# REPORT OF THE SECTION OF CRIMINAL JUSTICE

## RECOMMENDATION*

*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).

## REPORT

### Introduction

While the American Bar Association has no current general policy on capital punishment, the ABA has long had a special interest in seeing reforms in the juvenile justice system. This is demonstrated, for example, in its nine-year project to draft Juvenile Justice Standards along with the Institute of Judicial Administration. However, the Standards do not specifically address the question of the application of capital punishment to juveniles.

Particularly in the early 1980's, capital punishment of juveniles is reemerging as an issue of great national importance, sufficient even to capture the attention of the United States Supreme Court.[1] The reincarnation of capital punishment for crimes committed while under age eighteen is the result of the coming together of two trends. One trend is the increasing tendency to subject persons under the maximum juvenile court jurisdictional age limit to criminal prosecution, either through direct prosecution of that young offender in criminal court[2] or through initial juvenile court jurisdiction being transferred in waiver proceedings to criminal court.[3] The other trend is the return of reliance upon capital punishment in the criminal justice system.[4] The combined effect of these trends is to increasingly expose juveniles to the possibility of capital punishment for their misdeeds.

### History of Capital Punishment for Young Criminals

As with most other facets of our criminal law, we inherited the tradition of capital punishment primarily from England but also from other European countries. A fundamental premise from 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.[5] 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 crime and be sentenced to death.[6] No such presumption applied to persons age fourteen or over. This view of children's liability in the criminal justice system has apparently been accepted by the United States Supreme Court in *In Re Gault:*

---

*The recommendation was approved. See page 814.

[1] *Eddings v. Oklahoma,* 455 U.S. 104 (1982).

[2] See, e.g., N.Y. Fam. Ct. Act §712(a)(ii) (McKinney Supp. 1979); N.Y. Penal Law §§10(18), 30 (McKinney Supp. 1979); N.Y. Crim. Proc. Law §§180.75, 190.71, 210.43, 220.10(5)(g)(McKinney Supp. 1980).

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

[4] *Gregg v. Georgia,* 428 U.S. 153 (1976), held that capital punishment statutes were not inherently unconstitutional. There have been four executions since then: Gary Gilmore (January 17, 1977); John Spenkeling (May 25, 1979); Jesse Bishop (October 22, 1979); and Steven Judy (March 9, 1981).

[5] 4 W. BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 23-24 (1792); 1 HALE, PLEAS OF THE CROWN 25-28 (1682).

[6] *Id.*

> At common law, 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.[7]

Considerable debate has centered around whether or not children were actually executed after having been sentenced to death. Much of the debate seems to be confused by the use of relatively vague terms such as "children," "adolescents," and infrequent specification of the age of the offender when the crime occurred or when executed. However, it seems reasonably clear that in England "adolescents as well as children could be—and actually were—sentenced to death and even executed."[8] As for younger children, the law's bark was probably much worse than its bite. For example, one researcher studied the records from 1801 to 1836 for the Old Bailey in London. He found 103 cases of children under age fourteen being sentenced to death but not a single one being finally executed.[9]

This same discrepancy between what was said and what was done apparently carried over to colonial America and the early United States. In early nineteenth century United States, it seems likely that "courts were extremely hesitant to sentence a child under fourteen to death."[10] As for carrying out the death sentence, some have observed that

> only 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.[11]

That at least some trial courts were convinced of this reluctance to execute younger children is suggested by a criminal trial judge's observation 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 search none could be found, and it is presumed none can be found.[12]

Even if younger children were sentenced to death, these younger offenders were apparently much more likely than older offenders to have their death sentence commuted to a lesser penalty by the governor of the state.[13]

Recent research results, presented in more detail later in this report, suggest that the courts' observations cited above were misinformed. Seven children were executed prior to 1800 and 97 prior to 1900, with the youngest being age 10.

### Impact of the Juvenile Justice System, 1899-1925

During this period in the United States, the embryonic roots of the juvenile justice system were emerging.[14] This observation by the United States Supreme Court in *In Re Gault* is the conventional view:

> 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.

---

[7] *In Re Gault,* 387 U.S. 1, 16 (1967).

[8] 1 L. RADZINOWICZ, A HISTORY OF ENGLISH CRIMINAL LAW AND ITS ADMINISTRATION FROM 1750: THE MOVEMENT FOR REFORM 11 (1948).

