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CAPITAL CRIMES AS DEFINED IN AMERICAN STATUTORY LAW

LEONARD D. SAVITZ

The author is about to complete his work for the Ph.D. in Sociology, majoring in Criminology, at the University of Pennsylvania. Professor Thorsten Sellin has written of this article saying that it is the first to his knowledge "that accurately, tells what crimes are punishable by death in continental United States and should, therefore, have considerable reference value."—EDITOR.

Many persons today probably believe that capital offenses in the United States consist only of murder and, in a few jurisdictions, of rape and kidnapping. Even those who know that there are other capital crimes are yet unaware of their precise number, for no accurate listing is presently available of the capital offenses defined by the laws of the states,¹ the District of Columbia and the laws of the Federation.

This paper intends to fill this lacuna, to some degree, by determining what offenses are punishable by death in the United States as of January 1953, whether or not the courts ever applied this penalty. With this in mind, the author has examined the criminal codes and supplementary statutes of the jurisdictions mentioned. Where the statutes were ambiguous in any respect, pertinent adjudicated cases were utilized for clarification.

Before an examination of the capital offenses themselves, it is of some importance to determine the age of culpability in those jurisdictions which impose the death penalty, *i.e.*, the chronological age at which a child is deemed legally capable of receiving a death penalty.

In no jurisdiction is a juvenile court empowered to impose a death penalty on any child under its authority. Therefore, if the juvenile court has exclusive and original jurisdiction over a child, and has no power to transfer it to a criminal court, this child cannot be sentenced to death. For example, a juvenile court in New Jersey may transfer any child 16 years of age or over to the prosecutor of pleas of the county wherein the court is situated. If this is done, the child, thereafter, will be dealt with like an adult offender. Therefore, an offender below the age of 16 in New Jersey cannot be sentenced to death; he falls completely under the juvenile courts' jurisdiction, cannot be transferred, and the juvenile court is without the power to inflict the death penalty.

If the statutes set no limit on the age of the child that the juvenile court can transfer to the trial court, nor state specifically the age of culpability, the common-law age of seven years is used.

When capital crimes are considered, a major problem of classification arises. An offense may be defined as murder in the first degree in one state, while a similar offense is not so defined in another jurisdiction, though it may still carry the death penalty. The solution used here is the obvious one; unless a crime is specifically

¹ Maine, Minnesota and Wisconsin were eliminated from further consideration as the death penalty cannot be applied for any offense in these states.

TABLE I
AGE OF CULPABILITY IN 47 U. S. JURISDICTIONS (45 STATES, DISTRICT OF COLUMBIA, AND
FEDERAL GOVT.)

Age of Culpability	No. of Jurisdiction	Jurisdictions
7	24	Calif., ¹ Conn., ² Del., Idaho, Ind., ³ Iowa, Kans., ¹ Ky., Md., ⁴ Mass., Mont., ⁵ N. H., N. Mex., Ohio, Okla., Oreg., S. C., S. Dak., Tenn., Vt., Wash., W. Va., ⁶ Wyo., Fed. Govt.
10	1	Ill.
12	2	Ark., Va. ⁷
13	1	Miss.
14	7	Ala., Ariz., ⁸ Fla., N. C., N. Dak., Pa., Utah
15	3	La., Mich., N. Y.
16	6	Ga., Nebr., ⁹ Nev., N. J., R. I., D. C.
17	2	Texas, Mo.
18	1	Colo. ¹⁰

¹ California and Kansas do not inflict a death penalty upon a murderer under 18 years of age at the time of the commission of the crime.

² A personal letter from the Attorney General's Office cites, in this matter, the case of *State v. Elbert* 115 Conn 589, which determined that the Superior Court has jurisdiction over children under 16 years of age.

³ *ex rel. Imel v. Municipal Court* 225 Ind 306, 72 NE (2nd) 35, found that the juvenile court did not have any jurisdiction over children committing capital offenses.

⁴ The age of culpability is 7, except that a rapist must be over 18 to receive the death penalty.

⁵ The death penalty cannot be inflicted on a murderer 16 years old or younger.

