THE GLOBALIZATION OF CHILDHOOD:

THE ROLE OF LAW AND NORMS IN THE GLOBAL ABOLITION
OF THE DEATH PENALTY FOR CHILD OFFENDERS

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CHAPTER 1
INTRODUCTION: THE GLOBALIZATION OF CHILDHOOD

The 20th century witnessed the development and maturation of human rights from a cluster of aspirational ideas to an international legal regime. Although a number of legal and international relations studies have focused on compliance with human rights norms once they are codified in international law,[1] few studies to date have shed light on the origins of specific rights and their evolution toward global acceptance.[2] This dissertation examines how an idea that begins in one part of the world becomes a global norm that almost all states in the international system obey. It investigates the processes of normative development and global diffusion through the study of a single norm: the prohibition of the death penalty for child offenders under the age 18.

Child offenders who commit the most egregious crimes are the least sympathetic children in society, in part because their behavior belies their age. For a society to protect infants, toddlers and even teenagers who pose no physical threat to the community at large, there is little controversy. For a society to protect child offenders whose crimes if committed by an adult could result in the death penalty, however, is far more difficult. The abolition of the death penalty for child offenders—a ban found in 96 percent of states at the end of the 20th century— is therefore a bold policy position, suggesting that the

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[1] Oona A. Hathaway, "Do Treaties Make a Difference? Human Rights Treaties and the Problem of Compliance," *Yale Law Journal* 111, no. 1935 (2002), ———, "Why Do Countries Commit to Human Rights Treaties?," *Journal of Conflict Resolution* 51 (2007), Emilie Hafner-Burton and Kiyoteru Tsusui, "Human Rights in a Globalizing World: The Paradox of Empty Promises," *American Journal of Sociology* 110, no. 5 (2005), Wade M. Cole, "Sovereignty Relinquished? Explaining Commitment to the International Human Rights Covenants, 1966-1999," *American Sociological Review* 70 (2005), Eric Neumayer, "Do International Human Rights Treaties Improve Respect for Human Rights?," *The Journal Of Conflict Resolution* 49, no. 6 (2005), Ellen L. Lutz and Kathryn Sikkink, "International Human Rights Law and Practice in Latin America," *International Organization* 54, no. 3 (2000), Oona A. Hathaway, "The Cost of Commitment," *Stanford Law Review* 55, no. 1821 (2003), ———, "Between Power and Principle: An Integrated Theory of International Law," *The University of Chicago Law Review* 72, no. 2 (2005), John W. Meyer and Lizabeth McEneaney, "The Content of Curriculum: An Institutionalist Perspective," in *Handbook of the Sociology of Education*, ed. Maureen T. Hallinan (New York: Plenum, 2006).

[2] For an interesting exception, see: Richard Price, "A Genealogy of the Chemical Weapons Taboo," *International Organization* 49, no. 1 (1995).

parameters of childhood are inviolable and that there is nothing that a child can do, no crime too brutal or too violent, to revoke the protection childhood affords.

Yet this overwhelming consensus on the meaning and boundaries of childhood did not always exist. Childhood, as this dissertation will demonstrate, is a historical construct developed over many centuries. Prior to the 19th century, children were afforded little, if any, *legal* protection from abuse, neglect and exploitation. In many parts of the world, there were no age-based limitations for criminal punishment such as the death penalty. In some states, including the United Kingdom and states that share its legal heritage, children as young as seven could be executed if intent or *mens rea* could be demonstrated; this was true for the United States well into the 20th century.[3] However, by the century's end, almost all states in the international system had either ended the death penalty for all crimes and all offenders or limited the penalty to those older than 18. How did this dramatic historical transformation take place? How did the position of children in society evolve from one in which children were legally indistinguishable from adults to one in which they were a separate, distinct and protected class, shielded from familial and state abuse? How did this particular construction of childhood come about? Why, for example, establish childhood as an age-specific institution as opposed to a behavioral category or one marked by intellectual ability, constructions that would

[3] As late as the 1988 Supreme Court ruling in *Thompson v. Oklahoma*, some U.S. states did not have a minimum age for the death penalty. As such, the minimum age for the penalty was taken from British law as seven or 14, depending on the demonstration of *mens rea*. No U.S. states codified seven as the minimum age, although some states set their age limits younger than 14 at the time of the *Thompson* ruling: Indiana set its minimum age for the penalty at ten; Mississippi's minimum age was 13; and Montana's was 12. Arizona, Delaware, Florida (if the defendant had prior convictions), Oklahoma, Pennsylvania, South Carolina, South Dakota, and Washington had no minimum age at the time of the *Thompson* ruling. Conflicting sources indicate there was no minimum age by statute for Idaho and Utah as well. No executions of children under the age 13 were recorded in the 20th century. Amnesty International, "United States of America: The Death Penalty and Juvenile Offenders, Amr 51/23/91," (1991; reprint)p. 64. Tom Seligson, "Are They Too Young to Die?," *Parade Magazine* 1986, p. 5. Hugo Adam Bedau, ed. *The Death Penalty in America: Current Controversies* (New York: Oxford University Press,1997).

exclude those who commit crimes that are at odds with widespread notions of childlike innocence? Why include protections for violent child criminals accused of murder and rape?

Indeed, by the end of the 20th century, a predominantly Western idea of childhood —characterized by the age parameters of birth (or conception)[4] to 18 — had become a globalized norm.[5] Built into this globalized childhood were age limitations for criminal sanctions, including the death penalty. This is not to suggest that all states have adopted this norm and no longer execute child offenders. There have indeed been several holdouts: Nine of the 10 states that maintained the death penalty for child offenders at the end of the 20th century, despite international pressure, were commonly at odds with international human rights law in general. They were: China, the Democratic Republic of the Congo (DRC), Iran, Iraq, Saudi Arabia, Sudan, Pakistan, Nigeria and Yemen. These states are largely out of step with international human rights norms, making their rejection of this particular norm unsurprising.

For the tenth state, the United States, to reject the international definition of childhood by continuing to execute child offenders was, however, puzzling. Since the 19th century, the United States had been a key actor in developing and promoting protections for children, and was a leader in penal reform protections for child offenders as recently as the early 20th century. In fact, the U.S. role in these efforts was so substantial that the United States helped to shape a Western, age-defined understanding

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[44] Some predominantly Catholic countries argue that life begins at conception. The beginning of childhood is therefore still a contested part of the model. See Van Bueran for a more detailed discussion of this issue.Geraldine Van Bueren, *The International Law on the Rights of the Child* (Boston: Martinus Nijhoff Publishers, 1998).

[5] Alma Gottlieb argues that developmental stages of childhood are cultural constructions and are based on a Western calendar.Alma Gottlieb, *The Afterlife Is Where We Come From: The Culture of Infancy in West Africa* (Chicago: The University of Chicago Press, 2004), 44.

of childhood, one in which children under the age 18 were protected in numerous areas of law. Yet the child death penalty remained legal in the United States until 2005. Hence the puzzle: Why did the United States comply with (and even promote) most norms about children adopted by the international community but not this one? How did a norm vociferously opposed by the United States, the global hegemon, become international law and secure widespread acceptance throughout the world without U.S. help and despite its opposition?

Although these puzzles are compelling as historical studies and political exercises, why should we care about the evolution of childhood in society or about the international diffusion of norms protecting children? In an age marked by terrorism, international war and economic turmoil—a period when security in military and economic matters would seem to trump all other issues—why should we concern ourselves with children and international efforts to protect them? I suggest that we should not underestimate or give short shrift to the dramatic social promotion of childhood over the last few centuries. Children were re-imagined and redefined from the legal property of their fathers to internationally protected and even 'sacrilized'[6] citizens of the international community—their position enshrined in dozens of international legal texts and in national law.

The transformation of children from legal nonentities into a distinct, cloistered and highly protected class was remarkable, challenging and ultimately serving to alter many of the core precepts of law and social organization in societies around the world. In effect, the promotion of childhood triggered such extraordinary changes in family

[6] Hugh Cunningham, *Children and Childhood in Western Society since 1500* (New York: Longman, 1995), Viviana A. Zelizer, *Pricing the Priceless Child: The Changing Social Value of Children* (Princeton, New Jersey: Princeton University Press, 1994).

structure and state organization that by the end of the 20th century, legal distinctions between children by race, status, class and gender were discarded in favor of a universal model of children's rights. Again, why does this matter? It matters because if we as human rights activists, political scientists and child advocates can understand the processes that produced this fundamental social change, we can build upon it and even repeat it. If we can understand how societies make profound shifts in social status that diffuse internationally through a variety of mechanisms and a range of motivations over relatively short periods of time, we can harness this knowledge to replicate that change in other areas of human rights, child advocacy and efforts toward international peace and reconciliation.

Norms matter, as this dissertation will argue. Understanding when and how they matter reveals important and powerful information about order in the international system. Since norms matter even for security issues, grasping the motivations behind state acceptance of international norms is valuable even for the most difficult and complicated questions facing international decision makers.

Finally, this is a study of childhood, not children *per se*. Although the idea of childhood reflects beliefs about children, the terms are not synonymous or coterminous. The idea of childhood, as I employ it in this dissertation, contains certain beliefs about the nature of children, their morality, their potential, how they should be raised, and what environment fosters their development. As states consolidated their power over children over the course of the 19th and early 20th centuries, they became the principal arbiters of the appropriate treatment of children. The result of state consolidation was the emergence

of one model of childhood, one standard, one idealized, globalized – and increasingly scrutinized – period of human life.

HISTORICAL BACKGROUND OF THE DEATH PENALTY

While the practice of the death penalty long predates the modern era, the abolitionist movement in the Western world is in fact fairly recent. The modern abolitionist movement really began with the publication in 1764 of Cesare Beccaria's treatise *On Crimes and Punishment*, a seminal text that influenced figures including Voltaire, Thomas Jefferson, Thomas Paine, the Marquis de Lafayette and Maximilien Robespierre.[7]

Different states have taken different paths to abolition, and limitations on the death penalty by age represent only one means of reform. States can also limit the penalty on the basis of gender, intent, advanced age, condition (such as pregnancy), the nature of the crime, or the method of execution. One common method of limiting the penalty has been to disallow it for ordinary crimes but to maintain it for crimes against the state, such as treason or war crimes. States can also end the penalty altogether, as many states around the world have done. By banning the penalty outright, states also, obviously, end the penalty for children. As a result, then, we can divide the states that do not execute children under the age 18 into those that simply restrict the penalty to adults and those that have abolished the penalty altogether. Additionally, a state may have banned the penalty for those under 18 at one point in its history and abolished for all offenders at a later date; the United Kingdom and France are examples of this order of abolition.

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[7] William Schabas, *The Abolition of the Death Penalty in International Law* (Cambridge: Cambridge University Press, 2002), 5.

Outright abolition of the death penalty in the modern era began in Austria, Brazil, Russia and Tuscany, as all of these jurisdictions suspended the use of the penalty for a period of time in the 18th and 19th centuries. Additionally, other states such as Portugal and the Netherlands abolished for ordinary crimes in the 19th century, but retained the penalty for extraordinary crimes, such as those committed during war.

Although the European system is today widely considered among the most advanced with regard to abolition, it was the United States that blazed an abolitionist trail in the 19th century.[8] Michigan was the first U.S. state to abolish the death penalty in 1846 for all crimes except treason, before any state in the world and more than 20 years before any state in Europe.[9] Wisconsin abolished the penalty for *all* crimes in 1853, 10 years before any state in the world and 13 years before the first European state, San Marino, in 1865. [10] Moreover, Wisconsin abolished the penalty for all offenders 119 years before any current member state in the European Union.[11]

Opposition to the death penalty outside of the few countries that abolished it outright merely targeted certain practices or sought to limit the penalty's application rather than to end it altogether. A concern about public executions (and the unruly crowds they attracted), limitations on the penalty for the very young and an ever-shrinking list of capital crimes characterized reform in the 19th and early 20th centuries. Efforts to eradicate the child death penalty began in earnest in the 19th century, and abolitionists

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[8] Tuscany, Austria and Russia all suspended the death penalty for periods during the 18th century. Roger Hood, *The Death Penalty: A Worldwide Perspective*, Third ed. (Oxford: Oxford University Press~, 2002).

[9] Franklin E. Zimring and Gordon Hawkins, *Capital Punishment and the American Agenda* (Cambridge: Cambridge University Press, 1986), x, Amnesty International, "Facts and Figures on the Death Penalty," (Amnesty International, 2005; reprint),Facts and figures on the death penalty </library/Index/ENGACT500062005?open&of=ENG-392>. Portugal was the first European state to abolish for ordinary crimes in 1867.

[10] Venezuela was the first country to abolish in 1863. Wisconsin restored the death penalty in 2006.

[11] Amnesty International, "Facts and Figures on the Death Penalty." Sweden and Finland were the first countries in the E.U. to abolish the death penalty for all crimes in 1972.

capitalized on a few executions of children that were especially disturbing, as described in chapter 3.[12] In Britain, at least, the abolitionists' intention was not to end the death penalty only for children, but to end it for everyone. Although these abolitionists had a broader agenda, they recognized child executions as particularly reprehensible and seized upon these executions to spotlight the penalty's inhumanity. Their reform efforts succeeded. The 19th century saw an end to public executions in the United Kingdom and elsewhere. Venezuela (1863), San Marino (1865), Costa Rica (1877) and Brazil (1882) ended the penalty for all crimes during the 19th century. Ecuador (1906) followed in the early years of the 20th century. France (1906), Paraguay (1914), Trinidad (1925) and the United Kingdom (1933) ended the penalty only for child offenders under the age 18 in the early 20th century.

Abolition accelerated after World War II, but not before some states carved out exceptions for war crimes even though the penalty was already prohibited in their domestic law.[13] This postwar period was notable for the creation of international human rights law and the establishment of the United Nations, and it marked a turning point in how the penalty was viewed. The events of the war made the danger of the penalty's abuse by individual states starkly evident.[14] The period was equally notable, however, for trials of war crimes and collaboration that allowed for and resulted in executions of the convicted.

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[12] See in particular the John Any Bird Bell execution in 1831 and the John Morely execution in 1887. Sir Leon Radzinowicz and Roger Hood, *A History of English Criminal Law*, 5 vols., vol. 5 (London: Stevens & Sons, 1986), The London Times, "Execution of John Any Bird Bell, for Murder," (London1831; reprint).

[13] Norway in 1946 is a good example of this. Schabas, *The Abolition of the Death Penalty in International Law* , 1.

[14] Ibid., 6.

These competing forces, a dawning global recognition of the right to life versus the continued pursuit of the long-held idea of retributive justice, shaped the human rights law that would emerge from this period.[15] The Universal Declaration of Human Rights (UDHR, 1948) does not mention the penalty at all, and the International Covenant on Civil and Political Rights (ICCPR, drafted in 1957) limits but does not ban the penalty, forbidding it only for child offenders under the age 18 and pregnant women. Not until the Second Optional Protocol to the ICCPR in 1989 do we see a call for complete abolition.

Nonetheless, by the end of the 20th century, almost 37 percent of all countries had abolished the death penalty for all crimes and all offenders.[16] By 2010, almost 50 percent of countries had abolished for all crimes and all offenders, children included.[17] Some of these countries had previously abolished the penalty only for child offenders. This group included Albania, Armenia, Australia, Azerbaijan, Bulgaria, Cook Islands, Denmark, France, Hungary, Italy, Mauritius, Netherlands, New Zealand, Paraguay, Philippines, Poland, Romania, Rwanda, Serbia,[18] South Africa, Ukraine, United Kingdom and Uzbekistan. The profound shift in death penalty law during the last half of the 20th century is dramatically illustrated by the changes between the post-World War II Nuremberg trials and the international criminal trials at the end of the century. When Uruguay objected to death sentences at the Nuremberg Tribunal, it was accused of sympathizing with the Nazis. In contrast, none of the recent international criminal trials,

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[15] Kiyoteru Tsutsui and Christine Min Wotipka, "Global Civil Society and the International Human Rights Movement: Citizen Participation in Human Rights International Nongovernmental Organizations," *Social Forces* 83, no. 2 (2004): 590.
[16] Based on United Nations membership of 189 in 2000. The number of abolitionist countries was 69 in 2000.
[17] Based on United Nations membership of 192 in 2010. The number of abolitionist countries for all crimes was 95 in March 2010.
[18] Abolished for child offenders in 1992 as the Federal Republic of Yugoslavia.

including the tribunals for the former Yugoslavia and Rwanda and rules established for the International Criminal Court, permit the penalty.[19]

With countries that fall into one of two sets or categories — one that abolished the death penalty altogether and one that abolished only for child offenders who commit their crimes when under the age 18 — both in practice end the death penalty for child offenders. However, states that abolished the penalty outright are of little use in an analysis of the death penalty for child offenders because it is not clear what motivations or collection of factors led to abolition. In the case of these countries, it is not immediately evident that the protected status accorded to children or the special legal and cultural significance of childhood had any impact whatsoever on death penalty policy.

In contrast, when a state limits the penalty to those who commit their crimes when they are older than 18, it says something specific about that state's actions. First, the limitation creates a law and policy distinction between adults and children and may indicate a social and cultural distinction as well. Second, it signifies acceptance of age 18 as a demarcation point separating childhood from adulthood. Third, it suggests that children are different from adults, at least in terms of state penal policy. In short, the abolition of the death penalty for child offenders may suggest a widespread acceptance of societal responsibility for children and their actions, a responsibility not accepted for adult criminals. I say '*may'* because the legal limitation of the death penalty to criminals who commit their crimes when they are older than 18 actually says nothing *prima facie* about the motivations or processes behind the reform. States may adopt these reforms for a host of reasons, including pressure from the international community, regional norms or

[19] Schabas, *The Abolition of the Death Penalty in International Law*
, 1-2.

adherence to international law, in place of (or in addition to) ideas about children's protection, vulnerability and reduced culpability for their actions.

