

INTERNATIONAL CONSENSUS AS PERSUASIVE AUTHORITY IN
THE EIGHTH AMENDMENT

YOUNGJAE LEE[†]

This Article is about the epistemic significance of international consensus on constitutional interpretation in the Eighth Amendment context. First, this Article examines whether meaningful conclusions about one's desert judgments can be reached through a process of interjurisdictional comparison that focuses on the existence of a consensus on the question of what punishment is appropriate for what crimes and criminals. Second, this Article examines the relevance of international consensus on penal practices by analogizing the consensus to three different types of consensus: scientific, aesthetic, and moral. This Article concludes from this discussion that so long as the Supreme Court stays with what this Article calls the "norm-centric analysis" in consulting foreign sources, the existence of an international consensus on a penal practice should not lead us to lean one way or the other about its constitutionality under the Eighth Amendment. This Article then argues that the Court, given its judicial minimalist tendencies, is unlikely to go beyond its norm-centric mode of analysis and also that abandoning the norm-centric analysis would counsel against consulting types of foreign legal materials, such as international human rights treaties, that do not reveal reasons behind the norms that they endorse. This Article ends by exploring both broader implications and limits of arguments made in this Article for the judicial borrowing debate.

[†] Associate Professor of Law, Fordham University School of Law. Thanks to Larry Alexander, Gráinne de Búrca, Debby Denno, Antony Duff, Dick Fallon, Martin Flaherty, Laura Ford, Stuart Green, Abner Greene, Alon Harel, Tom Lee, Dan Richman, Julie Suk, Mark Tushnet, Ian Weinstein, Jim Whitman, Ben Zipursky, and Lorenzo Zuca for reading and commenting on earlier drafts. Thanks are due also to participants at the Fordham Law School Faculty Workshop and the workshop on Comparative Constitutionalism at the XXIII World Congress of Philosophy of Law and Social Philosophy.

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INTRODUCTION

After the Supreme Court declared the juvenile death penalty unconstitutional under the Cruel and Unusual Punishments Clause of the Eighth Amendment¹ in *Roper v. Simmons*,² one aspect of the decision has dominated the scholarly commentary on *Roper*: the Court’s partial reliance on prevailing international norms and practices of foreign countries.³ The debate over the relevance of comparative and international legal materials to constitutional interpretation is not new,⁴ but it has intensified in recent years after the Court’s citations of

¹ The Eighth Amendment provides: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” U.S. CONST. amend. VIII.

² 543 U.S. 551 (2005).

³ See, e.g., Roger P. Alford, *Roper v. Simmons and Our Constitution in International Perspective*, 53 UCLA L. REV. 1 (2005); 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, 77-80 (2006); Robert J. Delahunty & John Yoo, *Against Foreign Law*, 29 HARV. J.L. & PUB. POL’Y 291 (2005); Vicki C. Jackson, *Constitutional Comparisons: Convergence, Resistance, Engagement*, 119 HARV. L. REV. 109 (2005); Jeremy Waldron, *Foreign Law and the Modern Ius Gentium*, 119 HARV. L. REV. 129 (2005); Melissa A. Waters, *Mediating Norms and Identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Law*, 93 GEO. L.J. 487 (2005); Ernest A. Young, *Foreign Law and the Denominator Problem*, 119 HARV. L. REV. 148 (2005).

⁴ See, e.g., *Thompson v. Oklahoma*, 487 U.S. 815, 868 n.4 (1988) (Scalia, J., dissenting) (“The plurality’s reliance upon Amnesty International’s account of what it pronounces to be civilized standards of decency in other countries . . . is totally inappro-

foreign sources in such high-profile and controversial cases as *Roper*, *Lawrence v. Texas*,⁵ and *Atkins v. Virginia*.⁶ Justices disagree with each other sharply on this issue both in judicial opinions⁷ and in other public fora,⁸ and similar debates took place during the confirmation hearings of Chief Justice John Roberts⁹ and Justice Samuel Alito¹⁰ and in measures introduced in Congress to condemn the practice of citing foreign laws.¹¹

The size of academic literature on the relevance of foreign laws question has quickly grown in the past several years and continues to grow.¹² Most of these commentaries, generally from international law

appropriate as a means of establishing the fundamental beliefs of this Nation. . . . We must never forget that it is a Constitution for the United States of America that we are expounding.”); MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE 145-70 (1991).

⁵ 539 U.S. 558, 576-77 (2003).

⁶ 536 U.S. 304, 316 n.21 (2002).

⁷ See, e.g., *Roper*, 543 U.S. at 604-05 (O’Connor, J., dissenting); *Lawrence*, 539 U.S. at 598 (Scalia, J., dissenting); *Foster v. Florida*, 537 U.S. 990, 990 (2002) (Thomas, J., concurring in denial of certiorari); *Atkins*, 536 U.S. at 324-25 (Rehnquist, C.J., dissenting).

⁸ See, e.g., Ruth Bader Ginsburg, Assoc. Justice, U.S. Supreme Court, “A Decent Respect to the Opinions of [Human]kind”: The Value of a Comparative Perspective in Constitutional Adjudication, Keynote Address Before the Ninety-Ninth Annual Meeting of the American Society of International Law (Apr. 1, 2005), in 99 AM. SOC’Y INT’L L. PROC. 351 (2005); Sandra Day O’Connor, Asso. Justice, U.S. Supreme Court, Keynote Address Before the Proceedings of the Ninety-Sixth Annual Meeting of the American Society of International Law (Mar. 16, 2002), in 96 AM. SOC’Y INT’L L. PROC. 348 (2002); *The Relevance of Foreign Legal Materials in U.S. Constitutional Cases: A Conversation Between Justice Antonin Scalia and Justice Stephen Breyer*, 3 INT’L J. CONST. L. 519 (2005) [hereinafter *Scalia-Breyer Conversation*]; Antonin Scalia, Assoc. Justice, U.S. Supreme Court, Foreign Legal Authority in the Federal Courts, Keynote Address Before the Ninety-Eighth Annual Meeting of the American Society of International Law (Apr. 2, 2004), in 98 AM. SOC’Y INT’L L. PROC. 305 (2004).

⁹ *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).

¹⁰ *Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to be an Associate Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary*, 109th Cong. 370-71, 470-72 (2005).

¹¹ See, e.g., H.R. Res. 97, 109th Cong. (2005); S. Res. 92, 109th Cong. (2005).

¹² See sources cited *supra* note 3; see also Matthew D. Adler, Commentary, *Can Constitutional Borrowing Be Justified?: A Comment on Tushnet*, 1 U. PA. J. CONST. L. 350 (1998); Roger P. Alford, *In Search of a Theory for Constitutional Comparativism*, 52 UCLA L. REV. 639 (2005); Diane Marie Amann, “Raise the Flag and Let It Talk”: *On the Use of External Norms in Constitutional Decisionmaking*, 2 INT’L J. CONST. L. 597 (2004); Steven G. Calabresi, “A Shining City on a Hill”: *American Exceptionalism and the Supreme Court’s Practice of Relying on Foreign Law*, 86 B.U. L. REV. 1335 (2006); Sujit Choudhry, *Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation*, 74 IND. L.J. 819 (1999); Martin S. Flaherty, *Separation of Powers in a Global Context*, in

or constitutional law scholars, tend to be top-down. They explore the question of whether foreign or international laws should be relevant to constitutional interpretation as a general theoretical matter, starting either from theories of constitutional interpretation or from debates about the domestic legal status of international laws, and then apply such general considerations to specific contexts like the Eighth Amendment or the Fourteenth Amendment.

Much insight has been gained from this academic literature. For instance, the debate over whether the practice of citing foreign laws is a recent doctrinal invention or something that has always been with us is over. The practice is not new; it is indisputable that the Court has engaged with foreign sources in the past.¹³ Next, it is also an undeniable fact that judges from all over the world are talking to each other on common issues, sometimes through opinions, sometimes in international courts and tribunals, and other times in more informal venues, such as seminars and conferences.¹⁴ The normative significance of such transnational dialogues may be in dispute, but no one can deny that such dialogues are increasingly common. As to the debate over whether the Court is treating foreign laws as “binding” or “au-

JUDGES, TRANSITION, AND HUMAN RIGHTS CULTURES: ESSAYS IN HONOUR OF STEPHEN LIVINGSTON (John Morrison & Colin Harvey, eds., forthcoming 2006); David Fontana, *Refined Comparativism in Constitutional Law*, 49 UCLA L. REV. 539 (2001); Sarah K. Harding, *Comparative Reasoning and Judicial Review*, 28 YALE J. INT'L L. 409 (2003); Ran Hirschl, *The Question of Case Selection in Comparative Constitutional Law*, 53 AM. J. COMP. L. 125 (2005); Vicki C. Jackson, *Transnational Discourse, Relational Authority, and the U.S. Court: Gender Equality*, 37 LOY. L.A. L. REV. 271 (2003); 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 Court’s Use of Foreign and International Law in Domestic Constitutional Interpretation*, 65 OHIO ST. L.J. 1283 (2004); Sanford Levinson, *Looking Abroad When Interpreting the U.S. Constitution: Some Reflections*, 39 TEX. INT'L L.J. 353 (2004); Gerald L. Neuman, *The Uses of International Law in Constitutional Interpretation*, 98 AM. J. INT'L L. 82 (2004); Eric A. Posner & Cass R. Sunstein, *The Law of Other States*, 59 STAN. L. REV. 131 (2006); Michael D. Ramsey, *International Materials and Domestic Rights: Reflections on Atkins and Lawrence*, 98 AM. J. INT'L L. 69 (2004); Judith Resnik, *Law’s Migration: American Exceptionalism, Silent Dialogues, and Federalism’s Multiple Ports of Entry*, 115 YALE L.J. 1564 (2006); Carlos F. Ronsenkranz, *Against Borrowings and Other Nonauthoritative Uses of Foreign Law*, 1 INT'L J. CONST. L. 269 (2003); Cheryl Saunders, *The Use and Misuse of Comparative Constitutional Law*, 13 IND. J. GLOBAL LEGAL STUD. 37 (2006); Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225 (1999); Mark Tushnet, *When Is Knowing Less Better Than Knowing More?*, 90 MINN. L. REV. 1275 (2006) [hereinafter Tushnet, *Knowing Less*]; Richard Posner, *No Thanks, We Already Have Our Own Laws*, LEGAL AFF., July–Aug. 2004, at 40.

¹³ See Calabresi & Zimdahl, *supra* note 3, at 756; Cleveland, *supra* note 3.

¹⁴ See ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER 65-103 (2004); Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT'L L. 1103 (2000).

thoritative,” or merely “persuasive,” “instructive,” or “confirmatory,” it seems that we are at a standstill. This particular debate is like two ships passing each other at night. One side accuses the Court of giving up our sovereignty; the other side simply denies it with a shrug, as if wondering why anyone would ever think such a silly thing.¹⁵

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. This Article thus proceeds in the opposite direction with a new focus. Instead of going top-down from theories of international law or constitutional interpretation to an interpretive claim about the Eighth Amendment, this Article starts at the opposite end—the Eighth Amendment—and works toward the issue of the relevance of comparative and international materials in constitutional interpretation. In other words, this Article takes as its starting point the question *Roper* asked—whether the juvenile death penalty is unconstitutional under the Cruel and Unusual Punishments Clause of the Eighth Amendment—and then asks whether the practice of looking overseas can illuminate the juvenile death penalty issue and, through extension where appropriate, other domestic constitutional issues. And in doing so, this Article focuses in particular on the significance of international consensus as persuasive authority in the Eighth Amendment. If, as the *Roper* Court stated, “the United States is the only country in the world that continues to give official sanction to the juvenile death penalty,”¹⁶ should such an international consensus carry any persuasive weight in judging whether the juvenile death penalty is unconstitutional under the Eighth Amendment?

This Article argues that, contrary to conventional wisdom held by several Supreme Court Justices and many legal scholars, the answer to this question is no. In understanding this claim, however, it is important to be clear that the key concept here is that of *persuasiveness* or *instructiveness*. One of the reasons why much of the current debate over the question of judicial borrowing of foreign laws has the flavor of people talking past each other is that there is no agreement on what is to be justified or criticized. For instance, foreign authorities may be thought to be *binding*, the way Supreme Court precedent is binding on lower courts. Almost nobody defends this view. Or, foreign au-

¹⁵ Compare, e.g., Young, *supra* note 3, at 151-56 (criticizing the Court for treating foreign legal sources as “authoritative,” despite its assertions to the contrary), with Tushnet, *Knowing Less*, *supra* note 12, at 1286-87 (dismissing sovereignty concerns).

¹⁶ 543 U.S. 551, 575 (2005).

thorities may be thought to be *relevant*. But “relevance” is a concept that confuses more than illuminates, as it occupies the large area between “dispositive” and “worth mentioning.”¹⁷ A quote from a Shakespeare play may sometimes be “relevant” in a judicial opinion in some weak, uncontroversial sense. *A fortiori*, no one can deny the relevance of foreign legal materials that seem to address the issue at hand, if “relevance” is defined weakly enough. Much time is wasted in the judicial borrowing debate because opponents attack the view that almost nobody defends (“binding”), and proponents respond by defending the view that nobody attacks (“relevant”).¹⁸

A further difficulty here is that we cannot theorize about the proper relationship between domestic constitutional law and international norms without agreeing on an account of the relevant domestic doctrine in the first place. For instance, if it is the case that the meaning of the Cruel and Unusual Punishments Clause can be ascertained by referring to what practices were considered cruel and unusual by founders at the time the Clause was enacted, then the question of whether current foreign sentiments are relevant to constitutional interpretation is of course beside the point. Or, if it is the case that the Clause asks only a question of, say, cost-effectiveness in administration of the criminal justice system, then it obviously makes sense to see whether other countries have come up with less costly or harsh ways of

¹⁷ In evidence law, because of the flexibility of the term “relevance,” the concept of “probative value” is used to give “relevance” more shape. See FED. R. EVID. 401, 403 (defining “relevant evidence” as that having the tendency to make any consequential fact “more probable or less probable” but allowing its exclusion if its “probative value” is outweighed by prejudice).

¹⁸ For an example arguing against the “binding” view, see Posner, *supra* note 12, at 42 (“I think most Americans would think it outrageous that Zimbabwean judges, however distinguished they may be, were making law for us.”). Justice Ginsburg, on the other hand, has defended the “relevant” view:

Judges in the United States are free to consult all manner of commentary, re-statements, treatises, what law professors or even law students write copiously in law reviews, for example. If we can consult those writings, why not the analysis of a question similar to the one we confront contained in an opinion of the Supreme Court of Canada, the Constitutional Court of South Africa, the German Constitutional Court, or the European Court of Human Rights?

Ginsburg, *supra* note 8, at 354.

combating crime.¹⁹ These are not, however, the ways in which the Eighth Amendment is commonly understood.²⁰

More plausibly, if the correct understanding of the Cruel and Unusual Punishments Clause is to conform to prevailing international norms because the Clause calls for disfavoring “unusual” punishments, then of course it is the case that foreign sources must be taken into account in interpreting the provision. Foreign laws, used this way, do not act as *binding precedent* but rather partially *constitute* the substance of the Eighth Amendment itself. Some have defended the use of foreign legal materials in the Eighth Amendment context precisely on this basis.²¹ Regardless of the merits of this reading of the Eighth Amendment, this type of argument can further obscure the judicial borrowing debate as it blurs the distinction between the idea that foreign laws are *helpful* or *instructive* in interpreting our law and

¹⁹ See Larsen, *supra* note 12, at 1289-91 (arguing that “empirical” uses of comparative and international law are unproblematic).

²⁰ We have moved far beyond the point at which we believe that the Eighth Amendment bans only concrete historical practices that were considered “cruel and unusual” at the time of the Amendment’s ratification. It is far more plausible, and far less radical, to read the Eighth Amendment as “draw[ing] its meaning from the evolving standards of decency that mark the progress of a maturing society.” *Trop v. Dulles*, 356 U.S. 86, 101 (1958). As to the cost-effectiveness argument, as Judge Posner once remarked in an article defending the use of economics in interpreting the Constitution, “the Eighth Amendment has no clear economic interpretation.” Richard A. Posner, *The Constitution as an Economic Document*, 56 GEO. WASH. L. REV. 4, 38 (1987).

²¹ The reasoning for such an argument is that

[t]o decide whether a particular punishment is “unusual” necessitates comparison of the particular facts at issue to some generalized practice. . . . [W]hat is the appropriate frame of reference for the comparison? Ought the referent be juries in a particular locality, states in the federal union or the community of nations? . . . Although [this] question commands no obvious answer, the broadest framework, the world community, is as logical as any other.

Joan F. Hartman, “Unusual” Punishment: *The Domestic Effects of International Norms Restricting the Application of the Death Penalty*, 52 U. CIN. L. REV. 655, 688 (1983) (footnote omitted); see also Harold Hongju Koh, *The Supreme Court Meets International Law*, 12 TULSA J. COMP. & INT’L L. 1, 9 (2004) (“[I]f we are the only country that executes persons with mental retardation[,] that practice is *unusual*. And remember, the 8th Amendment to the United States Constitution specifically bans ‘cruel and unusual punishments.’”). The phrase “evolving standards of decency” has inspired similar arguments. Justice Blackmun, for instance, once wrote, “If the substance of the Eighth Amendment is to turn on the ‘evolving standards of decency’ of the civilized world, there can be no justification for limiting judicial inquiry to the opinions of the United States.” Harry A. Blackmun, *The Supreme Court and the Law of Nations*, 104 YALE L.J. 39, 48 (1994).

the idea that foreign laws are *constitutive* in that they at least partially *determine what our law is* through incorporation.

