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COMMENT

REFLECTIONS ON THE JUVENILE DEATH PENALTY: CONTRAVENTION OF PRECEDENT AND PUBLIC OPINION

Kim A. Lechner*

I. INTRODUCTION

In 1988 the juvenile homicide rate exceeded ten percent of total homicides.[1] Although a number of factors, including childhood poverty, child abuse, drug abuse (parental and child), and the availability of guns, may explain the increase in juvenile violent crime, no single reason emerges as the precipitating factor. The tragedy surrounding murder is not diminished by the fact that a homicide may have been committed by a juvenile offender. While it may serve some retributive function, executing children for their crimes does not provide an answer to increasing juvenile homicide rates.

Currently thirty-eight states permit capital punishment. Of these thirty-eight states, twenty allow the death penalty to be used on juvenile offenders. Nine states have no minimum age at which a juvenile may be sentenced to capital punishment and three states

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[1] CHARLES P. EWING, KIDS WHO KILL 169 (1990).

set the minimum at age fourteen or fifteen.[2] The most recent Supreme Court ruling on the constitutionality of the juvenile death penalty, *Stanford v. Kentucky,*[3] upheld a Kentucky statute allowing the practice by deferring to the Kentucky State Legislature to gauge public sentiment. Child welfare advocates can utilize *Stanford*'s disregard of precedent established in prior death penalty decisions, as well as legislative and other considerations, to weaken the Court's foundation of support for future challenges to juvenile death penalty statutes.

II. SUPREME COURT PRECEDENT AND THE DEATH PENALTY

The Eighth Amendment prohibition of "cruel and unusual punishment" controls the constitutionality of the Supreme Court's analysis of capital punishment.[4] For almost 100 years, Eighth Amendment issues have turned on the question of proportionality, (i.e., whether the severity of the punishment fits the severity of the crime, and the mental state of the actor).[5]

To set proportional levels of punishment in the Post World War II Era, the Court relied on what it called "contemporary norms of society."[6] For thirty years prior to *Stanford*, the Supreme Court determined what forms and under what circumstances capital punishment would be acceptable to the public by analyzing jury sentencing trends, state laws, and norms of international law.

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[2] STATE OF WISCONSIN LEGIS. REFERENCE BUREAU, BULL. 95-1, CAPITAL PUNISHMENT IN WISCONSIN AND THE NATION, 26 (1995).

[3] 492 U.S. 361 (1989) (4-1-4 plurality) (majority holding death penalty for 16 and 17-year-old offenders constitutional).

[4] U.S. CONST. amend. VIII.

[5] Solem v. Helm, 463 U.S. 277, 280 (1983).

[6] Trop v. Dulles, 356 U.S. 86, 101 (1958).

Stanford rejected this established mode of analysis. Considering the long line of death penalty cases decided before it, *Stanford* can be seen as an aberration.

A. "Evolving standards of decency"[7]

Recent Supreme Court jurisprudence on applying the Eighth Amendment to the imposition of the death penalty has turned on an assessment of whether such punishment is disproportional to the crime and, therefore, cruel and unusual. In *Trop v. Dulles*, the Court considered any practice in contravention of "evolving standards of decency that mark the progress of a maturing society" cruel and unusual.[8] In developing these standards, the Court turned to several indicators of public opinion, among them state legislation and jury sentencing trends.

Applying the *Trop* standard in *Furman v. Georgia,*[9] the Court struck down a Georgia statute which gave unguided discretion to juries to impose the death penalty.[10] The *Furman* Court ruled that states had to impose guidelines on sentences and delineate factors to consider when imposing the sentence, thus initiating a five-year moratorium on the use of the death penalty. During this five-year period, states worked to enact legislation that would satisfy the requirements of *Furman* by choosing one of two legislative models. Many states sought to impose a system of "guided discretion" on juries by limiting the classes of death-eligible crimes and creating a system to evaluate aggravating and

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[7] *Trop*, 356 U.S. 86 (1958).

[8] *Id.* at 101.

[9] 408 U.S. 238, 242 (1972) (5-4 decision).

[10] *Id.*

mitigating factors. Other states eliminated discretion altogether and passed mandatory death penalty legislation for enumerated crimes.[11]

Upholding a post-*Furman* Georgia death penalty statute in 1976, the Supreme Court held that the death penalty is not a *per se* violation of the Eighth Amendment.[12] Persuasive to the Court was Georgia's provision for a bifurcated procedure. Following this procedure, the jury heard additional evidence before deciding to impose the death penalty and was instructed to consider both aggravating and mitigating factors,[13] including the age of the defendant.[14]

Two years later, in *Lockett v. Ohio*,[15] the Court cemented its commitment to "guided discretion"[16] by striking down an Ohio death penalty statute because it did not permit the type of individualized consideration of mitigating factors required by the Eighth and Fourteenth Amendments. The rule in *Lockett* now controls further determination of the validity of specific death penalty statutes: a sentencer in capital cases must be permitted to consider any relevant mitigating factors,[17] including the age of the offender.

