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EXECUTING YOUTHFUL OFFENDERS: THE UNANSWERED QUESTION IN EDDINGS v. OKLAHOMA

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EXECUTING YOUTHFUL OFFENDERS: THE UNANSWERED QUESTION IN *EDDINGS v. OKLAHOMA*

I. Introduction

The juvenile justice system was created to "treat" and to "rehabilitate" the juvenile offender.[1] The philosophy underlying this approach is that the vulnerable nature of children makes the goals of prosecution and punishment inappropriate.[2] It was long believed that because children could not formulate criminal intent[3] the state

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1. *In re* Gault, 387 U.S. 1, 16 (1966). The Court held that in a proceeding which determines whether a juvenile should be transferred from juvenile to criminal court, the juvenile has certain rights protected by the due process clause of the Constitution, including the rights of representation by counsel, freedom from self-incrimination, confrontation, and cross-examination of witnesses. For a discussion of *Gault*, see *infra* notes 108-13 and accompanying text. For a discussion of the juvenile court system, see *infra* notes 39-49 and accompanying text. For expansive treatments of the history of the juvenile justice system, see S. Cox & J. Conrad, Juvenile Justice, A Guide to Practice and Theory 72-94 (1978) (discussing purpose and scope of juvenile court acts); L. Empey, Juvenile Justice, The Progressive Legacy and Current Reforms (1979) (collection of essays concerning history of juvenile court system and its present changing system).

2. Feld, *Reference of Juvenile Offenders for Adult Prosecution: The Legislative Alternative to Asking Unanswerable Questions*, 62 Minn. L. Rev. 515, 516 (1978) [hereinafter cited as *Unanswerable Questions*]; *see also* T. Johnson, Introduction to the Juvenile Justice System 11-19 (1975).

On October 5, 1977, President James Carter signed the International Covenant on Economic, Social, and Cultural Rights and the International Covenant on Civil and Political Rights. Weissbrodt, *United States Ratification of the Human Rights Covenants*, 63 Minn. L. Rev. 35 (1978). Article six of the covenant on Civil and Political Rights forbids the imposition of the death penalty on either pregnant women or children under the age of eighteen. *Id.* at 72. In his message to the Senate concerning these covenants, President Carter proposed a reservation to article six which would reject the proposed restriction. President's Human Rights Treaty Message to the Senate, 14 Weekly Comp. of Pres. Doc. 396 (Feb. 23, 1978). By reserving this right to execute juveniles and pregnant women, President Carter, arguably, concluded that this right is consistent with the United States Constitution, federal laws, and the constitutions of the individual states.

3. Frey, *The Criminal Responsibility of the Juvenile Murderer,* 1970 Wash. U.L.Q. 113. At common law three presumptions existed as to the liability of a minor. *Id.* A child under seven years of age was conclusively presumed to be incapable of forming criminal intent and evidence could not be used to show such intent. *Id.* A child between the ages of seven and fourteen was presumed incapable of forming such intent but evidence was admissible to rebut this presumption. *Id.* Finally, a child over fourteen was presumed capable of forming a *mens rea* and responsible for his criminal acts and had the burden to show an absence of *mens*

could not punish juvenile offenders as it could adult offenders who were able to formulate such intent. Instead, the state's duty was to rehabilitate juvenile offenders and to protect them from the social conditions that lead to crime.[4]

The existence of the juvenile court system does not immunize children from criminal prosecution. Forty-eight states currently have statutes that allow for or require the transfer of a juvenile offender from a juvenile court to a county, city, or state criminal court.[5] The effect of such a transfer is that the minor is removed from a court system whose proceedings are characterized as non-criminal[6] and whose purpose is "treatment" and "rehabilitation"[7] to a court which will investigate the culpability of the minor and possibly impose a penal sanction. Thereafter, if the state has a death penalty and the juvenile is alleged to have committed a capital offense, it is possible that the juvenile will receive the death penalty.

287 of the known 14,029 criminals executed in American history have been juveniles under the age of eighteen.[8] On May 1, 1982,

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rea. Id.; see also P. BEAN, PUNISHMENT 111-12 (1981) [hereinafter cited as PUNISHMENT]; Note, *Problem of Age and Jurisdiction in the Juvenile Court*, 19 VAND. L. REV. 833, 835 (1966); *infra* notes 30-37 and accompanying text.

4. Handler, *The Juvenile Court and the Adversary System: Problems of Function and Form*, 1965 WIS. L. REV. 7, 10 [hereinafter cited as *Juvenile Court and the Adversary System*].

5. *Unanswerable Questions, supra* note 2, at 516 n.5. For an expansive treatment of the transfer proceeding, see generally S. DAVIS, RIGHTS OF JUVENILES—THE JUVENILE JUSTICE SYSTEM (2d ed. 1984).

6. *See* T. JOHNSON, INTRODUCTION TO THE JUVENILE JUSTICE SYSTEM 79 (1975) [hereinafter cited as JUVENILE INTRODUCTION].

7. *See supra* note 1 and accompanying text.

8. Streib, *Death Penalty for Children: The American Experience with Capital Punishment for Crimes Committed While Under Age Eighteen*, 36 OKLA. L. REV. 613, 618-19 (1983). This computation was a joint effort between Professor Streib and Watt Espy of the Capital Punishment Research Project of the University of Alabama School of Law. The case files were examined by Professor Streib in order to determine what percentage involved juveniles.

By contrasting the number of juveniles who commit murder to the percentage of juveniles who are put to death, one can see the reluctance of society to impose capital punishment on minors. In 1983, 19,308 murders were committed, or one murder every twenty-seven minutes. FED. BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, CRIME IN THE UNITED STATES 5 (1984) [hereinafter cited as U.C.R. for Uniform Crime Reports]. Of those persons convicted of murder in 1983, 41% were under twenty-five years of age while 7% were under age seventeen. *Id.* Thirty-four percent of those convicted were between the ages of eighteen and twenty-four. *Id.* The following table illustrates juvenile involvement in other violent crimes throughout the United States as tabulated from the voluntary reporting of local and state police departments.

seventeen of the 794 people on death row[9] were under the age of eighteen.[10] In *Eddings v. Oklahoma*,[11] the United States Supreme Court granted certiorari for consideration of whether the eighth amendment[12] prohibits the imposition of the death penalty on juveniles.[13] However, the Court did not consider the constitutional question and, instead, remanded the case for consideration of an "eleventh hour" claim submitted by the petitioner concerning the failure of the state court to consider mitigating evidence before it passed sentence.[14] As a result of *Eddings*, state laws concerning juvenile capital punishment continue to operate subject to state judicial interpretation of the eighth amendment.[15]

	Total of Those Arrested			
Crime	Total Occurrences	%under 25	%under 21	% under 18
Robbery	500,221	68	48	26
Burglary	3,120,842	75	N/A	28
Larceny Theft	6,707,020	N/A	48	32
Car Theft	1,004,372	N/A	55	35
Arson	19,800	62	N/A	38
Forcible Rape	78,918	50	25% were between ages 18 & 22	

Table compiled by author from Uniform Crime Reports. N/A means that the numbers for this age group were not available. *See* U.C.R., *supra*, at 13, 19, 26, 30, 35, and 39.

9. For purposes of this Note, the term "death row" refers to that part of a prison set aside for those who have been sentenced to death and are awaiting execution.

10. Brief for the Petitioner at 55, Eddings v. Oklahoma, 455 U.S. 104 (1982).

11. 455 U.S. 104 (1982).

12. The eighth amendment provides: "[E]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." U.S. CONST. amend. VIII.

13. *Eddings*, 455 U.S. at 120 (Burger, C.J., dissenting). For purposes of this Note, "eleventh hour" refers to an issue originally raised in petitioner's brief and not in the petition for certiorari.

14. *Id.* at 117. The question submitted by the petitioner was "[w]hether the Court should address the plain error committed by the trial court when it refused to consider the relevant mitigating evidence in violation of Lockett v. Ohio, 438 U.S. 586 (1978)." Brief for petitioner at 1, Eddings v. Oklahoma, 455 U.S. 104 (1982). The *Lockett* Court held that a sentencer in a capital case must give full consideration to all mitigating factors. Lockett v. Ohio, 438 U.S. 586, 606 (1978). For a discussion of *Lockett*, see *infra* notes 88-94 and accompanying text. The *Eddings* Court remanded the case for a consideration of all mitigating factors, thereby answering the petitioner's questions affirmatively. For a discussion of *Eddings*, see *infra* notes 182-98 and accompanying text.

15. *See infra* notes 133-48 and accompanying text.

This Note examines the theories of punishment underlying the death penalty, briefly discusses the creation of the juvenile court system and the mechanism of juvenile transfer.[16] This Note then discusses the development of the death penalty by examining Supreme Court cases which have considered state laws challenged under the eighth amendment as forms of cruel and unusual punishment.[17] Supreme Court decisions which have extended constitutional guarantees to minors in the areas of criminal prosecutions and privacy rights also will be examined.[18] The decision of the Court in *Eddings v. Oklahoma*[19] will then be analyzed as will the conflicting state and federal decisions and capital punishment statutes.[20] Finally, this Note proposes a model amendment to existing death penalty statutes which prohibits capital punishment of juveniles.[21]

II. Threshold Considerations: Punishment, The Juvenile Court System and Transfer

A. Theories of Punishment: Deterrence and Retribution

Sentencing in criminal court is based on four theories of punishment: retribution, deterrence, restraint and rehabilitation.[22] The verb "deter" means to "discourage, or prevent from acting by fear or consideration of dangerous, difficult, or unpleasant attendant circumstances or consequences."[23] Therefore, deterrence, as a philosophy in penal sentencing, is that restraint which fear of criminal prosecution imposes on those likely to commit crimes.[24] This theory

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16. *See infra* notes 22-59 and accompanying text. For purposes of this Note, "transfer" refers to the change of jurisdiction over a juvenile to criminal court from juvenile court.

17. *See infra* notes 60-104 and accompanying text.

18. *See infra* notes 105-32 and accompanying text.

19. *See infra* notes 193-98 and accompanying text.

20. *See infra* notes 133-250 and accompanying text.

21. *See infra* notes 251-52 and accompanying text.

22. S. GRUPP, THEORIES OF PUNISHMENT 5 (1971). Since the imposition of the death penalty would negate any application of the rehabilitation theory, this section will restrict its analysis to deterrence and retribution. Rehabilitation will be discussed in its capacity as a theory underlying the juvenile court system.

The restraint theory holds that the offender is dangerous to society and, therefore, should be removed from the community. R. GERBER & P. MCANANY, CONTEMPORARY PUNISHMENT: VIEWS, EXPLANATIONS, AND JUSTIFICATIONS 129 (1972). Because this Note is not precluding the possibility of imprisonment for juvenile offenders, restraint will not be discussed as an applicable theory.

23. WEBSTER'S THIRD INTERNATIONAL DICTIONARY 616 (3d ed. 1976).

24. J. GIBBS, CRIME, PUNISHMENT, AND DETERRENCE 2 (1975) [hereinafter cited as GIBBS]. Several authors recognize that the theory of deterrence is extremely

assumes that people know the law and the consequences of violating it and can conform their behavior to the norm.[25] Therefore, deterrence emphasizes the knowledge of the person who committed the act and the voluntary nature of the act rather than its severity.

Retribution demands the punishment of the transgressor because society's sense of justice demands it.[26] The goal of retribution is to vindicate the rights of society whose sense of security has been disturbed.[27] However, since it is logical to conclude that society would want only to punish those who willingly and knowingly offend the public, the offender must act with a *mens rea*.[28]

That an offender is a juvenile at the time of his offense may make punishment based on the theories of deterrence or retribution ineffective. The deterrence theory assumes knowledge of the law and the ability to conform behavior in accordance with that knowledge.[29] However, research has shown that children learn most of their behavior through mere imitation of other's actions.[30] Moreover,

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complex and such a simplistic definition does not fully explain all of its ramifications. For discussions of this point, see GIBBS *supra* at 29; PUNISHMENT, *supra* note 3, at 29; Hawkins, *Punishment and Deterrence: The Educative, Moralizing, and Habituative Effects*, 1969 WIS. L. REV. 550.

Deterrence has been broken down by one group of authors into two categories: special deterrence and general deterrence. S. KADISH, S. SCHULHOFER, & M. PAULSEN, CRIMINAL LAW AND ITS PROCESSES—CASES AND MATERIALS 195-96 (1983) [hereinafter cited as CRIMINAL LAW]. General deterrence is the threat of punishment which acts to restrain all potential offenders. *Id.* Special deterrence acts to inflict punishment on convicted defendants so as to restrain them from future criminal conduct. *Id.* For purposes of this Note, deterrence will be explored as a single, general concept.

25. LAW REFORM COMMISSION OF CANADA, FEAR OF PUNISHMENT: DETERRENCE 10-12 (1976). The Commission notes that there are eight assumptions which underlie the theory of deterrence:

> 1. Man is a rational being; 2. man is a hedonistic being, attracted by pleasure and repelled by pain; 3. man is free to choose; 4. men know in every case what is harmful to them; 5. man is able to control his behavior; 6. man learns from his own experience and from the experience of others; 7. man can be deterred by fear; 8. men are knowledgable of laws and sanctions.

Id.