In this dissertation, I focus on several phenomena: First, I trace the international adoption of death penalty reforms for those under 18, presenting data from all states that abolished for child offenders, regardless of whether they abolished the penalty altogether or just for offenders under 18. I map the arc of this type of reform by identifying the global pattern of adoption, the diffusion of the norm against child offender executions. Second, I compare this phenomenon of diffusion with other historical events: colonialism, world wars, the Cold War, and the birth and development of international institutions. Third, I contextualize changes in death penalty reforms for children within movements toward children's rights in general. Finally, I select case studies that allow me to get at the micro-level processes of death penalty reform for children and the motivations of states for abolishing the penalty for child offenders.

By restricting my case study analyses to those states that abolished the death penalty for child offenders under the age 18, I can better target and examine the advent, spread and acceptance of the norm against executing child offenders. While I recognize that some states that abolished the death penalty for all crimes and all criminals may have been influenced by norms against child offender executions, this broader phenomenon is beyond the scope of this dissertation.

METHODOLOGY

By considering how states integrate a specific norm into their domestic value system and legal framework, I explore the distinct roles and particular contributions of

state structure, international pressure, domestic-level actors and law in human rights change and international transformation. Hegemony, I found, did matter in the diffusion of this norm, as the British and French empires spread the norm to their colonies. However, the post-World War II hegemon, the United States, vociferously opposed the norm and was one of only two states that did not ratify the 1990 Convention on the Rights of the Child (CRC), the most significant legal treaty for the enshrinement of children's rights, specifically citing the provision banning the child death penalty among other objections.

My dissertation employs qualitative and comparative methodologies that draw on the legal histories of countries primarily through the use of archives and foreign law collections. I trace the lifecycle of the norm against the death penalty for child offenders from its origins to its rapid global spread in two cascades, in 1960-1981 and in 1985-2005, to the present period, when it has been internalized by most countries while also strongly contested by a handful of others. To track the norm's evolution, I have compiled a dataset of countries that abolished the death penalty for child offenders between 1863 (the date of Venezuela's general abolition) and 2009 (Burundi and Togo) through multiple archives and collections, namely, the Amnesty International USA archives (then) at the University of Colorado-Boulder, the United Nations Repository at the University of Minnesota, the private archives of David Weissbrodt, at the University of Minnesota, and the foreign law and history of childhood collections at the University of Minnesota Law School, New York University Law School, Smith College and the University of Massachusetts-Amherst.

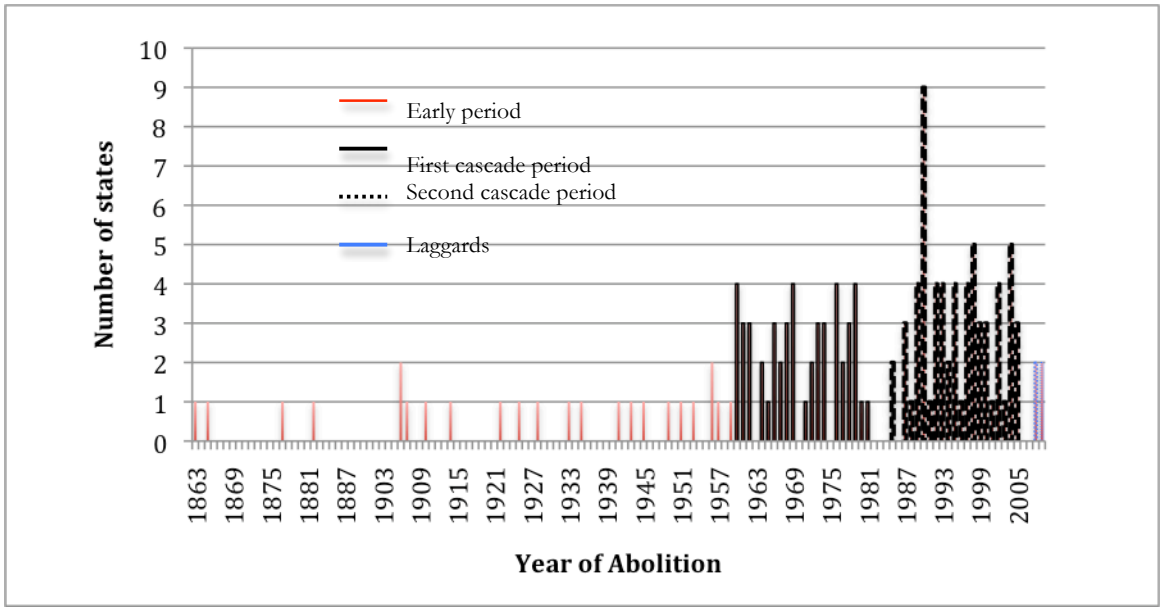
Prior to this dissertation, there were no comprehensive comparative legal studies on the execution of child offenders in national law in the humanities, social sciences or law in the form of dissertations, monographs and published articles. The degree to which the practice of executing child offenders occurred and the processes and methods by which it became practically obsolete by 2010 were unknown. To better understand the history of children and the death penalty, I located the *first* instances in the penal codes of states when children under the age 18 were excluded from the death penalty. To do this, I examined the penal codes of these countries through the 19th and 20th centuries and traced the law through various alterations and legal addendums until the modern understanding of child protection emerged, an understanding defined by the exclusion of children under the age 18 from the death penalty without any qualifications, through terms such as '*mens rea*,' '*avec discernement,'* '*mente culpable*,' 'with intent,' or 'with malice aforethought.' I used primary source material where possible, insofar as it (or a reliable translation) could be found in French, Spanish or English. Some legal codes are simply not available in American libraries, thus limiting my research.

As a result, this dissertation does not fit neatly within typical disciplinary boundaries such as comparative politics and international relations. Moreover, the dissertation draws heavily on scholarship outside of political science, from fields including sociology, international law, comparative law, business studies, cultural studies, curriculum studies, history and anthropology. Because the dissertation is, at once, grand in its scope of inquiry—international legal diffusion over an extended period of time—as well as case study oriented, it has benefited tremendously from diverse efforts, methods and approaches across disciplines.

From this dataset, I selected case studies according to the time period in which states abolished the child death penalty. These case studies thus include *early adopters*—states that abolished between 1863 and 1959—(the United Kingdom, Tunisia, France, Japan, Ethiopia); *first cascade adopters*—1960-1981—(Algeria, Tanganyika/Tanzania, Kenya); and *second cascade adopters* and *laggards*—1985-2005—(the United States, China, Pakistan). I also conducted case studies of one international governmental organization (IGO)—the United Nations Fund for Children (UNICEF), an organization important to the advancement of the model of the globalized child after World War II—and one international nongovernmental organization (INGO), Amnesty International and its American chapter, AIUSA, organizations that were critical to the selection of the child death penalty as a focus of rights-based efforts beginning in the late 1980s.

As shown in Figure 1.1 below, the first cascade was smaller than the second; it contained fewer states and had a lower rate of adoption.

FIGURE 1.1: NUMBER OF STATES THAT ABOLISHED THE CHILD DEATH PENALTY BY YEAR



The data suggests that the period after 2005 can be thought of as the late period of norm diffusion, or the period when the norm has been widely adopted or institutionalized. Even though more states could adopt protections against the child death penalty, by the late period the norm has successfully cascaded and been enshrined as customary international law.

With this research completed, I then organized these case studies into categories by like mechanisms of diffusion:

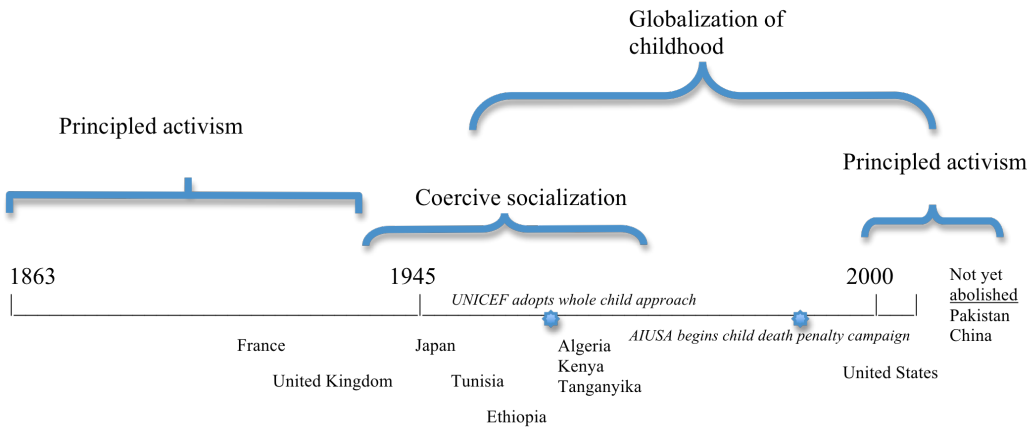
1. *Principled activism:* Principled actors petitioning their state for changes in law and policies of child protection.

2. *Coercive socialization*: The forced adoption of child protection laws through colonialism and the subsequent legal acculturation that occurred.

3. *Globalized childhood*: Western norms about children in terms of age, development, maturity and competence becoming a singular, universal model applied to children in all states, economies and cultures after World War II. This model derived its authority from the natural sciences and later from the social sciences and international law.

Although these categories correspond roughly with the temporal periods of early adoption, first and second cascade adoption, and late period adoption, organizing the case studies by mechanism of diffusion is a much more efficient method of presenting the dissertation's empirical and theoretical findings. See Figure 1.2 below.

FIGURE 1.2: THE MECHANISM OF DIFFUSION OF THE NORM PROHIBITING THE DEATH PENALTY FOR CHILD OFFENDERS.



The overlap of diffusion mechanisms seen in the above figure demonstrates how a purely temporal categorization of case studies is less useful than organization by like mechanism of diffusion.

This dissertation topic has also entailed certain obstacles. Children have been "distant from the epicenters of power," and studying them presents many challenges.[20] Indeed, the intersection of childhood and human rights is a marginalized topic in almost every field of the social sciences, and its study therefore requires creativity in using sources not explicitly produced to advance the study of childhood. Before the 1970s, for example, there was comparatively little written on children and childhood.[21] This dearth

[20] Gottlieb, *The Afterlife Is Where We Come From: The Culture of Infancy in West Africa*, 49-50.
[21] Some exceptions; Edward Fuller, *An International Yearbook of Childcare and Protection* (London: Save the Children Fund, 1924), Jean S. Heywood, *Children in Care: The Development of the Service for the Deprived Child*, 2nd ed. (London: Routledge & Kegan Paul, 1965), Fielding H. Garrison M.D., "History of Pediatrics," in *Abt-Garrison History of Pediatrics*, ed. Isaac A Abt M.D. (Philadelphia: W. B. Saunders Company, 1965), Emma Duke, "Infant Mortality; Results of a Field Study in Johnstown, Pa, Publication No. 9," (Washington, D.C.: United States Children's Bureau, 1915; reprint), Phillipe Aries, *Centuries of Childhood* (New York: Random House, 1962), Edward Fuller, "The International Year Book of the Child Care and Protection, V. 2," (London: Save the Children Fund, 1925; reprint), ———, "The International Handbook of Child Care and Protection, V. 3," (London: Save the Children Fund, 1928; reprint), A.W.G. Kean, "The History of the Criminal Liability of Children," *The Law Quarterly Review* 53 (1937), Edward Fuller, *The Right of the Child: A Chapter in Social History* (London: Victor Gollancz Ltd., 1951), Ivy Pinchbeck and Margaret Hewitt, *Children in English Society, Volume 1: From Tudor*

of source material is a problem not only for a Western historical study of childhood, but also for the greater challenge of researching the history of childhood in Africa, the Middle East, Latin America and Asia. A focus on the child death penalty—an obscure part of the history of childhood and one widely ignored—compounds these difficulties. Where I must, I employ proxies to help me determine the status and motivations of actors in these regions. In the selection of proxies—for example, investigating the child policies of the British Empire in India in order to understand the actions of the British in African colonies—I make every attempt to be conservative in my generalizations and to note these where necessary.

Finally, I trace the model of childhood as it diffuses internationally through *law*—specifically, criminal law addressing child offenders, usually those convicted of murder or rape. Law gives us important information about a state's attitudes toward children by revealing the parts of childhood the state chooses to regulate. The exclusion of offenders from the death penalty based on age sends a powerful message of protection for children, as the ban applies to all children, murderers and rapists included. Moreover, laws that abolish the death penalty for child offenders require little additional infrastructure, as facilities to house criminals who previously would have been given the death penalty likely already exist. As such, laws protecting violent children may better reflect common ideas of childhood than more material developments outside of law, such as increases in vaccinations or the building of schools.

Times to the Eighteenth Century, 2 vols., vol. 1 (London: Routledge & Kegan Paul, 1969), Ira J. Gordon, *Children's Views of Themselves* (Association for Childhood Education International, 1959), Margaret Rasmussen, *Early Childhood* (Washington,: Association for Childhood Education International, 1966), William Dewees, *A Treatise on the Physical and Medical Treatment of Children*, 3rd ed. (Philadelphia: Carey, Lea & Carey, 1829), Frederic Milton Thrasher, *The Gang* (Chicago, Ill.,: The University of Chicago Press, 1927), B.E.F. Knell, "Captial Punishment: Its Administration in Relation to Juvenile Offenders in the Nineteenth Century and Its Possible Administration in the Eighteenth," *British Journal of Criminology* 5, no. 198 (1965).

LITERATURE REVIEW

In contrast to other social sciences, the international relations literature suffers from a paucity of scholarship on childhood or children, as "very few writers address in any critical way either their role, or the implications of conceptualizing it."[22] Even feminist theories in international relations, a body of scholarship devoted, among other endeavors, to the exploration of public and private spheres, largely exclude children.[23] Alison Watson suggests that the private sphere is not only highly gendered, as feminist theorists contend, but also "*highly kindered*."[24] International law tends to conflate women and children into a single category, a grouping that impedes a recognition of women's independent agency.[25] Children's agency is likewise ignored in this conflation, as scholars fail to recognize the "variety of political spheres that exist—public and private—and the intersection that takes place between them."[26]

Most international relations scholarship on children is found in the child conflict literature[27] or child labor literature,[28] but a few authors have addressed the construction of

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[22] Alison Watson, "Children and International Relations: A New Site of Knowledge?," *Review of International Studies* 32, no. 2 (2006): 239.
[23] Ibid.: 242.
[24] Ibid.
[25] Ibid.: 243.
[26] Ibid.
[27]Frank Faulkner, "Kindergarten Killers: Morality, Murder and the Child Soldier Problem," *Third World Quarterly* 22, no. 4 (2001)., Vera Achvarina and Simon F. Reich, "No Place to Hide: Refugees, Displaced Persons, and the Recruitment of Child Soldiers," *International Security* 31, no. 1 (2006).,Carol B. Thompson, "Beyond Civil Society: Child Soldiers as Citizens in Mozambique," *Review of African Political Economy* 26, no. 80 (1999), Steve Hicks, "The Political Economy of War-Affected Children," *Annals of the American Academy of Political and Social Sciences*, no. 575 (2001), Jo de Berry, "Child Soldiers and the Convention on the Rights of the Child," *Annals of the American Academy of Political and Social Sciences*, no. 575 (2001), Charli Carpenter, "Surfacing Children: Limitations of Genocidal Rape Discourse," *Human Rights Quarterly* 22, no. 2 (2000), Siobhan McEvoy-Levy, ed. *Troublemakers or Peacemakers? Youth and Post-Accord Peacebuilding* (Notre Dame: University of Notre Dame Press,2006), Helen Brocklehurst, *Who's Afraid of Children: Children Conflict and Global Politics* (Surrey: Ashgate, 2006).
[28] William E. Myers, "The Right Rights? Child Labor in a Globalizing World," *Annals of the American Academy of Political and Social Sciences*, no. 575 (2001), Sudharshan Canagarajah and Helena Skyt Nielson, "Child Labor in Africa: A Comparative Study," *Annals of the American Academy of Political and Social Sciences*, no. 575 (2001), Geeta Chowdhry and Mark Beeman, "Challenging Child Labor: Transnational Activism and India's Carpet Industry," *Annals of the American Academy of Political and Social Sciences*, no. 575 (2001).

childhood in international relations head-on. Norman Lewis, for example, considers the relationship between the construction of childhood in international law and the measure of legitimacy for developing states.[29] Vanessa Pupavac, also a noteworthy exception, suggests that international efforts to protect children reflect our disenchantment with humanity and present a legal challenge both to self-determination and individual agency.[30] Both of these scholars view childhood as a site of intervention by the North into the South, a "moral imperialism" reminiscent of colonialism. This issue is taken up in chapters 5 and 7.

Constructivism, critical theory and postmodern approaches to international relations offer opportunities to explore the position of children and childhood in international society through genealogical studies that expose the origins of social constructions of children. Yet children have been largely ignored in these areas of scholarship as well. A key objective of this dissertation is to remedy this exclusion by revealing and explaining the historical and social construction of children and childhood in the post-World War II international system.

