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The Efficacy of Harsh Punishments for Teenage Violence

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THE EFFICACY OF HARSH PUNISHMENTS FOR TEENAGE VIOLENCE*

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The tidal wave of teenage violence over the past decade is known to all concerned.[1] Indeed, the latest sound bite escalating the rhetoric concerning these violent youths seems to be "super-predators."[2] The enormous tragedies these violent youth impose on the individual victims and on our communities are similarly well-known and universally lamented. Typical, very human reactions to such overwhelming tragedies are nearly uncontrollable anger and strident demands for instant, draconian action against those responsible. However, if the shared goal is a reduction of teenage violence, then we should let cooler heads prevail. We should marshal our resources and energies to save the next victim rather than to punish the last offender.[3] Prevention, not punishment, is the answer.

In contrast to several of the more sweeping articles in this symposium, this Article is quite narrowly focused. The subject here is solely violent crime, primarily murder, by younger teenagers. While drug sales and drug abuse are often factors in such incidents, I leave to other Articles in this symposium the in-depth examination of those issues. Other crimes by teenagers, such as theft, are no doubt serious but beyond the scope of this piece. And, while violent crime by adults is not unimportant, the focus here is the special nature of violent crime by juveniles.

The final narrowing factor for the scope of this Article is its exclusive attention to the harshest of punishments for murder by juveniles—either life imprisonment without parole or the death penalty. The paper on which this Article is based was presented near the end of the conference which preceded

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* This article is based largely upon a paper presented by the author at the National Conference on Teenage Violence and Drug Use at the Valparaiso University School of Law in Valparaiso, Indiana, on November 16, 1996.

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1. *See, e.g.*, JOHN J. DIIULIO ET AL., BODY COUNT (1996).

2. *Id. See also* James Traub, *The Criminals of Tomorrow*, THE NEW YORKER, Nov. 4, 1996, at 50.

3. For a more complete exposition of this proposition, see the author's earlier effort: *Sentencing Juvenile Murderers: Punish the Last Offender or Save the Next Victim?*, 26 U. TOL. L. REV. 765 (1995).

this symposium, being billed as one of the responses to the question "what works?" My response is two-fold: (1) harsh punishments do not "work" if the goal is to reduce violent juvenile crime; and (2) correcting the social conditions under which so many young children live is the only thing that will "work" in the long run. Most of this Article's attention is devoted to (1) above, primarily because harsh punishments are being pushed so strongly by so many political leaders as the cure-all for violent juvenile crime. Clinging to this attractive but ultimately hollow "quick fix" both leaves us with a false belief that we are reacting rationally to the problem and prevents us from facing the need to seek true solutions to violent juvenile crime.

Because every message must be interpreted through the background and perspective of the speaker, let me provide some evidence of that factor. For over a quarter of a century, I have been teaching,[4] researching,[5] and practicing[6] in the area of violent juvenile crime. The driving force behind this, my life's work, is to find ways to reduce the amount of violent crime that occurs, particularly that committed by juvenile offenders.[7] In contrast, the primary thrust of criminal justice is to react to past crime and to put past offenders, whether teenagers or adults, through elaborate procedural schemes in order to punish them. My work shunts that approach aside as basically irrelevant unless it can be shown that the effort to punish past violent crimes has

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4. Beginning in 1971, I have been teaching courses primarily in the areas of criminal law, criminal procedure, juvenile law, and capital punishment.

5. My research interests on this topic have resulted in a variety of publications, such as DEATH PENALTY FOR JUVENILES (1987); JUVENILE JUSTICE IN AMERICA (1978); *Perspectives on the Juvenile Death Penalty in the 1990s*, *in* CHILD, PARENT AND STATE: LAW AND POLICY READER 646 (S. Randall Humm et al. eds., 1994); *Excluding Juveniles from New York's Impendent Death Penalty*, 54 ALB. L. REV. 625 (1990); *Executing Juvenile Females*, 22 CONN. L. REV. 3 (1989) (with Lynn Sametz); *The Eighth Amendment and Capital Punishment of Juveniles*, 34 CLEV. ST. L. REV. 363 (1986); *Death Penalty for Children: The American Experience with Capital Punishment for Crimes Committed While Under Age Eighteen*, 36 OKLA. L. REV. 613 (1983); and *From* Gault *to* Fare *and* Smith: *The Decline in Supreme Court Reliance Upon Delinquency Theory*, 7 PEPP. L. REV. 801 (1980).

