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DEATH PENALTY FOR CHILDREN: THE AMERICAN EXPERIENCE WITH CAPITAL PUNISHMENT FOR CRIMES COMMITTED WHILE UNDER AGE EIGHTEEN

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Within the seamless web of the law and the empirical reality of capital punishment, what role does the youth of the offender play? If it is assumed that "children have a very special place in life which law should reflect,"[1] does it necessarily follow that "civilized societies will not tolerate the spectacle of execution of children?"[2]

Fueled by eight recent executions[3] and by the presence of more than twelve hundred persons on death row awaiting execution,[4] the debate about capital punishment continues with renewed vigor. The debate embraces such issues as the historical evolution of capital punishment, the legal process involved, the characteristics of the executed offenders, the nature of their offenses, and the criminological purposes served by "a punishment . . . unique in its severity and irrevocability."[5] This article examines these issues as applied to very young offenders lawfully executed in the United States for crimes they committed while under age eighteen.

In the early 1980s, capital punishment of children is reemerging as an issue of great national importance,[6] sufficient even to capture the

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1. *In re* Anderson, 345 U.S. 528, 536 (1953) (Frankfurter, J., concurring).

2. MODEL PENAL CODE § 210.6 commentary at 133 (Official Draft and Revised Comments 1980).

3. Gary Gilmore, Utah, Jan. 17, 1977; John Spenkelink, Florida, May 25, 1979; Jesse Bishop, Nevada, Oct. 22, 1979; Steven Judy, Indiana, Mar. 9, 1981; Frank Coppola, Virginia, Aug. 10, 1982; Charles Brooks, Jr., Texas, Dec. 7, 1982; John Louis Evans III, Alabama, Apr. 22, 1983; and Jimmy Lee Gray, Mississippi, Sept. 2, 1983.

4. As of Aug. 20, 1983, 1,230 persons were on death row awaiting execution. NAACP LEGAL DEFENSE AND EDUCATION FUND, INC., DEATH ROW, U.S.A. 1 (Aug. 20, 1983).

5. Gregg v. Georgia, 428 U.S. 153, 187 (1976) (plurality opinion).

6. For the purpose of this article, the term "children" means all persons under the age of eighteen. Capital punishment of children refers to sentencing to death or executing a person for a crime committed by that person at an age of less than eighteen years. It is beyond the scope of this article to explore the various ages at which persons are considered children or adults for purposes of voting, driving, contracting, working, etc. For particularly insightful analysis of some of these issues, *see* F. ZIMRING, THE CHANGING LEGAL WORLD OF ADOLESCENCE (1982);

attention of the United States Supreme Court and the American Bar Association.[7] The reappearance of capital punishment for crimes committed by persons under age eighteen is primarily the product of two trends. One trend is an increasing willingness to subject persons under the maximum juvenile court jurisdictional age limit to criminal prosecution, either through direct prosecution of the child in criminal court[8] or through initial juvenile court jurisdiction being transferred in waiver proceedings to criminal court.[9] The other trend is the return to reliance upon capital punishment in the criminal justice system.[10] The combined effect of these trends is an increased exposure of children to the possibility of capital punishment for their misdeeds.

Historical Background of Capital Punishment for Children

The United States inherited the bulk of its criminal law, including the tradition of capital punishment, primarily from England but also from other European countries. A fundamental premise of this criminal jurisprudence was then and is now that persons under age seven were conclusively presumed to be incapable of entertaining criminal intent and thus could not have criminal liability imposed upon them.[11] For persons from age seven to age fourteen, the presumption of inability to entertain criminal intent was rebuttable, and if rebutted, such a person could be convicted of a crime and be sentenced to death.[12] No such presumption applied to persons age fourteen or over. This view of children's liability in the criminal justice system was accepted by the United States Supreme Court in *In re Gault*[13]: "At common law,

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Batey, *The Rights of Adolescents*, 31 WM. & MARY L. REV. 363 (1982). Eighteen is chosen as the crucial age in this analysis because a large majority of jurisdictions use that age as the cutoff for juvenile court jurisdiction.

7. *See* Eddings v. Oklahoma, 455 U.S. 104 (1982). At its Annual Meeting in Atlanta, Ga., in August, 1983, the American Bar Association adopted the following resolution: "Be it resolved that the American Bar Association opposes, in principle, the imposition of capital punishment upon any person for any offense committed while under the age of eighteen (18)." Juvenile Justice Letter No. 9 from Alaire Bretz Rieffel, Section of Criminal Justice, ABA, to Members of the Juvenile Justice Committee of the Criminal Justice Section, ABA (Aug. 11, 1983).

8. *See, e.g.*, N.J. FAM. CT. ACT § 712(a)(ii), N.J. STAT. ANN. § 2A:4A (West Supp. 1981); N.Y. PENAL LAW §§ 10.00 (18), 30.00 (McKinney Supp. 1982); N.Y. CRIM. PROC. LAW §§ 180.75, 190.71, 210.43, 220.10(5)(g) (McKinney 1982).

9. *See, e.g.*, Kent v. United States, 383 U.S. 541 (1966).

10. Gregg v. Georgia, 428 U.S. 153 (1976) (holding that capital punishment statutes are not inherently unconstitutional). Since *Gregg*, more than two-thirds of the states have adopted new capital punishment statutes. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CAPITAL PUNISHMENT 1980, at 3 (1981).

11. 4 W. BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 23-24 (1792); 1 M. HALE, PLEAS OF THE CROWN 25-28 (1682).

12. 4 BLACKSTONE, *supra* note 11, at 23-24; 1 HALE, *supra* note 11, at 25-28.

13. 387 U.S. 1 (1967).

children under seven were considered incapable of possessing criminal intent. Beyond that age, they were subjected to arrest, trial, and in theory to punishment like adult offenders."[14]

Considerable debate has centered on the issue of whether children were actually executed after being sentenced to death. Much of the debate seems to be confused by the use of relatively vague terms such as "children" and "adolescents," and by infrequent reporting of the age of the offender on the date of the crime or the execution. The term "adolescent" has rarely been used in a legal sense even though it is a regular part of the vocabulary of the social sciences.[15] Despite this confusing "linguistic discontinuity,"[16] the conventional historical view is that in England "[a]dolescents as well as children could be—and actually were—sentenced to death and even executed."[17]

As for the younger members of this group, the English law's bark was apparently much worse than its bite. Knell studied the official records for the years 1801 to 1836 for the Old Bailey,[18] a major criminal court in London. In 103 cases, children under age fourteen were sentenced to death but none were ever executed.

The same dichotomy between sentencing and execution carried over to colonial America and the early United States. In the early nineteenth century, "courts were extremely hesitant to sentence a child under fourteen to death."[19] As for actually carrying out the death sentence, Platt and Diamond[20] found: "[O]nly two children under fourteen were judicially executed between the years 1806 and 1882. In both cases, the defendants were Negro slaves and, in one case, the victim was the son of a white property owner."[21] At least some trial courts were convinced that the reluctance to execute younger children was universal. A criminal trial judge observed in 1823: "The lowest period, that judgment of death has been inflicted upon an infant in the United States, has never extended below sixteen years, or at least after a careful

14. *Id.* at 16.

15. ZIMRING, *supra* note 6, at xi-xiii.

16. *Id.* at xii.

17. 1 L. RADZINOWICZ, A HISTORY OF ENGLISH CRIMINAL LAW AND ITS ADMINISTRATION FROM 1750: THE MOVEMENT FOR REFORM 1750-1853 11 (1948).

18. Knell, *Capital Punishment: Its Adminstration in Relation to Juvenile Offenders in the Nineteenth Century and Its Possible Adminstration in the Eighteenth*, 5 BRIT. J. CRIMINOLOGY 198, 199 (1965).