For sociological institutionalists, education serves as a primary site of emerging features of global culture, and therefore, a considerable body of scholarship examines the standardization of education and curricula around the world. [31] Schools, after all, are where the state instills values and imparts a worldview.[32] Children and the relationship

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[29] Watson, "Children and International Relations: A New Site of Knowledge?.", Norman Lewis, "Human Rights, Law and Democracy in an Unfree World," in *Human Rights Fifty Years On: A Reappraisal*, ed. Tony Evans (Manchester: Manchester University Press, 1998).

[30] Vanessa Pupavac, "Misanthropy without Borders: The International Children's Rights Regime," *Disasters* 25, no. 2 (2001): 96.

[31] John W. Meyer, "The Nation as Babbitt: How Countries Conform," *Contexts* 3, no. 3 (2004): 46-47.

[32] Marianne N. Bloch and ebrary Inc., "The Child in the World/the World in the Child Education and the Configuration of a Universal, Modern, and Globalized Childhood," In *Critical cultural studies of childhood.* (Basingstoke: Palgrave Macmillan, 2006), http://www.columbia.edu/cgi-bin/cul/resolve?clio6729173.

between children and the state have also figured prominently in these studies. Although the death penalty for child offenders has not received attention in the sociological institutionalist literature, the two fields are related because limitations on the death penalty for child offenders are a product of the state/child relationship and speak to the nature of children and their role in society, the state and the future direction of the world polity.

On the broader topic of children in general, sociological institutionalists argue that childhood is a social construction, one that has been built (and continues to be built) on a global scale. This view is consistent with that of scholars in international relations and law, constructivists and international legal theorists included, who contend that citizens and legal subjects are constructed over time.[33] There is strong support for the argument that childhood is a social construction because its meaning has been understood differently at different times and places. Moreover, attitudes or moral positions about the nature and capabilities of children have likewise varied remarkably.

When social constructivists and sociological institutionalists refer to something as universal, as a global norm or a part of world culture, they do not mean that it is found everywhere, in every society. Rather, they suggest that it is:

> presented to the world 'as if' it were universally meaningful, applicable, useful, or proper. The element is presumed to be interpretable in a largely

[33] Margaret E Keck and Kathryn Sikkink, *Activists Beyond Borders* (Ithaca: Cornell University Press, 1998), Micheal Barnett, "Social Constructivism," in *The Globalization of World Politics*, ed. John Baylis and Steve Smith (New York: Oxford University Press, 2005), Emanuel Adler, "Constructivism and International Relations," in *Handbook of International Relations*, ed. Walter Carlsnaes, Thomas Risse, and Beth Simmons (London: Sage, 2002), Nicholas Onuf, "Worlds of Our Making: The Strange Career of Constructivism in International Relations," in *Visions of International Relations*, ed. Donald J. Puchala (Columbia: University of South Carolina Press, 2002), ———, *World of Our Making: Rules and Rule in Social Theory and International Relations* (Columbia: University of South Carolina Press, 1989), Ted Hopf, "The Promise of Constructivism in International Relations Theory," *International Security* 23, no. Summer (1998), Franklin E. Zimring, *The Changing Legal World of Adolescence* (New York: Free Press; Collier Macmillan, 1982).

> uniform way and to make sense both cognitively and, often, normatively, in any particular local culture or social framework.[34]

The term universal thus refers to the "correlative concept of cultural universalism."[35] When this dissertation refers to the 'universal model of childhood' or a 'globalized childhood,' it does not describe a model that all states have adopted. Rather, it refers to the qualities of childhood that are reflected in international law, the childhood that should, according to world society, apply to children everywhere.

NORM EMERGENCE

The role of principled actors in the origin and development of the norm against the child death penalty conforms to the expectations of agentic constructivists and liberal theorists in international relations.[36] Constructivists have proposed that norms may evolve in stages with a distinct lifecycle of emergence, acceptance and internalization. The emergence period can be differentiated from the lifecycle's late period—by which time the majority of states have adopted the norm—by the development of a critical mass of support for the norm. This critical mass forms during the cascade period, when states in quick succession adopt the norm. Sociological institutionalists have explored at length the process by which state institutional models have diffused internationally. Their findings suggest that domestic factors are most influential at early stages of the normative lifecycle and that they are less influential as the norm spreads. Since liberal theories of

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[34] Frank J. Lechner and John Boli, *World Culture: Origin and Consequences* (Malden, MA: Blackwell Publishing, 2005), 21.
[35] Ibid.
[36] Andrew Moravcsik, "The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe," *International Organization* 54, no. 2 (2000), Martha Finnemore and Kathryn Sikkink, "International Norm Dynamics and Political Change," in *Exploration and Contestation in the Study of World Politics*, ed. Peter J. Katzenstein, Robert O. Keohane, and Stephen D. Krasner (Cambridge, Massachusetts: MIT Press, 1999), Keck and Sikkink, *Activists Beyond Borders*, Thomas Risse, Stephen C. Ropp, and Kathryn Sikkink, eds., *The Power of Human Rights: International Norms and Domestic Change*, Cambridge Studies in International Relations (Cambridge: Cambridge University Press,1999).

international relations seek domestic explanations for international developments, these theories are especially suited to studies of norm emergence.

Constructivist and liberal theories are, in fact, the *only* ones capable of explaining the emergence of norms. Although sociological institutionalists recognize that key parts of the global cognitive framework have their origins at the domestic level,[37] they fail to offer a theory of emergence apart from the origins of norms in powerful, Western cultures. How, for example, can theories of emulation account for peripheral innovators, such as the Latin American states that abolished the death penalty in the 19th century? Realists, as well, would have little to say about the emergence of a norm considered to be low politics and epiphenomenal to international organization.[38] Chapter 3 evaluates the principled activism for the norm against the death penalty for child offenders through the case studies of the United Kingdom and France.

NORM CASCADES

The key demarcation between the early period of norm emergence and the later period of norm institutionalization is the cascade—a period of rapid spread during which a critical mass of states adopt the norm. Constructivists and sociological institutionalists contend that the cascade ushers in a new stage of widespread acceptance, whereby the primary motivation for states to adopt the law or norm is to emulate other states in the

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[37] Tsutsui and Wotipka, "Global Civil Society and the International Human Rights Movement: Citizen Participation in Human Rights International Nongovernmental Organizations," 589. Francisco O. Ramirez, Yasemin Soysal, and Suzanne Shanahan, "The Changing Logic of Political Citizenship: Cross-National Acquisition of Women's Suffrage Rights, 1890 to 1990," *American Sociological Review* 62, no. 5 (1997), Cole, "Sovereignty Relinquished? Explaining Commitment to the International Human Rights Covenants, 1966-1999.", John W. Meyer, "Globalization: Theory and Trends," *International Journal of Comparative Sociology* 48, no. 261 (2007), Hafner-Burton and Tsusui, "Human Rights in a Globalizing World: The Paradox of Empty Promises."

[38] Stephen D. Krasner, "Sovereignty, Regimes, and Human Rights," in *Regime Theory and International Relations*, ed. Volker Rittberger (Oxford: Clarendon Press, 1993).

system. A distinguishing quality of the cascade period is that countries may adopt a norm even without domestic pressure to do so. In other words, the sole impetus for the adoption of a norm may be external, the result of international or regional pressure. Sociological institutionalists expect isomorphism across the system of states precisely because of these cascades. They would expect that as the norm protecting child offenders from the death penalty continues to find purchase, the pressure on states that have not yet adopted the norm should increase, resulting in a cascade of legislative spread.

Sociological institutionalists also have clear expectations regarding the increasing reliance of child advocates on scientific expertise and objectivity. Today, according to sociological institutionalists, evidence of this dependence on science can be found in the phenomenon of relatively undifferentiated national policies across the globe by countries pursuing a single standard of national progress and welfare.[39] Sociological institutionalists argue that the isomorphism of state structure and national policies is the result of a world culture that furnishes the cognitive framework within which both states and individuals "understand the world and orient [themselves] to it."[40] States eagerly adopt similar (and often identical) forms of organization because they desire progress, a good society and international legitimacy as defined through the prevailing cognitive framework in contemporary world culture.[41]

Global models of state organization and isomorphic interpretations of progress and justice have expanded throughout the last few centuries, according to sociological

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[39] Meyer, "Globalization: Theory and Trends," 262. James G. March and Johan P. Olsen, *Rediscovering Institutions : The Organizational Basis of Politics* (New York: Free Press, 1989), Walter W. Powell and Paul DiMaggio, *The New Institutionalism in Organizational Analysis* (Chicago: University of Chicago Press, 1991), Martha Finnemore, "Norms, Culture, and World Politics: Insights from Sociology's Institutionalism," *International Organization* 50, no. 2 (1996).
[40] Lechner and Boli, *World Culture: Origin and Consequences*, 15.
[41] Meyer, "Globalization: Theory and Trends," 263. ———, "The Nation as Babbitt: How Countries Conform.", Lechner and Boli, *World Culture: Origin and Consequences*, Meyer, "Globalization: Theory and Trends."

institutionalists. This trend has especially accelerated since the end of World War II.[42] Moreover, the preoccupation of the international community with human rights is a particularly visible part of this acceleration. Since there is no supranational authority in the international system, human rights cannot be rooted in positive law. Instead, its authority is based in science and rationality and in modern conceptions of prosperity and progress that emphasize individual well-being.[43]

Within world culture, according to sociological institutionalists, there are 'scripts'—akin to norms in the international relations literature—that are created through the joint production of individuals, societies and states.[44] Yet the contributions of members of world society and world polity[45] to global scripts or norms are not adopted equally as part of world culture, as will be discussed below, because members do not all exhibit the same degree of progress and justice—an important measure of legitimacy in modern world culture.

Sociological institutionalists argue that between the end of the 18th century and the beginning of the 20th century, certain rapid changes took place in the international system: The world exhibited more unity, expressed symbolically through the creation and development of international law, for example.[46] By the beginning of the 20th century, sociological institutionalists contend, a single world culture—one primarily "made in and by Europe" —had "coalesced."[47] For more than a century now, we have understood the

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[42]Tsutsui and Wotipka, "Global Civil Society and the International Human Rights Movement: Citizen Participation in Human Rights International Nongovernmental Organizations," 597.
[43] Meyer, "Globalization: Theory and Trends," 263, 267.
[44] Lechner and Boli, *World Culture: Origin and Consequences*, 44.
[45] Sociological institutionalists consider world polity to be states and IGOs. World society consists to be nongovernmental organizations (similar to what others may refer to as civil society). Cole, "Sovereignty Relinquished? Explaining Commitment to the International Human Rights Covenants, 1966-1999," 480.
[46] Lechner and Boli, *World Culture: Origin and Consequences*, 69-70.
[47] Ibid., 65.

world as a "unitary social system," "a singular polity" where actors view the entire world "as their arena of action and discourse."[48]

By joining institutions committed to global ideals of progress and justice, states gain legitimacy in world society and, as a result, are invited to participate in the global market and take part in elaborate ceremonies that celebrate a commitment to justice (often spoken of as human rights) and economic progress (often referred to as development), such as global forums and conferences. Through the cognitive frames of progress and justice, the goals of world society are diffused, triggering a desire for legitimacy and peer pressure on states to conform to global standards. This process makes the adoption of these goals and forms of organization 'appear' voluntary and, at times, even indigenous.

Interestingly, however, sociological institutionalists do not necessarily see this global peer pressure as requiring action, such as compliance with international human rights law, but often only as needing to "appear virtuous" in order to gain legitimacy.[49] The need to appear virtuous to neighbors and other states in the international system (by ratifying the necessary treaties), rather than to 'be virtuous' (by complying with the treaties ratified) explains, to some degree, the presence of laggards in the 21st century regarding the norm against the death penalty for child offenders. In fact, sociological institutionalists even *expect* laggards, a problematic assertion, as will be argued below.

Drawing on Emile Durkheim, John Meyer argues, "Collective principles, ceremonies, and agreements influence individual and national behavior, despite their

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[48] John Boli and George M. Thomas, *Constructing World Culture : International Nongovernmental Organizations since 1875* (Stanford, Calif.: Stanford University Press, 1999), 14.
[49] Meyer, "Globalization: Theory and Trends," 264.

specific intentions and often beyond their conscious awareness."[50] Global models shape the values, beliefs and actions of individuals within states by offering cognitive frames within which they understand social problems and solutions. Even if states do not change specific behaviors as a result of global cultural pressure, their citizens will be nonetheless affected by the global consensus through international institutions and law as well as by other displays of ideological unity.

Sociological institutionalists have little to say about the coercive nature of colonialism as a method of diffusion.[51] As Martha Finnemore argues, "Violence is a fundamentally different mechanism of change than cognition."[52] In the case studies of this dissertation, state models and laws about children were originally adopted in British and French colonies through coercion. Although sociological institutionalists recognize the unique role of the British Empire in shaping world culture, they tend to downplay the role of coercion in that process. Even considering that the violence inherent to the colonial enterprise took place before independence and that cognitive approaches can explain patterns of adoption in the post-independence and cascade periods, there is still an agency problem. The primary mechanism of diffusion for world society, cognitive processes, is only relevant after the initial violence of acculturation. Cognitive processes cannot explain the model's spread.

Moreover, sociological institutionalists tend to under-emphasize the role of law in the diffusion of world cultural models. For these theorists, law and national policy are

[50] ———, "The Nation as Babbitt: How Countries Conform," 44.
[51] Finnemore, "Norms, Culture, and World Politics: Insights from Sociology's Institutionalism," 339-340.
[52] Ibid.: 343.

seen as the dependent variable, as evidence of the isomorphism of state models.[53] Yet the case studies in this dissertation demonstrate that legal diffusion is in fact a primary method of norm diffusion and that it should be recognized as an independent variable that can explain isomorphism in both state organization and in the values of newly independent states.

Coercion via law is likewise a different type of coercion than that theorized by realists; it is not material coercion like military power or economic pressure. Rather, it is a method of organizing society by determining permissible behaviors, legitimate petitioners (as subjects under law), contracts and consequences. Only constructivists acknowledge this kind of power. Michael Barnett and Bud Duvall suggest that many approaches in international relations suffer because they employ simplistic and narrow understandings of power derived from realist analysis.[54] Indeed, colonial power via law, according to Barnett and Duvall, is compulsory and institutional, representing a direct form of power that works through the interactions of specific actors (the traditional way we understand power), and through the social relations that constitute the capacities of subjects (as either colonizers or the colonized), respectively.[55] Furthermore, a simplistic or inadequate conception of power is not limited to international relations scholars. Legal positivists in the field of law likewise expect that international treaties and norms are meaningless because they lack coercion capable of securing compliance with international law.[56]

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[53] Meyer, "Globalization: Theory and Trends.", John W. Meyer et al., "World Society and the Nation-State," *The American Journal of Sociology* 103, no. 1 (1997).
[54] Micheal Barnett and Raymond Duvall, "Power in International Politics," *International Organization* 59 (2005): 43.
[55] Ibid.: 43-48.
[56] Benedict Kingsbury, "The Concept of Compliance as a Function of Competing Conceptions of International Law," *Michigan Journal of International Law* 19, no. 345 (1998), Arend Anthony Clark, Robert J. Beck, and Robert van der Lugt, eds.,

Legal diffusion also possesses a "productive power" that is indirect.[57] Barnett and Duvall contend that productive power works by constituting "all social subjects with various social powers through systems of knowledge and discursive practices of broad and general social scope."[58] Coercive socialization through law, as a form of productive power, discursively produces legal subjects, attaches legal meanings, and defines the scope of judiciable actions.[59]

This dissertation argues that the mechanics of diffusion in the cascades are best understood through a hybrid of realist/sociological institutionalist/agentic constructivist approaches. Realists can explain the role of the British and French empires in cultivating Western norms through coercive means; sociological institutionalists can explain the spread of a particular global model of childhood with similar or identical features throughout the world, while constructivists can explain the unique type of power at work in coercive socialization. These schools of thought, however, disagree about the play of competing norms in the international system: Constructivist theories claim that norms compete against one another in the international arena and that some norms succeed over others because they are more persuasive or are backed by powerful actors, better framed, or nest better within already adopted norms. This is certainly all true, but sociological institutionalists (and realists) would take these assertions further and claim that the competition was rigged from the beginning.

International Rules: Approaches from International Law and International Relations (Oxford: Oxford University Press,1996), John Austin and Sarah Austin, *The Province of Jurisprudence Determined*, 2nd ed. (London,: J. Murray, 1861), John Austin and Wilfrid E. Rumble, *The Province of Jurisprudence Determined*, Cambridge Texts in the History of Political Thought (New York, NY ; Cambridge: Cambridge University Press, 1995), John Austin, Robert Campbell, and Sarah Austin, *Lectures on Jurisprudence, or, the Philosophy of Positive Law*, 3d ed. (London: J. Murray, 1869).

[57] Barnett and Duvall, "Power in International Politics," 43.

[58] Ibid.: 55.

[59] Ibid.: 56.

A more significant point of contention, however, concerns agency, as will be discussed below. Even though recent scholarship has sought to fix the agency problem in sociological institutionalism, these theorists (and realists) traditionally have been unable to locate agency outside of the current cognitive framework, such as change initiated by non-Western actors.[60] Only agentic constructivism can accommodate change originating from non-state actors outside of the West.[61]

Other studies support this method of coercive diffusion. Carsten Anckar, one of the few social scientists to address the death penalty on a global scale through a cross-national, quantitative study, found that

> Former colonies have simply incorporated the death penalty statutes of their former mother countries into their own legislation. The other explanation follows the same line of reasoning that applied to the discussion on the link between a history of slavery and the death penalty. The inhabitants of the colonies grew accustomed to the use of force and cruel punishments in the colonial era….Of these two explanations, diffusion is probably more important."[62]

Although Anckar examines death penalty use and not abolition, he agrees that statutes regarding the penalty were copied or adopted through emulation, and that states "grew accustomed" to the penalty through its practice, an argument that credits processes of socialization.[63] Anckar's argument, taken together with mine, suggests that colonial powers that used the child death penalty diffused the penalty, and that those that abolished the penalty diffused abolition.

