relative international norm at issue.¹¹⁴ As Sarah Cleveland has noted, such acceptance could be ascertained by looking to four different areas: 1) treaty ratifications; 2) acceptance of treaties through

109. *See, e.g.*, *Thompson v. Oklahoma*, 487 U.S. 815, 822 (1988) (“[I]n confronting the question whether the youth of the defendant . . . is a sufficient reason for denying the State the power to sentence him to death, we first review relevant legislative enactments, then refer to jury determinations.”).

110. *Cf.* Cleveland, *supra* note 10, at 113.

111. *See* Young, *supra* note 10, at 153.

112. *See, e.g.*, TWINING, *supra*, note 106 and sources cited therein.

113. A snapshot of Human Rights Watch’s website in May 2010 provides a useful example. At that time, Human Rights Watch had recently conducted studies of the persecution of Kurds in Syria, alleged witchcraft and sorcery cases in Saudi Arabia, sham trials of human rights activists in China and an assessment of the National Security Law in Sudan. *See* HUMAN RIGHTS WATCH, <http://www.hrw.org> (last visited May 5, 2010).

114. *See* Cleveland, *supra* note 10, at 115-24.

customary international law;¹¹⁵ 3) international customary laws to which the U.S. has not persistently objected; and 4) *jus cogens* norms.¹¹⁶ By contrast, the U.S. should be understood to have rejected an international norm through a treaty reservation or through persistent objection.¹¹⁷

A somewhat more difficult factor here is the United States' decision not to ratify a treaty. While such a decision is a clear signal of the U.S.'s intention not to consent to the treaty, it does not necessarily always entail a rejection of the norms embodied in the treaty. For example, while five senators on the Senate Committee on Foreign Relations acknowledged pervasive human rights violations against women throughout the world and expressed an interest in seeing such violations ended, they recommended against ratification of the Convention on the Elimination of All Forms Discrimination Against Women ("CEDAW") because they did not believe that CEDAW was "a proper or effective means of pursuing that objective."¹¹⁸ Indeed, the Committee as a whole did recommend ratification, but it did not pass the Senate.¹¹⁹ A court considering such a treaty as part of a consideration of international materials could, *ceteris paribus*, count it as a neutral factor.

While such an inquiry properly respects the role of the political branches in the interpretative process,¹²⁰ assessing the U.S.'s acceptance of a norm in the Eighth Amendment context should not be treated by courts as dispositive—at least under the "independent judgment" inquiry.¹²¹ By looking to how, or indeed if, the Legislative and Executive branches have responded to an international norm, courts avoid the critique that they are doing an end-run around the political process. Indeed, a court should include the U.S.'s acceptance or rejection of the international norm as part of its inquiry into objective indicia of consensus,¹²² especially considering

115. Cleveland gives as examples the Vienna Convention on the Law of Treaties and aspects of the Law of the Sea Convention. *See id.* at 115.

116. *Id.* *Jus cogens* norms refer to peremptory rules of international law from which no derogation is permitted. *See* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 121 (6th ed. 2003).

117. Cleveland, *supra* note 10, at 115.

118. *See* STAFF OF S. COMM. ON FOREIGN RELATIONS, 103D CONG., EXEC. REP. (1994) S384-10 reprinted in HENRY J. STEINER & PHILIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS 207 (2d ed. 2000).

119. STEINER & ALSTON, *supra* note 118, at 208.

120. *See* Cleveland, *supra* note 10, at 116.

121. *See supra* Part II.B.

122. Asking an American court to consider whether American legislatures, executives and courts have accepted or rejected an alleged international norm as part of the objective indicia of consensus is distinct from asking an American court to consider foreign jurisdictions as part of the objective indicia analysis. Although, as noted *supra* Part II.A, American courts are ill-equipped to tackle the latter analysis, they regularly interpret the actions of American institutions.

that such a statement would clearly address whether such consensus existed. At the same time, in a situation where foreign jurisdictions as well as international treaty and customary law have established a norm that the American political branches have rejected, a court would not be restricted from considering such materials as part of the independent judgment inquiry under the Eighth Amendment analysis.¹²³

However a court comes out, it should fully and transparently identify how the U.S. has responded to an international norm. Further, a court should explain how the U.S. position—acceptance, rejection or something in between—factors into its own decision. As noted above, if a court is unable or unwilling to engage in this type of analysis, consideration of international materials is arguably best excluded.

C. Principles in Action: A Brief Application to *Roper*

Applying the two principles articulated here, it is apparent that the Court's use of international materials in *Roper* falls short of the mark. Such a conclusion does not imply that international materials should not have been considered; rather, it suggests that the Court should have done a more effective job of using and explaining its use of such materials.

