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From Rapists to Superpredators: What the Practice of Capital Punishment Says About Race, Rights and the American Child

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**From Rapists to Superpredators:
what the practice of capital punishment says about race, rights and the American child**

ABSTRACT

At the turn of the 20th century, the United States was widely considered to be a world leader in matters of child protection and welfare, a reputation lost by the century's end. This paper suggests that the United States' loss of international esteem concerning child welfare was directly related to its practice of executing juvenile offenders. The paper analyzes why the United States continued to carry out the juvenile death penalty after the establishment of juvenile courts and other protections for child criminals. Two factors allowed the United States to continue the juvenile death penalty after most states in the international system had ended the practice: the politics of American federalism and a system of racial subordination that excluded some juvenile offenders from the umbrella of child protection measures, a conclusion suggesting that racial prejudice has interfered with U.S. compliance with international norms of child welfare and juvenile justice.

KEYWORDS: International law, norms, compliance, children's rights, juvenile death penalty, capital punishment, human rights, racial prejudice, racial bias, federalism

INTRODUCTION

At the beginning of the 20th century, the United States was considered a global leader in child protection, child welfare and juvenile justice reform, and many states around the world modelled their penal reform efforts after those in the United States. Yet by the century's end, the United States had lost international esteem and was the object of widespread criticism over its failure to protect children's rights. A centrepiece of international debate was the 1990 Convention on the Rights of the Child (CRC), the principal international treaty for children's

rights and one to which every state in the international system is party except the United States and Somalia. Particular attention focused on the U.S. violation of Article 37§a, which outlaws both life imprisonment and the death penalty for children who commit their crimes when they are under 18 years of age. This paper argues that the loss of international esteem for the United States over its children's rights policies was directly attributable to the continued practice of the U.S. juvenile death penalty, a practice that increasingly put the United States at odds with the international community and in violation of international law and norms governing children. Ultimately, the penalty was found to be unconstitutional in a 5-4 decision by the United States Supreme Court in *Roper v. Simmons* (543 U.S. 551 [2005]), a ruling that brought the United States into greater compliance with international norms about children and criminal justice.

Although a great deal of attention has focused on the reasons the United States abolished the juvenile death penalty in the *Roper* decision, the continuation of the penalty throughout the 20th century is a puzzle given the clear conflict between the penalty and other norms about children that had already been internalized by the United States. Throughout most of the century, children in the United States were widely thought to be less culpable for their actions than adults; their decision-making abilities were believed to be compromised; and their crimes were thought to be a product of their environment. In many important ways, children were distinguished from adults in terms of access to vice (such as alcohol and cigarettes), military service, voting and other markers of adulthood. Nonetheless, when children committed capital crimes in certain jurisdictions, they were made eligible for adult penalties, including the death penalty. Why did the United States continue a policy that was out of step not only with international opinion but also with other norms about children already internalized by the United States? What was distinct about these child criminals that excluded them from a steadily expanding set of

protections for children? This paper argues that the United States continued to execute juvenile offenders throughout the 20th century because of a unique combination of factors: the specific politics of American federalism, which limited centralized control over individual U.S. states in terms of penalties for crimes within state jurisdiction, combined with a legacy of racial prejudice. The result was a penalty that was largely reserved for African-American juveniles convicted of violent crimes in the South.

This paper will begin with a summary of the interaction between the United States and the international children's rights regime at the end of the 20th century. As the paper will show, this relationship was a troubled one, marked by consistent and escalating rebuke of the United States by the international community regarding the lack of recognition of and protection for children's rights. The paper will then briefly discuss the evolution of juvenile penal reform and rehabilitation in the United States in the 20th century. This will be followed by a review of the roles of U.S. federalism and race in the application of the juvenile death penalty over the last four centuries. The final section of the paper will evaluate the role that race has played in the American conception of children and childhood and in the procuring of children's rights in the United States.

THE UNITED STATES AND THE INTERNATIONAL CHILDREN'S RIGHTS REGIME

As this section will demonstrate, the degree of international criticism directed at the United States regarding children's issues at the end of the 20th century offers evidence that the United States was at variance with the international children's rights regime. The regime can be thought of as a collection of norms, international and regional customary law, treaties, declarations, intergovernmental organizations and nongovernmental organizations that address children's

issues, and various resolutions and comments by organs of the United Nations and other international and regional bodies. A key part of this regime is the three international declarations and one treaty addressing children’s issues by the League of Nations and later, by the United Nations, during the century: the 1924 Geneva Declaration, the 1948 Declaration on the Rights of the Child, the 1959 Declaration on the Rights of the Child, and the 1990 CRC. Other conventions – the 1976 International Covenant on Civil and Political Rights (ICCPR), the 1978 American Convention on Human Rights, and the 1999 African Charter on the Rights and Welfare of the Child – also address juvenile justice issues. International law regarding children largely consists of these treaties and declarations, which became increasingly detailed and broad in scope – in the enshrinement of rights for children and the delineation of areas of child protection – over the course of the century. A comparison of three of these instruments – the Geneva Declaration, the ICCPR and the CRC – illustrates the rapid development in the 20th century of rights and protections for juvenile offenders in international law. See Table 1 below.

Table 1: Changing norms about juvenile justice as evident in three international documents related to children

1924 Geneva Declaration	1976 ICCPR	1990 CRC
Rehabilitation of the child criminal (Section 2)	<p>No death penalty for those under 18 years of age (Article 6).</p> <p>Juvenile offenders should be separated from adults (Article 10).</p> <p>Adjudication should be speedy (Article 10).</p> <p>Treatment should be appropriate to age (Article 10).</p> <p>Judgments rendered in criminal cases shall be kept private when it is in the interest of juveniles, and in matters concerning</p>	<p>No death penalty or life imprisonment for those under 18 years of age without possibility of release (Article 37).</p> <p>Separated from adult criminals (Article 37).</p> <p>Freedom from unlawful or arbitrary deprivation of liberty (Article 37).</p> <p>Allowed to maintain contact with family (Article 37).</p> <p>Prompt access to legal and other assistance (Article 37).</p> <p>Right to challenge the legality of a sentence promptly (Article 37).</p>

	<p>matrimonial disputes or guardianship of children (Article 14).</p> <p>Judicial procedures should take into account the age of the juvenile and the promotion of rehabilitation (Article 14).</p>	<p>Treated in a manner consistent with the child's age (Article 40).</p> <p>Right to judicial protections: no <i>ex post facto</i> punishment, presumed innocence, speedy hearing, legal assistance, examination of witnesses, access to an interpreter, privacy in all stages of the process (Article 40).</p> <p>Establish a minimum age of criminal responsibility (Article 40).</p>
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As Table 1 demonstrates, international law protecting juvenile offenders evolved from a vague duty to rehabilitate in 1924 to a full-fledged system of rights by 1990. Norms about children's reduced culpability and increased vulnerability diffused internationally over the course of the 20th century through several means, principally through British and French colonialism, international institutions and international law.

