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THE EFFECTS OF CAPITAL PUNISHMENT ON THE ADMINISTRATION OF JUSTICE

"A POSTER CHILD FOR US"

by ROBERT BLECKER

The most heinous killers,
although not yet 18 when they
murdered, may still deserve to die.

"A poster child for us"—that's what Seth Waxman, the lawyer urging

the U.S. Supreme Court to outlaw the "juvenile" death penalty, called Mark Anthony Duke. Four justices—Stephen Breyer, Ruth Bader Ginsburg, John Paul Stevens, and David Souter—had already publicly declared the juvenile death penalty "shameful," while Justices Antonin Scalia, Clarence Thomas, and William Rehnquist could be counted on to support a state's right to decide on a case-by-case basis. Anthony Kennedy's vote would be key. "Chilling reading," Justice Kennedy observed, pointing to Alabama's *amicus* brief cataloguing young killers it had condemned to die. "Look at those examples, the very first one," Waxman shot back, focusing on Mark Anthony Duke. "This is a kid who went on a killing spree." His behavior demonstrated "transient aspects of youth" rather than "a stable, enduring character." Thus, the Constitution forbade his execution, and, concluded the abolitionist lawyer replying to Justice Kennedy during oral argument, Mark Anthony Duke was "a poster child for us."

This characterization may well have had its impact: On March 1, 2005, in *Roper vs. Simmons* (543 U.S. 551), the United States Supreme Court, 5-4, made headlines, categorically striking down the death penalty for 16- or 17-year-olds as unconstitutional. Justice Kennedy supplied

the key fifth vote and wrote the majority opinion. "Progressives" have hailed this opinion

as a triumph for human dignity and decency, a step in the right direction that only enhances the administration of justice. How could any humane person—even those of us who generally support the death penalty for the most egregious criminals—disagree that kids who kill on the spur of the moment can't possibly be among those who deserve to die?

But some of us don't see it quite that way. We insist that far from refining and improving the administration of justice, this watershed decision, fundamentally flawed and flatly wrong in spots, seriously undermines a system of justice devoted to ensuring that the "worst of the worst" do get their just deserts.

Now that Mark Anthony Duke has been spared the death penalty and transferred to general population, the world at large may forget this "poster child's" "transient" behavior on March 22, 1997, and the response it warrants. But we cannot. . .

The Duke and Simmons cases

Generally annoyed at his father who was "always on my case about something," but especially angry when his father refused to lend him the family truck, Duke, 16, enlisted his

older friend to help kill his father. But Dedra Hunt, his father's live-in girlfriend, and her two young children, ages 6 and 7, would also be at home. No matter. According to Duke's plan, his friend Brandon would kill Dedra. Duke would take care of the rest.

Armed with a .45 he had carefully wiped clean, Mark Anthony Duke brought his friend Brandon Samra, 19, to his house. In the kitchen, Duke told his father he was tired of being bossed around and shot him to death. Meanwhile, Dedra and her children were on the couch by the fireplace, watching television. Samra shot Dedra in her face. Bleeding, Dedra fled upstairs with her little girls, Samra chasing after her, shooting but missing. Dedra locked herself in the bathroom with her six-year-old. Samra, out of bullets, couldn't pry the door open, but Duke kicked it down, and, as Dedra begged for her life, he shot her in the forehead, killing her instantly. Sixteen-year-old Duke then found six-year-old Chelisa cowering in the shower. "It will only hurt for a minute," Duke assured her as he slit the child's throat with a kitchen knife. Then Duke searched and found seven-year-old Chelsea, hiding, terrified, under her bed. While she struggled he slashed her face and hands 15 times, but he could not slit her throat. So Duke ordered Samra who first refused, but, afraid of Duke, slit the child's throat as Duke held her down.

Now Duke began an elaborate, calculated, cover-up. He carefully cleaned up the house, then took his friends to see the movie "Scream," ordering them to keep the ticket stubs as proof of an alibi. Then they had dinner and shot pool. Overnight, Duke must have had second thoughts, because the next day, he brought his friends back to the home, and ransacked it to make it look like robbery. Then Duke dialed 911: He had just discovered his family murdered. When the police arrived, an apparently frightened Duke gratefully accepted protective custody.

According to the state medical examiner, six-year-old Chelisa suf-

fered two 5 1/4 inch lacerations across her throat at Duke's hands. Like her older sister, before she died, the child aspirated her own blood for several minutes. It hadn't "only hurt for a minute."

