

Behavioral Science and the Juvenile Death Penalty

Gregory B. Leong, MD and Spencer Eth, MD

Behavioral science data included in an amicus brief has been introduced into a recent Supreme Court decision (*Thompson v. Oklahoma*) involving the juvenile death penalty. However, a close examination of the data fails to provide support for either the pro- or antijuvenile death penalty position.

The juvenile death penalty, or capital punishment of individuals who committed offenses while under the age of 18 years, remains a highly controversial issue. An emotionally charged milieu has surrounded the current debate over whether the juvenile death penalty is a violation of the Eighth Amendment prohibition against cruel and unusual punishment. In addition, psychiatric and psychological material has been introduced into the fray. In this article, we will examine the use of behavioral data in resolving the legality of juvenile capital punishment. Before doing so, we will describe the present status of the juvenile death penalty in the United States.

Dr. Leong is assistant professor of psychiatry, School of Medicine, University of California, Los Angeles; Staff Psychiatrist, West Los Angeles Veterans Administration Medical Center. Dr. Eth is assistant professor of psychiatry, School of Medicine, University of California, Los Angeles; clinical associate professor of psychiatry, School of Medicine, University of Southern California; acting chief of psychiatry, West Los Angeles Veterans Administration Medical Center. Address reprint requests to: Gregory B. Leong, MD, Mental Health Clinic (B116A12) West Los Angeles VAMC 11301 Wilshire Blvd. Los Angeles, CA 90073.

Presented in part at the 19th Annual Meeting, American Academy of Psychiatry and the Law, San Francisco, CA, October 21, 1988.

Capital Punishment for Juveniles

The death penalty has been an increasingly contentious topic in recent times. Between the *Furman*¹ decision in 1972 and Supreme Court decisions starting in 1976, principally *Gregg*,² the constitutionality of the death penalty remained in doubt. Further, there were no executions in the United States between 1967 and 1977.³ However, public sentiment has begun to favor capital punishment,⁴⁻⁷ after polls indicated that less than half the country supported capital punishment just over 20 years ago.^{4,5} Major justifications for the death penalty include deterrence and retribution.⁸⁻¹⁰ Critics of capital punishment have noted the apparent inequity of executions as tabulated by ethnicity and region.⁷ Other criticisms of capital punishment involve social and moral concerns.¹¹⁻¹³

Between 1806 and 1882, only two children under fourteen were sentenced to death and executed in the United States; both were black slaves.¹⁴ Of the 14,029 executions in the United States recorded since 1642, only 2 percent

(287) have involved persons under age 18. Interestingly, 192 of these have occurred after 1900, i.e., after adoption of the juvenile justice system in the United States. And of the 192, 93 percent were for capital crimes committed by juveniles aged 16 and 17. From a racial viewpoint, about two-thirds of the 287 executed during the past 340 years under the juvenile death penalty have been black.⁶

Despite its relative rarity, the constitutionality of juvenile capital punishment is unclear. In 13 states and the District of Columbia, the juvenile death penalty is prohibited.^{15,16} In contrast, 19 states have no minimum age expressly stated in their death penalty statutes.¹⁶ Clearly, legislative and operational disparity in the juvenile death penalty has occurred. From an international perspective, the juvenile death penalty has been abolished in most Western countries and the Soviet Union.¹⁶

Historically, the juvenile death penalty was permissible under English common law. Under the age of seven, children were believed to be incapable of committing a crime, because they could not form the *mens rea* or criminal intent. Between the ages of seven and 14, juveniles were similarly held to be incapable of forming the *mens rea*. However, this was a rebuttable presumption; and, if proven, children could be found guilty and executed for the commission of capital offenses. After age 14, juveniles were assumed to have the capacity to form the *mens rea* by their ability to distinguish right from wrong⁴ and thus be subject to the death penalty. Given the

connection between English common law and American law, these rules have generally continued in both countries with modification. For example, the juvenile death penalty has been not used in England since the abolition of the capital punishment for persons under 16 in 1908.¹⁷ More recently, several American states have proscribed the juvenile death penalty.^{3,15,16}