By the end of the 20th century, 96 percent of all states in the world either banned the death penalty for juveniles in law, had ceased to execute these offenders for at least a decade, or prohibited the penalty for all crimes. Of the noncompliant four percent, the United States was the only Western democracy. Since 1990, when Amnesty International began tracking the execution of juvenile offenders worldwide, only a handful of states continued to put juvenile offenders to death. These states were: China, the Democratic Republic of the Congo, Iran, Nigeria, Pakistan, Saudi Arabia, the Sudan, the United States and Yemen (Amnesty International, 2008). Of these, the United States carried out the vast majority of executions, accounting for almost 56 percent of all juvenile offenders *in the world* between 1990 and 2003, when the last juvenile offender was executed in the United States.

The issue of juvenile justice and specifically, the continued practice of the juvenile death penalty, put the United States on a collision course with the international children's rights regime

at the end of the 20th century. This conflict was evidenced by two events in the 1990s: the U.S. ratification of the ICCPR in 1992 and its failure to ratify the 1990 CRC. As presented in Table 1 above, both treaties prohibit the juvenile death penalty. First, when the United States ratified the ICCPR, which forbids the penalty in Article 6§5, it reserved on this article, eliciting sharp rebuke from the international community (Reservation No. 2). The European Union, Belgium, Denmark, Finland, France, Germany, Italy, the Netherlands, Norway, Portugal, Spain and Sweden all criticized the reservation (Weissbrodt, Fitzpatrick et al., 2001: 717). The monitoring body of the ICCPR, the Human Rights Committee, commented that the reservation offended the “object and purpose of the treaty” (United Nations Human Rights Committee, 1994; United Nations Human Rights Committee, 1995). Widespread criticism of the United States empowered both domestic and transnational actors to pressure the United States to comply with international law and norms about children.

Second, states around the world quickly ratified the CRC beginning in 1990; in fact, every state except the United States and Somalia, as mentioned earlier, was a party to the treaty by the year 2000.¹ The CRC is one of the most well respected and least controversial of international human rights treaties (Gunn, 2006: 127). Within the United States, however, the treaty had many detractors. President Clinton signed the CRC in 1995, sparking widespread opposition by conservatives because of a perceived threat to parental rights and U.S. sovereignty. Although opposition to the convention had little to do with the juvenile death penalty, at least by the most vociferous opponents, international criticism of the United States focused on Article 37§a, the prohibition of life sentences and the death penalty for juvenile offenders, about which

¹ Newly formed states in the 21st century have since ratified: Montenegro, Serbia and Timor-Leste.

U.S. noncompliance with the international children's rights regime was most evident (Gunn, 2006; Smolin, 2006).

It is noteworthy that with the exception of Article 37§a, the United States is largely in compliance with the CRC. In fact, the United States has ratified a number of other treaties that address many of the key issues of the CRC, including the 1999 Worst Forms of Child Labour Convention; the 2000 Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict; the 2000 Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography; the 2001 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, of the United Nations Convention Against Transnational Organized Crime; the 1993 Hague Convention on Intercountry Adoption; and the 1980 Hague Convention on the Civil Aspects of Child Abduction (Smolin, 2006).

One could argue that the United States is not in compliance with other provisions of the CRC, especially social and economic protections such as “enjoyment of the highest attainable standard of health” and access to health care services (Article 24). Yet these standards are markedly and qualitatively different from the prohibition of the juvenile death penalty. First, social and economic rights in many human rights treaties have clauses that temper their force. For example, Article 24 of the CRC addressing children's health care ends with the statement, “States Parties undertake to promote and encourage international co-operation with a view to *achieving progressively* the full realization of the right recognized in the present article” [emphasis added]. States are thus obligated to make reasonable advances toward these goals, given other constraints such as financial limitations. The flexible and aspirational standards of progressive achievement for economic and social rights contrast starkly with the clearly defined

standards applicable to other categories of rights, such as protection from the juvenile death penalty. Second, as a general rule, customary law regarding social and economic rights is not of the same calibre as customary law prohibiting the juvenile death penalty. A number of legal scholars and regional courts have claimed that the norm prohibiting the penalty can be characterized as either customary law or as a norm of *jus cogens* (de la Vega and Fiore 1999; Inter-American Commission on Human Rights 1986-7; Sawyer 2004), meaning that it is the subject of such widespread international consensus that it does not require states to have signed treaties in order to be bound by it, that it “permits no derogation,” and that it can only be modified by the development of a new norm “of the same character” (Weissbrodt, Fitzpatrick et al. 2001: 23). Few, if any, social or economic rights for children have yet achieved the legal status of *jus cogens*.

The powerful international consensus embodied in customary law against the juvenile death penalty was underscored by the vehement rebuke from both the international community and domestic stakeholders regarding the continued administration of the penalty in the United States. Beginning in 1980, the U.N. General Assembly issued a series of resolutions affirming the widespread consensus against the penalty.² The U.N. Economic and Social Council (ECOSOC) adopted the 1984 Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty (E/1984/84), joining the U.N. Commission on Human Rights in multiple resolutions from 1980 to 2004 that called for an end to the penalty.³ Additionally, a number of NGOs and professional associations took up the issue in the final years of the 20th century, including the American Bar Association, the American Civil Liberties Union, Amnesty

² See resolutions U.N. Doc A/RES/35/172 (1980), A/RES/36/22 (1981), A/RES/38/96 (1983), A/RES/51/92 (1996), A/RES/53/147 (1998), A/RES/55/111 (2000), A/40/3 (1985)

³ See E/CN.4/RES/1997/12 (1997), E/CN.4/RES/1998, E/CN.4/RES/1999/61, E/CN.4/RES/2000/65, E/CN.4/RES/2001/68, E/CN.4/RES/2001/75, /8, E/CN.4/RES/2002/77, E/CN.4/RES/2003/67, E/CN.4/1998/68 (1997), E/CN.4/1999/39 (1999), E/CN.4/2000/3 (2000), E/CN.4/2001/9 (2001), E/CN.4/2002/74 (2002), E/CN.4/2004/7 (2004)

International, Amnesty International's USA section, the Death Penalty Information Center, Hands Off Cain, the Justice Project, the American Bar Association Juvenile Justice Center, the National Association for the Advancement of Colored People's Legal Defense and Educational Fund, the National Coalition Against the Death Penalty and the National Juvenile Defender Center (Conner and William 2005). These organizations waged collective and individual efforts to change U.S. policy. Finally, in 2003, juvenile offender executions ended as state courts awaited a highly anticipated decision from the U.S. Supreme Court. That decision was handed down in 2005, when the Court in *Roper* found by a 5-4 majority that juvenile executions were unconstitutional under the Eighth and Fourteenth Amendments, prohibiting cruel and unusual punishment and applying the prohibition to U.S. states.

Children's protection in the United States in the 20th century

The United States' noncompliance with international standards of juvenile justice marked a dramatic departure from its earlier leadership in this arena. The United States participated in and even helped to shape many of the norms that would later be adopted by the international children's rights regime. Indeed, child welfare reform in the United States in the 19th and early 20th centuries, including juvenile justice reform, served as a model for many countries around the world. International opinion of the United States' child welfare and protection policies at the end of the 19th century was high, as many countries drew on American institutions and philosophies about children in establishing their own systems of protection for juvenile offenders (Junger-Tas 2006: 507; Prins and Conti 1911: 207; Sen 2005: 62; Tanenhaus and Drizin 2002: 646).