26. F. FASUST & P. BRANTINGHAM, JUVENILE JUSTICE PHILOSOPHY 7 (1974). The authors identify three basic requirements for the effective use of criminal punishment based on the retribution theory: 1. criminal acts must be voluntary and morally wrong; 2. punishment must fit the offense; and 3. punishment must represent a return of suffering to the wrongdoer for his morally wrong act. *Id.*

27. Mueller, *Punishment, Corrections and the Law*, 45 NEB. L. REV. 58, 68 (1966).

28. *Mens rea* is defined as "blameworthiness entailed in choosing to commit a criminal wrong." CRIMINAL LAW, *supra* note 24, at 267.

29. *See supra* note 25 and accompanying text.

30. E. HETHERINGTON & R. PARKE, CHILD PSYCHOLOGY: A CONTEMPORARY VIEWPOINT 147 (1975).

positive reinforcement is not necessary for these new responses to repeat themselves.[31]

In one study, children watched an adult pummel, hit and kick a large inflated doll.[32] When left alone with the doll, the children exhibited behavior which matched that of the adult.[33] Clearly, learning had taken place.[34] Although the children imitated the adult, they were unaware of the violent nature of their activity.[35] Arguably, a child may not be able to comprehend that the violent acts they commit could result in the death of a living person.[36] Therefore, the minor's knowledge of the penal sanctions for murder, would not deter him. Since a minor may be unable to conform his behavior to the law, capital punishment of juveniles is not justified by the deterrence theory.[37]

A minor's lack of knowledge as to the nature of his actions also might negate the formation of the criminal intent necessary for the successful use of the retribution theory. By punishing a youthful offender, society punishes not a willful transgressor but only an immature and inexperienced one thus rendering retribution undesirable.[38]

B. The Development of the Juvenile Court System

On July 1, 1899, the first juvenile court was established in Cook County Chicago by a law entitled "An Act to Regulate the Treatment and Control of Dependent, Neglected, and Delinquent Children."[39]

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31. *Id.* at 148.

32. *Id.* While the doll was being attacked, the attacker was neither praised nor punished for his actions. Therefore, no consequences of punishment or reward were attributed to the adult, so that the child was not reinforced. *Id.*

33. *Id.* Many of the model's verbal and motor responses were purposely bizarre and novel, unlike anything that the children in the study had ever seen before, much less performed. *Id.*

34. *Id.* The researchers concluded that the reproduction by the children of novel violent behavior clearly showed that learning had taken place. *Id.*

35. *Id.*

36. *Id.*; *see also* J. DOUGLAS & F. WAKSLER, THE SOCIOLOGY OF DEVIANCE: AN INTRODUCTION 262 (1982). The authors note the importance of looking to the intent of an actor who performed a violent act before determining a proper and just punishment. *Id.*

37. L. EMPEY, AMERICAN DELIQUENCY—ITS MEANING AND CONSTRUCTION 516 (1982).

38. *Id.*

39. S. DAVIS, RIGHTS OF JUVENILES, THE JUVENILE JUSTICE SYSTEM 1 (1984); L. SIEGAL & J. SENNA, JUVENILE DELIQUENCY: THEORY, PRACTICE, AND LAW 310-13 (1981) [hereinafter cited as JUVENILE DELIQUENCY]; JUVENILE INTRODUCTION, *supra* note 6, at 3.

By 1917, all but three states had enacted statutes mandating the use of separate court systems for minors.[40] Presently, there are more than 3000 juvenile courts and approximately 1000 juvenile correctional facilities throughout the United States.[41]

The primary concern of those who established the juvenile court system was that the social conditions of the age, such as the widespread poverty resulting from industrialization and rapid urbanization, had forced the juvenile population to geographic areas prone

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The Act established a separate court for delinquent, dependent, and neglected children under the age of sixteen. *See* JUVENILE DELINQUENCY, *supra*, at 313. It also established special legal procedures to govern the adjudication and disposition of juvenile matters. *Id.* For example, it gave the court authority to appoint probation officers who would investigate the case and represent the child when the case was heard. Schultz, *The Cycle of Juvenile Court History*, 19 CRIME AND DELINQ. 457, 458 (1973) [hereinafter cited as *The Cycle*]. The Act also mandated that children should be separated from adults whenever they were confined in the same institution. *Id.* Finally, the Act stated in its concluding paragraph that its purpose was to approximate closely the care that minors would receive from their parents. *Id.*

40. *See Juvenile Court and the Adversary System, supra* note 4, at 10. New York was one of the three states which resisted the juvenile court movement. Note, *Post-Conviction Proceedings Under New York's Juvenile Offender Laws: A Due Process Critique*, 26 N.Y.L. SCH. L. REV. 773, 778 (1981) [hereinafter cited as *Post-Conviction Proceedings*]. The other two states were Maine and Wyoming. Whisenand & McLaughlin, *Completing the Cycle: Reality and the Juvenile Justice System in New York State*, 47 ALB. L. REV. 1, 10 n.32 (1982). New York, however, adopted a juvenile court system similar to those in other states with the passage of the Children's Court Act. *See Post-Conviction Proceedings, supra*, at 781; *see also* 1922 N.Y. Laws ch. 547, § 3. The notion that the purpose of the juvenile court system was to provide rehabilitative treatment was not affirmed judicially in New York until 1932. *See* People v. Lewis, 260 N.Y. 171, 176, 183 N.E. 353, 354 (1932). In *Lewis*, the New York Court of Appeals held that it was the State's obligation to aid the child and not impose criminal sanctions. *Id.* This view remained unchanged in New York until 1962. *See Post-Conviction Proceedings, supra*, at 781.

In 1962, New York enacted The Family Court Act. 1962 N.Y. Laws, ch. 686, § 115. The Act gave the family court jurisdiction over juvenile delinquents, persons in need of supervision, and neglected children. *Id.* It was believed that the family court could best consider the interests of the child. Woods, *New York's Juvenile Offender Law: An Overview and Analysis*, 9 FORDHAM URB. L.J. 1, 18 (1980) [hereinafter cited as *Juvenile Offender Law*]. Under the Act, a juvenile arrested for a crime either was released by the police to his parents or brought directly to the family court. *Id.* If the prosecutor decided to file a petition against the juvenile, the juvenile is brought before a family court judge who can either grant parole or remand for detention. *Id.*

The role of the family court judge was altered significantly by the passage of the Juvenile Justice Reform Act of 1976. *See Juvenile Offender Law, supra* note 3, at 16; *see also* 1976 N.Y. Laws ch. 878. The Act specifically requires the court to consider the need for protection of the community as well as the needs of the defendant. *Id.* However, the family court retained jurisdiction over the juvenile offender. *Id.*

41. *See* JUVENILE DELIQUENCY, *supra* note 39, at 275.

to criminal deviance and immorality.[42] The child was considered by reformers not as an enemy of society but rather as a ward who needed to be protected from these social conditions.[43] The objectives of the system, therefore, were to provide guidance and rehabilitation for the child and protection for society, not to extend the concepts of criminal responsibility, guilt, and punishment.[44]

The legal concept of *parens patriae*,[45] which was used to justify this view, referred to the power of the state as sovereign to act as guardian for those under a legal disability.[46] The originators of the juvenile court system expanded this concept to justify the establishment of a separate individualized court system for minors.[47] The juvenile court sought to provide services to promote the development

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42. Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN. L. REV. 1187, 1191 (1970) [hereinafter cited as *Juvenile Justice Reform*]. The original juvenile courts concentrated on aiding those who were vagrants or guilty of petty thefts or other minor offenses, while major offenders were tried in the adult criminal system. *Id.* Therefore, the major concern of the juvenile justice system was not with non-reformable major offenders, but was with those who engaged in less serious antisocial conduct. *Id.* at 1191-92.

43. This is illustrated by the wording of the Illinois act:

> This act shall be liberally construed, to the end that its purpose may be carried out, to wit: That the care, custody, and discipline of the child shall approximate as nearly as may be that which should be given by its parents, and in all cases where it can properly be done, the child be placed in an improved family home and become a member of the family by legal adoption or otherwise.

The Cycle, supra note 39, at 458.

44. Kent v. United States, 383 U.S. 541, 554-55 (1966). In *Kent*, the juvenile court waived jurisdiction over the appellant and transferred him to criminal court. *Id.* at 546. Kent attacked the criminal conviction by alleging errors in the waiver proceeding. *Id.* at 551. In reversing the appellant's conviction, the Supreme Court held that the transfer proceeding was a critically important action in determining the adjudication of a minor and, therefore, must comply with the basic requirements of due process and fairness. *Id.* at 553. The Court concluded that Kent had the right to a hearing, assistance of counsel, and a statement of the reasons for transfer. *Id.* at 554.

45. *In re* Gault, 387 U.S. at 16; *Kent*, 383 U.S. at 555. *See generally* R. VINTER & R. SARRI, BROUGHT TO JUSTICE? JUVENILES, THE COURTS AND THE LAW 3 (1983) [hereinafter cited as BROUGHT TO JUSTICE]; Note, *Misapplication of the Parens Patriae Power in Deliquency Proceedings*, 29 IND. L.J. 475 (1954) (argues that in deliquency hearings proof of parental deficiency must be shown before juvenile sent to institution); Note, *The Parens Patriae Theory and Its Effect on the Constitutional Limits of Juvenile Court Powers*, 27 U. PITT. L. REV. 894 (1966) (examines historical development of parens patriae doctrine).

46. R. & J. TROJANOWICZ, JUVENILE DELIQUENCY, CONCEPTS AND CONTROL 24 (2d ed. 1978); Reasons, Gault: *Procedural Change and Substantive Effect*, 16 CRIME AND DELINQ. 163, 164 n.3 (1970); *see* BLACK'S LAW DICTIONARY 1003 (5th ed. 1979).

47. *See Juvenile Justice Reform, supra* note 42, at 1192-93.

of those who came before it and not to impose penal sanctions.[48] Since its inception, the juvenile court has been designated as noncriminal in nature.[49]

C. Transfer From Juvenile Court to Criminal Court

The protections of the juvenile court are not extended to all minors charged with violating the law. Minors who commit serious offenses are subject to trial as adult defendants in the criminal court under certain circumstances. Forty-eight states provide some statutory mechanism[50] to prosecute juveniles in adult criminal proceedings.[51]

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48. *Id.* at 1192-93; *see* BROUGHT TO JUSTICE, *supra* note 45, at 3.

49. *See* JUVENILE DELIQUENCY, *supra* note 39, at 280-81. The authors note that the different terminology used in juvenile court as compared with the criminal court also illustrates the noncriminal nature of the juvenile court. *Id.* A youth does not go to "trial" in juvenile court; he goes to a hearing where his case is then adjudicated. *Id.* Instead of pleading guilty, a youthful offender agrees to a finding or, if the youth wants to assert his innocence, the youth denies the petition. *Id.* The minor is thereafter detained in a detention facility or a child care shelter, not a jail. *Id.* Finally, the offender is not sentenced, but a plan of rehabilitative treatment is designed. *Id.*

50. The mechanism for transferring jurisdiction over a youthful offender from juvenile to criminal court is known by a variety of terms. These include "reference," "certification for adult prosecution," "waiver," "decline," and "transfer of juvenile court jurisdiction." *Unanswerable Questions, supra* note 2, at 516 n.5.

51. ALA. CODE § 12-15-34 (1977); ALASKA STAT. § 47.10.060 (1982); ARIZ. REV. STAT. § 8-202 (West Supp. 1984); ARK. STAT. ANN. § 45-417 (Supp. 1983); CAL. WELF. & INST. CODE § 707 (West 1984); COLO. REV. STAT. § 19-3-108 (1973); CONN. GEN. STAT. § 46b-122 (West 1983); DEL. CODE ANN. tit. 10, § 938 (Supp. 1984); FLA. STAT. ANN. § 39.02(5) (West 1984); GA. CODE ANN. § 15-11-39 (1982); HAWAII REV. STAT. § 571-22 (Supp. 1983); IDAHO CODE § 16-1806 (Supp. 1984); ILL. REV. STAT. ch. 37, § 702-7 (Supp. 1985); IND. CODE § 31-6-2-4 (Supp. 1984); IOWA CODE ANN. § 232.72 (West Supp. 1985); KAN. STAT. ANN. § 38-808 (1981); LA. REV. STAT. ANN. § 13:1571.1 (West 1983); ME. REV. STAT. ANN. tit. 15, § 3101(4) (West Supp. 1985); MD. CTS. & JUD. PROC. CODE ANN. § 3-817 (1984); MASS. GEN. LAWS ANN. ch. 119, § 61 (West Supp. 1984); MICH. COMP. LAWS ANN. § 764.27 (West 1982); MINN. STAT. ANN. § 260.125 (West 1982); MISS. CODE ANN. § 43-21-157 (Supp. 1980); MO. ANN. STAT. § 211.071 (Vernon Supp. 1985); MONT. CODE ANN. §§ 41-5-204 to -206 (1983); NEB. REV. STAT. § 43-247 (1984); NEV. REV. STAT. §§ 62.060-.080 (1979); N.H. REV. STAT. ANN. § 169:21 (1977); N.J. STAT. ANN. § 2A:4-26 (West Supp. 1985); N.M. STAT. ANN. § 32-1-29 (1978); N.Y. CRIM. PROC. LAW § 180.75 (McKinney 1982); N.C. GEN. STAT. § 7A-524 (1981); N.D. CENT. CODE § 27-20-34 (Supp. 1983); OHIO REV. CODE ANN. § 2151.26 (Page Supp. 1983); OKLA. STAT. ANN. tit. 10, § 1112 (West Supp. 1985); OR. REV. STAT. § 419.533 (1981); R.I. GEN. LAWS § 14-1-7 (1981); S.C. CODE ANN. § 20-7-430 (Law. Co-op. Supp. 1983); S.D. CODIFIED LAWS ANN. § 26-11-1 (1984); TENN. CODE ANN. § 54:02 (1975); TEX. FAMILY CODE § 54.02 (Vernon 1975); UTAH CODE ANN. § 78-3a-25 (1983); VT. STAT. ANN. tit. 33, § 635A (1981); VA. CODE §§ 16.1-269 to -270 (1982); WASH. REV. CODE ANN. § 13.40.060 (West Supp. 1985); W. VA. CODE § 49-5-10 (1980); WIS. STAT. ANN. § 48.18 (West Supp. 1984); WYO. STAT. § 14-6-203 (Supp. 1984).

