Juvenile Justice Issues

Youth Advocate Program International is committed to ending the death penalty for youthful offenders in the United States and throughout the world. Individuals younger than age 18 are children and should be granted additional protections not necessarily provided to adults. Children who commit crimes should be dealt with in a juvenile justice system where adjudication emphasizes correction and rehabilitation. Execution has no rehabilitative value.

Arguments Surrounding the Execution of Youthful Offenders

by Rebecca Wiegand

State-sanctioned execution of criminal offenders is the harshest punishment any society can apply. Throughout history both adults and young people have been executed for committing crimes. What most distinguishes the 21st century from all others is that now almost every country in the world, with the exception of the United States, Yemen, Pakistan, Nigeria, Saudi Arabia, Iran and the Democratic Republic of Congo, have outlawed the application of the death penalty for youthful offenders.

Note that throughout this paper the term "youthful offender" refers to any person under age of 18 at the time of committing a crime who is convicted in a court of law.

Since the year 2000, only three countries have executed youthful offenders: The Democratic Republic of Congo, Iran and the United States.[2] The United States leads the world in both the frequency and total number of executions of youthful offenders. Currently 76 young men are awaiting execution for crimes committed in the United States before they reached age 18.[3] Since 1990, 56 percent of all the verified executions of children in conflict with the law were carried out in the United States.[4]

Because most executions of youthful offenders take place in the United States, the

cultural and political arguments for and against the application of the death penalty in cases involving children as perpetrators of crimes in the United States will be the focus of this paper.

HISTORY OF EXECUTING YOUTHFUL OFFENDERS IN THE UNITED STATES

The Juvenile Justice System was Founded on the Principle of Rehabilitation

The U.S. juvenile justice system was founded over 100 years ago as a separate court system designed to look at the ways to reintegrate children in conflict with the law back into society. The rehabilitation of children, rather than punishment, was emphasized because it was widely believed that children did not have fully developed reasoning faculties and therefore could not be held to the same social standard of accountability as adults. Advocates for the juvenile justice system also argued that children in conflict with the law had not chosen to live "a life of crime" and could learn alternative behaviors. Children in conflict with the law were supposed to be represented by social workers who would determine the best treatment and rehabilitation methods for the child.[5]

The juvenile justice system and its philosophy of rehabilitation remained relatively the same from 1899 to the late 1960s. With the social and political movements that spread throughout the United States in the 1960s and 1970s, adolescents began taking a more independent and active role in society that resulted in them being viewed as capable of greater adult accountability than they had in the past.

Over the years, the rehabilitative goal of the juvenile justice system has eroded and it now encompasses many of the more punitive aspects of adult courts. The political and social movements of the 1960s and early 1970s began changing the image of young people from innocents needing protection, to social rebels and often troublemakers. This resulted in popular political measures that increased the penalties for youthful offenders. Violent crime rates where youth were the perpetrators began to soar to their highest levels in history during the 1980s and continued until the mid 1990s. Specific traumatic events that affected the entire nation, such as school shootings and gang violence, prompted punitive federal and local measures to be implemented.

These measures ranged from abolishment of parole, imposition of mandatory prison sentences and transfers of youthful offenders' cases to regular criminal court. Prosecutors sought the application of the death penalty in more youthful offender cases.[6]

Between 1992 and 1999, 49 states and the District of Columbia passed laws making it easier for juveniles to be tried as adults, without judicial discretion. A mandate in a 2002 Florida case of two young brothers, 12 and 13 years old, required that they be automatically tried as adults for a murder charge.[7] In 1999, a Michigan court prosecuted an 11 year old as an adult for a murder case.[8] He became the youngest person in American history to be prosecuted in an adult court.[9]

Application of the Death Penalty for Youthful Offenders

In 1642, 16-year-old Thomas Graunger of Plymouth Colony, Massachusetts, became the first youthful offender in recorded history executed in the United States. The youngest known person to be executed in the United States was James Arcene, a Native American boy who was 10 years old at the time of his crime in 1885.[10] Since World War II, the youngest person to be executed was 14-year-old African American George Stinney of South Carolina in 1944. Because of his small size of approximately 95 pounds, the mask covering his face during electrocution fell off during the process.[11]