This Article focuses on the question of whether international consensus should be treated as *persuasive* in the Eighth Amendment context and does not address the questions of whether it should be considered *binding* or *constitutive*. The reason I focus on the question of persuasiveness is that the practice of citing foreign authorities is most often defended on that basis²²—perhaps because it is commonly believed that the argument that foreign authorities can be persuasive, unlike the argument that foreign authorities may bind American judges or constitute American constitutional law, avoids the charge that citing foreign authorities undermines sovereignty.²³

Another reason it is useful to focus on the idea of persuasiveness is that framing the issue this way forecloses, at the outset, the common

²² Various Supreme Court Justices, while quick to deny that foreign authorities are binding, have defended the practice on the grounds that foreign sources can be helpful, instructive, or persuasive. In *Roper*, for instance, Justice Kennedy stressed that the foreign practices he was citing in his opinion were “not . . . controlling” and insisted that “the task of interpreting the Eighth Amendment remains our responsibility.” *Roper v. Simmons*, 543 U.S. 551, 575 (2005). He further stated that the “opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions.” *Id.* at 578. Justice Ginsburg, too, stated in a speech that “[f]oreign opinions are not authoritative” and that “they set no binding precedent for the U.S. judge.” Ginsburg, *supra* note 8, at 353. Rather, the reason to look at foreign sources, Justice Ginsburg added, is “to learn what we can from the experience and good thinking foreign sources may convey.” *Id.* Similarly, Justice O’Connor stated that “[a]lthough international law and the law of other nations are rarely binding upon our decisions in U.S. courts, conclusions reached by other countries and by the international community should at times constitute persuasive authority in American courts.” O’Connor, *supra* note 8, at 350. Finally, Justice Breyer, although he is the most vocal member of the Court on this debate, has stated repeatedly that foreign authorities are not “binding” or “controlling” but “helpful.” *Scalia-Breyer Conversation*, *supra* note 8, at 524, 528.

²³ Although there is an analytic distinction to be made between “binding” and “constitutive,” treating foreign legal materials as constitutive does not look much different from treating them as binding authority as far as the judicial borrowing debate is concerned. Compare the following propositions. Proposition 1: Penal practice *p* is cruel and unusual if it is the case that foreign authorities *a* have decided, in manner *m*, that penal practice *p* is not permitted. Proposition 2: Penal practice *p* is ‘cruel and unusual’ if it is the case that foreign authorities *a* have decided, in manner *m*, that penal practice *p* is not permitted, and this is so *because that would make penal practice p ‘unusual’ in the sense of rare or uncommon*. In the first proposition, foreign authorities are binding; in the second, they are constitutive. If the worry with the first proposition is that it undermines our sovereignty, the same worry should apply to the second proposition. Therefore, from the sovereigntists’ perspective, there is no meaningful difference between binding and constitutive. For an argument along these lines, see Young, *supra* note 3, at 155-56.

attempt to end this debate with the argument that foreign legal authorities are “relevant” in the trivial sense that they constitute simply one type of source among many that judges may consult, such as treatises, restatements, law review articles, popular music, and poetry.²⁴ This “no big deal”²⁵ argument is somewhat disingenuous for two reasons. First, it is no accident that the Supreme Court, when it cites foreign sources, cites *legal authorities*, such as court decisions and international treaties, and not, say, the latest book from Habermas. When the Court does so, the problem is not that the sources being cited are irrelevant but that they *appear highly relevant* and even potentially *authoritative*, due to their status as legal authorities somewhere else. Second, the rhetorical power of statements like, “the United States is the only country in the world that continues to give official sanction to the juvenile death penalty,”²⁶ cannot be ignored.²⁷ The *Roper* Court engaged in this rhetoric presumably as a way of increasing the persuasive force of its legal conclusion. The Supreme Court is using this mode of argumentation as a way of justifying a particular exercise of power, which is not a bad thing in itself, but we must scrutinize it and ask ourselves whether the persuasive force such citations carry is justifiable.²⁸ And the only way to do that is to examine what exactly it is about the existence of an international consensus that is carrying the rhetorical load as persuasive authority and whether the load can be justified. This Article argues that it cannot be justified, *not* because international consensus is not binding, *not* because it is not relevant, *not* because it is not constitutive, but *because it is not persuasive*.

This Article proceeds as follows. Part I discusses how the Court has used foreign sources in *Roper v. Simmons* as well as in similar Eighth Amendment decisions over the years and describes its practice as a “norm-centric,” as opposed to “reason-centric,” analysis. The terms “norm-centric” and “reason-centric” refer to two different ways of using foreign materials in constitutional interpretation. One may cite a foreign norm for or against a given practice and consider the

²⁴ See, e.g., Tushnet, *Knowing Less*, *supra* note 12, at 1278.

²⁵ *Id.*

²⁶ *Roper*, 543 U.S. at 575.

²⁷ Cf. NICHOLAS RESCHER, PLURALISM: AGAINST THE DEMAND FOR CONSENSUS 6 (1993) (“The belief that consensus plays a leading role in matters of rational inquiry, decision, and evaluation is among the oldest and most pervasive ideas of philosophy.”); *id.* at 21-28 (surveying “philosophical partisans of cognitive consensus”).

²⁸ Cf. DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION (1997) (scrutinizing the concept of the rule of law and its ideological implications).

existence of the norm itself to be relevant to whether a particular practice should be permitted under the U.S. Constitution. Or, one may instead cite a foreign norm for or against a practice and consider whether the reasons behind the norm are applicable to constitutional interpretation. The former mode of analysis (norm-centric) takes the existence of a prevailing norm to be significant in itself, whereas the latter mode of analysis (reason-centric) explores reasons behind a prevailing norm and asks whether such reasons to endorse the norm apply in the domestic context. Part I argues that the current Supreme Court practice of citing foreign laws is best characterized as employing the norm-centric analysis. The rest of the Article accordingly²⁹ focuses on the norm-centric analysis, although this assumption will be reexamined in Part IV.

Parts II and III address the question of the Court's practice of looking at foreign sources in its Eighth Amendment jurisprudence. Here we immediately encounter a difficulty. The Eighth Amendment jurisprudence in this area is a mess. Different readings of the case law are possible, and, as noted above, different readings invite different articulations about the relationship between domestic doctrine and foreign laws. Part II thus takes as its starting point a particular interpretation of *Roper's* doctrinal context, which is that cases like *Roper* should be analyzed in terms of 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. The operative normative idea in this context, in other words, should be proportionality. This interpretation, I believe, is the correct reading of this jurisprudence, and I have defended it in detail previously.³⁰ This reading is hardly outside the mainstream,³¹ but it is by no means in-

²⁹ I say "accordingly" because to the extent that the current controversy over foreign legal materials stems from the Court's practice in cases like *Roper* and *Atkins*, any defense or criticism of the practice of citing foreign laws should start with the actual practice, not with an idealized version that bears little resemblance to reality. See also *infra* Part IV.

³⁰ See Youngjae Lee, *The Constitutional Right Against Excessive Punishment*, 91 VA. L. REV. 677, 687-99 (2005).

³¹ See, e.g., Stephen J. Schulhofer, *Two Systems of Social Protection: Comments on the Civil-Criminal Distinction, with Particular Reference to Sexually Violent Predator Laws*, 7 J. CONTEMP. LEGAL ISSUES 69, 83 (1996) ("[The] just-deserts limit governs Eighth Amendment proportionality jurisprudence (in death cases, at any rate) . . ."); Carol S. Steiker, *No, Capital Punishment Is Not Morally Required: Deterrence, Deontology, and the Death Penalty*, 58 STAN. L. REV. 751, 765 n.44 (2005) (arguing that the principle that "proportionality is a constraint on just punishment" is "deeply embedded in American

disputable, as it rationalizes a doctrinal area characterized by incoherence, controversy, and fractured opinions.³² But we have to start *some-where*—a particular interpretation of the relevant doctrinal context—in order to advance the analysis. Assuming, then, that the relevant inquiry is that of proportionality, Part II argues that the existence of an international consensus against the juvenile death penalty does not illuminate whether the juvenile death penalty is a practice that imposes disproportionate—or excessively harsh—punishments.

Part III loosens the presumption that we should attempt to make sense of the Court's citation of foreign sources in this doctrinal context by seeking a tight fit between our understanding of the Eighth Amendment in terms of proportionality and what we can infer from an international consensus. Part III thus asks instead: Does the conclusion of Part II change once we ask whether the norm-centric analysis is relevant in helping us think about whether a punishment is "cruel and unusual," or even more generally, "unjust" or "immoral," regardless of whether the problem with the practice has to do with the question of proportionality? In order to answer this question, Part III explores the broad issue of the epistemic significance of consensus. That is, when there is an overwhelming consensus on a given moral issue, what is its significance for the purposes of one's moral deliberation? Part III answers this question by drawing analogies to different kinds of consensus—aesthetic, scientific, and moral—and argues that the norm-centric analysis cannot be defended even if we reframe the question without relying on the notion of proportionality.

Part IV considers whether the problems with the norm-centric analysis pointed out in Parts II and III can be solved simply by jettisoning the norm-centric analysis and adopting the reason-centric analysis.

law and society" and "has been repeatedly invoked by the Supreme Court for nearly a century as the bedrock of its Eighth Amendment jurisprudence").

³² The literature on the Eighth Amendment is enormous. For a sampling of different approaches, see, for example, Laurence Claus, *The Antidiscrimination Eighth Amendment*, 28 HARV. J.L. & PUB. POL'Y 119 (2004); Richard S. Frase, *Excessive Prison Sentences, Punishment Goals, and the Eighth Amendment: "Proportionality" Relative to What?*, 89 MINN. L. REV. 571 (2005); Margaret Jane Radin, *The Jurisprudence of Death: Evolving Standards for the Cruel and Unusual Punishments Clause*, 126 U. PA. L. REV. 989 (1978); Alice Ristroph, *Proportionality As a Principle of Limited Government*, 55 DUKE L.J. 263 (2005); Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 40 (Amy Gutmann ed., 1997); Antonin Scalia, *Response*, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW, *supra*, at 129, 145-47; Malcolm E. Wheeler, *Toward a Theory of Limited Punishment: An Examination of the Eighth Amendment*, 24 STAN. L. REV. 838 (1972).

Part IV dismisses this possibility for two reasons. First, it is unlikely that the Court will shift to the reason-centric analysis in the near future, given its “judicial minimalist”³³ tendencies, at least in the Eighth Amendment context. That is, the reason the Court engages with the norm-centric analysis as opposed to the reason-centric analysis in looking to foreign sources is not because of some momentary confusion about how to engage with foreign legal materials that can be easily fixed once a clear theory is articulated for the Court to adopt. Rather, there are deeper reasons behind the Court’s tendency to employ the norm-centric analysis in applying foreign legal materials to the domestic context, and such reasons will make it difficult to dislodge the Court from its current mode of engaging with foreign legal materials.

Second, the main alternative to the norm-centric analysis, the reason-centric analysis, is biased against consulting foreign sources in which reasons behind a particular norm or practice are opaque. That is, the reason-centric analysis may justify consulting legal sources produced by processes in which reason-giving is routinely practiced—such as judicial decisions—but not legal materials that do not always make clear the reasons behind a given legal norm. This means that the reason-centric analysis may make unavailable many of the legal materials—such as international treaties—that the proponents of citing foreign laws favor as legitimate sources for consultation. In other words, abandoning the norm-centric analysis to avoid its problems may be too costly for the proponents of consulting foreign laws because for certain types of foreign legal materials, the norm-centric analysis may be the only available kind of analysis.

This Article concludes with a caveat. There is an important limitation to the arguments advanced in this Article. One implication of limiting the scope of this Article to the question of *persuasiveness* of foreign authorities is that it assumes a strict separation between domestic law on one hand and foreign and international law on the other, and asks whether foreign and international law illuminate questions raised in domestic law. But one need not be bound by this picture. It is also possible to reject the separation and the accompanying tendency to prioritize domestic constitutional law over foreign laws and imagine the boundary between domestic constitutional law and

³³ The phrase is borrowed from Cass Sunstein’s work. See, e.g., CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (1999) [hereinafter SUNSTEIN, ONE CASE AT A TIME]; CASS R. SUNSTEIN, LEGAL REASONING AND POLITICAL CONFLICT 171-82 (1996) [hereinafter SUNSTEIN, LEGAL REASONING].

foreign norms to be more fluid and permeable. This Article will end with a quick sketch of this alternative vision—not to defend or criticize it, but to emphasize that, given the doubts that this Article raises about the idea that *others'* legal norms somehow help us think through *our* constitutional problems, if the current Supreme Court practice is to be justified at all, its justification would have to rest ultimately on the strength of arguments provided by what may be called the “International Constitution School.”

I. THE SUPREME COURT’S USE OF FOREIGN LEGAL MATERIALS IN THE PROPORTIONALITY JURISPRUDENCE

In holding the juvenile death penalty to be unconstitutional, the *Roper* Court applied the doctrinal framework developed in the years since *Coker v. Georgia*. Under this framework, the Court first reviews attitudes of legislatures and behaviors of juries to identify a national consensus on the sentencing practice in question.³⁴ Second, the Court engages in an independent proportionality analysis to determine whether the Court agrees with the national consensus.³⁵ The *Roper* Court found that there was a national consensus against imposition of the death penalty on juveniles³⁶ and further concluded that “neither retribution nor deterrence provides adequate justification for imposing the death penalty on juvenile offenders.”³⁷

Then, in support of its holding, the Court noted that “the United States is the only country in the world that continues to give official sanction to the juvenile death penalty.”³⁸ The Court also mentioned several human rights conventions, including the UN Convention on the Rights of the Child, International Covenant on Civil and Political Rights, American Convention on Human Rights, and African Charter on the Rights and Welfare of the Child, which all include a prohibi-

³⁴ See *Roper v. Simmons*, 543 U.S. 551, 564-67 (2005); *Atkins v. Virginia*, 536 U.S. 304, 313-17 (2002); *Stanford v. Kentucky*, 492 U.S. 361, 370-77, 380 (1989) (plurality opinion); *Thompson v. Oklahoma*, 487 U.S. 815, 823-33 (1988) (plurality opinion); *Tison v. Arizona*, 481 U.S. 137, 152-55 (1987); *Enmund v. Florida*, 458 U.S. 782, 789-96 (1982); *Coker v. Georgia*, 433 U.S. 584, 593-97 (1976) (plurality opinion).

³⁵ See *Roper*, 543 U.S. at 568-75; *Atkins*, 536 U.S. at 317-21; *Thompson*, 487 U.S. at 833-38; *Tison*, 481 U.S. at 155-58; *Enmund*, 458 U.S. at 797-801; *Coker*, 433 U.S. at 597-600. *But see Stanford*, 492 U.S. at 379-80 (rejecting the “proportionality” analysis).

³⁶ See *Roper*, 543 U.S. at 564 (comparing the evidence of national consensus with that presented in *Atkins*).

³⁷ *Id.* at 572.

³⁸ *Id.* at 575.

tion of the juvenile death penalty.³⁹ The Court added that “only seven countries other than the United States have executed juvenile offenders since 1990: Iran, Pakistan, Saudi Arabia, Yemen, Nigeria, the Democratic Republic of Congo, and China,” and that “[s]ince then each of these countries has either abolished capital punishment for juveniles or made public disavowal of the practice.”⁴⁰

The *Roper* Court’s use of foreign sources is similar to the way the Court has used foreign sources over the years in the same doctrinal context. For instance, in *Coker*, while holding that the Eighth Amendment prohibited imposition of the death penalty for the crime of rape, the plurality noted that it is “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,” citing a UN study on capital punishment.⁴¹ In *Enmund v. Florida*, while considering the felony murder doctrine in the Eighth Amendment context in 1982, the Court repeated *Coker*’s formulation—“not irrelevant”—and stated that it is “worth noting that the doctrine of felony murder has been abolished in England and India, severely restricted in Canada and a number of other Commonwealth countries, and is unknown in continental Europe.”⁴²

In *Thompson v. Oklahoma*, in which the Court held in 1988 that it was cruel and unusual to impose the penalty of death for crimes committed by those under the age of sixteen, the Court stated that

[t]he conclusion that it would offend civilized standards of decency to execute a person who was less than 16 years old at the time of his or her offense is consistent with the views that have been expressed by respected professional organizations, by other nations that share our Anglo-American heritage,⁴³ and by the leading members of the Western European Community.

The Court then went on to observe that “[t]he death penalty has been abolished in Australia, except in the State of New South Wales,” and also in “West Germany, France, Portugal, the Netherlands, and all of the Scandinavian countries, and is available only for exceptional crimes such as treason in Canada, Italy, Spain, and Switzerland.”⁴⁴

³⁹ *Id.* at 576.

⁴⁰ *Id.* at 577.

⁴¹ *Coker v. Georgia*, 433 U.S. 584, 596 n.10 (1976) (plurality opinion).