The procedure for the transfer of juvenile defendants varies among these states.[52] Generally, however, the procedure includes a hearing in which such factors as the age of the defendant, the nature of the crime committed, and the defendant's past history are investigated.[53] The juvenile court judge then transfers the defendant to criminal court if he determines that the defendant is not amenable

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The District of Columbia and the federal government both provide for transfer. *See* D.C. CODE ANN. § 16-2307 (1981); 18 U.S.C.A. § 5032 (West Supp. 1983). Both Kentucky and Pennsylvania had such a mechanism but have repealed them. *See* KY. REV. STAT. § 208.170 (Supp. 1984); PA. STAT. ANN. tit. 11, § 50-325 (Purdon Supp. 1984).

52. For example, Oklahoma treats a juvenile offender under the age of sixteen differently than it does older children. OKLA. STAT. ANN. tit. 10, §§ 1104-1112(B) (West Supp. 1985). If a person is age sixteen or seventeen, the court, before transferring a juvenile, will consider in what manner the offense was committed, whether it was against a person or property, the past record of the juvenile, and the prospect for adequate protection of the public if the accused proceeds through the juvenile justice system. *Id.* § 1112.

Other states do not make this sort of age differentiation. Both Connecticut and Maine provide that a child of any age can be transferred from the juvenile court system if he committed a serious felony such as murder, armed robbery, or kidnapping. CONN. GEN. STAT. ANN. § 46b-126 (West 1983); ME. REV. STAT. ANN. tit. 15, § 3101 (West Supp. 1985). However, in deciding whether to transfer the juvenile, these states will use criteria similar to those employed by Oklahoma. *Id.* In contrast, the state of Alabama will not allow a child to be transferred unless he was age fourteen at the time of the offense. ALA. CODE § 12-15-34 (1977).

53. *See supra* note 51. New York's system differs from those of most other states. If a defendant is fourteen or fifteen and is alleged to have committed any of the fourteen crimes (including second degree murder), or a thirteen-year-old who is criminally responsible for acts constituting second degree murder, that defendant is classified as a juvenile offender. N.Y. PENAL LAW § 10.00(18) (McKinney Supp. 1984). Once arrested, the juvenile is treated as an adult and his case is screened by an assistant district attorney. *See Juvenile Offender Law, supra* note 40, at 25. If the attorney decides that the crime does not fall under the Juvenile Offender Act, he can decline to prosecute. *Id.* at 25. However, if he chooses to prosecute, the juvenile is arraigned in criminal court as an adult. *Id.* at 26.

The criminal court judge can order removal of the defendant to the family court by request of the district attorney in certain circumstances. First, the judge can order removal if he determines that removal is in the best interests of justice. N.Y. CRIM. PROC. LAW § 180.75(4) (McKinney 1982). However, if the juvenile is charged with murder, rape, sodomy, or an armed felony (i.e. armed robbery), the order to remove must be based upon a finding of one or more of the following factors:

> (i) mitigating circumstances that bear directly upon the manner in which the crime was committed; or (ii) where the defendant was not the sole participant in the crime, the defendant's participation was relatively minor although not so minor as to constitute a defense to the prosecution; or (iii) possible deficiencies in proof of the crime.

Id.

If the juvenile court retains jurisdiction over the juvenile, there are two additional possible ways in which the juvenile may be removed from the criminal court based

to rehabilitative treatment.[54] Some states provide for automatic transfer if the juvenile commits a certain type of crime.[55] The transfer determination generally is binding on the criminal trial court.[56]

As a result of the transfer proceeding from juvenile to criminal court, the minor is held to the same standard of guilt[57] and is susceptible to the same punishment as an adult.[58] Once transfer has been completed, the defendant's special status as a juvenile is lost.[59] Therefore, despite their minority, juveniles are treated as mature and held to an adult standard of behavior.

III. Supreme Court Precedents

A. The Death Penalty

The primary focus of courts examining claims of violations of the eighth amendment's prohibition against cruel and unusual punishment[60] has been on the method or kind of punishment imposed for violation of criminal statutes.[61] The social policy underlying the

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on the result of the criminal court trial. If the jury convicts a juvenile on a lesser included offense, the criminal court must order the verdict vacated and replaced by a juvenile delinquency fact determination. N.Y. CRIM. PROC. LAW § 310.85(3) (McKinney 1982). If a jury verdict is vacated by the judge, the court must remove the proceeding to family court. *Id.* § 310.85(2). Additionally, if the juvenile is convicted of the crime for which he was indicted and the crime is one other than second degree murder, the action may be removed upon a motion by the juvenile and with the consent of the district attorney. *Id.* § 330.25(1); *see* N.Y. PENAL LAW § 70.05 (McKinney Supp. 1984) (sanctions criminal court may impose upon youthful offender if it retains jurisdiction).

It has been suggested that New York consider changing the jurisdictional transfer system of youthful offenders so that the Family Court would again have exclusive jurisdiction. *See* N.Y. Times, Jan. 6, 1985, at A23, col. 1.

54. Note, *Transfer of Cases Between Juvenile and Criminal Courts: A Policy Statement*, 8 CRIME AND DELINQ. 3, 6 (1962).

55. *See supra* note 52.

56. Waiver determinations must be appealed to the juvenile court. Mountford & Berenson, *Waiver of Jurisdiction: The Last Resort of the Juvenile Court*, 18 U. KAN. L. REV. 55, 67 (1969). Therefore, the question of the propriety of the waiver conclusion is not a proper question for the criminal court and the determination is binding on that court.

57. *See Kent*, 383 U.S. at 556-57.

58. Alers, *Transfer of Jurisdiction from Juvenile to Criminal Court*, 19 CRIME AND DELINQ. 519, 522 (1973).

59. *Id.*

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

61. *See, e.g.*, Ingraham v. Wright, 430 U.S. 651, 667 (1976). The Court in *Ingraham* considered the propriety of a Florida statute which authorized corporal punishment in school after the teacher had consulted with the principal. *Id.* at

amendment's protection is nothing less than the "dignities of man."[62] The Supreme Court, in *Trop v. Dulles*,[63] stated that the eighth amendment draws its meaning from "the evolving standards of decency that mark the progress of a maturing society."[64] Therefore, a court must consider society's standards and determine society's willingness to accept the statute and the punishment it permits when construing a capital punishment statute in light of the eighth amendment.

In *Furman v. Georgia*,[65] the Supreme Court, in a plurality opinion, held that the state's death penalty violated the eighth and fourteenth amendments in each of the three specific cases.[66] One case involved

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655. The statute was challenged on the ground that it prescribed a cruel and unusual punishment in violation of the eighth amendment. *Id.* at 659. The Court rejected this claim by holding that the cruel and unusual punishment clause of the eighth amendment only applies to criminal prosecution. *Id.* at 667.

See Powell v. Texas, 392 U.S. 514, 531-32 (1967) (plurality opinion). Appellant-petitioner Powell was arrested and charged with violating a state public intoxication law and fined fifty dollars. *Id.* at 517. Appellant argued that he was a chronic alcoholic and that the state was violating the eighth amendment by punishing him merely for his status. *Id.* at 532. The Court rejected the eighth amendment claim and concluded that Texas had the right to impose a criminal sanction on one whose public behavior may create a substantial health or safety hazard. *Id.*; *see also* Weems v. United States, 217 U.S. 349, 367 (1910); L. TRIBE, AMERICAN CONSTITUTIONAL LAW 916 (1978). In *Weems*, the Court considered the constitutionality of section 56 of the Penal Code of the Phillipine Islands which prescribed fifteen years of hard labor as the punishment for falsifying public documents. 217 U.S. at 362. The Court held that the statute violated the eighth amendment and reasoned that the confinement prescribed—at least twelve years in which the offender was chained at the ankle and the waist, forced to undertake hard and painful labor, and permitted no contact with any family and friends—coupled with the psychological impact of such an ordeal created a punishment disproportionate to the crime committed. *Id.* at 363-67.

62. Trop v. Dulles, 356 U.S. 86, 100 (1958). Petitioner, a native born American, lost his United States citizenship by reason of his conviction by court martial for wartime activity. *Id.* at 87. The Court concluded that such a punishment was violative of the eighth amendment because loss of citizenship stripped an individual of his status in society and was disproportionate to the offense the defendant committed. *Id.* at 101.

63. *Id.* at 86.

64. *Id.* at 101.

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

66. *Id.* at 241 (Douglas, J., concurring). The Court subsequently held that when a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, then the holding of the Court is that position taken by those members who concurred on the narrowest grounds. Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976). The Court then stated that its holding in *Furman* was that position taken by Mr. Justice Stewart and Mr. Justice White. *Id.* Justices Stewart's and White's position rested on the conclusion that "the Eighth and Fourteenth ammendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and freakishly imposed." 408 U.S. at 310.

a murder conviction,[67] and the other two cases were rape convictions.[68] In all three instances, the determination as to whether the death penalty should be imposed had been left to the discretion of the jury.[69] The Court concluded that, in giving the jury complete and unguided sentencing authority in these three cases, the statute allowed for sentences which were "wantonly and freakishly" imposed by the state court.[70] However, in restricting its opinion to the three cases, the Court effectively withheld judgment on whether capital punishment was unconstitutional for all crimes and in all circumstances or whether any state capital punishment system was unconstitutional.

These questions were answered in *Gregg v. Georgia*,[71] where the Supreme Court upheld the constitutionality of a Georgia statute which prescribed a bifurcated trial to separately consider a defendant's guilt and, upon a finding that the defendant was guilty, to determine what constituted a just sentence.[72] The statute also provided that one of ten aggravating circumstances listed in the statute had to be found for death to be imposed.[73] These aggravating circumstances included a defendant's prior criminal convictions, whether the murder, rape, armed robbery or kidnapping was committed while the defendant was engaged in a buglary or arson, whether the defendant endangered more than one person, and whether the deceased was a peace officer.[74]

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67. Furman v. State, 225 Ga. 253, 167 S.E.2d 628 (1969) (court upheld death penalty where defendant guilty of shooting decedent-homeowner during burglary).

68. Jackson v. State, 225 Ga. 790, 794, 171 S.E.2d 501, 504 (1969) (petitioner, an escaped convict, sentenced to death for rape); Branch v. State, 447 S.W.2d 932, 933 (Tex. Crim. App. 1969) (petitioner sentenced to death for breaking into victim's home, raping her, and then stealing her money).

69. *Furman*, 408 U.S. at 240 (Douglas, J., concurring). In all three cases the death penalty was imposed.

70. *Id.* at 309-10 (Stewart, J., concurring). Justice Stewart reasoned that the sentencing procedure was imposed discriminatorily because large numbers of rapes had occurred in 1967 and 1968 while the death penalty was imposed on only a small fraction of the rapists. *See also* Note, *Discrimination and Arbitrariness in Capital Punishment: An Analysis of Post*—Furman *Murder Cases in Dade County, Florida 1973-1976*, 33 STAN. L. REV. 75, 77-78 (1980).

71. 428 U.S. 153, *reh'g denied*, 429 U.S. 875 (1976).

72. *Id.* at 169. Petitioner Gregg was sentenced to death under the statute after he was convicted of robbing and murdering two people who had stopped to give him a ride.

73. *Id.* at 164.

74. *Id.* at 165-66 n.9. The statute provided:

> (a) The death penalty may be imposed for the offenses of aircraft hijacking or treason, in any case.
>
> (b) In all cases of other offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions

The Georgia statute also required consideration of factors that could mitigate a sentence from death to life imprisonment.[75] However, the scope of the mitigating factors was not detailed by the statute, leaving the judge or jury to consider "any factor they deemed relevant

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to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by the evidence:

(1) The offense of murder, rape, armed robbery, or kidnapping was committed by a person with a prior record of conviction for a capital felony, or the offense of murder was committed by a person who has a substantial history of serious assaultive criminal convictions.

(2) The offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony, or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree.

(3) The offender by his act of murder, armed robbery, or kidnapping knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person.

(4) The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value.

(5) The murder of a judicial officer, former judicial officer, district attorney or solicitor or former district attorney or solicitor during or because of the exercise of his official duty.

(6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person.

(7) The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.

(8) The offense of murder was committed against any peace officer, corrections employee, or fireman while engaged in the performance of his official duties.