19. Platt & Diamond, *The Origins of the "Right and Wrong" Test of Criminal Responsibility and Its Subsequent Development in the United States: An Historical Survey*, 54 CALIF. L. REV. 1227, 1246 (1966). *See also* A. PLATT, THE CHILD SAVERS: THE INVENTION OF DELINQUENCY 211-12 (2d ed. 1977).

20. Platt & Diamond, *supra* note 19.

21. *Id.* at 1246-47 (referring to Godfrey v. State, 31 Ala. 323 (1858), and State v. Guild, 10 N.J.L. 163 (1828)).

search none could be found, and it is presumed none can be found."[22] Courts that sentenced younger offenders to death apparently believed that commutation of their sentences was likely.[23]

Recent research suggests that these scholars and courts were seriously misinformed.[24] Seven children were executed prior to 1800 and 95 prior to 1900, the youngest aged ten years. It is likely that courts today are no better informed.

Impact of the Juvenile Justice System, 1899 to 1930

During this period in the United States, the juvenile justice system began to emerge.[25] The United States Supreme Court provided the conventional explanation:

> The early reformers were appalled by adult procedures and penalties, and by the fact that children could be given long prison sentences and mixed in jails with hardened criminals. . . . The apparent rigidities, technicalities, and harshness which they observed in both substantive and procedural criminal law were therefore to be discarded. The idea of crime and punishment was to be abandoned. The child was to be "treated" and "rehabilitated" and the procedures, from apprehension through institutionalization, were to be "clinical" rather than punitive.[26]

Mid-nineteenth-century reformers focused primarily upon modifying the harshness of the correctional phase of the criminal justice system.[27] The best-known reforms were the houses of refuge established in various cities by reformers anxious to separate youthful offenders from adult criminals.[28] The success of these reforms was limited by the continuing criminal court jurisdiction over those youthful offenders. This led reformers to believe that a separate legal system for juveniles was needed.

Following Illinois' lead in 1899, a number of states enacted juvenile court legislation patterned on the statutes of Illinois and other pioneer states. By 1925 almost all states had such legislation;[29] the federal govern-

22. People v. Teller, 1 WHEELER CRIMINAL LAW CASES 231, 233 (N.Y. City Ct. 1823).

23. W. SMITHERS, EXECUTIVE CLEMENCY IN PENNSYLVANIA (1909); Wolfgang, Kelly & Nolde, *Comparison of the Executed and the Commuted Among Admissions to Death Row*, 53 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 301 (1962).

24. *See infra* note 45 and Table 9.

25. Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN. L. REV. 1187 (1970).

26. *In re* Gault, 387 U.S. 1, 15-16 (1967).

27. S. DAVIS, RIGHTS OF JUVENILES: THE JUVENILE JUSTICE SYSTEM (2d ed. 1981).

28. Mennel, *Origins of the Juvenile Court: Changing Perspectives on the Legal Rights of Juvenile Delinquents*, 18 CRIME & DELINQUENCY 68 (1972). Some commentators suggest that the reformers were in fact motivated by a desire to gain greater control over children through punitive policies disguised as rehabilitation. PLATT, *supra* note 19; Fox, *supra* note 25, at 1188-89.

29. V. STREIB, JUVENILE JUSTICE IN AMERICA 5-7 (1978).

ment joined the trend in 1938.[30] The appearance of the juvenile justice system can be seen as a codification of the previous unofficial and implicit policy of giving special treatment to young offenders.[31] For the purpose of this article, the premise is accepted that a juvenile justice system should not punish the juvenile offender but must treat and rehabilitate him.[32] Adoption of this premise requires rejection of the death penalty for juvenile offenders. During the early era of juvenile justice (1900-1930), however, seventy-seven persons were executed for crimes committed while under age eighteen.[33] None were sentenced to death directly by juvenile courts but were condemned by adult criminal courts.

Prosecution of Children in Criminal Court

In most jurisdictions today, delinquent acts are defined as acts in violation of state or federal law, local ordinance, or an order of the juvenile court.[34] Generally, this definition encompasses acts that would be crimes if committed by an adult. This broad category includes murder and other capital crimes unless they are specifically excluded from the jurisdiction of the juvenile court. The essentially criminal nature of these delinquent acts means that the cases could fall within the jurisdiction of criminal court, as has been recognized by the Supreme Court in *Gault*:

> [T]he fact of the matter is that there is little or no assurance . . . that a juvenile apprehended and interrogated by the police or even by the Juvenile Court itself will remain outside of the reach of adult courts as a consequence of the offense for which he has been taken into custody. In Arizona, as in other States, provision is made for Juvenile Courts to relinquish or waive jurisdiction to the ordinary criminal courts.[35]

In 1975 the Supreme Court noted in passing that "an overwhelming majority of jurisdictions permits transfer in certain instances."[36]

The Supreme Court's first direct consideration of juvenile justice

30. Rupert, *Juvenile Criminal Proceedings in Federal Courts*, 18 LOY. L. REV. 133, 139 (1971-72).

31. STREIB, *supra* note 29, at 5-13.

32. This premise was uniformly incorporated into juvenile statutes and was explicitly recognized by the Supreme Court: "The idea of crime and punishment was to be abandoned. The child was to be 'treated' and 'rehabilitated' and the procedures, from apprehension through institutionalization, were to be 'clinical' rather than punitive." *In re* Gault, 387 U.S. 1, 15-16 (1967).

33. See *infra* note 45 and Table 9.

34. DAVIS, *supra* note 27, at 2-12.

35. *In re* Gault, 387 U.S. 1, 50-51 (1967).

36. Breed v. Jones, 421 U.S. 519, 535 (1975).

issues, in *Kent v. United States* in 1966,[37] was a review of the procedures by which a juvenile court could and should waive jurisdiction over a juvenile offender in order to transfer the case to adult criminal court. The significance of such transfer is apparent from the facts in *Kent*: 16-year-old Morris A. Kent, Jr., was transferred from juvenile to criminal court, convicted of six felonies, and sentenced to a total of thirty to ninety years in prison.[38] For many jurisdictions, the transfer from juvenile to criminal court can trigger the possibility of the death penalty.[39]

A person under the age limit for juvenile court jurisdiction will nevertheless be tried in criminal court if the offense charged has been expressly excluded from the jurisdiction of juvenile court.[40] Typically, only the most serious crimes such as murder, rape, and robbery are excluded. Some states expressly exclude capital offenses from juvenile court jurisdiction,[41] leaving only criminal court jurisdiction over such offenses.

Finally, some states give the prosecuting attorney discretion to decide in which court the case should be filed.[42] If the prosecutor files a juvenile petition, the case proceeds in juvenile court; if a criminal information is filed or a grand jury indictment is obtained, the case proceeds in criminal court.

Each of these three alternatives lodges the choice of court in a different primary decision-maker. The traditional court waiver alternative leaves the decision up to the judiciary—specifically the juvenile court judge. In the second alternative, the legislature has made the original and preemptive decision to place certain cases exclusively in criminal court. The prosecutor is the decision-maker as to the choice of court in the third alternative. Whichever means is followed, an offender under the juvenile court age limit is subjected to the full authority of the criminal court, typically including the power to impose capital punishment for certain crimes.

Characteristics of Executed Children

Of the 14,029 known legal executions in American history,[43] 287 of

37. 383 U.S. 541 (1966).
38. *Id.* at 550.
39. ZIMRING, *supra* note 6, at xii:

> In some jurisdictions, the question of whether a 16-year-old accused of murder will stay in juvenile court, or be tried in the criminal courts for a capital crime, will depend on an individual judge assessing whether that 16-year-old is "mature" and "sophisticated." If he is found to be "sophisticated," his reward can be eligibility for the electric chair.