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[60] Tsutsui and Wotipka, "Global Civil Society and the International Human Rights Movement: Citizen Participation in Human Rights International Nongovernmental Organizations."
[61] Keck and Sikkink, *Activists Beyond Borders*.
[62] Carsten Anckar, *Determinants of the Death Penalty : A Comparative Study of the World*, Routledge Research in Comparative Politics 8 (London ; New York: Routledge, 2004), 167.
[63] Ibid.

The diffusion literature, predominantly coming out of international relations and comparative politics, is useful for organizing the competing causal mechanisms of policy cascades. There are three main schools of thought in this area: the normative imitation approach that houses both sociological institutionalists and constructivists; the rationalist approach that typically includes neo-liberal institutionalists and some "weak" constructivists (to cite Hasenclever);[64] and a cognitive-psychological approach that suggests that the use of cognitive shortcuts may lead to suboptimal decision-making and bounded rationality.[65] There are also two principal 'classes' of mechanisms of diffusion, learning and adapting, which straddle the three schools of thought in the literature, but which rest most comfortably within a rationalist approach to diffusion.[66]

The problem with these typologies is that they tend to disregard methods of diffusion that are both coercive *and* rely on the socializing effects of policy adoption. Kurt Weyland, for example, makes a distinction between external pressure and domestic initiative, suggesting a strict dichotomy between forces distinct from the state (such as international institutions) and those within it.[67] Yet Weyland's analysis is different from the distinction drawn in this dissertation between international and domestic forces. In my argument, domestic actors (principled activists, norm entrepreneurs, etc.) pushed for the adoption of protections for children before a global model of legitimate statehood included children. Once this model existed, it exerted a powerful pull on states to adopt policies respecting human rights, the rights of children included. Domestic actors of

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[64] Andreas Hasenclever, Peter Mayer, and Volker Rittberger, *Theories of International Regimes*, vol. 55, Cambridge Studies of International Relations (Cambridge: Cambridge University Press, 1997).
[65] Kurt Weyland, "Theories of Policy Diffusion: Lessons from Latin American Pension Reform," *World Politics* 57, no. 2 (2005), ———, "The Diffusion of Innovations: How Cognitive Heuristics Shaped Bolivia's Pension Reform," *Comparative Politics* 38, no. 1 (2005).
[66] Zachary Elkins and Beth Simmons, "On Waves, Clusters, and Diffusion: A Conceptual Framework," *The ANNALS of the American Academy of Political and Social Science* 598, no. 33 (2005).
[67] Weyland, "Theories of Policy Diffusion: Lessons from Latin American Pension Reform."

other states were then socialized to the model through legal acculturation to a Western system of rights and liberties. This process is not, strictly speaking, external and purely coercive, nor is it mere emulation. Rather, it is a combination of brute force (realism), socialization through law (constructivism), and the pull of an increasingly international model of legitimate statehood (sociological institutionalism and international legal theories). Yet the diffusion literature in international relations tends to ignore the first and second processes, and to gloss over the third. When normative considerations are taken seriously, as in the work of some rationalists, they tend to be utility-driven as opposed to ideologically based.[68] Other authors reduce normative approaches to the perception of legitimacy without investigating the genealogy of legitimacy (how certain state characteristics come to be perceived as legitimate at the expense of other characteristics) or the processes by which legitimacy derives its power.[69]

Liberalism and much of the 'childhood literature' do not explain well the process of international legal diffusion that led to the norm cascade prohibiting the child death penalty. First, liberal theories of international relations suggest that domestic bargaining shapes policy outcomes, but there is no evidence that issues of child protection were a point of contention in colonialism, with one glaring exception: child marriage. The British, especially, but also the French, extended their civilizing mission to child brides, and passed a number of laws and protections throughout the colonies dictating the legal age of consent. This intrusion into family law, as discussed in more detail in chapter 4, was met with considerable resistance, but was seen by the British (at least) as a necessary

[68] Elkins and Simmons, "On Waves, Clusters, and Diffusion: A Conceptual Framework."
[69] Weyland, "Theories of Policy Diffusion: Lessons from Latin American Pension Reform.", ———, "The Diffusion of Innovations: How Cognitive Heuristics Shaped Bolivia's Pension Reform."

burden of their civilizing mission. The colonial powers succeeded in passing laws that raised the eligibility age for marriage for girls throughout the colonies, and all the countries included as case studies in this dissertation maintained these age-based restrictions, give or take a year, after independence—in most cases, the age restrictions for marriage were *raised* shortly after independence.

Second, historians, psychologists, curricula and education scholars and others have developed a young, yet thriving, scholarship on childhood and the history of the family. Drawing on the work of Hugh Cunningham and Michael Anderson, we can classify this literature into categories: the "sentiments" approach, the demographic approach, the socioeconomic approach, and (I would add another), the globalized childhood approach. First, a number of early investigators understood historical changes to childhood as changes in sentiment or attitude toward children.[70] Second, a demographic approach has sought to understand changes in families through changes in marriage age and in family size over time.[71] Third, a number of historians and social scientists have argued that socio-economic factors play a key role in the diffusion of protections for children around the globe.[72] Cunningham and others stress the structural opportunities of capitalism, especially wealth accumulation and competition among labor forces, to explain the introduction of protections for children.[73] In particular, Cunningham and others make the argument that compulsory schooling took away the economic value

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[70] Aries, *Centuries of Childhood*, Norbert Elias, *The Civilizing Process : The History of Manners* (New York: Urizen Books, 1978), Lloyd De Mause, ed. *The History of Childhood* (London: The Psychohistory Press,1974), Edward Shorter, *The Making of the Modern Family* (New York: Basic Books, 1975), Lawrence Stone, *The Family, Sex and Marriage in England* (New York: Harper & Row, 1977).
[71] Cunningham, *Children and Childhood in Western Society since 1500*, 13.
[72] Ibid.. Ferdinand Mount, *The Subversive Family: An Alternate History to Love and Family* (New York: Free Press, 1982).
[73] Cunningham, *Children and Childhood in Western Society since 1500*.

of children and was the "key change which made possible the spread of the idea that all children should have a proper childhood."[74]

Like liberal theories in international relations, the scholarship of childhood and the family does little to explain the international isomorphism of child policies. An evolution of sentimental changes toward children cannot account for how most countries in the international system developed nearly identical child policies, although it may shed light on how shifting attitudes in powerful states produced shifts in policy that were then forced upon other states. Demographic changes merely suggest convergence in (or divergence of) policies and family structure, and socio-economic factors cannot explain how states with widely varied resources and levels of material wealth adopted similar state structures and policies toward children within 100 years of one another. The globalized childhood approach, addressed in the next section, commonly draws on sociological institutionalist literature and suggests that the creation of a single, universal standard of childhood explains the isomorphism in policies toward children as well as the problems in achieving positive, lasting change for children.[75]

Finally, coercive socialization as a mechanism of diffusion did not occur in every type of colonial enterprise. Spain, Portugal and Belgium all abolished the child death penalty significantly *after* their colonies had ended the penalty. Ruggie's distinction between American *hegemony* and *American* hegemony is relevant here.[76] It was not hegemony that explained the postwar institutional arrangement, but the particular

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[74] Ibid., 203, Zelizer, *Pricing the Priceless Child: The Changing Social Value of Children*, Alan Macfarlane, *Marriage and Love in England: Modes of Reproduction 1300-1840* (London: Oxford, 1986).
[75] Marianne N. Bloch, *Governing Children, Families, and Education : Restructuring the Welfare State*, 1st ed. (New York: Palgrave Macmillan, 2003), Bloch and ebrary Inc., "The Child in the World/the World in the Child Education and the Configuration of a Universal, Modern, and Globalized Childhood.", Nikolas S. Rose, *Governing the Soul: The Shaping of the Private Self* (New York: Routledge, 1990), Roberta Lyn Wollons, *Kindergartens and Cultures: The Global Diffusion of an Idea* (New Haven: Yale University Press, 2000).
[76] John Gerard Ruggie, "Multilateralism: The Anatomy of an Institution," *International Organization* 46, no. 3 (1992): 593.

hegemony of the United States.[77] Likewise, it was not *colonialism* that was responsible for the diffusion of norms of child protection, but the particular goals and concerns of the *British* and *French* colonial powers.

LAGGARDS

Although sociological institutionalists expect hegemonic laggards and the "radical decoupling"[78] of global models and state practices, this expectation presents a theoretical contradiction not easily reconciled. Indeed, radical decoupling is exactly what we find in the international system with regard to human rights. Emilie Hafner-Burton and Kiyoteru Tsusui found that

> in no instance does state ratification of any of the six core UN human rights treaties predict the likelihood of government respect for human rights. Rather, state ratification of all six treaties has a negative effect on signatories' behavior: treaty members are more likely to repress their citizens than nonratifiers.[79]

Sociological institutionalists explain that social movements, like the movement for children's rights, are fueled by liberal ideas that may come out of the West, but that powerful actors (such as the United States) tend to resist key aspects of world culture.[80] Beth Simmons offers a more nuanced approach, suggesting in a study of international monetary affairs that states comply with international norms because of reputational concerns. Economics often plays a role as well, as states face off against their neighbors for competitive advantage within a particular region.[81]

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[77] Ibid.: 592.
[78] Hafner-Burton and Tsusui, "Human Rights in a Globalizing World: The Paradox of Empty Promises," 1383.
[79] Ibid.: 1398.
[80] Meyer, "Globalization: Theory and Trends," 266.
[81] Beth A. Simmons, "International Law and State Behavior: Commitment and Compliance in International Monetary Affairs," *American Political Science Review* 94, no. 4 (2000).

The theoretical contradiction of expecting hegemonic laggards is twofold: First, if liberal ideas about children came from the West as sociological institutionalists claim, and these ideas were fashioned in part in the United States in particular, how can a theory of global emulation of Western ideas tolerate hegemonic laggards? Sociological institutionalists provide a structural approach to norm creation and diffusion whereby norms or scripts are created and diffused by powerful countries, especially by the hegemon. The presence of hegemonic laggards in this case suggests that sociological institutionalist theories are inadequate to explain the complete diffusion of the norm against the child death penalty. Second, sociological institutionalist theories attempt to explain both the role of the British and French, as the global hegemons in the 19th and early 20th centuries, in diffusing the norm, *and* the presence of hegemonic laggards such as the United States in the late 20th century. But these theories cannot account for both phenomena.

In effect, by expecting hegemonic laggards, sociological institutionalists attempt to explain everything, and end up undermining their own approach to diffusion. If nothing could disprove a sociological institutionalist approach, then it is too adaptive as a theory of diffusion and fails to serve as a reliable guide to explain and understand the international system. I suggest instead that sociological institutionalism has much to offer as an interdisciplinary approach to diffusion, but that the school suffers from overreach. In particular, the expectation of hegemonic laggards through decoupling challenges the core assumptions of the theory and needs to be reconsidered.

Like sociological institutionalists, realists expect a compliance gap between international human rights law and state practice because human rights norms are

epiphenomenal to states' interests.[82] Even legal scholars and neoliberal institutionalists suggest that states comply with human rights law and norms only when it is in their interest to do so, although proper management can aid cooperation with treaties and international regimes.[83] However, even though realists expect laggards, they do not expect hegemonic laggards, since realists propose that the normative framework in global society should reflect the objectives, goals and values of the hegemon. Additionally, realists overlook the effects that human rights norms and laws can have on domestic societies through NGOs and INGOs.[84]

Like constructivists, many international legal theorists expect compliance with international human rights law. [85] Law, for these theorists, represents a powerful normative framework that when endowed with legitimacy, can "pull" states toward compliance, in a manner akin to the power of domestic law over individuals. [86] According to the international legal scholarship, both domestic and international law function differently than many realists and legal positivists claim: For example, as demonstrated in Chapter 5, individual states in the United States tended to comply with

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[82] Krasner, "Sovereignty, Regimes, and Human Rights." Hafner-Burton and Tsusui, "Human Rights in a Globalizing World: The Paradox of Empty Promises," 1380.

[83] Hafner-Burton and Tsusui, "Human Rights in a Globalizing World: The Paradox of Empty Promises," 1377, Robert O. Keohane, *After Hegemony : Cooperation and Discord in the World Political Economy* (Princeton, N.J.: Princeton University Press, 1984). George W. Downs, David M. Rocke, and Peter N. Barsoom, "Is the Good News About Compliance Good News About Cooperation," *International Organization* 50, no. 3 (1996), Abram Chayes and Antonia Handler Chayes, "On Compliance," *International Organization* 47, no. 2 (1993).

[84] Hafner-Burton and Tsusui, "Human Rights in a Globalizing World: The Paradox of Empty Promises," 1380-1381.

[85] Chayes and Chayes, "On Compliance.", Louis Henkin and Council on Foreign Relations., *How Nations Behave ; Law and Foreign Policy* (New York,: Published for the Council on Foreign Relations [by] F.A. Praeger, 1968), Harold Koh, "How Is International Human Rights Law Enforced?," *Indiana Law Journal* 74, no. 1397 (1999), ———, "Review Essay: Why Do Nations Obey International Law?," *Yale Law Journal* 196, no. 8 (1997).,Thomas M. Franck, *Fairness in International Law and Institutions* (New York: Oxford University Press, 1995), ———, "Legitimacy in the International System," *The American Journal of International Law* 82, no. 4 (1988), Martha Finnemore and Stephen J. Toope, "Alternatives To "Legalization": Richer Views of Law and Politics," *International Organization* 55, no. 3 (2001).

[86] Franck, "Legitimacy in the International System.", Friedrich V. Kratochwil, *Rules, Norms, and Decisions: On the Conditions and Practical and Legal Reasoning in International Relations and Domestic Affairs* (New York: Cambridge University Press, 1989). On the other hand, Jack Goldsmith and Eric Posner argue that while compliance may offer reputational benefits, a states' reputation will not necessarily be important for compliance. Jack L. Goldsmith and Eric A. Posner, "A Theory of Customary International Law," *University of Chicago Law Review* 66, no. 1113 (1999).

compulsory education laws for children and other norms regarding children long before (sometimes 50 to 100 years before) the federal government sought to enforce these laws. This suggests that norms about compulsory education in the United States were very successful in altering the behavior of individual states, in many cases, decades before the laws were backed by coercion, a defining quality of domestic law and one notably lacking in international law. Since legal positivists are skeptical of law that lacks teeth, this finding suggests that even domestic law is not as dependent upon coercion as legal positivists argue. It may even suggest that international and domestic law have many mechanisms in common.

At the risk of carrying this finding too far, it is nonetheless worth noting that similar phenomena are evident in the international arena. As this dissertation makes clear, most states have adopted age restrictions for the death penalty as part of the universal model of childhood, even though the international treaties that prohibit the death penalty for child offenders do not have teeth. Of course, as constructivists expect, INGOs largely carry out a type of enforcement through monitoring and documenting compliance, shaming violators and publicizing violations. Even so, compliance with the norm against the child death penalty is almost universal even without any form of enforcement, a phenomenon suggesting the failure of rationalist theories to explain the mechanics of international law and order.

Finally, liberal theories are unable to explain the isomorphism of law and policy across the international system, since policy, for them, is based on state preferences.[87] Additionally, there is a great deal of scholarship that investigates the domestic use of the

[87] Moravcsik, "The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe."

death penalty in the United States and other countries, much of which shares a theoretical kinship with liberalism. Case studies on the United States and other countries tend to examine the role of domestic factors such as social and cultural factors,[88] political institutions,[89] race relations,[90]and norms and identities.[91]

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[88] Michael Mitchell and Jim Sidanius, "Social Hierarchy and the Death Penalty: A Social Dominance Perspective," *Political Psychology* 16, no. 3 (1995), Austin Sarat, *When the State Kills: Capital Punishment and the American Condition* (Princeton: Princeton University Press, 2001), Mark Peffley and Hurwitz Jon, "Persuasion and Resistance: Race and the Death Penalty in America," *American Journal of Political Science* 51, no. 4 (2007), David Jacobs and T. Carmichael Jason, "The Political Sociology of the Death Penalty: A Pooled Time-Series Analysis," *American Sociological Review* 67, no. 1 (2002), Stephen Garvey, *Beyond Repair?: America's Death Penalty* (Durham: Duke University Press, 2003), Franklin E. Zimring, *The Contradictions of American Capital Punishment*, Studies in Crime and Public Policy (New York: Oxford University Press, 2003). David Jacobs and Stephanie L. Kent, "The Determinants of Executions since 1951: How Politics, Protests, Public Opinion, and Social Divisions Shape Capital Punishment," *Social Problems* 54, no. 3 (2007), Frank R. Baumgartner, Suzanna De Boef, and Amber E. Boydstun, *The Decline of the Death Penalty and the Discovery of Innocence* (Cambridge ; New York: Cambridge University Press, 2008).