Since 1642, at least 365 youthful offenders have been executed by 38 states and the federal government. In 1972, the Supreme Court declared an effective moratorium on the death penalty when it ruled, in ***Furman v. Georgia***, that all existing death penalty statutes were unconstitutional.[12] In 1976, the Supreme Court case ***Gregg v. Georgia*** reinstated the death penalty including the implementation of it for youthful offenders.[13] This ruling marked the beginning of the modern period of capital punishment. Twenty-one executions of youthful offenders have been carried out in states from 1976 to 2002.[14]

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Currently, 38 states and the federal government (both civilian and military) have statutes authorizing the death penalty for capital crimes. Of those 40 death penalty jurisdictions, 18 jurisdictions (45 percent) have expressly chosen age 18 at the time of the crime as the minimum age for eligibility for that ultimate punishment. The federal government did not reinstate provisions to execute youthful offenders. Another five state jurisdictions (13 percent) have chosen age 17 as the minimum. The other 17 death penalty jurisdictions (42 percent) use age 16 as the minimum age, either through an express age in the statute (five states) or by court ruling (12 states).[15] Since 1988 in the U.S. Supreme Court ruling on the ***Thomson v. Oklahoma*** case it has been constitutionally illegal to execute anyone who committed a crime before attaining age 16.[16]

LEGAL CONTEXT AND EVOLVING STANDARDS OF LAW

During the past decade, the constitutionality of the death penalty for youthful offenders in the United States has been a reasonably well-settled issue. However, some observers of the U.S. Supreme Court sense a new interest by the Court in reconsidering this practice. Below are some key legal cases in the recent history of executing youthful offenders in the United States.

- ***Thompson v. Oklahoma (1988)***: the U.S. Supreme Court held that executions of offenders age 15 and younger at the time of their crimes are prohibited by the Eighth Amendment to the U.S. Constitution. The combined effect of the opinions by Justice Stevens and Justice O'Connor in ***Thompson*** is to hold that no state without a minimum age in their death penalty statute can go below age 16 without violating ***Thompson***, and in fact no state with a minimum age in its death penalty statute establishes an age of application less than 16.[17]

- ***Stanford v. Kentucky (1989)***: the U.S. Supreme Court held that the Eighth Amendment to the U.S. Constitution does not prohibit the death penalty for crimes committed at ages 16 or 17 regardless of state statutory provisions.[18]

- ***Atkins v. Virginia (2002)***: the U.S. Supreme Court held that the U.S. Constitution prohibits the death penalty for mentally retarded offenders. Those who want to end the juvenile death penalty maintain that many of the arguments that won ***Atkins v. Virginia*** also apply to children in conflict with the law.[19]

- ***Patterson v. Texas (2002):*** the U.S. Supreme Court denied a stay of execution and petition from Toronto Patterson, a youthful offender about to be executed. However, Justice Stevens dissented (joined by Justices Ginsburg and Breyer), stating that the Court should revisit the issue of the death penalty for crimes committed while under age 18.[20]

- ***In re Stanford (2002)***: the Supreme Court decided not to take the case, over a strong dissent by Justice Stevens (joined by Justices Breyer, Ginsburg, and Souter). These four Justices not only wanted to revisit the juvenile death penalty issue but were ready to declare it unconstitutional and to "put an end to this shameful practice."[21]

The four Justices made this joint statement regarding the practice, "The practice of executing such offenders is a relic of the past and is inconsistent with the evolving standards of decency in a civilized society." Justice Stevens added in his statement that "a national consensus has developed that juvenile offenders should not be executed."[22]

There are a number of recent changes within public opinion and in state legislation that have shown dramatic moves away from support for juvenile death penalty, reflecting Justice Stevens statement about a "national consensus" and "evolving standards of decency." Below are some examples of changes in opinion and policy.