6. Following an early stint as a juvenile court prosecutor, my more recent efforts have been as appellate defense counsel in such cases as *Thompson v. Oklahoma*, 487 U.S. 815 (1988) (holding that the United States Constitution prohibits the death sentence for murder by 15-year-old boy); *Allen v. Florida*, 636 So. 2d 494 (Fla. 1994) (holding that the Florida Constitution prohibits the death sentence for a murder by a 15-year-old boy); *Commonwealth v. Kocher*, 602 A.2d 1308 (Pa. 1992) (vacating the refusal of the adult criminal court to transfer to juvenile court the murder case of a nine-year-old boy); and *Cooper v. Indiana*, 540 N.E.2d 1216 (Ind. 1989) (holding that the Indiana Constitution prohibits the death sentence for a murder by a 15-year-old girl).

7. For consistency purposes, the term "juvenile" in this article refers to persons under the age of 18 at the time of their offense. Despite considerable variation among the various jurisdictions, age 18 continues to be the most common dividing line between juvenile court and criminal court. SAMUEL M. DAVIS, RIGHTS OF JUVENILES: THE JUVENILE JUSTICE SYSTEM at apps. B-1 to B-31 (1996).

a positive impact on the more important goal of preventing future violent crimes.[8] My turning away from the punishment approach came in part as a result of working with victims' families. Several times over the years I have found myself listening to the stories of parents whose child has been murdered as they struggled to deal with such unfathomable grief. Each time I have been chagrined and embarrassed to witness the criminal justice system, usually in the person of the local prosecutor, promising to serve the needs of this victim's family by wreaking horrible punishments on the person who killed their family member. In contrast, what the victim's family really wants, at bottom, is not that some horrible punishment be imposed on this stranger, but that they have their murdered child returned to them alive and well. Under our current approach, after the punishment is all over and the offender is either executed or imprisoned for eons, their murdered child is still dead. The prosecutors and prosecutor-impostors who promised to serve the needs of the victim's family never seem to understand what their real needs are.

My approach, and I think the wiser approach, is not to promise the family of a murdered child that we will marshal all of the forces of government in order to "do something" about their murdered child. Instead, we should turn to the family of a child who has not yet been murdered. We should promise that family that we will marshal all of the forces of government in order to keep their child alive, essentially to prevent their child's murder. Then, when all the dust settles, that family will still have their child with them, rather than having wallowed in the twisted joy of seeing some wretched juvenile offender suffer horrible punishments. This theory might be tested by asking the various victims' rights advocates whether the families of murdered children would rather have the offender punished or their child back alive. I have probed, subtly and sensitively, I hope, many such individual families with such questions, and the responses have always been what you would expect.

Turning away from the "PUNISH! PUNISH! PUNISH!" reaction to teenage violence will not be easy. First, it is a deeply ingrained human emotion to seek revenge on those who injure our family and friends. As we wreak that revenge, we may mouth rationales as to the desired long-range deterrent effects of our harmful acts toward the offender, but at bottom we just want to "hit him back," to make him hurt at least partly as bad as we are hurting. Politicians understand these basic human emotions quite well and gear their rhetoric and

8. Again, the narrow focus of this article is on the imposition of the harshest of punishments for violent crime committed by juvenile offenders. Such crime, particularly murder by young teenagers, seems immune to threats of life imprisonment or the death penalty.

actions to them.[9] Oh yes, they cloak their efforts in the garb of long-range deterrence and "sending a message," but they know that working gradually to lower the violent crime rate in the future does not have the same immediate political payoff as roundly condemning the latest teenage Willie Horton and demanding the most severe punishments for him.[10] This public call to "Get him!" feeds easily into the human emotion to seek revenge, and the modern-day lynch mob is off and running.

Two of the most extreme punishments for teenage violence advocated in such cases are life imprisonment without parole[11] or even the death penalty for teenagers.[12] Both of these punishments require totally abandoning hope for the individual offender, either by executing him or by locking him up and throwing away the key. The supporters of such punishments tend to justify them by the outrageousness of the crimes committed.[13] And, lest we forget, teenage violent

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9. An excellent new exploration of this phenomenon is RICHARD C. DIETER, KILLING FOR VOTES: THE DANGERS OF POLITICIZING THE DEATH PENALTY PROCESS (1996). An excellent recent law review piece on this issue is Steven B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 73 B.U. L. REV. 759 (1995).