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[11] *See* Gregg v. Georgia, 428 U.S. 153, 179-180, 181 n.23 (1976) (listing state statutes).

[12] *Gregg*, 428 U.S. at 169.

[13] *Id.* at 173; *see* GEORGIA CODE ANN. § 26-1101 (1972).

[14] *Gregg*, 428 U.S. at 198.

[15] 438 U.S. 586 (1978).

[16] *See* Scott E. Sundby, *The* Lockett *Paradox: Reconciling Guided Discretion and Unguided Mitigation in Capital Sentencing*, 38 U.C.L.A. L. REV. 1147 (1991).

[17] *Locket,* 438 U.S. 586 (1978).

B. Limitations Regarding Juveniles under the Eighth Amendment

After the Court abandoned its *per se* prohibition on capital punishment, it was widely believed that the Court would be reluctant to uphold a death penalty statute applicable to minors. This belief was signaled by the Court's deference to popular sentiment regarding mitigating factors when setting the severity of punishment for a particular offense. *Eddings v. Oklahoma*[18] was the first juvenile capital case to come before the Court. While the Court did not address whether the death penalty as applied to a juvenile (in this case a sixteen-year old) was *per se* unconstitutional, it did vacate the youth's death sentence because it found that the sentencing court failed to meet *Lockett*'s mandate. Specifically, the sentencing court failed to take into account relevant mitigating factors besides age, in particular, the youth's upbringing and development.[19]

The Supreme Court squarely faced the issue of the juvenile death penalty in two subsequent cases decided within a year of each other. These decisions mark opposing determinations of the constitutionality of the juvenile death penalty. In *Thompson v. Oklahoma*,[20] the Court reversed the death sentence of a fifteen-year old offender. Relying on *Trop*'s "evolving standards of decency," the trends in legislative enactments,[21] jury behavior, and "the views . . . expressed by respected professional organizations, by other

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[18] 455 U.S. 104 (1982) (reversing and remanding).

[19] *Id.* at 104, 116 (acknowledging that the "age of a minor is itself a relevant mitigating factor of great weight.").

[20] 487 U.S. 815 (1988).

[21] *Id.* at 829 ("When we confine our attention to the 18 States that have expressly established a minimum age in their death-penalty statutes, we find that all of them require that the defendant have attained at least the age of 16 at the time of the capital offense.").

nations that share our Anglo-American heritage, and by the leading members of the Western European community,"[22] the *Thompson* court held that the death penalty as applied to a fifteen-year old was unconstitutional.[23]

A year later, the Court decided *Stanford v. Kentucky*[24] by a four-one-four plurality. *Stanford* affirmed death sentences of two youthful offenders -- a sixteen-year old and a seventeen-year old -- holding that the petitioners failed to carry their "heavy burden" of establishing a national consensus showing disapproval of the death penalty for juveniles over the age of sixteen.[25]

The *Stanford* Court analyzed the same statistical data regarding state legislation and jury sentencing used in *Thompson,* but reached the opposite conclusion.[26] The *Thompson* dissenters, now the authors of the *Stanford* plurality, surveyed state legislation and found no national consensus existed against the death penalty for minors. Although capital sentencing of juveniles was rare, the *Stanford* plurality opined that this rarity of juvenile death sentences was not indicative of a rejection of the punishment, rather it was the result of infrequent egregious homicides committed by juveniles.

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[22] *Id.* at 831.

[23] Additionally, the Court considered the culpability of the offender in terms of the juvenile mind and its unique position in the process of human psychological development. Juveniles were found to have a less developed and rational thought process than adults. Penological theories of deterrence and retribution -- their goals to punish the rational person for criminal behavior -- were, therefore, determined inapplicable to juveniles.

[24] *Stanford,* 492 U.S. 361 (1989).

[25] *Id.* at 373 (citing *Gregg*, 428 U.S. at 175).

[26] This curious result can be explained by examining Justice O'Connor's concurrence in *Thompson*. O'Connor confined her concurrence to the facts in *Thompson*, convinced the sentence of execution was cruel and unusual because Oklahoma failed to set a minimum age at which a defendant could be sentenced to death. Apparently, O'Connor was persuaded by the legislatures' deliberations in *Stanford* -- because the legislature considered at what age the penalty was appropriate, deference was due that decision.