(9) The offense of murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement.

(10) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another.

(c) The statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in charge and in writing to the jury for its deliberation. The jury, if its verdict be a recommendation of death, shall designate in writing, signed by the foreman of the jury, the aggravating circumstance or circumstances which it found beyond a reasonable doubt. In non-jury cases the judge shall make such designation. Except in cases of treason or aircraft hijacking, unless at least one of the statutory aggravating circumstances enumerated in section 27-2534.1 (b) is so found, the death penalty shall not be imposed.

GA. CODE ANN. § 27-2534.1 (Supp. 1975). The current Georgia statute is unchanged. GA. CODE ANN. § 17-10-30 (1984).

75. 428 U.S. at 164.

to mitigation."[76] Finally, the statute required an expedited direct review by the Supreme Court of Georgia for a determination whether the death penalty was imposed appropriately.[77] The Supreme Court concluded that the concerns it expressed in *Furman*,[78] that a death penalty not be imposed in an arbitrary or capricious manner, had been fulfilled by the Georgia statute.[79]

In *Gregg*, the Supreme Court concluded that an eighth amendment analysis of a challenged capital punishment statute involved an assessment of contemporary values concerning the application of a criminal sentencing statute.[80] The Court stated that the jury was a significant and reliable objective index of these values because it was so directly involved in sentencing procedures.[81] Therefore, to ascertain whether imposition of capital punishment is proper, a state or federal court must look to society's values and to sentencing decisions made by juries.

While the Georgia death penalty statute satisfied constitutional requirements, not all post-*Furman* statutes have been able to do so. In *Woodson v. North Carolina*[82] and *Roberts v. Louisiana*,[83] the

76. *Id.*

77. *Id.* at 166. This provision is still a part of the Georgia death penalty. GA. CODE ANN. § 17-10-30(c) (1984). In looking to the sentence the court must determine:

> 1. Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, and 2. Whether, in cases other than treason or aircraft hijacking, the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in section 27.2534.1(b) and, 3. Whether the sentence of death is excessive or disproportionate to the penalty imposed, in similar cases, considering both the crime and the defendant.

428 U.S. at 166-67.

78. 408 U.S 238; *see also supra* notes 65-70 and accompanying text.

79. 428 U.S. at 198. Justice Stewart's plurality opinion was supported by Justices Powell and Stevens. *Id.* at 158. Justice White's opinion was joined by Chief Justice Burger and Justice Rehnquist. *Id.* at 226-27. For a discussion of the significance of a plurality decision, see *supra* note 66.

80. *Id.* at 181-82. Although the Court did not state as such, it seems logical to conclude that such an examination of social values may necessitate the need to use statistics. For a discussion of the propriety of the use of such statistics in a capital case, see Nat'l L.J., Dec. 10, 1984, at 1, col. 4.

81. 428 U.S. at 181. There were two dissenters in *Gregg*, Justices Brennan and Marshall. Justice Brennan concluded that the death penalty treated members of society as "nonhumans" and that its exercise is inconsistent with the guarantees of the eighth amendment of civilized treatment to all citizens. *Id.* at 230 (Brennan, J., dissenting). Justice Marshall concluded that the death penalty did not further the goals of retribution or deterrence and was, therefore, an excessive punishment. *Id.* at 241 (Marshall, J., dissenting).

82. 428 U.S. 280 (1976). Petitioners were convicted of first degree murder as the result of their participation in an armed robbery in which one person was killed. *Id.* at 282-83. Woodson was a lookout in the escape vehicle during the robbery. *Id.* at 283.

83. 428 U.S. 325 (1976). Petitioner was convicted of first degree murder for

Court struck down two statutes which prescribed the death penalty as mandatory punishment for two defendants who had been convicted of murder in the first degree.[84] The Court concluded that, in both instances, the statutes were unconstitutional because they did not allow for a consideration of the particular offense or the character and propensities of the defendant.[85] The Court also concluded that the statutes failed to provide the juries with an adequate guide as to which criminal should receive a death sentence.[86] In *Woodson*, the Court reiterated that the eighth amendment requires a court considering the death penalty to look to indicia of society's values such as history and prior usage of the statute, legislative enactments, and jury determination.[87]

The importance of full consideration of all mitigating factors was detailed by the Court in *Lockett v. Ohio*.[88] In *Lockett*, a pawnbroker was fatally shot during a robbery while the petitioner remained in the getaway car.[89] Subsequently, Lockett was found

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shooting a gas station attendant in the course of a robbery. *Id.* at 327-28.

84. *Woodson*, 428 U.S. at 305; *Roberts*, 428 U.S. at 336. The North Carolina statute prescribed death as the mandatory punishment for first degree murder. *Woodson*, 428 U.S. at 286. The Louisiana statute prescribed death as mandatory punishment for all persons found guilty of first degree murder, aggravated rape, aggravated kidnapping, or treason. *Roberts*, 428 U.S. at 331. However, the two statutes differed in that the crime of first degree murder in North Carolina included any willful, deliberate, or premeditated homicide and felony murder while the Louisiana statute was limited to the following five categories of homicide: where homicide was committed during certain felonies; where the victim was a fireman or peace officer performing his duties; where the killer's motive was remuneration; where there was intent to harm more than one person; or where the killer has a prior murder conviction or is under a current life sentence. *Id.* at 331-32.

85. *Woodson*, 428 U.S. at 304-05; *Roberts*, 428 U.S. at 333. In *Woodson*, the Court held that the statute was unconstitutional because it did not give significance to the relevant facets of the character and record of the individual offender or the circumstances of the offense. 428 U.S. at 304-05. In *Roberts*, the Court reiterated the need to focus on the circumstances of the particular offense and the character and propensities of the offender. 428 U.S. at 333-34.

86. *Woodson*, 428 U.S. at 302-03; *Roberts*, 428 U.S. at 334-35. In *Woodson*, the Court showed concern over the fact that American juries had refused to convict a significant portion of persons charged with first-degree murder of that offense under mandatory death penalty statutes. 428 U.S. at 302. In *Roberts*, the Court stated that a sentencing system based on inflexible standards which failed to consider mitigating factors invites jurors to choose a verdict for a lesser offense if they feel that the death penalty is inappropriate. Consequently, individuals are convicted for crimes which were different from those that they actually committed. *Roberts*, 428 U.S. at 334-35.

87. *Woodson*, 428 U.S. at 288.

88. 438 U.S. 586, 604-05 (1978).

89. *Id.* at 590. Lockett also helped plan the robbery and hid the two gunmen afterwards. *Id.* at 589-91.

guilty of aggravated murder, for which the death penalty was an appropriate punishment.[90] Under Ohio law, the judge was required to impose the death penalty unless he found that one of the three statutory mitigating factors existed.[91] In concluding that none of the three factors were present in Lockett's case, the trial judge imposed the death sentence.[92]

The Supreme Court struck down the Ohio death penalty statute because it prevented the sentencer in a capital case from giving consideration to independent mitigating factors relating to the defendant's character and past history and to the circumstances surrounding the actual offense.[93] The Court concluded that limiting the range of mitigating factors is incompatible with *Furman* and that a death penalty statute must consider any factor relevant to mitigation to meet constitutional requirements.[94]

Recently, the Supreme Court took a major step in the development of the death penalty when it decided that capital punishment is never constitutional for certain types of crimes. In determining whether the death penalty was an appropriate punishment for rape, the Court, in *Coker v. Georgia*,[95] looked to the number of states which imposed such a punishment[96] and the propensity of juries to impose the death penalty on convicted rapists.[97] The Court, noting that recent cases gave rise to the need for this analysis,[98]

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90. *Id.* at 593.

91. *Id.* The trial judge was required by state law to consider the nature of the offense and the defendant's "history, character, and condition" and then determine whether "1. the victim had induced or facilitated the offense, 2. it was unlikely that Lockett, would have committed the offense but for the fact that she 'was under duress, coercion, or strong provocation,' or 3. the offense was 'primarily the product of [Lockett's] psychosis or mental deficiency.' " *Id.*

92. *Id.* at 594. The trial judge noted that the offense was not the product of a psychosis or mental deficiency, but he did not specifically mention the other two factors.

93. *Id.* at 605 (Burger, C.J., concurring).

94. *Id.* at 608 (Burger, C.J., concurring).

95. 433 U.S. 584 (1977). Petitioner Coker broke into the home of Allen and Elnita Carver. He tied up Mr. Carver and raped Mrs. Carver. He then drove away in their car, taking Mrs. Carver with him. She was later rescued by the police. *Id.* at 587.

96. *Id.* at 593. The Court observed that at no time in the past had a majority of states authorized death as a punishment for rape. *Id.* It also observed that those states which had authorized such a punishment had their death penalties invalidated by *Furman*. *Id.*

97. *Id.* at 596-97. The Court concluded that in nine out of ten cases juries had not imposed the death penalty. *Id.* at 597.

98. *Id.* at 593. The Court does not specifically mention to which cases it is referring, but one must conclude that they are concerned with such cases as *Furman*, *Gregg*, *Woodson*, and *Roberts*.

recognized that while the attitude of state legislatures and sentencing juries was an important indicator, it did not wholly determine the controversy.[99] The Court stated that this evidence supported its opinion that death was a disproportionate penalty for the crime of rape and that the statute violated the eighth amendment.[100]

The limitations and requirements developed by the Supreme Court since *Furman* make clear that a death penalty statute must consider a sufficient number of aggravating factors[101] as well as any factor that the judge or jury deems relevant to mitigation to surpass eighth amendment challenges.[102] A state cannot mandate capital punishment for a specific act.[103] While the appropriateness of considering the defendant's age has never been squarely decided by the Court, it has been referred to as a mitigating factor in several cases.[104] Although these cases demonstrate that a court must consider the age of the offender before imposing the death penalty, it remains unclear whether the eighth amendment might mandate a full immunity from capital punishment for juveniles.

B. Constitutional Rights of Juveniles

The Supreme Court has recognized that minors share in the benefits and protections of the Constitution.[105] However, it also has held that, due to the special nature of the role of the parents and the

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99. *Id.* at 597.

100. *Id.* The dissenting opinion in *Coker*, written by Chief Justice Burger and joined by Justice Rehnquist, essentially concluded that the issue decided by the majority was one for the state legislatures. *Id.* at 604 (Burger, C.J., dissenting). Chief Justice Burger reasoned that rape is a serious crime and, therefore, it is not cruel and unusual punishment to impose death as a sanction. *Id.* The Georgia legislature, therefore, properly could impose death as a sanction. *Id.* at 604-05 (Burger, C.J., dissenting).

101. *Gregg*, 428 U.S. at 197-98; *see supra* notes 71-81 and accompanying text.

102. *Lockett*, 438 U.S. at 608; *see supra* notes 88-94 and accompanying text.

103. *Woodson*, 428 U.S. at 305; *Roberts*, 428 U.S. at 336; *see supra* notes 88-94 and accompanying text.

104. *See, e.g., Lockett*, 438 U.S. at 604 ("[t]he sentencer . . . [must] not be precluded from considering, *as a mitigating factor,* any aspect of a defendant's character or record . . ."); *Gregg*, 428 U.S. at 197 ("[a]re there any special facts about this defendant that mitigate against imposing capital punishment [e.g., his youth] . . .?"); Jurek v. Texas, 428 U.S. 262, 273, *quoting with approval*, Jurek v. Texas, 522 S.W.2d 934, 939-40 (Tex. Crim. App. 1975) ("[t]he jury . . . could further look to the age of the defendant . . .").

105. *In re* Gault, 387 U.S. 1, 13 (1967). The Court reversed the conviction of a minor for a crime which prescribes incarceration as its punishment due to the failure of the juvenile court to provide written notice of the issues at trial to the

family in the development and protection of juveniles,[106] constitutional principles must be applied with sensitivity and flexibility in matters concerning parents and children.[107] Seemingly, the Supreme Court's treatment of cases involving the rights of juveniles can be divided into two categories: (1) constitutional expansion in which minors' rights as citizens are expanded such that they are afforded "adult" constitutional rights; and (2) constitutional protection in which state restrictions are upheld and minors are protected by the Court. The question, therefore, is whether juvenile death penalty statutes belong in the category of protection or expansion.

In civil and criminal proceedings which threaten the loss of a minor's liberty or property interests, the Supreme Court has concluded that the child's constitutional rights are virtually identical to those of an adult.[108] In *In re Gault*,[109] the Court held that minors

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parents or child, and its failure to inform the parents and child of the child's right to counsel, as well as his privilege against self-incrimination. *Id.* at 33, 41, 55. The Court held that these procedural requirements were part of the due process rights of the child, and stated that "neither the fourteenth amendment nor the Bill of Rights is for adults alone." *Id.* at 13. In his dissent, Justice Stewart reasoned that a juvenile proceeding's purpose differs from that of the prosecution in a criminal court. *Id.* at 79 (Stewart, J., dissenting). Justice Stewart criticizes the majority in stating that they are attempting to change the juvenile proceeding into a criminal prosecution. *Id.*

106. Moore v. East Cleveland, 431 U.S. 494, 503-04 (1977) (plurality opinion) (Powell, J., concurring). "Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition. . . . It is through the family that we inculcate and pass down many of our most cherished values, moral, and cultural." *Id.* At issue in *Moore* was an Ohio ordinance which limited occupancy of a dwelling unit to members of a single nuclear family. *Id.* at 495-96. The Court struck down the statute. *Id.* at 506.