[9] Knell, "Capital Punishment: Its Administration in Relation to Juvenile Offenders in the Nineteenth Century and its Possible Administration in the Eighteenth, 5 BRIT. J. DELINQ. 198, 199 (1965).

[10] Platt & Diamond, "The Origins of the 'Right and Wrong' Tests of Criminal Responsibility and Its Subsequent Development in the United States: An Historical Survey," 54 CALIF. L. REV. 1227, 1246-47 (1966); *see also* A. PLATT, THE CHILD SAVERS: THE INVENTION OF DELINQUENCY 211-12 (2nd ed. 1977).

[11] Platt & Diamond, *supra* note 11, at 1246-47, citing *Godfrey v. State,* 31 Ala. 323 (1858), and *State v. Guild,* 10 N.J.L. 163 (1828).

[12] *People v. Teller,* 1 Wheeler Crim Law Cases 231, 233 (N.Y. City Court, 1823).

[13] W. SMITHERS, TREATISE ON EXECUTIVE CLEMENCY IN PENNSYLVANIA (1909); Wolfgang, Kelly and Nolde, "Comparison of the Executed and the Commuted Among Admissions to Death Row," 53 J. CRIM. L., C. & P.S. 301 (1962).

[14] Fox, "Juvenile Justice Reform: An Historical Perspective," 22 STAN. L. REV. 1187 (1970).

> The child was to be "treated" and "rehabilitated" and the procedures, from apprehension through institutionalization, were to be "clinical" rather than punitive.[15]

Mid-nineteenth century reforms had focussed primarily upon modifying the harshness of the correctional phase of the criminal justice system.[16] The most well-known examples are the houses of refuge established in various cities by apparently well-meaning reformists anxious to separate youthful offenders from adult criminals.[17] The motives of these reformists of "child-savers" have been persuasively impuned by some who suggest this was simply encouragement to reach into children's private lives with punitive policies sugar-coated in the rhetoric of rehabilitation.[18] In any event, those reforms were overshadowed by the continuing criminal court jurisdiction over those youthful offenders. Thus came the need for a separate legal system for juveniles.

Following Illinois' 1899 lead, other states enacted juvenile court legislation tending to duplicate the example provided by Illinois and other pioneer states. By 1925 all states but two had such legislation, with the federal government passing a juvenile court act in 1938.[19] The appearance of the juvenile justice system can be seen as bringing the official position of the law into line with the previous unofficial and implicit special treatment given to young offenders. For the purposes of this report, a most obvious premise is that no juvenile court could impose "punishment" upon a juvenile offender but must treat and rehabilitate. This seems to be an unarguable rejection of the death penalty for juvenile offenders. However, during this early era of juvenile justice (1900-1925), over 50 persons were executed for crimes committed while under age eighteeen.

**Prosecution of Juveniles in Criminal Court**

In most jurisdictions today, delinquent acts are defined as acts that are in violation of state or federal law, local ordinance, or an order of the juvenile court.[20] Generally, this means acts which would be crimes if committed by an adult. This broad category would include murder and other capital crimes unless they are specifically excluded from the jurisdiction of the juvenile court. The criminal nature of these delinquent acts means that the cases could conceivably end up under the jurisdiction of criminal court, as has been observed by the Supreme Court in *Gault:*

> the 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.[21]

In 1975, the Supreme Court noted in passing that "an overwhelming majority of jurisdictions permit transfer in certain instances."[22]

The Supreme Court's first direct consideration of juvenile justice issues, in *Kent v. United States,* 383 U.S. 542 (1966), was a review of the procedures by which a juvenile court could and should waive jurisdiction over a juvenile offender, resulting in transfer of the case to adult criminal court. The impact of such transfer is exemplified by the facts in *Kent:* 16-year-old Morrils A. Kent, Jr., was convicted of six felonies and sentenced to a total of 30 to 90 years in prison.[23]

Another way that a person under the age limit for juvenile court jurisdiction can end up in criminal court is to commit an offense which has been expressly excluded from the jurisdiction of juvenile court.[24] These excluded offenses are typically only the most serious crimes, such as murder, rape, rob-