The absence of a minimum age in some capital punishment statutes was not the result of an oversight by state legislators; rather, the Court found it to be a deliberate choice to permit the execution of juvenile offenders. According Justice Scalia, who wrote for the plurality, current standards of decency are best reflected in legislation.[27] Therefore, the existence of statutes providing for capital punishment of minors provide sufficient evidence to satisfy the *Trop* standard.

Based on *Eddings, Thompson*, and *Stanford*, it is clear that there is no legal bar to the execution of juvenile offenders. *Eddings* requires that all mitigating evidence, including age and youth, be considered in sentencing.[28] *Thompson* seems to allow for a substitution of the Court's judgment if a legislature fails to set a minimum age at which an offender can be executed,[29] and *Stanford* approves the execution of offenders sixteen and older at the time of the crime because that age is set by a state legislature.

III. LEGISLATIVE CONSIDERATIONS IN JUVENILE DEATH PENALTY ENACTMENT

Although the juvenile death penalty has been held constitutional, there are many other relevant issues which demand consideration before a legislative body enacts a juvenile death penalty statute. These issues include juvenile reasoning capacity, the goals of punishment, the goals of juvenile justice, the state as *parens patriae*, and public opinion.

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[27] *Thompson*, 487 U.S. 815 (1988).

[28] *Eddings*, 455 U.S. at 115-17.

[29] *Thompson*, 487 U.S. at 857-58, (O'Connor, J., concurring).

A. Juvenile Reasoning and Emotional Maturity

Juvenile thinking is characterized by a false sense of power and impaired judgment which can lead to outrageous acts of violence. Consequential thinking is not carried out among juvenile murderers, as evidenced by the fact that most murders committed by this group are unplanned.[30] Adolescents are more impulsive and less self-disciplined than adults. It can be reasonably asserted, therefore, that most juvenile offenders do not weigh the death penalty when acting impulsively or from fear or surprise.

Death, their own and other's, is not relevant to an adolescent. Death as a deterrent to behavior is invalid among adolescents because they lack a personal grasp of death.[31] Heath Wilkins, a juvenile murderer, wanted (and received) the death penalty over life imprisonment stating, "one I fear, the other I don't."[32]

In 1987, ninety-two percent of juvenile offenders on death row who had been convicted on felony murder charges had no specific intent to commit murder at the time of the crime.[33] Most juvenile murders occur without the necessary *mens rea* because unexpected circumstances arise while the felony is in progress. The youthful perpetrator panics and reacts suddenly and irresponsibly.

The Supreme Court has recognized psychological and behavioral differences between adults and minors. In *Bellotti v. Baird*,[34] the Court observed that "during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment" of adults. The *Eddings* Court, relying

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[30] *Id.* at 864.

[31] *Id.*

[32] *Stanford*, 492 U.S. at 400 (Brennan, J., dissenting).

[33] James R.P. Ogloff, *The Juvenile Death Penalty: A Frustrated Society's Attempt For Control*, 5 BEHAV. SCI. & L. 447, 452 (1987).

[34] 443 U.S. 622, 635 (1979).

partly on a report indicating that juveniles deserve less punishment, stated that age is more than chronological, but also "a time and condition of life when a person may be most susceptible to influence and to psychological damage."[35] Although crimes committed by juveniles may be as harmful to victims as those committed by adults, juveniles may have reduced capacity for self-control or for long-range thinking.[36]

A recent line of cases also indicates that the Court presumes minors are less capable of making important decisions than adults.[37] In these decisions, the Court recognizes the particular vulnerability of children, as well as their inherent inability to function in the same responsible manner as adults.

Despite these Court decisions, a growing body of literature among social scientists suggests that by the age of fourteen, most minors have basically the same ability to understand and reason about long term decisions as adults.[38] This research, used by capital punishment supporters to bolster a bright-line age for the death penalty, is erroneously relied upon for several reasons. The ability to make long-term decisions occurs only when the adolescent can take time to deliberate. As mentioned above, most juvenile homicides are spontaneous events, committed without premeditation or consideration of the consequences.

Even if one argues that adolescents possess reasoning skills equal to adults, a lack of experience as a framework for decision making results in different conclusions between the adolescent and the adult. Because of their lack of experience, adolescents act more irresponsibly and with more volatility than experienced adults in

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[35] *Eddings,* 455 U.S. at 115.