107. Bellotti v. Baird, 443 U.S. 622, 634 (1979) (plurality opinion) (Powell, J., concurring) (Court invalidated Massachusetts statute which required parental consent before abortion could be performed on unmarried woman under age of eighteen).

108. *See, e.g.*, Ingraham v. Wright, 430 U.S. 651, 674 (1977) (corporal punishment of school children implicates constitutionally protected liberty interest); Breed v. Jones, 421 U.S. 519, 529-31 (1975) (fifth amendment double jeopardy clause prohibits prosecuting minors as adults after adjudicatory finding in juvenile court that they violated criminal statute); Goss v. Lopez, 419 U.S. 565, 576 (1975) (property interest in educational benefits which student receives may not be taken away from student without due process); *In re* Winship, 397 U.S. 358, 368 (1970) (conviction of minor for adult crime reversed due to failure of state court to use "beyond a reasonable doubt" standard required by "the essentials of due process and fair treatment"). *But see* T.L.O., 53 U.S.L.W. 4083, 4087 (U.S. Jan. 15, 1985) (school officials can search students without warrant or probable cause if search is reasonable); McKeiver v. Pennsylvania, 403 U.S. 528, 543-45 (1971) (children tried in juvenile court have no right to trial by jury). For an analysis of *New Jersey v. T.L.O.*, see N.Y. Times, Jan. 21, 1985, at B4, col. 4.

109. 387 U.S. 1 (1967).

are entitled to adequate notice of the charges against them,[110] the assistance of counsel,[111] the privilege against self incrimination,[112] and the right to confront and cross examine witnesses when under the jurisdiction of a non-juvenile criminal court.[113] Minors also have been given protection against double jeopardy[114] and the protection of the "beyond a reasonable doubt" standard of proof in non-juvenile criminal proceedings.[115]

In concluding that these rights extend to minors, the Court stated that juvenile criminal proceedings need not conform in all respects with the requirements of an adult criminal trial.[116] However, the due process clause of the fourteenth amendment[117] requires application of the essentials of "due process and fair treatment" in

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110. *Id.* at 33-34. "[The Constitution] does not allow a hearing to be held in which a youth's freedom and his parents' right to his custody are at stake without giving them timely notice, in advance of the hearing, of the specific issues that they must meet." *Id.*

111. *Id.* at 36 (citing Powell v. Alabama, 287 U.S. 45, 69 (1932)). "The child 'requires the guiding hand of counsel at every step in the proceeding against him.' " *Id.* In *Powell*, the Court held that if, in a criminal case, the accused is unable to obtain counsel, it is the duty of the trial court to appoint counsel for him. 287 U.S. at 73.

112. *Gault*, 387 U.S. at 55. The Court stated:

> We conclude that the constitutional privilege against self-incrimination is applicable in the case of juveniles as it is with respect to adults. We appreciate that special problems may arise with respect to waiver of the privilege by or on behalf of children, and that there will be some differences in technique—but not in principle—depending upon the age of the child and the presence and competence of parents.

Id.

113. *Id.* at 57. "We now hold that, absent a valid confession, a determination of delinquency and an order of commitment to a state institution cannot be sustained in the absence of sworn testimony subjected to the opportunity for cross-examination in accordance with our law and constitutional requirements." *Id.*

114. Breed v. Jones, 421 U.S. 519, 531 (1975). The respondent was tried initially in juvenile court where it was determined that he violated a criminal statute and that he was unfit for treatment as a juvenile. *Id.* at 520. It was ordered that he be prosecuted as an adult, and subsequently was convicted of robbery by the Superior Court of California. *Id.* at 524-25.

115. *In re* Winship, 397 U.S. 358, 368 (1970). Section 744(B) of the New York Family Court Act provided that "[a]ny determination at the conclusion of [an adjudicatory] hearing that a [juvenile] did an act or acts must be based on a preponderance of the evidence." *Id.* at 360. The appellant was found guilty under this statute of an act which if done by an adult would have constituted larcency. *Id.* at 368. The Court struck down this statute by holding that the standard of proof in such a proceeding must be that beyond a reasonable doubt. *Id.* at 368. The Court reasoned that the due process clause required application during the juvenile hearing of the essentials of due process and fair treatment. *Id.* at 365-66.

116. *Kent*, 383 U.S. at 562.

117. U.S. CONST. amend. XIV, § 1. The amendment provides that "[n]o state

juvenile criminal proceedings.[118] By granting juveniles only specific constitutional guarantees, the Court can preserve the juvenile justice system distinct from that of the adult system and still safeguard the vulnerability of children.[119]

The constitutional right to privacy[120] also has been recently extended to minors.[121] The Court has reasoned that constitutional rights do attach not only when one reaches the age of majority but also are present during minority.[123] Therefore, minors have the right to seek

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shall . . . abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law. . . ." *Id.*

118. *Gault*, 387 U.S. at 30 (quoting Kent v. United States, 383 U.S. 541, 562 (1966)). Justice Harlan (concurring in part, dissenting in part) outlined three criteria by which the procedural requirements of due process should be measured.

> [F]irst, no more restrictions should be imposed than are imperative to assure the proceedings' fundamental fairness; second, the restrictions which are imposed should be those which preserve, so far as possible, the essential elements of the State's purpose; and finally, restrictions should be chosen which will later permit the orderly selection of any additional protections which may ultimately prove necessary. In this way, the Court may guarantee the fundamental fairness of the proceeding, and yet permit the State to continue development of an effective response to the problems of juvenile crime.

Id. at 72.

119. *See supra* note 1 and accompanying text.

120. The Constitution does not explicitly mention a right to privacy. Carey v. Population Servs. Int'l, 431 U.S. 678, 684 (1977) (quoting Roe v. Wade, 410 U.S. 113, 152 (1973)). However, the Court has recognized that one aspect of liberty which is protected by the due process clause of the fourteenth amendment is a right of personal privacy, which guarantees certain zones of privacy into which the government may not intrude. *Id. See generally* Roe v. Wade, 410 U.S. 113 (1973) (right to privacy protects the decision to have an abortion); Eisenstadt v. Baird, 405 U.S. 438 (1972) (right to privacy includes unmarrieds' decision to use contraceptives); Stanley v. Georgia, 394 U.S. 557 (1969) ("[p]rivate possession of obscene matter cannot constitutionally be made a crime."); Griswold v. Connecticut, 381 U.S. 479 (1965) (right to privacy includes rights of married couples to use contraceptives.); L. TRIBE, AMERICAN CONSTITUTIONAL LAW 886-90 (1972) (discussion of right to privacy).

121. *See, e.g.*, Carey v. Population Servs. Int'l, 431 U.S. 678, 693-94 (1977) (minor entitled to use contraceptives without state intrusion because this right is protected by privacy rights of minors); Planned Parenthood of Missouri v. Danforth, 428 U.S. 52, 75 (1976) (Missouri statute which required written consent of parent before unmarried woman under age of eighteen could obtain abortion unconstitutional). For a discussion of the state of the law in this area before the *Carey* and *Planned Parenthood* decisions, see generally Note, *A Minor's Right to Contraceptives*, 7 U.C.D. L. REV. 270 (1974).

122. *Danforth*, 428 U.S. at 74. "Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights." *Id.*

123. *Id.* at 75. However, the right can be restricted by the state. The state can

an abortion and to purchase and use contraceptive devices.[124] However, as with all challenged state restrictions which infringe on a constitutional right, if a significant state interest can be found which supersedes the juvenile's privacy interest, the constitutional right will be pre-empted by that interest.[125]

However, the Supreme Court also has recognized that minors are particulary vulnerable in some areas and has upheld state laws which have limited the rights of minors in these areas. In *Ginsberg v. New York*,[126] the Court decided that the inability of children to make mature choices superseded minors' first amendment rights to purchase pornographic magazines.[127] The Court concluded that the New York State Legislature could determine that the material in question presented a danger to children against which they should be protected despite the fact it could not have restricted the sale of the same materials to adults.[128] In *Prince*

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require a pregnant minor to show either: (1) that she is mature enough and has enough knowledge to make her abortion decision in consultation with her physician, without parental consent or, (2) that even if she does not have the requisite maturity or knowledge, the abortion would be in her best interests. *Bellotti*, 443 U.S. at 643-44.

124. *Carey*, 431 U.S. at 694.

125. *See, e.g.*, Roe v. Wade, 410 U.S. 113, 155 (1973) ("[w]here certain 'fundamental rights' are invoked the Court has held that regulation limiting these rights may be justified only by a 'compelling state interest,' . . . and that legislative enactments must be narrowly drawn to express only the legitimate state interest at stake"); *see also Carey*, 431 U.S. at 688; Eisenstadt v. Baird, 405 U.S. 438, 463-64 (1972) (White, J., concurring); Griswold v. Connecticut, 381 U.S. 479, 485 (1965).

126. 390 U.S. 629 (1968).

127. *Id.* at 638. The defendant-petitioner had been convicted for selling sexually oriented magazines to a minor under the age of seventeen in violation of a New York statute. It was conceded that the conviction would have been reversed if based upon the sale of the same material to an adult because of first amendment protections. *Id.* at 634. For cases in which the rights of children have been limited under the *Ginsberg* rationale, see New York v. Ferber, 458 U.S. 747, 749-65 (1982) (New York statute which prohibited persons from knowingly promoting sexual performance by child under age sixteen by distributing material which depicts such performance upheld); H.L. v. Matheson, 450 U.S. 398, 409 (1981) (statute requiring parental notice of abortion by minor does not violate constitutional rights of that minor); F.C.C. v. Pacifica Foundation, 438 U.S. 726, 749-50 (1978) (court allows federal restrictions on broadcasted materials because of ease in which children may gain access to them); M.S. News Co. v. Casado, 721 F.2d 1281, 1285-86 (10th Cir. 1983) (upholds city ordinance which prohibited promotion of sexually oriented material to minors even though such material could be sold to adults).

128. *Ginsberg*, 390 U.S. at 637. In *Ginsberg*, the Court reasoned that the New York legislature could rationally conclude that the material prohibited by the statute could impair the ethical and moral development of children. *Id.* at 641. The Court also noted that prohibiting the sale of such material to minors did not bar parents from purchasing the magazines for their children. *Id.* at 639. In his dissent, Justice Douglas concluded that obscenity is not excluded from the first amendment. *Id.*

v. Massachusetts,[129] an adult was convicted for violating a child labor statute by allowing a minor to sell religious literature even though the child had asked to engage in this activity.[130] In upholding the conviction and rejecting the adult petitioner's first amendment defense, the Court stated that the interest of society in protecting the welfare of children and safeguarding them from abuse[131] permitted the state to enforce the statute even though it would be invalid if made applicable to adults.[132]

These cases illustrate the paradox of imposing the death penalty on juveniles. While judicial decisions have expanded the constitutional rights of minors in the privacy and criminal procedure areas, the Supreme Court still acknowledges the need to restrict certain constitutional rights of juveniles and to maintain a separate juvenile justice system.

IV. Statutory Analysis

The Model Penal Code (Code) accepted the constitutional protection category when it examined the validity of juvenile capital punishment and expressly rejected imposing the death penalty on minors under the age of eighteen regardless of the crime.[133] The Code drafters believed that "civilized societies will not tolerate the spectacle of execution of children."[134] It was recognized, however,

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at 653. Therefore, he reasoned that it was improper for New York to prohibit the sale of pornography to a minor. *Id.* at 655

129. 321 U.S. 158 (1944).

130. *Id.* at 162, 170. Petitioner challenged the statute as a restraint on the minor's freedom of religion. *Id.* at 164. In rejecting this claim, the Court noted that religious training may be accomplished in many ways, such as parental religious training and training through the church. *Id.* at 171.

131. *Id.* at 165. "It is the interest of youth itself, and of the whole community, that children be both safeguarded from abuses and given opportunities for growth into free and independent well-developed men and citizens." *Id.* For other cases in which the Supreme Court balanced first amendment rights against the welfare of juveniles or adults, see Stanley v. Georgia, 394 U.S. 557, 567 (1969); Redrup v. New York, 386 U.S. 767, 769 (1967); Jacobellis v. Ohio, 378 U.S. 184, 195 (1964); Beard v. Alexandria, 341 U.S. 622, 644-45 (1951); Kovacs v. Cooper, 336 U.S. 77, 88-89 (1949).

132. *Prince*, 321 U.S. at 167.

133. MODEL PENAL CODE AND COMMENTARIES § 210.6(1)(d) (1980) [hereinafter referred to as M.P.C.]. The M.P.C. provides that when a defendant is found guilty of murder and the defendant was under eighteen years of age at the time of the commission of the crime, the court shall impose sentence for a felony of the first degree as opposed to capital punishment. *Id.*

134. *Id.* at 133. This belief was strengthened by the observation that the drafters

that some juveniles had the mental and physical capabilities to pose a danger to society, and, therefore, the drafters debated lowering the maximum age of juveniles protected from capital punishment to fourteen.[135] This proposal was rejected based on the belief that the death penalty should be reserved for adults.[136]

The Code's criteria for determining the propriety of a juvenile death penalty were published originally by the American Law Institute in 1959.[137] Since that time, several states have considered the Code's provision. Presently, eight states have enacted death penalty statutes which prohibit the execution of juvenile offenders.[138] Seven of these states prohibit capital punishment if the defendant is under age eighteen.[139] Nevada will not impose capital punishment if the defendant is under sixteen.[140]

One significant difference among the statutes is in the procedural form that the prohibitions against juvenile capital punishment take. The two basic approaches used by the states are outright prohibition,

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of the Code had the opportunity to make the offender's age only a mitigating factor but decided to include it as an absolute prohibition as well as a mitigating factor for those over eighteen. *Id.* § 210.6(4)(h).