---

[15]*In Re Gault,* 387 U.S. 1, 15-16 (1967).
[16]*See, generally,* S. DAVIS, RIGHTS OF JUVENILES: THE JUVENILE JUSTICE SYSTEM (2d, 1981).
[17]Mennel, Origins of the Juvenile Court: Charging Perspectives on the Legal Rights of Juvenile Delinquents, 18 CRIME & DELINQUENCY 68 (1972).
[18]A. PLATT, *supra,* note 10; Fox, *supra,* note 14.
[19]*See, generally,* V. STREIB, JUVENILE JUSTICE IN AMERICA 5-7 (1978); and Rupert, "Juvenile Criminal Proceedings in Federal Courts, 18 LOYOLA LAW REVIEW 133 (1971-72).

[20]S. DAVIS, *supra,* note 16, at 2-12.
[21]*In Re Gault,* 387 U.S. 1, 50-51 (1967).
[22]*Breed v. Jones,* 421 U.S. 519, 535 (1975).
[23]*Kent v. United States,* 383 U.S. 542, 550 (1966).
[24]S. DAVIS, *supra,* note 16, 2-15 to 2-17.

bery, etc. Some states[25] expressly exclude capital offenses from juvenile court jurisdictions, leaving only criminal court jurisdiction over such offenses.

A third alternative is presented by those states which give the prosecutor the authority to decide in which court—juvenile or criminal—the case should be filed.[26] If the prosecutor files a juvenile petition, the case proceeds in juvenile court. If the prosecutor files a criminal information or obtains a grand jury indictment, the case proceeds in criminal court.

Each of these three alternatives lodges the choice of court in a different decision-maker. The traditional waiver alternative leaves the decision up to the judiciary—for our purposes here 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, the young offender is under the juvenile court age limit but is subjected to the full authority of the criminal court, including the power to impose capital punishment for certain crimes.

### Recent Legal Developments in Capital Punishment of Juveniles

Over three fourths of the nations of the world (73 of 93 reporting countries) have set age eighteen as the minimum for execution.[27] This was also the position taken by the United Nations in 1976.[28] Contrast this benevolent international attitude with the current "get tough" attitude toward violent juvenile offenders which seems to be sweeping legislatures and the judiciary in the United States.[29] As for public acceptance of the death penalty as an appropriate legal reaction to serious crime, United States polls indicate that from 66 percent[30] to 63 percent[31] of those questioned favor the death penalty.

The primary constitutional gatekeeper for death penalty cases 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." The general theories of the Cruel and Unusual Clause 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.[32]

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 line for adult voting rights. Also should be noted is that the Supreme Court has not regarded age as a "suspect class" under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.[33]

The last decade has seen approximately one major decision by the United States Supreme Court each year on the death penalty. In 1972, the Supreme Court held in *Furman v. Georgia*[34] that the death penalty was unconstitutional as then applied but did

---

[25] *See, e.g.,* N.C. Gen. Stat. §7A-608 (Supp. 1979).

[26] S. DAVIS, *supra,* note 16, at 2-17 to 2-19.

[27] Patrick, "The Status of Capital Punishment: A World Perspective," 56 J. CRIM. L., C. & P.S. 397, 398-403, 410 & Table 1 (1965).

[28] International Covenant on Civil and Political Rights, *entered into force* March 23, 1976, G.A. Res. 2200A, 21 U.N.G.A.O.R., supp. (No. 16) 49, 52, U.N. Doc. A/63/6 (1967) art. 6(5).

[29] *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,'" 1981 MINN. L. REV. 167; and Feld, "Reference of Juvenile Offenders for Adult Prosecution: The Legislative Alternative to Asking Unanswerable Questions," 1978 MINN. L. REV. 515.

[30] Washington Post, June 26, 1981, at A-19, col. 1 (reporting results of Gallup Poll).

[31] TIME, June 1, 1981, at 13, col. 3.

[32] *Ingraham v. Wright,* 430 U.S. 651, 667 (1977).

[33] *Massachusetts Board of Retirement v. Mugia,* 427 U.S. 307 (1976); *Vance v. Bradley,* 440 U.S. 93 (1979).