⁴² *Enmund v. Florida*, 458 U.S. 782, 796 n.22 (1982).

⁴³ 487 U.S. 815, 830 (1988).

⁴⁴ *Id.* at 830-31.

“Juvenile executions,” the Court further noted, “are also prohibited in the Soviet Union,” as well as in the United Kingdom and New Zealand.⁴⁵ In *Atkins*, the Court mentioned, citing a brief submitted by the European Union, that “within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved.”⁴⁶

For the purposes of this Article, the important thing to note is the way the Court used foreign legal materials in *Roper* and other cases in the same doctrinal context. As noted in the Introduction, we may distinguish between “norm-centric” and “reason-centric” reasoning. Norm-centric reasoning cites a foreign norm for or against a given practice and considers the existence of the norm itself to be relevant to the issue whether a particular practice should be permitted. Reason-centric reasoning cites a foreign norm for or against a practice and considers whether the reason behind the existence of the foreign norm is applicable to our domestic constitutional interpretation.⁴⁷

To illustrate, consider the question of whether capital punishment is cruel and unusual and in violation of the Constitution. Under the norm-centric analysis, the existence of an international consensus against capital punishment has an independent significance as a fact that is relevant to the question of whether the death penalty should be unconstitutional under the Eighth Amendment. By contrast, under the reason-centric analysis, the analysis would proceed in two steps. First, what is the reason behind the international consensus against capital punishment? Second, is the reason behind the consensus relevant to our constitutional analysis? So, if the consensus against capital punishment is premised on the view that it is not cost-effective, the next question would be whether the reason that capital punishment is not cost-effective should be a consideration that is relevant to our reading of the Constitution.

In *Roper* and other cases, the mode of analysis the Court engages in is norm-centric, or, as one commentator noted, a form of “nose-counting.”⁴⁸ The Court did not engage with foreign legal systems deeply to understand why there may be a prevailing norm against a

⁴⁵ *Id.* at 831 & n.34.

⁴⁶ *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002).

⁴⁷ For a similar distinction, see Larsen, *supra* note 12, at 1291-97 (distinguishing between “reason-borrowing” and “moral fact-finding”) and Young, *supra* note 3, at 153-56 (using the terms “persuasive authority” and “nose-counting authority”).

⁴⁸ Young, *supra* note 3, at 149-56.

practice but instead noted an area characterized by a widespread agreement. The rest of the Article examines this practice.

II. PROPORTIONALITY AND INTERNATIONAL CONSENSUS

A. *The Eighth Amendment As a Retributivist Constraint*

Roper is the latest case from the Supreme Court's nearly century-old jurisprudence on proportionality in sentencing. Unlike cases that prohibit certain *types* of punishments, such as burning at the stake, crucifixion, and drawing and quartering, or certain conditions-of-confinement cases,⁴⁹ these cases are about constitutionally permitted types of punishment that are nevertheless unconstitutional because they are *excessive* for the crimes for which they are imposed. This category of cases may be read as an instantiation of the retributivist principle that the harshness of punishment should not exceed the gravity of the crime, or that one should not be punished more harshly than one deserves.⁵⁰ Some may offer alternative interpretations,⁵¹ and different interpretations may call for different answers to the central question of this Article. It is beyond the scope of this Article to refute all alternative interpretations. Elsewhere, I have argued in detail for this particular retributivist reading of the law,⁵² and I am hardly alone in reading the case law this way in any event.⁵³ Instead of rehashing my arguments for the retributivist reading, I will proceed in this Part with the assumption that it is correct. This assumption will be relaxed in Part III.

The challenge is to articulate the relationship between the principle in the excessive punishment cases that one should not be punished more harshly than one deserves and the practice of looking overseas for answers to the question of what one does or does not deserve. The first step in understanding this issue is to ask what kind of statement we are making when we say that a punishment is undeservably harsh. The Supreme Court's decisions in this area may be re-

⁴⁹ *E.g.* *Estelle v. Gamble*, 429 U.S. 97, 101-06 (1976); *Gregg v. Georgia*, 428 U.S. 153, 170-71 (1976) (plurality opinion); *In re Kemmler*, 136 U.S. 436, 446-47 (1890); *Wilkerson v. Utah*, 99 U.S. 130, 135-36 (1878).

⁵⁰ See Lee, *supra* note 30, at 699-700.

⁵¹ See sources cited *supra* note 32.

⁵² Lee, *supra* note 30.

⁵³ See, *e.g.*, Schulhofer, *supra* note 31, at 82-83; Steiker, *supra* note 31, at 765-69.

stated as follows: Rape is not a crime deserving of the death penalty.⁵⁴ Robbery is not a crime deserving of the death penalty.⁵⁵ Mentally retarded criminals do not deserve to be put to death.⁵⁶ Juvenile offenders do not deserve to be put to death.⁵⁷

Notice that such judgments of “cruel and unusual” in the excessive punishment context are qualitatively different from judgments of “cruel and unusual” made when we decide that, say, drawing and quartering should not be allowed or that certain prison conditions cross the line and become cruel and unusual. “Drawing and quartering” and certain prison conditions would be considered “cruel and unusual” no matter how heinous the crime or the criminal is because the practice itself is objectionable, but once we are talking about types of punishments that are permitted, the judgment of “cruel and unusual” cannot be made without also considering how heinous a crime or criminal is. That is, when we say that “drawing and quartering” is “cruel and unusual,” we are saying that certain penal practices simply should not take place in our society no matter how bad the criminal, but when we say that the death penalty is excessive because it is undeserved for the crime of rape, we are saying that there is a *mismatch* between the gravity of the crime and the harshness of the punishment.

So what kind of statement is a desert statement? As Joel Feinberg explained, desert statements have the form, “A deserves X in virtue of Y,” where A is the deserving person, X is what he deserves, and Y is the desert basis.⁵⁸ The relationship between X, what is deserved, and Y, the desert basis, is that of “fittingness” or “appropriateness.”⁵⁹ “Fittingness” in the punishment context refers to the idea that the harshness of the punishment should reflect our level of condemnation or disapproval of the criminal act. Thus, a punishment would be excessive if the degree of condemnation symbolized by the amount of punishment were too high relative to the criminal’s blameworthiness. This further implies that the harshness of the punishment should increase as our level of condemnation or disapproval increases, which in turn should increase with the gravity of the crime. In other words, the question of what punishment is deserved for what crime changes de-

⁵⁴ Coker v. Georgia, 433 U.S. 584, 593-600 (1977) (plurality opinion).

⁵⁵ Enmund v. Florida, 458 U.S. 781, 789-801 (1982).

⁵⁶ Atkins v. Virginia, 536 U.S. 304, 313-21 (2002).

⁵⁷ Roper v. Simmons, 543 U.S. 551, 564-79 (2005).

⁵⁸ JOEL FEINBERG, *Justice and Personal Desert*, in *DOING AND DESERVING: ESSAYS IN THE THEORY OF RESPONSIBILITY* 55, 61 (1970).

⁵⁹ *Id.* at 81-82.

pending on our perception of how serious the crime (or the criminal) is.⁶⁰

B. *Desert Comparisons Across Jurisdictions*

Given the features of the practice of blame as discussed, under what conditions would we be justified in looking at foreign sources when we are trying to determine whether it is the case that a certain punishment is undeserved for a crime or a criminal? In other words, when the Supreme Court notices that “the United States is the only country in the world that continues to give official sanction to the juvenile death penalty,”⁶¹ what should be its significance for our desert judgment?

To answer this question, consider the following. Assume that there are ten countries, *A* through *J*. To simplify the analysis, assume that there is only one form of punishment, imprisonment, and further assume that there is only one theory of punishment, retribution, that all countries employ to determine the appropriate amounts of punishment. Now assume that there is a way to compare punishments that these countries impose for a crime committed in a certain situation by a certain offender, which we will call “crime *x*.” If *A*’s punishment for crime *x*, measured in terms of amount of time spent in prison, is substantially higher than the punishment that countries *B* through *J* are willing to impose, what should the fact of *A*’s apparent harshness compared to the rest of the countries tell us about *A*’s desert judgment?

There are several possibilities. First, *A* simply got the desert judgment wrong and should bring its punishment in line with all the other countries. This is the argument implied in *Roper* about the juvenile death penalty in the United States. Second, *A* got the desert judgment right and everyone else is wrong. Third, no country is mistaken, but the punishments look different because *A* has a different understanding of the seriousness of “crime *x*” from that of *B* through *J*. “Crime *x*” may simply be viewed as a more serious violation in *A* than it is in *B* through *J*.

⁶⁰ See JOEL FEINBERG, *The Expressive Function of Punishment*, in DOING AND DESERVING: ESSAYS IN THE THEORY OF RESPONSIBILITY, *supra* note 58, at 95, 118; see also R.A. DUFF, PUNISHMENT, COMMUNICATION, AND COMMUNITY 132-35 (2001); ANDREW VON HIRSCH, CENSURE AND SANCTIONS 15-17 (1993).

⁶¹ *Roper*, 543 U.S. at 575.

Fourth, no country is mistaken, but the punishments look different because *A* has an inflated scale of imprisonment compared to *B* through *J*, so that the message sent by the same amount of punishment may be quite different in different countries. That is, perhaps five years in prison is a mild punishment considering *A*'s overall level of harshness in punishment, whereas *B* through *J* would take the same amount of punishment very seriously because imprisonment is rare. Fifth, it is also possible that the reason the punishment allowed in *A* is not allowed in *B* through *J* is that imprisonment of more than a certain number of years is simply not available in *B* through *J*, no matter how serious a crime is, for reasons not having to do with desert but with other considerations, such as a country's particular understanding of what human dignity requires.

The question, again, is what the fact that country *A* is willing to impose a sentence of imprisonment that lasts longer than countries *B* through *J* for the same crime—"crime *x*"—should tell us about the validity of *A*'s desert judgment. The conclusion that *A*'s desert judgment is wrong is certainly a possibility, but, as we saw, it is not the only possibility.

The reason all these possibilities exist is that desert is a concept that is indeterminate and highly context-specific in action (why do the winners of Olympic events receive a "gold medal," for instance?).⁶² Different jurisdictions that apply the same desert principles to devise their sentencing regimes may end up producing punishments that look very different, and one jurisdiction may have a different understanding of the blameworthiness of "crime *x*" from everyone else without violating the principle of desert. Because the amount of punishment appropriate for a given crime depends on the level of blameworthiness expressed by different amounts of punishment, different places may attach different significances to the punishment that looks the same on the surface.

Also, there is nothing in the principle of desert that answers the question of whether the death penalty should be reserved only for his-

⁶² See FEINBERG, *supra* note 60, at 100 ("To say that the very physical treatment itself expresses condemnation is to say simply that certain forms of hard treatment have become the conventional symbols of public reprobation. . . . Moreover, particular kinds of punishment are often used to express quite specific attitudes . . . ; note the differences, for example, between beheading a nobleman and hanging a yeoman, burning a heretic and hanging a traitor, hanging an enemy soldier and executing him by firing squad."); *id.* at 114 ("Even floggings and imposed fastings do not constitute punishments, then, where social conventions are such that they do not express public censure . . .").

toric instances of evil that a society experiences rarely or whether it should be more readily available so that it can be imposed on the worst group of criminals selected from instances of criminal offenses that a society experiences more routinely, such as homicide. Finally, there is nothing in the principle of desert that requires the death penalty or precludes limitations on punishment for reasons having little to do with the principle of desert. Even if, as we have assumed, the only theory of punishment available is retributivism, there may be other constraints that limit the types and amounts of punishment that can be imposed. (For instance, members of a society may agree that a certain criminal deserves to be tortured but still maintain that he should nevertheless not be tortured for dignitarian reasons.)

To apply this general framework to the juvenile death penalty context, perhaps the fact that “the United States is the only country in the world that continues to give official sanction to the juvenile death penalty” means that the United States is willing to impose on juvenile offenders punishments that are undeservedly harsh. But it is also possible that, for whatever reason, the United States is the only country that is willing to impose on some juvenile offenders the punishment that they deserve, and the rest of the international community should learn from the United States.⁶³ It is also possible that the United States is willing to hold people fully responsible for their acts at a younger age than other countries do, simply because of our own particular understanding of the age at which people should be held responsible for their acts.⁶⁴

⁶³ For an argument along these lines, see Robert Blecker, *A Poster Child for Us*, 89 JUDICATURE 297, 299-301 (2006).

⁶⁴ Where childhood ends and adulthood begins is not an easy question. The inconclusive nature of Article 1 of the Convention on the Rights of the Child, which defines a “child” as “every human being below the age of eighteen years *unless, under the law applicable to the child, majority is attained earlier,*” reflects the difficulty of the line-drawing problem in this area. Convention on the Rights of the Child art. 1, Nov. 20, 1989, 1577 U.N.T.S. 3 (emphasis added); see also Thomas Hammarberg, *Justice for Children Through the UN Convention*, in JUSTICE FOR CHILDREN 59, 64 (Stewart Asquith & Malcolm Hill eds., 1994) (“Obviously, this wording [of Article 1] is the result of a compromise.”). For some discussions of complexities of this issue, see FRANKLIN E. ZIMRING, AMERICAN JUVENILE JUSTICE 17-22 (2005); Elizabeth S. Scott, *The Legal Construction of Adolescence*, 29 HOFSTRA L. REV. 547 (2000); see also Anthony N. Doob and Michael Tonry, *Varieties of Youth Justice*, in YOUTH CRIME AND YOUTH JUSTICE: COMPARATIVE AND CROSS-NATIONAL PERSPECTIVES 1, 5-10 (Michael Tonry & Anthony N. Doob eds., 2004); Jeffrey Fagan, Atkins, *Adolescence, and the Maturity Heuristic: Rationales for a Categorical Exemption for Juveniles from Capital Punishment*, 33 N.M. L. REV. 207, 223-25, 248-52 (2003); Barry C. Feld, *Competence, Culpability, and Punishment: Implications of*

It is also possible that we do not take the death penalty as seriously as some of the other countries that allow the death penalty. That is, some of these other countries may reserve the death penalty only for the most exceptional circumstances, such as acts of terrorism, genocide, and other instances that qualify as acts of evil of historic magnitude, and crimes committed by juvenile offenders rarely rise to that level.⁶⁵ Finally, it is also possible that the reason the juvenile death penalty is not allowed in some of those other countries is simply that the death penalty as a mode of punishment is not allowed at all in those countries for reasons not necessarily having to do with desert.⁶⁶

Atkins for Executing and Sentencing Adolescents, 32 HOFSTRA L. REV. 463, 545-52 (2003); Elizabeth S. Scott & Laurence Steinberg, *Blaming Youth*, 81 TEX. L. REV. 799 (2003).

⁶⁵ See ROGER HOOD, THE DEATH PENALTY: A WORLDWIDE PERSPECTIVE 252 (3d ed. 2002) (listing countries that, as of December 2001, have abolished the death penalty for ordinary crimes but retained them for exceptional crimes); *id.* at 35 (discussing Israel's retention of the death penalty "for all crimes except those connected with the Holocaust"); *id.* at 49-50 (discussing India's "'rarest of the rare' cases principle" (quoting *Singh v. Punjab*, (1980) 2 S.C.J. 475, 524)); see also Julia Eckert, *Death and the Nation: State Killing in India*, in THE CULTURAL LIVES OF CAPITAL PUNISHMENT: COMPARATIVE PERSPECTIVES 195, 195-97 (Austin Sarat & Christian Boulanger eds., 2005) (discussing death sentences for crimes involving Muslim terrorism, caste violence, and Hindu nationalism).

⁶⁶ See HOOD, *supra* note 65, at 249-52 (listing countries that have completely abolished capital punishment). It is beyond the scope of this Article to survey the history of abolition of the death penalty worldwide and explore individual countries' reasons for abolition, but even a quick glance shows a variety of rationales behind the abolitionist movement. See *id.* at 26-27 (reporting that "[m]ost West European nations have come to recognize that . . . capital punishment inflicted by the state is contrary to their commitment to maintain human rights" and mentioning as examples Switzerland, which thought the death penalty to be "a flagrant violation of the right to life and dignity"; Spain, which believed the death penalty to be "degrading"; and Greece, which declared human life to be "of supreme value" and stated that "efficiency of the death penalty has been proven non-existent"); see also *S v Makwanyane & Another* 1995 (2) SACR 1 (CC) at 52-53, 115 (S. Afr.) (citing both the "rights to life and dignity" and the spirit of reconciliation (as opposed to revenge) behind the constitution as reasons for holding the death penalty unconstitutional); RICHARD J. EVANS, RITUALS OF RETRIBUTION: CAPITAL PUNISHMENT IN GERMANY 1600-1987, at 775-804, 855-71 (1996) (examining the death penalty abolition movement in East and West Germany); Shai J. Lavi, *Imagining the Death Penalty in Israel: Punishment, Violence, Vengeance, and Revenge*, in THE CULTURAL LIVES OF CAPITAL PUNISHMENT: COMPARATIVE PERSPECTIVES, *supra* note 65, at 219, 228 ("Among the primary reasons still given for opposing the death penalty for terrorists is the risk of drawing punishment into a cycle of revenge and of turning terrorists into martyrs."); Cass R. Sunstein & Adrian Vermeule, *Is Capital Punishment Morally Required? Acts, Omissions, and Life-Life Tradeoffs*, 58 STAN. L. REV. 703, 746 (2005) ("Israel does not execute terrorists, in part because of a belief that executions of terrorists would breed more terrorism . . ."); Patrick Timmons, *Seed of Abolition: Experience and Culture in the Desire To End Capital Punishment in Mexico, 1841-1857*, in THE CULTURAL LIVES OF CAPITAL PUNISHMENT: COMPARATIVE PERSPECTIVES, *supra* note 65, at 69, 74-78 (linking Mexico's attitude to the death penalty with its experience with po-

The upshot of all this is that it is not obvious how one can go from the observation that the United States is the only country in the world that allows the juvenile death penalty to the conclusion that the United States is allowing undeservedly harsh punishments on certain juvenile offenders. In order to draw that conclusion, all the other possibilities that are consistent with the principle of desert would somehow have to be ruled out, and the work of ruling out all the other options may actually require the kind of moral knowledge that was initially lacking and inspired the Court to turn its gaze overseas in the first place. In other words, the particular “moral shortcut” the Court attempted to take by looking to other countries’ penal practices may not be warranted. And doing it correctly would actually involve a long detour.