40. DAVIS, *supra* note 27, at 2-15 to 2-17.
41. *See, e.g.*, N.C. GEN. STAT. § 7A-608 (Repl. 1981).
42. DAVIS, *supra* note 27, at 2-17 to 2-19.
43. The figure 14,029 was provided by Watt Espy, Capital Punishment Research Project,

them have been for crimes committed by persons under the age of eighteen.[44] Ninety-five of these executions occurred prior to the advent of the juvenile justice system (pre-1900) and 192 occurred after 1900. The first such execution was in 1642 in Massachusetts; the most recent was in 1964 in Texas.[45]

Table 1 indicates the age of these executed children at the time of the offense as accurately as can be determined from the available information. The youngest were age ten at the time of the offense, with a total of thirty-nine children executed for committing crimes while age fifteen or younger. The two 10-year-olds were an unnamed black

Table 1

Pre-1900 and Post-1900 Executions
for Crimes Committed While Under Age Eighteen
According to Age When Crime Committed

Age When Crime Committed	1642 to 1899	1900 to Present	Totals
Unknown	4(4%)	1(1%)	5(2%)
10	2(2%)	0(0%)	2(1%)
11	1(1%)	0(0%)	1(0%)
12	4(4%)	0(0%)	4(1%)
13	4(4%)	1(1%)	5(2%)
14	3(3%)	2(1%)	5(2%)
15	8(8%)	9(5%)	17(6%)
16	22(23%)	30(16%)	52(18%)
17	47(49%)	149(78%)	196(68%)
Totals:	95(100%)	192(100%)	287(100%)

University of Alabama School of Law. Letter with data from Watt Espy to Victor Streib (Apr. 28, 1983). Espy has verified these 14,029 executions through newspaper reports, official documents, and other sources over his many years of research on this project.

44. *Id.* The 14,029 case files were examined to identify the 287 cases discussed in this article. The other primary source of data was Teeters & Zibulka, *Executions Under State Authority—An Inventory*, in W. BOWERS, EXECUTIONS IN AMERICA 200 (1974). For some of the older cases, the information is fairly sketchy; however, this is clearly the most complete and accurate data on capital punishment for young offenders available.

45. The data presented in this section are the most up-to-date and accurate available from this ongoing research. These data and their analyses supersede previously presented papers from earlier stages of this research, including: Streib & L. Sametz, "Killing Kids for Justice: Capital Punishment for Young Offenders" (Nov. 1982) (Annual Meeting of the American Society of Criminology, Toronto, Ontario, Canada); Streib, "Capital Punishment for Juveniles in the Criminal Justice System" (June 1982) (Annual Meeting of the Law and Society Association, Toronto, Ontario, Canada); Streib, "Death Penalty for Children: State Execution for Crimes Committed While Under Age Eighteen" (Mar. 1982) (Annual Meeting of the Academy of Criminal Justice Sciences; Louisville, Kentucky) (all available from the author).

child, hanged at Alexandria, Louisiana, in September of 1855,[46] and James Arcene, a Cherokee Indian child hanged at Fort Smith, Arkansas, on June 26, 1885.[47] Since 1900, the youngest has been 13-year-old Fortune Ferguson, Jr., electrocuted at the Florida State Prison on April 27, 1927.[48] The unmistakable conclusion to be drawn from these data is that, in more recent times, capital punishment has been almost exclusively reserved for older children; approximately two-thirds (22/35) of the executions of those age fifteen or younger occurred prior to 1900. Since 1900, 93% of child executions were for crimes committed by persons aged sixteen or seventeen.

The race of the offender has long been a glaring issue in capital punishment.[49] Race also seems to be an important factor in the execution of children. Table 2 indicates the race of the 287 executed children. Not surprisingly, about two-thirds of the children executed during this 340-year period were black. This would seem not to be just a century-old history of casually executing slaves. The overrepresentation of black children in this population of executed children has increased

Table 2

Pre-1900 and Post-1900 Executions
for Crimes Committed While Under Age 18 According
to Race of the Executed Offender

Race of Executed Offender	1642 to 1899	1900 to Present	Totals
American Indian	9(9%)	1(1%)	10(3%)
Chinese	0(0%)	3(2%)	3(1%)
Hispanic	2(2%)	5(3%)	7(2%)
Black	44(46%)	135(70%)	179(62%)
White*	25(26%)	34(18%)	59(21%)
Unknown	15(16%)	14(7%)	29(10%)
Totals	95(100%)	192(100%)	287(100%)

*Some persons categorized as white, particularly in early recordkeeping, may actually have been Hispanic.

46. QUINBY, THE GALLOWS, THE PRISON AND THE POOR HOUSE 49-50 (1856) (located in library of Watt Espy, Capital Punishment Research Project, University of Alabama).

47. G. SHIRLEY, LAW WEST OF FORT SMITH 218 (1968); Galveston Daily News, June 27, 1885.

48. *See generally* Ferguson v. State, 90 Fla. 105, 105 So. 840 (1925), *cert. dismissed,* 273 U.S. 663 (1927) (no federal question presented).

49. For a general discussion, *see* Furman v. Georgia, 408 U.S. 238, 250-57 (1972) (Douglas, J., concurring).

dramatically since 1900. Nor has the racial factor disappeared recently; 79% (33/42) of the children executed since 1945 were black.

The treatment of black children should be compared to that of female children. Of these 287 children executed, seven were female, all black or Indian. The last female child executed was 17-year-old Caroline Shipp, hanged near Dallas, North Carolina, on January 22, 1892, for the murder of her infant son.[50]

Capital punishment is imposed only for capital crime, but this category of crime has changed frequently over the past three centuries. Table 3 presents the data on the kinds of capital crimes committed by executed children. The overwhelming majority of executions (80%) were for murder. Thirty-one executions were for rape and eleven were for attempted rape; all forty-two of these children were black. The last child execution occurred in Texas in 1964 for the crime of rape.[51] Curiously, two of the earliest executions of children were for sodomy with animals.[52]

Table 3

Pre-1900 and Post-1900 Executions for Crimes Committed While Under Age 18 According To Offense

Offense	1642 to 1899	1900 to Present	Totals
Unknown	1(1%)	5(3%)	6(2%)
Sodomy/Animals	2(2%)	0(0%)	2(1%)
Arson	3(3%)	0(0%)	3(1%)
Spy	1(1%)	0(0%)	1(0%)
Robbery	1(1%)	3(2%)	4(1%)
Assault	2(2%)	9(5%)	11(4%)
Rape	4(4%)	27(14%)	31(11%)
Murder	81(84%)	148(77%)	229(80%)
Totals	95(100%)	192(100%)	287(100%)

50. Williams & Dover, *The Last Woman to be Hanged,* in THE STATE, Feb. 1980, at 25; Louisville Courier-Journal, Jan. 23, 1892.

51. *See generally* Echols v. State, 370 S.W.2d 892 (Tex. Crim. App. 1963) (affirming conviction and death sentence for James Andrew Echols, executed May 7, 1964); Houston Post, May 7, 1964.

52. N. TETTERS & J. HEDBLOM, . . . HANG BY THE NECK: THE LEGAL USE OF SCAFFOLD AND NOOSE, GIBBET, STAKE AND FIRING SQUAD FROM COLONIAL TIMES TO THE PRESENT 111 (1967).

Executions of children have been much more common in some regions of the United States than in others,[53] as is illustrated by Table 4. The South region has accounted for 62% of the total (178/287), with the South-Atlantic division of that region providing about two-thirds of those 178. The other three regions have executed from 8% to 16%, respectively, of the total nationwide.

(text continued on p. 624)

53. The four regions and nine divisions used as the basis for these analyses are those established by the United States Bureau of the Census.