In a May 2002 Gallup Poll, 69 percent of Americans did not want to execute youth, according to the Gallup News Service.[23] A different study in 2001 concluded that "while 62 percent [of Americans] back the death penalty in general, just 34 percent favor it for those committing murder while under the age of 18."[24]

The Florida Supreme Court has interpreted its own Florida Constitution to prohibit the death penalty for 16-year-old offenders (***Brennan v. State 1999***).[25] Other states also have considered imposing a higher minimum age than is mandated by the federal Constitution, using their own state constitutions as the mandating authority.[26]

Considerable legislative activity has been seen to *raise* the statutory minimum to age 18. When Kansas and New York reinstated their death penalties in 1994 and 1995, respectively, their new statutes included minimum ages of 18 as well. Montana instated legislation in 1999 to raise its minimum age to 18, and Indiana raised its minimum age to 18 in 2002. As of fall 2002, many other states were strongly considering such legislative amendments to their death penalty statutes.[24] Abolition legislation has progressed toward adoption in Florida, Kentucky and Texas. Bills that would abolish the death penalty for youthful offenders also have been introduced in Arizona, Arkansas, Mississippi, Nevada, Pennsylvania, and South Dakota. The Missouri Supreme Court ruled in an August, 2003 case that executing youthful offenders was unconstitutional [27] Some states allow the death penalty for youthful offenders but have not applied it in years.

This is the most legislative attention to this issue in past 20 years. Thirteen American jurisdictions remain without the death penalty for offenders of any age: Alaska, District of Columbia, Hawaii, Iowa, Maine, Massachusetts, Michigan, Minnesota, North Dakota, Rhode Island, Vermont, West Virginia, and Wisconsin.[28]

CRUEL AND UNUSUAL PUNISHMENT?

The basic concept underlying the Eighth Amendment is the dignity of man… The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.[29]

—1958 Interpretation from U.S. Supreme Court Chief Justice Warren regarding "cruel and unusual punishment" in the case *Trop v. Dulles*, 356 U.S. 86

The question of whether or not executing youthful offenders constitutes an act of cruel and unusual punishment is at the forefront of international and domestic debate right now. The Eighth Amendment to the U.S. Constitution guarantees that no "cruel and unusual punishment" shall be used against people. The above quote determines that the standard for what constitutes "cruel and unusual punishment" must be determined by the "evolving standards of decency" in our society.

During the ***In re Stanford*** ruling in October of 2002, some of the justices referred to the "evolving standards of decency" statement in the above quote, that places the onus on society to show a national consensus to end the death penalty for children who commit crimes. This increases the importance of advocacy against the death penalty for youthful offenders in state and local governments as well as public opinion during this crucial time in history. If a clear message is given to the U.S. Supreme Court that society's "evolving standards of decency" now dictate that executing youthful offenders is "cruel and unusual," then the practice will be outlawed.

Continuous criticism of the United States from the international community and human rights organizations advocate in favor of ending the practice. However, some victims rights groups and law enforcement organizations argue for continuing the practice. Community organizations and faith-based groups throughout the United States are divided. Below, are some of the main points and arguments from both sides of this issue.

ARGUMENTS IN FAVOR OF EXECUTING YOUTHFUL OFFENDERS

If we are to abolish the death penalty, I should like to see the first step taken by my friends the murderers.[30]

— Alphonse Karr (1808-1890)

Proponents of applying the death penalty in criminal cases sometimes make no distinction between applying it to adult offenders or youthful offenders. As a result, many of the arguments in favor of executing youth are the same as those applied to adult cases. Furthermore, there are arguments that youth is an aggravating factor in crime. Increased violent crime perpetrated by youth in the 1980s and 1990s were arguments used to maintain the legality of executing youthful offenders. These, along with other arguments, will be discussed further in the following section.

Moral Justice, Fairness, and Retribution

Most of us continue to believe that those who show utter contempt for human life by committing remorseless, premeditated murder justly forfeit the right to their own life.[31]

— Alex Kozinski, U.S. 9th Circuit Court of Appeals

One of the primary arguments in favor of executing youthful offenders, or any offender for that matter, is based on the moral notions of justice, fairness and retribution. Precedence for executing offenders appears throughout history in almost all societies, encompassing government and religious institutions. In Christianity, Judaism, and Islam examples of divine and secular executions appear in the holy texts.