The Court in *Roper* included no discussion of whether countries that have legislatively abolished the death penalty as applied to juvenile offenders actually adhere to these laws in practice. Justice Scalia rightfully criticizes the Court on this point; indeed he even provides a citation for his supposition that a number of the countries that have putatively proscribed the penalty in fact use it in practice.¹²⁴ The “weight of the authority”¹²⁵ on this point is almost certainly with the Court,¹²⁶ but it fails to communicate this effectively when it does not adequately consider state practice in foreign jurisdictions alongside its consideration of international law “on the books.”

Additionally, the Court's treatment of the U.S. response to the two relevant treaties—the International Convention on Civil and Political Rights (“ICCPR”) and the Convention on the Rights of the Child

123. See Cleveland, *supra* note 10, at 118. Cleveland notes in particular that with norms that construe limits on governmental power—generally understood as “countermajoritarian constraints on the political branches”—courts owe less judicial deference to those branches. See *id.* at 117.

124. *Roper v. Simmons*, 543 U.S. 552, 623 (2005) (Scalia, J., dissenting) (citing RITA J. SIMON & DAGNY A. BLASKOVICH, *A COMPARATIVE ANALYSIS OF CAPITAL PUNISHMENT: STATUTES, POLICIES, FREQUENCIES, AND PUBLIC ATTITUDES THE WORLD OVER* (2002)).

125. *Id.* at 578 (majority opinion).

126. Indeed, this is evident from the very study Justice Scalia cites. See generally SIMON & BLASKOVICH, *supra* note 124.

(“CRC”)—leaves much to be desired. While the Court does acknowledge that the U.S. made a reservation to the ICCPR’s prohibition on capital punishment for juveniles in Article 6(5),¹²⁷ it then claims that the reservation is largely immaterial on account of both five U.S. states having abolished the death penalty for juveniles and subsequent Congressional action unrelated to the ICCPR.¹²⁸ While such events may be relevant for the domestic consensus inquiry, the Court’s implicit suggestion that such actions somehow cancelled the reservation is both misleading and, from an international law perspective, simply incorrect.¹²⁹ Moreover, the Court’s emphasis on the fact that other countries have not entered reservations on the capital punishment provision in the CRC obscures the important point that the U.S. have entered such a reservation to the relevant provision in the ICCPR.¹³⁰ The U.S.’s specific rejection of the prohibition on capital punishment pursuant to its ICCPR reservation need not determine the Court’s conclusion in *Roper*, but the Court must make a better effort at forthrightly explaining why it does not.

Finally, the Court’s passing reference to the CRC does not adequately explain why a treaty that the U.S. has not ratified is worthy of the Court’s attention. If the Court points to the CRC as objective indicia of consensus, Justice Scalia’s obvious rejoinder that the U.S. has explicitly *not* joined such consensus seems fatal.¹³¹ But this would not be so if the Court were to explain that non-ratification does not necessarily imply rejection of the norm at issue¹³² and that in any case, the overwhelming number of countries that have signed onto (and not entered reservations on) the CRC and its prohibition of capital punishment for juveniles is relevant to the Court’s exercise of its independent judgment. This may indeed not have been the Court’s reasoning; the point here is to emphasize the Court’s failure to flesh out its reasoning on the relevance of the U.S.’s non-ratification of the CRC.

IV. INTERNATIONAL MATERIALS APPLIED TO *GRAHAM V. FLORIDA*

With the *Graham* and *Sullivan* cases, the Court had the opportunity to elucidate the proper role of international materials in Eighth Amendment

127. See *Roper*, 543 U.S. at 567.

128. *Id.*

129. See LORI DAMROSCH ET AL., INTERNATIONAL LAW: CASES AND MATERIALS 477 (4th ed. 2001). See also *Roper*, 543 U.S. at 622-23 (Scalia, J., dissenting).

130. See *Roper*, 543 U.S. at 576.

131. *Id.* at 622 (Scalia, J., dissenting).

132. See *supra* Part III.B.

cases. For some justices, of course, this means no role at all.¹³³ But for those convinced that there is a role for international materials in the Eighth Amendment analysis, this Part applies the principled use of such materials developed in Part III to the *Graham* case.¹³⁴ This application leads to two conclusions. First, it is clear the juvenile LWOP sentence is widely proscribed in law and practice. Second, the political branches of the United States have repeatedly opted out of the relevant international treaties and treaty provisions prohibiting the juvenile LWOP sentence. On balance, then, the use of international materials on the question of whether the juvenile LWOP sentence should be held unconstitutional stands in equipoise. While such a minimal contribution to the final result in the *Graham* case may seem unsatisfactory, an analysis that lends clarity to how international materials will be used in Eighth Amendment cruel and unusual punishment cases would prove of great methodological use over the longer term.