Table 4

Nationwide Executions for Crimes Committed While Under Age Eighteen According to Race of Offender, Crime and Time Period, Listed By Census Region and Division

Census Region and Division	Race of Offender			Crime			Time Period		Totals
	Black	White	Other	Murder	Rape	Other	Pre-1900	Post-1900	
Northeast Region:									
New England Div.	2	5	6	8	0	5	9	4	13
Middle Atlantic Div.	12	11	9	29	0	3	9	23	32
Region Totals	14	16	15	37	0	8	18	27	45
North Central Region:									
East No. Central Div.	8	15	1	24	0	0	8	16	24
West No. Central Div.	4	5	2	11	0	0	8	3	11
Region Totals	12	20	3	35	0	0	16	19	35
South Region:									
South Atlantic Div.	101	3	5	77	18	14	24	85	109
East So. Central Div.	31	8	1	31	8	1	14	26	40
West So. Central Div.	21	3	5	21	5	3	9	20	29
Region Totals	153	14	11	129	31	18	47	131	178
West Region:									
Mountain Div.	0	4	6	10	0	0	6	4	10
Pacific Div.	0	4	10	14	0	0	3	11	14
Region Totals	0	8	16	24	0	0	9	15	24
Other Federal	0	1	4	4	0	1	5	0	5
Nationwide Totals	179	59	49	229	31	27	95	192	287

Tables 5, 6, 7, and 8 provide the state-by-state breakdown of these 287 executions. Within the Northeast region, New York accounts for one-half of the total (22/45) for this nine-state region. In the six New England states, only thirteen children have been executed. Certain states have also provided the bulk of the cases for the North-Central region. For example, Ohio is responsible for 79% (19/24) of the executions of children within the five-state East North-Central division. Missouri's total of seven is 64% of the eleven within the seven-state West North-Central division. Table 7 reveals the same pattern, with Arizona and California far outpacing their sister states within the two divisions of the West region.

(text continued on p. 630)

Table 5

Northeast Region Executions for Crimes Committed While Under Age Eighteen According to Race of Offender, Crime and Time Period, Listed By Census Division and State

Census Division And State	Race of Offender			Crime			Time Period		Totals
	Black	White	Other	Murder	Rape	Other	Pre-1900	Post-1900	
New England Division:									
Connecticut	1	1	2	4	0	0	2	2	4
Maine	0	0	0	0	0	0	0	0	0
Massachusetts	1	3	4	3	0	5	6	2	8
New Hampshire	0	0	0	0	0	0	0	0	0
Rhode Island	0	0	0	0	0	0	0	0	0
Vermont	0	1	0	1	0	0	1	0	1
Division Totals	2	5	6	8	0	5	9	4	13
Middle Atlantic Division:									
New Jersey	4	1	0	4	0	1	3	2	5
New York	8	8	6	20	0	2	4	18	22
Pennsylvania	0	2	3	5	0	0	2	3	5
Division Totals	12	11	9	29	0	3	9	23	32
Region Totals	14	16	15	37	0	8	18	27	45

Table 6

North Central Region Executions for Crimes Committed While Under Age Eighteen According to Race of Offender, Crime and Time Period, Listed By Census Division and State

Census Division And State	Race of Offender			Crime			Time Period		Totals
	Black	White	Other	Murder	Rape	Other	Pre-1900	Post-1900	
East North Central Division:									
Illinois	0	2	0	2	0	0	0	2	2
Indiana	2	1	0	3	0	0	2	1	3
Michigan	0	0	0	0	0	0	0	0	0
Ohio	6	12	1	19	0	0	6	13	19
Wisconsin	0	0	0	0	0	0	0	0	0
Division Totals	8	15	1	24	0	0	8	16	24
West North Central Division:									
Iowa	0	1	0	1	0	0	1	0	1
Kansas	0	0	0	0	0	0	0	0	0
Minnesota	0	2	0	2	0	0	2	0	2
Missouri	4	1	2	7	0	0	5	2	7
Nebraska	0	1	0	1	0	0	0	1	1
North Dakota	0	0	0	0	0	0	0	0	0
South Dakota	0	0	0	0	0	0	0	0	0
Division Totals	4	5	2	11	0	0	8	3	11
Region Totals	12	20	3	35	0	0	16	19	35

Table 7

West Region Executions for Crimes Committed While Under Age Eighteen According to Race of Offender, Crime and Time Period, Listed By Census Division and State

Census Division And State	Race of Offender			Crime			Time Period		Totals
	Black	White	Other	Murder	Rape	Other	Pre-1900	Post-1900	
Mountain Division:									
Arizona	0	2	4	6	0	0	3	3	6
Colorado	0	0	0	0	0	0	0	0	0
Idaho	0	0	0	0	0	0	0	0	0
Montana	0	1	0	1	0	0	1	0	1
Nevada	0	0	1	1	0	0	0	1	1
New Mexico	0	0	1	1	0	0	1	0	1
Utah	0	1	0	1	0	0	1	1	1
Wyoming	0	0	0	0	0	0	0	0	0
Division Totals	0	4	6	10	0	0	6	4	10
Pacific Division:									
Alaska	0	0	0	0	0	0	0	0	0
California	0	3	7	10	0	0	2	8	10
Hawaii	0	0	0	0	0	0	0	0	0
Oregon	0	0	1	1	0	0	0	1	1
Washington	0	1	2	3	0	0	1	2	3
Division Totals	0	4	10	14	0	0	3	11	14
Region Totals	0	8	16	24	0	0	9	15	24

Table 8

South Region Executions for Crimes Committed While Under Age Eighteen According to Race of Offender, Crime and Time Period, Listed By Census Division and State

Census Division And State	Race of Offender			Crime			Time Period		Totals
	Black	White	Other	Murder	Rape	Other	Pre-1900	Post-1900	
South Atlantic Division:									
Delaware	2	0	0	2	0	0	2	0	2
District of Columbia	0	0	0	0	0	0	0	0	0
Florida	11	1	0	8	3	1	0	12	12
Georgia	37	1	1	28	6	5	6	33	39
Maryland	7	0	0	6	0	1	4	3	7
North Carolina	14	1	3	14	2	2	2	16	18
South Carolina	10	0	0	7	2	1	3	7	10
Virginia	19	0	0	11	4	4	5	14	19
West Virginia	1	0	1	1	1	0	2	0	2
Division Totals	101	3	5	77	18	14	24	85	109
East South Central Division:									
Alabama	11	1	0	8	3	1	4	8	12
Kentucky	8	1	0	5	4	0	4	5	9
Mississippi	6	0	1	7	0	0	1	6	7
Tennessee	6	6	0	11	1	0	5	7	12
Division Totals	31	8	1	31	8	1	14	26	40

West South Central Division:									
Arkansas	4	1	2	6	0	1	2	5	7
Louisiana	4	0	1	3	1	1	3	2	5
Oklahoma	0	0	0	0	0	0	0	0	0
Texas	13	2	2	12	4	1	4	13	17
Division Totals	21	3	5	21	5	3	9	20	29
Region Totals	153	14	11	129	31	18	47	131	178

This pattern of single-state dominance of the divisions is not as strong for the South region. Although Georgia leads the South region (as well as all jurisdictions nationwide) with forty executions, it accounts for only 36% of the total for the nine-state South-Atlantic division. This is because other states also have executed many children, such as nineteen in Virginia, eighteen in North Carolina, and twelve in Florida. Within the four-state East South-Central division, the leaders are Tennessee with thirteen and Alabama with twelve. Texas with seventeen leads the four-state West South-Central division.

The regional theme is important within the categories of the race of the offender and the crime involved. Nationwide, 62% of the children executed have been black; outside of the South region, 24% have been black. Within the seventeen-state South region, 86% have been black; within the South region's South-Atlantic division (nine states), 93% have been black. For four of these states, 100% of the children executed have been black.[54]

The South region has been more willing than other regions to impose capital punishment for crimes other than murder. Nationwide, 80% of the executions have been for the crime of murder. Within the South region, the figure is 72%; outside, 92%. One striking example is that all forty-two of the child executions for rape or attempted rape have occurred in the South region.