[36] *Id.*

[37] *See* Planned Parenthood of Pa. v. Casey, 505 U.S. 833 (1992), Ohio v. Akron Ctr. for Reprod. Health, 497 U.S. 502 (1990), H.L. v. Matheson, 450 U.S. 398 (1981) (upholding statutes requiring parental consent before a minor undergoes an abortion).

[38] Ogloff, *supra* note 33, at 449.

felonious situations.

B. The Goals of Punishment

While the dual penological goals, retribution and deterrence, may theoretically be effective when the death penalty is applied to adults, it is wrong to sweepingly assume these goals are met when the death penalty is applied to juveniles. The egocentrism of juveniles, coupled with a sense of immortality, and society's special place for children within the legal system, negates the realization of retribution and deterrence in the application of the death penalty to juveniles.

According to the Court in *Gregg,* capital punishment must serve a legitimate penological goal of either retribution or deterrence.[39] Retribution, or vengeance, is the oldest and most elemental theory of punishment.[40] Its purpose is to vent society's outrage and need for revenge. One commentator stated that "even if the execution of an adult . . . is permissible this justification loses its appeal when the object of that righteous vengeance is a child."[41] Because children are not fully mature in judgment and control, juvenile executions provide shallow satisfaction of society's need for retribution.[42]

Deterrence may be either specific or general. Specific deterrence is a mechanism by which the offender is disabled from committing future crimes.[43] While the death penalty is the ultimate form of specific deterrence, juvenile murderers have a very low

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[39] *Gregg*, 428 U.S. at 183.

[40] Ogloff, *supra* note 33, at 454.

[41] VICTOR L. STREIB, DEATH PENALTY FOR JUVENILES 35 (1987).

[42] Steven M. Scott, *Evolving Standards of Decency and the Death Penalty for Juvenile Offenders,* 19 CAP. U. L. Rev. 851, 865 (1990).

[43] Ogloff, *supra* note 33, at 453.

recidivism rate when released from long-term imprisonment.[44] Any need for the juvenile death penalty is thereby negated by the comparable specific deterrent effect of long-term imprisonment.

General deterrence seeks to inhibit others in society from committing similar crimes for fear of incurring the same punishment.[45] This premise may be true for society generally, but cannot be assumed for juvenile offenders as a group because of their underdeveloped thought processes.

C. Goals of Juvenile Justice

Juvenile justice, arising from the Progressive Movement at the turn of the century, is based on the principles of rehabilitation of the juvenile and protection of society through the use of non-punitive, treatment-oriented sanctions.[46] The foundation of the juvenile justice system is to protect and rehabilitate juvenile offenders. This is accomplished by balancing the best interest of the child against the needs of society.[47] Rehabilitation recognizes the uniqueness of children. It also recognizes that children lack fully developed thinking and judgment processes and should be given an opportunity to learn to become responsible adults.[48] While rehabilitation has historically been thought of as best for the child, the death penalty rejects the concept of rehabilitation.

Public sentiment has shifted away from policies of rehabilitation as juvenile crime has become more violent and the offenders younger. This is apparent in the waiver system, whereby

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[44] Streib, *supra* note 41, at 37.

[45] Ogloff, *supra* note 33 at 454.

[46] Suzanne D. Strater, *The Juvenile Death Penalty: In the Best Interests of the Child?,* 26 LOY. U. CHI. L.J. 147, 162 (1995).

[47] *Id.* at 163.

[48] *See* May v. Anderson, 345 U.S. 528, 536 (1953).

juvenile offenders may be transferred to adult criminal court, and tried and punished as adults.[49] The age of waiver varies among states, but all rest on the concept that the more serious the crime the child commits, the more mentally capable the child is to be presumed. Capital punishment of juvenile offenders, therefore, rejects the principals of one hundred years of juvenile justice, and the principals of rehabilitation.

D. The State as *Parens Patriae* and Executioner

Children's interests are considered and balanced against societal interests in all areas of the law, except when the child commits a capital crime.[50] For example, the Wisconsin Children's Code is clear in its intent: the "best interest of the child shall always be of paramount consideration."[51] As *parens patriae* the state is required to protect children and consider their "best interest".

The state has the power to act in *loco parentis* for the purpose of protecting the child because the child is presumed unable to care for him or herself. Through *parens patriae,* the child is subject to state control in addition to parental control.[52] This doctrine is the foundation in all areas of law relating to children.[53]

It is contradictory when the parental state is called upon to execute its own children. When the state executes juvenile offenders, it fails in its role as *parens patriae*. It is difficult to explain to a juvenile that a death sentence is in his or her best interest. Clearly the question becomes how a humane society, which promotes the welfare and rehabilitation of children one moment,

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[49] EWING, *supra* note 1, at 114.