Recent Supreme Court Activity

The Death Penalty for 15-Year-Olds The current American ambivalence about the juvenile death penalty can be illustrated by *Thompson*,¹⁶ decided in the past Supreme Court term. In this case, 15-year-old William Wayne Thompson was convicted of murdering his former brother-in-law along with three confederates. Thompson received the death penalty under Oklahoma law, and his death sentence was upheld on appeal to Oklahoma's highest court.¹⁸

On appeal to the United States Supreme Court, Thompson's death sentence was overturned.¹⁶ The voting of the justices in this case involved a plurality opinion, thus it is not altogether clear that capital punishment is proscribed for all 15-year-old adolescents. Even if their ruling prohibits execution of individuals who were 15 at the time of the crime, juveniles 16 or 17 are still subject to capital punishment. Nevertheless, the plurality, concurring, and dissenting opinions need to be examined.

Justices Stevens, Brennan, Marshall, and Blackmun signed the plurality opinion.¹⁶ They reversed Thompson's death sentence as violating the "cruel and un-

usual punishment” prohibition of the Eighth Amendment for the following reasons: (1) the “evolving standing of decency” that a civilized society should reject the death penalty for a person less than 16 years old at the time of the crime; (2) the ascendancy of those favoring the abolition of the death penalty, including a number of state legislatures (for juveniles under 16 at the time of the crime), the American Bar Association, the American Law Institute, and many in the international community; (3) the behavior of juries in not imposing the death penalty for offenders under 16, suggesting that such a sentence is “now generally abhorrent to the conscience of the community”; and (4) the “juvenile’s reduced culpability” as a result of inexperience, less education, less intelligence, and greater susceptibility to emotional or peer pressure than an adult, rendering him or her less able to evaluate the consequences of his or her conduct. The first three reasons given in the plurality opinion reflect a moral viewpoint. The fourth reason, involving the “juvenile’s reduced culpability,” appears to be largely based upon psychiatric and psychological evidence.

In a separate concurring opinion.¹⁶ Justice O’Connor noted that a national consensus probably existed for prohibiting capital punishment of those under 16 at the time of the crime, but she did not commit herself whether this probable consensus should be adopted as law. She concurred with the plurality opinion to overturn Thompson’s death sentence on the basis that Oklahoma law did not explicitly set a minimum age for capital

punishment. Justice O’Connor’s opinion appears to defer the question of the constitutionality of the juvenile death penalty to the wisdom of state governments, at least for those under 16. Even if she assumes that adolescents are generally less blameworthy than adults who commit similar crimes, she did not believe that this fact implied that they lacked moral culpability. Interestingly, she commented that: “The conclusion I have reached in this unusual case is itself unusual.”

Justices Scalia, Rehnquist, and White wrote the dissenting opinion.¹⁶ They agreed that the statistics demonstrate the rarity of executions of 15 year-olds but found no legal basis that those under 16 cannot be mature and sufficiently responsible to deserve the death penalty. They did acknowledge that some minimum age for capital punishment should exist, as it had under common law, but failed to state what it ought to be.

The common thread among all the *Thompson* opinions is that below a still undefined age, juveniles are immune to capital punishment.

The Death Penalty for 16 and 17-Year-Olds The Supreme Court has recently granted writs of certiorari to two juvenile cases, *Wilkins*¹⁹ and *High*.²⁰ The former involves a 16-year-old and the latter a 17-year-old.