That is not all. Recall that up to now we have assumed that all countries follow the retributivist theory of punishment. Now let’s relax this assumption and revisit the question we started with: If *A*’s punishment for crime *x*, measured in terms of amount of time spent in prison, is substantially higher than the punishment that countries *B* through *J* are willing to impose, what should the fact of *A*’s apparent harshness compared to other countries tell us about *A*’s desert judgment? Now, on top of all the possibilities we have discussed, introducing different sentencing philosophies multiplies potential explanations. Perhaps in some countries it was determined that the punishment *A* is willing to impose is far more than sufficient to get the desired level of deterrent effect. Others may have decided that the amount that would be imposed in *A* would be far more than is necessary to rehabilitate criminals charged with crime *x*.⁶⁷ Yet others may have determined that the incapacitation theory does not justify keeping criminals convicted of crime *x* for the amount of prison time that *A* would require. So looking at other countries to determine whether one’s punishment is undeservedly harsh for crime *x* is of limited use even when one assumes that all countries follow the retributivist phi-

litical repression and its preventive philosophy of punishment); Elizabeth Vicens, Note, *Application of the Federal Death Penalty Act to Puerto Rico: A New Test for the Locally Inapplicable Standard*, 80 N.Y.U. L. REV. 350, 376, 382-84 (2005) (discussing the Puerto Rican attitude toward the death penalty); cf. JAMES Q. WHITMAN, *HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE* (2003) (discussing cultural differences between the United States and Europe as an explanation for differing approaches to state punishment).

⁶⁷ Cf. HOOD, *supra* note 65, at 26 (reporting that Spain “took the view” in 1995 that the death penalty is “contrary to the philosophy of punishment enshrined in our Constitution, where punishment is seen as a means of rehabilitation”).

losophies of punishment. Once we add into the mix different purposes of punishment, the informative value of looking at other countries for the purposes of assessing one's own desert judgments starts to approach zero.

The conclusion that there is nothing necessarily disturbing about having sentences differ in different jurisdictions for roughly equivalent crimes is nothing new in the sentencing literature. This point has been most frequently made recently in the debate surrounding regional variations in enforcing federal criminal law and the Federal Sentencing Guidelines. If there is a strong case anywhere for uniformity in sentencing across different geographic regions it is in the context of administering federal criminal law across the country. However, as many have argued, a combination of prosecutorial and judicial discretion leads to disparities in federal sentencing in different regions. Such disparities should not necessarily be worrisome and are in fact desirable in many instances.⁶⁸

Given all this, what should we make of the Court's citation of other countries' domestic penal practices in *Roper* and other proportionality cases? In *Roper* the Court observed that "the United States is the only country in the world that continues to give official sanction to the juvenile death penalty"; that "only seven countries other than the United States have executed juvenile offenders since 1990: Iran, Pakistan, Saudi Arabia, Yemen, Nigeria, the Democratic Republic of Congo, and China"; and that "[s]ince then each of these countries has either abolished capital punishment for juveniles or made public disavowal of the practice."⁶⁹ Similarly in *Coker*, the plurality of the Court noted that "it is . . . 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."⁷⁰ And in *Enmund*, the Court stated that

⁶⁸ See Stephanos Bibas, *Regulating Local Variations in Sentencing*, 58 STAN. L. REV. 137, 139-41 (2005) (distinguishing between legitimate and illegitimate regional variations in federal criminal sentencing); Frank Bowman et al., *Panel II: The Effects of Region, Circuit, Caseload and Prosecutorial Policies on Disparity*, 15 FED. SENT'G REP. 165, 165 (2003); John Gleeson, *Supervising Federal Capital Punishment: Why the Attorney General Should Defer When U.S. Attorneys Recommend Against the Death Penalty*, 89 VA. L. REV. 1697 (2003); Katherine Tang Newburger, *Caseload Matters: Caseload Composition as an Explanation for Regional Sentencing Differences*, 15 FED. SENT'G REP. 197, 197 (2003); Ian Weinstein, *The Historical Roots of Regional Sentencing Variation*, 11 ROGER WILLIAMS U. L. REV. 495, 495 (2006) ("[P]erhaps we should respect a modicum of regional variation and not seek to eliminate every vestige of regional legal culture in America.").

⁶⁹ *Roper v. Simmons*, 543 U.S. 551, 575, 577 (2004).

⁷⁰ *Coker v. Georgia*, 433 U.S. 584, 596 n.10 (1976).

“[i]t is . . . worth noting that the doctrine of felony murder has been abolished in England and India, severely restricted in Canada and a number of other Commonwealth countries, and is unknown in continental Europe.”⁷¹

The discussion thus far implies that it is opaque what such observations can tell us about whether the desert judgment being challenged—for instance, that some offenders under the age of eighteen may deserve the death penalty—is right or wrong. Such observations in fact tell us very little about the issue, and if it is indeed possible to rule out various reasons not to find other countries’ practices probative, then it is not clear what foreign sources add. In short, those who can demonstrate the informativeness of foreign laws likely have no need for them, whereas those who cannot demonstrate their usefulness should not rely on them.

Finally, the Court has relied on two types of sources from outside the United States: comparative and international. My reservations have so far been directed at the use of comparative materials, which has the form of “Countries *B* through *J* do things differently from Country *A*.” But what about the Court’s reliance on various international treaties? For instance, in *Roper*, the Court cited the UN Convention on the Rights of the Child, the International Covenant on Civil and Political Rights, the American Convention on Human Rights, and the African Charter on the Rights and Welfare of the Child.⁷² The same criticisms I have outlined above apply here, but the problems deepen. On top of having to compare different jurisdictions with differing desert judgments *and* philosophies of punishment, now we need to establish an additional link—the relationship between each country’s penal judgments and the fact that the countries have signed onto such treaties. Why countries enter human rights treaties and what difference human rights treaties make are subjects on which there is already an extensive literature.⁷³ But whatever the reason countries sign such treaties, there is no reason why we should allow the fact that international human rights treaties ban one practice or another to influence our judgments about who deserves what pun-

⁷¹ *Enmund v. Florida*, 458 U.S. 782, 796 n.22 (1982).

⁷² *Roper*, 543 U.S. at 576.

⁷³ For a useful summary, see Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935, 1942-62 (2002). See also JACK L. GOLDSMITH & ERIC POSNER, *THE LIMITS OF INTERNATIONAL LAW* 107-34 (2005); Andrew Moravcsik, *The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe*, 54 INT’L ORG. 217, 220 (2000).

ishment, at least without going through much work to demonstrate that alternative explanations do not apply.

III. CRUELTY AND INTERNATIONAL CONSENSUS

A. *What Kind of Consensus?*

Some may object that I am missing the point of comparisons. The question is not, the objection will go, whether the fact that no other country practices the juvenile death penalty can yield the conclusion that juvenile offenders do not deserve the death penalty. The claim, rather, is that we can draw normative significance from the fact that there appears to be a near universal consensus on the issue whether the juvenile death penalty should be allowed as a penal practice. That is, putting things in terms of desert unduly constrains the inquiry. What we can draw from the fact that no other country appears to practice the juvenile death penalty—and that countries around the world are willing to go further and agree to conventions that explicitly ban the juvenile death penalty—is that there exists a universal norm against the practice, whether the norm has to do with desert or otherwise. And to the extent that the juvenile death penalty prohibition deals with a penal practice, the argument would go, the international consensus must be relevant to our understanding of what constitutes cruel and unusual punishment.

This line of reasoning is plausible, but raises a number of questions. It is clear that we have a constitutional question on one hand, and an international consensus that appears to address the constitutional question on the other hand. But what is unclear is how we should conceive of the relationship between the two. That is, what exactly is the significance of an international consensus against a penal practice for the purposes of interpreting the Cruel and Unusual Punishments Clause? The purpose of the discussion in Part II was to rule out, or at least complicate the path of arriving at, one possible answer—that the international consensus reflects the view that the death penalty is an undeservedly harsh punishment for juvenile offenders. Setting that possible answer aside, then, how else should we conceive of the relationship? Much of the answer to this question turns on how we ought to characterize the nature of the international consensus, because different types of consensus dictate different answers.

Jeremy Waldron gives one characterization of the consensus in a recent comment on *Roper* in the *Harvard Law Review*.⁷⁴ He argues that when we confront the issue of when it is proper to cite foreign law, we should think the issue through in terms of the “law of nations,” or *ius gentium*, by which he means “a body of law purporting to represent what various domestic legal systems share in the way of common answers to common problems.”⁷⁵ *Ius gentium*, the way Waldron conceives of it, represents “the accumulated wisdom of the world on rights and justice” from “the decisions of judges and lawmakers grappling with real problems.”⁷⁶ Waldron compares the law of nations to an established body of scientific findings and suggests that when we confront a problem like the juvenile death penalty, we should “treat it as a problem to be solved in part by attending to the established deliverances of legal science—the enterprise . . . of grappling with, untangling, and resolving the rival rights and claims that come together in issues of this kind.”⁷⁷

Waldron’s proposal is worth considering in detail. The questions that we ultimately have to answer when we see an international consensus against a penal practice are what the nature of the consensus is, and what the consensus should accordingly mean for us. Waldron’s answer is that we should view the consensus as analogous to a scientific consensus, as “solutions to certain kinds of problems in the law [that] might get established in the way that scientific theories are established.”⁷⁸ In defending the analogy to science, Waldron contrasts it against two other types of consensus: aesthetic consensus and moral consensus. When Justice Thomas argues that the “Court’s Eighth Amendment jurisprudence should not impose foreign moods, fads, or fashions on Americans,”⁷⁹ the suggestion is that the international consensus against a penal practice is, at best, like an aesthetic consensus and a transient one at that. Waldron rejects the analogy,⁸⁰ and at the same time distances *ius gentium* from another kind of consensus that may appear more obviously appropriate in the death penalty con-

⁷⁴ Waldron, *supra* note 3.

⁷⁵ *Id.* at 133; see also H.F. JOLOWICZ & BARRY NICHOLAS, HISTORICAL INTRODUCTION TO THE STUDY OF ROMAN LAW 104-07 (3d ed. 1972).

⁷⁶ Waldron, *supra* note 3, at 138.

⁷⁷ *Id.* at 143.

⁷⁸ *Id.* at 144.

⁷⁹ *Foster v. Florida*, 537 U.S. 990, 990 n.* (2002) (Thomas, J., concurring in denial of certiorari).

⁸⁰ Waldron, *supra* note 3, at 144.

text—a moral consensus that is arrived at through making “moral judgments” by answering “direct moral questions about justice and rights.”⁸¹

We thus have three kinds of consensus on the table as potentially analogous to the international consensus on the question of the juvenile death penalty: scientific, aesthetic, and moral. Justice Thomas invokes the image of an aesthetic consensus in order to dismiss the practice in question. Waldron, in response, says that an international legal consensus is like a scientific consensus, while carefully distinguishing it from the notion of a moral consensus. In the following sections, I consider these various analogies. My purpose here is not necessarily to declare one analogy as the winner over the other two, but to attempt to answer the question—“What is the significance of an international consensus against the juvenile death penalty?”—through discussing proper attitudes toward consensus within each context.

B. *Scientific Consensus*

Waldron says that we should think of international legal consensus as analogous to “the established body of scientific findings,” which “stands as a repository of enormous value to individual researchers as they go about their work.”⁸² He argues that “it is unthinkable that any of them would try to proceed without drawing on that repository to supplement their own individual research and to provide a basis for its critique and evaluation.”⁸³ He adds further that “[n]o one in the modern world would take seriously novel claims about energy or gravity that did not refer to the work of the scientific community at large,” and that *ius gentium* serves as the similar site for “the accumulated wisdom of the world on rights and justice.”⁸⁴ I single out Waldron here because he is, as far as I am aware, the only scholar who has made this analogy to defend the practice of consulting foreign legal materials in constitutional interpretation.⁸⁵

Waldron is of course correct when he says that it would be absurd for a scientist to disregard an established body of scientific knowledge. A more difficult question is whether the analogy holds, given the dif-

⁸¹ *Id.* at 137.

⁸² *Id.* at 132.

⁸³ *Id.* at 132-33.

⁸⁴ *Id.* at 138.

⁸⁵ This is not to say that his suggestion has not been embraced by others. For a positive reaction, see Cleveland, *supra* note 3, at 10-11.

ferences between scientific inquiries and legal-moral inquiries. Can the question of whether to permit the juvenile death penalty be answered by consulting an established body of moral and legal knowledge⁸⁶ the way scientists consult an established body of scientific knowledge to learn about “energy or gravity”?⁸⁷ Waldron correctly characterizes the “relation between the juvenile death penalty and the values embodied in the Eighth Amendment” as involving “dignitarian issues and the tangled issues of culpability and responsibility.”⁸⁸ However, it is not obvious why working through the “tangled issues of culpability and responsibility” is similar to making observations about “energy or gravity” in a way that warrants the analogy that Waldron puts forward.

The analogy is not warranted because a scientific consensus has a different epistemic status from a moral consensus. Even when scientists disagree among themselves, there is broad agreement among them on the question of how such disagreements may be resolved—that is, how one should go about finding answers to these questions, what kind of evidence is relevant to answering these questions, what procedures should be used to collect this kind of evidence, what kinds of inferences are warranted by the evidence collected, and so on.⁸⁹ The existence of such agreements on methodological questions comes with an understanding as to the nature of the collective enterprise: namely, to describe the physical world as it is. Thus, we understand how to treat scientific consensus on a question, since we understand what it is that scientists are doing and what standards must be met before a proposition attains the status of scientific knowledge. Again, how we respond to different types of consensus turns on what the con-

⁸⁶ I use the phrase “moral and legal knowledge” here because, as Waldron recognizes, the relationship between law and morality in this context is not easy to sort through. See Waldron, *supra* note 3, at 136 (“Historians of jurisprudence have spent gallons of ink on the question of whether *ius gentium* was conceived as natural law or positive law. The fact is that . . . it has been both, as well as the product of a sort of reflective equilibrium between the two.”).

⁸⁷ *Id.* at 138.

⁸⁸ *Id.* at 143.

⁸⁹ At least this is the conventional understanding. See, e.g., LEE SMOLIN, *THE TROUBLE WITH PHYSICS: THE RISE OF STRING THEORY, THE FALL OF A SCIENCE, AND WHAT COMES NEXT* 289-307 (2006). This is not to say that scientists do not have fundamental disagreements. For an account of the recent controversy over string theory and its relationship to the question of “what science is,” see generally SMOLIN, *supra*.

sensus signifies, and, in the scientific context, a consensus signifies a correct description of *how things actually are*.⁹⁰

We do not have that kind of agreement on how to go about resolving moral disagreements, and this in turn means that our attitude toward moral consensus should be different from our attitude toward scientific consensus. Unlike in the scientific field, there is no agreed-upon methodology for resolving disagreements in the moral context. Some would invoke God, others would invoke rights, yet others might invoke utility, and there is no agreement on how such different world-views are to be sorted out when we wrestle with moral questions.⁹¹ What this in turn means is that when we do see a moral agreement, it is unclear how we ought to treat it because we do not have an account of how it is that the process that created the moral agreement in question reflects the moral reality, analogous to the way a scientific consensus is thought to reflect physical reality.⁹² The problem is acute, even if we assume that the international consensus against the juvenile death penalty is in fact a *moral* consensus, since it is unclear whether expressions of international consensus really have to do with “moral

⁹⁰ See BERNARD WILLIAMS, *ETHICS AND THE LIMITS OF PHILOSOPHY* 136 (1985) (“In a scientific inquiry there should ideally be convergence on an answer, where the best explanation of the convergence involves the idea that the answer represents how things are”); see also Susan Haack, *Coherence, Consistency, Cogency, Congruity, Cohesiveness, &c.: Remain Calm! Don’t Go Overboard!*, 35 *NEW LITERARY HIST.* 167, 178 (2004) (“[T]he fact that scientists agree on a theory doesn’t warrant it; gradually killing off those who don’t accept a new scientific idea, or playing a tape repeating ‘the earth moves’ under the pillows of the holdouts while they sleep, won’t make the claim in question any more likely true. No: consensus in the scientific community is epistemologically significant because—by no means always, but on the whole and in the long run, often enough—the strong evidence that warrants the theory also explains scientists’ agreement.”).