10. United States Supreme Court Justice John Paul Stevens has made clear his disapproval of candidates for judicial office who rely upon such rhetoric in their campaigns or public relations releases:

> Persons who undertake the task of administering justice impartially should not be required—indeed, they should not be permitted—to finance campaigns or to curry the favor of voters by making predictions or promises about how they will decide cases before they have heard any evidence or argument. A campaign promise to "be tough on crime," or to "enforce the death penalty," is evidence of bias that should disqualify a candidate from sitting in criminal cases.

Justice John Paul Stevens, Address to the Opening Assembly, American Bar Association Annual Meeting (Aug. 3, 1996), *in* DIETER, *supra* note 9, at 1.

11. Instances of young teenagers sentenced to life imprisonment without parole include *Harris v. Wright*, 93 F.3d 581 (9th Cir. 1996) (affirming the constitutionality of a 15-year-old offender in a robbery-murder being sentenced to mandatory life imprisonment without possibility of parole); *Washington v. Massey*, 803 P.2d 340 (Wash. Ct. App. 1988), *cert. denied*, 499 U.S. 960 (1991) (upholding the conviction of the 13-year-old codefendant with Michael Harris in *Harris v. Wright*); *Naovarath v. State*, 779 P.2d 944 (Nev. 1989) (reversing a 15-year-old offender's life sentence without parole on state constitutional grounds); *Workman v. Commonwealth*, 429 S.W.2d 374 (Ky. 1968) (same).

12. *See, e.g.*, Stanford v. Kentucky, 492 U.S. 361 (1989) (holding that the Eighth Amendment does not prohibit the death penalty for 16 and 17-year-old offenders); Thompson v. Oklahoma, 487 U.S. 815 (1988) (holding that the Eighth Amendment prohibits the death penalty for 15-year-old offenders).

13. Pounding on the shocking characteristics of the crime is standard fare for trial prosecutors and public speakers. Somewhat surprisingly, however, this technique finds its way even into Supreme Court opinions. The structure of Justice Scalia's opinions in the juvenile death penalty cases are typical examples of this tendency to lead with the gruesome facts of the crime and only then get to the legal issues involved. *See Stanford*, 492 U.S. at 365; *Thompson*, 487 U.S. at 859-61 (Scalia, J., dissenting).

crime can be particularly senseless and brutal, spurring many to call for maximum punishments.

However, American criminal law requires that the severity of criminal punishment be based not only upon the amount of harm inflicted but also upon the maturity and clarity of the mental and emotional state of the offender at the time of the crime.[14] This latter factor, commonly termed the "mens rea" requirement in criminal law, ranges through such well-established and accepted issues as the infancy defense, the provocation/emotional disturbance element of manslaughter, the premeditation element of murder, and the insanity defense. In criminal law, as well as in a wide variety of civil law areas, teenagers are assumed to have less than adult mental and emotional capabilities.[15] Can teenagers be presumed to have adult mental and emotional characteristics for purposes of the death penalty or life imprisonment if they are conclusively presumed not to have these characteristics for purposes of voting, drinking, marrying, or even playing church bingo?

Despite the apparent inconsistencies in treatment of these issues, as many as half of the states do permit life imprisonment without parole[16] and some even the death penalty for teenagers.[17] While still an evolving area of law, recent cases have permitted life sentences without parole for crimes committed at ages fifteen and even ages as young as thirteen.[18] In a more settled area of law, the United States Supreme Court has drawn the line for the minimum age

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14. This principle of basing the punishment on both the crime and the offender is manifested in such key death penalty cases as *Stanford*, 492 U.S. at 374; *Thompson*, 487 U.S. at 824; and *Gregg v. Georgia*, 428 U.S. 153 (1976).

15. For a discourse on this issue in the context of the appropriateness of severe criminal punishments for juveniles, see *Thompson*, 487 U.S. at 815-25.

16. Apparently, at least 21 states authorize imposition of mandatory life imprisonment on 15-year-old offenders. *Harris*, 93 F.3d at 584.

17. A recent collection of these statutory provisions is as follows:

Age 18:	California, Colorado, Connecticut, Illinois, Kansas, Maryland, Nebraska, New Jersey, New Mexico, New York, Ohio, Oregon, Tennessee, and Federal
Age 17:	Georgia, New Hampshire, North Carolina, and Texas
Age 16:	Alabama*, Arizona**, Arkansas**, Delaware**, Florida**, Idaho**, Indiana*, Kentucky*, Louisiana*, Mississippi**, Missouri*, Montana**, Nevada*, Oklahoma*, Pennsylvania**, South Carolina**, South Dakota**, Utah**, Virginia**, Washington**, and Wyoming*

* by statute ** by court ruling

Victor L. Streib, The Juvenile Death Penalty Today: Present Death Row Inmates Under Juvenile Death Sentences and Death Sentences and Executions for Juvenile Crimes, January 1, 1973 to June 30, 1996, at 5 (July 2, 1996) (unpublished report, on file with author).