[89] Ellen Benoit, "Not Just a Matter of Criminal Justice: States, Institutions, and North American Drug Policy," *Sociological Forum* 18, no. 2 (2003), Curtis A. Bradley, "The Juvenile Death Penalty and International Law," *Duke Law Journal* 52, no. 3 (2002), David F. Greenberg and Valerie West, "Siting the Death Penalty Internationally," *Law & Social Inquiry* 33, no. 2 (2008), Sangmin Bae, "The Death Penalty and the Peculiarity of American Political Institutions," *Human Rights Review* 9, no. 2 (2008), Biko Agozino, "The Crisis of Authoritarianism in the Legal Institutions," *Journal of Contemporary Criminal Justice* 19, no. 3 (2003), Paul Brace and Brent D. Boyea, "State Public Opinion, the Death Penalty, and the Practice of Electing Judges," *American Journal of Political Science* 52, no. 2 (2008), Stephen F. Smith, "The Supreme Court and the Politics of Death," *Virginia Law Review* 94, no. 2 (2008), Brent D. Boyea, "Linking Judicial Selection to Consensus," *American Politics Research* 35, no. 5 (2007), Jacobs and Kent, "The Determinants of Executions since 1951: How Politics, Protests, Public Opinion, and Social Divisions Shape Capital Punishment.", Sangmin Bae, "The Right to Life Vs. The State's Ultimate Sanction: Abolition of Capital Punishment in Post-Apartheid South Africa," *International Journal of Human Rights* 9, no. 1 (2005), ———, *When the State No Longer Kills : International Human Rights Norms and Abolition of Capital Punishment*, Suny Series in Human Rights (Albany: State University of New York Press, 2007), Eric Neumayer, "Death Penalty: The Political Foundations of the Global Trend Towards Abolition," *Human Rights Review* 9, no. 2 (2008), ———, "Death Penalty Abolition and Teh Ratification of the Second Optional Protocol," *International Journal of Human Rights* 12, no. 1 (2008).

[90] Timothy V. Kaufman-Osborn, "Capital Punishment as Legal Lynching?," in *From Lynch Mobs to the Killing State: Race and the Death Penalty in America*, ed. Charles Ogletree Jr. and Austin Sarat (New York: New York University Press, 2006), Charles Ogletree Jr. and Austin Sarat, eds., *From Lynch Mobs to the Killing State: Race and the Death Penalty in America* (New York: NYU Press,2006), Howard W. Allen, Jerome M. Clubb, and Vincent A. Lacey, *Race, Class, and the Death Penalty : Capital Punishment in American History* (Albany: State University of New York Press, 2008), Amnesty International USA., *Killing with Prejudice : Race and the Death Penalty* ([New York: Amnesty International USA, 1999), Barry C. Feld, *Bad Kids : Race and the Transformation of the Juvenile Court*, Studies in Crime and Public Policy (New York: Oxford University Press, 1999), Jesse Jackson, Jesse Jackson, and Bruce Shapiro, *Legal Lynching : The Death Penalty and America's Future* (New York: New Press, 2001), Anckar, *Determinants of the Death Penalty : A Comparative Study of the World*, James D. Unnever and Francis Cullen, "The Racial Divide in Support for the Death Penalty: Does White Racism Matter?," *Social Forces* 85, no. 3 (2007), Peffley and Jon, "Persuasion and Resistance: Race and the Death Penalty in America.", Jacobs and Jason, "The Political Sociology of the Death Penalty: A Pooled Time-Series Analysis.", Joe Soss, Laura Langbein, and Alan R. Metelko, "Why Do White Americans Support the Death Penalty?," *The Journal of Politics* 65, no. 2 (2003), James D. Unnever and Francis T. Cullen, "Reassessing the Racial Divide in Support for Capital Punishment: The Continuing Significance of Race," *Journal of Research in Crime & Delinquency* 44, no. 1 (2007).

[91] Jeffrey Fagan and Valarie West, "The Decline of the Juvenile Death Penalty: Scientific Evidence of Evolving Norms," *Journal of Criminal Law and Criminology* 95, no. 2 (2004), Zimring, *The Contradictions of American Capital Punishment*, Schabas, ***The Abolition of the Death Penalty in International Law***
, Benjamin D. Steiner, William J. Bowers, and Austin Sarat, "Folk Knowledge as Legal Action: Death Penalty Judgments and the Tenet of Early Release in a Culture of Mistrust and Punitiveness," *Law & Society Review* 33, no. 2 (1999), Ridvan Peshkopia and Arben Imami, "Between Elite Compliance and State Socialisation: The Abolition of the Death Penalty in Eastern Europe," *International Journal of Human Rights* 12, no. 3 (2008), Marika Lerch and Guido Schwellnus, "Normative by Nature? The Role of Coherence in Justifying the Eu's External Human Rights Policy," *Journal of European Public Policy* 13, no. 2 (2006), Bae, "The Right to Life Vs. The State's Ultimate Sanction: Abolition of Capital Punishment in Post-Apartheid

DEATH PENALTY INDICATORS

A number of scholars have noted the paucity of cross-national quantitative studies of the abolition of the death penalty.[92] One of the few, the work of Carsten Anckar, discussed above, found that a positive view of the death penalty was positively associated with a large population size, history of slavery, and religion (particularly Islam and, to a lesser degree, Buddhism). A positive view of the death penalty was negatively associated with a lack of colonial heritage, the extent of democratic governance, and religion (Christianity).[93] Another study, by Eric Neumayer, found that political—as opposed to social, cultural or economic—determinants explain general abolition. Neumayer argues that democracy, democratization (regime change toward democracy), international pressure and regional contagion are determinants of abolition.[94] Although not a cross-national quantitative study, Sangmin Bae's case studies on the Ukraine, South Africa, South Korea and the United States concluded that a centralized decision-making process and a moment of opportunity or radical political transformation were strongly associated with death penalty abolition.[95]

AGENCY AND SOCIAL CHANGE

Agency presents a central problem for theories of sociological institutionalism. First, sociological institutionalists do not provide a theory for the origin of norms, one

South Africa." ———, *When the State No Longer Kills : International Human Rights Norms and Abolition of Capital Punishment*, William Schabas, "Life, Death and the Crime of Crimes: Supreme Penalties and the Icc Statute," *Punishment & Society* 2, no. 3 (2000), Katie Lee, "China and the International Covenant on Civil and Political Rights: Prospects and Challenges," *Chinese Journal of International Law* 6, no. 2 (2007).

[92] Neumayer, "Death Penalty: The Political Foundations of the Global Trend Towards Abolition," 3.

[93] Anckar, *Determinants of the Death Penalty : A Comparative Study of the World*, 165-168.

[94] Neumayer, "Death Penalty: The Political Foundations of the Global Trend Towards Abolition."

[95] Bae, *When the State No Longer Kills : International Human Rights Norms and Abolition of Capital Punishment.*

that constructivists and liberals credit to principled agents, as discussed above and in further detail in chapter 3. Second, and more importantly, sociological institutionalists struggle with agency and social change. In particular, their approach does not tolerate the role of nonstate actors, especially those from the developing world. Although more recent efforts by sociological institutionalists have sought to address the issue of agency,[96] a structural theory of diffusion, like traditional sociological instititonalism, cannot recognize the power of nonstate and non-Western actors in the face of foundational Western ideas.[97]

In their critique of structural theories, agentic constructivists argue that states often change their human rights policies and practices in response to nonstate actors.[98] Organizations such as Amnesty International, Human Rights Watch and Medicin du Monde challenge state and international practice and succeed at altering many important aspects of the global model of legitimate statehood. These organizations routinely draw on international human rights law to monitor and document atrocities, shame violators and publicize their findings all over the world.[99] Agentic constructivists contend that domestic and transnational actors help to bring about human rights change by rallying supporters across the world in the name of human rights ideals and justice.[100] The role of nonstate actors in human rights compliance is explored by scholars in international

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[96] Meyer, "The Nation as Babbitt: How Countries Conform.", Tsutsui and Wotipka, "Global Civil Society and the International Human Rights Movement: Citizen Participation in Human Rights International Nongovernmental Organizations."
[97] Boli and Thomas, *Constructing World Culture : International Nongovernmental Organizations since 1875*.
[98] Risse, Ropp, and Sikkink, eds., *The Power of Human Rights: International Norms and Domestic Change*, Keck and Sikkink, *Activists Beyond Borders*.
[99] Tsutsui and Wotipka, "Global Civil Society and the International Human Rights Movement: Citizen Participation in Human Rights International Nongovernmental Organizations," 591, Risse, Ropp, and Sikkink, eds., *The Power of Human Rights: International Norms and Domestic Change*, Keck and Sikkink, *Activists Beyond Borders*, Ann Marie Clark, *Diplomacy of Conscience: Amnesty International and Changing Human Rights Norms* (Princeton: Princeton University Press, 2001).
[100] Keck and Sikkink, *Activists Beyond Borders*.

relations that argue for boomerang theories, spiral models and the use of human rights commitments by dissidents to change state behavior.[101]

Constructivists take a more optimistic view of compliance than other theorists do, as the international system offers many avenues for positive human rights change.[102] For them, interests are defined within a given framework of international norms.[103] Some constructivists suggest that IGOs and INGOs can teach states how to implement human rights protections,[104]that states can learn from international society,[105] and that domestic actors can enlist INGOs to pressure states to change their policies.[106] Much of the constructivist human rights literature consists of success stories that document the paths taken by local, transnational and international actors to end human rights violations by states.[107]

As more recent sociological institutionalist scholarship attests, there appears to be a convergence between forms of agentic constructivism and sociological institutionalism. In a pivotal 1999 book, John Boli and George Thomas, two important sociological institutionalists, identify a "missing link" in sociological institutionalist scholarship, which has historically treated INGOs as "epiphenomenal" or "marginal," with the

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[101] Ibid, Risse, Ropp, and Sikkink, eds., *The Power of Human Rights: International Norms and Domestic Change*, Daniel C. Thomas, "The Helsinki Accords and Political Change in Eastern Europe," in *The Power of Human Rights* ed. Thomas Risse, Stephen C. Ropp, and Kathryn Sikkink (Cambridge: Cambridge University Press, 1999).
[102] Keck and Sikkink, *Activists Beyond Borders*, Lutz and Sikkink, "International Human Rights Law and Practice in Latin America.", Risse, Ropp, and Sikkink, eds., *The Power of Human Rights: International Norms and Domestic Change*, Clark, *Diplomacy of Conscience: Amnesty International and Changing Human Rights Norms*.
[103] Audie Klotz, *Norms in International Relations: The Struggle against Apartheid* (Ithaca: Cornell University Press, 1995), Alexander Wendt, *Social Theory of International Politics*, Cambridge Studies in International Relations ; 67 (Cambridge ; New York: Cambridge University Press, 1999).
[104] Martha Finnemore, *National Interests in International Society* (Ithaca Cornell University Press, 1996).
[105] John Gerard Ruggie, "What Makes the World Hang Together? Neo-Utilitarianism and the Social Constructivist Challenge," *International Organization* 52, no. 4 (1998), Peter Hall, "Policy Paradigms, Social Learning, and the State," *Comparative Politics* 25, no. 3 (1993).
[106] Keck and Sikkink, *Activists Beyond Borders*.
[107] Hafner-Burton and Tsusui, "Human Rights in a Globalizing World: The Paradox of Empty Promises.", Keck and Sikkink, *Activists Beyond Borders*. Risse, Ropp, and Sikkink, eds., *The Power of Human Rights: International Norms and Domestic Change*.,Clark, *Diplomacy of Conscience: Amnesty International and Changing Human Rights Norms*, Lutz and Sikkink, "International Human Rights Law and Practice in Latin America."

exception of large organizations like Amnesty International or Greenpeace.[108] Like realism in international relations, sociological institutionalism had overlooked the role that nonstate actors played in shaping the world polity.[109] Boli and Thomas concluded that INGOs possessed a "surprising" degree of cultural authority in the world, shaping "universalistic discourse and debate."[110] These debates center around topics familiar to constructivists in international relations: the origin of interests, the emergence of new values, changes in the identities of actors, and the constitution of rational behavior.[111]

Recent sociological institutionalist literature argues that the concrete achievements of international human rights law do not rest in the laws themselves or in the states that ratify them, but in the diligent and important work of INGOs. [112] This argument is similar to that of agentic constructivists: Although powerful states were interested in including human rights in the United Nations Charter in 1948, it took an NGO push for human rights language to actually be enshrined in the charter.[113] As these states' enthusiasm for international human rights began to dwindle, Third World countries took up the human rights baton, motivated by "anticolonialist fervor and by their aspiration to establish racial equality in the postcolonial world order."[114] Third World countries' fervent belief in human rights as a vehicle for racial equality is evident in the first major U.N. human rights treaty that was adopted: the International Convention

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[108] Boli and Thomas, *Constructing World Culture : International Nongovernmental Organizations since 1875*, 2.
[109] Ibid., 2-3.
[110] Ibid., 298-299.
[111] Ibid., 299.
[112] Tsutsui and Wotipka, "Global Civil Society and the International Human Rights Movement: Citizen Participation in Human Rights International Nongovernmental Organizations."
[113] Ibid.: 590, Meyer, "The Nation as Babbitt: How Countries Conform," 45.
[114]Tsutsui and Wotipka, "Global Civil Society and the International Human Rights Movement: Citizen Participation in Human Rights International Nongovernmental Organizations," 590.

on the Elimination of All Forms of Racial Discrimination.[115] Yet the increased involvement of Third World countries in the human rights regime and in United Nations politics meant that these states' domestic behavior and compliance with emerging human rights norms were monitored, and they were routinely criticized for failing to uphold human rights principles in their own countries. This criticism by the international community diminished these states' interest in the human rights regime and, beginning in the 1970s, kindled an antagonism toward the institutions they once embraced. They began to join Western countries as new "doubters" and "critics."[116]

Sociological institutionalists contend that a key indicator of the embeddedness of a particular state in world culture is the number of its memberships in nongovernmental and international organizations.[117] By this standard, human rights organizations, both domestic and international, are a fundamental unit of the international order in the late 20th and early 21st centuries. These organizations provide information about human rights violations, monitor state compliance with human rights norms, and empower positive human rights change at the local, national, transnational and international levels. They provide yet another crucial source of expertise that serves to direct national "policies in a common, global direction."[118]

The dominance of Western philosophy and practice in global cultural models, according to sociological institutionalists, poses the question: If the human rights principles of world culture were forged in the West, spread by the West, and monitored (predominantly) by large Western INGOs, what role is there in these global models for

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[115] Ibid.
[116] Ibid.
[117] Cole, "Sovereignty Relinquished? Explaining Commitment to the International Human Rights Covenants, 1966-1999," 480.
[118] Meyer, "The Nation as Babbitt: How Countries Conform," 46.

the rest of the world? Sociological institutionalists concede that the human rights regime "clearly reflect[s] the ideas and organizational participation of dominant liberal societies," and that the movement itself is driven by individuals and organizations from liberal society.[119] And yet, the scripts and models that shape world culture do not simply come from Western countries wholesale; they are "edit[ed], analyz[ed] and interpret[ed]" by countries outside of the West.[120] In other words, these global norms and scripts are subject to interaction effects that localize them, making their application place-specific and contextual. These norms and scripts are flexible, adapting to the cultures in which they are applied. Moreover, the primary method of influencing world culture by Third World countries is through INGOs, "the engine of global expansion of human rights in the post World War II era."[121] Indeed, there is substantial evidence that human rights INGOs have increased in number in developing countries, as they have in general.[122]

One key aspect of a sociological institutionalist/agentic constructivist convergence is a common explanatory interest in how human rights organizations mobilize around and in response to international treaties, "leveraging the emergent legitimacy of human rights as a global norm of appropriate state behavior to pressure states to improve actual human rights practices."[123] This is what Hafner-Burton and Tsusui call the "paradox of empty promises," whereby states' weak commitment to the human rights regime (generally expressed by ratifying agreements they have no intention

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[119] ———, "Globalization: Theory and Trends," 265.
[120] ———, "The Nation as Babbitt: How Countries Conform," 46.
[121] Tsutsui and Wotipka, "Global Civil Society and the International Human Rights Movement: Citizen Participation in Human Rights International Nongovernmental Organizations," 587.
[122] Ibid.: 599.
[123] Hafner-Burton and Tsusui, "Human Rights in a Globalizing World: The Paradox of Empty Promises," 1378.

of obeying) nonetheless provides nonstate actors with the necessary means to monitor these states and exert pressure toward compliance.[124]

Despite the recent convergence of agentic constructivism and sociological institutionalism, differences between these theoretical approaches remain. Constructivism, for example, has more positive and generous expectations of the behavior of states than sociological institutionalism does. Yet the mechanism for human rights change in both approaches is similar in that INGOs play an important role in the international system. As a result, global civil society (constituted by human rights advocates, social movements, norm entrepreneurs, domestic, international and transnational organizations), equipped with international treaty instruments and conventions, serves to enforce human rights norms and obligations.[125]

Still, even in light of a partial convergence of theories, sociological institutionalists face criticism that their theories are overly structural, leaving little room for the agency of individuals. Sociological institutionalism holds that INGOs and the like merely facilitate global culture and that individual norm entrepreneurs "are rarely central to the building of world norms."[126] Sociological institutionalists further distinguish between two types of agency, enactment and cultural construction, whereby:

> enactment is also constructive, i.e., an indicator of 'agency,' but only in the limited sense that it tautologically reproduces the culture being enacted. It makes sense to reserve the notion of cultural construction for the development or propagation of cultural innovation (or cultural revival, which is rather common), that is, for departures from institutionalized rules, models, and principles. However, this form of construction or agency can occur only when actors are firmly anchored in the solid bedrock of cultural enactment.[127]

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[124] Ibid, Thomas, "The Helsinki Accords and Political Change in Eastern Europe."
[125] Hafner-Burton and Tsusui, "Human Rights in a Globalizing World: The Paradox of Empty Promises," 1385.
[126] Meyer, "Globalization: Theory and Trends," 267.
[127] lLechner and Boli, *World Culture: Origin and Consequences*, 15.