135. *Id.* at 133. The facts of this debate are not included in the commentaries.

136. *Id.*

137. *See id.* at 133-34.

138. CAL. PENAL CODE § 190.5 (West Supp. 1984); COLO. REV. STAT. § 16-11-103(5)(a) (1978); CONN. GEN. STAT. § 53a-46a(f)(1) (Supp. 1984); ILL. REV. STAT. ch. 38, § 9-1(b) (Supp. 1984); NEV. REV. STAT. § 176.025 (1979); N.M. STAT. ANN. § 31-18-14(A) (Supp. 1978); OHIO REV. CODE ANN. § 2929.03(D)(1) (Page 1982); TEX. PENAL CODE ANN. § 8.07(d) (Vernon Supp. 1985). Kentucky had also passed a statute which, had it come into effect, would have prohibited the imposition of the death penalty on juvenile convicts. KY. REV. STAT. § 208F.040 (1982). However, the statute, which was to become effective July 15, 1984, was repealed July 13, 1984. KY. REV. STAT. § 208F.040 (Supp. 1984). The Maryland State Senate recently defeated an effort to prohibit the imposition of the death penalty on minors. The Senate voted 26 to 21 against repealing the section of their death penalty which permits such executions. *See* The Wash. Post, Feb. 19, 1985, at A18, col. 1 (editorial).

139. CAL. PENAL CODE § 190.5 (West Supp. 1984); COLO. REV. STAT. § 16-11-103(5)(a) (1978); CONN. GEN. STAT. ANN. § 53A-46A(f)(1) (Supp. 1983); ILL. REV. STAT. ch. 38, § 9-1(B) (Supp. 1984); N.M. STAT. ANN. § 31-18-14(A) (Supp. 1978); OHIO REV. CODE ANN. § 2929.03(D)(1) (Page 1982); TEX. PENAL CODE ANN. § 8.07(d) (Vernon Supp. 1985).

140. NEV. REV. STAT. § 176.025 (1979). It is interesting to note that under Nevada law a juvenile becomes an adult when he reachs age eighteen. NEV. REV. STAT. § 129.010 (1979). The statute provides that "[a]ll persons of age eighteen years who are under no legal disability, shall be capable of entering into any contract, and shall be, to all intents and purposes, held and considered of lawful age." *Id.* No explanation could be found as to the reason for the the discrepancy between the two statutes, but this demonstrates the state's conclusion that juveniles warrant special state protection in the area of criminal sentencing.

and consideration of the defendant's minority as an absolute mitigating factor.[141] For example, the California statute provides that the death penalty shall not be imposed on any person who is under age eighteen at the time of the crime.[142] However, the Connecticut statute provides that,

> [t]he court shall not impose the sentence of death on the defendant if the jury or, if there is no jury, the court finds by special verdict, as provided in subsection (d), that any mitigating factor exists. The mitigating factors to be considered concerning the defendant shall include, but are not limited to, the following: [t]hat at the time of the offense (1.) he was under the age of eighteen. . . .[143]

While this difference in approaches may seem to be significant, the effect is the same. In each instance, the age of the defendant will prohibit imposition of the death penalty.

The statutes do share some common characteristics. All eight statutes are identical in that the minor's age at the time of the offense is the relevant consideration rather than his age at the time of arrest.[144] For example, one could conceivably commit a murder while still a juvenile yet not be arrested until three years later. In this situation, the state statute would apply and the death penalty would not be imposed. The statutes are also identical in providing that the maximum permissible alternative penalty is life imprisonment.[145]

Thirteen other states which have death penalties specifically mention the age of the defendant as a potential mitigating factor.[146]

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141. *See supra* note 138.

142. CAL. PENAL CODE ANN. § 190.5 (West Supp. 1984).

143. CONN. GEN. STAT. ANN. § 53A-46A(f)(1) (West Supp. 1984).

144. *See supra* note 138.

145. *Id.* It is recognized that the sentences of life imprisonment with or without parole have been challenged as being, respectively, ineffective or unconstitutional, but such a discussion is beyond the scope of this Note. For a discussion of life imprisonment in terms of cruel and unusual punishment, see generally Note, Rummel v. Estelle: *Can Non-Capital Punishment Still Be Cruel and Unusual?*, 38 WASH. AND LEE L. REV. 243 (1981). New York does not have an active death penalty, but is presently considering legislation which would permit judges to sentence murderers to life imprisonment without parole. *See* N.Y. Times, Jan. 25, 1985, at B2, col. 1.

146. ALA. CODE § 13A-5-51(7) (1981); ARIZ. REV. STAT. ANN. § 13-703(G)(5) (1978); ARK. STAT. ANN. § 41-617 (Supp. 1983); FLA. STAT. § 921.141(6)(g) (West 1984); MD. CRIM. LAW § 413(G)(5) (1982); NEB. REV. STAT. § 29-2523(2)(D) (1979); N.H. REV. STAT. ANN. § 630.5 II(b)(5) (Supp. 1983); N.J. REV. STAT. § 2C:11-3(5)(C) (1982); N.C. GEN. STAT. § 15A-2000(F)(7) (1983); PA. CONS. STAT. § 9711(E)(4) (Supp. 1983); S.C. CODE ANN. § 16-3-20(C)(b)(7) (Supp. 1983); UTAH CODE ANN. § 76-3-207(2)(E) (Supp. 1983); WYO. STAT. § 6-2-102(j)(vii) (1977).

These states allow the jury to decide whether the defendant's youth is a sufficiently significant factor to commute the death penalty to life imprisonment. However, they do not specify how old the defendant must be for his age to be considered as a mitigating factor nor do they suggest that a lower age must lead to greater mitigation; they simply state that the youth of the defendant may be considered in determining the length of his sentence.[147]

In keeping with the requirements enunciated in *Lockett*, the other seventeen death penalty states must allow for consideration of any factor that the jury deems relevant to mitigation[148] thus permitting the sentencer to consider the defendant's age in mitigation if it deems it relevant. Lastly, there are states which prohibit the imposition of the death penalty under any circumstances. These states obviously accept the belief that states should not impose the death penalty on juveniles.

IV. Case Law Analysis

The age of the defendant has been considered by numerous appellate courts in reviewing the propriety of an imposed death penalty. This section will examine the reasoning of those appellate courts.

A. Pre-*Eddings*

1. Death Penalty Not Imposed on Juvenile

It is difficult to categorize decisions which have commuted death sentences imposed upon juveniles since the reasons for the rejection of a death sentence and sentence reduction are varied. Some courts, however, have relied expressly on the defendant's age as a ground for sentence reduction.[149] While no state court has determined that a statute which allows the imposition of a death sentence on a juvenile is unconstitutional *per se*, at least one state court has ruled that imposition of the death penalty on a juvenile defendant is impermissible.[150]

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147. *Id.*

148. *See, e.g.*, DEL. CODE ANN. tit. 11, § 4209(c)(4) (1979); GA. CODE ANN. § 17-10-30 (1984); IDAHO CODE § 19-2515 (1984); IND. CODE ANN. § 35-50-2-9 (1984); MISS. CODE ANN. § 97-3-19 (1984); OKLA. STAT. ANN. tit. 21, § 701.10 (West 1983); S.D. CODIFIED LAWS § 23A-27A-1 (1984).

149. *See infra* notes 151-69.

150. *See infra* notes 151-59.

In *Ridge v. State*,[151] the Criminal Court of Appeals of Oklahoma reduced a death sentence imposed on a fourteen-year-old boy to life imprisonment.[152] The defendant, a black youth, had been found guilty of beating and murdering the wife of a prominent farmer in the area.[153] The state court held that even though the murder was deliberately planned and executed and the boy was aware that the act was wrong, the death penalty was an inappropriate sentence.[154]

The *Ridge* court showed concern for the interaction of the policy of deterrence in criminal sentencing and the policy of rehabilitation underlying juvenile statutes.[155] While the court recognized that maximum punishment for crime was the only method that had proven effective as a deterrent, it noted that juvenile criminal responsibility had been modified substantially by statute.[156] The court reasoned that a fourteen-year-old boy did not have the discretion or sense of responsibility that an adult possessed and, therefore, should be punished differently.[157] The court concluded, as a matter of law, that the jury had abused its discretion in imposing the death penalty on this defendant.[158]

The *Ridge* court effectively proscribed imposition of the death penalty on a juvenile. In reasoning that the jury abused its discretion, the court stated that the case should have been assessed without any sentimental considerations and only in terms of policy.[159] The court must have concluded that imposing capital punishment on a juvenile would not support the theories of deterrence or retribution.

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151. 28 Okl. Crim. 150, 229 P. 649 (1924).

152. *Id.* at 156, 229 P. at 651.

153. *Id.* at 151, 229 P. at 649. The defendant lived near the farmer's home. He was employed to do odd jobs in and about the home and was, therefore, familiar with the surroundings. On the day of the murder, the defendant entered the home on the pretext of inquiring about a horse bridle. He thereafter commenced a twenty-minute assault upon the deceased. *Id.* The reason for the assault was never stated by the court.

154. *Id.* at 156, 229 P. at 651. The court did conclude that "for the safety of society" the defendant should be imprisoned for life. *Id.*

155. *Id.* at 153-55, 229 P. at 650.

156. *Id.*; *see also* supra notes 51-59 and accompanying text.

157. 28 Okl. Crim. at 155, 229 P. at 650. The court noted that had the defendant been an adult the court would have affirmed the death penalty. *Id.* However, in this instance, the court gave great weight to the policy considerations against imposing the death penalty against juvenile offenders. *Id.*

158. *Id.*

159. 28 Okl. Crim. at 155, 229 P. at 651. ("[i]t is a hard problem to solve, but, after a most careful consideration in all of its aspects, we think that, as a matter of law, stripped of all sentimental considerations, the jury abused its discretion in assessing the death penalty . . .").

In *State v. Stewart*,[160] the Supreme Court of Nebraska reduced the death sentence of a sixteen-year-old boy to life imprisonment.[161] The murder victim had been meeting with the defendant to consumate a narcotics sale at the time of the murder.[162] While attempting to steal the drugs from the victim, the defendant fatally shot the drug seller.[163] The defendant was convicted in state district court of first degree murder and sentenced to death.[164] The trial judge decided that the age of the defendant was not a mitigating circumstance[165] concluding that the defendant's youth could not excuse his "heartless diabolical conduct."[166]

The Supreme Court of Nebraska, however, reasoned that the issue was not whether the defendant's age "excused" the murder[167] but whether it should be considered in sentencing.[168] The court concluded that a sixteen-year-old should receive the benefit of consideration of mitigating factors including age and commuted the death sentence to life imprisonment.[169]

The issue whether a defendant's age should prohibit the imposition of capital punishment isolated in *Stewart* and *Ridge* must be examined by other courts. The issue that must be decided is not whether the minor defendant's age "excuses" the murder but whether the defendant's inexperience and lack of knowledge due to his age proscribes the use of capital punishment.

2. Validity of Juvenile Death Penalty Upheld

The issue whether the eighth amendment prohibits imposing capital punishment on children has been considered by two state courts,

160. 197 Neb. 497, 250 N.W.2d 849 (1977).

161. *Id.* at 527-28, 250 N.W.2d at 866-67.

162. *Id.* at 501-03, 250 N.W.2d at 854. The defendant was to pay the victim-supplier a specified price for the marijuana he sold and retain any money he made when he resold the drugs.

163. *Id.* at 501-03, 250 N.W.2d at 855. The defendant shot the decedent and an associate who survived and proceeded to set fire to the van.

164. *Id.* at 500, 250 N.W.2d at 853.

165. *Id.* at 517, 250 N.W.2d at 865. The death penalty statute of Nebraska at that time provided that the age of the defendant at the time of the offense was a mitigating factor. *Id.* at 517, 250 N.W.2d at 862.

166. *Id.* at 524, 250 N.W.2d at 865. The trial court also discussed the growing tendency of persons under seventeen years of age to commit crimes. *See supra* note 8.

167. 197 Neb. at 524, 250 N.W.2d at 865.

168. *Id.* at 525, 250 N.W.2d at 865.

169. *Id.* For a case in which a court determined that the age of the defendant, twenty-one at the time of the capital offense, was a significant and substantial mitigating factor, see State v. Watson, 129 Ariz. 60, 628 P.2d 943 (1981).

which determined that the age of the defendant did not prohibit imposing the death penalty.