Fourteen American jurisdictions are without the death penalty: Alaska, District of Columbia, Hawaii, Iowa, Maine, Massachusetts, Michigan, Minnesota, North Dakota, Rhode Island, Vermont, West Virginia, and Wisconsin. *Id.*

18. *See supra* note 11 and accompanying text.

for the death penalty at age sixteen.[19] This case law merely recognizes the constitutional freedom of the states to impose such punishments on young teenagers; it does not endorse the wisdom or effectiveness of such state decisions.[20] States that have authorized such draconian punishments for teenage violence may have been feeding into the predictable hew and cry for vengeance from the modern day lynch mob rather than seeking rational ways to reduce teenage violence.

But, others may say, such draconian punishments *will* reduce teenage violence. These punishments: (1) will remove these convicted offenders (either by execution or imprisonment without parole) from any situation in which they will commit future crimes;[21] and (2) will "send a message" to other teenagers contemplating violent acts, deterring them from carrying out their acts.[22] The punishment advocates are correct about (1), but these are financially expensive and shockingly unmerciful alternatives as compared to the preferred alternative that provides essentially the same societal protection at a fraction of the cost.[23]

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19. *See supra* note 12 and accompanying text.

20. *See, e.g.*, Justice Scalia's characterization of this issue as essentially the United States Supreme Court's obligation to respect a state's right to follow this policy regardless of its wisdom:

> Placing restraints upon the manner in which the States make their laws, in order to give 15-year-old criminals special protection against capital punishment, may well be a good idea, as perhaps is the abolition of capital punishment entirely. It is not, however, an idea it is ours to impose.

Thompson v. Oklahoma, 487 U.S. 815, 877 (Scalia, J., dissenting).

21. This position is essentially the "incapacitation" justification for criminal sanctions, applied here to violent juvenile crime. Obviously, the death penalty is the fool-proof incapacitant. An offender executed for a juvenile crime will never again commit another crime. Life imprisonment without parole, absent escape from prison, similarly prevents the juvenile offender from committing any future crimes out in the general society. However, of course, the incarcerated may commit future offenses inside the prisons against prison employees, visitors, and/or inmates.

22. This position is most often referred to as the "general deterrence" rationale for criminal sentencing. The basic theory here is that potential offenders in the general society will learn of the punishment given to a recent past offender and thus be discouraged from committing the offenses they were contemplating. A fundamental premise, as applied to the focus of this article, is that young teenagers prone to employing violence in their interpersonal relationships will engage in an informed cost/benefit analysis before acting. If, instead, such young teenagers typically are unaware of reports on the six o'clock news and tend to act impulsively and without thinking, then this general deterrence theory would not apply to them.

23. The cost-related presumption here is that a maximum of approximately 20 years imprisonment would be less expensive than life imprisonment. This position assumes that the offender was age 14 to 16 at the time of the crime and has a life expectancy, even in prison, of at least 50 years. Additionally, the very high cost of the death penalty as compared to even life imprisonment is well documented. *See, e.g.*, Robert L. Spangenberg & Elizabeth R. Walsh, *Capital Punishment or Life Imprisonment? Some Cost Considerations*, 23 LOY. L.A. L. REV. 45 (1989); Ronald J. Tabak, *The Execution of Injustice: A Cost and Lack-of-Benefit Analysis of the Death Penalty*, 23 LOY. L.A. L. REV. 59 (1989).

That preferred alternative is to lock up violent teenagers in secure confinement in order to remove them and their violence from our community. While they are in secure confinement, we should work with them in a variety of ways to teach them control of, and alternatives to, their violent proclivities. Some can be released to the community within relatively short periods of time, and others will take many years. In any event, if we keep them confined for about twenty years until they are in their mid-thirties, in almost all cases they will have outgrown their teenage impulsiveness and violence and will no longer be a threat to society. Keeping them locked up an additional thirty or forty years when they present no real threat of violence is morally questionable, financially wasteful, and does almost nothing to prevent future acts of teenage violence.[24] The recommended alternative allows us to remove violent teenagers from society so long as they continue to be violent, but not either to take their lives or to keep them incarcerated long after the time they are no longer a threat to us.