⁶ The death penalty cannot be inflicted on a male under 16 years of age, convicted of the rape of a girl over 12 years of age who gave her free consent.

⁷ While the statutes give the juvenile court power to transfer a child 14 or over to proper authorities (Va. Code (1950) Tit 63:303), the case of *Michen v Commonwealth* 178 Va 273, 16 SE (2nd) 641 determined that a juvenile court has no power to acquit persons over 12 charged with aggravated felonious offenses; if evidence is sufficient the juvenile court must hold the offender for the Grand Jury.

⁸ *State v Henderson* 34 Ariz 430, 272 Pac. 1929, and *Burrows v State* 38 Ariz 99, 297 Pac 1029 find that the offender over 14 years of age may, optionally, be tried in criminal court.

⁹ Statutes show that the juvenile court has concurrent jurisdiction for children under 18 (Nebr. Rev Code (1947) Tit 43:201) and exclusive jurisdiction of children under 16 (Nebr Rev Code (1947) Tit 43: 221).

¹⁰ There are only two capital crimes in Colorado, and for each of these there can be no death penalty imposed on an offender under 18 years of age.

stated in the statutes to be murder in the first degree, it is considered to be a separate felony and is so classified.

Murder in the first degree carries a death penalty in 46 jurisdictions, *i.e.*, in every state² (except Maine, Wisconsin, Minnesota and Michigan), in the District of Columbia and in the Federal Code, both in its jurisdiction over special maritime and territorial areas,³ and in the Uniform Code of Military Justice.⁴ In addition

² There is no death penalty for any crime in Colorado if the conviction was based on circumstantial evidence.

³ Tit 18 USCA Sec 7.

⁴ Tit 50 USCA Sec 22.

to the normative definition of murder in the first degree, which includes premeditation, malice aforethought, done by poisoning, from ambush, etc., first degree murder encompasses such varied conduct as:

1. Duelling, with resultant death to one of the parties—Ark., Fla., Ill., Ind., Iowa, Mass., Miss., Nev., N. C., Okla., S. C., Texas, Utah, Va., W. Va., Wyo.
2. Abortion causing the death of the mother—Ark., Colo., Ga., Ill., Miss., Texas, W. Va.
3. Lynching—Ark., Ga., Pa., Va.
4. Accidentally killing someone while attempting to commit suicide—S. C.
5. Aiding a person to commit suicide—Ark., S. C.
6. Trainwrecking in which a person dies—Colo., Conn., Fla., Ga., Idaho, Ind., Ky., Md., Mont., N. Car., N. Mex., Ohio, Oreg., Pa., Wash., Va., Wyo., Fed. Govt.
7. Perjury which secures the execution of an innocent person—Colo., Ill., Nebr., Nev.
8. Stabbing which results in death to some person—S. C.
9. Killing a policeman while he is on duty—Ohio, Oreg.
10. Exceeding the bounds of moderation by an officer of the law assuming that a death ensues—Ark.
11. Selling a known poisonous liquid as a beverage with a resultant death—Ill.
12. The killing of a guard by a convict—Ohio.
13. The killing of any person by a prisoner while attempting to escape prison—Nev., Md.
14. Deliberate ramming of a boat by a captain of another boat which results in someone's death—Ark.
15. Killing of a person while criminal syndicalism is being advocated—Ky.
16. Bombing which results in death to some person—Conn., Iowa.
17. Killing of a person in a fight by the sudden use of a deadly weapon which was concealed before the commencement of the fight, the adversary having no deadly weapon—Ala.
18. Killing of a kidnapped person—Conn.
19. Killing the President, Vice-president, cabinet officer, Governor or Vice-Governor—Ohio.
20. Arson which results in the death of some person—Ark., Ind.
21. In Rhode Island, only murder committed by a prisoner sentenced to a life term is punishable by death.
22. Five states have "common-law" definitions of murder—Ga., Ill., Ky., S. C., Texas.

Though murder in the first degree carries similar connotations in all jurisdictions, so-called "felony murders" vary in nature from state to state. These are unpremeditated homicides done in connection with the commission or attempt to commit certain specified felonies.