Founded on the belief that children's delinquency is caused by their environment and that children are redeemable, the first juvenile court in the United States was established in Illinois in 1899, further enhancing the United States' reputation as a leader in child welfare efforts (Moore

and Kelling 1987: 41). Although there are a variety of interpretations regarding the impetus for the court's creation, the court's mission was clear: It sought to provide individualized treatment that would ensure an offender's future welfare rather than punish him for past crimes (Feld 1999: 62).

The United States' reputational loss over the course of the 20th century is captured by the gradual, but increasingly pronounced divergence between its laws and policies regarding children and the laws and policies of other leading states, England, for instance. Like the United States, England had initiated its own penal reform for juveniles over the course of the 19th century; indeed, the two countries often looked to one another for new models of penal reform. This relationship changed during the 20th century, when limitations on the juvenile death penalty in England logically followed other penal reform measures for juveniles. The same type of reforms did not follow in the United States. The 1899 Illinois court introduced the doctrine of *parens patriae*, taken from English law, which gave the state authority to make decisions for children when parents were deemed incapable for a variety of reasons (Feld 1999: 52; Moore, Bearrows et al. 1987: 52; Rubin and Sloan 1986: 39). Although the establishment of juvenile courts in the United States reformed the treatment of juvenile offenders in many ways, it did not affect the death penalty for child offenders in any significant way. The U.S. juvenile court was precluded from giving the death sentence, but child offenders who committed crimes that were death-eligible were often transferred to adult court. In contrast to late 20th century practice, transfers to adult criminal court in the early years of the juvenile court were rare, about one percent of cases per year (Feld 1999: 73). In 1938, the Federal Juvenile Delinquency Law defined a juvenile as an individual under age 18, in keeping with an emerging, age-based international consensus about children, but in order to be within the jurisdiction of the juvenile

court, the offense had to be one that was not punishable by death or life imprisonment (Bremmer 1974: 1118).

Legal rulings in the United States in the mid-20th century reinforced a commitment to the *parens patriae* doctrine. *In re Holmes* (109 A.2d 523 [Pa. 1954]) exempted juveniles from civil rights in court proceedings because juvenile courts were not criminal courts. The Standard Juvenile Court Act (SJCA) of 1959 was based on *parens patriae*, and a series of court cases further institutionalized the doctrine as the dominant way to think about children in the United States (Rubin and Sloan 1986: 42). These cases included *Kent v. U.S.* (383 U.S. 541[1966]), *In re Gault* (387 U.S. 1 [1967]), *McKiever v. PA* (403 U.S. 528 [1971]) and *Schall v. Martin* (467 U.S. 253 [1984]). *Kent* warned against arbitrariness in the granting of waivers from juvenile court so that an offender could be tried in adult criminal court. *Gault* found that constitutional protections that were afforded to adults, such as the right to cross-examination, should also apply to children in juvenile court (Rubin and Sloan 1986: 18-19). In *McKiever*, the court found that juries were not constitutionally required in juvenile courts. In *Schall*, the court used the doctrine of *parens patriae* to deny juveniles' liberty interest in favour of the state's interest in protecting both the juvenile and society (Rubin and Sloan 1986: 21-22).

This emerging body of law in the United States based on *parens patriae* coincided with a new global era for children's rights, which were granted in numerous international conventions and declarations, most importantly, the CRC. The drafters of these conventions, as well as many children's advocates, recognized a problem in the understanding of children's rights that complicated efforts toward change: Children are not independent individuals capable of exercising their rights; rather, they are dependent upon adults for the exercise of their rights. Moreover, children's rights may conflict with the rights of parents and with the interests of the

state. U.S. Supreme Court decisions in the second half of the 20th century suggest that children's rights are derivative of parental rights (Levesque 1994: 260), and key rulings by the Supreme Court on childhood in the 20th century address the rights of parents vis-à-vis the state. These include *Meyer v. Nebraska* (262 U.S. 390 [1923]), *Pierre v. Society of Sisters* (268 U.S. 510 [1925]), *Prince v. Massachusetts* (321 U.S. 158 [1944]), *In re Gault* (1967), *Wisconsin v. Yoder* (406 U.S. 205 [1972]) (Levesque 1994: 253-261). *Meyer* upheld a Nebraska law allowing the state to establish school curricula. *Pierre* recognized the state's power to regulate school attendance, but found that power to be limited by parental liberty in selecting the nature of instruction for children. In *Prince*, a case about determining whether selling religious literature constitutes child labour, the court found that the state's authority only trumps parental authority when parents fail to fulfil their obligations to protect their children (Levesque 1994: 255-256). *In re Gault* granted due process rights to juveniles, but the ruling also determined that the state may intervene if a child commits a crime, thus essentially equating juvenile crime with the failure of parents to meet their parental obligations (Levesque 1994: 260). *Yoder* found that Amish children could not be forced to attend school after the eighth grade, on the grounds of freedom of religion.

Other Supreme Court cases have established some rights for children. *Tinker v. Des Moines Independent Community School District* (393 U.S. 503 [1969]) found a school rule banning the expression of political views by children to be unconstitutional. Although the ruling was narrow, it found students to be persons under the Constitution (Levesque 1994: 260-261). *Brown v. Board of Education* (347 U.S. 483 [1954]), the case that found separate public schools for African-American and white children to be unequal and unconstitutional, was also the first

Supreme Court case to directly examine the rights of children vis-à-vis the state, granting them the right to equal protection (Levesque 1994).

Thus, insofar as U.S. Supreme Court rulings may accurately capture the general consensus of U.S. society as a whole or articulate a widely held view, children in the United States at the end of the 20th century were considered to be dependent upon adults for protection and care, less culpable than adults for their behaviour, redeemable, and deserving of more lenient punishments. U.S. policy regarding the juvenile death penalty was difficult to reconcile with these previously adopted norms about children. The inconsistency between the penalty and established ideas about children is evident in many key markers of the transition from childhood to adulthood in the United States: Juvenile offenders who could be executed in the United States were, depending on the jurisdiction, unable to vote, serve on a jury, marry or consent to sex. They could not work in hazardous occupations, buy alcohol or cigarettes or fight in wars. Additional restrictions applied to jury duty, consent to medical treatment, the purchase of pornographic material, gambling, movie attendance, and the validity of contracts (Gainborough and Lean 2008: 11; Horowitz 2000: 166). These restrictions assume that children are less mature than adults, that their decision-making ability and cognitive reasoning is less developed than adults' ability, and that protection from larger social harms is needed. These assumptions about children were incompatible with a policy that allowed them to be executed for crimes committed as children.