[34] *Furman v. Georgia,* 408 U.S. 238 (1972).

not decide whether it is unconstitutional for all crimes and in all circumstances. The Court held in 1976 that the death penalty does not per se violate the Eighth Amendment.[35] In 1976[36] and 1977,[37] the Court struck down statutes incorporating mandatory death sentences, and the Court rejected the death penalty for rape cases in 1977.[38] The next year in *Lockett v. Ohio,*[39] 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."[40]

It seems well established in the 1980's that the sentencing decision must take into account the age of a particularly young offender:

> we conclude that the Eighth and Fourteenth Amendments require that the sentences . . . 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.[41]

*Lockett* overruled the Ohio death penalty statute in part because "consideration of defendant's . . . age would generally not be permitted, as such, to affect the sentencing decision."[42] The youth of the offender as an appropriate mitigating factor was also mentioned in passing by the Supreme Court in *Gregg v. Georgia,*[43] *Jurek v. Texas,*[44] (Harry) *Roberts v. Louisiana,*[45] and *Bell v. Ohio.*[46] In *Bell,* the offender was a sixteen-year-old boy sentenced to death for murder, but the Court didn't directly consider his age since the Ohio statute under which he had been convicted was found to be unconstitutional.

In *Eddings v. Oklahoma,*[47] the Court had granted certiorari[48] on only one question:

> 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?[49]

However, when the briefs were filed and the case argued before the Court, 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)?[50]

It was this second, " 'eleventh-hour' claim"[51] that collected five of the nine votes in the United States Supreme Court, resulting in reversing the imposition of the death penalty and remanding the case for another sentencing decision more in line with *Lockett.*[52]

And what of the original issue before the court: Whether inflicting the death penalty on children is unconstitutional? Chief Justice Burger made a passing reference to that issue:

> Our 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,* 438 U.S. 586 (1978), I would decide the sole issue on which we granted certiorari,

---

[35] *Gregg v. Georgia, 428 U.S. 153 (1976); Profitt v. Florida,* 428 U.S. 242 (1976); and *Jurek v. Texas,* 428 U.S. 262 (1976).

[36] *Woodson v. North Carolina,* 428 U.S. 280 (1976); and *Roberts v. Louisiana,* 428 U.S. 325 (1976).

[37] (Harry) *Roberts v. Louisiana,* 431 U.S. 633 (1977).

[38] *Coker v. Georgia,* 433 U.S. 584 (1977).

[39] *Lockett v. Ohio,* 438 U.S. 586 (1978); *Bell v. Ohio,* 438 U.S. 637 (1978).

[40] *Gregg v. Georgia,* 428 U.S. 153, 187 (opinion of Stewart, J., Powell, J., and Stevens, J.) (1976).

[41] *Lockett v. Ohio,* 438 U.S. 586, 604 (1978).

[42] *Lockett v. Ohio,* 438 U.S. at 608.

[43] *Gregg v. Georgia,* 428 U.S. 153, 197 (1976).

[44] *Jurek v. Texas,* 428 U.S. 262, 272-73 (1976).

[45] (Harry) *Roberts v. Louisiana,* 431 U.S. 633, 637 (1977).

[46] *Bell v. Ohio,* 438 U.S. 637, 641 (1978).

[47] *Eddings v. Oklahoma,* 455 U.S. 104 (1982).

[48] *Eddings v. Oklahoma,* 450 U.S. 1040 *certiorari granted,* No. 80-5727 (April 6, 1981).

[49] Brief for Petitioner at i, *Eddings v. Oklahoma,* 455 U.S. 104 (1982).

[50] *Id.*

[51] *Eddings v. Oklahoma,* 455 U.S. 104, 120 (Burger, C.J., dissenting).

[52] *Eddings v. Oklahoma,* 455 U.S. at 117.

offender was a sixteen-
ced to death for murder,
directly consider his age
ute under which he had
vas found to be un-

*lahoma,*[47] the Court had
on only one question:
iction of the death penal-
o was sixteen at the time
stitutes cruel and unusual
er the Eighth and Four-
ents of the Constitution
ates?[49]
e briefs were filed and the
the Court, the petitioner
tional question for the

ourt should address the
mitted by the trial court
d to consider relevan
dence in violation o
, 438 U.S. 586 (1978)?[50]
cond, " 'eleventh-hour
cted five of the nine vote
tes Supreme Court, result
he imposition of the deat
nding the case for anothe
ion more in line wit

ne original issue before th
nflicting the death penalt
nconstitutional? Chief Jus
a passing reference to tha

ority is to decide whethe
e constitutional under th
lment. The Court stops fa
gesting that there is an
proscription against impo
death penalty on a perso
er age 18 when the murd
d . . . . Because the senten
gs in this case were in n
stent with *Lockett v. Ohi*
(1978), I would decide th
which we granted certiora