Table 9 presents these data broken down by the decade in which

Table 9

Executions For Crimes Committed While Under Age 18 By Time Period

Time Period	Executions	Time Period	Executions
1642-1699	2	1900-1909	23
1700-1799	5	1910-1919	26
1800-1809	0	1920-1929	28
1810-1819	1	1930-1939	44
1820-1829	2	1940-1949	50
1830-1839	3	1950-1959	17
1840-1849	4	1960-1969	4
1850-1859	7	1970-1979	0
1860-1869	13	1980-present	0
1870-1879	14		
1880-1889	22		
1890-1899	22		
1642-1899	95	1900-present	192

54. Delaware, Maryland, South Carolina, and Virginia.

the execution occurred. The peak periods for executions of children were the 1930s and 1940s. Almost half of all of the post-1900 executions took place during those twenty years.

For a variety of reasons, all executions ceased in the 1960s and did not begin again until 1977. No children have been executed since 1964, but approximately twenty persons have been sentenced to death and await execution for crimes committed while under age eighteen. Included are Todd Ice of Kentucky, who was only fifteen years old at the time his crime was committed, and Tina Canadea of Mississippi, who was only sixteen at the time of her crime.

Recent Legal Developments in Capital Punishment of Children

More than three-fourths of the nations of the world (73 of 93 reporting countries) have set age eighteen as the minimum age for execution.[55] The United Nations endorsed this position in 1976.[56] Another indication of the present global attitude is the recent condemnation of the death penalty by Pope John Paul II.[57] Contrast this benevolent international attitude with the current "get tough" attitude toward violent juvenile offenders that seems to be sweeping legislatures and the judiciary in the United States.[58] As for public acceptance of the death penalty as an appropriate legal reaction to serious crime, polls in the United States indicate that about two-thirds of those questioned favor the death penalty.[59]

The primary constitutional barrier to imposition of the death penalty has been the eighth amendment to the United States Constitution, which provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[60] The general

55. Patrick, *The Status of Capital Punishment: A World Perspective,* 56 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 397, 398-404, 410 (1965).

56. International Covenant on Civil and Political Rights, *entered into force* March 23, 1976, G.A. Res. 2200A, 21 U.N. GAOR Supp. (No. 16) at 49, 52, U.N. Doc. A/63/6 (1967) art. 6(5).

57. N.Y. Times, Jan. 16, 1983, at 5, col. 2.

58. *See, e.g.,* P. STRASBURG, VIOLENT DELINQUENTS (1978); TWENTIETH CENTURY FUND TASK FORCE ON SENTENCING POLICY TOWARD YOUNG OFFENDERS, CONFRONTING YOUTH CRIME (1978); Feld, *Juvenile Court Legislative Reform and the Serious Young Offender: Dismantling the "Rehabilitative Ideal,"* 65 MINN. L. REV. 167 (1980); Feld, *Reference of Juvenile Offenders for Adult Prosecution: The Legislative Alternative to Asking Unanswerable Questions,* 62 MINN. L. REV. 515 (1978).

59. "Since the late 1960s, according to every available measure, the American public has professed support for capital punishment by a majority of more than two to one." THE DEATH PENALTY IN AMERICA 65 (H. Bedau 3d ed. 1982); Washington Post, June 26, 1981, at A-19, col. 1 (66% favor death penalty); TIME, June 1, 1981, at 13, col. 3 (63% favor death penalty).

60. In addition to the eighth amendment, of peripheral interest is that the twenty-sixth amendment to the United States Constitution sets age eighteen as the dividing line for adult voting rights. Also, it should be noted that the Supreme Court has never regarded age as a suspect class under the equal protection clause of the fourteenth amendment to the Constitution.

purposes of the cruel and unusual punishment clauses were set forth by the Supreme Court in 1977:

> First, it limits the kinds of punishment that can be imposed on those convicted of crimes; second, it proscribes punishment grossly disproportionate to the severity of the crime; and third, it imposes substantive limits on what can be made criminal and punished as such. We have recognized the last limitation as one to be applied sparingly.[61] [Citations omitted.]

The constitutionality of the death penalty seems to have been presumed by the United States Supreme Court for a century.[62] Welcomed by some[63] and harshly criticized by others[64] is the Court's apparent willingness in the past decade to reevaluate this premise of constitutionality. In 1972 the Court held in *Furman v. Georgia*[65] that the death penalty was unconstitutional as applied in those particular cases, but it did not decide whether it is unconstitutional for all crimes and under all circumstances. This lingering question was answered by the Court in 1976 in *Gregg v. Georgia*,[66] in which a majority found that the death

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Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 313 (1976). *See also* Vance v. Bradley, 440 U.S. 93, 96-97 (1979).

61. Ingraham v. Wright, 430 U.S. 651, 667 (1977).

62. The several concurring opinions acknowledge, as they must, that until today capital punishment was accepted and assumed as not unconstitutional *per se* under the Eighth Amendment or the Fourteenth Amendment. This is either the flat or the implicit holding of a unanimous Court in *Wilkerson v. Utah*, 99 U.S. 130, 134-135, in 1879; of a unanimous Court in *In re Kemmler*, 136 U.S. 436, 447, in 1890; of the Court in *Weems v. United States*, 217 U.S. 349, in 1910; of all those members of the Court, a majority, who addressed the issue in *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 463-464, 471-472, in 1947; of Mr. Chief Justice Warren, speaking for himself and three others (Justices Black, Douglas, and Whittaker) in *Trop v. Dulles*, 356 U.S. 86, 99, in 1958; in the denial of certiorari in *Rudolph v. Alabama*, 375 U.S. 889, in 1963 (where, however, Justices Douglas, Brennan, and Goldberg would have heard argument with respect to the imposition of the ultimate penalty on a convicted rapist who had "neither taken nor endangered human life"); and of Mr. Justice Black in *McGautha v. California*, 402 U.S. 183, 226, decided only last Term on May 3, 1971.

Furman v. Georgia, 408 U.S. 238, 407-08 (Blackmun, J., dissenting).

> Perhaps enough has been said to demonstrate the unswerving position that this Court has taken in opinions spanning the last hundred years. On virtually every occasion that any opinion has touched on the question of the constitutionality of the death penalty, it has been asserted affirmatively, or tacitly assumed, that the Constitution does not prohibit the penalty. No Justice of the court, until today, has dissented from this consistent reading of the Constitution.

Id. at 428 (Powell, J., dissenting).

63. *See* H. BEDAU, THE COURTS, THE CONSTITUTION, AND CAPITAL PUNISHMENT 75-90 (1977).

64. *See* R. BERGER, DEATH PENALTIES (1982).

65. 408 U.S. 238 (1972).

66. 428 U.S. 153, 169 (1976) (plurality opinion by Stewart); *id.* at 226 (White, J., concurring). *Accord,* Jurek v. Texas, 428 U.S 262 (1976); Profitt v. Florida, 428 U.S. 242 (1976).

penalty does not per se violate the eighth amendment. In 1976[67] and 1977,[68] the Court struck down statutes incorporating mandatory death sentences, and the Court rejected the death penalty for rape cases in 1977.[69] The next year in *Lockett v. Ohio*,[70] the Court expressly required that all aspects of the offender's character and record be considered before imposing the death penalty. The meticulous treatment given these cases stems from the Court's unarguable premise that "death as a punishment is unique in its severity and irrevocability."[71]

It seems well-established in the 1980s that the sentencing decision must take into account the age of a particularly young offender: "[W]e conclude that the Eighth and Fourteenth Amendments require that the sentencer. . . not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record . . . that the defendant proffers as a basis for a sentence less than death."[72] In *Lockett* the Ohio death penalty statute was overruled partly because "consideration of defendant's . . . age, would generally not be permitted, as such, to affect the sentencing decision."[73] The youth of the offender as an appropriate mitigating factor was also mentioned in passing by the Supreme Court in *Gregg v. Georgia*,[74] *Jurek v. Texas*,[75] *Roberts v. Louisiana*,[76] and *Bell v. Ohio*.[77]

The most recent Supreme Court consideration of this issue is *Eddings v. Oklahoma*.[78] The Court had granted certiorari[79] on only one question:

67. Roberts v. Louisiana, 428 U.S. 325 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976).

68. Roberts v. Louisiana, 431 U.S. 633 (1977).

69. Coker v. Georgia, 433 U.S. 584 (1977).

70. 438 U.S. 586 (1978). *Accord,* Bell v. Ohio, 438 U.S. 637 (1978).