Others in favor of the death penalty believe that the death penalty reaffirms the sanctity of life by executing those who take life from others.

Recidivism of Offenders and the Risk of Continued Harm to Society

"That the death penalty, for murder in the commission of armed robbery, each year saves the lives of scores, if not hundreds of victims of such crimes cannot reasonably be doubted by any judge who has had substantial experience at the trial court level with the handling of such persons."
— The Honorable B. Rey Shauer, Justice of the Supreme Court of California[30]

Proponents of the death penalty often cite cases where some youthful offenders return to prisons again and again after being released for committing other crimes. This is called recidivism. If tried in the juvenile court system, a youthful offender is often released at age 21, regardless of the severity of his or her crime.[31] This practice allows youth to return to society and possibly commit crimes again. Many proponents of the death penalty for youthful offenders believe that lives will be saved if the life of the offender is ended, thereby not allowing that person to commit crimes again.

People in favor of the death penalty also sometimes claim that life imprisonment is not sufficient to remove the offender's threat to society. If the offender is sentenced to life in prison without parole they are still able to harm or kill others within their range, including visitors to the prison, fellow inmates and guards. Proponents believe that the risk of taking an innocent life in execution is minimal compared to the innocent lives saved by eliminating repeat offenders.

High Violent Crime Rates Among Juveniles Can Only be Stopped with Harsh Punishments

The United States experienced sharply growing rates of violent crime committed by children during the 1980s and 1990s. The number of juvenile arrests for violent offenses grew 64 percent between 1980 and 1994. Juvenile arrests for murder jumped 99 percent during that same period causing some policymakers and news media to begin referring to youthful offenders as "juvenile super predators."[34] Many people who favor of the death penalty for youthful offenders saw these trends and pushed policymakers to enact harsher punishments for violent youth, including the death penalty.

Between 1994 and 2000, arrests for many of the most serious offenses committed by juveniles fell sharply. The arrest rates for murder dropped 68 percent among youth, robbery arrests dropped 51 percent, burglary arrests fell 33 percent, and youth arrests for vehicle theft dropped by 42 percent.[35] Many proponents of the death penalty for youth interpret these declines as a direct result of the application of harsh punishments like the death penalty for violent crimes. (Opponents attribute the decreasing youth crime rate to the economic boom that began in the mid 1990s.)

Age as an Aggravating Factor for Youth

In criminal cases there are aggravating and mitigating factors that are weighed by the judge or jury to determine the appropriate conviction and sentence for a specific case. An aggravating factor is one that toughens or hardens the case against the defendant. For example, an aggravating factor may be killing a police officer or premeditation of a crime. Conversely, a mitigating factor is one that softens or lightens the case against the defendant. For example, a mitigating factor may be committing a crime in self-defense or having a history of abuse or neglect.

Some death penalty proponents believe that age is an aggravating factor rather than a mitigating factor in a youth death penalty case. It is argued that because of their chronological youth, juvenile offenders are more dangerous to society because they have more time to commit future crimes.

Death Penalty for Youth as a Deterrent

Proponents of applying the death penalty to youthful offenders believe that for a criminal justice system to have credibility and deterrent value, three factors are required: a high rate of arrest and a punishment that reflects the severity of the crime, the criminal's record and the demand for justice. The severity of the death penalty is a deterrent to future offenders both youthful and adult.

The highest murder rate in Houston (Harris County), Texas occurred in 1981, with 701 murders (all murders). Texas resumed executions in 1982. Since that time, Houston (Harris County) has executed more murderers than any other city or AND has seen the greatest reduction in murder, 701 in 1981 down to 261 in 1996—a 63 percent reduction.[36]

ARGUMENTS IN OPPOSITION TO EXECUTING YOUTHFUL OFFENDERS

The United States is Acting in Opposition to the International Community's Opinion about Executing Youthful Offenders