138 U.S. 637, 641 (1978).
*Oklahoma,* 455 U.S. 1

*Oklahoma,* 450 U.S. 10
*ted,* No. 80-5727 (April

etitioner at i, *Eddings*
5 U.S. 104 (1982).

*klahoma,* 455 U.S. 104, 1
dissenting).
*klahoma,* 455 U.S. at 117.

and affirm the judgment.[53]

Thus, four members of the Court (Chief Justice Burger and Justices Blackmun, Rehnquist and White) can be said to believe no constitutional bar exists to imposition of the death penalty on an offender who committed murder when age sixteen.

The majority in *Eddings* left much more doubt as to where they stand, simply reminding us that "chronological age of a minor itself a relevant mitigating factor of great weight."[54] In her separate concurring opinion, Justice O'Connor succinctly characterized 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.[55]

After *Furman v. Georgia,* the response of the state legislatures has been seen as "the most marked indication of society's endorsement of the death penalty."[56] Even though the Model Penal Code[57] expressly rejects the death penalty for offenders under eighteen, after *Furman* the states have overwhelmingly passed new death penalty statutes which would permit it. Of the thirty-five presumptively valid death penalty statutes now in existence, only eight prohibit execution of offenders whose crimes were committed while under age sixteen,[58] seventeen[59] or eighteen.[60] Twenty-three statutes[61] have expressly designated the offender's youth as a mitigating factor, while others do not specify particular mitigating circumstances but do not rule out the youth of the offender. The presently proposed federal statute[62] would follow the majority of the state statues by expressly setting out age of the offender as a mitigating but not prohibitive factor.

State appellate courts have necessarily faced the "death penalty for children" question with much more frequency than the federal courts. No clear pattern can be defined from these decisions, but it seems that a substantial number of cases have come down on both sides of the issue, some approving the death penalty for young offenders[63] and others rejecting or strongly criticizing it.[64] Note, however, that express

---

*Eddings v. Oklahoma,* 455 U.S. at 128 Burger C.J., dissenting).

*Eddings v. Oklahoma,* 455 U.S. at 116.

*Eddings v. Oklahoma,* 455 U.S. at 117 O'Connor, J., concurring).

*Gregg v. Georgia,* 428 U.S. 153, 179 976).

AMERICAN LAW INSTITUTE, ODEL PENAL CODE §210.6(1)(d) roposed Official Draft, 1962).

NEV. REV. STAT. §176.025 (1973 & pp. 1977).

TEXAS PENAL CODE ANN., tit. 2, .07(d)(Vernon Supp. 1980-1981).

CAL. PENAL CODE §190.5 (West Supp. 80); COLO. REV. STAT. §16-11-103(5)(a) 978); CONN. GEN. STAT. ANN. 3a-46a(f)(1)(West Supp. 1980); and ILL. EV. STAT. ch. 38, §9-1(b)(Smith Hurd pp. 1978); OHIO REV. CODE §2929.02 pp. 1982); TENN. CODE ANN. 7-234(a)(1).