71. Gregg v. Georgia, 428 U.S. 153, 187 (1976) (plurality opinion of Stewart, J.).

72. Lockett v. Ohio, 438 U.S. 586, 604 (1978) (emphasis in original).

73. *Id.* at 608.

74. "Are there any special facts about this defendant that mitigate against imposing capital punishment (e.g., his youth, . . .)?" Gregg v. Georgia, 428 U.S. 153, 197 (1976) (plurality opinion by Stewart).

75. "It [the jury] could further look to the age of the defendant. . . ." Jurek v. Texas, 428 U.S. 262, 273 (1976), *quoting with approval* Jurek v. Texas, 522 S.W.2d 934, 940 (Tex. Cr. App. 1975).

76. But it is incorrect to suppose that no mitigating circumstances can exist when the victim is a police officer. Circumstances such as the youth of the offender. . . [is an example of a mitigating fact] which might attend the killing of a peace officer and which [is] considered relevant in other jurisdictions.

Roberts v. Louisiana, 431 U.S. 633, 636-37 (1977).

77. In Bell v. Ohio, 438 U.S. 637 (1978), the offender was a 16-year-old boy sentenced to death for murder. At the sentencing hearing, Bell's attorney had argued that "Bell's minority established mental deficiency as a matter of law; . . . [Y]outh, the fact that he cooperated with the police, and the lack of proof that he had participated in the actual killing strongly supported an argument for a penalty less than death in this case." *Id.* at 641.

78. Eddings v. Oklahoma, 455 U.S. 104 (1982).

79. *Id., cert. granted,* 450 U.S. 1040 (1981).

"Whether the infliction of the death penalty on a child who was sixteen at the time of the crime constitutes cruel and unusual punishment under the Eighth and Fourteenth Amendments of the Constitution of the United States."[80] When the briefs were filed and the case argued before the Court, however, the petitioner inserted an additional question for the Court: "Whether the Court should address the plain error committed by the trial court when it refused to consider relevant mitigating evidence in violation of *Lockett v. Ohio*, 438 U.S. 586 (1978)."[81] It was this second, "'11th-hour' claim"[82] that garnered the five votes necessary for reversing the imposition of the death penalty on Monty Lee Eddings and remanding the case for sentencing consistent with *Lockett*.[83]

Chief Justice Burger made passing reference to the original issue—the constitutionality of imposing the death penalty on children:

> [O]ur only authority is to decide whether [sentences] are constitutional under the Eighth Amendment. The Court stops far short of suggesting that there is any constitutional proscription against imposition of the death penalty on a person who was under age 18 when the murder was committed. . . . Because the sentencing proceedings in this case were in no sense inconsistent with *Lockett v. Ohio* [citation omitted], I would decide the sole issue on which we granted certiorari, and affirm the judgment.[84]

Thus, four members of the Court (Chief Justice Burger and Justices Blackmun, Rehnquist, and White) have indicated that they see no constitutional bar to the imposition of the death penalty on a person who committed murder when age sixteen.

The majority in *Eddings* left much more doubt as to where they stand, simply restating that the "chronological age of a minor is itself a relevant mitigating factor of great weight."[85] In her separate concurring opinion,[86] Justice O'Connor succinctly stated her view of the majority's holding: "I, however, do not read the Court's opinion either as altering this Court's opinions establishing the constitutionality of the death penalty or as deciding the issue of whether the Constitution permits imposition of the death penalty on an individual who committed a murder at age 16."[87] The constitutional question is thus left in limbo. Despite strong opposition,[88] the Court seems poised on the brink of

80. Brief for Petitioner at i, Eddings v. Oklahoma, 455 U.S. 104 (1982).
81. *Id.*
82. Eddings v. Oklahoma, 455 U.S. 104, 120 (1982) (Burger, C.J., dissenting).
83. *Id.* at 117.
84. *Id.* at 128 (Burger, C.J., dissenting).
85. *Id.* at 116.
86. *Id.* at 117 (O'Connor, J., concurring).
87. *Id.* at 119.
88. *See, e.g.*, Gwin, *The Death Penalty: Cruel and Unusual Punishment When Imposed Upon Juveniles*, 45 KY. BENCH & BAR 16 (Apr. 1981).

finding no constitutional prohibition to capital punishment for crimes committed by minors.

After *Furman v. Georgia*, the response of the state legislatures can be seen as "[t]he most marked indication of society's endorsement of the death penalty for murder."[89] Even though the Model Penal Code[90] expressly rejects the death penalty for offenders under eighteen, a strong majority of the states that have enacted new death penalty statutes would permit it. Of the thirty-nine presumptively valid death penalty statutes now in existence, only eight prohibit execution of offenders whose crimes were committed while under age sixteen,[91] seventeen,[92] or eighteen.[93] Nineteen other statutes have expressly designated the offender's youth as a mitigating factor.[94] The remainder do not specify particular mitigating circumstances but do not rule out the youth of the offender. The proposed federal statute would follow the majority by expressly requiring that the age of the offender be considered as a mitigating but not a prohibitive factor.[95]

State appellate courts have necessarily faced this question with much more frequency than have federal courts. No clear pattern can be derived from these decisions; a substantial number of courts have come down on both sides of the issue, some approving the death penalty for young offenders,[96] and others rejecting or strongly criticizing it.[97] Note,

89. Gregg v. Georgia, 428 U.S. 153, 179 (1976).

90. MODEL PENAL CODE § 210.6(1)(d) (Proposed Official Draft 1962).

91. NEV. REV. STAT. § 176.025 (1979).

92. TEX. PENAL CODE ANN. § 8.07(d) (Vernon Supp. 1982).

93. CAL. PENAL CODE § 190.5 (West Supp. 1982); COLO. REV. STAT. § 16-11-103(5)(a) (1973); CONN. GEN. STAT. ANN. § 53a-46a(f)(1) (West Supp. 1982); ILL. ANN. STAT. ch. 38, § 9-1(b) (Smith-Hurd Supp. 1982); OHIO REV. CODE ANN. § 2929.02(A) (Page 1982); TENN. CODE ANN. § 37-234(a)(1) (Supp. 1982).

94. ALA. CODE § 13A-5-51 (1975); ARIZ. REV. STAT. ANN. § 13-703G.5 (Supp. 1982); ARK. STAT. ANN. § 41-1304(4) (Repl. 1977); FLA. STAT. ANN. § 921.141(6)(g) (West Supp. 1982); KY. REV. STAT. § 532.025(2)(b)(8) (Supp. 1982); LA. CODE CRIM. PROC. ANN. art. 905.5(f) (Supp. 1982); MD. CRIM. LAW CODE ANN. § 413(g)(5) (Repl. 1982); MISS. CODE ANN. § 99-19-101(6)(g) (Supp. 1982); MO. REV. STAT. § 565.012(3)(7) (Supp. 1980); MONT. CODE ANN. § 46-18-304(7) (1979); NEB. REV. STAT. § 29-2523(2)(d) (Reissue 1979); N.H. REV. STAT. ANN. § 630:5 II(b)(5) (Supp. 1979); N.M. STAT. ANN. § 31-20A-6 I (Repl. 1981); N.C. GEN. STAT. § 15A-2000(f)(7) (Supp. 1981); 42 PA. CONS. STAT. ANN. § 9711(e)(4) (Purdon 1982); S.C. CODE ANN. § 16-3-20(C)(b)(7) (Supp. 1982); UTAH CODE ANN. § 76-3-207(2)(e) (Supp. 1982); VA. CODE § 19.2-264.4(B)(v) (Repl. 1983); WYO. STAT. § 6-2-102(j)(vii) (Repl. 1983).