Of the 46 jurisdictions (44 states, D. C. and the Federal Code):

1. Six states define murder as killing in the commission or attempt to commit *any* felony—Kans., N. Mex., N. Y., N. C., Okla., S. Dak.
2. Two states find that murder in the first degree entails killing in the perpetration or attempt to perpetrate *any* crime punishable by life imprisonment or death penalty—Del., Mass.

Of the remaining 32 jurisdictions, homicide is murder in the first degree if done in the commission or attempt to commit:

1. Rape—All 32 jurisdictions
2. Burglary—All 32 jurisdictions
3. Robbery—All but Md.
4. Arson—All but Ariz.
5. Mayhem—Ariz., Calif., Colo.⁵, D. C., Md., Mo., Mont., N. Dak.
6. Kidnapping—N. J., Pa., N. H.
7. Sodomy—Md., N. J., N. Dak., Federal Code
8. Larceny—Ark., Tenn., Wash.
9. Bombing—Conn.
10. Train-wrecking—D. C., Washington

In addition to murder, the major crimes carrying capital penalties, from the viewpoint of number of jurisdictions involved, are perjury resulting in the execution of an innocent party, kidnapping, rape, treason, robbery, lynching, crimes of extreme danger to life, burglary, trainwrecking and arson.

The crime of perjury, or subornation of perjury which secures the conviction and execution of judgment of death on an innocent person is a capital offense and a felony distinct from murder in Arizona, California, Idaho, Montana, Texas and Vermont.

Kidnapping, variously defined is a capital crime in 36 jurisdictions. In 21 jurisdictions, it is kidnapping for ransom—Ala.,⁶ Calif., Del., Fla., Ga., Ill., Ind., Iowa, Ky., Md., Miss., Mo., N. J., Okla., Tenn., Texas, Utah, Vt., Va., Wash., Federal Govt. (Uniform Code of Military Justice). In 11 jurisdictions, the death penalty can be applied for kidnapping only where the person is not released unharmed—Ark.,⁷ Ariz., Colo.,⁸ Idaho, La., Nev., N. Mex., S. Dak., W. Va., Wyo., and Federal Govt. (Code of Maritime and Territorial Areas.) In New York, Ohio and South Carolina, the death penalty comes into effect only if the kidnapped person is not released alive before the trial. Finally, Nebraska makes a capital crime of kidnapping where there is bodily harm or threat of bodily harm.

Rape is a capital crime in twenty-one jurisdictions⁹,—Ala. (12)¹⁰ Ark.,¹¹ Del. (7),

⁵ *Supra*, footnote 2.

⁶ There is also a separate capital felony of Attempted or Threatened Kidnapping.

⁷ This felony includes not only kidnapping for ransom but kidnapping to maim, rob, torture or prevent arrest or detection after committing a felony.

⁸ *Supra*, footnote 2.

⁹ Following most jurisdictions, in parentheses, is the female age below which carnal knowledge, even without force, is deemed to be rape.

¹⁰ The Alabama Criminal Code sets up two separate felonies: Rape—forcible knowledge of a female (*Ala. Code* Tit 14: 395) and Carnal Knowledge, which does *not* include force but: I. Administering a drug and then having carnal knowledge of female; II. Falsely personating a husband and then having knowledge of a wife who erroneously believes the offender to be her husband. III. Sexual relations with a girl under 12, even with her consent. (*Ala. Code* Tit 14: 397). Both crimes carry the death penalty.

¹¹ In addition to the crime of Rape, Arkansas also makes the following offenses capital crimes: a. Intent to commit rape by giving a female a stupor-producing drug. b. Forcing a female to marry against her will.

Fla. (10), Ga. (14), Ky. (12), La. (12), Md. (14), Miss. (12), Mo. (16), Nev. (18),¹² N. C. (12), Okla. (18),¹³ S. C., Tenn. (12), Texas (18),¹⁴ Va. (16),¹⁵ D. C. (16), W. Va. (16),¹⁶ Federal Govt (Code of Maritime and Territorial Areas and Uniform Code of Military Justice).