981 ALA. ACTS, §13(g); ARIZ. REV. STAT. §13-703G.5 (Supp. 1980); ARK. STAT. ANN. §41-1304(4) (Supp. 1979); CAL. PENAL CODE §190.3(i)(West Supp. 1980); COLO. REV. STAT. ANN. §16-11-103 (5.1)(f)(1978); CONN. GEN. STAT. ANN. §53a-46a(f)(West Supp. 1980); FLA. STAT. ANN. §921.141(6)(g)(West Supp. 1981); KY. REV. STAT. §532.025(b)(8)(Supp. 1980); LA. CODE CRIM. PRO. ANN. art. 905.5(f)(Supp. 1981); MD. CRIM. LAW CODE ANN. §413(g)(5) (Supp. 1980); MISS. CODE ANN. §99-19-101(6)(g)(Supp. 1979); MO. REV. STAT. §565.012(3)(7)(Supp. 1981); MONT. REV. CODES ANN. §46-18-304(7) (1979); NEB. REV. STAT. §29-2523(2)(d)(1979); NEV. REV. STAT. §200.035(6)(1979); N.H. REV. STAT. ANN. §630:5 II(b)(5)(Supp. 1979); N.M. STAT. ANN. §31-20A-6 I (Supp. 1980); N.C. GEN. STAT. §15A-2000(f) (7)(Supp. 1979); 18 PA. CONS. STAT. ANN. §1311(e)(4)(Purdon 1980); S.C. CODE §16-3-20(c)(b)(7)(Supp. 1980); UTAH CODE ANN. §76-(a)(b)(7)(Supp. 1979); VA. CODE §19.2-264(B)(V)(Supp. 1980); WYO. STAT. ANN. §6-4-102(j)(vii) (Supp. 1980).

[62]S. 114, 97th Cong., 1st Sess., 127 Cong. Rec. S. 162 (1981), §3562A(g)(1)(defendant under age 18 at time of crime).

[63]*See, e.g., High v. State,* 276 S.E.2d 5 (Ga. 1981); *State v. Prejean,* 379 So.2d 240 (La. 1979); *State v. Shaw,* 273 S.C. 194, 255 S.E.2d 799 (1979); and *State v. Valencia,* 124 Ariz. 139, 602 P.2d 807 (1979).

[64]*See, e.g., Bracewell v. State,* ____ So.2d ____ (Ala. Cr. App. 1980) ("We would likewise direct the trial court to carefully reconsider the imposition of the death sentence where two mitigating circum-

language in *Lockett*[65] and other cases mentioned above require that age be considered as a mitigating factor, at least if the defendant proffers such evidence.

**Purposes Served by Executing Juveniles**

Regardless of the much debated but still unresolved appropriateness of capital punishment as a reaction to adult crime, it seems clear that the same arguments do not apply equally to juvenile crime. Consider the applicability to persons under age eighteen of the "six purposes conceivably served by capital punishment: retribution, deterrence, prevention of repetitive criminal acts, encouragement of guilty pleas and confessions, eugenics, and economy."[66]

Retribution or legal vengeance seems difficult enough for a government to justify where adult offenders are involved, and vengeance against children for their misdeeds seems quite beyond justification. It has been persuasively argued that the Eighth Amendment precludes retribution for its own sake as improper.[67] The spectacle of our society seeking legal vengeance through execution of a child should not be countenanced by the ABA.

Probably the most complex issue is whether capital punishment is more effective than life imprisonment as a deterrent to crime. When applied to juveniles, a key question is the adolescent's perception of death and whether that perception then acts as a more significant deterrent than life imprisonment. We know even less about death as a deterrent for adolescents than we do about death as a deterrent for adults. Most would agree that adolescents live for today with little thought of the future consequences of their actions.[68] Their defiant attitude and risk-taking behavior is probably related to their "developmental stage of defiance about danger and death."[69] The meager research on this issue leads to the conclusion that threatening a child with death does not have the same impact as threatening an adult with death. Even if there exists for adults a significant deterrent effect of the death penalty, this deterrent effect probably loses any power it once may have had when translated into an adolescent's world.

No one can deny that execution of a child will prevent repetitive criminal acts by that particular child. However, this is simply an extremely unnecessary reaction to the problem. Not only are murderers "extremely unlikely to commit other crimes either in prison or upon their release,"[70] but such irreversible giving up upon a person even before they emerge from childhood is squarely in opposition to the fundamental premises of juvenile justice and comparable socio-legal systems. While this specific deterrence may carry some weight for the case of the 45 year old habitual criminal, it is uniquely inappropriate for a 16 year old juvenile.

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 juvenile's case. Sufficient leverage for adolescents is surely provided by the threat of a life of imprisonment, which could extend for over fifty years.