In *State v. Valencia*,[170] the Supreme Court of Arizona upheld the death penalty sentence which had been imposed on a juvenile defendant who had been found guilty of first degree murder.[171] The youth had shot and killed his victim after hiding in her car in order to rob her.[172] At the time of the murder, the defendant was sixteen-years-old, and at the time of the confession and arrest, he was seventeen-years-old.[173]

In *State v. Harris*,[174] the Supreme Court of Ohio upheld the death penalty sentence imposed on the defendant who had been convicted of first degree murder.[175] Harris had abducted, raped, robbed, and murdered his victim.[176] At the time of the murder and his subsequent arrest, the defendant was seventeen years and nine months old.[177]

Both the *Harris* and the *Valencia* courts concluded that the eighth amendment does not prohibit the sentencing of juveniles to death.[178] The *Harris* court further concluded that the death penalty must apply equally to adults and juveniles tried as adults.[179] The *Valencia* court, however, stated that the age of the offender was an important consideration in sentencing.[180] However, it did not cite any authority

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170. 124 Ariz. 139, 602 P.2d 807 (1979).

171. *Id.* at 141, 602 P.2d at 809. Although the court reasoned that imposing the death penalty on a minor was valid, the court found other difficulties with the sentencing procedure. The court remanded the case for resentencing before a judge other than the one who imposed the death penalty. For a discussion of the final holding in *Valencia*, see *infra* notes 246-50 and accompanying text.

172. 121 Ariz. 191, 193, 589 P.2d 434, 436 (1979).

173. *Id.* The defendant had been picked up by police in order for them to administer a polygraph exam to test the credibility of his alibi. *Id.* En route to the police station, the youth confessed to having killed the deceased.

174. 48 Ohio St. 2d 351, 359 N.E.2d 67 (1976), *rev'd on other grounds sub nom.* Harris v. Ohio, 438 U.S. 911 (1978). *Harris* was remanded for further proceedings in light of *Lockett v. Ohio*. For a discussion of *Lockett*, see *supra* notes 88-94 and accompanying text.

175. 48 Ohio St. 2d at 363, 359 N.E.2d at 74. The court concluded that no mitigating circumstances had been established by a preponderance of the evidence and, therefore, the death penalty imposed should be affirmed. *Id.*

176. *Id.* at 351, 359 N.E.2d at 68. Harris was one of four men who abducted the deceased and was the only one who shot her.

177. *Id.* at 353, 359 N.E.2d at 69.

178. *Id.* at 358-59, 359 N.E.2d at 71; *Valencia*, 124 Ariz. at 141, 602 P.2d at 809.

179. 48 Ohio St. 2d at 359, 359 N.E.2d at 72.

180. 124 Ariz. at 141, 602 P.2d at 809.

for concluding that youth may be an absolute prohibition to capital punishment.[181]

B. *Eddings v. Oklahoma*

In *Eddings v. Oklahoma*,[182] the United States Supreme Court was confronted with the issue of whether a state criminal court's imposition of the death penalty on a sixteen-year-old juvenile convicted of murder constituted cruel and unusual punishment in violation of the eighth and fourteenth amendments.[183] The Court, however, decided the case on the issue [184] of "[w]hether 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* . . . ."[185]

Eddings was charged with the murder of a state highway patrol officer on April 4, 1977.[186] Since Eddings was sixteen-years-old at the time of the crime, the state moved to have him certified to stand trial as an adult, and the motion was granted and affirmed.[187] Subsequently, Eddings entered a plea of *nolo contendere* to the charge of first degree murder.[188] After a hearing on aggravating and

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181. *Id.* This conclusion by the court might lead to the inference that the Arizona court seemed to rely on the fact that Valencia's attorney did not cite any authority for concluding that youth may be an absolute bar. *Id.*

182. 455 U.S. 104 (1982).

183. *Id.*

184. *Id.* at 120 (Burger, C.J., dissenting). Chief Justice Burger stated that the Court took care to clearly limit their consideration to the initial question as to whether a juvenile death penalty is constitutional by refusing all other questions in the petition for certiorai. *Id.*

Chief Justice Burger also discussed the propriety of the Court's actions. He argued that the *Lockett* question was never fairly presented to the state court so as to give it the first opportunity to apply controlling legal principles. *Id.* at 120 n.1 (Burger, C.J., dissenting). The majority also noted the discrepancy, but stated that the issue was argued in both briefs and, therefore, the Court could properly decide the issue. *Id.* at 113-14 n.9.

185. Brief for Petitioner at i, Eddings v. Oklahoma, 455 U.S. 104 (1982).

186. Eddings v. State, 616 P.2d 1159, 1162 (Okla. 1980). The testimony established that Eddings had stolen his brother's car so that he, his sister and two friends could run away from their homes in Missouri. At one point, Eddings lost control of the car, arousing the interest of a highway patrolman. The officer pulled Eddings off the road. When the officer was six feet away from the car, petitioner shot him with a sawed-off shot gun. *Id.* at 1162-63.

187. *In re* M.E., 584 P.2d 1340 (Okla.), *cert. denied sub. nom.* Eddings v. Oklahoma, 436 U.S. 921 (1978). For a discussion of transfer, see *supra* notes 50-59 and accompanying text.

188. *Eddings*, 616 P.2d at 1162. Oklahoma law provides that the legal effect of a plea of *nolo contendere* shall be the same as that of a plea of guilty. OKLA. STAT. ANN. tit. 22, § 513 (West Supp. 1984-1985). Therefore, Eddings effectively was pleading guilty.

mitigating circumstances, the district court sentenced Eddings to death.[189]

At the sentencing hearing, the defense presented evidence of the defendant's troubled youth in an attempt to mitigate his sentence.[190] It also attempted to present testimony which indicated that he was emotionally disturbed at the time of the crime.[191] Both the trial judge and the court of criminal appeals concluded that they could not consider this evidence as a matter of law.[192]

The Supreme Court held that the failure of the two state courts to consider the age and prior family history of Eddings as possible mitigating factors violated the sentencing mitigation rule it had enunicated in *Lockett*.[193] This rule stated that a judge or jury contemplating imposition of a death sentence could not be precluded from considering as a mitigating factor any aspect of the defendant's character.[194] The Court remanded the case ordering the state court to consider all relevant mitigating evidence and to weigh it against the evidence of the aggravating circumstances.[195]

The Court discussed the mitigating factors offered by the defendant at the state courts and confirmed the importance both of a convicted juvenile's minority status and family background. The Court stated that "just as the chronological age of a minor is itself a relevant mitigating factor of great weight, so must the background and mental and emotional development of a youthful defendant be duly considered in sentencing."[196] Thus, although the Court did not rule on whether the youth's age by itself prohibited imposition of the death

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189. 616 P.2d at 1162.

190. *Eddings*, 455 U.S. at 107. The facts presented included that Eddings' parents were divorced when he was five-years-old, his mother may have been an alcoholic or prostitute, Eddings could no longer be controlled at age fourteen and was sent to live with his father, and Eddings' father inflicted excessive physical punishment upon him. *Id.*

191. *Id.*

192. *Id.* at 113. The trial judge stated that "in following the law" he could not "consider the fact of this young man's violent background." *Id.* The Supreme Court interpreted this statement to mean that the trial judge had concluded, as a matter of law, that he could not consider the evidence. *Id.* The Court of Criminal Appeals stated that this evidence was useful in explaining Eddings' behavior, but that the evidence tended to show that Eddings "knew the difference between right and wrong at the time he pulled the trigger, and that is the test of criminal responsibility in this State." *Eddings*, 616 P.2d at 1170.

193. *Eddings*, 455 U.S. at 117.

194. Lockett v. Ohio, 438 U.S. 586, 604 (1978); *see supra* note 94 and accompanying text.

195. *Id.* at 116.

196. *Id.*

penalty, it did state, in dictum, that it was a very important factor.

Chief Justice Burger's dissenting opinion, which was supported by Justices Blackmun, Rehnquist, and White, stated that the case should have been decided on the eighth amendment issue on which certiorari was granted and that the court should have affirmed Edding's death sentence.[197] In essence, the minority opinion concluded that a juvenile death penalty does not violate the eighth amendment. These justices also concluded that the state courts must consider what evidence would mitigate a death sentence.[198]

C. Post-*Eddings* Decisions

1. Federal Court Affirmance of a Juvenile Death Penalty

After *Eddings*, a federal court, in *Prejean v. Blackburn*,[199] upheld a juvenile death penalty reasoning that death was proper retribution for the severe crime committed regardless of the age of the defendant. The court's failure to consider the character of the juvenile defendant runs contrary to the Supreme Court's emphasis in *Gregg* on the importance of societal values and the need to examine mitigating factors.

In *Prejean*, a black male was sentenced to death for killing a police officer when he was seventeen-years-old.[200] The sentence of death was upheld, and the federal district court found no eighth amendment violation.[201] The *Prejean* court stated that a court must look at the kind of punishment imposed in relation to the crime in order to determine if the sentence is just and constitutional.[202] Here, the court applied this proportionality approach and found the death penalty proper based on the severity of the crime committed by the juvenile defendant. The court concluded that the eighth amendment generally

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197. *Id.* at 128 (Burger, C.J., dissenting).

198. *Id.*

199. 570 F. Supp. 985 (W.D. La. 1983).

200. *Id.* at 988-89. Prejean, a seventeen-year-old black male, was convicted by a jury of first degree murder for the shooting death of Louisiana state police officer Donald Cleveland. At the sentencing phase of the trial, the jury found one aggravating circumstance, namely that the victim of the crime was a peace officer. After considering any factors that they may have deemed relevant to mitigation, the jury unanimously recommended capital punishment. *Id.*

201. *Id.* at 999. The court stated that Prejean's claim that the death penalty was unconstitutional when applied to individuals under eighteen was without merit. *Id.* The court also pointed out, however, that youth is a mitigating factor when judges or juries impose the death penalty in Louisiana. *Id.* at 999 n.19.

202. *Id.* at 998.

is not directed at the propriety of the punishment of a particular person.[203]

The *Prejean* court based its proper and proportionate punishment conclusion on the recent Supreme Court decisions in *Solem v. Helm*[204] and *Powell v. Texas*.[205] In *Solem*, the respondent was sentenced to life imprisonment for issuing a "no account" check for $100.[206] In *Powell*, the petitioner was criminally charged and fined for public intoxication.[207] Both courts held that the punishment imposed was not disproportionate to the crime committed and, therefore, did not violate the eighth amendment.[208]

Both *Solem* and *Powell* considered eighth amendment protections against disproportionate sentences for noncapital crimes. Justice Powell's majority opinion in *Solem* noted the distinction between capital and noncapital cases and stated that the death penalty differs in kind from all other forms of punishment.[209] He concluded that capital cases are of limited assistance in assessing possible eighth amendment violations for sentencing in a noncapital case.[210] Arguably, the contrary also should be true: a noncapital criminal case which considers eighth amendment protections should not be relied on when evaluating whether the imposition of the death penalty violates the Constitution. The *Prejean* court, in emphasizing the *Powell* and *Solem* analyses to evaluate capital cases and the eighth amendment implications, misplaced its reliance on noncapital decisions.

This *Prejean* approach of examining only the proportionality of the punishment to the crime detracts from the spirit of the Supreme Court decisions in *Furman, Gregg, Woodson, Roberts,* and *Lockett* to the great detriment of juvenile offenders.[211] For example, *Lockett* specifically guarantees that all possible mitigating factors will be

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203. *Id.*

204. 103 S. Ct. 3001 (1983).

205. 392 U.S. 514 (1968).

206. *Solem*, 103 S. Ct. at 3002. In effect, Solem was writing checks for funds he did not possess.

207. *Powell*, 392 U.S. at 517. In *Powell*, the petitioner was fined fifty dollars. On appeal to the Supreme Court, Powell, a chronic alcoholic, argued that because the statute penalized public drunkenness it in effect punished him for his status and not for having committed a criminal act. Therefore, the punishment was cruel and unusual as defined by the eighth amendment. The Court rejected this argument, reasoning that Powell was not being punished for being an alcoholic, but rather was punished for being drunk on a particular occasion. *Id.* at 532

208. *Solem*, 103 S. Ct. at 3008; *Powell*, 392 U.S. at 532.

209. *Solem*, 103 S. Ct. at 3009.

210. *Id.*

211. *See supra* notes 65-104 and accompanying text.

examined when a court determines the propriety of a death penalty.[212] In looking only to the crime and the penalty imposed and effectually ignoring the defendant, the *Prejean* court circumvented the requirements of these previous cases.

2. *State Court Affirmance of the Juvenile Death Penalty*

Several state courts have concluded that the eighth amendment does not forbid the use of capital punishment against juveniles. One state court, relying on the *Eddings* decision as the basis for its conclusion,[213] still reasoned that society's contempory standards of decency have not rejected the capital punishment of juveniles.[214]

In *State v. Battle*,[215] the defendant was convicted and sentenced to death for the murder of an eighty-year-old woman.[216] Battle was eighteen at the time of the murder.[217] Because the Missouri age limit for juvenile jurisdiction was seventeen,[218] Battle could not use the *Eddings* argument that the adult sentence should not be imposed. However, in questioning the propriety of his sentence, the defendant stressed his age as a ground for sentence reduction.[219]

In upholding the death sentence, the Missouri State Supreme Court first determined that the Missouri Legislature could enact a statute prohibiting the death penalty in cases involving juveniles. However, absent such a statute, the court was required to apply the state's death penalty against youthful offenders who met the requirements of the statute.[220] The *Battle* court, citing *Eddings v. Oklahoma*,[221] also stated that "the imposition of the death penalty is not cruel

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212. *See supra* note 94 and accompanying text.

213. *See infra* notes 215-24 and accompanying text.