Treason carries a death penalty in 26 jurisdictions—Ala., Ark., Ariz., Calif., Conn., Del., Ga., Ill., Ind., Kans., La., Md., Mich., Mo., Mont., Nev., N. Dak., N. J., N. Y., Oreg., Texas, Vt., Va., Wash., W. Va., Federal Govt (Code of Maritime and Territorial Areas).

Robbery carries a capital penalty in Alabama, Georgia, Kentucky, Mississippi, Missouri, Oklahoma and Virginia; train robbery has a similar penalty in Alabama, Missouri, Nevada and Wyoming; bank robbery is a capital offense in Virginia and in the Federal Code of Special Maritime and Territorial Areas.¹⁷

Lynching (as a felony distinct from murder) carries a death penalty in Alabama, Indiana, Kentucky, South Carolina, South Dakota, Texas and West Virginia.

In seven jurisdictions, what might be thought of as crimes of extreme danger to life (dynamiting, bomb-throwing, machine-gunning) are capital crimes—Ala., Fla., Ga., Ill., Miss., Mo., Nev.

Train-wrecking, *without any resultant death*, is a capital offense in Arizona, California and Wyoming.

Burglary carries a death penalty in Alabama, Delaware, Kentucky and North Carolina.

Arson is threatened by death in four jurisdictions—Ala., Ga., Nev., Va.

The next series of offenses may be classified as Specialized Capital Crimes, in that they are generally applicable only to a particular jurisdiction, or, at most, to two jurisdictions.

1. Assault with intent to rob—Ky.
2. Assault to commit murder—Tenn.
3. Assault on train to commit a felony—N. Mex.
4. Assault to commit rape—Md.
5. Assault or conspiracy to kill an inspector of convicts or an officer or any other person having charge or superintendence or convicts by a prisoner serving a life term—Ala.
6. Assault on high governmental official—N. J.
7. Assault on a prisoner with a deadly weapon by a prisoner serving a life term—Ariz., Utah
8. Killing of someone in the course of attempting to escape prison—Nev.
9. Killing a jailer by persons who have forced entry into a jail—N. Mex.

¹² The male must be over 16 years of age at the time of the crime to receive the death penalty.

¹³ If a girl over 18 was raped by a male under 16 years of age, the death penalty is not applicable. For rape (carrying a death penalty) to have been committed on a female between the ages of 16 to 18, *who gave her consent*, she must have previously "been known to have been chaste".

¹⁴ The rapist must be over 14 years of age at the time of the crime to receive the death penalty.

¹⁵ If a female who was raped was between 14 and 16 years of age, and gave her consent, there is no death penalty.

¹⁶ If a female is over 12 years old and gave her consent, and male was under 16 at the time of the crime, no death penalty can be imposed.

¹⁷ The death penalty is applicable only if there is *both* an attempt to rob a bank and the offender either carries off a hostage or else someone is killed during the commission of the felony.

10. Forcibly freeing a prisoner convicted of a capital crime—N. Mex.
11. Arson by a convict in a prison—Ark.
12. Desecration of a grave—Ga.
13. Castration of a person by another person or group—Ga.
14. In wartime, giving a secret document or information to the enemy—S. C., Fed. Code of Maritime and Territorial Areas.
15. In wartime, giving aid to enemy, such as arms, money or intelligence—S. C., Fed. Code of Maritime and Territorial Areas
16. Attempt to kill the President or an ambassador—Conn.
17. Relative or husband instigating a minor or spouse to commit a capital crime—Texas
18. Destruction of essential property, by a group of persons during wartime—Vt.
19. Espionage Fed. Code of Maritime and Territorial Areas

Finally, there are capital crimes applicable only to the armed forces during wartime and imposed by a military court:

1. Soliciting a person to mutiny or desert
2. Desertion.
3. Striking a superior officer.
4. Disobedience of a lawful command.
5. Mutiny.
6. Sedition.
7. Failure to suppress or report a mutiny or sedition.
8. Unsoldierly conduct.¹⁸
9. Attempt to get a commander to surrender his post.
10. Unlawful disclosure of a countersign.
11. Forcing a safeguard.
12. Being asleep at a post.