The Supreme Court issued a number of rulings specifically addressing the juvenile death penalty in the period after *Furman v. Georgia* (408 U.S. 238 [1972]), when the Court ruled that the death penalty in general as it was then applied was arbitrary and violated the Eighth and Fourteenth Amendments of the Constitution. These rulings include *Eddings v. Oklahoma* (455

U.S. 104 [1982], *Thompson v. Oklahoma* (487 U.S. 815 [1988]), *Stanford v. Kentucky* (492 U.S. 361 [1989]) and *Roper* (2005). The first Supreme Court case to consider age as a mitigating factor, or consideration for reducing a sentence, in the determination of guilt was *Eddings v. Oklahoma* in 1982, a case involving the death sentence of 16-year-old Monty Lee Eddings. The Court found in a 5-4 decision that the sentence should be vacated because it did not consider mitigating factors as required by the Eighth and Fourteenth Amendments. Although the Court did not rule on the larger issue of the constitutionality of the death penalty for 16-year-olds, it nonetheless prohibited any barriers to the use of mitigating factors in sentencing.

Not until *Thompson v. Oklahoma* (1988) did the Supreme Court, in a 5-3 decision, rule on the constitutionality of executing child offenders, reserving the penalty for those 16 and older. Before *Thompson*, age limits to the penalty varied widely by state, with some states allowing children as young as ten to be executed and other states having no minimum age at all.⁴ The second Supreme Court case came the following year with a 5-4 decision in *Stanford v. Kentucky*, which held that the Eighth Amendment does not prohibit the death penalty for offenders who committed their crimes when they were 16 or 17 years old. Finally, in *Roper* (2005), the Court held that a national consensus had emerged in the 16 years since the *Stanford* decision and, in a 5-4 decision, found the death penalty for juvenile offenders under age 18 to be unconstitutional. *Roper* commuted the death sentences of 72 child offenders around the country and brought the United States into compliance with international law on the issue (Streib 2005: 11).

⁴ Arizona, Delaware, Florida (if the defendant has prior convictions), Oklahoma, Pennsylvania, South Carolina, South Dakota, and Washington had no minimum age for the penalty at the time of the *Thompson* ruling. Indiana's minimum age was ten; Mississippi's was 13; and Montana's was 12. Although the minimum age for the death penalty has historically varied, the age of eligibility derived from English law was seven. Children under age 14 could legally be executed if *mens rea* (intent) could be demonstrated.

FACTORS IN THE CONTINUATION OF THE JUVENILE DEATH PENALTY

This section argues that there were two principal causes of the continuation of the juvenile death penalty in the United States after most states in the international system had ended the penalty altogether or restricted it to offenders who commit their crimes when they are 18 years or older: the U.S. federal system that allowed individual U.S. states to establish age restrictions on the penalty (until the *Thompson* decision in 1988), and the role of racial subordination in the practice of the juvenile death penalty.

U.S. federalism and the prohibition of the juvenile death penalty

The U.S. federal system of government is a relatively uncommon method of organizing state authority, whereby the federal government and individual U.S. states share legal sovereignty over U.S. territory. Some of the larger federations in the international system are Australia, Belgium, Brazil, Canada, Germany, India, Mexico and Switzerland. Most commonly, federations are formed in larger countries through an agreement regarding the distribution of power among previously distinct parts to form a federal arrangement that often involves military and economic benefits or the resolution of some conflict due to ethnic, political or cultural cleavages. Federal systems can be distinguished from unitary systems of government, such as that found in the United Kingdom and in most other countries in the world.

The United States responded to the international rebuke over the juvenile death penalty by defending its federalist structure and the right of individual states to determine the penalties associated with particular crimes within their jurisdiction, given Constitutional limitations. When the United States ratified the ICCPR in 1992, as described above, it modified the terms of the treaty by submitting an understanding addressing U.S. federalism in addition to its specific

reservation on the juvenile death penalty. This understanding, quoted below, was similar to a reservation submitted by the United States when it ratified the 1987 Convention Against Torture and other Cruel, Inhuman, or Degrading Treatment or Punishment (Reservation II.5) and the Convention on the Elimination of All Forms of Racial Discrimination (Reservation II), both ratified in 1994. The U.S. memorandum of understanding regarding the ICCPR stated:

That the U.S. understands that this Covenant shall be implemented by the Federal Government to the extent that it exercises legislative and judicial jurisdiction over the matters covered therein, and otherwise by the state and local governments; to the extent that state and local governments exercise jurisdiction over such matters, the Federal Government shall take measures appropriate to the Federal system to the end that the competent authorities of the state or local governments may take appropriate measures for the fulfilment of the Covenant (United States understanding No. 5 submitted upon ratification to the ICCPR).

In other words, by submitting its reservation, the United States attempted to limit the application of the treaty by defending its right to impose the death penalty on juveniles based on two criteria: First, the U.S. Constitution did not prohibit the death penalty for juveniles; and second, the U.S. federalist system allows individual U.S. states to make decisions about penalties for crimes within state jurisdiction.

Additionally, the United States' poor record on human rights treaty ratification can be partly explained by the peculiarity of the American political system and its treaty ratification process. It should be remembered that the United States has one of the most difficult treaty ratification processes in the world, requiring two-thirds of the Senate to consent to ratification. The process of ratification in the United States is therefore far more onerous than the majority requirement in a Parliamentary system. Additionally, many international human rights treaties in the United States are non-self-executing, requiring additional legislation for domestic implementation. This two-part process ensures the participation of the legislative branch of

government in both stages, first in initial consent and then in enacting and implementing further legislation, slowing the diffusion of international human rights law both nationally and sub-nationally. The United States declared the ICCPR non-self-executing in Declaration No.1, thus complicating debates about the applicability of the norm against the juvenile death penalty to domestic law and hindering its application.

Racial composition of the juvenile death penalty

As argued above, some children in the United States were excluded from the contemporary conception of childhood and its attendant rights and protections based on their actions, such as being convicted of a violent crime. As this section will demonstrate, African-American juvenile offenders were overrepresented in this exclusion and faced the juvenile death penalty much more often than white juvenile offenders did. This pattern was consistent throughout the 20th century; it clearly indicates that race was a key factor in determining which children would fall under the protective umbrella of children's rights. A number of studies have looked at the overrepresentation of people of colour in U.S. executions (Allen, Clubb et al. 2008; Amnesty International USA 1999; Bedau 1997; Dow and Dow 2002; Jackson, Jackson et al. 2001; Kleck 1981; Mitchell and Sidanius 1995; Ogletree Jr. and Sarat 2006). The purpose of this section is not to review this literature, but rather to consider the juvenile death penalty in light of what is already known about race and the death penalty overall and to examine why U.S. death penalty practices diverged so markedly from international norms about children and juvenile justice. Racial disparities in executions were in fact even greater among juveniles than adults. Furthermore, as with adult offenders, the evidence suggests that crimes with a particular offender/victim relationship were more likely to incur the death penalty in the post-*Furman*

period (after 1972), especially the combination of an African-American male offender and a white female victim (Farrell and Swigert 1978; Streib 2005: 5).

Before the 1960s, the U.S. history of executing offenders who committed their crimes when they were under age 18 is not fully known. The primary source of information on juvenile offender executions in the United States, the Espy file, is not an ideal data set. It does not include the age of the offender *at the time of the crime* or provide information about the race or gender of the victim (Espy and Smykla 2002). Many of the executions recorded in the data file do not list an age at all. As a result, all that can be determined from the Espy file is the age (*at the time of execution*) and race of the offender for some cases. According the file, 160 children were executed in the United States between 1642 and 1960 *while* they were under age 18. An additional 23 juvenile offenders have been executed since the 1960s for crimes committed when they were younger than age 18 (Amnesty International 2008). Yet leading scholars argue that many more juvenile offenders were executed by the United States; Victor Streib, for example, counts 366 executions of juveniles since 1642; this number includes some offenders who were executed after they had reached adulthood (Streib 2005). The dataset used for this paper is the Espy file, plus the additional 23 executions of juvenile offenders since the 1960s, for a total of 183 cases.