95. S. 114, 97th Cong., 1st Sess., 127 CONG. REC. 5,162 (1981), § (f) (defendant youthful at time of crime).

96. *See, e.g.*, State v. Valencia, 124 Ariz. 139, 602 P.2d 807, 809 (1979) (remanded for resentencing on other grounds); High v. State, 247 Ga. 289, 276 S.E.2d 5 (1981); State v. Prejean, 379 So. 2d 240 (La. 1979); State v. Shaw, 273 S.C. 194, 255 S.E.2d 799 (1979).

97. *See, e.g.*, Bracewell v. State, 401 So. 2d 124, 125 (Ala. Cr. App. 1980): ("[W]e would likewise direct the trial court to carefully reconsider the imposition of the death sentence where two mitigating circumstances weigh heavily in the appellant's favor, i.e., her young age and the dominance of the husband, her senior by several years."); Vasil v. State, 374 So. 2d 465 (Fla. 1979) (court reduced 15-year-old's death sentence), *cert. denied*, 446 U.S. 967 (1980); Coleman

however, that the express language of *Eddings*,[98] *Lockett*,[99] and other cases require that age be considered as a mitigating factor, at least if the defendant proffers such evidence.

Criminological Purposes Served by Executing Children

From the foregoing discussion, it seems reasonable to conclude that capital punishment for children has been common enough during the past 340 years to warrant attention. Even though the youthfulness of offenders has probably always been considered, and now must be specifically taken into account as a mitigating factor, the choice must still be made between execution and a long term, usually life, in prison. What factors unique to such cases should be considered?

A number of policies and presumptions underlie the continuing debate over the appropriateness of capital punishment for crimes by adults. Perhaps the most complete list has been provided by Justice Thurgood Marshall: "There are six purposes conceivably served by capital punishment: retribution, deterrence, prevention of repetitive criminal acts, encouragement of guilty pleas and confessions, eugenics, and economy."[100] Each should be considered in the context of crimes committed by persons under age eighteen.

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v. State, 378 So. 2d 640, 650 (Miss. 1979) (Court reduced the death sentence of a 16-year-old. "Only after being fired upon did the 16-year-old shoot. Again, Coleman had the opportunity to shoot [the victim's wife], who was an eyewitness, but did not."); State v. Stewart, 197 Neb. 497, 524-25, 250 N.W.2d 849, 865-66 (1977) (Court reduced death sentence of a 16-year-old. "The issue is not whether his age 'excuses' the murder. Obviously it does not, and defendant has been convicted of premeditated murder. . . . After weighing the aggravating and mitigating circumstances in this case we conclude that the defendant's age at the time of the crime and the absence of any significant criminal record mitigate strongly against the imposition of the death penalty upon Rodney Stewart; and that the public will be served and justice done by sentencing him to a term of life imprisonment.").

98. Eddings v. Oklahoma, 455 U.S. 104, 116 (1982).

99. Lockett v. Ohio, 438 U.S. 586, 604, 608 (1976).

100. Furman v. Georgia, 408 U.S. 238, 342 (1972) (Marshall, J., concurring). Amnesty International summarizes the arguments as follows:

> The retentionist argument is often based upon the following points:
>
> 1. For particularly reprehensible offences, death is the only fitting and adequate punishment.
> 2. The death penalty acts as a deterrent.
> 3. Those who commit certain grave offences must be put to death for the protection of society at large.
>
> Among the main arguments put forward by the abolitionists are:
>
> 1. The death penalty is irreversible. Decided upon according to fallible processes of law by fallible human beings, it can be—and actually has been—inflicted upon people innocent of any crime.
> 2. There is lack of convincing evidence that the death penalty has any more power to deter than—say—a long period of imprisonment. Its deterrent effect on rational offenders is highly questionable; it is even more so in the case of offenders who are mentally-ill, or who are impelled by violent political motives.

The goal of societal retribution or legal vengeance achieved through execution of a child seems difficult to justify. However, capital punishment can be characterized as an understandable expression of societal outrage at particular crimes.[101] In this sense, Justice Stewart referred favorably to a retributive purpose in *Gregg v. Georgia*[102] and in *Furman v. Georgia*.[103] Chief Justice Burger has also approved this justification.[104] In contrast, Justice Marshall has argued persuasively that the eighth amendment precludes retribution for its own sake.[105]

Even if the execution of an adult solely for revenge is constitutionally permissible, this justification of capital punishment is less appealing when the object of righteous vengeance is a child. The spectacle of our society seeking legal vengeance through execution of a child raises fundamental questions about the nature of children's moral responsibility for their actions and about society's moral responsibility to protect and nurture children.

Probably the most complex issue is whether capital punishment is more effective than life imprisonment as a deterrent to crime. This key issue has been the subject of extensive research,[106] but no consistent

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3. Execution by whatever means and for whatever offence is a cruel, inhuman and degrading punishment.

AMNESTY INTERNATIONAL, THE DEATH PENALTY: AMNESTY INTERNATIONAL REPORT 3 (1979).

101. *See* H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 43-44 (1968).

102. "This function [retribution] may be unappealing to many, but it is essential in an ordered society that asks its citizens to rely on legal processes rather than self-help to vindicate their wrongs." Gregg v. Georgia, 428 U.S. 153, 183 (1976) (opinion of Stewart, J.).

103. On that score I would say only that I cannot agree that retribution is a constitutionally impermissible ingredient in the imposition of punishment. The instinct for retribution is part of the nature of man, and channeling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law. When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they "deserve," then there are sown the seeds of anarchy—of self-help, vigilante justice, and lynch law.

Furman v. Georgia, 408 U.S. 238, 308 (1972) (Stewart, J., concurring).

104. It is argued that retribution can be discounted because that, after all, is what the Eighth Amendment seeks to eliminate. There is no authority suggesting that the Eighth Amendment was intended to purge the law of its retributive elements, and the Court has consistently assumed that retribution is a legitimate dimension of the punishment of crimes. . . . It would be reading a great deal into the Eighth Amendment to hold that the punishments authorized by legislatures cannot constitutionally reflect a retributive purpose.

Id. at 394-95 (Burger, C.J., dissenting).

105. *Id.* at 342-45 (Marshall, J., concurring).

106. *See, e.g.*, T. SELLIN, CAPITAL PUNISHMENT (1967); Bailey, *A Multivariate Cross-Sectional Analysis of the Deterrent Effect of the Death Penalty*, 64 SOC'Y & SOCIAL RESEARCH 183 (1980); Bailey, *The Deterrent Effect of the Death Penalty for Murder in California*, 52 S. CAL. L. REV. 743 (1979); Baldus & Cole, *A Comparison of the Work of Thorsten Sellin and Isaac Ehrlich*

conclusions have been drawn by members of the Supreme Court.[107] When applied to children, the key issues are adolescents' perception of death and whether that perception acts as a more significant deterrent to criminal acts than life imprisonment.

Even less is known about death as a deterrent for adolescents than is known about death as a deterrent for adults. Many social scientists would agree that adolescents live for today with little thought of the future consequences of their actions.[108] The defiant attitudes and risk-taking behaviors of some adolescents are probably related to their "developmental stage of defiance about danger and death."[109] Some

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on the Deterrent Effect of Capital Punishment, 85 YALE L.J. 170 (1975); Bedau, *Deterrence and the Death Penalty: A Reconsideration*, 61 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 539 (1970); Bowers & Pierce, *The Illusion of Deterrence in Isaac Ehrlich's Research on Capital Punishment*, 85 YALE L.J. 187 (1975); Ehrlich, *The Deterrent Effect of Capital Punishment: A Question of Life and Death*, 65 AM. ECON. REV. 397 (1975); Glaser, *Capital Punishment—Deterrent or Stimulus to Murder? Our Unexamined Deaths and Penalties*, 10 U. TOL. L. REV. 317 (1979); Peck, *The Deterrent Effect of Capital Punishment: Ehrlich and His Critics*, 85 YALE L.J. 359 (1976).