In *Wilkins*, the juvenile represented himself and asked for the death penalty at the trial court level. In an appeal to the Missouri Supreme Court, the death sentence was upheld by a four to three margin. The dissenting opinions introduce some important concepts. All three

dissenting justices considered Wilkins' age, cognitive-emotional disorder, and drug abuse as mitigating factors that should reduce his sentence to life imprisonment without the possibility of parole. This dissenting opinion illustrates the weighing of psychiatric testimony as mitigating factors in this case but does not imply that such evidence is the grounds for the prohibition of the juvenile death penalty for every case. In a separate dissenting opinion one justice wrote: "Regardless of the current belief of many that the death penalty is a deterrent to crime, utilization of the death penalty in cases such as this only serves to bury and cover up the failures of our existing social and penal programs." This opinion underscores the moral argument that the death penalty is a result of societal failures.

High, involving an individual convicted of a capital offense committed while 17, raises no specific psychiatric issues.

Now that the Supreme Court numbers nine justices again, the outcome of *Wilkins* and *High* may provide a definitive ruling on the constitutionality of the juvenile death penalty in the case of 16 and 17-year-olds.

Amicus Briefs by Psychiatric Organizations

Two mental health organizations, the American Society for Adolescent Psychiatry and the American Orthopsychiatric Association signed an *amicus curiae* brief²¹ in support of the arguments against the juvenile death penalty in *Thompson*. The brief identifies two pri-

mary objections to capital punishment. First, "... adolescence is a transitional period between childhood and adulthood in which young people are still developing the cognitive ability, judgment, and fully formed identity or character of adults." Second, "[a]dolescents who commit murder suffer from serious psychological and family disturbances which exacerbate the already existing vulnerabilities of youth." This argument relies on the data published in the psychiatric literature.²²

These same two organizations have jointly signed a second *amicus* brief for *Wilkins* and *High*.²³ In addition to essentially identical arguments as their brief for *Thompson*,²¹ they make additional arguments that have substantial overlap with the plurality opinion of *Thompson*.

Developmental Perspective

Development is an asynchronous process, with "different 'maturities' occurring at different ages."²⁴ With regard to biological development, puberty refers to the marked physical maturation that occurs in almost every system of the body in both males and females starting at about 10 years of age. Menarche has occurred for most girls by around 13 years, while most boys have achieved their first ejaculation of seminal fluid at about 14 years of age.²⁵ These events have profound psychological ramifications and may serve as organizers for the consolidation of the youngster's sexual identity. The pubertal growth spurt is generally over by age 14 for females and 17 for males, at which

time their physical development may be essentially complete. The fact that teenagers are physically mature is consistent with their abundant capacity to commit crimes. The 1983 United States age-specific arrest rates peaked at 17 for burglary and robbery.²⁶ Moreover, 7 percent of the 18,692 suspects apprehended for murder and nonnegligent manslaughter in 1984 were teenagers.²⁷

There are also significant mental changes that characterize adolescence. In the cognitive realm, Piaget²⁸ described the concrete operational stage during which the individual is able to apply logical principles to the world without the interference of personal perception. This level of understanding is consolidated by 13 years of age and remains the dominant intellectual mode for most people throughout their lives, although some fraction of adults later reach the stage of formal operational thought associated with abstraction and complex transformation. This highest stage of cognition is not essential for the lawful conduct of human affairs. Corresponding to Piaget's stage of concrete operations is Kohlberg's²⁹ conventional level of moral development where the individual's value judgments conform to the expectations of family, community, and nation. A minority of people advance to the postconventional stage of moral development consistent with a search for a universal or transcendent value system. This ultimate level of moral thought is not necessary for socialized behavior.

The Supreme Court has come to recognize the intrinsic biological and psy-

chological imperative in at least one context. Adolescent females are capable of conceiving and bearing children several years before they are granted the legal right to marry without parental consent. The Court, in *Bellotti v. Baird*,³⁰ abandoned the arbitrary age of 18 as the youngest age that a woman can exercise the right to terminate her pregnancy. Instead, if a minor "satisfies the court that she is mature and well enough informed to make intelligently the abortion decision on her own, the court must authorize her to act without parental consultation or consent." Subsequent to this ruling, virtually all adolescents became successful in independently obtaining abortions. Billick³¹ favors the inclusion of adolescents as competent decision-makers on the basis of their developmental status. He selects 14 years of age as providing an acceptable margin of at least two years from the time of the expected achievement of a level of cognitive and moral development that is adequate for functioning as a citizen in our society.