African-Americans are clearly overrepresented in executions of juvenile offenders in the United States, according to the Espy file. Only 45 of 183 juvenile offenders executed between 1642 and 2003 were white (a total of 24.7 percent). African-Americans made up 125 of these executions, or 68.6 percent, even though the African-American population has never exceeded 20 percent of the total population in the United States and never exceeded 13 percent in the 20th century (Gibson and Jung 2002). Additionally, five Latinos and five Native Americans were

executed, according to the data, constituting 0.027 percent each of total executions of juvenile offenders. One juvenile of Asian/Pacific Islander descent was also executed (0.0054 percent), and one child whose race was not provided. The data for non-white juvenile offenders who received the death penalty is broken down by century in Table 2 below:

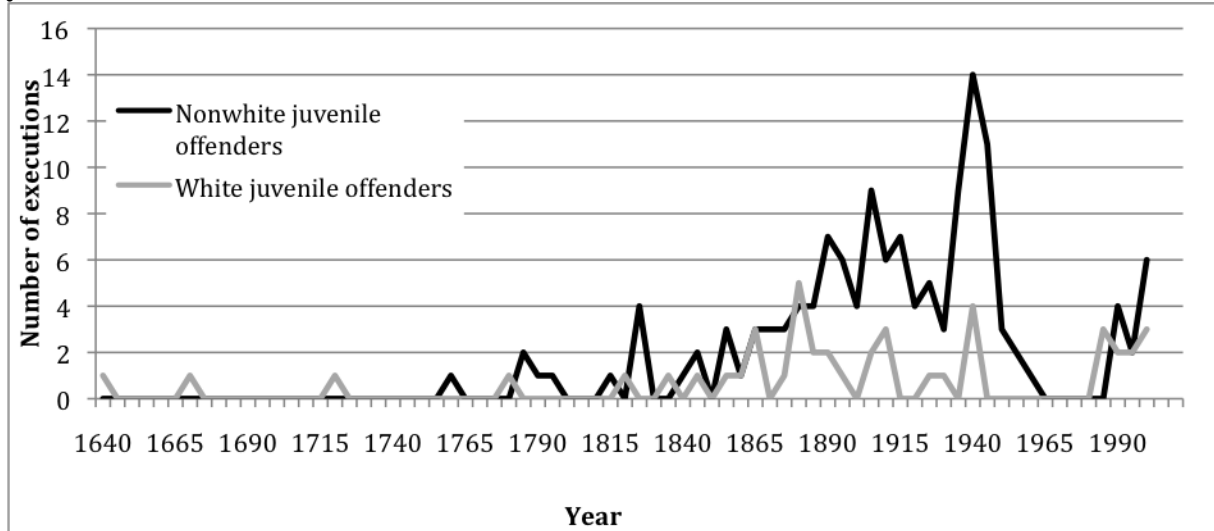
Table 2: Percentage of known non-white juvenile offenders executed in the United States by century (Espy and Smykla 2002)

Century	Percentage of known non-white juvenile offenders executed
17 th	0%
18 th	62.5%
19 th	68%
20 th	88.5%

Table 2 demonstrates the overrepresentation of non-white offenders executed for crimes committed as juveniles, according to the available data in the Espy file. The disparity in executions between white and non-white juvenile offenders increased from the 17th to the 20th century and dramatically spiked in the 20th century as the penalty came to be reserved exclusively for non-white offenders. Again, these are known executions. They do not include non-state-sanctioned executions, such as lynching.

Figure 1 below charts the number of executions of white and non-white juvenile offenders by year from the 17th to the 20th centuries, according to the Espy data.

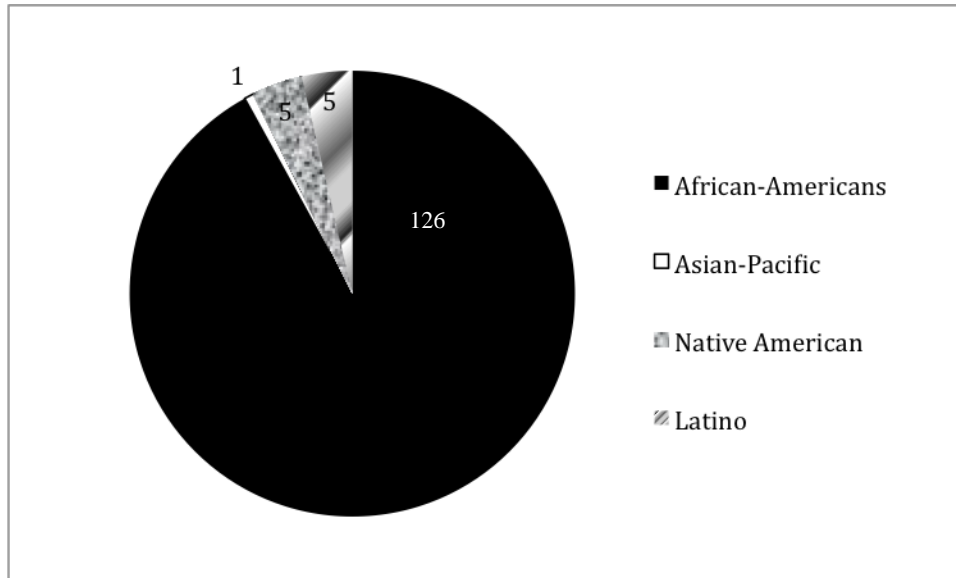
Figure 1: Number of white and non-white juvenile offender executions by year



According to Figure 1, executions of non-white juvenile offenders reached their highest point in the 1940s, as the punishment was increasingly and exclusively reserved for non-white offenders. The post-*Furman* period (after 1972) shows more parity in executions between white and non-white juvenile offenders, although non-white offenders are still overrepresented relative to their percentage of the U.S. population.