As such, human agency, for sociological institutionalists, is strictly limited. INGOs and principled activists merely embody or carry out world culture by following established scripts. While sociological institutionalists grant actors a degree of agency by allowing them to "actively draw on, select from, and modify shared cultural models, principles and identities," the choices available to these actors are limited to those contained within pre-existing cultural models, principles and identities, which these actors may draw from, select or modify.[128] Our movements, ideals, goals and achievements are forged out of and bounded by existing world culture. We can innovate, but not create anew.

The expectation by agentic constructivists (and more recently, by sociological institutionalists) that INGOs would serve as the key defender of human rights in the late 20th century corresponds well with the findings of this dissertation, as children's advocacy groups and INGOs took up the anti-death penalty fight for child offenders. Indeed, domestic and international advocacy groups were critical to ending the penalty in the United States and were at times the only ones in the international system concerned with such matters. A more detailed discussion of INGOs in the United States is presented in chapters 5 and 6.

ARGUMENT

The abolition of the death penalty for child offenders under the age 18 was part of a larger and longer-term trend of law and policy reform protecting children in general. The protection of children *in law* first emerged in the West around the 16th century—in

[128] Boli and Thomas, *Constructing World Culture : International Nongovernmental Organizations since 1875*, 18.

the form of regulation of poor and vagrant children as well as laws governing apprenticeships—but protective policies greatly increased both in force and scope in the 19th and 20th centuries.[129] These laws and policies toward children were part of a broader pattern of humanistic reform in Western societies that also produced a specific type of liberal state following the Enlightenment.[130]

One of the signature characteristics of these states was the shared goal of national progress defined principally through (what would later be known as) Gross Domestic Product (GDP) and, eventually, a higher quality of life for their citizens.[131] As Michel Foucault has argued, the primary objective of governing for the post-Enlightenment state is to maximize national resources and improve the well-being of individuals in society.[132] Progress is measured by economic growth, driven by the harnessing of available resources for profit and gain. The combination of the rise in material wealth and humanistic reform in society improved the welfare of the state's citizens.

These goals of progress and welfare were made explicit in the colonialism that characterized the period: British and French colonialism, as institutions, were justified on these pillars. Empires would acquire colonies and (ostensibly) prepare them for entry in the global market, harvesting their resources to enrich themselves. These empires also felt a duty to expose their colonies to cultural 'enlightenment' though the imposition of Christianity and metropolitan customs, norms and values. This was the civilizing mission.

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[129] In Britain see, the 1536 Apprenticing of Parish Poor Children (27 Hen. VIII, c. 25), the 1562 Apprenticeship under the Elizabethan Statute of Artificers. (5 Eliz., c. 4), the 1572 Poor Law Act (14 Eliz., c. 5), the 1601 Further Provision for Apprenticing Pauper Children. (43 Eliz.c. 2), and the 1661 Poor Relief Act (13 & 14 Car. 2, c. 12).

[130] Cole, "Sovereignty Relinquished? Explaining Commitment to the International Human Rights Covenants, 1966-1999," 473, Jack Donnelly, *Universal Human Rights in Theory and Practice*, 2nd ed. (Ithaca: Cornell University Press, 2003).

[131] Meyer, "The Nation as Babbitt: How Countries Conform," 43.

[132]Bloch and ebrary Inc., "The Child in the World/the World in the Child Education and the Configuration of a Universal, Modern, and Globalized Childhood." Michel Foucault, "Governmentality," in *The Foucault Effect: Studies in Governmentality*, ed. Graham Burchell, Colin Gordon, and Peter Miller (Chicago: University of Chicago Press, 1991).

Anthony Pagden suggests that we can only understand the connection between human rights and the Western state model by examining how human rights emerged within an imperial context.[133] Pagden argues that human rights developed out of the concept of natural rights, with its origins in Roman common law in the second through the sixth centuries and especially during the reign of Emperor Justinian.[134] Drawing from its European origins, human rights are a "secularized transvaluation of the Christian ethic," and their connection to Western principles and values is "undeniable." [135] It was only in the French *Declaration of the Rights of Man* that the link between individual rights and national citizenship was made explicit.[136] Reflecting a growing uneasiness with the idea of essentialism in natural law,[137] rights after the French Revolution:

> were no longer those rights which could be held against society, or across differing societies. They were those that could only be held *in* society, and furthermore only in a society of a particular kind, republican, democratic and representative.[138]

The central unit of membership in these states was the individual citizen, who was endowed with particular rights vis-à-vis the state. Yet this notion of the individual citizen—autonomous, self-governing and central to the liberal philosophy underlying the modern Western state—emerged only at the end of the 18th century, when it was enshrined in both the French *Declaration of the Rights of Man* and the American *Declaration of Independence*.[139] Lynn Hunt describes a shift in the last half of the 18th century whereby:

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133 Anthony Pagden, "Human Rights, Natural Rights, and Europe's Imperial Legacy," *Political Theory* 31, no. 2 (2003).
134 Ibid.: 171-172.
135 Ibid.: 173.
136 Ibid.: 189.
137 Ibid.: 176.
138 Ibid.: 190.
139 Lynn Hunt, *Inventing Human Rights: A History* (New York: W.W. Norton & Company, 2007), 28.

> The absolute authority of fathers over their children was questioned. Audiences started watching theatrical performances or listening to music in silence. Portraiture and genre painting challenged the dominance of the great mythological and historical canvases of academic painting. Novels and newspapers proliferated, making the ordinary lives accessible to a wide audience. Torture as a part of the judicial process and the most extreme forms of corporal punishment both came to be seen as unacceptable. All of these changes contributed to a sense of the separation and self-possession of individual bodies, along with the possibility of empathy with others.[140]

Moreover, individual rights and citizenship did not mean that all people were equally capable of autonomy, as even today we challenge the idea that children (of a certain age) and the mentally ill possess these capabilities.[141]

Other historians suggest that absolute paternal authority was a new development in Anglo-American law: Holly Brewer examined the role of custody and authority in law and found that parental custody as we understand it today did not exist in the 15th and 16th centuries, when only propertied children or heirs had custodians and only until they were 14.[142] Only in the 17th century did the authority of fathers begin to be asserted, but even then, children were still signing their own labor contracts.[143] Paternal authority was strengthened in the 18th century,[144] and by the beginning of the 19th century, fathers had property rights over their children.[145] As such, when the claim is made in this dissertation that the state usurped parental authority beginning in the 19th century, it was an authority only recently asserted (and naturalized) by legal commentators.

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[140] Ibid., 30.
[141] Ibid., 28.
[142] Holly Brewer, *By Birth or Consent: Children, Law, & the Anglo-American Revolution in Authority* (Chapel Hill: The University of North Carolina Press, 2005), 231-232.
[143] Ibid., 250, 271.
[144] Ibid., 260.
[145] Ibid., 277.

A new wave of colonialism in the 19th and early 20th centuries demanded a broadening of the idea and application of rights from the national to the universal in an effort to confer legitimacy.[146] Nineteenth-century colonialism was justified under the guise of spreading 'civilization' and 'civilized' culture; a prerequisite to this effort was a return to thinking of rights in terms of the laws of nature, such that cultures that do not exhibit the same norms held by 'civilized' people could be "dispossessed by those who do."[147] The result was that rights could only be understood within the context of " 'civilization,' by which was meant roughly the value system of the European peoples" and of a particular political order, representative government.[148] This trend toward universalism was still limited, however, by citizenship in a state: "Barbarians, as Mills said, 'do not have rights as nations.' And only members of nations could have rights."[149] As such, the laws of nature could be applied to the colonies, via the expansion of colonialism, but the colonized themselves had no say in the matter.

The death penalty provides an interesting context in which to examine this logic. The British used the death penalty in its colonies in order to instill fear and the rule of law. But apart from the Mau Mau revolution (discussed in detail in chapter 4), they were careful to distance themselves from the actual act of capital punishment.[150] The British were very sensitive to critiques of the death penalty and its savage nature and sought to sanitize it through reforms, even while complete abolition was being sought at home.[151] These pressures originated from the metropole, or mother country, because "Those who

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146 Pagden, "Human Rights, Natural Rights, and Europe's Imperial Legacy," 177-178.
147 Ibid.: 183-184.
148 Ibid.: 190.
149 as qtd. in Ibid.: 191.
150 Stacey Hynd, "Killing the Condemned: The Practice and Process of Capital Punishment in British Africa: 1900-1950s," *Journal of African History* 49 (2008): 416.
151 Ibid.: 417.

believed themselves to be civilized had a duty not to behave towards 'backwards' or 'barbarian' peoples in a cruel and 'inhuman' manner."[152] In other words, the British had to walk a fine line between fear and charity.

It is precisely this unsustainable conflict between a need to instill fear and to demonstrate imperial benevolence that led both to the demise of the British Empire and to the protection of children. Both the British and French empires felt growing pressure from their citizens to do more for the people of the colonies, and, as I will argue in chapter 4, this pressure especially targeted young girls who were in 'moral danger.' These protections required intervention in family law, a move that triggered, or at least further inflamed, tensions between the colonizers and the colonized.

After World War II, colonialism was widely seen as morally bankrupt and its rapid disintegration meant that a "new consensus" was needed.[153] The construction of human rights that would emerge from these debates was "an appeal to individual agency which could be sustained even against—in most cases especially against—the political community to which the individual belonged."[154] These rights, however, never fully outgrew their origins in a liberal political order forged in the French Revolution.

The development of a liberal state was aided by the promotion of the natural and social sciences in the 19th and 20th centuries. The emergence of experts in the sciences as well as a preoccupation with objectivity through scientific methods in the 19th century drove efforts toward progress in the liberal state.[155] These experts claimed the ability to separate the normal from the abnormal, the desirable from the undesirable, and the moral

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[152] Pagden, "Human Rights, Natural Rights, and Europe's Imperial Legacy," 191.
[153] Ibid.
[154] Ibid.
[155] Bloch, *Governing Children, Families, and Education : Restructuring the Welfare State*. Lorraine Daston and Peter Galison, "The Image of Objectivity," *Representations* 40 (1992).

from the amoral.[156] In so doing, a single standard of normality emerged in multiple areas of social and political life, allowing states to develop national policies to ensure the 'normal' and to address the 'abnormal' child. Below, I will discuss how the 'normal' child emerged and how his or her labor, education, health and leisure were regulated by the state, and eventually monitored by the international community, in an effort to purge societies of the 'abnormal' child.

In delineating a class of persons, the idea of childhood in the West was co-constitutive of ideas about how children should be treated. By tracing the history of social perceptions about childhood, the "history of European political thought" can itself be traced.[157] As concerns were raised by child advocates (increasingly in the 19th century but also much earlier) about child abuse and neglect, the state and its institutions intervened. A social and political interest in child welfare validated and institutionalized ideas about childhood as a vulnerable period of life when children needed protection, structure and guidance. Protection came in the form of statutes that outlawed neglect and abuse; structure and guidance were provided by educational institutions, reformatories, industrial schools, church and, decreasingly, places of employment.

Western state institutions were established to determine the extent of abuse and neglect and the required nature of state intervention. Abuse and neglect, however, were difficult to gauge without benchmarks. Child advocates, quick to use science to inform their actions, encouraged and supported the attention paid to children by science. Doctors

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[156] Bloch, *Governing Children, Families, and Education : Restructuring the Welfare State*, 16.
[157] Watson, "Children and International Relations: A New Site of Knowledge?," 240.

established guidelines for nutrition, hygiene, welfare and psychological well-being.[158] Social scientists developed curricula, investigated the effects of child labor, abuse and neglect, and advanced theories about children's distinct nature. Developmental psychology, in particular, "offered new, scientifically constructed indices by which 'normal development' could be quantitatively as well as qualitatively distinguished from the 'subnormal' or 'abnormal.' "[159] These guidelines progressively became part of the dogma of childhood as competing norms, especially those not legitimized by science, were discarded.

In line with theories of agentic constructivism, standards of behavior toward children evolved and expanded as ideas about childhood evolved and expanded. Thus, the science of childhood co-constituted the role of children in society. One of the principal ideas that developed in the West in the 19th and early 20th centuries was that children were less culpable for the crimes they commit and should not be given adult penalties such as the death penalty. As will be argued in chapters 4, 5 and 6, as scientific methods to study children were applied outside the West, the model of the globalized child began to emerge. Western studies of children in the periphery demonstrated that all children experience the same stages of development, and have the same requirements for good health, education, leisure and need for labor restrictions. Eventually, there would be a single standard of childhood—a globalized child with the same needs, wants and desires regardless of the state to which he or she belonged.

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[158] Harry Hendrick, *Children, Childhood and English Society 1880-1990* (Cambridge: Cambridge University Press, 1997), p. 12, Karen Baistow, "From Sickly Survival to the Realisation of Potential: Child Health as a Social Project in Twentieth Century England," *Children & Society* 9, no. 1 (1995): p. 22.

[159] Baistow, "From Sickly Survival to the Realisation of Potential: Child Health as a Social Project in Twentieth Century England," pp. 26-27.

Yet the idea that childhood is a social construction says little about how it came to be the particular social construction enshrined in state and international law today or about how a specific aspect of the model, such as reduced culpability, came to be integral to our understanding of children's capacities. Sociological institutionalists have argued that since all states share the goal of economic progress, they are highly susceptible to new ideas about how best to achieve this progress.[160] A focus on children as a tool of development became increasingly fashionable in the 19th century, as states such as the United Kingdom recognized a connection between children's health and the ability of the empire to win wars.[161] The interest in childhood and children by states and the world polity is directly related to a state's goal of progress, as defined by GDP. Educating and caring for children as the future heirs of the nation came to be seen as a concrete investment in the stability and prosperity of the state. The expansion of compulsory education in Europe, for example, grew out of concerns about working-class children as a potentially threatening social class.[162] By the 1960s, a focus on children as a key part of national development had become global wisdom.

Children were also a tool of empire, as missionaries, travelers and scientists used Western ideas about children and families (among other cultural constructs) to measure the " 'civilization' and 'culture,' and the 'nature' of primitive families and childhood in exotic places."[163] According to Marianne Bloch, in her research of curricula, studies of children in the colonies and other cultures outside the West "produced 'new' types of 'advanced' and 'progressive' knowledge about childhood, the family, and schooling" that

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160 Meyer, "The Nation as Babbitt: How Countries Conform," 43.
161 Baistow, "From Sickly Survival to the Realisation of Potential: Child Health as a Social Project in Twentieth Century England."
162 Hendrick, *Children, Childhood and English Society 1880-1990*.
163 Bloch, *Governing Children, Families, and Education : Restructuring the Welfare State*, 16.

resulted in the discovery of 'universal truths' about children and their development.[164] Satadru Sen has shown in his studies of juvenile orphanages and reform schools in 19th- and 20th-century India that the children in government facilities became the subjects of countless studies and experiments designed to identify the core, natural, universal child by separating the child from his/her racial identity.[165]

Over the course of the 20th century, education, in particular, came to be recognized globally as a prerequisite to the development of the modern child and the modern nation.[166] The principal objective of education became the creation of children (and parents) that were "cosmopolitan, entrepreneurial, and flexible participants in the global economy, politics, and cultural context."[167] As national as well as global citizens, they were groomed "to choose well in order to be successful for self, nation, region, and world."[168]

The children of the colonies were also constructed as the biggest threat to empire. An increase in attention to crime and vice by these children in the mid-20th century resulted in the invention of juvenile delinquency, as African historian Laurent Fourchard contends.[169] In a study of the British in Nigeria, Fourchard argues that juvenile delinquents became a distinct group with the creation of the Social Welfare Office in

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164 Bloch and ebrary Inc., "The Child in the World/the World in the Child Education and the Configuration of a Universal, Modern, and Globalized Childhood."
165 Satadru Sen, "The Orphaned Colony: Orphanage, Child and Authority in British India," *Indian Economic & Social History Review* 44, no. 4 (2007), ———, *Colonial Childhoods: The Juvenile Periphery of India 1850-1945* (London: Anthem South Asian Studies, 2005), ———, "A Separate Punishment: Juvenile Offenders in Colonial India," *The Journal of Asian Studies* 63, no. 1 (2004).b, ———, "A Juvenile Periphery: The Geographies of Literary Childhood in Colonial Bengal," *Journal of Colonialism and Colonial History* 5, no. 1 (2004).
166 Bloch, *Governing Children, Families, and Education : Restructuring the Welfare State*, 20.
167 Bloch and ebrary Inc., "The Child in the World/the World in the Child Education and the Configuration of a Universal, Modern, and Globalized Childhood."
168 Ibid.
169 Laurent Fourchard, "Lagos and the Invention of Juvenile Delinquency in Nigeria," *Journal of African History* 46 (2006).