Arguing that adolescents are physically, cognitively, and morally comparable to adults is yet another assault on the mythology of adolescence. Traditional wisdom held that adolescence was, "a time of crisis, often of great crisis."³² Teenagers were seen as buffeted by aggressive and sexual impulses, resulting in symptomatic turmoil. The available empirical data, however, paint a very different picture. Disruption and distress are not normative features of this period.³³ Rather, most adolescents are reasonably happy, law abiding mem-

bers of the community. There are developmental tensions facing the teenager, but there are phase-specific challenges throughout the human life cycle, including those confronting adults.³⁴ Shielding adolescents from full accountability for their actions ignores their competence and deprives them of an opportunity for an empowering experience.³⁵ Almost a half century ago, Bender and Curran³⁶ observed that: "The mechanisms in children and adolescent murderers are different and that the latter group appear to show the mechanisms seen in adult aggressive criminals." From a developmental perspective, it is appropriate and proper that adolescents be held to the same standards as adults.³⁷

Recent Neuropsychiatric Studies of Death Row Inmates

Recent neuropsychiatric studies of violent individuals convicted of capital offenses have yielded significant findings. In their study of 14 of the 37 death row inmates who committed capital crimes while juveniles, Lewis *et al.*²² found the following: (1) 11 had a history of head trauma; (2) nine had documented evidence of severe neurological abnormalities on physical examination or EEG; (3) seven were psychotic during the examination or had a history of previous psychosis: four had histories consistent with severe mood disorders, and three had a history of periodic paranoid ideation; (4) only two had IQ > 90; and (5) 12 had a history of being physically or sexually abused. In their study of 15 adult death row inmates, the same research group³⁸ also documented significant neuropsychiatric findings, includ-

ing: (1) all 15 had a history of head injury; (2) 10 had evidence of cognitive dysfunction by neuropsychological testing, although all but one had a normal IQ; (3) nine gave histories of psychiatric symptoms during childhood, with four having attempted suicide in childhood or adolescence; and (4) six had a chronic psychosis; three were episodically psychotic; and two met criteria for bipolar disorder. In another report of these 15 adult death row inmates,³⁹ parental physical and/or sexual abuse were found in 13, with eight having been victims of potentially filicidal assaults. In the two studies involving neuropsychiatric findings,^{22,38} the authors contend that such neuropsychiatric findings could have been used as mitigating factors during the sentencing phase.

The reasonable conclusion from these neuropsychiatric studies of death row inmates is that both juvenile and adult groups have significant findings. Moreover, the study of adult death row inmates catalogued similar, although not identical, clinically significant neuropsychiatric findings.³⁸ As such, these two groups are not readily distinguishable. Nothing further can be reasonably concluded from these data. In fact, the authors made no reference to proscription of the death penalty based on this data. There is no doubt, however, that neuropsychiatric findings can have relevance in the sentencing phase on an individual basis.

Discussion

The use of behavioral science data as a basis to argue against the juvenile

death penalty does not appear to rest upon a solid foundation. When psychiatric principles are employed in a legal context, a standard generally defined as "reasonable medical certainty" is minimally necessary. Admittedly, reasonable medical certainty does not have rigorous definition,⁴⁰ but reflects the level of confidence maintained by the psychiatric experts for their opinions,⁴¹ which should be consistent with "scientific reality."⁴² The research²² cited in the *amici* briefs documented significant neuropsychiatric findings in individuals on death row who committed capital offenses while juveniles. However, the neuropsychiatric symptoms in these individuals cannot with reasonable medical certainty be distinguished from the neuropsychiatric status of those condemned to death for committing capital offenses while adults.