An Alabama jury sentenced Mark Anthony Duke to die.

Seth Waxman, however, wasn't representing this poster child. His client, Christopher Simmons, at 17 also the leader of *his* pack, convinced *younger* friends they'd "get away with it" because they were minors. In the middle of the night, Simmons broke into a house he had picked at random, dragged Shirley Crook from her bed, duct-taped her eyes and mouth, bound her hands, and drove her minivan to a state park. They walked the terrified victim to a railroad trestle, tied her hands and feet together with electrical wire, wrapped her entire face in duct tape and threw her from the bridge to drown in the Meramec River. Later, Simmons bragged about the killing, telling friends he had killed a woman "because the bitch seen my face." A jury in Missouri had sentenced Simmons to die, and now, years later, the Court was deciding whether states with the death penalty could *ever* constitutionally condemn 16- or 17-year-olds.

Using highly questionable measures, as Justice Scalia acidly pointed out in dissent, the Court found American "standards of decency" had "evolved" into a national consensus against the juvenile death penalty. History will show that this "consensus" is at best speculative and probably false. Can anyone honestly insist that once exposed to the grisly details of Mark Anthony Duke's multiple murders—carefully planned and covered up, leaving a little girl, lying on the floor next to her Legos, her throat slit, to bleed to death—a majority of Americans would vote to let him live out his life in general population?

Drawing the line

Why draw a constitutional bright line at 18? True, as the majority pointed out, "almost every State prohibits

those under 18 from voting, serving on juries, or marrying without parental consent." But most states allow 16- and 17-year-olds to drive cars—relying on their mature judgment and split-second decision making to operate high-speed, multi-ton death machines among the public. Many states also set 16 as the age at which a woman may consent to have an abortion—to terminate a potential human life. And many states, such as New York, set 13—yes 13—as the age of full criminal responsibility for non-capital murder.

An extraordinary 13-year-old can get life in prison, 14-year-olds may be tried and convicted as adults for many other serious felonies, and 16-year-olds are punishable as adults for *all* crimes. Of course, prosecutors and judges may channel young criminals into a juvenile system, based upon an individual case-by-case analysis. Why, then, not do it case-by-case with the death penalty? Certainly the community has judged that 16-year-olds *can* be fully responsible for their own choices.

When a 16-year-old bravely runs into a house ablaze, risking his life to save two young children, we justifiably celebrate and reward this heroism. We do not—nor should we—dismiss this goodness and bravery as a product of a not-yet fully formed personality. We see this heroic act as clearly manifesting great and good character. If we can fully celebrate the heroism of our best youth, why can we not fully condemn cowardly and vicious selfishness of our worst?

Of course adolescents may be particularly susceptible to peer influence, while feeling invulnerable toward risks of punishment, and particularly unconcerned with the future punitive consequences attaching to their present homicidal behavior. Adolescent behavior *may* be impulsive. Youth ordinarily does diminish culpability. The majority of the Court does reflect the majority of the People, insisting that "retribution is not proportional *if* the law's most severe penalty is imposed on one whose culpability or blamewor-

thiness is diminished, to a substantial degree, by reason of youth and immaturity" (emphasis added).

True, Mark Anthony Duke, 16, their "poster child," was the younger of the killing duo. But he was the source not the subject of peer pressure. He initiated, planned, executed, and carefully covered up the mass murder. He coerced the dim-witted 19-year-old Brandon Samra to go along with it. Nor was Christopher Simmons subject to outside pressure, acting in the fury of the moment. He played the adult role, planning the random burglary/murder and assuring his younger friends they could "get away with it" because they were underage.

Almost never is not never

During closing argument, the prosecutor had improperly suggested that the jury treat Simmons's youth as an aggravating circumstance. Being young may make a killer more dangerous and less deterrable. But for us retributivists, we who believe that punishment should be proportional to past culpability, youth cannot make a person more deserving to die. If the Court was determined to reverse Simmons's death sentence, and make a categorical pronouncement, it could have held that a defendant's youth may never be treated as an aggravating circumstance. A very strong presumption of life should attach to juvenile killers. We should almost never execute a person for what he or she did at 16 or 17.

But almost never is not never.