⁹¹ This is something that Waldron himself has persuasively laid out. Jeremy Waldron, *The Irrelevance of Moral Objectivity*, in *NATURAL LAW THEORY* 158, 171-76 (Robert P. George ed., 1992).

⁹² See RESCHER, *supra* note 27, at 14 (“From the angle of rationality it will only be a rationally engendered consensus that is significant: and what is significant about it is not its consensuality but its rationality.”); WILLIAMS, *supra* note 90, at 136 (“[E]ven if [ethical convergence] happens, it will not be correct to think it has come about because convergence has been guided by how things actually are”); Norman Daniels, *Wide Reflective Equilibrium and Theory Acceptance in Ethics*, 76 *J. PHIL.* 256, 275 (1979) (“[Some worry that] there may be consensus on moral falsehoods. The worry is clearly reasonable when we suspect that the factors that led to consensus have little, if anything, to do with rational inquiry”).

agreements” as opposed to a more complex set of national interests that have only marginally to do with moral truths.⁹³

To further illustrate, consider another current debate in which the argument from “consensus” is frequently made: global warming.⁹⁴ In the debates over climate change, there are two types of debates: scientific debates and policy debates. The scientific debate is about whether “global warming” is a real phenomenon and whether there is a gradual warming of the earth that is being caused by human activities.⁹⁵ The policy debate is about what should be done about global warming if it is a real phenomenon.⁹⁶

Whether there are genuine disagreements in the scientific community on the issue of global warming, or whether those disagreements have been invented by those with political agendas, is not the important issue here.⁹⁷ What is important for the purposes of the Article is the difference between the two types of debates. What makes scientific disagreements fundamentally different from policy disagreements is that policy disagreements in the global warming context frequently implicate moral questions (which need to be distinguished from pragmatic, empirical, predictive questions about how to get from point *A* to point *B*).⁹⁸ In the global warming context, difficult moral judgments must be made on questions such as what the correct balance between development and environmental protection is, what we owe to future generations, when and whether it is legitimate to impose economic sacrifices on one particular group of people for the benefit of the overall population, whether developed countries and

⁹³ As an example, consider the various forces that led to drafting and ratification of the Convention on the Rights of the Child, discussed in LAWRENCE J. LEBLANC, *THE CONVENTION ON THE RIGHTS OF THE CHILD* 25-62 (1995). See also sources cited *supra* note 73.

⁹⁴ See, e.g., INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, WORKING GROUP I, *CLIMATE CHANGE 2001: THE SCIENTIFIC BASIS* (J.T. Houghton et al., eds. 2001) [hereinafter *CLIMATE CHANGE*]; PHILIPPE SANDS, *PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW* 357-81 (2d ed. 2003); PATRICIA W. BIRNIE & ALAN E. BOYLE, *INTERNATIONAL LAW & THE ENVIRONMENT* 523-33 (2d ed. 2002); Peter Doran, *Cold, Hard Facts*, N.Y. TIMES, July 27, 2006, at A25; Gregg Easterbrook, *Finally Feeling the Heat*, N.Y. TIMES, May 24, 2006, at A27.

⁹⁵ MICHAEL GRUBB ET AL., *THE KYOTO PROTOCOL: A GUIDE AND ASSESSMENT* 3-26 (1999).

⁹⁶ *Id.* at 27-114.

⁹⁷ See TIM FLANNERY, *THE WEATHER MAKERS: HOW MAN IS CHANGING THE CLIMATE AND WHAT IT MEANS FOR LIFE ON EARTH* 238-46 (2005); ELIZABETH KOLBERT, *FIELD NOTES FROM A CATASTROPHE: MAN, NATURE, AND CLIMATE CHANGE* 159-72 (2006).

⁹⁸ See KOLBERT, *supra* note 97, at 141-47.

developing countries have different responsibilities, and so on.⁹⁹ “[T]he tangled issues of culpability and responsibility” that Waldron refers to in the juvenile death penalty context¹⁰⁰ are more like policy disagreements than scientific disagreements in the global warming context, with all their accompanying methodological problems.

It is important to be clear about what I am not claiming. I am not highlighting moral disagreements and invoking the differences between ethics and science in order to question the existence of objective moral reality itself,¹⁰¹ to argue in favor of moral relativism,¹⁰² or even to argue that the only kind of knowledge we should treat as genuine knowledge is scientific knowledge, or at least something that shares those features of scientific knowledge that make it “scientific.”¹⁰³ Neither am I making the positive argument that moral agreements, even when they happen, are always accidental or meaningless.

Rather, the point is this. The only question here is over the significance of consensus on a moral question. In order to understand the significance of a consensus, we need to examine the procedure by which the consensus is arrived at. (For example, if a consensus is produced through coercion, that would be a reason to dismiss it.) And understanding the procedure entails understanding how the procedure handles and resolves disagreements if they arise. So, for the purposes of this section, we should note the differences between moral agreements and scientific agreements in order to assess the argument that the international consensus on the morality of the juvenile death penalty can be analogized to a scientifically established piece of knowledge. The force of the analogy comes from the fact that, on scientific matters, it would be unthinkable, as Waldron argues, for someone to start out without first asking what the current state of scientific knowledge on the matters is. And I have been argu-

⁹⁹ FLANNERY, *supra* note 97, at 230; KOLBERT, *supra* note 97, at 155-57. See generally ENVIRONMENTAL ETHICS (Robert Elliot ed., 1995).

¹⁰⁰ Waldron, *supra* note 3, at 143.

¹⁰¹ See J.L. MACKIE, ETHICS: INVENTING RIGHT AND WRONG 15-49 (1977).

¹⁰² See GILBERT HARMAN, THE NATURE OF MORALITY 3-10 (1977).

¹⁰³ Compare John McDowell, *Projection and Truth in Ethics*, in MORAL DISCOURSE AND PRACTICE: SOME PHILOSOPHICAL APPROACHES 215, 222 (Stephen Darwall et al. eds., 1997) (criticizing the view that “natural science has a foundational status in philosophical reflection about truth—that there can be no facts other than those that would figure in a scientific understanding of the world”) with Brian Leiter, *Objectivity, Morality, and Adjudication*, in OBJECTIVITY IN LAW AND MORALS 66, 67, 71-72, 77-78 (Brian Leiter ed., 2001) (defending what he calls the “Naturalistic Conception” of objectivity).

ing that that is because we have confidence that science is the enterprise of describing the physical world as it is and the participants agree on a method and its tight connection to that enterprise. When we look at the moral realm, we lack such confidence because there is no similar understanding of a procedure that is designed to help us attain moral knowledge. Therefore, the reasons why a scientist would not ignore the current state of scientific knowledge in embarking on a scientific quest do not readily apply to the moral realm.

C. *Aesthetic Consensus*

Here we consider another analogy. Justice Thomas argued that the “Court’s Eighth Amendment jurisprudence should not impose foreign moods, fads, or fashions on Americans,”¹⁰⁴ and Waldron makes the point of distinguishing *ius gentium* from “foreign moods, fads, or fashions.”¹⁰⁵ Now what is it about “moods, fads, or fashions” that is so objectionable? I argue in this section that the disparagement of aesthetic judgments implied in both Justice Thomas’s dismissal and Waldron’s distancing is in fact unwarranted. There are features of aesthetic judgments that make them appropriate as a useful analogy for our purposes. The aesthetic analogy presents a model as to how and why one may engage with, and even defer to, others’ judgments that conflict with one’s own. Comparing the norm-centric analysis in the juvenile death penalty context against the process of consulting others’ aesthetic judgments raises some doubts about the norm-centric analysis.

Suppose that I participate as a judge in a film festival, and it turns out that there is a broad consensus among the participants as to how different films should be ranked, but that my own ranking departs from it significantly. I may have one of several reactions. I might decide that although my taste in films is different from everyone else’s, it is nothing to worry about since there is nothing wrong with having a different taste. Or I might think that my taste is different from everyone else’s, and that means there is something wrong with me, and I should therefore try to change what I think about different films and bring it in line with what everyone else thinks. Or I might wonder why it is that other people experience these films differently from the way I

¹⁰⁴ *Foster v. Florida*, 537 U.S. 990, 990 n.* (2002) (Thomas, J., concurring in denial of certiorari).

¹⁰⁵ Waldron, *supra* note 3, at 144.

experience them and use it as an occasion to deepen my understanding of this art form.

Which of the three should be one's reaction when one's judgment about film differs from the prevailing "consensus," and can we analogize the answers to the norm-centric analysis in the juvenile death penalty context? The first possibility calls for disregarding others' judgments as irrelevant to one's judgment and is thus no support for the norm-centric analysis. Perhaps this was the sentiment that Justice Thomas expressed when he dismissed foreign experiences as "moods, fads, or fashions."¹⁰⁶ But the other two possibilities seem to be more promising from the perspective of the norm-centric analysis.

So then what about the second possibility? When would the act of deferring to others make sense in the aesthetic context? There may be two situations when such a reaction is warranted—first, when one is a novice when it comes to films and, second, when one is comparing notes with those who are believed to be experts. In the two contexts, the bare fact of consensus among those who are experienced or knowledgeable about an issue by itself should weigh significantly for those less experienced or knowledgeable. Even asking what is behind the consensus may be a waste of time and effort for some beginners because they may not know enough to understand the reasoning process that drives experts to their judgments. For those beginners, the proper way of increasing one's knowledge is simply through blind emulation, the way one learns to play music at first through imitation. The problem for the norm-centric model is that neither situation seems analogous to the relationship between the United States and the rest of the world on the issue of the juvenile death penalty.

First, the United States is not new to the issue of the death penalty. Of course, if there is some moral problem that we are not familiar with, but we know that others have more experience grappling with, it may make sense to consider deferring to others and bringing one's judgment in line with others, at least until we accumulate our own experience with the matter. For instance, after the 9/11 attacks, the issue of how we ought to strike the liberty-security balance became more urgently important to us than in our recent past, and it made sense to look to other countries with more recent experiences dealing with those issues, such as Israel and England, and to learn from

¹⁰⁶ *Foster*, 537 U.S. at 990 n.*.

them.¹⁰⁷ Similarly, new technologies raise new moral questions, and we are accustomed to encountering issues we had not fully thought through in the context of bio- and medical ethics all the time.¹⁰⁸ In such situations, we may look around and seek wisdom from others by asking what kinds of judgments they have reached in dealing with similar issues.

But the problem of the juvenile death penalty is not “new” in that sense. Death penalty issues are heavily litigated year after year in the United States. Thanks to Supreme Court involvement with the death penalty since *Furman v. Georgia*,¹⁰⁹ there is no shortage of cases, law review articles, conferences, books, and editorials on the morality of the death penalty. The Supreme Court decides a handful of death penalty cases every term, and such decisions are often on the front pages of major newspapers. It is possible that we Americans, for some reason or another, repeatedly end up making decisions that cannot be defended as a moral matter. And it is also likely that there is a lot of misinformation and bad argumentation on this topic, and maybe even some sentiments that are correctly characterized as “barbaric.” But *unfamiliar* with the moral ins and outs of the issues, we are not.

Similarly, although, as mentioned, one can imagine a person who decides to defer to a well-regarded film critic or at least to emulate the critic’s taste, the United States does not stand in that kind of relationship to the rest of the world. There is no reason to believe that the rest of the world has moral expertise in this area, such that it would make sense for us to attempt to emulate them in the way an amateur cultivates his or her own skills and instincts by emulating an expert.

¹⁰⁷ See, e.g., Kent Roach, *Must We Trade Rights for Security? The Choice Between Smart, Harsh, or Proportionate Security Strategies in Canada and Britain*, 27 *CARDOZO L. REV.* 2151, 2155 (2006) (“The United Kingdom has had much experience with terrorism and is an influential innovator with respect to anti-terrorism laws.”); Stephen J. Schulhofer, *Checks and Balances in Wartime: American, British, and Israeli Experiences*, 102 *MICH. L. REV.* 1906, 1908 (2004) (“Fighting terrorism poses challenges that are essentially new (or newly recognized) for America. For that reason, it is worth considering the experience of Western democracies that confronted grave terrorist threats over extended periods before September 11, 2001.”).

¹⁰⁸ See Jackson, *supra* note 12, at 320 (discussing the value of “international experience” in dealing with issues raised by the emergence of new technologies); Tushnet, *Knowing Less*, *supra* note 12, at 1278 n.9 (“The time may soon come when non-U.S. courts will grapple with novel issues—such as the regulation of genetic engineering—before U.S. courts do. The non-U.S. courts may provide some insights that would be useful when the U.S. courts later consider constitutional issues arising out of the same social phenomena.”).

¹⁰⁹ 408 U.S. 238 (1972).

Some of us may believe that Europeans are more civilized than we are as a general matter, and that we should mimic their ways of dealing with juvenile offenders. But it is not at all clear how such an assumption can be demonstrated in a way that does not beg the question.

What about, then, the last possibility? When my judgment of film differs from others', I may try to understand why by inquiring into why others came to the assessments that they did. I can ask people why they ranked the films the way they did—what about these films they liked or disliked. After having dialogues about the merits of different films—about their plot, script, acting, look, music, originality, emotional impact, insight, and so on—I may still disagree with others' rankings, but at least I will have a better understanding of specifically how others' experiences of these films differed from mine. And, depending on whether their explanations resonate with my own aesthetic standards, I may or may not decide to reconsider my thinking on the subject. Of course, the analogy works whether we are talking about film or other contexts in which similar judgments of beauty are made, such as in fine art, music, and literature.¹¹⁰

Should we think about the debate over foreign materials as being analogous to these sorts of comparisons?¹¹¹ Questions about desert, culpability, and responsibility are frequently vexing, and when we notice that other countries have blanket prohibitions on the juvenile death penalty, we can consult their legal materials and ask what the rationale behind such prohibitions is. The fundamental moral question we face is how to think through issues of desert when a child under the age of eighteen commits a crime so evil and heinous that the death penalty becomes a live option as an appropriate response. It

¹¹⁰ For more examples of how we make evaluations of various kinds, see Joseph Raz, *Notes on Values and Objectivity*, in OBJECTIVITY IN LAW AND MORALS, *supra* note 103, at 194, 223 (discussing humor and music). There is a large philosophical literature on how to make sense of aesthetic judgments. See, e.g., DAVID HUME, *Of the Standard of Taste*, in ESSAYS, MORAL, POLITICAL, AND LITERARY 226 (Eugene F. Miller ed., Liberty Fund 1985) (1777). For useful overviews, see, for example, John W. Bender, *Aesthetic Realism 2*, in THE OXFORD HANDBOOK OF AESTHETICS 80 (Jerrold Levinson ed., 2003); Richard Eldridge, *Aesthetics and Ethics*, in THE OXFORD HANDBOOK OF AESTHETICS, *supra*, at 722 (Jerrold Levinson ed. 2003); Robert Stecker, *Value in Art*, in THE OXFORD HANDBOOK OF AESTHETICS, *supra*, at 307 (Jerrold Levinson ed. 2003); Nick Zangwill, *Aesthetic Realism 1*, in THE OXFORD HANDBOOK OF AESTHETICS, *supra*, at 63.

¹¹¹ Vicki Jackson's suggestion that "constitutional law can be understood as a site of engagement between domestic law and international or foreign legal sources and practices" seems similar to this model. Jackson, *supra* note 3, at 114; see also Choudhry, *supra* note 12, at 835-38 (describing what he calls the "dialogical use of comparative legal materials"); Harding, *supra* note 12, at 424-27 (describing the "dialogic model").

seems clear that youth makes a difference, but in what way?¹¹² Is there some understanding that one should not be held fully responsible for one's acts if they do not flow from a fully formed character? Do we believe that children under the age of eighteen are not able to control their impulses as well as adults can, and should that make a difference?¹¹³ As we attempt to come to grips with issues like this, we can benefit from looking at how other countries have thought through similar issues.

This is an attractive and plausible picture, but the problem is that it does not apply to the relevant debate. In order for the kind of engagement that I described to happen, there has to be a way to talk to different people behind the consensus about the reasons for their votes. What the Supreme Court does in cases like *Roper* is not like that. As I have been emphasizing, the Court engages in norm-centric, not reason-centric analyses. There is no dialogue, and there is no engagement with other countries' rationales. And, for that matter, as I describe in more detail below in Part IV, it is not even clear how one should go about finding "the rationale" behind an international consensus against the juvenile death penalty.

In sum, analogizing the process of consulting foreign legal materials to consulting others' aesthetic judgments does not help us defend the Supreme Court's use of foreign legal materials in its constitu-

¹¹² The *Roper* Court had its own answer to this question when it conducted its proportionality analysis. See *Roper v. Simmons*, 543 U.S. 551, 569-70 (2005) (stating that youth is highly correlated with recklessness, susceptibility to peer pressure, and lack of fixed character). For some general discussions about the issue of culpability of juvenile offenders, see ANDREW VON HIRSCH & ANDREW ASHWORTH, *PROPORTIONATE SENTENCING: EXPLORING THE PRINCIPLES* 36-41 (2005); ZIMRING, *supra* note 64, at 49-69, 193-218; Laurence Steinberg & Elizabeth Cauffman, *A Developmental Perspective on Jurisdictional Boundary*, in *THE CHANGING BORDERS OF JUVENILE JUSTICE: TRANSFER OF ADOLESCENTS TO THE CRIMINAL COURT* 379, 393-99 (Jeffrey Fagan & Franklin E. Zimring eds., 2000); Fagan, *supra* note 64, at 207. Cf. Peter Strawson, *Freedom and Resentment*, 48 *PROC. BRIT. ACAD.* 1 (1962), *reprinted in* *FREE WILL* 72, 88 (Gary Watson ed., 2d ed. 2003).