214. *See infra* notes 225-39 and accompanying text.

215. 661 S.W.2d 487 (Mo. 1983).

216. *Id.* at 488. The defendant lived in an apartment near the victim. The victim discovered the defendant and a companion while they were ransacking the victim's apartment. They proceeded to rape and kill the woman. *Id.* at 489.

217. *Id.* at 488.

218. MO. ANN. STAT. § 211.021(2) (1983) (" '[c]hild' means a person under seventeen years of age"). Section 211.011 states that "[t]he purpose of this chapter is to facilitate the care, protection and discipline of children who come within the jurisdiction of the juvenile court." MO. ANN. STAT. § 211.011 (1983). Therefore, a child must be under seventeen years of age to fall within Missouri's juvenile court jurisdiction. *Id.*

219. *Battle*, 661 S.W.2d at 494.

220. *Id.* at 494 n.7. "Absent such a statute, states are free to apply their death penalty statutes to young offenders, and even juvenile offenders who stand trial as adults, so long as such statutes comport with general eighth amendment standards." *Id.*

221. *Id.*

and unusual punishment *per se* simply because the defendant is a minor at the time of the offense."[222]

Arguably, the *Eddings* majority did not intend its decision to be interpreted to support a decision such as *Battle*. The *Eddings* dissent stated that the Court had not decided the issue of whether a juvenile death penalty would be constitutional.[223] Justice O'Connor, who joined in the majority opinion but also wrote a separate concurring opinion, stated that the constitutional issue had not been decided.[224] Therefore, a majority of the Court refused to hold that imposing the death penalty on minors was not cruel and unusual and *per se* contrary to the eighth ammendment.

In *Trimble v. State*,[225] the Maryland Court of Appeals upheld the trial court's decision to apply capital punishment to a juvenile found guilty of first degree murder.[226] Trimble challenged his sentence arguing that imposing the death penalty on persons under eighteen years of age violated the eighth amendment.[227] The *Trimble* court acknowledged that this question was left unanswered in *Eddings* and concluded that the eighth amendment did not shield Trimble from capital punishment.[228]

The *Trimble* court followed *Gregg's* mandate to examine whether society had rejected capital punishment as a means of punishing youthful capital offenders. The court noted that the willingness of some states to impose such a punishment was counterbalanced by the reluctance of juries to sentence juveniles to death.[229] The court concluded, however, that society did not reject capital punishment for juveniles because the most probative evidence of societal standards

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222. *Id.*

223. *Eddings*, 455 U.S. at 128 (Burger, C.J., dissenting).

224. *Id.* at 119 (O'Connor, J., concurring). "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." *Id.*

225. 300 Md. 387, 478 A.2d 1143 (1984).

226. *Id.* at 393, 478 A.2d at 1146.

227. *Id.* at 416, 478 A.2d at 1158. Trimble maintained that "imposing the death penalty on persons under eighteen years of age constitutes cruel and unusual punishment in violation of the [e]ighth [a]mendment and [a]rticles 16 and 25 of the Maryland Declaration of Rights." *Id.* at 416-17, 478 A.2d at 1158.

228. *Id.*

229. *Id.* at 422, 478 A.2d at 1161. The court noted that out of aproximately 800 total death row inmates, only seventeen committed their capital offense while under age eighteen. *Id. citing* Brief for the Petitioner at 19A (App. E), Eddings v. Oklahoma, 455 U.S. 104 (1982).

was that a firm majority of death penalty states permitted the imposition of capital punishment on juveniles.[230]

The *Trimble* court acknowledged that its conclusion was inconsistent with the view that juveniles "have a very special place in life which the law should reflect."[231] The court reasoned that not all juveniles were deserving of or susceptible to such benign treatment.[232] The court based its decision on the belief that the theories of deterrence and retribution require that juveniles who commit certain capital crimes, especially murder, be held fully accountable as adults.[233] The court also noted that the overtaxed juvenile system had not been able to handle serious juvenile offenders.[234]

The *Trimble* court's conclusion was contrary to most of the sociological and statistical evidence that it examined.[235] Despite its acknowledged obligation to look to society's values in determining whether the death penalty should be imposed and noting that most juries would not impose it and that other countries are reluctant to apply it,[236] the *Trimble* court upheld the death sentence.[237] The court conceded, however, that imposing a death penalty on children was contrary to the standard view of the juvenile in society.[238]

To distinguish this evidence and justify the juvenile death penalty sentence the court noted that twenty-nine of the thirty-nine death penalty states allowed juveniles to be executed and concluded that this number constituted a "substantial majority."[239] What the court failed to mention was that eleven states would not impose the death penalty under any circumstances. Arguably, the fact that that twenty-nine states allow juvenile capital punishment does not create a "significant" or "substantial majority" which could provide the sole

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230. *Id.* at 421-22, 478 A.2d at 1160-61. The court did a national search of state statutes and determined in 1984 that twenty-nine out of the thirty-nine states which provided for capital punishment permitted the execution of juveniles. *Id.* The court determined that this was a substantial majority. *Id.*

231. *Id.* at 423, 478 A.2d at 1161, *citing* May v. Anderson, 345 U.S. 528, 536 (1953). For a discussion of juvenile rights, see *supra* notes 105-32 and accompanying text.

232. 300 Md. at 424, 478 A.2d at 1161.

233. *Id.*

234. *Id.*

235. *Id.* at 422-23, 478 A.2d at 1161.

236. *See supra* note 2.

237. 300 Md. at 423, 478 A.2d at 1161. "Based on this evidence, we are unable to conclude that society's contemporary standards of decency have rejected capital punishment of juveniles." *Id.*

238. *Id.*

239. *Id.* at 421, 478 A.2d at 1160.

basis for the court to justify its acceptance of this controversial form of punishment.

3. *Cases Where the Death Penalty Was Not Imposed*

Only one state court since *Eddings* has determined that the defendant's youth mandated commuting his death penalty to life imprisonment. In *State v. Valencia (Valencia I)*,[240] the defendant was convicted of murdering a woman.[241] The trial judge had determined that the defendant's age was the only mitigating factor and that it was not enough to overcome the aggravating factors of the defendant's two prior convictions.[242] The case, however, was remanded by the state supreme court so that the aggravation-mitigation hearing could be held before a judge other than the one who had tried the defendant.[243] When the hearing judge on remand also concluded that the defendant's youth was not enough to prohibit imposition of the death penalty,[244] Valencia challenged the validity of the conclusion.[245]

The state supreme court, in *State v. Valencia* (*Valencia II*),[246] reversed in favor of the defendant but refused to hold that imposing the death penalty on juveniles was constitutionally prohibited.[247] However, in its discussion of the proper consideration to be accorded to age by a death penalty sentencer, the *Valencia II* court came closer to a determination of the constitutionality of juvenile capital punishment than any other post-*Eddings* case. The court concluded, as had the *Eddings* Court,[248] that the age of the defendant is a substantial and relevant factor which must be given great weight.[249] It held that the defendant's age, sixteen-years old at the time of

240. 124 Ariz. 139, 602 P.2d 807 (1979).

241. *See supra* note 173 and accompanying text.

242. 132 Ariz. 248, 249, 645 P.2d 239, 240 (1982). The defendant had been convicted of offenses in the state of Arizona involving the threat or use of violence and for which the sentence of life imprisonment was impossible. *Id.*

243. *Id.* The trial judge had spoken with the victim's brother concerning the family's wishes that the defendant receive the death penalty. *Id.*

244. *Id.*

245. *Id.*

246. 132 Ariz. 248, 645 P.2d 239 (1982).

247. *Id.* at 250, 645 P.2d at 241. "And while we do not hold that age alone will always act to require life imprisonment . . . ." *Id.*

248. *See supra* note 189 and accompanying text.

249. *Valencia*, 132 Ariz. at 250-51, 645 P.2d at 241. "Where there is a doubt whether the death sentence should be imposed, we will resolve that doubt in favor of a life sentence. In the instant case, the age of the defendant, 16 at the time of both crimes, is 'sufficiently substantial' to call for life imprisonment instead of death." *Id.*

the murder, was a mitigating factor of sufficient substantiality to require the commutation of the death sentence in favor of life imprisonment.[250] In so holding, the *Valencia* court gave great weight to the defendant's age as a sentence mitigation factor although it fell short of holding that the eighth amendment prohibits juvenile capital punishment.

V. Recommendations

By refusing to declare the imposition of the death penalty on minors violative of the eighth amendment, the Supreme Court has effectively placed the burden of protecting juveniles from death sentences on state legislatures. Therefore, to protect minors, the legislatures, which permit death sentences but do not recognize an exception for juveniles, must pass amendments prohibiting the use of capital punishment against a minor defendant. It is suggested that the following model provision will accomplish this end.

Model Provision-Amendment to Death Penalty

1. The court shall not impose a penalty of death if the defendant was age eighteen or younger at the time of the commission of the offense.
2. If the defendant were older than age eighteen at the time of the offense, then the sentencer must consider in migitation the age of the defendant.

The choice of the age eighteen creates an arbitrary dividing line for when a defendant's youth will serve as an absolute prohibition to capital punishment. However, this age was chosen to provide consistency with other areas of the law in which an eighteen-year-old person is deemed to be an adult.[251] The first section of the

250. *Id.*

251. For example, one cannot vote unless he has reached age eighteen. U.S. CONST. amend. XXVI, § 1. This amendment provides that "[t]he right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any state on account of age." *Id.* A male can avoid draft registration until he reaches the age of eighteen. 50 U.S.C.A. § 453(a) (West Supp. 1984). This section provides that any male between the ages of eighteen and twenty-six must present himself for draft registration. *Id.* Lastly, in terms of contract law, an increasing number of states have reduced the age for contractual capacity to age eighteen. *See* J. CALAMARI & J. PERILLO, CONTRACTS 231 (2d ed. 1977). For other areas where a state can pass restrictions for the valid state interest in protecting juveniles, see *supra* notes 115-21 and accompanying text.

Model Provision is written as an absolute prohibition so that it cannot be subject to varying judicial interpretations as are statutes which require consideration of age as a mitigating factor.

Section two of the Provision is necessary to circumvent the possibility that a party who has limited knowledge of the ramifications of his actions will receive the death penalty. This section imposes a duty on the sentencer to investigate such an occurrence. Finally, it is important to note that these provisions only prohibit capital punishment; they do not prescribe a required alternative sentence. The imposition of life imprisonment or life imprisonment without the possibility of parole remain viable alternatives.[252]

VI. Conclusion

A minor who is on trial for a capital crime and possibly facing a possible death penalty already has been transferred into the adult criminal justice system.[253] However, the rationale for the existence of a separate juvenile justice system best illustrates society's opinion of how juvenile offenders should be treated. Although these minors are thrust into the adult system by virtue of their crimes, they are still juveniles by virtue of their ages.[254]

The early reformers of the juvenile justice system believed that society's role was not to ascertain whether the child was "guilty" or "innocent" but to ascertain what could be done to aid him.[255] It was believed that the child was essentially "good" and could be "saved" with society's aid.[256] Accordingly, the basis of the juvenile justice system was not punishment but rehabilitation. Executing a juvenile, therefore, would not satisfy the desire of society to rehabilitate minors who have committed criminal acts.

Presently, in eight states, a defendant's youth prohibits the im-

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252. *See supra* note 145.

253. *See supra* notes 50-59 and accompanying text.

254. For a discussion of an opposing point of view, see Note, *The Death Penalty for Juveniles—A Constitutional Alternative*, 7 J. JUV. L. 53, 66 (1983). This Note argues that due to a history of anti-social and criminal conduct, some minors should receive sentences equivalent to those of adults. This sort of reasoning seems to circumvent the rationale underlying the juvenile justice system, that being that it is society's obligation to rehabilitate those minors who are prone to criminal conduct due to their past social history. *See supra* notes 39-49 and accompanying text.

255. *In re* Gault, 387 U.S. 1, 15 (1967); *see supra* notes 109-13 and accompanying text.

256. *See supra* notes 42-43 and accompanying text.

position of capital punishment.[257] In thirteen states, a jury must look to the defendant's youth as a mitigating factor in capital sentencing decisions.[258] The Supreme Court, which has not yet decided whether the eighth amendment prohibits imposing capital punishment on juveniles, [259] construed death penalty statutes in recent cases to protect the constitutional rights of convicts on death row.[260] While a Supreme Court decision prohibiting juvenile capital punishment based on an eighth amendment analysis is the surest way to fully protect juveniles in every state, a secondary alternative is for states which have death penalty laws to pass amendments prohibiting juvenile capital punishment.

In the early 1900's, Judge Julian Mack wrote, that "[t]he problem of the delinquent child, though jurisdictionally comparatively simple, is in its social significance, of the greatest importance, for upon its wise solution depends the future of many of the rising generation."[261] Executing youthful offenders will not adequately solve the dilemma of serious juvenile crime. Society must employ another method to punish minors who have committed capital offenses. It is only in this way that the protections of the eighth amendment, the societal demand for protection of its minors, and the rehabilitative rationale for juvenile punishment can be fulfilled.

Rona L. Just

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257. *See supra* note 138 and accompanying text.
258. *See supra* note 146 and accompanying text.
259. *See supra* note 196 and accompanying text.
260. *See supra* notes 71-100 and accompanying text.
261. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104 (1909).