107. *Compare* the view of Justice Stewart:

> Although some of the studies suggest that the death penalty may not function as a significantly greater deterrent than lesser penalties, there is no convincing empirical evidence either supporting or refuting this view. We may nevertheless assume safely that there are murderers, such as those who act in passion, for whom the threat of death has little or no deterrent effect. But for many others, the death penalty undoubtedly is a significant deterrent. There are carefully contemplated murders, such as murder for hire, where the possible penalty of death may well enter into the cold calculus that precedes the decision to act.

Gregg v. Georgia, 428 U.S. 153, 185-86 (1976) *with* that of Justice Brennan:

> In short, whatever the speculative validity of the assumption that the threat of death is a superior deterrent, there is no reason to believe that as currently administered the punishment of death is necessary to deter the commission of capital crimes. Whatever might be the case were all or substantially all eligible criminals quickly put to death, unverifiable possibilities are an insufficient basis upon which to conclude that the threat of death today has any greater deterrent efficacy than the threat of imprisonment.

Furman v. Georgia, 408 U.S. 238, 302 (1972) (Brennan, J., concurring), *and with* Justice Marshall's perspective:

> Despite the fact that abolitionists have not proved nondeterrence beyond a reasonable doubt, they have succeeded in showing by clear and convincing evidence that capital punishment is not necessary as a deterrent to crime in our society. That is all that they must do. We would shirk our judicial responsibilities if we failed to accept the presently existing statistics and demanded more proof. It may be that we now possess all the proof that anyone could ever hope to assemble on the subject. . . .
>
> In light of the massive amount of evidence before us, I see no alternative but to conclude that capital punishment cannot be justified on the basis of its deterrent effect.

Id. at 353-54 (1972) (Marshall, J., concurring).

108. Kastenbaum, *Time and Death in Adolescence*, in THE MEANING OF DEATH 99 (H. Feifel ed. 1959).

109. Fredlund, *Children and Death from the School Setting Viewpoint*, 47 J. SCHOOL HEALTH 533 (1977).

adolescents may play games of chance with death from a feeling of omnipotence.[110] They typically have not learned to accept the finality of death.[111] Adolescents tend to view death as a remote possibility; old people die, not teenagers. Consider, for example, teenagers' propensity to flirt with death through reckless driving, ingestion of dangerous drugs, and other similar "death-defying" behavior.

The meager research on this issue suggests the conclusion that threatening a child with death probably does not have the same impact as threatening an adult with death. Even if some percentage of adults are deterred by the death penalty, the deterrent effect tends to lose much of its power when imposed upon an adolescent.

No one can deny that execution of a child will prevent repetitive criminal acts by that particular child. The death penalty does, however, seem an unnecessarily harsh solution to the problem of recidivism. Not only are murderers "extremely unlikely to commit other crimes either in prison or upon their release,"[112] but irreversibly abandoning all hope of the reform of a child is squarely in opposition to the fundamental premises of juvenile justice and comparable socio-legal systems. While the specific deterrence argument may be somewhat persuasive in the case of the 45-year-old habitual criminal, it is singularly inappropriate and defeatist when applied to the 16-year-old child.

Using capital punishment as leverage to encourage guilty pleas and confessions seems not only a questionable justification for this ultimate sanction but also unnecessary in a child's case. The threat of life imprisonment for an adolescent who has fifty to sixty years yet to live is so overwhelming that it should provide whatever leverage the government might need.

The potential fifty to sixty years of life in prison also gives rise to an economic argument—that it is simply an enormous and unjustifiable financial burden on society to support life imprisonment instead of executing youthful offenders. Given the extraordinarily high cost of capital trials and appeals, as well as the cost of maintaining death row and of performing executions, it would seem reasonable to conclude that "there can be no doubt that it costs more to execute a man than to keep him in prison for life."[113]

Finally, the issue of using capital punishment for eugenic purposes or to improve the human race seems unworthy of serious considera-

110. Miller, *Adolescent Suicide: Etiology and Treatment,* in 9 ADOLESCENT PSYCHIATRY 327 (S. Feinstein, J. Looney, A. Schwartzberg, & A. Sorosky eds. 1981).

111. R. LONETTO, CHILDREN'S CONCEPTIONS OF DEATH 134-41 (1980); Hostler, *The Development of the Child's Concept of Death,* in THE CHILD AND DEATH (O. Sahler ed. 1978).

112. Furman v. Georgia, 408 U.S. 238, 355 (1972) (Marshall J., concurring).

113. *Id.* at 358.

tion.[114] In any event, the less severe alternatives of sterilization and/or life imprisonment would seem to be required by the Constitution.[115]

This brief consideration of the purposes served by capital punishment for children is inconclusive at best, as is such a consideration vis-à-vis adults. Most of the justifications for capital punishment of adults lose whatever persuasiveness they have when applied to the case of an offender under age eighteen.

Conclusion

The 287 executions for crimes committed by persons under age eighteen comprise only 2% of the total of 14,029 executions in our history. The concept of capital punishment for children seems surprising in a country that so dotes upon its children. If early reforms of the criminal justice system were intended to benefit children by minimizing the harshness of criminal sentences, why is it that capital punishment of children was allowed to continue? How can the 192 executions of children since the inception of the socio-legal experiment in juvenile justice be explained?

If the phenomenon ended there, perhaps the execution of children would be cast aside as just another odd chapter in American history. But the reemergence of capital punishment in the past few years, complete with placing children on death row, makes it clear that this issue is of current as well as historical importance.

Few state capital punishment statutes prohibit executions of children, and the Supreme Court has come perilously close to removing any supposed constitutional barriers. The present state of the law is that the youth of the offender must be considered as a mitigating factor by the sentencing authority. That and other mitigating factors can be overcome by aggravating factors, though, resulting in capital punishment for a child even in the 1980s.

114. [T]his Nation has never formally professed eugenic goals, and the history of the world does not look kindly on them. If eugenics is one of our purposes, then the legislatures should say so forthrightly and design procedures to serve this goal. Until such time, I can only conclude, as has virtually everyone else who has looked at the problem, that capital punishment cannot be defended on the basis of any eugenic purposes.

Id. at 357.

115. For example, even Chief Justice Burger has recognized that sentencing procedures should not create "the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments." Lockett v. Ohio, 438 U.S. 586, 605 (1978). Whether sterilization would be a constitutionally acceptable "less severe penalty" is in doubt. *See* Skinner v. Oklahoma, 316 U.S. 535 (1942).

The notion of a governmental agency imposing the death penalty upon a child through its judicial system raises the deepest questions about the demands of justice versus the special nature of childhood. A handful of states have formed a minority position that rejects capital punishment for children. Other jurisdictions will be considering new capital punishment statutes or amendments to present capital punishment statutes, and they should give strong consideration to this minority position. As the Supreme Court continues to review challenges to the constitutionality of capital punishment, the issue of the age of the offender should be given special consideration. Even if the eighth amendment does not inherently proscribe death as a punishment for particularly aggravated murder by mature adults, the unique legal, psychological, and social status of persons under age eighteen should be incorporated into this area of constitutional interpretation. The response to this article's opening question should be that the United States counts itself among "civilized societies [which] will not tolerate the spectacle of execution of children."[116]

116. MODEL PENAL CODE § 210.6, commentary at 133 (Official Draft and Revised Comments 1980).