¹¹³ The issue of culpability of juvenile offenders is, of course, connected to the broader issue of culpability generally and the debate between "choice" theorists and "character" theorists. For a representative discussion, see NICOLA LACEY, *STATE PUNISHMENT: POLITICAL PRINCIPLES AND COMMUNITY VALUES* 58-78 (1988); Peter Arenella, *Character, Choice, and Moral Agency: The Relevance of Character to Our Moral Culpability Judgments*, in *CRIME, CULPABILITY, AND REMEDY* 59 (Ellen Frankel Paul et al. eds. 1990); R.A. Duff, *Choice, Character, and Criminal Liability*, 12 *LAW & PHIL.* 345 (1993); H.L.A. Hart, *Negligence, Mens Rea, and Criminal Responsibility*, in *PUNISHMENT AND RESPONSIBILITY* 136 (1968); Jeremy Horder, *Criminal Culpability: The Possibility of a General Theory*, 12 *LAW & PHIL.* 193 (1993); Michael Moore, *Choice, Character, and Excuse*, in *CRIME, CULPABILITY, AND REMEDY*, *supra*, at 29.

tional decisions, although not necessarily for the reasons implied by Justice Thomas's dismissal of the whole business as an imposition of "foreign moods, fads, or fashions on Americans." As philosophers have noticed, there are instructive parallels between aesthetic judgments and moral judgments.¹¹⁴ Thinking about the Supreme Court practice of consulting other countries' laws can benefit from the analogy to aesthetic judgments, as the analogy suggests in what situations it would be appropriate to defer to or engage with others' opinions. None of those situations, however, apply to the present controversy over the use of foreign laws in constitutional interpretation, at least in the Eighth Amendment context.

D. Moral Consensus

Finally, instead of drawing analogies to an aesthetic consensus or a scientific consensus, what if we just treat the consensus against the juvenile death penalty the way it looks—as a moral consensus? In other words, what should be the significance of an international moral consensus for our evaluation of the juvenile death penalty?

The short answer to this question is that there is no significance because a consensus could always be wrong.¹¹⁵ This is not an idle objection. The institution of slavery, for instance, was supported by *ius gentium* after all.¹¹⁶ At the same time, the objection is too easy and too quick—and hence easy to dismiss with the simple rebuttal, "Of course it could be wrong and why would anybody deny that?" Consensus, of course, is no guarantee of truth. But neither the objection that consensus can be wrong, nor the rebuttal that nobody thinks that consensus is a guarantee of truth, sufficiently acknowledges the rhetorical force carried by consensus. It is unrealistic as a matter of everyday moral reasoning to believe that consensus has no significance in one's moral deliberation. The question is what the significance is.

In order to get at the question of the epistemic significance of consensus on moral issues, consider the following. Say I belong to an association called the "Dignity Society," the members of which all place a high value on human dignity. I am a member of the association because I find that the members hold the values that I hold and that I have similar moral instincts as they do on various issues. They

¹¹⁴ See, e.g., Eldridge, *supra* note 110; Zangwill, *supra* note 110, at 74-78.

¹¹⁵ Waldron, *supra* note 3, at 139.

¹¹⁶ *Id.* at 134; Alan Watson, *Seventeenth-Century Jurists, Roman Law, and the Law of Slavery*, 68 CHL-KENT L. REV. 1343, 1354 (1993).

are, in short, a group of like-minded people with whom I identify on moral issues. Consider further that I one day realize that my view on assisted suicide differs from the others in the group. There is a near unanimous consensus in the group that assisted suicide is as a categorical matter immoral and in violation of human dignity. And let's say I happen to hold the view that assisted suicide should be allowed precisely because I take human dignity seriously.

In this situation, it is clear that the mere fact of consensus should weigh heavily in my own moral deliberation. If people whose values I share and whose judgments I respect uniformly reach a conclusion different from mine, that is a reason for me to lose confidence in my own judgment and reexamine it, asking myself where I went wrong in my moral deliberation. (Here, we have to be careful not to confuse such loss of confidence in one's judgment with the pressure to conform that arises from a desire for approval and/or a fear of being shunned or socially isolated.) It is possible that I will still end up disagreeing with them on the issue in the end, but, by the end of that rethinking process, I should have gone through some adjustments in my thinking, either in my view about assisted suicide or in my more general views about dignity.¹¹⁷

Similarly, if I am unsure about a moral issue that implicates dignity concerns, I could proceed by surveying the members of the Dignity Society or I could come to a tentative conclusion about the issue and then seek to confirm it with others in the Society. The idea should be familiar and should not require a construct as fanciful as the "Dignity Society." We all have experiences of consulting members of various groups we belong to in order to test our intuitions about one matter or another. So this is one context in which "consensus" is epistemically significant. This discussion explains a situation in which we may take a consensus seriously. It seems to me that the vision is perfectly intelligible, and it explains why the mere existence of consensus can sometimes powerfully guide one's moral deliberation one way or the other. However, the situation I described here does not apply to the problem that this Article addresses.

Consider the following statements made by the *Roper* Court: "the United States is the only country in the world that continues to give official sanction to the juvenile death penalty";¹¹⁸ "[a]rticle 37 of the

¹¹⁷ I have in mind a process akin to that described in John Rawls' description of "reflective equilibrium." JOHN RAWLS, A THEORY OF JUSTICE 20 (1971).

¹¹⁸ *Roper v. Simmons*, 543 U.S. 551, 575 (2005).

United Nations Convention on the Rights of the Child, which every country in the world has ratified save for the United States and Somalia, contains an express prohibition on capital punishment for crimes committed by juveniles under 18";¹¹⁹ "the United States now stands alone in a world that has turned its face against the juvenile death penalty."¹²⁰ The *Coker* plurality, too, made note of how widespread the agreement on the issue of the death penalty for rape was when it stated 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," citing a UN study on capital punishment.¹²¹ And in *Atkins*, the Court referred to "the world community," in which "the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved."¹²²

These statements do not stress that those who share values that are common to ours have reached a conclusion contrary to ours. The emphasis is actually in the opposite direction: the juvenile death penalty is one of those norms that transcend cultural differences, and countries with different moral, cultural, and religious backgrounds all have reached an agreement on this particular issue. This, too, is a type of consensus, but one's attitude toward this kind of consensus should differ from my attitude toward a consensus from members of the hypothetical Dignity Society. The significance of the Dignity Society's consensus lies in the fact that those who share my moral premises have reached a uniform conclusion on some matter, and, if it turns out my conclusion differs from the consensus view, it makes sense to question how I can hold the Dignity Society's premises and the particular moral judgment in question without contradicting myself. But the "culturally transcendent" or "cross-cultural" consensus that the *Roper*, *Atkins*, and *Coker* courts appear to appeal to does not have that feature. What is significant about the consensus is precisely that those with wildly varying moral premises and outlooks have come to an agreement on this particular issue.

This kind of consensus, too, carries a special kind of force, but the question again is why and how it applies to the current debate. Let me examine several possibilities. The first possibility I will call the "Wisdom of Crowds" argument. The basic idea is this: individuals

¹¹⁹ *Id.* at 576.

¹²⁰ *Id.* at 577.

¹²¹ *Coker v. Georgia*, 433 U.S. 584, 596 n.10 (1977) (plurality opinion).

¹²² *Atkins v. Virginia*, 536 U.S. 304, 317 n.21 (2002).

have biases that come from their particular makeup and places in society. But aggregate those individuals' judgments together, and the group's collective judgment is often better than any particular individual's judgment within the group.¹²³ This is a familiar idea with numerous variants over time,¹²⁴ such as the saying, "Two heads are better than one"; John Stuart Mill's discussion of the value of diversity in truth finding¹²⁵ ("the marketplace of ideas"); and even, at least according to some, the adversary system.¹²⁶

Of course these are all very different ideas, but there is at least a family resemblance among them in a way that is relevant to the idea of objectivity and truth. One way of explaining why these decision procedures are likely to bring one closer to the right answer is that they eliminate biases that interfere with truth-finding. In this sense, they occupy the flipside of various moral theories, or, if "theory" is too strong, moral devices, whose appeal lies in their commitment to the pursuit of right answers through elimination of biases and distortions that result from one's particular, limited perspective. Plato's allegory of the cave warns of such distortions,¹²⁷ and the impulse to rid oneself of such distortions by taking a transcendent, unbiased, and objective viewpoint is evident in Kant's moral philosophy¹²⁸ as well as in contemporary formulations like "the veil of ignorance"¹²⁹ and "the view from nowhere."¹³⁰

I say that the first group of ideas and the second group of ideas are two sides of the same coin because they are both importantly

¹²³ See generally JAMES SUROWIECKI, *THE WISDOM OF CROWDS* (2004); see also Posner & Sunstein, *supra* note 12 (applying the Condorcet Jury Theorem to the foreign laws debate).

¹²⁴ See Thomas Kelly, *The Epistemic Significance of Disagreement*, in 1 *OXFORD STUDIES IN EPISTEMOLOGY* 167, 191 (Tamar Szabó Gendler & John Hawthorne eds., 2005) (discussing the view that diversity of views leads to better information); Aviezer Tucker, *The Epistemic Significance of Consensus*, 46 *INQUIRY* 501, 506-12 (2003) (arguing that a "heterogeneous consensus" is a uniquely reliable source of true beliefs).

¹²⁵ JOHN STUART MILL, *ON LIBERTY* (1859), reprinted in *ON LIBERTY* 5, 19-55 (Stefan Collini ed., Cambridge Univ. Press 1989).

¹²⁶ Cf. ROBERT NOZICK, *INVARIANCES: THE STRUCTURE OF THE OBJECTIVE WORLD* 94-95 (2001) (raising the possibility that including two biased jurors—one for each side—in each jury may result in more accurate decisions in the long run, as opposed to having each jury be composed of twelve unbiased jurors).

¹²⁷ See PLATO, *THE REPUBLIC* 220-51 (G.R.F. Ferrari ed., Tom Griffith trans., Cambridge Univ. Press 2000).

¹²⁸ See IMMANUEL KANT, *CRITIQUE OF PRACTICAL REASON* 3-5 (Lewis White Beck trans., Macmillan Publishing Co. 1956) (1788).

¹²⁹ RAWLS, *supra* note 117, at 136-42.

¹³⁰ THOMAS NAGEL, *THE VIEW FROM NOWHERE* 3-12, 138-43 (1986).

driven by the idea of elimination of bias. One main difference between the two groups is that the first group of theories eliminates biases by throwing all of them in one place and having them cancel each other out, whereas the second group of theories envisions the process of abstracting oneself away from one's particularities in order to attain a clearer perspective. But the goal is the same: arrival at an unbiased perspective. The appeal of these ideas is clear and familiar, and it seems plausible that some of the persuasive force of citation of an international consensus against a penal practice may derive from the idea of reaching the right answer by finding an idea that has been scrutinized from various perspectives and still survived.

I do not mention all these theories in order to criticize them but only to explore the epistemic appeal of an answer that comes out of a process in which various perspectives are represented. The question is whether this model is applicable in this context. There are three problems with this account here. First, it is not clear that the international consensus reflects a moral consensus, as opposed to, say, simply an opportunity for countries to express to each other how civilized and committed to human rights they are, whether or not they actually believe in the content of whatever they are signing onto.¹³¹ Second, as I have stated above,¹³² given our lack of clear understanding as to what decision procedure can bring us closer to the moral truth, we do not have sufficient grounds to trust the outcome of whatever surveys the Court has taken as a moral truth.

Third, there is a deeper problem here that is actually a specific form of the general worry about whether this is the right way to go about finding moral truths. The fact that different countries with wildly divergent moral, religious, and cultural perspectives can agree on the norm against the juvenile death penalty may signal that once we eliminate various biases that result from our particular perspective, the objective view delivers the conclusion that the juvenile death penalty is wrong. But there is something very odd about this argument.

The idea of supplying an unbiased answer by seeking an area of agreement among people from different perspectives crucially relies on the notion of what is and is not relevant in a particular inquiry. On politically contentious scientific issues like global warming and evolution, we would rightly be suspicious of "scientific" conclusions ad-

¹³¹ See Hathaway, *supra* note 73, at 2002-20 (describing the "expressive role" of human rights treaties).

¹³² See *supra* Part III.A-C.

vanced by ideologically biased groups because one's politics should have no bearing on such scientific truths. If you want to know whether there is a real estate bubble that could pop in six months, it would not make sense to listen only to real estate brokers because they have a stake in sustaining a certain version of reality whether or not it correctly reflects the empirical reality. And one has a good reason to distrust wine ratings given out by magazines whose advertising revenues are dependent on the makers of the wines that are being reviewed.¹³³ Perhaps one way of correcting such biases is to aggregate judgments given by people with biases in all directions and see where they come out.

This is all well and good, but what exactly are the biases that are being cancelled out (or abstracted from) in the juvenile death penalty context? People from different moral, religious, and cultural perspectives get together and agree that the juvenile death penalty is a terrible business. It is one thing to eliminate biases that are irrelevant to truth-seeking, but the "biases" that are being canceled out are precisely the kinds of biases that one needs to hold onto in order to navigate through a moral landscape.¹³⁴ If I happen to be against torture for deontological reasons, the additional knowledge that consequentialists are also against torture does not increase the strength of my moral conviction on the basis that any view that survived the process of deontologists' and consequentialists' biases "canceling each other out" is somehow "more objective" and "free from bias." That is like saying that a Newtonian physicist's belief in some feature about the universe is strengthened by the additional knowledge that an Aristotelian physicist happens to believe in it too. One's moral, religious, and cultural background forms one's moral universe and is directly relevant to the moral inquiry one might make; such background is not some "bias" that needs to be "cancelled out" or "eliminated" in order to reach the moral truth of the matter. It is in fact just the opposite; elimination of such biases is a good way of losing one's way around the moral map.¹³⁵

¹³³ See Gary Rivlin, *In Vino Veritas?*, N.Y. TIMES, Aug. 13, 2006, § 3, at 1 (reporting on the biases that affect ratings by major wine publications).

¹³⁴ Cf. ROBERT NOZICK, *THE NATURE OF RATIONALITY*, at xii (1993) (dealing with an extreme, absurd version of this problem—the claim that “the attempt to correct for biases itself [is] a bias”).

¹³⁵ Cf. NAGEL, *supra* note 130, at 140 (“As in metaphysics, so in the realm of practical reason the truth is sometimes best understood from a detached standpoint; but sometimes it will be fully comprehensible only from a particular perspective within the world.”); WILLIAMS, *supra* note 90, at 110 (criticizing attempts “to see philosophical re-

In other words, there is no reason to privilege the least common denominators among different moral perspectives as more likely to be moral truths than those that do not make it onto the list. It does mean that it will be politically easier to build a coalition against the juvenile death penalty than against torture, but that has nothing to do with the moral worths of the practices themselves.

Perhaps the key to the idea of cross-cultural moral truths is not that of objectivity or elimination of bias but that of universality or undeniability. That is, the best explanation of the fact that there is such an overwhelming consensus on a norm might be that the convergence reflects moral reality.¹³⁶ It is not that the least common denominator of moral views reflects moral reality any better than others; it is just that the reason there is convergence around certain ideas is because certain truths are “self-evident” or “undeniable.” Certain moral truths might be thought to be so obvious as to need no further justification, and that is why it would be wrong to think the convergence around such truths to be meaningless or accidental.¹³⁷ And such truths need not exhaust the universe of moral truths; they could just be the *minimum* required for a moral society.¹³⁸ The key idea here is not consensus but the obvious rightness of such truths.

flection in ethics as a jump to the universalistic standpoint” and the view that “the theoretical reasonings of the cool hour can do without a sense of the moral shape of the world, of the kind given in the everyday dispositions”); Raz, *supra* note 110, at 210 (“Ideal convergence cannot be a requirement that rules out parochial concepts or removes them to a lesser status. Rather, settling the question of the status of parochial concepts is necessary before one can establish what sort of convergence is necessary.”).

¹³⁶ Cf. Joseph Raz, *The Claims of Reflective Equilibrium*, 25 INQUIRY 307, 327 (1982) (“It is not a person’s divergence from others which would make him lose confidence in some of his views. It is the fact that the best explanation of the fact that those others converge away from him is that they converge around the truth.”).

¹³⁷ Consider a similar point by Nagel:

Although no single objective principle of practical reason like egoism or utilitarianism covers everything, the acceptance of some objective values is unavoidable—not because the alternative is inconsistent but because it is not *credible*. Someone who, as in Hume’s example, prefers the destruction of the whole world to the scratching of his finger may not be involved in a contradiction or in any false expectations, but there is something the matter with him nonetheless

NAGEL, *supra* note 130, at 154-55 (citation omitted).