Constitutionally, jurisprudentially, and morally, capital crimes should be defined narrowly, to include only the worst of the worst. Current death penalty statutes commonly violate this ideal: Absent additional aggravating circumstances, robbery-felony-murder—that most typical teenage, impulsive murder committed by one pushed or pulled by peers—should

not make killers—juvenile or adult—death eligible. The "drug related" aggravator, too, should be dropped along with robbery. But once an individual, whether 16 or 26, apparently falls within that class of especially vicious killers, we should consider that person's case and character concretely and individually. Fairness requires no less:

If a 17-year-old, acting alone, without peer pressure, kidnaps a 7-year-old; rapes and tortures her, and throws her off a bridge or buries her alive, or bludgeons her to death after she pleads for her life and tosses her in a trash bin, then peer group pressure is irrelevant. So too are the callous killer's short time horizon and general risk-proneness. That these sadists or psychopaths do not consider their own future punishment or their own personal mortality while torturing their helpless victims is morally irrelevant. They are the worst of the worst and deserve to die. We can, we should—morally, we must—decide this, case by case.

The "scientific" evidence

But the Supreme Court majority was categorical, four times citing and quoting from Laurence Steinberg and Elizabeth Scott's brief essay *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*.¹ Steinberg and Scott, to be sure, categorically oppose a 'juvenile' death penalty. The scientific bases for their personal policy preference, however, are just the opposite—tentative, non-categorical, and matters of degree. Several statements from their essay, which the majority fails to acknowledge, show this: "In our view it is an open and unstudied question whether, under real-world conditions the decision making of mid-adolescents is truly comparable with that of adults."² "[A]lthough more research is needed, the widely held stereotype that adolescents are more impulsive than adults finds some support in research"³ "Taken together, these findings indicate that adolescents may have more difficulty regulating their moods, impulses, and behaviors than do

adults"⁴ So, even the abolitionists' experts concede that "more research is needed" to conclusively prove or disprove that which merely finds "some support" and only "may" be true. Yet, they and the Court majority simply outlaw the penalty wholesale.

Abolitionists claim that scientific research shows teenagers have not fully developed brains. We retributivists, who would execute sadists for torture murders committed when they were 16 or 17, should find it unsettling if evidence did demonstrate a not-fully developed brain structure as the cause of the killing. But again, even Steinberg and Scott concede the evidence is far from categorical: "At this point, the connection between neurobiological and psychological evidence of age differences in decision-making capacity is indirect and suggestive."⁵ "[J]uveniles may have diminished decision-making capacity compared with adults because of differences in psychosocial capacities [that] are likely biological in origin."⁶

The much larger and deeper debate between free will and determinism underlies all criminal responsibility. But search the literature the Court cites; no connection between organic brain development and moral responsibility has been explicated, much less demonstrated. As Justice Sandra Day O'Connor declared in dissent, "the Court adduces no evidence whatsoever in support of its sweeping conclusion."

We who are committed to executing the worst of the worst—those, but only those who deserve to die—insist on a case-by-case examination. Only if, after a detailed study of the individual, we can conclude not only beyond a reasonable doubt that he or she did it, but also to a moral certainty that this is the very uncommon young adult who deserves it, we may and we should condemn him to die. This case-by-case approach is not only moral, it more naturally flows from the very research and findings the majority embraces.

What really counts?

The Supreme Court's decision in *Roper v. Simmons* made front-page

1. 58 AM. PSYCHOLOGIST 1009 (2003).

2. *Id.* at 1012 (emphasis added).

3. *Id.* at 1012 (emphasis added).

4. *Id.* at 1013 (emphasis added).

5. *Id.* at 1013 (emphasis added).

6. *Id.* at 1013 (emphasis added).

headlines that day and has continued to reverberate politically, even moving justices to make a rare public defense, and Chief Justice John Roberts to make a rare criticism of recent case law in his confirmation hearings.

The majority of five and Justice O'Connor's separate dissent together insist that although the Eighth Amendment's prohibition of grossly disproportionate punishment does depend on "evolving standards of decency," an American consensus can be bolstered by an international consensus to indicate those evolving standards. "The basic premise of the Court's argument—that American law should conform to the laws of the rest of the world—ought to be rejected out of hand," protested Justice Scalia. "I do not believe that the meaning of our Eighth Amendment . . . should be determined by the subjective views of five Members of this Court and like-minded foreigners." But, as the majority had declared repeatedly, this world consensus was not constitutionally "controlling." Over and over, the majority declared it as their own "independent judgment" that death is an unconstitutionally "disproportionate" response to murder committed by a 16 or 17-year-old.