No other industrialized nation in the world executes children for committing crimes. The United States is widely criticized by most governments in the world for carrying out this practice in defiance of countless international treaties and agreements. This causes unneeded hostility between the United States and almost every other country in the world. The only countries that have executed youthful offenders since 2000, aside from the United States, are The Democratic Republic of Congo and Iran but their official numbers of executions pale in comparison to that of the United States.[37]

Youth Are Not Adults

The internationally recognized standard in determining adulthood is based on the chronological age of 18 years, in most circumstances.[38] In the United States, this holds true in almost every area of governance and legislation with the exception of the death penalty. Youth under 18 years of age are not permitted by law in any state or federal jurisdiction to vote in elections, to sign contracts, to authorize their own medical care, to execute wills, to drink alcohol, or even to buy cigarettes. The reasons given for not allowing these privileges is based on the widespread belief that youth are not emotionally or cognitively mature enough to make these important decisions.

Age as a Mitigating Factor for Youth

Opponents of applying the death penalty to youthful offenders argue that the youthful nature of the offender is a mitigating factor in any case and makes the practice itself cruel and unusual. Opponents note that youth are much more susceptible to being wrongfully convicted and executed because they are less capable than adults to aid their lawyers in their defense, are more easily led to self-incriminate, and are more easily coerced, influenced and encouraged to commit crimes.[39]

A U.S. Supreme Court ruling in 1982 ruled that "the chronological age of a minor is itself a relevant mitigating factor of great weight" and a 1998 Florida Supreme Court decision stated that "considering that it is the patent lack of maturity and responsible judgement that underlies the mitigation of young age, the closer the defendant is to the age where the death penalty is constitutionally barred, the weightier this statutory mitigator becomes."[40]

Youth are Wrongfully Convicted

Youthful offenders, when tried as adults in capital offense cases, are put into the same flawed justice system that has already wrongfully convicted and subsequently released more than 100 people since 1973. This means that for every eight people convicted of a capital crime in the United States since 1976, one has been convicted wrongfully. Of the past 21 youthful offenders that have been sentenced to death, three were later exonerated and the others are still awaiting executions or in the appeals process.[41] Almost half of youth sentenced to death since 1976 had the decision reversed on appeal due to inexperienced counsel or wrongful sentencing.[42]

Executions of Youth are Arbitrary and Discriminatory

Twenty years have passed since this Court declared that the death penalty must be imposed fairly, and with reasonable consistency, or not at all, and, despite the effort of the states and courts to devise legal formulas and procedural rules to meet this daunting challenge, the death

penalty remains fraught with arbitrariness, discrimination, caprice, and mistake.[43]

— Justice Harry A. Blackmun, February 22, 1994

Opponents to executing youthful offenders note the arbitrary nature of the application of the death penalty. Many people believe that the death penalty is carried out only on the harshest criminals in this country. Instead of applying a national consensus or standard for executing youthful offenders, judgments are sometimes determined based on only a couple of people, such as whether a prosecutor in a specific jurisdiction favors the death penalty, or whether a jurisdiction requires a jury to hear the case or only a single judge.

Although 23 states permit the application of the death penalty to youthful offenders, only 14 currently have any youth serving time on death row. Texas alone accounts for 35 percent (28 cases) of youthful offenders on death row in the United States, and by far the largest number of any jurisdiction in the world. In particular Harris County, Texas holds more youthful offenders on death row than all other states combined.[44] Six of the seven most recently executed youth in the United States were from Texas. The state of Texas only accounts for 7.5 percent of the U.S. population but accounts for 62 percent of youthful offender executions since 1976.[45]

Recent studies have shown racial disparities in the demographics of people on death row. Two-thirds of the youthful offenders on death row are people of color, while three-quarters of their victims were white. There has never been a white youthful offender executed for killing an African American even though white and African Americans are approximately equal victims of murders in the United States.[46]

Methods of Execution

Some opponents to the death penalty for youthful offenders argue that the methods of execution constitute cruel and unusual punishment. There are five methods of execution used in the United States — electrocution, gassing, hanging, poisoning, or shooting. Prisoners undergo paralysis of organs and burning of flesh through electrocution, asphyxiation through gassing, tearing of the spinal cord or asphyxiation through hanging, respiratory paralysis through poisoning, and destruction of vital organs or the central nervous system through shooting.[47]