1941.[170] The colonial administration and judicial system actually "legislated 'juvenile delinquency' into existence."[171] According to Fourchard, concerns about juvenile delinquency were directed in particular at young, female street hawkers who were at risk for prostitution and other forms of exploitation.[172] The construction of juvenile delinquency and the focus on the 'moral danger' of young girls were not unique to Nigeria or even to the British colonies, as "special judicial machinery for the 'treatment of juvenile offenders' was also established" in the empires of the French, Belgians and Portuguese in the 1940s and 1950s.[173]

Reformatories for young criminals were established in the French and British colonies in the early 20th century, although their modest use suggests that juvenile crime was not an important concern that early in the century.[174] By the 1930s, around the time that the Children and Young Person Act was passed in Britain (1933), the British, characteristically, sought to standardize their juvenile criminal system. The Colonial Office established a committee to survey the colonies and determine what policies and protections were in place for young criminals.[175] Subcommittees on juvenile crime were established, and a Social Welfare Officer was appointed for the entire empire. The philosophy of child protection and the treatment of juvenile offenders—if not always the practice—closely followed the prevailing model in Britain itself.[176]

The widespread standardization of the treatment of young criminals by the British helped lay the groundwork for a global model of childhood that would emerge after

170 Ibid.: 115.
171 Ibid.: 116.
172 Ibid.: 132-134.
173 Ibid.: 116.
174 Ibid.: 126.
175 Ibid.: 127.
176 Ibid.: 130-131.

World War II. The same connection between children's welfare and civilization, seen in British and French colonialism, was made by IGOs and INGOs to promote a particular type of development that emphasized education and health for children (and women, because support for women trickled down to children more readily than support for men did). These institutions also promoted the open market and other characteristics of the liberal state and served to foster support for an emerging global standard of childhood.

The model of childhood that emerged after World War II had four general qualities, as suggested by authors who study global trends in curricula: First, the child is knowable through scientific study; second, this knowledge is applicable to all children; third, this knowledge can result in development projects, such as educational and health care initiatives, directed at all children; fourth, social problems and issues at the domestic and international levels can be addressed through these projects.[177] The global model of childhood, which posits that children (both collectively and individually) are suitable objects of scientific study, suggests that all children go through largely identical stages, possess similar intellectual and rational potential as well as similar natures, and learn in the same manner.[178]

The specific characteristics of the universal model of childhood are difficult to flesh out precisely, in part because, as with all global models, the model of childhood is dynamic, having developed and expanded so much in such a short period of time. Any effort to do so runs the risk of treating the model as if it were a fixed quality of world culture. That being said, international law, once codified, effectively crystallizes the

[177] Here, I adapt Marianne Bloch's taxonomy on the universal child and education. Bloch and ebrary Inc., "The Child in the World/the World in the Child Education and the Configuration of a Universal, Modern, and Globalized Childhood."
[178] Ibid.

model—reflecting the parts of childhood that states are willing to legislate, as well as prevailing beliefs about children. Later in this chapter, I draw on international law as well as on United Nations publications to track the expanding and still evolving model of childhood.

THE DEATH PENALTY

A global trend in national policies toward progress and justice naturally shaped the application of the death penalty. Types of torture accompanying the penalty were limited in the West in the latter half of the 18th century.[179] Hangings were more efficient (limiting the duration of suffering); judicial torture was outlawed in France in 1789; and the guillotine was introduced in 1792 (ideally making the penalty less painful).[180] Yet the penalty remained popular and even increased in use during the 18th century, especially in Great Britain.[181] The 18th century saw such drastic increases in the number of capital crimes in Britain that by the century's end, there were more than 200 such crimes. Yet as the number of capital crimes increased, the number of persons actually executed declined.

The reform of the death penalty, as described above, began in earnest in the 19th century, as many countries, especially in Latin America and Europe, abolished the penalty for all crimes and all offenders. States around the world also began to limit the penalty by age in the 19th century. Previously, in the United Kingdom (and in states influenced by its legal system), the penalty was limited to those older than seven years of age, or 14 if *mens rea* could not be demonstrated. Many states in Europe, especially,

[179] Hunt, *Inventing Human Rights: A History*, 76.
[180] Ibid.
[181] Ibid., 77.

raised the age of eligibility for the penalty to 16 by the early 20th century, as did many colonies of Britain and France.

The abolition of the death penalty for child offenders was the outcome of the increasing treatment of children as objects of scientific study and of growing concern for children's welfare. The confluence of these phenomena resulted in the construction of an idealized childhood that would, at least ideologically, transcend class, status and race in terms of legal protections. In England, in particular, the trend toward standardizing childhood began with principled actors who were preoccupied with children's welfare and who gave special attention to reforms for young offenders. Although humanitarian concerns were important to child welfare reform in England in the 19th and early 20th centuries, it was the treatment of children as objects of scientific study that established guidelines for their nutrition, family life, employment and education, and that laid the foundation for changes in the judicial treatment of children. The emerging science of childhood helped to foster a conception of childhood that was broadly inclusive of all children and that created a common standard of 'childhood' that required state regulation.

The rise in the consolidation of state authority over children in the 19th and 20th centuries corresponded with a decline in parental control over children. Many authors have argued that as a single, common standard of childhood emerged, the state came to be seen as the central arbiter and enforcer of that standard, allowing it to intervene in families when the standard was not met.[182] The abolition of the death penalty for those

[182] Hendrick, *Children, Childhood and English Society 1880-1990*, David Taylor, *Crime, Policing and Punishment in England, 1750-1914* (New York: St. Martin's Press, 1998), Michael Lavalette, "The Changing Form of Child Labour *Circa* 1880-1918: The Growth of 'out of School Work'," in *A Thing of the Past?: Child Labour in Britain in the Nineteenth and Twentieth Centuries*, ed. Michael Lavalette (New York: St. Martin's Press, 1999).

under age 18 was one of many changes that emerged out of this process of standardization.

Other states would abolish the death penalty for child offenders under age 18 in fits and starts between 1863 and 1959. I refer to these states as early adopters of the norm of abolition. In order of abolition, they were: Venezuela, San Marino, Costa Rica, Brazil, Ecuador, France, Uruguay, Columbia, Paraguay, Panama, Trinidad and Tobago, Iceland, Mauritius, Italy, Lebanon, Denmark, Japan, Jamaica, Grenada, Honduras, Tunisia, Ethiopia and Nigeria. Some of these, especially Ethiopia, Lebanon, Japan, Tunisia, Nigeria, and Trinidad and Tobago, consulted or were directly influenced by criminal laws and constitutions in other states. Some states (Ethiopia) even hired foreign consultants, while such consultants were thrust upon others (post-World War II Japan, for instance). Others still were likely coerced by a colonial power (Tunisia, Lebanon, Trinidad and Tobago, Nigeria, Jamaica and Grenada), although the degree to which they were coerced cannot be determined without case studies. Certainly, the child policies of Tunisia (as discussed in more detail in chapter 4) were shaped by its experience of French colonialism.

In many ways, these early adopters of the norm helped to write the developing of a globalized childhood. But states that protected children in general through state regulation before World War II would also influence the global scripts of progress and justice that emerged after the war by including children in measures of both economic progress and citizen welfare. This interpretation of progress and justice would become important for state organization in the latter half of the 20th century. The United Kingdom and France were especially influential as they coercively enforced their norms and

principles through colonialism in Africa, the Middle East and Asia. Latin American states tended to ban the penalty outright, as discussed earlier. Beginning in the 19th century, the United Kingdom and France diffused Western norms about children through the establishment of bureaucratic administrative structures and Western legal principles and systems in colonies.

By the 20th century, the idea of childhood transmitted to these colonies was age-specific, meaning that its parameters were not limited by behavior, rite, ritual, race, class, status or gender, but rather by age. Age 18 became widely accepted as the upper age limit of childhood in criminal codes after World War II, and this parameter was extended to areas of child protection even outside criminal matters. The model of childhood that emerged after World War II was not initially one that bestowed many rights upon children, but rather duties upon adults (see Table 1.1 below). Children were, however, crucial to national identity, considered vulnerable and in need of care, and were increasingly seen as less culpable for their actions than adults.

The acculturation of colonies to Western legal and political systems, carried out most extensively by the French in the Maghreb, included an inherent logic of state consolidation over citizens, including children. Laws prohibiting the child death penalty were commonly found in criminal codes, and the British took the lead in standardizing criminal procedures and sanctions. At independence, many (if not most) former colonies had laws prohibiting the death penalty for offenders under age 18.

Beginning in the 1960s, a first cascade of countries limited the death penalty to those who commit their crimes when they are under age 18. This phenomenon was bolstered by the rapid decolonization that took place around the globe. Between 1960 and

1981, thirty-five percent of countries known to abolish the death penalty for child offenders under age 18 in law did so within those 21 years, more than twice as many as in the preceding 100 years. This first wave of cascade adopters includes (in order of abolition): Azerbaijan, Ghana, Kuwait, Ukraine Soviet Socialist Republic, Armenia, New Zealand, Tanganyika, Madagascar, USSR, Tanzania, Uganda, Sierra Leone, Algeria, the Dominican Republic, Gambia, Cameroon, Kenya, Austria, Bulgaria, Jordan, Belarus, Benin, Poland, Vatican City State, Israel, Finland, Sweden, Australia, Czechoslovakia, Hungary, Egypt, Iraq, Syria, Bahrain, Portugal, United Arab Emirates, Yemen PR (South), Albania, Rwanda, Congo, Netherlands, Romania, Luxembourg, Nicaragua, Norway and Sri Lanka. Some of these states would later be the sites of devastating human rights violations and wars (Sierra Leone, Uganda, Rwanda and Sri Lanka); other states carried out clandestine executions that made their promises to protect children unverifiable (Iraq).

A great many of these countries are, as stated, former colonies. The colonial experience of some of these countries can be described as one of 'coercive socialization,' the process whereby colonial powers imposed by force a type of state organization that included authority over children, but that also served to socialize colonies to the norms and scripts contained within these organizational models, including norms of child protection and the emerging global script of childhood. These types of governments varied. The British colonies were typically administered by local magistrates. In French colonies, there was greater administrative variation, although some French colonies such as Algeria were crucial to French identity and were subjected to extensive efforts to impose French language, custom and culture. Either way, the research for the colonial

case studies examined in this dissertation (Algeria, Kenya, Tanzania and Tunisia) suggests that state authority over children was included in the governmental structure imposed on these states as colonies, and that this authority included protections such as exclusion from the death penalty.

Many of these colonies maintained after independence, at least initially, the state organizational structure they had inherited, including the prohibition of the child death penalty and other protections for children. Many even increased protections for children in the first few decades of statehood. Kenya and Tanzania, for example, increased protections for children in the areas of criminal reform, education, immigration, citizenship and marriage restrictions. These states had internalized key parts of the colonial state model that not only recognized the validity of children's protection, but also could not imagine a solution to issues of child welfare outside of law. They were, in effect, socialized to Western ideas of child protection and to the role of the state in guaranteeing it. These ideas included protection from adult criminal penalties.

In sum, the global model of childhood expanded during the latter half of the 20th century to include a wide array of protections for and assumptions about children. The birth of the United Nations after World War II greatly accelerated the creation of global scripts about children and the proper role of the state in ensuring children's welfare. This internationalization of childhood occurred on many levels. To a large extent, internationalization began in the 19th century as the (predominately) British and French empires acculturated colonies to their legal structures and norms, discussed above. INGOs and IGOs, such as Save the Children International Fund and UNICEF, were vital to the spread of Western norms in the developing world as well. Finally, international law

about children was predominately (though not exclusively) reflective of Western values, codifying Western norms about children throughout the world. Beginning in the 1970s, states began to draft the CRC, and by 1990, a comprehensive list of children's rights and protections was enshrined in international law. The CRC symbolized the emergence of a globalized childhood, as will be argued below, as children became subjects of international law under a unified treaty that granted them an unprecedented range of rights and protections.

These events resulted in a second cascade, one more rapid and widespread than the first. This second cascade stretches from 1985 to 2005 and includes the states (in order of abolition): Cook Islands, Cape Verde, Singapore, Vietnam, Germany, Haiti, Liechtenstein, South Korea, Barbados, Cambodia, Slovenia, Tunisia, Andorra, Croatia, Czech Republic, Ireland, Mozambique, Namibia, Sao Tome and Principe, Slovak Republic, South Africa, Macedonia, Angola, the Former Republic of Yugoslavia, Peru, Switzerland, Guinea-Bissau, Myanmar, Philippines, Russia, Seychelles, Uzbekistan, Zimbabwe, Djibouti, Moldova, North Korea, Spain, Belgium, Georgia, Indonesia, Nepal, Tanzania, Canada, Estonia, Latvia, Lithuania, Tajikistan, Timor-Leste, Turkmenistan, Ukraine, Cote D'Ivoire, India, Malta, Bosnia-Herzegovina, Cyprus, Montenegro, Serbia, St. Vincent and the Grenadines, Thailand, Bhutan, Greece, Samoa, Senegal, Turkey, Liberia, Mexico, and the United States. Forty-six percent of all states that would abolish the child death penalty did so in the second cascade.

Stages of Diffusion

The following sections will present the primary mechanisms of diffusion of the norm against the child death penalty with their accompanying methodologies. These mechanisms are: principled activism, coercive socialization and the globalization of childhood. This section also discusses laggards, or states that were able to resist or reject some norms contained within the global model of childhood. Figure 1.4 below summarizes the processes of diffusion.

Principled activism

The emergence of the norm against the death penalty for child offenders under age 18 was initially the result of the efforts of domestic norm entrepreneurs in a handful of countries, since there was not yet any international law, norms or scripts restricting the penalty to adults. Reforms for children were emblematic of the humanistic trend of progress and justice, since children represented the future of the nation as well as reflected its sense of compassion and the extent of its concern for the welfare of its citizens. Reforms for children in the United Kingdom, for example, came out of a variety of state reforms that limited the monarchy and its ruling class, and prescribed change for numerous aspects of society, including its penal system. These reforms sought to protect children from abuse and neglect, and they provided greater attention to infant mortality, nutrition, disease prevention, sanitation, education and labor restrictions. In other states, the impetus for reform came out of the horrors of World War II, as countries around the world restricted or outlawed the death penalty. These restrictions would eventually prove to be a boon for children, as they foretold the cascade of death penalty restrictions for

offenders under the age 18 beginning in the 1960s. In other cases, it is not clear why certain countries acted as they did. Some acts of abolition are simply perplexing: Italy, for example, abolished the penalty in the middle of World War II, in 1941, during Mussolini's reign.

Britain held a particularly important position in world culture in general, beginning in the mid-19th century.[183] The British Empire advocated strongly for global free trade and attempted to spread 'civilization' via British culture, claiming that colonial development would allow these countries to take part in global economic activity:[184]

> Its bureaucrats brought clean, rationalized administration to foreign lands. Its missionaries exported the blessing of a faith that promised individual salvation. Its merchants set up new enterprises around the globe.[185]

In other areas, Britain advocated for "universal humanitarian standards" through a variety of measures, including an end to the slave trade.[186]

The impact of British advocacy on the abolition of the child death penalty cannot be understated. The United Kingdom was not simply one of many countries that adopted the penalty prior to its inclusion in a global script; rather, the United Kingdom was central to the creation of modern world society in the 20th century:

> To be sure, many other parties helped to craft world culture. Latin American countries pioneered the new form of the nation-state. Many liberalizing ideas came from America and France. Japan…left its own imprint on world culture. Yet in many spheres, the [British] empire celebrated in 1897 had been the primary, though by no means the only, vehicle for the spread of the new world culture.[187]

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[183] Lechner and Boli, *World Culture: Origin and Consequences*, 76.
[184] Ibid.
[185] Ibid.
[186] Ibid.
[187] Ibid.

Therefore, if we are to understand the origins of the norm against the child death penalty, we have to understand it within the context of British culture. Indeed, the United Kingdom was not the first country to abolish the penalty for those under age 18; countries in Latin America abolished the death penalty altogether in the 19th century and France raised its age of majority to 18 in 1906, thus technically (though not explicitly) abolishing the penalty for those younger than 18. The United Kingdom, however, was far more influential—it shaped the criminal policies of many more colonies than any other power—and proved to be far more willing to export its child policies and norms to the colonies.

From the existing evidence, it appears that the norm against the child death penalty had its origins in the hard-won victories of child advocates and death penalty opponents. This was especially the case in the United Kingdom, where norm entrepreneurs functioned as ministers in government, social workers, intellectuals, scientists and lawyers. They advanced ideas about children's vulnerability, reduced culpability and need of care. As described above, these conclusions about children were justified through scientific studies that diagnostically separated 'normal' childhood from 'abnormal' childhood and legislated accordingly.

Coercive socialization

As described above, the colonies of the British and the French underwent a process of 'coercive socialization,' whereby norms, principles and rubrics of state organization were diffused to the colonies via law and policy. Included within these organizational forms were laws and policies specifying the relationship between the state

and the child, one that included criminal sanctions within its scope of authority. Coercive socialization included four steps that were not, necessarily, linear: First, British and French colonial powers imposed a form of state organization that allowed them to efficiently achieve their goals. These goals varied among the colonial powers and colonies, but they were primarily the goals of progress (wealth accumulation) and justice (*mission civilatrice* or white man's burden).

Second, the British and French enforced laws derived from Western legal systems where individuals are the central legal subjects. As stated above, the British were especially motivated to develop a single criminal code and procedure throughout their colonies. French colonial law was much more complicated. It varied to a far greater extent by colony, time period, offence and offender. In some cases, French law applied directly to the colony; in others, there were a number of different legal sources for a particular area.

Third, child law and policy developed, straddling disparate areas of law, government and custom. Invariably, these laws and policies dictated a paternal relationship between the state and the child that would eventually usurp parental power over children. Although both the British and the French were hesitant to impinge upon customary family law (which usually governed the bulk of children's lives), both empires eventually did to some degree. Restrictions to the death penalty by age were typically found in criminal codes or criminal procedure codes and, with a brief lag of a few decades in some cases, eventually reflected the metropolitan age limit of the penalty.