Although they never explicitly acknowledged it, the majority plus O'Connor must hold that "gross disproportionality" and "evolving standards of decency" are real, objectively discernable facts, independent of individual justices' personal tastes and preferences. Retributivist advocates of the death penalty, although vigorously opposing the result in *Roper v. Simmons*, may nonetheless embrace the majority plus O'Connor's underlying ontology: There *are* moral facts. *Some* 16- and 17-year-olds deserve to die. Regardless of public opinion, Mark Anthony Duke's death sentence was not *per se* disproportionate. Ultimately we know this fact—that he deserves to die—intuitively, with a moral faculty that requires an emotional connection to the victim, attention to the defendant's character and how it was (de)formed, and

the motives, harm, nature, and circumstances of the crime.

Thus here the *Roper* majority, and O'Connor in dissent, are correct: Public opinion, including international public opinion, does help guide us to the moral fact of the matter. But if an overwhelming majority of the American public today supported the death penalty for blasphemy, or petty larceny, or drug dealing, their anger might be understandable, but the punishment they urged would in moral fact be disproportionate and unconstitutional.

More importantly, however, "the overwhelming weight of international opinion against the juvenile death penalty" is probably non-existent, and definitely not demonstrated. Every Supreme Court justice in *Roper* missed the crucial distinction between international law and international public opinion—between governmental elites and the people they supposedly represent. The Supreme Court majority simply equates the "practices of other nations" with "the views of the international community." It cites treaties between governments, and parliamentary laws—the products of governmental elites—and then simply morphs them into "the overwhelming weight of international public opinion" or "the opinion of the world community," when they are no such thing. Justice O'Connor, too, conflates "foreign and international law" with "the views of other countries" and converts them into "the overwhelming weight of international opinion." Even Justice Scalia equates "the laws of the rest of the world" with "the views of other countries and the so-called international community" (emphasis added).

Once exposed, the fallacy becomes obvious. When abolitionists point to America's "moral isolation" as the "only democracy" with a death penalty, they must ignore recent surveys that show that 81 percent of the Japanese support the death penalty.⁷ Thus America becomes the "only Western democracy with the death penalty." But here, too, the facts are embarrassing. *Every European gov-*

ernment and Canada abolished the death penalty, but always in the teeth of overwhelming public support for its continuation. Even today, decades later, rejecting repeated attempts by the elites—teachers, media, and governmental officials—to shame them, a majority of Canadians, over two-thirds of the British, and probably a majority of the People in almost every European nation continues to support capital punishment.⁸ Recently Poland's Parliament narrowly rejected reinstating the death penalty in a 198-195 vote, although opinion polls showed 77 percent of the Poles support its return.⁹

Real-world cases

Let us present fully and fairly to the *People* of Europe, or Asia, or Africa, or South America the facts of real-world cases—and not a simple distorting question in the abstract such as 'Do you support executing juveniles?' Ask the world community about Kenneth Loggins and Trace Duncan, whom Alabama has condemned. Both 17, Loggins and Duncan picked up hitchhiker Vickie Deblieux, traveling to her mother's home in Louisiana. They took her to a secluded spot and, after throwing bottles at her as she tried to escape, tackled her and then kicked and stomped her for 30 minutes until she died. Loggins stood on Vickie's throat until she gurgled blood and then exclaimed, "Okay, I'll party." They threw Vickie into their truck, stripped her naked, and played with her lifeless body—at one point inserting a beer bottle into her vagina. When they had finished, they

7. *Japan: Most People Support the Death Penalty*, ANSA - Eng. News Service, February 19, 2005. ("More than 80 percent of the Japanese, the highest rate ever, are in favour of the death penalty, according to a government survey published on Saturday").

8. *See, Most Czechs want capital punishment to exist*, Czech News Service, November 21, 2003; *Most Slovaks favor capital punishment (61.7%) in Slovakia*, CTK, July 25, 2005; *63 percent of respondents believe the death penalty should be applied in Mexico*, Angus Reid Global Scan, August 9, 2005; *6% of Russians support death penalty*, Itar-Tass, July 5, 2005.

9. *Poland narrowly rejects return of death penalty*, Agence France Presse, October 22, 2004 ("According to an opinion poll earlier this year, 77 percent of Poles support the return of capital punishment and 19 percent are against it").

threw her body off a cliff. Loggins and Duncan returned to the crime scene, further mutilating Vickie's corpse—stabbing and cutting her 180 times, removing a portion of one lung (one reportedly even bit into it), and cutting off her fingers and thumbs. Ask the People, "What do these two 17-year-olds deserve?"