A. The Law and Practice of the Juvenile LWOP Sentence

Dissenting in *Roper* to the majority's use of international materials, Justice Scalia noted that while the Court's decision invalidated the death penalty, it left in the place the similarly prohibited juvenile LWOP sentence.¹³⁵ Indeed, if anything, the juvenile LWOP sentence appears even more widely proscribed than the juvenile death penalty.¹³⁶ Importantly, this proscription is captured in both law *and practice*.

The international community's rejection of the juvenile LWOP sentence appears in two widely ratified international treaties and a couple of recent United Nations General Assembly resolutions. First, the Convention on the Rights of the Child ("CRC") specifically refers to, and condemns, the practice in Article 37(a).¹³⁷ Moreover, Article 37(b) provides that any incarceration of juveniles "shall be used only as a

133. This would be particularly true of Justice Scalia and Justice Thomas. *See supra* note 14.

134. As noted, *Sullivan v. Florida* was dismissed as improvidently granted. *See supra* note 2.

135. *Roper*, 543 U.S. at 623 (Scalia, J., dissenting) ("It is also worth noting that, in addition to barring the execution of under-18 offenders, the United Nations Convention on the Rights of the Child prohibits punishing them with life in prison without the possibility of release.").

136. *See generally* Connie De La Vega & Michelle Leighton, *Sentencing Our Children to Die in Prison: Global Law and Practice*, 42 U.S.F. L. REV. 983 (2008) (surveying the global use of the juvenile LWOP sentence).

137. Convention on the Rights of the Child art. 37(a), Nov. 30, 1989, 1577 U.N.T.S. 3. The Committee on the Rights of the Child, which is tasked with overseeing implementation of the CRC, added a General Comment in 2007 clarifying the prohibition: "The death penalty and a life sentence without parole are explicitly prohibited under article 37(a) of CRC." Comm. on the Rights of the Child, *Children's Rights in Juvenile Justice, General Comment No. 10*, ¶ 11, U.N. Doc. CRC/C/GC/10 (Apr. 25, 2007).

measure of last resort and for the shortest appropriate period of time.”¹³⁸ All members of the United Nations except for Somalia and the United States have ratified the CRC, and only a handful of those that have ratified the CRC have made a reservation to Article 37.¹³⁹ Second, provisions of the International Covenant on Civil and Political Rights (“ICCPR”)¹⁴⁰ have been read to disallow the juvenile LWOP sentence. In particular, commentators have emphasized the requirement in Article 14(4) that states shall take into account a juvenile’s age when applying criminal sanctions¹⁴¹ alongside the language in Article 9(1) that “[n]o one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law”¹⁴² to reach the result that the ICCPR prohibits the juvenile LWOP sentence.¹⁴³ Other commentators have looked to the Article 7 prohibition on cruel, degrading or inhumane punishment¹⁴⁴ as well as the requirement in Article 10(3) that “[j]uvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.”¹⁴⁵ Finally, the United Nations General Assembly has twice recently passed overwhelming resolutions which in part condemned the practice of juvenile LWOP sentences; the resolution carried 185 votes in 2006 and 183 votes in 2007.¹⁴⁶ In both cases, only the United States opposed the resolutions.¹⁴⁷

In addition to the international law consensus against the juvenile LWOP sentence, the law and practice of foreign jurisdictions indicates the juvenile LWOP sentence is only in use in the United States.¹⁴⁸ A 2005 survey conducted by Human Rights Watch and Amnesty International

138. Convention on the Rights of the Child art. 37(b), Nov. 30, 1989, 1577 U.N.T.S. 3.

139. See United Nations Treaty Collection, Convention on the Rights of the Child, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en (last visited Nov. 21, 2010). Australia, Canada, Iceland, Japan, Malaysia, the Netherlands, New Zealand, Singapore, and Switzerland have entered reservations. In all but two cases, these reservations are to Art. 37(c)’s requirement to avoid mixing children with adult detainees.

140. International Covenant on Civil and Political Rights, Dec. 16, 1966, S. Exec. Doc. E, 95-2 (1978), 999 U.N.T.S. 171.

141. *Id.* at art. 14(4).

142. *Id.* at art. 9(1).

143. See Vincent G. Levy, Note, *Enforcing International Norms in the United States After Roper v. Simmons: The Case of Juvenile Offenders Sentenced to Life Without Parole*, 45 COLUM. J. TRANSNAT’L L. 262, 270-71 (2007).