Advocates of the "send a message" alternative are on much shakier ground. These advocates hold out the hope that future acts of violence by other teenagers will be reduced through draconian punishments for past acts of violence by the subject teenager. They assume that when we "send a message," teenagers are tuned in to our station. Only someone who has not been around teenagers would claim with a straight face that teenagers, particularly those who are the primary subject of this Article, tend to listen to and follow the guidance of adults in positions of authority.

The research has found that teenage violence is committed by a fairly small percentage of hard-core violent teenagers.[25] Given the bleak and violent conditions and neighborhoods in which these kids live, combined with their low intelligence levels,[26] poor educations,[27] and lack of any hope for a better life in the future, it is unrealistic to assume that they will alter their behavior

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24. For a typical case, assume that a 15-year-old offender is imprisoned for 20 years until age 35 and then could be released, if he appears to no longer present a threat of violence to the community. Keeping him in prison about 30 more years until he dies, presumably at age 65 or so, does nothing to protect us from violent crime from him (since he is no longer violent). Further, imprisonment of someone from middle age to senior citizen status is unlikely to get the attention of current teenagers caught up in violent activities.

25. *See, e.g.*, SOURCEBOOK ON SERIOUS, VIOLENT, AND CHRONIC JUVENILE OFFENDERS (James C. Howell et al. eds., 1995); DONNA HAMPARIAN ET AL., THE VIOLENT FEW (1978).

26. It seems now beyond dispute that children caught up in this world are more likely than others to be born of malnourished, often drug-addicted mothers, and tend to receive poor nourishment and medical attention in their early childhood years. These factors handicap them physically and mentally from even before birth, resulting in an enhanced effect of the poor educational systems, and a lack of a supportive and enriching home life.

27. *See, e.g., Fighting Crime with Education*, N.Y. TIMES, Dec. 1, 1996, at E8.

because of the vague threat of severe punishment should they be caught. These are *Lord of the Flies* children,[28] growing up not just in broken families but in truly feral environments, and they fight daily just to survive. They constantly see decayed neighborhoods, devastated lives, routine violence, and death all around them. The "message" we have immersed them in since birth is that this is what life is all about.[29] Surely it is obvious that the minute-to-minute reality of their lives speaks much more clearly to them than any saber rattling from on high about draconian punishments should they replicate the behavior they see modeled for them daily.

The short-term, "as needed" incarceration alternative described above permits us to protect ourselves in the short term from presently violent teenagers. However, the long-term solution is not simply to continue to incarcerate and treat violent teenagers. We need to reduce the supply of violent teenagers in the first place. Our primary attention should be not on sixteen-year-old Johnny who rapes and kills people, but on Johnny's younger brothers[30] who will grow up to be just like him. We not only have to take Johnny out of circulation for as long as necessary, but we have to work with our communities to change the lives of all of these children.

Regardless of the political unpopularity of being "tough on crime" by correcting societal conditions,[31] this is the only true long-term fix we have. We should not chose just to react after the blood is on the floor. We must begin to move toward reducing the number of times anyone needs to call 911. Our focus should be less on punishing the last offender and more on saving the next victim.

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28. *See* WILLIAM GOLDING, LORD OF THE FLIES (1954) (the classic fictional story of a group of schoolboys isolated on a coral island who revert to savagery, brutally depicting the rapid and inevitable dissolution of social mores and civilized standards in the absence of mature and competent adults to maintain the social system).

29. So many portraits of this way of life have been provided that choosing one among the many is daunting. One of my favorites is the snapshot provided by Edward Humes of a home visit by a probation officer in Los Angeles:

> Sharon visits her probationers and sees their little brothers and sisters playing not house or doctor or fireman, but drug dealer, crack house, and bank robber—their heroes and role models. Little kids actually standing there passing play money and bogus rocks of cocaine to one another over the counter, then pretending to smoke or shoot. She has seen this with her own eyes, this last gasp of childhood fantasy, modeled after the most successful adults on the block.

EDWARD HUMES, NO MATTER HOW LOUD I SHOUT 208 (1996).

30. Again, the primary concern is with young males. While some increase in violent crimes by teenage females may be apparent, the overwhelming problem remains the violent proclivities of teenage males.

31. United States Attorney General Janet Reno is today's most constantly criticized spokesperson for this approach. For concerns about using positions on the death penalty as fodder for political campaigns, see *supra* notes 9 & 10 and accompanying text.