[50] *Id.* at 168.

[51] WIS. STAT. ANN. § 48.01(2) (West 1987 & Supp. 1994).

[52] *In re* Gault, 387 U.S. 1 (1967).

[53] Strater, *supra* note 46, at 162.

would be willing to execute the same child the next.[54] The paradox lies in the fact that state legislatures enact laws protecting children and also laws legalizing the execution of children.

E. Public Opinion

The Supreme Court, in determining the constitutionality of the death penalty, looks to the acts of state legislatures as measures of public opinion. Although the Court in *Stanford* rejected the determination of sentencing juries as objective indicia measuring the evolving standards of decency, legislatures are free to examine these sentences in assessing public opinion.[55]

Between 1984 and 1993, not one state enacted a death penalty for juvenile offenders despite the 1989 *Stanford* decision. In fact, the years 1985 through 1995 saw eight states raise their minimum death sentencing age or abolish the juvenile death penalty altogether.[56] In 1994 and 1995, Kansas and New York, respectively, passed death penalty laws; however, both states refuse to execute juvenile offenders, setting a minimum age at eighteen.[57]

Although twenty-five states allow for capital sentencing of juveniles, very few juries choose to do so. From 1973 through 1992, 114 juveniles received a death sentence.[58] Between 1964 and 1985, the United States did not execute anyone for crimes

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[54] *Id.* at 172.

[55] *See Thompson*, 487 U.S. 815; *Stanford*, 492 U.S. 361.

[56] Scott, *supra* note 42, at 860. The breakdown is as follows: age raised to seventeen (one state), eighteen (six states), banned (one state).

[57] STATE OF WIS. REFERENCE BUREAU Bull., *supra* note 2, at 25.

[58] Ved P. Nanda, *The United States Reservation to the Ban on the Death Penalty for Juvenile Offenders: An Appraisal Under the International Covenant on Civil and Political Rights,* 42 DEPAUL L. REV. 1311, 1312-13 (1993).

committed as a minor.[59] This reluctance to sentence or execute minors is consistent with the findings of a recent research study exploring community sentiment about the juvenile death penalty.[60]

Recently, the Florida Supreme Court held the death penalty, as applied to a person who was fifteen years of age when committing the crime in question, unconstitutional, because it violated the "cruel or unusual punishment" clause in the State constitution.[61] Florida's statute sets no sentencing minimum age, and the court appears unwilling to push the envelope and test the *Thompson* decision.

Under *Stanford*, the Supreme Court turned to state legislatures for assessing public opinion regarding capital punishment as applied to juvenile offenders. Yet the court failed to look to public opinion, embodied in all areas of juvenile law in order to clearly perceive public sentiment regarding juveniles.

When measured by the lack of juvenile death penalty acts in the last ten years, the jurors' reluctance to utilize the juvenile death penalty, and public sentiment embodied in other areas of juvenile law, public opinion weighs against the execution of juveniles and indicates the need for overturning current juvenile death penalty legislation.

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[59] *Id.* at 1319.

[60] Norman J. Finkel et al., *Killing Kids: The Juvenile Death Penalty and Community Sentiment*, 12 BEHAV. SCI. & L. 5, 8-9 (1994). This study utilized subjects identified through *voir dire* as death qualified subjects to determine whether jurors would be willing to give the death sentence on a case-by-case basis. Three fact patterns similar to *Thompson, Enmund,* and *Wilkins v. Missouri* were distributed to the subjects, along with jury instructions and capital sentencing instructions. Two experiments varying the age and severity of the crime found it highly improbably that, under any circumstance, juries would sentence an offender under age eighteen. *Id.* at 18-19.

[61] Allen v. State, 636 So. 2d 494 (Fla. 1994) (per curiam).

IV. CONCLUSION

Dependence on the juvenile death penalty as part of the answer to increasing juvenile homicides only delays the search for an acceptable means of reducing violent juvenile crime.[62] Although constitutionally permissible, the practice benefits neither the juvenile nor society. The juvenile death penalty has been tried sufficiently long enough in American history to be found wanting.

The necessary legislative considerations taken individually may or may not persuade against the enactment of the juvenile death penalty. Considered as a totality, however, these considerations strengthen the premise that the juvenile death penalty must be rejected by state legislatures, even in the face of rising juvenile homicide rates. Though appealing to "tough on crime" politicians and citizens, the juvenile death penalty is a short-sighted placebo to a deeply rooted complex problem.

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[62] Victor L. Streib, *Excluding Juveniles from New York's Impendent Death Penalty*, 54 ALB. L. REV. 625, 677 (1990).