144. ICCPR, *supra* note 140, at art. 7.

145. *Id.* at art. 10(3). For this argument, see De La Vega & Leighton, *supra* note 136, at 1010.

146. Rights of the Child, G.A. Res. 62/141, ¶ 36(a), U.N. Doc. A/RES/62/141 (Dec. 18, 2007); Rights of the Child, G.A. Res. 61/146, ¶ 31(a), U.N. Doc. A/RES/61/146 (Dec. 19, 2006).

147. See De La Vega & Leighton, *supra* note 136, at 1012.

148. *Id.* at 985.

indicated that only fourteen countries permitted a juvenile LWOP sentence—and it was not even clear whether “life” necessarily foreclosed the possibility of parole.¹⁴⁹ More recent research suggests that in fact only ten countries other than the United States permit the penalty.¹⁵⁰ Looking at the actual practice of juvenile LWOP sentences, the 2005 survey identified only three countries other than the United States where juvenile offenders are actually serving such sentences: South Africa, Tanzania and Israel.¹⁵¹ Updating this research through communications with officials in every country where the juvenile LWOP sentence is possible, Professors Connie de La Vega and Michelle Leighton found that as of 2008, no juvenile offenders were serving a life without the possibility of parole sentence.¹⁵² Even if this exhaustive study failed to identify a country that in fact has sentenced a juvenile offender to LWOP, it is clear that the overwhelming number of foreign jurisdictions disfavor the use of the juvenile LWOP sentence in both law and practice.

B. The United States’ Response to International Prohibition on Juvenile LWOP Sentences

The United States’ response to the international prohibition on the juvenile LWOP sentence has been largely uniform: explicit disagreement. This position is clearly articulated in a series of reservations to the ICCPR. First, the Senate explicitly defined cruel, inhumane or degrading treatment in Article 7 of the ICCPR as synonymous with “cruel and unusual punishment” as captured in the U.S. Constitution.¹⁵³ Second, while noting that “the policy and practice of the United States are generally in compliance with and supportive of the Covenant’s provisions regarding treatment of juveniles in the criminal justice system,” the Senate reserved to the United States “the right, in exceptional circumstances, to treat juveniles as adults, notwithstanding [contrary ICCPR treaty provisions].”¹⁵⁴ In carving these reservations out of the ICCPR, the Senate made clear that the United States remained free to use the juvenile LWOP sentence, albeit

149. HUMAN RIGHTS WATCH & AMNESTY INTERNATIONAL, *THE REST OF THEIR LIVES: LIFE WITHOUT PAROLE FOR CHILD OFFENDERS IN THE UNITED STATES* 106 (2005) [hereinafter HRW & AI].

150. MICHELLE LEIGHTON & CONNIE DE LA VEGA, *SENTENCING OUR CHILDREN TO DIE IN PRISON: GLOBAL LAW AND PRACTICE* 4 (2007); *see also* De La Vega & Leighton, *supra* note 136, at 990. The ten countries are Antigua and Barbuda, Argentina, Australia, Belize, Brunei, Cuba, Dominica, Saint Vincent and the Grenadines, the Solomon Islands, and Sri Lanka. *Cf.* HRW & AI, *supra* note 149, at 106-07.

151. HRW & AI, *supra* note 149, at 106.

152. De La Vega & Leighton, *supra* note 136, at 985.

153. 138 CONG. REC. S. 4781 (1992).

154. *Id.* at 4783.

in “exceptional circumstances.”¹⁵⁵ More recently, the United States twice opposed United Nations General Assembly resolutions calling in part for the abolition of the LWOP sentence for juvenile offenders.¹⁵⁶

As noted above, a slightly more difficult inquiry is how to assess the United States’ decision not to ratify the CRC.¹⁵⁷ Most basically, the United States has no *treaty* obligation requiring it not to use the juvenile LWOP sentence.¹⁵⁸ A number of commentators have argued that the abolition of the juvenile LWOP sentence has now risen to the level of customary international law,¹⁵⁹ and would thus bind the United States notwithstanding the fact that it has not ratified the CRC.¹⁶⁰ Even if this is the case, it does not reveal anything about the United States’ decision not to ratify the CRC. While a number of reasons underlie the political branches’ decision not to ratify the CRC,¹⁶¹ the most relevant objection to ratification relating to the juvenile LWOP sentence is based in concerns about federalism.