Importantly, among non-white juvenile offenders who received the penalty in the United States, African-Americans made up the overwhelming majority of those executed. See Figure 2 below:

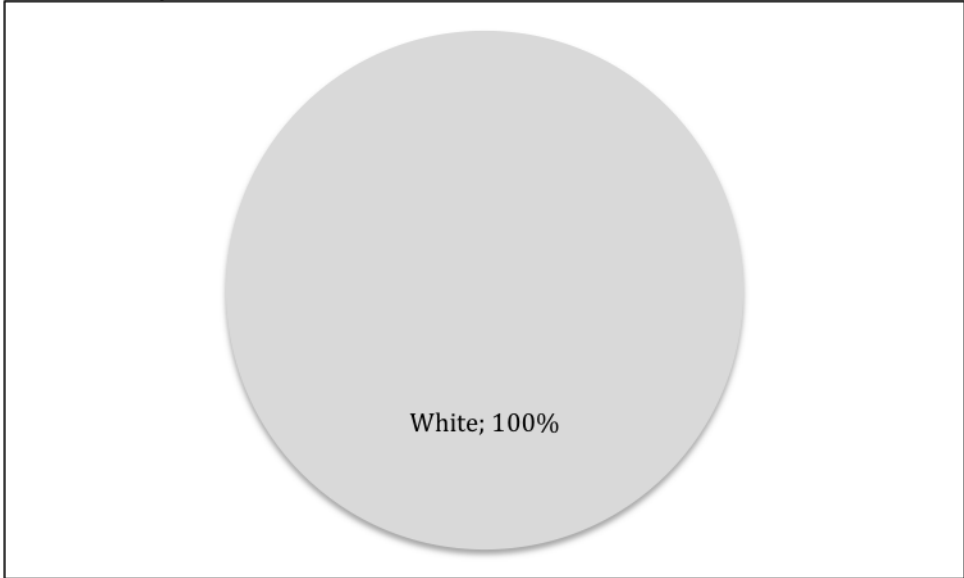
Figure 2: Racial composition of non-white offenders executed in the United States from 1642-2003



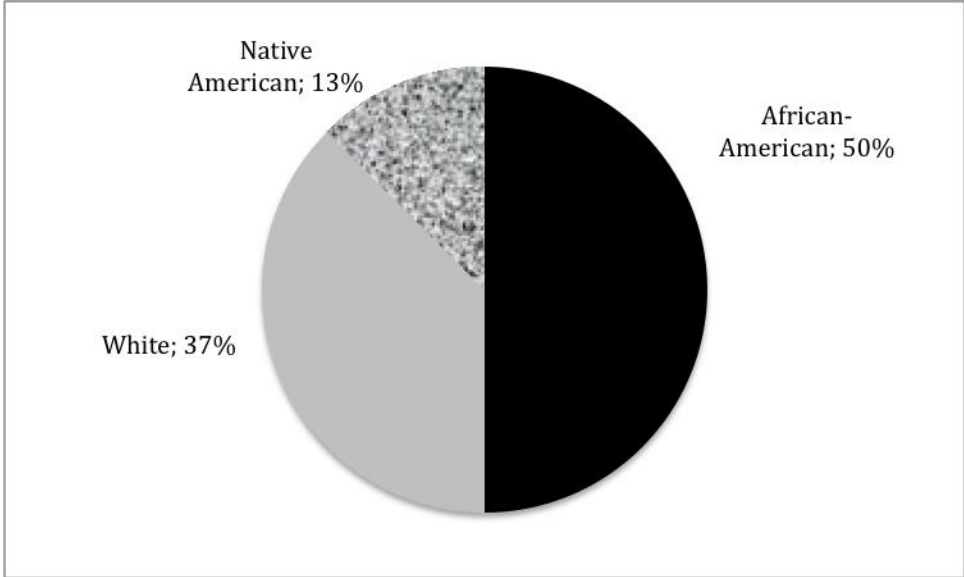
The data reveals that African-Americans made up almost 92 percent of all non-white juvenile offenders executed in U.S. history. The overrepresentation of African-American juveniles in U.S. executions continually increased over the course of the last four centuries, as demonstrated in Figure 3 below:

Figure 3: Racial composition of juvenile offenders executed in the United States in each of the four centuries, from the 17th to the 20th century

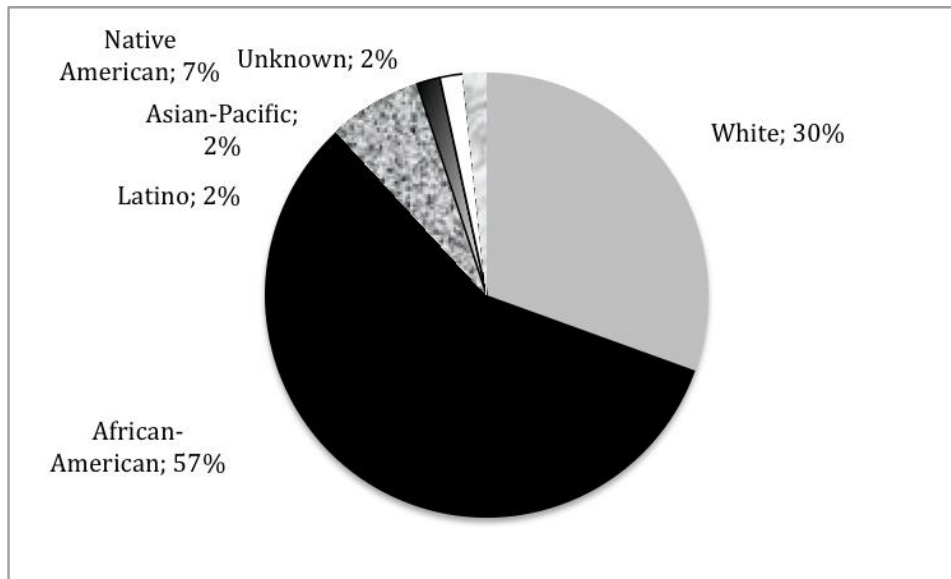
17th Century



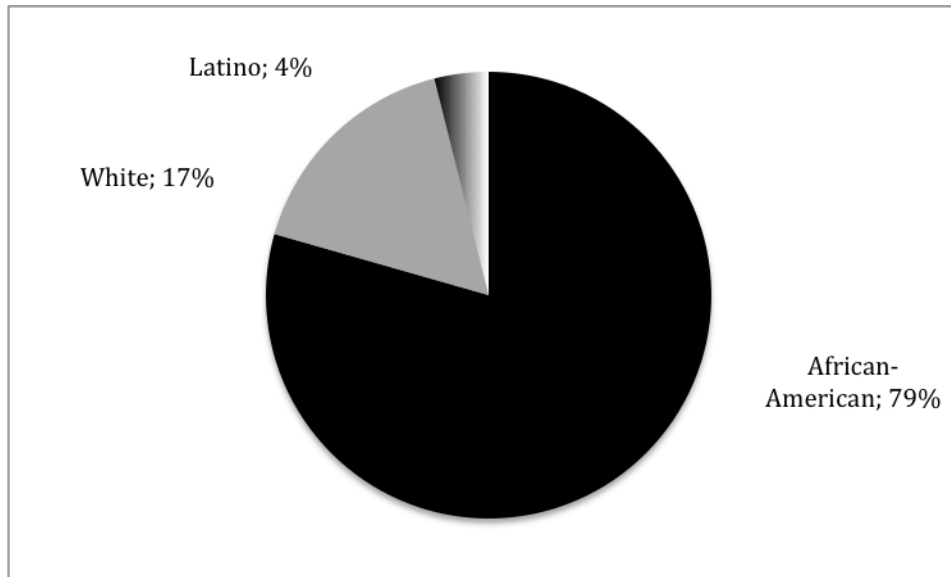
18th Century



19th Century



20th Century



As is evident in Figure 3 above, the number of white offenders executed fell for each century as the number of Latino, and especially of African-American, offenders increased.