Criminal responsibility is based on the ability to distinguish right and wrong.¹⁴ The behavioral science data support sufficient cognitive, moral, biological, and psychosexual development of adolescents such that they are in most ways comparable to adults. Although emotional immaturity exists in many adolescents, many adults never progress beyond this "adolescent" stage and yet are subject to legal sanctions as an adult. There is an insufficient basis to reach a level of reasonable medical certainty to argue that adolescence is special enough to exclude the death penalty on psychological grounds.

A lack of consensus by major psychiatric and psychological organizations on the unconstitutionality of the juvenile

death penalty based on behavioral science data likely exists. The American Psychiatric Association, American Psychological Association, American Academy of Child and Adolescent Psychiatry, and the American Academy of Psychiatry and the Law have not filed *amicus* briefs for either anti or pro-juvenile death penalty positions.

The juvenile death penalty, like the death penalty in general, presents several social, moral, and legal complexities. Interestingly, the British abolished the juvenile death penalty for those under 16 in 1908 long before any of the present behavioral science data in the *amicus* briefs was known. Our present behavioral science data do not present an adequate foundation to argue for or against the juvenile death penalty. Personal opinions are strongly held on an emotional issue such as the juvenile death penalty, but they should not be supported by equivocal scientific arguments. The introduction of behavioral science data serves only to confound the juvenile death penalty as fundamentally a moral issue.

References

1. Furman v. Georgia, 408 U.S. 238 (1972)
2. Gregg v. Georgia, 428 U.S. 153 (1976)
3. Streib VL: Death Penalty for Juveniles. Bloomington, Indiana University Press, 1987
4. Bedau HA: Introduction. American attitudes toward the death penalty, in The Death Penalty in America (ed 3). Edited by Bedau HA. Oxford, Oxford University Press, 1982.
5. Vidmar N, Ellsworth PC: Research on attitudes toward capital punishment, in The Death Penalty in America (ed 3). Edited by Bedau HA. Oxford, Oxford University Press, 1982.
6. Streib VL: Death penalty for children: the American experience with capital punish-