Examining why the United States chose not to ratify the CRC reveals a strong concern with preserving states’ control over a body of law traditionally understood to fall within their ambit.¹⁶² Most broadly, “[t]he CRC touches on many aspects of family law and juvenile justice that have customarily been regulated by the states and not the federal

155. *Id.* The Human Rights Committee, which oversees implementation of the ICCPR, recently suggested that the United States’ practice of juvenile LWOP rendered it non-compliant with article 24 of the ICCPR notwithstanding its reservation. *See* Human Rights Comm., Consideration of Reports Submitted by States Parties under Article 40 of the Covenant: Concluding Observations of the Human Rights Committee, ¶ 34, U.N. Doc. CCPR/C/USA/CO/3/Rev.1 (Dec. 18, 2006). Commentators have interpreted these observations to mean that “[t]he extraordinary breadth and rapid development in the United States of sentencing child offenders to LWOP since the United States’ ratification of the ICCPR contradicts the assertion that the United States has applied this sentence only in exceptional circumstances.” De La Vega & Leighton, *supra* note 136, at 1010.

156. *See supra* note 146.

157. *See supra* Part III.B.

158. *See* CRC, *supra* note 137, at art. 37(a).

159. *See, e.g.*, De La Vega & Leighton, *supra* note 136, at 1013-18; Levy, *supra* note 143, at 276 (“Ultimately, the view that Article 37(a) [of the CRC] is binding upon the United States by virtue of its crystallization into a norm of customary law is more than just colorable.”).

160. The reach of customary international law and the extent of its applicability in federal court in the United States are well beyond the scope of this Note. For a recent discussion, see generally Ernest A. Young, *Sorting Out the Debate Over Customary International Law*, 42 VA. J. INT’L L. 365 (2002). For an argument that a country should be able to opt-out of customary international law, see generally Curtis A. Bradley & Mitu Gulati, *Withdrawing from International Custom*, 120 YALE L.J. 202 (2010).

161. *See* Lainie Rutkow & Joshua T. Lozman, *Suffer the Children?: A Call for the United States Ratification of the United Nations Convention on the Rights of the Child*, 19 HARV. HUM. RTS. J. 161, 173-80 (2006) (describing objections to ratification of the CRC as rooted in concerns about sovereignty, federalism, reproductive and family planning, and parents’ rights).

162. *See* Susan Kilbourne, Student Research, *The Convention on the Rights of the Child: Federalism Issues for the United States*, 5 GEO. J. ON POVERTY L. & POL’Y 327, 327 (1998).

government.”¹⁶³ More specifically, an objection to ratification centered on uninhibited state autonomy to sentence juvenile offenders.¹⁶⁴ And while the Court’s decision in *Roper* indeed rendered moot the need to protect a state’s right to permit the death penalty for juvenile offenders, the decision specifically left unaddressed—and arguably seemed to endorse—the juvenile LWOP sentence.¹⁶⁵ In light of the existing ICCPR reservations¹⁶⁶ and the opposition votes to the recent U.N. General Assembly resolutions,¹⁶⁷ the United States’ ongoing refusal to ratify the CRC should be seen to include a rejection of the strong international consensus against the juvenile LWOP sentence.

Taken together, the two prongs of the proposed analysis of international materials do not place much of a thumb on the scale in the *Graham* case. Although the survey of law and practice in foreign jurisdictions weighs heavily in favor of a decision that prohibits the juvenile LWOP sentence, the United States’ persistent expression of disagreement with this international consensus amounts to a strong counterweight. The resultant stasis—had this been the Court’s analysis in this case—would, however, have been far from uninformative. It would have shed considerable light on the methodological questions underlying the normative debate about the use of international materials in constitutional interpretation—at least as applied to the Eighth Amendment cruel and unusual punishment analysis.

V. A MISSED OPPORTUNITY: INTERNATIONAL MATERIALS IN *GRAHAM V. FLORIDA*

When, however, the Court was presented the opportunity to clarify the role of international materials in Eighth Amendment analysis in the *Graham* case, it let the opportunity slip away. In deciding that the juvenile LWOP sentence for non-homicide offenders is unconstitutional, the Court devoted a brief section of its opinion in *Graham* to considering how

163. Rutkow & Lozman, *supra* note 161, at 177.

164. See Howard Davidson, *A Model Child Protection Legal Reform Instrument: The Convention on the Rights of the Child and its Consistency with United States Law*, 5 GEO. J. ON POVERTY L. & POL’Y 185, 187 (1998).

165. *Roper v. Simmons*, 543 U.S. 551, 572 (2005) (“To the extent the juvenile death penalty might have residual deterrent effects, it is worth noting that the punishment of life imprisonment without the possibility of parole is itself a severe sanction, in particular for a young person.”).