Not only did African-Americans make up an increasing and disproportionate number of juvenile offenders executed, but the nature of their crimes, which excluded them from the protection of juvenile reform measures, is likewise revealing of systemic racial subordination in the United States. Only African-Americans were executed for the crimes of rape (27), attempted rape (2), robbery (1) and attempted murder (1), according to the Espy file. There were no white children executed for rape alone in the United States. In addition, of the seven executions of girls recorded in the Espy data, none were white. Other sources suggest that as many as 10 girls, all of colour, have been executed in the United States (National Coalition to Abolish the Death Penalty 2003: 12).

Moreover, of the 41 juvenile offenders executed for crimes other than murder from the 17th to the 20th centuries, 36 were African-American. In fact, no member of any other minority group has ever been executed for a non-lethal crime, according to the Espy file. The data reveals that the last white person under the age 18 to be executed for a crime other than murder was during the Civil War for espionage. The last African-American executed for a non-lethal crime was in 1954, when a 17-year-old was executed for rape. At the time of *Roper* (2005), all child offenders on death row were convicted of murder.

Death penalty scholarship has already established that the penalty in general in the United States has increasingly been a Southern phenomenon (Zimring and Hawkins 1986: 30, 32). This regionalism is even more pronounced in the case of the juvenile death penalty. Seventy-two percent of all juvenile offender executions since the 17th century took place in the South. Ninety-

one percent of all executions of African-American juvenile offenders in the United States took place in the South. Moreover, no executions of juvenile offenders have taken place outside of the South since before the *Furman* ruling in 1972. A total of 12 white juvenile offenders were executed in the South during the entire 20th century, only two of whom were executed before *Furman*.

The highest period of disparity in the executions of white and non-white juvenile offenders was in the pre-*Furman* period, when, for the years between 1944 and 1965, *the only recorded child executions were of African-American males*. During the post-*Furman* period, 1973-2003, this racial disparity decreased, as 54.5 percent of juvenile offenders executed were non-white, although almost 92 percent of these were African-American. The disparity is still large, however, considering African-Americans' overall percentage of the population, between 11 and 12 percent in the 1980s and 1990s (Gibson and Jung 2002). The data therefore supports the finding that in the 20th century, the juvenile offenders most likely to be denied children's rights, as defined by international law, were murderers or rapists (or both), and that the overwhelming majority of these were African-American males who committed their crimes in the South.

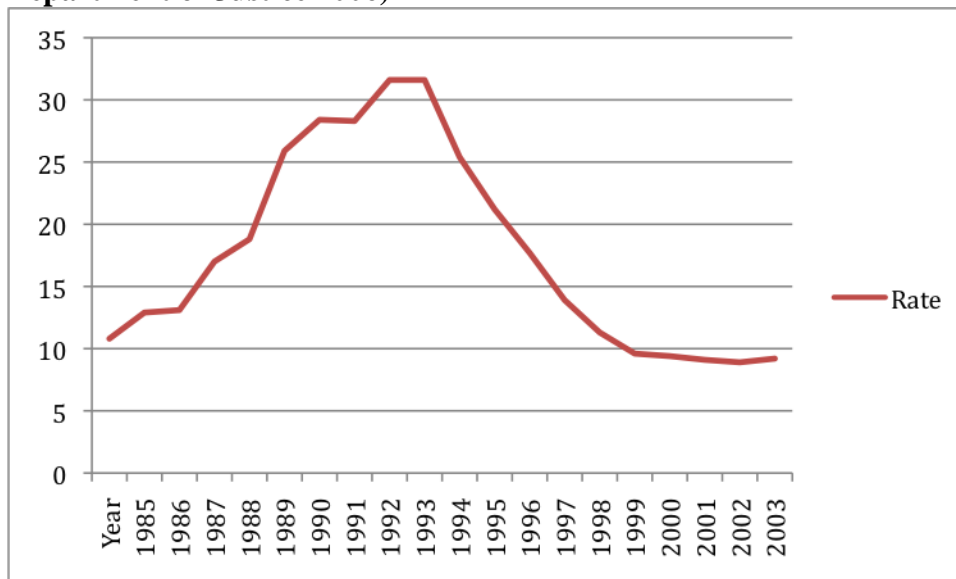
It is furthermore noteworthy that the juvenile death penalty is not the only area of children's rights affected by race in the United States. U.S. children of colour tend to have lower rates of health insurance and higher rates of infant mortality, and they experience differential treatment in other areas of juvenile justice, such as life sentences (Feld 1999: 73; MacLean 2008; Williams and Collins 1995). Moreover, race appears to have an impact on death penalty practice at the international level. Carsten Anckar has found a statistically significant correlation between states that abolished slavery relatively late, after 1879, and those that exhibit "a more positive

attitude” toward the penalty as compared with states that abolished slavery earlier (88). Because slavery historically has so often entailed racial subordination, this finding indicates that race may play a role in the use of the penalty outside the United States as well. Additionally, Anckar has argued that the higher the degree of religious, ethnic or linguistic fragmentation in a state (differences that may include racial cleavages), the greater the inclination to use the penalty (38).

DISCUSSION

Although the history of juvenile justice in the United States in the 20th century was marked by a gradual shift from the goals of rehabilitation to more retaliatory and punitive measures, that shift accelerated in the 1960s and 1970s as juvenile crime began to increase (Feld 1999: 5; Gainborough and Lean 2008; Horowitz 2000: 141). By the 1980s, the large number of homicides by juveniles led some scholars and reporters to argue that a new breed of young offender had emerged, the superpredator, who was becoming increasingly violent with each additional child cohort (Bennett, DiIulio et al. 1996; Tanenhaus and Drizin 2002: 642). Juvenile crime did in fact continue to increase during this period (See Figure 4 below).

Figure 4: Juvenile homicide rates per 100,000 by year (Bureau of Justice and United States Department of Justice 2006)



In 1993, the age group 15 to 19 had the second highest number of individuals arrested for criminal homicide, only slightly behind the 20 to 24 age group (Bedau 1997: 61). Those 19 and under made up almost 31 percent of those arrested in 1993 for criminal homicide (Bedau 1997: 61). Yet it was not so much the number of criminals that received attention in the media, but the type of crime and the race of the offender. In the 1980s, African-American juveniles were arrested for homicide at more than seven times the rate of white juveniles (Feld 1999: 203). The superpredator whose depiction saturated the American media was young, male, urban and often of colour (Feld 1999: 208). Violent crimes dominated the local and national news and were commonly the random crimes of strangers (Feld 1999: 6). Gang killings almost quadrupled between 1989 and 1991, while juvenile gang killings increased by more than 1.5 times in the same period (Bedau 1997: 64). By 1993, the rate of juvenile gang killings in the United States was more than double that of 1989, with 1,147 in 1993 (Bedau 1997: 64).

Violent juvenile crime corresponded with high death penalty rates, with the South having both a high death penalty rate for child offenders and some of the highest juvenile crime rates in the country (Elikann 1999: 152). The response by legislators was to appear tough by introducing the 'war on crime' and the 'war against drugs' into the American lexicon. The result of this media attention, public concern and legislative reaction was an increasing emphasis on retribution rather than rehabilitation for juvenile criminals, bolstering a trend in juvenile offender cases over the last century (Tanenhaus and Drizin 2002: 642).