- In May of 1946, a youthful offender in Louisiana named Willie Francis was to be electrocuted for a crime he committed at the age of 15. The switch was thrown but the electric chair malfunctioned. Electricity reached him for a few moments but the surge failed to kill him. He was taken back to his cell and remained there for another year while his case was argued in the courts. His lawyers appealed that a second attempt at execution would be cruel and unusual punishment. The Supreme Court disagreed in a vote of 5-4. He was taken back to the chair and executed on June 7 1947.[48]

- At a 1990 Florida execution, a malfunction of the electric chair equipment caused flames to leap six inches above the prisoner's head each time the current was turned on.[49]

- In 1992, a prisoner in Oklahoma had a violent reaction to the drugs used in the lethal injection. While he gasped and gagged violently, the muscles in his jaw, neck and abdomen reacted spasmodically. Eleven minutes elapsed before he died.[50]

- In 1994 it took five minutes for David Lawson to die in North Carolina's gas chamber. During that time he screamed, "I'm human! I'm human!"[51]

Potential of Rehabilitation

Methods of rehabilitation and restorative justice practices are currently incorporated into many juvenile justice systems around the world and within the United States. They have often proven very successful. The programs are built on recognizing accountability for the crime committed but progress to help the offender develop into a competent citizen of their community. Opponents to the death penalty for youthful offenders argue that if the resources utilized in trying death penalty cases for youth were instead invested in prevention and restorative programming we could envision a future where violent crime rates of children would continue to decline and justice systems would see decreases

in recidivism. They argue that rehabilitation is of benefit to society in general and execution has no rehabilitative value.

Adolescent Brain Development

They frequently know the difference between right and wrong and are competent to stand trial. Because of their impairments, however, by definition they have diminished capacities to understand and process mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others…. Their deficiencies to not warrant an exemption from criminal sanctions, but they do diminish their personal culpability.[52]

— Opinion of the US Supreme Court in the ***Atkins v. Virginia*** case banning executions of mentally retarded read by Justice Stevens, June 20, 2002

Opponents of the death penalty for youthful offenders argue that the above statement can now be similarly applied to offenders under the age of 18 due to recent substantial scientific research. The brain changes significantly during adolescence and scientists have now determined that the adolescent brain is far less developed than previously believed.

Researchers at the University of California in Los Angeles, Harvard Medical School and the National Institute of Mental Health have teamed up to "map" the development of the brain from childhood through adulthood. They have found that the brain undergoes an intense change during adolescence. The pace and severity of these changes, which typically continue into a person's early 20s has shown that the brain is still developing throughout this period.[53]

Dr. Ruben C. Gur, neuropsychologist and Professor at the University of Pennsylvania writes, "The evidence now is strong that the brain does not cease to mature until the early 20s in those relevant parts that govern impulsivity, judgement, planning for the future, foresight of consequences, and other characteristics that make people morally culpable… Indeed, age 21 or 22 would be closer to the 'biological' age of maturity."[54]

Adolescents are emotionally, physically, mentally, and psychologically trying to grow out of being a child and into an adult. This process often results in erratic behavior, mood swings, risky practices, impulsive responses and self-absorption.

CONCLUSION

"*But we must have goals beyond just punishment. We must, at the deepest level, embrace our youth instead of fearing them."*

– President George W. Bush, July 30, 2001[55]

The United States leads the world in executions of youthful offenders. The international community has almost universally rejected this practice as viable or just in their legal systems. The American public must now decide whether state-sanctioned executions of youthful offenders constitutes a violent miscarriage of justice or whether it is an historic method of enforcement that should be maintained in this country. With local and state legislative initiatives pending and the U.S. Supreme Court waiting for further legislative activity from more jurisdictions and indicators of public support, the United States has the opportunity to very nearly eradicate this practice in the world. The U.S. Supreme Court is giving the American public the onus to advise them as to which direction American "standards of decency" have evolved. The rest of the world is watching and waiting for the American response. ❖

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