166. See *supra* note 153 & 154.

167. See *supra* note 145 & 146.

international materials “support [its] conclusion.”¹⁶⁸ Not only did this section fail to explicitly address the methodological question of how to use international materials in Eighth Amendment analysis, it also used such materials in the unprincipled manner that has troubled critics.¹⁶⁹ This missed opportunity means that debate about the proper role of international materials in Eighth Amendment—and by extension domestic constitutional—analysis will almost certainly continue.

The Court’s analysis proceeded along similar lines to the death penalty cases reviewed above.¹⁷⁰ It began by invoking the language from *Trop* of “evolving standards of decency that mark the progress of a maturing society,”¹⁷¹ and then determined that the proper analysis for the “categorical challenge to a term-of-years sentence” presented in *Graham* was the two-step review: objective indicia of consensus and the exercise of independent judgment.¹⁷² Importantly, in determining that imposition of the juvenile LWOP sentence was “exceedingly rare,”¹⁷³ the Court clarified that this first step concentrated on the “objective indicia of national consensus.”¹⁷⁴ Accordingly, the Court only looked at domestic legislation and domestic sentencing practices.¹⁷⁵ In explaining why the “judicial exercise of independent judgment”¹⁷⁶ also led to the conclusion that the juvenile LWOP sentence is unconstitutional, the Court relied on many of the same factors it considered in *Roper*: lessened culpability of juveniles,¹⁷⁷ the harsh nature of the punishment as applied to juveniles,¹⁷⁸ and the weakened case for both retribution¹⁷⁹ and deterrence as applied to juveniles.¹⁸⁰ After a brief section justifying a categorical prohibition against—as opposed to a case-by-case determination of the appropriateness of—the juvenile LWOP sentence,¹⁸¹ the Court turned its attention to international materials.

168. *Graham v. Florida*, 130 S. Ct. 2011, 2033 (2010).

169. *See id.*; *see also supra* note 90 and accompanying text.

170. *See supra* Part III.

171. *Graham*, 130 S. Ct. at 2021 (citations omitted).

172. *Id.* at 2022. For a discussion of the two step process, *see supra* Part III.

173. *Id.* at 2026.

174. *Id.* at 2023 (emphasis added).

175. *See id.* at 2023-26.

176. *Id.* at 2026.

177. *Id.* at 2026; *Roper v. Simmons*, 543 U.S. 551, 569 (2005).

178. *Graham*, 130 S. Ct. at 2027-28; *Roper*, 543 U.S. at 572.

179. *Graham*, 130 S. Ct. at 2028; *Roper*, 543 U.S. at 571.

180. *Graham*, 130 S. Ct. at 2028-29; *Roper*, 543 U.S. at 571-72.

181. *See Graham*, 130 S. Ct. at 2030-34.

Before discussing how international materials affect the outcome in *Graham*, the Court justified its use of such materials by reference to the line of cases discussed above.¹⁸² Noting that “the Court has looked beyond our Nation’s borders for support for its independent conclusion that a particular punishment is cruel and unusual,” the majority cited *Roper*, *Atkins*, *Thompson*, *Enmund*, *Coker*, and *Trop*.¹⁸³ Indeed, in language that further suggests that the use of international materials has codified into a methodological precedent for Eighth Amendment cruel and unusual punishment analysis,¹⁸⁴ the Court described its interest in “the global consensus against [the juvenile LWOP] sentencing practice” as a continuation of “that longstanding practice” of looking to international materials.¹⁸⁵

Unfortunately, the Court’s consideration of international materials fails to elucidate the role such materials properly play. It should first be noted that the Court limits its use of international materials to that of confirming its decision.¹⁸⁶ As in *Roper*, the structure of the opinion¹⁸⁷ and the majority’s careful prose suggests that international materials function to confirm the Court’s conclusion; the Court specifically notes that international materials do not “control [its] decision,” but rather “support [its] conclusion.”¹⁸⁸ Indeed, the Court specifically cites *Roper* to support its claim that “international opinion” against the juvenile LWOP sentence “provide[s] respected and significant confirmation for our own conclusions.”¹⁸⁹ This confirmatory approach restricts consideration of international materials to only those instances where the Court has in essence already made up its mind, raising the basic question of why it should bother discussing what foreign jurisdictions have to say about the issue.¹⁹⁰

182. *See supra* Part II.

183. *Graham*, 130 S. Ct. at 2033.

184. *See supra* Part I.B.

185. *Graham*, 130 Sup. Ct. at 2033.

186. *See supra* Part II.C for a discussion of the confirmatory role of international materials.