A basic classification of the aforementioned offenses is that of crimes carrying optional death penalties (the judge or jury being permitted to sentence the convicted offender to capital punishment or to some lesser alternative penalty) and those with mandatory death penalties, i.e., the only sentence possible being the death penalty. All the offenses set forth above carry *optional* death penalties with the following exceptions:

1. Treason—Ariz., Calif., Conn., Ill., Kans., Mich., Mont., Nev., N. J., N. Y., Oreg., Vt., Va., Wash.
2. Perjury in capital cases resulting in the execution of an innocent party—Ariz., Calif., Idaho, Mont., Texas, Vt.
3. Trainwrecking—Calif.,¹⁹ Mont., N. C.
4. Murder in the first degree—Vt., D. C.²⁰

¹⁸ This consists of, while facing the enemy: running away; abandoning or surrendering a command; endangering the unit, casting away arms; cowardly conduct, plundering a village; sending false alarms, failure to engage the enemy; or not affording assistance to allies.

¹⁹ Mandatory death penalty only if a person dies in the wreck.

²⁰ An examination of the statutes of the District of Columbia fails to disclose that there is an optional choice of a lesser penalty with a conviction of murder in the first degree. *Johnson v US C* 38 app. P.C 347 Afid 225 US, 405, 46 L. Ed. 1142, 32 Sup Ct. 738, found that a jury may *not* qualify a verdict of murder in the first degree by adding the term "without capital punishment".

TABLE II

CAPITAL OFFENSES IN 47 JURISDICTIONS (45 STATES, DISTRICT OF COLUMBIA AND FEDERAL GOVT.)

Jurisdiction	No. of Offenses	Offenses
ALABAMA.....	13	Murder, Kidnapping, Attempted Kidnapping, Rape, Carnal Knowledge, Treason, Robbery, Train Robbery, Lynching, Dynamiting, Burglary, Arson, Assault on an official by a prisoner serving a life term.
ARIZONA.....	6	Murder, Perjury in capital offenses, Kidnapping, Treason, Trainwrecking, Assault on a prisoner by another prisoner serving a life term.
ARKANSAS.....	7	Murder, Kidnapping, Rape, Attempted Rape, Forcing a woman to marry against her will, Treason, Arson of a prison by a convict.
CALIFORNIA.....	5	Murder, Perjury in capital cases, Kidnapping, Treason, Trainwrecking.
COLORADO.....	2	Murder, Kidnapping.
CONNECTICUT.....	3	Murder, Treason, Attempted homicide of governmental official or foreign ambassador.
DELAWARE.....	5	Murder, Kidnapping, Rape, Treason, Burglary.
FLORIDA.....	4	Murder, Kidnapping, Rape, Bomb-throwing.
GEORGIA.....	9	Murder, Kidnapping, Rape, Treason, Robbery, Dynamiting, Arson, Castration, Desecration of grave.
IDAHO.....	3	Murder, Perjury, Kidnapping.
ILLINOIS.....	4	Murder, Kidnapping, Treason, Dynamiting.
INDIANA.....	4	Murder, Kidnapping, Treason, Lynching.
IOWA.....	2	Murder, Kidnapping.
KANSAS.....	2	Murder, Treason.
KENTUCKY.....	7	Murder, Kidnapping, Rape, Armed Robbery, Lynching, Trainwrecking, Assault to rob.
LOUISIANA.....	4	Murder, Kidnapping, Rape, Treason.
MARYLAND.....	5	Murder, Kidnapping, Rape, Treason, Assault to commit rape.
MASSACHUSETTS.....	1	Murder.
MICHIGAN.....	1	Treason.
MISSISSIPPI.....	5	Murder, Kidnapping, Rape, Robbery, Bombing.
MISSOURI.....	7	Murder, Kidnapping, Rape, Treason, Robbery, Train Robbery, Bombing.
MONTANA.....	3	Murder, Perjury in Capital Cases, Treason.
NEBRASKA.....	2	Murder, Kidnapping.
NEVADA.....	7	Murder, Kidnapping, Rape, Treason, Train Robbery, Dynamiting, Killing someone in the course of attempting to escape prison.
NEW HAMPSHIRE.....	1	Murder.
NEW JERSEY.....	4	Murder, Kidnapping, Treason, Assault on a high public official.
NEW MEXICO.....	5	Murder, Kidnapping, Killing someone when attempting to force way into prison, Assault on train to commit felony, Forcibly freeing a capital offender.