Inform other peoples about Christopher Simmons, Kenneth Loggins, Trace Duncan, Mark Anthony Duke, and their kind. Remind them of the innocent victims—Shirley Crook, Vickie Deblieux, Dedra Hunt and her two children Chelisa, 6, and Chelsea, 7. Let them recall the terror and suffering of these innocents and the pleasure or callous indifference evidenced by these 16- and 17-year-old sadistic, vicious killers inflicting torture. Then give "the world community" the real choice: Keep these monsters alive and in prison—allow them to read, watch TV, exercise outdoors, enjoy snacks, watch movies, play basketball and softball. Or condemn them to die. And see whether the "overwhelming weight of international opinion" is to let them live.

After Roper?

Buoyed by this latest categorical restriction, abolitionists can be counted on to use their winning "logic" to continue their piecemeal assault on the death penalty. Now that a Court majority has categorically outlawed death as disproportional for juveniles and the mentally retarded; the "mentally ill" are next. Pollsters will cooperate to show that our standards of decency have evolved to the point where the public clearly answers "no" when asked, "Do you favor executing the mentally ill?" Phrased this way, the blanket prohibition has strong appeal. Again, however, the question obscures moral reality.

The American Psychiatric Association's catalogue of "mental illnesses"—DSM IV—currently classifies psychopathy and sexual sadism as mental illnesses. A psychopath is generally intelligent, glib, beats lie detector tests, and feels little fear, while callously indifferent to the extreme

pain and suffering of others.

Psychopaths populate our prisons. Two especially stand out among hundreds of prisoners interviewed: "Spray shooters" who fired machine guns into a crowd from a passing van, *randomly* wounding and killing innocent bystanders, including children. Asked to consider their innocent victims, "S.O.L."—"Shit Outta Luck" one declared. "Shouldn't have gotten in the way of my bullet," the other, shrugged. These cold, callous killers—psychopaths—are without pity and deserve none.

And then there are the sadistic rapist/murderers like Michael Ross, recently executed in Connecticut. Ross, who strangled eight women to death, raping seven of them first, was diagnosed according to the DSM IV as suffering from the "mental illness" of "sexual sadism." A person who has repeated fantasies of causing great pain and humiliation to unwilling victims sexually, and either acts on that fantasy or is troubled by it, becomes by definition "mentally ill." (Ironically, if he has those fantasies but is *untroubled* by them, according to the current definition, he is not sick.) Danny Rolling—the Ninja killer—would stalk young co-eds, break into their apartments, rape and mutilate them, and pose their bodies pornographically. He, too, was a sexual sadist and "mentally ill."

The point is, for millennia we have understood, and the dictionary confirms, that the essence of cruelty is indifference to, or taking pleasure in, another's pain and suffering. At the extreme, the psychopaths and sadists—the most callous and vicious who kill either with a depraved indifference or positive enjoyment at the intense suffering they cause—are the core of the worst of the worst. Psychiatrically they may be "mentally ill;" morally they are most evil, and most, not least, deserving to die.

Abolitionists will probably not explicitly urge an exemption for psychopaths or sadists. Society generally detests them, and justifiably so. But if the Court (or legislatures) can be convinced categorically to exempt "the mentally ill", once again, these despi-

cable creatures may be shielded under the umbrella.

Administering justice after Roper

These challenges are on the horizon, swiftly approaching. But here we are, after a U.S. Supreme Court majority in *Roper* has rejected individualized justice for juveniles, adopting instead a morally obtuse, simplistic solution to a difficult problem. Manufacturing consensus, national and worldwide, they masquerade their policy preference as constitutional doctrine. Yet, of course, we must obey their mandate. In the face of a U.S. Supreme Court majority's morally indiscriminate but constitutionally binding decision, can we still salvage a morally appropriate response to the worst of the worst, based upon individualized justice?

Forever condemned although not to be killed, Mark Anthony Duke remains collectively denounced. To advance the administration of justice after *Roper*, the people should continue to *condemn* him and others like him. Each state has the power to specially punish the once-condemned, stripping them of all hope and subjecting them to the harshest prison conditions the Constitution allows. No good behavior inside can erase the past. We must keep our covenant with the dead. We owe them, him, and ourselves never to forget or forgive.

To those who seek death for the most heinous killers—notwithstanding the Court's decision but considering the content of his character and the consequences of his choices—Mark Anthony Duke, forever condemned though never to be executed, remains "a poster child for us." ❧

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