187. Part III of *Graham* includes four subsections. Subsection A considers objective indicia of national consensus; subsection B presents the Court’s exercise of independent judgment; subsection C justifies the use of a categorical rule; and subsection D considers international materials. *See* 130 Sup. Ct. at 2023-34. This structure suggests the consideration of international materials stands apart from the Court’s standard two-step analysis discussed *supra* Part III. *Cf.* *Roper v. Simmons*, 543 U.S. at 564-78 (considering objective indicia of consensus and independent judgment in Part III and the role of international materials in Part IV).

188. *Graham*, 130 Sup. Ct. at 2033.

189. *Id.* at 2034 (alterations omitted) (citing *Roper*, 543 U.S. at 578).

190. *See supra* notes 101-103 and accompanying text.

More troubling, however, is the Court's failure to use international materials in a principled manner: while it does consider the juvenile LWOP sentence in law and practice, it fails to consider the political branches' response to the international norm. The majority opinion begins by surveying the number of foreign jurisdictions that still permit the juvenile LWOP sentence, and accurately identifies that only ten countries in addition to the United States allow the sentence in their law.¹⁹¹ Moreover, it looks beyond law on the books to note that in practice, the United States is the only country that appears to impose the juvenile LWOP sentence.¹⁹² The Court then refers to the CRC's prohibition of the juvenile LWOP sentence,¹⁹³ and in the process refers to the United States' non-ratification of that treaty.¹⁹⁴ In addition to failing to elaborate on the significance of the United States' non-ratification of the CRC, however, the Court does not discuss the United States' repeated opposition to the development of an international norm prohibiting the juvenile LWOP sentence. Additionally, it does not address the reservations to the ICCPR or the recent no-votes in the U.N. General Assembly resolutions seeking to abolish the juvenile LWOP sentence.¹⁹⁵ Instead, the Court devotes the final two paragraphs of this brief section to first restating the confirmatory role international materials play¹⁹⁶ and then dismissing as irrelevant¹⁹⁷ the debate as to whether a binding *jus cogens* norm against the juvenile LWOP sentence exists.¹⁹⁸

A word about the Court's final sentence in this section is appropriate. As though to assuage critics who will argue the Court has once again relied on the opinions of "like-minded foreigners"¹⁹⁹ in reaching its decision, the Court repeats that international materials do not bind or control, but are useful in showing that "the Court's rationale has respected reasoning to support it."²⁰⁰ If the Court does have "respected reasoning" supporting its

191. *Graham*, 130 Sup. Ct. at 2033 (citing Leighton & De La Vega, *supra* note 136).

192. *Id.* at 2034.

193. *See* Convention on the Rights of the Child, *supra* note 137, at art. 37(a).

194. *Graham*, 130 Sup. Ct. at 2034.

195. *See supra* notes 143, 153 and accompanying text.

196. *Graham*, 130 Sup. Ct. at 2034.

197. *Id.*

198. The Court might have justified its consideration of international materials in part on the basis that in the exercise of its independent judgment, it found the prohibition of the juvenile LWOP sentence to be a *jus cogens* norm. *See supra* notes 116 & 122. It did not do so.

199. *Roper v. Simmons*, 543 U.S. 551, 608 (2005) (Scalia, J., dissenting).

200. *Graham*, 130 Sup. Ct. at 2034.

decision, however, it fails to make this clear in its opinion.²⁰¹ The mere fact that foreign jurisdictions have abolished the juvenile LWOP sentences says nothing about *why* they have chosen to do so.²⁰² The Court offers no discussion of the reasoning underlying foreign jurisdictions' decisions to proscribe the juvenile LWOP sentence. Even assuming reference to the "persuasive reasoning" of a foreign jurisdiction is an appropriate way to use international materials,²⁰³ the Court has merely shown that foreign jurisdictions have stopped using the juvenile LWOP sentence, not the reasoning driving those decisions.

Finally, two references in Justice Thomas's dissent illustrate how the Court's use of international materials in *Graham* perpetuates the confusion about the proper role such materials should play in Eighth Amendment analysis. First, in critiquing the majority's use of the objective indicia of national consensus, Justice Thomas counts as one of the metrics the Court looks to "state and federal legislation, jury behavior, and (surprisingly, given that we are talking about 'national' consensus) international opinion."²⁰⁴ Despite the Court's effort to underscore its use of international materials as providing "respected reasoning"²⁰⁵ to "support [its] conclusion,"²⁰⁶ Justice Thomas clearly sees the use of such materials as skewing the objective indicia inquiry—what some scholars would see as another example of "denominator swelling."²⁰⁷ Not only do the majority and dissent disagree about the use of international materials; they also disagree about how such materials are being used methodologically in the opinion itself.