TABLE II—Continued

Jurisdiction	No. of Offenses	Offenses
NEW YORK.....	3	Murder, Kidnapping, Treason.
NORTH CAROLINA.....	4	Murder, Rape, Burglary, Arson.
NORTH DAKOTA.....	2	Murder, Treason.
OHIO.....	2	Murder, Kidnapping.
OKLAHOMA.....	4	Murder, Kidnapping, Rape, Robbery.
OREGON.....	2	Murder, Treason.
PENNSYLVANIA.....	1	Murder.
RHODE ISLAND.....	1	Prisoner serving life term who commits murder.
SOUTH CAROLINA.....	6	Murder, Kidnapping, Rape, Lynching, In wartime, giving information to enemy, In wartime, giving photographs, plans and aid to enemy.
SOUTH DAKOTA.....	2	Murder, Kidnapping.
TENNESSEE.....	4	Murder, Kidnapping, Rape, Assault to commit rape.
TEXAS.....	7	Murder, Kidnapping, Rape, Treason, Perjury in Capital Offenses, Lynching, Instigating a minor or spouse to commit a capital crime.
UTAH.....	3	Murder, Kidnapping, Assault on a convict by another convict serving life sentence.
VERMONT.....	6	Murder, Perjury in capital offense, Kidnapping, Treason, Arson, Destruction of vital property by a group in wartime.
VIRGINIA.....	8	Murder, Kidnapping, Rape, Treason, Robbery, Bank Robbery, Burglary, Arson.
WASHINGTON.....	3	Murder, Kidnapping, Treason.
WASHINGTON, DISTRICT OF COLUMBIA.....	2	Murder, Rape.
WEST VIRGINIA.....	5	Murder, Kidnapping, Rape, Treason, Killing a guard or prison official by a prisoner.
WYOMING.....	4	Murder, Kidnapping, Train Robbery, Trainwrecking.
FEDERAL GOVERNMENT		
A. SPECIAL MARITIME & TERRITORIAL AREAS.....	9	Murder, Kidnapping, Rape, Treason, Bank Robbery, Trainwrecking, Espionage, Giving information to the enemy in wartime, Giving plans or photographs to enemy in wartime.
B. UNIFORM CODE OF MILITARY JUSTICE.....	15	Murder; Rape; Kidnapping; In wartime: Soliciting a person to desert or mutiny, Sedition, Desertion, Disobedience of a lawful command, Failure to suppress or report mutiny or sedition, Unsoldierly conduct, Compelling a commander to surrender his post, Disclosing a countersign unlawfully, Forcing a safeguard, Being asleep at a post.

5. Murder by a prisoner serving a life term—W. Va., R. I.
6. Murder in the commission or attempt to commit rape—Mass.
7. Murder of the President, Vice-President, Governor or Vice-Governor—Ohio.
8. Assault on a prisoner with a deadly weapon by another prisoner serving a life term—Ariz., Utah.
9. Assault of a prison official by a convict—Ala.
10. Forcible freedom of a prisoner convicted of a capital offense—N. Mex.
11. Arson of a prison by a convict—Ark.
12. Kidnapping—Ark.
13. Attempted homicide of the President or a foreign ambassador—Conn.
14. Instigating by a relative or husband of a minor or wife to commit a capital offense—Texas.
15. Assault on a train to commit a felony—N. Mex.
16. Destruction of vital property in wartime, by a group of persons—Vt.
17. Espionage—Federal Code of Maritime and Territorial Areas.
18. Killing of a jailer by persons forcing entry into a prison—N. Mex.

Finally, we may list (Table II) the various crimes carrying a death penalty in the sundry jurisdictions. It must be remembered, however, that the titles of these crimes must be considered in connection with the various qualifications given in the preceding pages of this article.