¹³⁸ Cf. THOMAS NAGEL, *Williams: Resisting Ethical Theory*, in OTHER MINDS: CRITICAL ESSAYS 1969-1994 at 174, 180 (1995) (“[T]heoretical principles may be universal without being totalitarian; they may handle some conflicts of values without handling them all. They can be regulative, allowing room for a great deal of pluralism and culturally determined ethical variation within the framework that they define.”).

I do not deny the existence of such truths. I would consider the belief that slavery is immoral to qualify as one such truth. However, I doubt that the *Roper* court faced the kind of question that could be answered by reference to an obvious moral truth needing no further explanation. To be sure, the case implicated some moral principles that I would consider difficult to deny, such as: “One should not be blamed for something for which one is not responsible,” or, “One should not inflict pointless suffering on another,” or, “Juvenile offenders are less culpable than adult offenders.” But the question is how such principles could translate to concrete decisions like *Roper*.

Here it should be remembered that although the *Roper* case is frequently referred to as the “juvenile death penalty” case, it is more accurate to call it “the sixteen- and seventeen-year-old death penalty case,” given that this was the only group of offenders whose status changed through the *Roper* ruling. Before *Roper*, it was already unconstitutional to impose the death penalty on juveniles—defined as offenders who were younger than sixteen at the time of the crime.¹³⁹ Therefore, the question that the *Roper* Court faced was not whether the death penalty can ever be imposed on five-year-olds, which seems obviously problematic. Rather, the question the Court had to decide was a line-drawing question: Should the line be drawn at sixteen or eighteen?¹⁴⁰

This question, in turn, was framed in terms of line drawing, as opposed to standard setting, by the Court in its previous decisions, such as *Coker* and *Thompson*. When the Court held in *Coker* that death was disproportionately harsh for the crime of rape, Justice Powell dissented in part on the basis that “a bright line between murder and all rapes—regardless of the degree of brutality of the rape or the effect upon the victim” may not be “appropriate”¹⁴¹ and criticized the plurality for “not limit[ing] its holding to the case before [the Court] or to similar cases.”¹⁴² Similarly, when the Court held in *Thompson* that those who commit a crime at the age of fifteen or younger were not deserving of death, Justice O’Connor concurred in the judgment only.

¹³⁹ *Thompson v. Oklahoma*, 487 U.S. 815, 838 (1988) (holding that “the Eighth and Fourteenth Amendments prohibit the execution of a person who was under 16 years of age at the time of his or her offense”).

¹⁴⁰ *Roper v. Simmons*, 543 U.S. 551, 574 (2005) (discussing several concerns with line drawing and the practical differences between sixteen- and eighteen-year-olds).

¹⁴¹ *Coker v. Georgia*, 433 U.S. 584, 603 (1976) (Powell, J., concurring in part and dissenting in part).

¹⁴² *Id.* at 601 (Powell, J., concurring in part and dissenting in part).

She did so despite her agreement with the premise that “adolescents are generally less blameworthy than adults who commit similar crimes” because she did not think the specific conclusion followed that “all 15-year-olds are incapable of the moral culpability that would justify the imposition of capital punishment.”¹⁴³ Justice O’Connor still voted to vacate the sentence because the State of Oklahoma had not set a minimum age at which one could be sentenced to death. What Justice O’Connor wanted to see from legislatures was not necessarily *the* correct line, but rather “the earmarks of careful consideration” regarding the relative culpability of juveniles in deciding at what age the line should be drawn.¹⁴⁴

As this discussion illustrates, it is naïve to think that general moral propositions about the relative culpability of juveniles necessarily require the holding of the *Roper* case.¹⁴⁵ In order for them to be implemented, such moral principles have to be further specified with the aid of additional normative, pragmatic, and empirical considerations that are sensitive to specific factors present in the American criminal justice system and its relationship to the society it inhabits. Factors to consider include our history of slavery and racism,¹⁴⁶ our jury system (which requires that the jury, not the judge, must find the factors warranting the imposition of capital punishment),¹⁴⁷ our federal system of government, our understanding of the proper role of the judiciary in setting limitations on punishment, our confidence in whether the democratic process can accurately reflect the values that society does or should hold, when and whether over- and underenforcement is appropriate, and so on.¹⁴⁸

¹⁴³ *Thompson*, 487 U.S. at 853 (O’Connor, J., concurring in the judgment).

¹⁴⁴ *Id.* at 857.

¹⁴⁵ *Cf. Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting) (“General propositions do not decide concrete cases.”).

¹⁴⁶ For a discussion of the relationship between *Coker* and racial disparity, see, for example, RANDALL KENNEDY, RACE, CRIME, AND THE LAW 323-26 (1997); Barbara Holden-Smith, *Inherently Unequal Justice: Interracial Rape and the Death Penalty*, 86 J. CRIM. L. & CRIMINOLOGY 1571, 1572-73 (1996) (reviewing ERIC W. RISE, THE MARTINSVILLE SEVEN: RACE, RAPE, AND CAPITAL PUNISHMENT (1995)); Charles J. Ogletree, Jr., *Black Man’s Burden: Race and the Death Penalty in America*, 81 OR. L. REV. 15, 27-28 (2002).

¹⁴⁷ *See Ring v. Arizona*, 536 U.S. 584, 589 (2002).

¹⁴⁸ For a discussion of the kinds of particular considerations that should go into deciding the line-drawing issue, see Carol Steiker & Jordan Steiker, *Defending Categorical Exemptions to the Death Penalty: Reflections on the ABA’s Resolutions Concerning the Execution of Juveniles and Persons with Mental Retardation*, 61 LAW & CONTEMP. PROBS. 89 (1998). *See also* sources cited *supra* note 64 (discussing the difficult issue of when childhood ends and adulthood begins for the purposes of ascribing responsibility for

The argument is not that obvious, undeniable moral truths take only the form of general principles that need further specification in order to be action guiding—although in the juvenile death penalty context, I would argue that the principles implicated are not specific enough to decide the *Roper* question. There could also be specific situations in which one could confidently say that the death penalty for that particular defendant for that particular crime is wrong.

The Court in *Roper* did not take either option, but instead specified a rule somewhere in the middle. The idea was not for the Court to announce an undeniable principle, nor to announce a specific result that was obviously the only just result. Rather, the Court announced a general rule that was obvious as neither a general proposition nor a particular instance. As a result, its outcome cannot be defended as a truth that no one could deny was a moral fixed point.

I consider one final possibility: John Rawls's idea of overlapping consensus. An "overlapping consensus" refers to an agreement on certain norms among people from different moral, religious, or cultural backgrounds, even if the individuals disagree with each other about the reasons for endorsing such norms.¹⁴⁹ In fact, accounts of drafting the UN Universal Declaration of Human Rights confirm that the Universal Declaration drafters designed it to be an agreement on a set of rights, with the understanding that there may be disagreements over the ultimate philosophical justifications for such rights. As Jacques Maritain observed, an apt description of the Universal Declaration is the statement, "[W]e agree about the rights *but on condition that no one asks us why.*"¹⁵⁰ The drafters of the Universal Declaration were quite conscious of the problem of diversity; the solution they reached was to agree on rights, but to agree to disagree on reasons.¹⁵¹ The

acts). For a more general discussion about how deep, wide, narrow, or shallow constitutional decision making by the Supreme Court should be, see, for example, RICHARD H. FALLON, JR., *IMPLEMENTING THE CONSTITUTION* (2001); JAMES E. FLEMING, *SECURING CONSTITUTIONAL DEMOCRACY: THE CASE OF AUTONOMY* (2006); SUNSTEIN, *ONE CASE AT A TIME*, *supra* note 33.

¹⁴⁹ JOHN RAWLS, *POLITICAL LIBERALISM* 147 (1993); see also Charles Taylor, *Conditions of an Unforced Consensus on Human Rights*, in *THE EAST ASIAN CHALLENGE FOR HUMAN RIGHTS* 124, 124 (Joanne R. Bauer & Daniel A. Bell eds., 1999).

¹⁵⁰ Jacques Maritain, *Introduction*, in *HUMAN RIGHTS: COMMENTS AND INTERPRETATIONS* 9, 9 (UNESCO ed., 1949).

¹⁵¹ See MARY ANN GLENDON, *A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS* 77-78, 147, 221-22 (2001) (describing the deliberate attempt on the part of the drafters to avoid any discussion of first principles); LOUIS HENKIN, *THE AGE OF RIGHTS* 6 (1990) ("The international expressions of rights themselves claim no philosophical foundation, nor do they reflect any clear phi-

question is whether this idea of an overlapping consensus provides any justification for the persuasive force of international consensus against the juvenile death penalty.¹⁵² I believe the answer is no.

An overlapping consensus is essentially a political device.¹⁵³ The idea of an overlapping consensus is most powerful as a way of justifying political coercion and ensuring political stability among a group that consists of people of diverse backgrounds, cultures, and belief systems.¹⁵⁴ When a country resists following human rights norms because they are foreign to the country's culture, the existence of an overlapping consensus on the norm can be used as a way to justify enforcing the norm against the country's will. However, in order for overlapping consensus to be used this way, the requisite work to establish the ways in which the country's own belief system endorses the overlapping consensus has to have been done.¹⁵⁵ Overlapping consensus works as a justification of coercion only because the connections between the norm around which there is a consensus and individual belief systems that constitute a polity have been made.

losophical assumptions; they articulate no particular moral principles or any single, comprehensive theory of the relation of the individual to society. . . . The Universal Declaration of Human Rights, striving for a pronouncement that would appeal to diverse political systems governing diverse peoples, . . . shunned philosophical exploration.”); MICHAEL IGNATIEFF, HUMAN RIGHTS AS POLITICS AND IDOLATRY 78 (Amy Gutmann ed., 2001) (“Instead of a substantive set of justifications explaining why human rights are universal, . . . the Universal Declaration . . . simply takes the existence of rights for granted . . .”); Maritain, *supra* note 150, at 10-11 (“I am quite certain that my way of justifying belief in the rights of man and the ideal of liberty, equality and fraternity is the only way with a firm foundation in truth. This does not prevent me from being in agreement on these practical convictions with people who are certain that their way of justifying them, entirely different from mine or opposed to mine, in its theoretical dynamism, is equally the only way founded upon truth.”); see also JACK DONNELLY, UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE 40-43 (2d ed. 2003).

¹⁵² Perhaps when it comes to the norm against the juvenile death penalty, which specifies the minimum age of eighteen, the idea of “incompletely theorized agreement[s]”—agreements on particulars at the shallow level despite disagreements on deep principles—is more appropriate, given the norm's concreteness. SUNSTEIN, LEGAL REASONING, *supra* note 33, at 35 (emphasis omitted). For a discussion of the similarities and differences between the idea of incompletely theorized agreements and an overlapping consensus, see *id.* at 46-48.

¹⁵³ This statement needs to be refined, as Rawls was at pains to point out that there was a difference between “overlapping consensus” and *modus vivendi*. And one of the differences was that the contents of an overlapping consensus were moral and they were endorsed on moral grounds, albeit from different perspectives. However, it is also importantly limited in the sense that it is not meant to replace or compete with any of the underlying comprehensive doctrines. RAWLS, *supra* note 149, at 147-48.

¹⁵⁴ *Id.* at 148.

¹⁵⁵ See Taylor, *supra* note 149, at 137-38.

In other words, the idea of overlapping consensus presupposes consensus building around a set of norms that are arrived at through different comprehensive doctrines. It does not make comprehensive doctrines that drive one's endorsement of the norms themselves superfluous. Neither does it replace the process of endorsement of the norms from the perspective of one's comprehensive doctrine. This means that the process of endorsement of the norms—which, one might say, is what the *Roper* Court was involved in—cannot be helped along by the existence of the overlapping consensus itself. An overlapping consensus leaves moral convictions as they are.

The implications of those features of overlapping consensus for the topic of this Article are as follows. First, even if foreign legal materials that form a consensus against the juvenile death penalty are seen as a sort of overlapping consensus, the idea of an overlapping consensus is not designed to be used as a moral shortcut that makes our own moral evaluations superfluous or even any easier. We have to ultimately make our own moral judgments about the practice of the juvenile death penalty. Second, it is possible that an overlapping consensus can indeed help us improve our moral deliberations, but only if we are able to peek behind the consensus and see what it is based on, and whether some of the reasons cited by other countries apply to us as well. There may be some normative perspectives that would not fit with our constitutional tradition, but then it would be a surprise if we found that none of the reasons cited by other countries moved us in our own moral deliberation. But, of course, what this process of looking behind the overlapping consensus requires is that the Court move beyond the norm-centric analysis. As I have emphasized, the Court's current practice is correctly characterized as the norm-centric, not reason-centric, analysis. The next Part discusses why the Court is unlikely to alter its current mode of analysis.

IV. NORMS AND REASONS

Arguments in Parts II and III repeatedly came to the conclusion that citing foreign legal materials may make sense, but the instances in which it makes sense require courts to engage with the reasons behind comparative and international norms, as opposed to just norms. It is legitimate to wonder, then, whether there is a real problem here. Even though the Court's current practice may not be defensible, that does not threaten the idea of consulting foreign materials, and courts rarely perform up to standards articulated as ideals by academics anyway. Why not just say that the Supreme Court's practice of citing for-

eign materials can be defended in theory, even if the practice often falls short? That is, if the problem has to do with the norm-centric analysis, as opposed to the practice of citing foreign sources in domestic constitutional adjudication generally, why does it not end the debate? In fact, commentators who defend the practice of citing foreign sources tend to distance themselves from the actual Supreme Court practice.¹⁵⁶ Is it not the case that all that the Supreme Court has to do is to make the adjustment from the norm-centric analysis to the reason-centric analysis? Perhaps this is so, but there are two problems, one having to do with the Supreme Court's judicial minimalism, and the other having to do with the nature of foreign legal materials.

A. *Judicial Minimalism and Foreign Law*

In order for the Court to engage with other countries on why they do not permit the juvenile death penalty and to consider other countries' rationales in relation to our own understanding of the Eighth Amendment, the Court needs to come to grips with exactly what evil it is that the ban on cruel and unusual punishments exists to prevent. However, this is usually not the case. It is not just that Eighth Amendment jurisprudence has the usual gaps, ambiguities, and conflicts that one sees in law generally. Rather, there is a willful refusal on the part of the Court to commit itself to a theory of the Eighth Amendment, and the doctrinal steps it goes through to justify its decisions are precisely designed for the Court to avoid the theoretical questions as to *why* a penal practice should be prohibited, while seeking common ground on *what* should be prohibited among different normative perspectives.

The Court's reluctance to commit to a theory of punishment, or a theory of limits on punishments, in the capital and noncapital proportionality cases is evident in the doctrinal tests that the Court applies. In the capital proportionality cases, when considering the constitutionality of a particular penal practice—say, executing juvenile offenders—the Court first undertakes a survey of attitudes of legislatures and behaviors of juries to identify a national consensus on the practice

¹⁵⁶ See, e.g., Waldron, *supra* note 3, at 146 (“I am under no illusion, however, that the practice of the Supreme Court in *Roper* and in other cases actually answers to the characterization I have given. Practice often falls short of theory—particularly when the practitioners have not shown much awareness of the theory in question!” (footnote omitted)).

in question.¹⁵⁷ Second, the Court engages in an “independent proportionality analysis” to determine whether the Court agrees or disagrees with the consensus.¹⁵⁸ The first step is a culpability analysis in which the Court compares the crime or criminal to what it considers to be the worst category of crimes: first-degree murders committed by sane adults of normal intelligence.¹⁵⁹ The second step, in turn, considers whether the punishment would advance either the retribution or deterrence purposes of punishment.¹⁶⁰

There are a number of unanswered questions about how these different steps are related to one another.¹⁶¹ But what is important for our purposes is the Court’s avoidance of engaging with deep philosophical issues about the purposes of punishment and what limitations should be placed on it.¹⁶² Roughly speaking, the Court looks around the country and counts heads and then hands down announcements like “neither retribution nor deterrence provides adequate justification for imposing the death penalty on juvenile offenders” in *Roper*,¹⁶³ or “[w]e are not persuaded that the execution of mentally retarded criminals will measurably advance the deterrent or the retributive purpose of the death penalty” in *Atkins*.¹⁶⁴ This way of proceeding enables the Court to avoid the difficult task of sorting through the vexed issue of what to do when retribution and deterrence theories give conflicting counsel, and how to strike a balance when there are conflicts.

A similar pattern prevails in the imprisonment context in the Court’s proportionality-in-sentencing jurisprudence. The case law in this area is in flux, but the Court’s resistance to theorizing is obvious in the Court’s latest decision in this area, *Ewing v. California*, which held that a prison term of twenty-five years to life under California’s three-strikes law was not excessive for shoplifting by a repeat-offender.¹⁶⁵ The *Ewing* plurality reasoned that a “sentence can have a

¹⁵⁷ See cases cited *supra* note 34.

¹⁵⁸ See cases cited *supra* note 35.

¹⁵⁹ *Roper v. Simmons*, 543 U.S. 551, 568-70 (2005); *Atkins v. Virginia*, 536 U.S. 304, 318 (2002); *Tison v. Arizona*, 481 U.S. 137, 157-58 (1987); *Enmund v. Florida*, 458 U.S. 782, 797-98 (1982) (plurality opinion); *Coker v. Georgia*, 433 U.S. 589, 598 (1977) (plurality opinion).