Using capital punishment for eugenic purposes or to improve the human race is indefensible for adults and illogical as applied to juveniles. Equally faulty is the economics argument, that it is cheaper to

---

stances weigh heavily in the appellant's favor, i.e., her young age and the dominance of the husband, her senior by several years." *Id.* at _____); *Coleman v. State,* 378 So.2d 640 (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."); Vasil v. State, 374 So.2d. 465 (Fla. 1979) (court reduced 15-year-old's death sentence); State v. Stewart, 197 Neb. 497, 250 N.W.2d 849 (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." *Id.* at 197 Neb. 524-25, 250 N.W.2d at 865-66.).

[65]*Lockett v. Ohio,* 438 U.S. 586, 604 & 608 (1976).

[66]*Furman v. Georgia,* 408 U.S. 238, 342 (1971) (Marshall, J., concurring).

[67]*Furman v. Georgia,* 408 U.S. 238, 342-345 (1971) (Marshall, J., concurring).

[68]Kastenbaum.

[69]Fredlund 533, 1977.

[70]*Furman v. Georgia,* 408 U.S. 238, 355 (1971) (Marshall, J., concurring).

execute such offenders than to imprison them for life. Given the elaborate process we have established for capital cases, "there can be no doubt that it costs more to execute a man than to keep him in prison for life."[71]

From all of this it seems clear that whatever the justifications are for capital punishment of adults, those justifications lose much of their persuasiveness when applied to an adolescent's case.

### Characteristics of Executed Juveniles[72]

Of the over 13,847[73] legal executions in American history, current research indicates that approximately 288 of them have been for crimes committed while under age eighteen. Ninety-seven of them occurred prior to the advent of the juvenile justice system (pre-1900) and 191 after 1900. The first such execution was in 1624 in Massachusetts (Thomas Graunger, crime of Buggery). The most recent was in 1964 in Texas (James Andrew Echols, crime of rape).

The youngest has been 10, with a total of 32 persons executed for crimes committed while age 15 or younger. Over two-thirds of those executed were Black children and one-fourth were White children. Murder is overwhelmingly (79 percent) the offense for which these executions occurred. However, there have been 29 executions for rape and 11 executions for attempted rape, all 40 executed children being Black.

There have been no executions since 1964 for crimes committed while under age eighteen. However, there are approximately 20 such persons who have been sentenced to death and are presently on death row. One (Todd Ice, Kentucky) was only 15 years old at the time his crime was committed; two-thirds of these condemned children are Black.

### Conclusions

The 200 executions for crimes committed while under age 18 comprise little more than 2 percent of the total of 13,847 executions. However, capital punishment for children seems surprising in a country that so dotes upon its children. If early reforms to the criminal justice system for the benefit of children were to minimize the harshness of criminal sentences, why is it that capital punishment was tolerated? How can we explain 188 executions of children since 1900, the period of operation of the magnificent socio-legal experiment called juvenile justice?

If the phenomenon ended there, perhaps this could all be cast aside as just another odd chapter in our history. 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. Most state capital punishment statutes do not prohibit executions of children, and the Supreme Court has come perilously close to endorsing that position. The present state of the law is that the youth of the offender must be considered as a mitigating factor by the sentencing entity. However, that and other mitigating factors can be overcome by the aggravating factors, resulting in capital punishment for a child. The notion of a governmental agency imposing the death penalty upon a child through its justice proceedings raises the deepest questions about the demands of justice versus the special nature of childhood.

Capital punishment for children should be opposed in principle by the ABA. To give effect to this opposition, the ABA should urge legislative bodies to amend their juvenile and criminal codes. Juvenile waiver statutes should include, as a condition of the transfer of jurisdiction, that such transferred juveniles may not receive capital punishment. Capital punishment statutes in criminal codes should specifically exempt persons whose crimes were committed while under age eighteen. Such statutory provisions would reenforce that fundamental premises of our juvenile and criminal justice system and would express most clearly the value we place upon our most important natural resource—our children.

WILLIAM W. GREENHALGH
*Chairperson*

---

[71] *Furman v. Georgia,* 408 U.S. 238, 358 (1971) (Marshall, J., concurring).

[72] For a detailed analysis of these characteristics, see Streib, and Sametz, "Killing Kids for Justice: Capital Punishment for Young Offenders," paper presented at the Annual Meeting of the American Society of Criminology, Toronto, Ontario, Canada, November, 1982.

[73] Letter, January 18, 1983, from Mr. Watt Espy, Capital Punishment Research Project, The University of Alabama School of Law, University, Alabama 35486.