- ment for crimes committed while under age eighteen. *Oklahoma Law Rev* 36:613-41, 1983.
7. French LA: Boundary maintenance and capital punishment: a sociological perspective. *Behav Sci Law* 5:423-32, 1987.
 8. Gibbs JP: Preventive effects of capital punishment other than deterrence, in *The Death Penalty in America* (ed 3). Edited by Bedau HA. Oxford University Press, 1982.
 9. King GD: On behalf of the death penalty, in *The Death Penalty in America* (ed 3). Edited by Bedau HA. Oxford, Oxford University Press, 1982.
 10. Van den Haag E: In defense of the death penalty: a practical and moral analysis, in *The Death Penalty in America* (ed 3). Edited by Bedau HA. Oxford, Oxford University Press, 1982.
 11. Schwarzschild H: In opposition to death penalty legislation, in *The Death Penalty in America* (ed 3). Edited by Bedau HA. Oxford, Oxford University Press, 1982.
 12. Yoder JH: A Christian perspective, in *The Death Penalty in America* (ed 3). Edited by Bedau HA. Oxford, Oxford University Press, 1982.
 13. Amnesty International: Proposal for a presidential commission on the death penalty in the United States of America, in *The Death Penalty in America* (ed 3). Edited by Bedau HA. Oxford, Oxford University Press, 1982.
 14. Platt A, Diamond BL: The origins of the "right and wrong" test of criminal responsibility and its subsequent development in the United States: an historical survey. *California Law Rev* 54:1227-59, 1966.
 15. Ogloff JRP: The juvenile death penalty: a frustrated society's attempt for control. *Behav Sci Law* 5:447-55, 1987.
 16. *Thompson v. Oklahoma*, 56 USLW 4892 (1988)
 17. Knell BEF: Capital punishment: its administration in relation to juvenile offenders in the nineteenth century and its possible administration in the eighteenth. *Br J Delinquency* 5:198-207, 1965.
 18. *Thompson v. Oklahoma*, 724 P.2d 780 (1986).
 19. *Wilkins v. Missouri*, 736 S.W.2d 409 (1987), certiorari granted, 56 USLW 3894 (1988).
 20. *High v. Kemp*, 819 F.2d 988 (11th Cir. 1987), certiorari granted, *High v. Zant*, 56 USLW 3894 (1988).
 21. Brief of the American Society for Adolescent Psychiatry and the American Orthopsychiatric Association as Amici Curiae in Support of Petitioner, *Thompson v. Oklahoma*, May 15, 1987.
 22. Lewis DO, Pincus JH, Bard B, *et al*: Neuropsychiatric, psychoeducational, and family characteristics of 14 juveniles condemned to death in the United States. *Am J Psychiatry* 145:584-9, 1988.
 23. Brief of the American Society for Adolescent Psychiatry and the American Orthopsychiatric Association as Amici Curiae in Support of Petitioners, *High v. Zant and Wilkins vs. Missouri*, September 2, 1988.
 24. Lewis M: *Clinical Aspects of Child Development* (ed 2). Philadelphia, Lea and Febiger, 1982.
 25. Tanner JM: *Growth at Adolescence* (ed 2). Oxford, Blackwell, 1962
 26. Blumstein A, Cohen J: Characterizing criminal careers. *Science* 237:985-91, 1987.
 27. Rowley JC, Ewing CP, Singer SI: Juvenile homicide: the need for an interdisciplinary approach. *Behav Sci Law* 5:1-10, 1987.
 28. Piaget J: The stages of the intellectual development of the child. *Bull Menninger Clin* 26:120-8, 1962.
 29. Kohlberg L: The development of children's orientations toward a moral order, in *The Process of Child Development*. Edited by Neubauer P. New York, Jason Aronson, 1976.
 30. *Bellotti v. Baird*. 443 U.S. 622 (1979).
 31. Billick SB: Developmental competency. *Bull Am Acad Psychiatry Law* 14:301-9, 1986.
 32. Group for the Advancement of Psychiatry (GAP): *Normal Adolescence*. New York, Scribner's, 1968.
 33. Oldham DG: Adolescent turmoil: a myth revisited. *Adolescent Psychiatry* 6:267-80, 1978.
 34. Levinson DJ: A conception of adult development. *Am Psychol* 41:3-13, 1986.
 35. Eth S: Adolescent separation-individuation and the court. *Bull Am Acad Psychiatry Law* 11:231-8, 1983.
 36. Bender L, Curran FJ: Children and adolescents who kill. *Criminal Psychopathology* 1:297-322, 1940
 37. Eth S, Schowalter JE: Debate: "resolved: there is no special developmental consideration in adolescence mitigating against capital punishment for those who committed murder under 18 years of age." *J Am Acad Child Adolesc Psychiatry*, in press, 1989.
 38. Lewis DO, Pincus JH, Feldman M, *et al*: Psychiatric, neurological, and psychoeducational characteristics of 15 death row inmates in the United States. *Am J Psychiatry* 143:838-45, 1986.
 39. Feldman J, Mallouh K, Lewis DO: Filicidal

Behavioral Science and the Juvenile Death Penalty

- abuse in the histories of 15 condemned murders. *Bull Am Acad Psychiatry Law* 14:345-52, 1986.
40. Rappeport JR: Reasonable medical certainty. *Bull Am Acad Psychiatry Law* 13:5-15, 1985.
41. Diamond BL: Reasonable medical certainty, diagnostic thresholds, and definition of mental illness in the legal context. *Bull Am Acad Psychiatry Law* 13:121-8, 1985.
42. Black B: Evolving legal standards for the admissibility of scientific evidence. *Science* 239:1508-12, 1988.