Second, Justice Thomas also evinces concern that the majority unjustifiably relies on global *practice* regarding the juvenile LWOP sentence while ignoring the fact that eleven countries continue to have the punishment established in their *laws*.²⁰⁸ This critique, of course, inverts that

201. See Sitaraman, *supra* note 10, at 676 ("Persuasive reasoning involves a judge considering the argumentation or logic of a foreign decision and using that argument in his decision.").

202. See *id.* at 677 ("In cases of persuasive reasoning, the court must of course pay close attention to the internal logic of the opinion. But it is also crucial that the court consider the context surrounding the foreign case. The texts of the provisions interpreted might be different, the foreign country's core values might differ, and the politics of the foreign country may have been instrumental in shaping the outcome of the decision.").

203. See *generally id.* at 670-77 (identifying the use of persuasive reasoning from foreign jurisdictions as a "potentially problematic" way to use international materials).

204. *Graham*, 130 Sup. Ct. at 2045 (Thomas, J., dissenting).

205. *Id.* at 2034 (majority opinion).

206. *Id.* at 2033.

207. See Young, *supra* note 10, at 158-60.

208. *Graham*, 130 Sup. Ct. at 2053 n.12 (Thomas, J., dissenting) ("[D]espite the Court's attempt to count the actual number of juvenile nonhomicide offenders serving life-without-parole sentences in

articulated by Justice Scalia in dissent in *Roper*: foreign countries may have laws prohibiting a certain practice, but these laws signify little if they do not actually adhere to such laws in practice.²⁰⁹ As this Note has argued, the response is that both law and practice matter.²¹⁰ In failing to explain, however, that it relies both on the relatively low number of jurisdictions that retain the juvenile LWOP sentence in law *and* on the fact that only one of these jurisdictions—the United States—actually imposes the sentence in practice,²¹¹ the Court leaves the impression—at least for the *Graham* (and *Roper*) dissenters—that it will selectively use the law *or* practice of foreign jurisdictions to make its point. A simple statement by the Court that it draws on both law and practice as part of its consideration of international materials would both clarify the proper analysis and illustrate that such analysis proceeds in a predictable and principled manner.

The upshot of the Court's brief discussion of international materials in *Graham*—and the dissent's even briefer response—is that confusion about the proper role of international materials in Eighth Amendment analysis persists. This is an unfortunate situation, especially given that *Graham* presented the Court with an ideal opportunity to tackle this thorny question head-on.

CONCLUSION

Whether American courts should consider international materials when interpreting the U.S. Constitution will likely be debated for years to come. This Note has largely abstained from staking out a position in this debate. Instead, starting from the observation that the Supreme Court has in fact considered international materials as part of its analysis of the Eighth Amendment's prohibition on cruel and unusual punishment, the Note aims both to make sense of and refine the Court's methodological approach to using such materials.

Indeed, better understanding of how the Court has incorporated consideration of international materials into the Eighth Amendment analysis, and how it might use those materials in a principled way, may

other nations . . . the laws of other countries permit juvenile life-without-parole sentences.”) (citations omitted) (emphasis added).

209. See *Roper v. Simmons*, 543 U.S. 551, 623 (2005) (Scalia, J., dissenting) (“It is interesting that . . . the Court is quite willing to believe that every foreign nation—of whatever tyrannical political makeup and with however subservient or incompetent a court system—in fact *adheres* to a rule of no death penalty for offenders under 18.”) (emphasis in original).

210. See *supra* Part III.A.

211. De La Vega & Leighton, *supra* note 136, at 985.

elucidate the normative arguments about the propriety of using such materials in the first place. This Note's normative claim is relatively modest: if an American court is to use international materials when determining whether a punishment is cruel and unusual under the Eighth Amendment, it should use such materials in a principled manner, or not use them at all. At a minimum, principled use involves considering not only the law on the books in foreign jurisdictions but also state practice. Likewise, to use international materials in a principled way under the Eighth Amendment, a court should confront head-on the United States' response to the international norm at issue, and explain what conclusions it draws from that response. Although the *Graham* case provided a vehicle through which such methodological clarification was possible, none was forthcoming. While the *Graham* decision does indicate that the use of international materials in Eighth Amendment cruel and unusual punishment is appropriate, it offers meager guidance on how such materials should be used.

Agreement on the propriety of using international materials to interpret the American Constitution seems unlikely. But surely it is uncontroversial to acknowledge that if courts are to use such materials in Eighth Amendment analysis, they should do so well. This Note suggests a methodological framework for such an analysis.