The superpredator myth was eventually discredited as the increase in juvenile crime in the latter half of the 20th century was found to be predominantly environmental (access to guns,

marketing of crack cocaine) as well as demographic (an overall increase in the youth population), rather than the outcome of an increasingly violent cohort of juvenile offenders (Cook and Laub 1998: 53, 58; Feld 1999: 11). Nonetheless, states responded to the superpredator myth by increasing both the number of juveniles tried as adults as well as those housed with adults in prison (Tanenhaus and Drizin 2002: 643). Transfers from juvenile court to adult court became commonplace in the 1990s, and non-white juveniles suffered the most from these measures (Gainborough and Lean 2008: 11; Tanenhaus and Drizin 2002: 666-667). One study in the 1990s found that 57 percent of all juvenile offenders transferred to adult court for violent crimes were African-American (Tanenhaus and Drizin 2002: 667). Individual state statistics are more disturbing: In California, studies demonstrate that possibly as many as 70 percent of transfers of juveniles to adult criminal court were for non-white offenders, while in Illinois, the number was 90 percent (Gainborough and Lean 2008: 11).

As more juveniles were transferred to adult criminal court, their rehabilitation, a founding principle of the first juvenile court in Illinois in 1899, was abandoned (Gainborough and Lean 2008: 11; Horowitz 2000: 142; Tanenhaus and Drizin 2002: 665). Barry Feld argues that the shift from the rehabilitation of juvenile offenders to a more punitive model was the result of socioeconomic changes (de-industrialization, race-based urban and suburban migration patterns), combined with environmental changes, such as access to guns and the introduction of crack cocaine into urban communities, that produced a “very visible escalation” in juvenile homicide and gun violence among African-Americans (Feld 1999: 14). Feld contends that African-Americans’ migration to the North and increased urbanization around mid-century focused national attention on issues of racial inequality, especially on procedural issues in the criminal justice system.

This is not to suggest that the first juvenile courts were founded on racially- or ethnically-neutral principles, despite their emphasis on rehabilitation. Feld argues that the 1899 Illinois court was established in response to “fear of other people’s children,” generally denoting those of a different socioeconomic class or ethnicity (Feld 1999: 47). Critics of the court point out that from the beginning, the court focused on crimes typically associated with poor and immigrant children, such as begging, drinking and sex-based crimes (Feld 1999: 64). A fear of other people’s children continued to shape the juvenile justice system throughout the 20th century, as evidenced by the increase in transfers to the adult criminal system and the shift in focus toward retribution.

The Supreme Court responded to calls for racial equality by focusing on procedural rights in juvenile and criminal courts in the second half of the 20th century. But the Court’s attention to due process concerns came at a cost. The procedural safeguards that resulted from *Gault* (1967) and other cases “legitimated the imposition of punitive sentences” that primarily affected juvenile offenders of colour (Feld 1999: 80-81). In other words, concerns about racial inequality effectively conferred legitimacy on a system that was by then widely understood to be prejudicial against African-American juvenile offenders.

Interestingly, however, the racial disparities in U.S. juvenile death penalty practice decreased in the 1980s (there were no juvenile offender executions in the 1970s). One explanation for the decrease can be found in the work of Timothy Kaufman-Osborn, who argues that the death penalty is part of a political system based on the subordination of nonwhites, a system referred to by Charles Mills as a “racial polity” (Kaufman-Osborn 2006; Mills 1997; Mills 1998: 192). The purpose of the polity is to maintain and reproduce a system of exploitation of the subordinate group (African-Americans) to benefit the superordinate group (the white

majority) (Kaufman-Osborn 2006: 24). This racial polity manifests in practices such as the death penalty, in which nonwhite individuals are grossly overrepresented (Kaufman-Osborn 2006: 23). The application of Kaufman-Osborn's argument to the juvenile death penalty in the post-*Furman* years, when it was more fairly administered than it had been previously, suggests that the penalty merely rendered the mechanics of the racial polity less visible by removing the more overt practice of racial subordination. The penalty still served to maintain a system of subordination, but it now appeared to be fair, objective and legitimate.

As the above discussion of the juvenile death penalty makes evident, the penalty served to reproduce the racial polity by supporting the idea that young, black males, unlike their white counterparts, were only to be afforded the protections of childhood on a conditional basis. Their legal status as children was contingent upon a state that could – and frequently did – revoke it. The juvenile sentenced to death is a legal child in a host of ways, but none of these limitations or protections are useful on death row (Gainborough and Lean 2008: 11; Horowitz 2000: 166). The juvenile offender on death row has been denied children's rights recognized and codified in international law. He (most commonly) has lost his legal status as a child in precisely that context where the rights afforded children are most needed.

In many ways, the greater fairness in the penalty's application in the post-*Furman* period reflected an emerging consensus that racial discrimination was illegitimate, or, at the very least, that the perception of racial discrimination in the application of death sentences reflected badly on public policy. The systematic exclusion of African-American young men from the category of 'child' and the denial of protections to them was a point of conflict with the emerging international children's rights regime that insisted upon racial equality and uniform standards of juvenile justice. These tensions—between liberal protections for children *and* capital punishment

that was applied disproportionately to African-American boys—resulted in the continuation of the penalty into the 21st century as well as greater fairness in the penalty’s application, though racial disparity persisted.

As described above, the penalty placed the United States at odds with the international community. At the international level, the United States defended its death penalty policy by invoking its federalist structure. At the state level, officials defended the penalty by citing the viciousness of juvenile offenders, claiming that they should be excluded from protective institutions based on their deeds. Public discourse was peppered with references to gang killings, drug offences and random violent crimes such as carjacking, crimes that typically invoked images of African-Americans. In this climate, the continuation of the penalty (largely anachronistic throughout the world) was permitted for this category of children.

The federalist system allowed the penalty to persist in some states, particularly those in the South. Issues of racial subordination, more visible in the South, resulted in the overrepresentation of African-Americans among juvenile offenders who received the penalty, especially in the pre-*Furman* period. As rights for children expanded in the last half of the century, African-American juveniles were increasingly transferred out of protective institutions. The penalty continued to be applied throughout the 20th century, despite international condemnation, because of the United States’ federalist system, its onerous treaty ratification process, and the racial subordination endemic to the juvenile and criminal justice systems.

CONCLUSION

The international esteem the United States enjoyed regarding juvenile justice issues at the beginning of the 20th century was lost by the century’s end. This paper has argued that this

reputational loss was directly related to the U.S. practice of executing juvenile offenders. The juvenile death penalty continued in the United States throughout the 20th century, long after most countries had ended the practice, because of a confluence of the uncommon system of U.S. federalism and racial prejudice that allowed Southern states to systematically apply the penalty to African-American juvenile offenders. This policy resulted in the exclusion of these offenders both from the American conception of childhood – as demonstrated by the penalty’s inconsistency with other key markers of childhood – and from the expanding international regime of children’s rights. The history of the juvenile death penalty in the United States thus reveals the failure of American jurisprudence, especially Southern jurisprudence, to consider African-American male children on par with other juvenile offenders.

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