¹⁶⁰ *Roper*, 543 U.S. at 571-72; *Atkins*, 536 U.S. at 319-20; *Enmund*, 458 U.S. at 798-99.

¹⁶¹ For a more extended discussion, see Lee, *supra* note 30, at 691-92.

¹⁶² Cf. Ristroph, *supra* note 32, at 315 (describing the proportionality jurisprudence in the capital context as utilizing the “overlapping consensus” approach).

¹⁶³ 543 U.S. at 572.

¹⁶⁴ 536 U.S. at 321.

¹⁶⁵ 538 U.S. 11, 30 (2003) (plurality opinion).

variety of justifications, such as incapacitation, deterrence, retribution, or rehabilitation” and announced that a sentence is not unconstitutionally excessive if it can be justified under any one of the traditional justifications of punishment.¹⁶⁶ In the *Ewing* case itself, the Court upheld the sentence on the grounds that the punishment “reflects a rational legislative judgment . . . that offenders who have committed serious or violent felonies and who continue to commit felonies must be incapacitated.”¹⁶⁷

Again, for the purposes of analysis, the point is to note the Court’s reluctance to adjudicate among conflicts among the traditional justifications of punishment. Rather, the Court simply asks whether *some* purpose of punishment is being advanced by the punishment in question, and, if so, that is sufficient for the Court to uphold the punishment. In both capital and noncapital contexts, then, the Court appears reluctant to devise a theory of Eighth Amendment proportionality that prioritizes one theory of punishment over the others, and its jurisprudence is designed to find a path that allows it to make decisions with minimal philosophical commitments.

Seen this way, the Court’s jurisprudence here is a classic instance of what Cass Sunstein has called “incompletely theorized agreements.”¹⁶⁸ The basic idea behind incompletely theorized agreements is that when there are several deep theories available to guide our decisions in an area of law and those theories conflict, the Court often avoids deciding deep questions and seeks areas of agreement among the different theoretical perspectives.¹⁶⁹ In other words, the juvenile death penalty is a cruel and unusual punishment because retribution theorists and deterrence theorists would agree—or at least so the Court claims—that it does not serve the purpose of punishment, even though they may disagree about *what* the purpose of punishment is. Mentally retarded offenders, too, should be exempt from the death penalty because the competing schools of thought on punishment can agree on the proposition that mentally retarded offenders should not be executed.

There are many reasons why the Supreme Court may find judicial minimalism attractive and why it may be normatively desirable.¹⁷⁰ It is

¹⁶⁶ *Id.* at 25.

¹⁶⁷ *Id.* at 30.

¹⁶⁸ SUNSTEIN, LEGAL REASONING, *supra* note 33, at 37.

¹⁶⁹ *Id.*

¹⁷⁰ *See id.* at 44-46.

beyond the scope of this Article to engage with this debate. The important thing is to see how this particular feature of Supreme Court jurisprudence in this area of law complicates the debate over citation of foreign laws. The recommendation that the Court engage with other countries' judgments by considering the reasons behind the international consensus on various penal practices, which I believe would be theoretically defensible, cannot be followed by the Court unless it changes its usual way of doing things.

In other words, there is a reason why the Court engages in the norm-centric, and not reason-centric, analysis, at least in this doctrinal context. The Court counts heads, but does not ask *why* when it looks at other countries. The Court has built Eighth Amendment jurisprudence so that it never has to answer the question why, or at least, it never has to commit itself to a reason for banning one penal practice or another, other than the reason that people with different theoretical commitments would agree on that particular outcome. The implication of the Court's tendency to avoid deep questions, count noses, and seek incompletely theorized agreements for the debate on citations of foreign laws, then, is that the Court is unlikely to become the kind of thoughtful, sophisticated comparativist that engages with other legal systems envisioned by some scholars¹⁷¹ unless it moves away from its judicial minimalist tendencies.

B. *Costs of Focusing on Reasons*

Another problem with the reason-centric analysis is that adopting this analysis is not costless. The process of comparison with other countries that focuses on reasons, as opposed to the norms that the reasons support, requires that we work with foreign legal materials that give reasons. Reason-centric analysis, as the name suggests, needs reasons. Therefore, adopting the reason-centric analysis would make unavailable a class of foreign legal materials that some would consider too important for the Court to ignore.

Take *Roper* for instance. As discussed previously, the Court noted that "the United States is the only country in the world that continues to give official sanction to the juvenile death penalty."¹⁷² The Court also mentioned several human rights conventions, including the UN

¹⁷¹ See, e.g., Jackson, *supra* note 3, at 114 (describing what she calls the "engagement" model).

¹⁷² *Roper v. Simmons*, 543 U.S. 551, 575 (2005).

Convention on the Rights of the Child, the International Covenant on Civil and Political Rights, the American Convention on Human Rights, and the African Charter on the Rights and Welfare of the Child, all of which include a prohibition of the juvenile death penalty.¹⁷³ The question is whether these foreign sources are susceptible to the reason-centric analysis.

As discussed in Part III.A, countries may come to the view that the juvenile death penalty should not be permitted for any number of reasons. In order to conduct a proper reason-centric analysis, the Court would have to explore why it is that different countries have bans on the juvenile death penalty and consider whether such reasons apply to our Eighth Amendment analysis. If there are different reasons why various countries believe the juvenile death penalty is undesirable, then the Court would have to engage with such different reasons separately.

This is not in itself a problem and, in fact, such a deliberative process probably leads to more thoughtful decision making on the part of the Supreme Court. But we should also be clear about what the Court would be losing, which is the argumentative force that draws on the existence of an overwhelming international consensus on an issue. And this is because what matters in the reason-centric analysis are the reasons behind the consensus, and not the fact of prohibition or the fact of consensus itself. That there is an *overwhelming* consensus ceases to be so impressive unless the Court is able to show that each country has converged on the same conclusion for the same reason and that that same reason is also important to us.

Perhaps a more serious loss that comes with adopting the reason-centric analysis is that it becomes more difficult to imagine what role various international human rights treaties cited in cases like *Roper* can play in constitutional interpretation. Human rights treaties, by design, leave theoretical issues of what justifies the rights they include obscure and are more accurately described as products of an overlapping consensus.

In fact, this feature of human rights treaties is their strength, and their purported lack of reliance on a “Western” metaphysics and worldview is what has enabled them to fight off charges of cultural imperialism. The issue of foundations of rights has dogged international human rights efforts from the beginning¹⁷⁴ and, as discussed

¹⁷³ *Id.* at 576.

¹⁷⁴ See the account contained in GLENDON, *supra* note 151, at 221-33.

above, the philosophical solution adopted early on was to agree on norms, but to agree to disagree on reasons behind the norms.¹⁷⁵ Documents of overlapping consensus seek agreement on concrete norms without reconciling different grounds that people cite for those norms. International human rights treaties are, therefore, willfully silent about the reasons behind the norms they adopt. What is important is that different nations can reach an agreement on a set of principles and norms, and the question why individual human rights provisions might be a good idea remains for individual signatories to determine.

This all means the reason-centric analysis, which is more defensible than the norm-centric analysis, is deeply incompatible with the way in which the Supreme Court approaches Eighth Amendment cases generally and an important set of foreign legal materials that may bear on Eighth Amendment issues. Therefore, we have a theoretical dilemma. The norm-centric analysis is indefensible for many of the aforementioned reasons, but adopting the reason-centric analysis is a false alternative, which carries the potential loss of an important set of foreign legal materials to draw on. The end result is that there are reasons to be pessimistic about the prospects of the Court adopting a form of comparative analysis in the Eighth Amendment context that can be defended.

CONCLUSION

This Article examined the idea of international consensus against a penal practice as persuasive authority in our interpretation of the Eighth Amendment. This Article first addressed the issue under the assumption that the Eighth Amendment should be read as a provision that places retributivist limitations on our institution of punishment. This Article then looked at the same issue without the retributivist assumption. The conclusion under either assumption is the same. The existence of an international consensus against a penal practice should not lead us to think one way or the other about the constitutionality of the penal practice under the Eighth Amendment, so long as the Court stays with what this Article has called the norm-centric analysis in consulting foreign sources. This Article also gave some reasons as to why the Court is unlikely to relinquish its current mode of

¹⁷⁵ See *supra* text accompanying notes 149-151.

analysis and explored some costs of giving up the norm-centric analysis and adopting the reason-centric analysis.

The conclusion this Article reached, however, is not all negative, because the criticism here is confined to the Court's use of foreign authorities in Eighth Amendment proportionality cases like *Atkins* and *Roper*. This Article's discussions have implications outside this narrow context, and the flipside of every negative discussion here suggests a defensible way of using foreign authorities, some of which, at least in theory, can be adopted by the Court in various legal contexts.

For instance, as discussed in Part III.A, if we are inexperienced relative to other countries on a matter of social policy, it is obtuse to think that the Court should not look to how other countries have dealt with a problem, and what kinds of impact others' solutions have had. The Supreme Court's discussion of the Dutch experience with euthanasia in *Washington v. Glucksberg*¹⁷⁶ is obviously appropriate for this reason. This kind of borrowing, however, does not work very well for something like understanding the meaning of "cruel and unusual," as the clause calls for a moral inquiry¹⁷⁷ and not merely an inquiry as to the policy impact of a given legal rule.¹⁷⁸

¹⁷⁶ 521 U.S. 702, 734-35 (1997).

¹⁷⁷ Accepting this view of the Eighth Amendment need not commit one to Ronald Dworkin's constitutional theory or philosophy of law. Compare RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 135-36 (1978) ("[I]t seems obvious that we must take what I have been calling 'vague' constitutional clauses as representing appeals to the concepts they employ, like legality, equality, and cruelty. The Supreme Court may soon decide, for example, whether capital punishment is 'cruel' within the meaning of the constitutional clause that prohibits 'cruel and unusual punishment.' . . . [T]he . . . question the Court . . . faces . . . is this: Can the Court, responding to the framers' appeal to the concept of cruelty, now defend a conception that does not make death cruel?"), with Joseph Raz, *Dworkin: A New Link in the Chain*, 74 CAL. L. REV. 1103, 1110 (1986) (reviewing RONALD DWORKIN, A MATTER OF PRINCIPLE (1985)) ("Dworkin's point here is sound . . . The framers of the Constitution intended to proscribe cruel and unusual punishment. . . . To put the point in a way that Dworkin does not, but which I find most congenial, the Constitution, by deploying many broad moral categories, gives discretion to the courts and directs them to use it in light of the true, or the best, moral understanding of what is cruel, etc."), and *id.* at 1115 ("[H.L.A.] Hart's position is that courts should follow the law and have discretion when the law does not determine a uniquely correct outcome in the case before them. When the law does not directly incorporate moral precepts (e.g., by abolishing the death penalty) but endorses their application by reference to them through the enactment of very general standards ('cruel and unusual punishment'), then it grants courts discretion to apply moral considerations to the case.").

¹⁷⁸ Indeed, the common belief that the Eighth Amendment implicates moral questions is precisely what makes the foreign law debate so controversial in this context.

Second, the discussion about the significance of aesthetic consensus shows a way in which consensus can prompt one to enter into a dialogue to attain a deeper understanding of the relevant evaluative criteria. But this model requires the Court to engage in reason-centric analyses, which the current Court may not be willing to undertake on a regular basis, as discussed in Part IV.

Or, as the discussion in Part III.D about the hypothetical “Dignity Society” illustrated, the Court may look around the world and consider emulating only the countries with values similar to ours and distancing ourselves from those countries with whom we would rather not be identified. As discussed in Part III.D, this model, too, is an awkward fit with how the Court treats Eighth Amendment cases, as the Court’s emphasis in cases such as *Roper*, *Atkins*, and *Coker* has been *not* that those who share values common to ours have reached a conclusion contrary to ours, but that there is an “overwhelming” consensus against certain penal practices among countries with different moral, cultural, and religious backgrounds. This is not to say that this type of thinking—“We are like *these* countries, and we are unlike *those* countries”—is entirely absent. Witness, for instance, Chief Justice Burger’s invocation of “the history of Western civilization” and “Judeo-Christian moral and ethical standards” in his notorious concurring opinion in *Bowers v. Hardwick*.¹⁷⁹ At the same time, the Court of late has seemed reluctant to engage in such a discussion about U.S. culture and its particular ethical tradition; such reluctance no doubt stems at least partly from the same reasons that have driven the Court away from reason-centric analyses.¹⁸⁰

¹⁷⁹ 478 U.S. 186, 196 (1986) (Burger, C.J., concurring).

¹⁸⁰ It should be noted that Justice Stevens, writing in *Thompson v. Oklahoma*, does refer to the view of “nations that share our Anglo-American heritage.” 487 U.S. 815, 830 (1988). However, he muddles the significance of the shared heritage when he also mentions the views of “the leading members of the Western European Community”: “West Germany, France, Portugal, The Netherlands, and all of the Scandinavian countries” as well as “Canada, Italy, Spain, and Switzerland,” and “the Soviet Union.” *Id.* at 830-31. Perhaps in *Lawrence v. Texas*, 539 U.S. 558 (2003), the Court employed the type of reasoning that involves dividing the world into those who are like us and those who are not, through the discussion of our “Western civilization.” *Id.* at 572. However, the discussion in *Lawrence*, too, is a bit obscure, as it is framed as responding to Chief Justice Burger’s “sweeping references . . . to the history of Western civilization and to Judeo-Christian moral and ethical standards,” and not as a freestanding discussion of what it means to be part of Western civilization. *Id.* at 571-73. Finally, when the *Roper* Court discussed England, it noted that “[t]he United Kingdom’s experience bears particular relevance here in light of the historic ties between our countries and in light of the Eighth Amendment’s own origins.” *Roper v. Simmons*, 543 U.S. 551, 577 (2005). How we should understand and evaluate the claim of “particular relevance” is, how-

Finally, as the slavery example in Part III.D illustrates, the Court may look for universal consensus on a moral question to find moral propositions that appear to hold universally, such as: “Slavery is immoral,” “Unjustified killing is immoral,” “One should not be blamed for something for which one is not responsible,” or “Juvenile offenders are less culpable than adult offenders.” However, as discussed in Part III.D, it is one thing to subscribe to the general proposition that “juvenile offenders are less culpable than adult offenders”; it is quite another to translate such a general proposition to a concrete legal decision such as the holding in *Roper*. The Cruel and Unusual Punishments Clause may incorporate a universal moral principle, but judicial enforcement of the clause must include not only purely moral considerations but also more fact-specific, pragmatic considerations on how best to implement a general moral principle.

Of course, as the Introduction made clear, this Article is about foreign legal materials as *persuasive authority*. This Article has not addressed the merits of the argument that foreign authority can be binding or constitutive in deciding what is “cruel or unusual” in interpreting the Cruel and Unusual Punishments Clause. In the current foreign law debate, an important school of thought has emerged, and the school of thought, which may be called the “International Constitution School,” defends the practice of citing foreign sources not just on the basis that they can serve as persuasive authority, but on the basis that we should start treating them as binding or constitutive.¹⁸¹ This school of thought questions whether a strict separation between domestic and foreign laws is descriptively realistic or normatively desirable and sees the boundary between the two to be flexible, fluid, permeable, dynamic, and constantly shifting. The School stresses the

ever, left unclear, as the Court quickly reverts back to the language of an international consensus.

¹⁸¹ For some examples of what I have in mind, see Cleveland, *supra* note 3; Flaherty, *supra* note 12; Koh, *supra* note 12; Slaughter, *supra* note 14. The titles of these articles—“Our International Constitution,” “Separation of Powers in a Global Context,” “International Law As Part of Our Law,” and “Judicial Globalization”—are good indicators of the general worldview of this school of thought. See also Harold Hongju Koh, *Paying “Decent Respect” to World Opinion on the Death Penalty*, 35 U.C. DAVIS L. REV. 1085, 1105-09, 1123-29 (2002) (discussing the relationship between the continued existence of the death penalty in the United States and its foreign policy efforts). But see Larsen, *supra* note 12, at 1318 (“[I]t is not clear by what authority the federal courts are licensed to rehabilitate the foreign policy of the United States. Foreign policy decisions have always been understood to be the domain of the political branches, and matters of foreign affairs are traditionally questions in which the courts are reluctant to intervene.”) (footnote omitted).

inherent benefits—and also the inevitability—of the increasing globalization of judicial thinking. The benefits of such dialogues are not simply limited to the possibility of “us” learning from “them” about “us.” Rather, the very distinction between “us” and “them” is challenged.

Because the focus of this Article is on the question of the persuasiveness of foreign legal materials, the model this Article has assumed looks overseas only in order to come to a better understanding of our own Constitution. The idea is to improve our laws by learning from others. The International School would not necessarily object to that, but there is a subtle shift in emphasis in their work, which is that we look overseas not because other countries’ laws will help us to understand our own constitutional norms, but because laws from elsewhere are (and, some would argue, have always been) part of our law in certain circumstances, and because there is sometimes a value in harmonizing our constitutional norms with prevailing international norms.

It is beyond the scope of this Article to normatively evaluate this school of thought, as the purpose of this Article has been limited to raising doubts about one common argument in this debate that may appear beyond dispute: that the Court’s current practice of citation of foreign laws can be justified on the grounds that foreign laws are persuasive or instructive in helping us think through our own constitutional issues.