Fourth, colonial society was socialized to the goals of the British and French colonial powers (to the twin goals of progress and justice), the method of state

organization, and Western legal values and principles. These colonial societies were thus socialized to the authority of the state over children and to the various protections and guarantees that state authority entailed, prohibitions of the child death penalty among them. Evidence for socialization is found in the way that many colonies after independence continued the protections for children begun under the empire, and even increased them. Although two countries in my study, Tunisia and Tanzania, would eventually revoke some of these protections, this reversal would not come until later. Tunisia continued its policies of state-based child protections, including the ban on the child death penalty, for a decade after independence, and then reduced the age restriction for the penalty to 16. Tanzania continued the ban on the penalty for 15 years, before ending it in 1979 and then reinstating in 1997.

Coercive socialization through law and state organization is not the typical way in which we understand coercion or socialization in international relations. Law represents a different type of coercion than military force or economic aid. Law imposes a society's values, dictates legitimate and illegitimate behavior, creates social units and levels of authority, and, to a degree, establishes the agency of actors within the system by recognizing (or failing to recognize) their legal status as individuals (or groups) with a given identity. In the case studies for this dissertation, I found that the colonial powers established an identity for children apart from that of their parents, kin, clan, religion and even gender. The legal category 'child,' as a Western conception, was universal and equally applied (in law) to all children below the age 18.

Although law as a type of coercion may seem less distasteful or violent at first blush than other forms of coercion, it can actually be more insidious and powerful than an

occupying force. By defining and organizing social relations in the Western image, colonial powers socialized the colonies in such a way that dictated, to a large degree, their structure and characteristics after independence. This socialization occurred on two levels: First, colonial powers imposed laws and organization that were designed to achieve their complementary goals of accumulating wealth through resource management and of advancing the welfare of colonial inhabitants (albeit in a very limited fashion). Second, as colonial powers advanced the Western liberal state model, they further strengthened the model internationally so that upon independence, the menu of existing state forms that the colonies could adopt had become so limited that the Western state model seemed the logical choice and, for the most part, prevailed. States had also by this time internalized the norms and values built into the model they had inherited.

As sociological institutionalists would expect, "state building proceeded largely according to global scripts" after World War II, "resulting in a world of sovereign, rational, nominally equal states."[188] A key part of the attraction to the Western liberal state model was the narrow definition of 'civilization' employed after the war. This definition, according to sociological institutionalists,

> crystallized in a body of international law that grew out of the culture of European states and their diplomatic interactions. The standard defined the world as a community of civilized states. Civilized were those states that guaranteed certain basic rights to their citizens, operated as competent bureaucracies, adhered to the precepts of international law, fulfilled their international obligations, and accepted 'civilized' norms.[189]

Both European and American liberals supported the development of a community of sovereign states following the war and the spread of decolonization through the creation

[188] Ibid., 46.
[189] Ibid., 67.

of IGOs such as the United Nations. Nonetheless, world culture following the war became hotly contested, as "rival core states sought to put their stamp on that culture, however much they already shared."[190]

Through colonialism and the diffusion of Western law, legal systems and values, children were included in development efforts and given a place in the state order as individuals. State authority over children usurped parental, clan, kinship or tribal control and created children as legal subjects that were equal to one another under the law throughout the state. As these laws and policies created child subjects in the image of the metropolitan child, this confirmed the beliefs of child advocates, international aid workers and development specialists that *all* children possess the same nature, needs and wants. This growing consensus on the common nature of children reinforced the efforts of IGOs, such as UNICEF and Save the Children International Fund, to make children a prominent part of development efforts and inspired the movement toward international children's rights that would begin to emerge in the 1970s. Former colonies of the British and French thus entered an international system in which the only legitimate (read: civilized) model of statehood was the Western model that created children as legal subjects, advanced the notion of a universal childhood, established the state as the rightful guardian of children's interests and affirmed the role of the rapidly developing international community in promoting and securing children's welfare.

Why then did some colonial powers fail to advance norms of child protection in their states? Why did the colonies of Spain, Portugal and Belgium lag behind in the adoption of the norm against the child death penalty? I suggest two explanations: First,

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[190] Ibid., 78.

the states of Latin America that abolished in the 19th century—Venezuela, Costa Rica and Brazil—abolished the death penalty for all crimes and all offenders. There is no evidence that this pattern of abolition had anything to do with norms about children and childhood; yet these states nonetheless must be considered in the database because their general abolition included and affected children. The larger question is, why did norms against the general death penalty emerge in the periphery and spread much later to the core? This presents its own set of questions and requires a completely separate evaluation of the diffusion of death penalty abolition *in general*—a subject beyond the scope of this dissertation. Second, and more importantly, the norm against the *child* death penalty for those under age 18 (apart from the norm against the general death penalty) did not emerge until the 20th century. Since colonialism in Latin America ended, for the most part, in the 19th century, the systems of rule established in these colonies predated the norm entirely.

GLOBALIZED CHILDHOOD

In the second half of the 20th century, the universal (or globalized) model of childhood became more complex and specific. It is important to reiterate the point made earlier: The term 'universal' here does not suggest that the model is found everywhere, only that it was and is presented to world society *as if* it were universal, as though it applies to all, regardless of locality or context. The process of diffusing this model of childhood occurred on many levels: First, to a large extent, internationalization began in the 19th century as the British and French (predominately) acculturated their colonies to their legal structures and norms, discussed above.

Second, an increasingly global community of child advocacy and set of norms protecting children emerged with the League of Nations and the Save the Children International Fund, eventually finding sure footing in the United Nations, especially within UNICEF. These organizations diffused the model's norms to the developing world. Save the Children International Fund, an organization founded in the United Kingdom in 1920, carried out its mission in a variety of ways, including gathering and compiling information about child welfare practices as well as advancing norms of child protection through outreach and education. Save the Children sent out teams of doctors and nurses with expertise in child welfare and maternity work abroad, establishing its presence in a number of countries.[191] By 1951, Save the Children was active in 40 countries in Europe, Asia and the Americas.[192]

UNICEF was also crucial in disseminating Western norms about children throughout the world, especially in developing countries after World War II. Established in 1946, the organization expanded to include campaigns about health, sanitation, education and childcare, eventually adopting a comprehensive child approach that looked at multiple areas of child development and well-being. These organizations were central to the internationalization of childhood, promoting Western norms of child welfare through their relief and humanitarian efforts.

Third, world conferences, meetings, special sessions and summits, some sponsored by the United Nations, were also key to diffusing a global model of childhood

[191] Fuller, *The Right of the Child: A Chapter in Social History*, 24-26.
[192] Ibid., 46, 96.

to states. These prestigious and influential events "display world culture under construction."[193] These meetings

> are rituals, scripted performances that lend special meaning to shared symbols and create a collective sense of the sacred through direct experience of the larger social whole. Global ideas and norms can originate in many places, but constituting them as global, as deserving of universal respect, requires deliberate collective effort by participants in world society. [194]

Meetings of this nature became common in the 19th century, but since World War II:

> carefully staged, periodic UN meetings on symbolically charged topics by the authorized representatives of key entities within world society have been peak events in those now more globally inclusive collective efforts."[195]

Through all the mobilizing, organizing, assessment and follow-up, the "UN has created a form of secular ritual that has served to crystallize new global understandings and invest them, at least in principle, with the authority of 'humankind.' "[196]

The United Nations organized 70 major meetings between 1960 and 2000 on issues of trade, crime, human rights, population, children and technology.[197] Summits were an especially popular way to diffuse global standards after the Cold War.[198] The most important meeting on children in the last 50 years was the 1990 World Summit on Children, corresponding with the 1990 CRC. At this summit, the largest assembly of world leaders ever convened (at that time) participated in what was heralded by UNICEF

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193 Lechner and Boli, *World Culture: Origin and Consequences*, 84.
194 Ibid.
195 Ibid.
196 Ibid., 89.
197 Ibid., 90.
198 Ibid.

as a "dramatic affirmation of the centrality of children to our common future." UNICEF itself described the experience as "transcendent."[199]

Finally, the evolution and growing complexity of international law has gradually produced an ever-expanding and detailed model of childhood, one that is in fact *globalized*. Three declarations and one convention about children were drafted during the 20th 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. These legal texts articulated the evolving model of childhood and reflected contemporary ideas about children and the role of the state and of parents. These documents provide a window onto the shifting parameters and growing substance of a global model of childhood. To facilitate comparison, Table 1.1 below lists the contents of three of these documents.

Of the four declarations and conventions *specifically addressing children*, only the CRC prohibits the death penalty for child offenders. Other conventions also ban the penalty for those under 18: The first international treaty to ban the execution of some child offenders was the 1949 Geneva Convention relative to the Protection of Civilian Persons in Time of War. Article 68 states that "protected persons" who commit their crimes when they are younger than 18 cannot be given the death penalty. Additionally, the ICCPR also bans the penalty in Article 6.

[199] UNICEF, "United Nations Special Session on Children: The World Summit for Children," http://www.unicef.org/specialsession/about/world-summit.htm.

TABLE 1.1: THE CHANGING GLOBAL MODEL OF CHILDHOOD AS EVIDENT IN FOUR INTERNATIONAL DOCUMENTS RELATED TO CHILDREN

Early-period norms found in law/1924 Declaration	First-cascade-period norms found in law/1959 Declaration and 1976 ICCPR	Second-cascade-period norms found in law/1990 CRC
Duties, obligations	Some rights, some duties	Mostly rights
Equality/freedom from discrimination: Race, nationality or creed (Preamble)	Equality/freedom from discrimination: Broader protections including color, sex, language, political opinion, social origin, property, birth or other status (1959 Principle 1, ICCPR Article 24)	Equality/freedom from discrimination expanded to include ethnic origin and disability (Article 2).
Material/physical needs: food, health care, shelter (Section 1 and 2)	Protection to develop: physically and mentally (1959 Principle 2) Right to adequate nutrition, housing and medical services (1959 Principle 4)	Health and health care (Article 24). Attainment of standard of living adequate for physical and mental development (Article 27)
Education, training (Section 2 and 4)	Education: free, compulsory primary school (1959 Principle 7)	Education: compulsory and free (Article 28)
Justice: rehabilitation of the child criminal (Section 2)	No death penalty for those under 18 years of age (ICCPR Article 6). Juvenile offenders should be separated from adults (ICCPR Article 10). Adjudication should be speedy (ICCPR Article 10). Treatment should be appropriate to age (ICCPR Article 10). Judgments rendered in criminal cases shall be kept private when it is in the interest of juveniles, matters concerning matrimonial disputes or guardianship of children (ICCPR Article 14). Judicial procedures should take into account the age of the juvenile and the promotion of rehabilitation (ICCPR Article 14).	No death penalty or life imprisonment for those under 18 years of age without possibility of release. (Article 37). Separated from adult criminals (Article 37). Freedom from unlawful or arbitrary deprivation of liberty (Article 37). Allowed to maintain contact with family (Article 37). Prompt access to legal and other assistance (Article 37). Right to challenge the legality of a sentence promptly (Article 37). Treated in a manner consistent with the child's age (Article 40). Right to judicial protections: no ex post facto punishment, presumed innocence, speedy hearing, legal assistance, examination of witnesses, access to an interpreter, privacy in all stages of the process (Article 40). Establish a minimum age of criminal responsibility (Article 40).
Moral guidance: spiritual development. (Section 2 and 5)	Happiness (1959 Introduction); Protection to develop: morally and spiritually (1959 Principle 2)	Attainment of standard of living adequate for spiritual and moral development (Article 27)

	Protection to develop socially (1959 Principle 2)	Attainment of standard of living adequate for social development (Article 27)
First to receive relief in times of distress (Section 3)	First to receive protection and relief (1959 Principle 8)	Right to protection in armed conflict (Article 38) Right not to be part of armed conflict if under age 15 (Article 38). Right not to be recruited if under age 15 (Article 38). Right to rehabilitation of child victims (Article 39).
Labor: freedom from exploitation, given education and training for a livelihood (Section 4)	Labor: limitations in age and type. Protection from hazardous labor. Protection from exploitation (1959 Principle 9)	Protection from economic exploitation (Article 32). Protection from hazardous work or work that interferes with physical, mental, spiritual, moral or social development (Article 32) Protection from sexual exploitation (Article 34).
	Best interest of the child (1959 Principle 2)	Best interest of the child (Article 3)
	Age defined: before and after birth; physical and mental immaturity (1959 Preamble)	Age defined: 18 unless majority is attained earlier (Article 1)
	Child seen not as an isolated unit but part of a family: reference to parents, individuals, voluntary organizations, local authorities and national governments (1959 Preamble and Introduction) Care from parents (1959 Principle 6) Protection of children at dissolution of marriage (ICCPR Article 23).	Recognition of family (Preamble, Articles 2 (1 and 2), 3 (2), 5, 9 (1, 2 and 4), 14, 18, 20. Care from parents (Article 7) Right to family relations (Article 8) Kept with parents when possible (Article 9) Request family unification (Article 10) Contact with family if separated (Article 10)
	Name and Nationality (1959 Principle 3) Registered, given name and nationality (ICCPR Article 24)	Name and Nationality (Articles 7 and 8) Identity Article 8
	Social Security (1959 Principle 4) Assistance to families without adequate means of support (1959 Principle 6)	Social Security (Article 26)
	Treatment, education and care for disabled children (1959 Principle 5)	Right of disabled children to enjoy full and decent life (Article 23) Right to special care and assistance (Article 23)
	Recreation and leisure (1959 Principle 7)	Rest, play, recreation and leisure (Article 31)
	Protection from trafficking, neglect, cruelty and exploitation	Freedom from physical and mental violence, abuse, neglect or

	(1959 Principle 9)	exploitation (Article 19)
		Life (Article 6)
		Right to act as a protagonist in best interest cases (Article 9)
		Right to leave any country (Article 10)
		Right to enter own country (Article 10)
		Freedom of expression including the ability to seek, receive and impart information (Article 13)
		Freedom of thought, conscience and religion (Article 14)
		Freedom of association and to peacefully assemble (Article 15)
		Privacy (Article 16)
		Alternative care if deprived of a family (Article 20) Right to periodic review of treatment and circumstance (Article 25)
		Protection and assistance of refugee children (Article 22)
		Enjoyment of culture (Article 30) Use of own language (Article 30) Take part in cultural and artistic life (Article 31)
		Protected from illicit drugs and substances (Article 33)
		Freedom from torture, cruel, inhumane or degrading treatment (Article 37)

In examining one aspect of the model—justice and punishment (highlighted in the above table) —it is evident that protections for children under the law greatly increased in the 13 years between the 1976 ICCPR and the 1990 CRC, while the age parameters of the norm of abolition for child offenders remained the same. The model of childhood advanced by the CRC was also significantly more detailed, complex and wider in scope than previous attempts to enumerate rights and protections for children.

Although children and childhood became a new focal point of international human rights efforts in the last half of the 20th century, the issue of the child death

penalty remained obscure until Amnesty International and its American chapter took it up in the 1980s and 1990s. Employing a moral authority derived from its legacy as a champion of human rights and the legitimacy of an emerging children's rights regime, Amnesty was able to put the issue of the child death penalty on the international human rights agenda. The fifth chapter of this dissertation considers the sources of authority for the globalized child. Through the case studies of one IGO (the United Nations) and one INGO (Amnesty International), I investigate how the sciences and law provided sources of authority for the globalized child and how these were used in campaigns against the child death penalty.

The 1990s saw the triumph of the Western liberal state model. The contestation that had characterized the international system since World War II came to an abrupt end in 1989 with the fall of the Soviet Union. The sudden demise of one of the world's two superpowers meant that the Western liberal state model was now the only game in town. The European Union quickly expanded to include some of the former Soviet states; apartheid ended; and human rights assumed a new importance in international political discourse. It was in this environment that the globalized child was institutionalized in the CRC.

The CRC began a period of intense international consolidation of authority over childhood, as international law and the institutions established to monitor it came to be viewed as the definitive authority on the treatment of children by the state. As of March 2010, all states in the international system have ratified the CRC except for two, the United States and Somalia. The convention's nearly universal ratification indicates global acknowledgment of a model of childhood that all states should adopt.

In assuming authority over the model of childhood, the international community lays claim to expertise over what childhood should be. It usurps state authority over children by asserting universal rights for children regardless of where they live. State sovereignty is thus undermined by international law on children in the same manner that international human rights law limits state behavior toward its citizens—ideologically, not materially. This will be discussed in greater detail below.

LAGGARDS

The late 20th and early 21st centuries exhibited a dramatic contestation between state sovereignty and international law prohibiting the child death penalty, as laggard states, such as the United States, China and Pakistan struggled between resistance to and compliance with international principles. Norms about the child death penalty received special attention beginning in the 1980s when Amnesty International and other INGOs took up the issue. Various parts of the United Nations also adopted the issue and chose the United States' and other states' continuing practice of the child death penalty as the focal point of many U.N. campaigns, reports and declarations. The resistance of the United States in particular to international law on the child death penalty kept the issue in the forefront of human rights criticism of the United States.

The evidence in chapter 6 suggests that the United States became a hegemonic laggard because the timing of its opposition to the emerging norm was off. Indeed, the shift in hegemonic power (from the United Kingdom to the United States in the mid-20th century) occurred *before* the norm diffused, but the United States initially went along with global trends in general death penalty abolition by instituting a moratorium on the

practice while the Supreme Court considered its constitutionality in the late 1960s and early 1970s. This unofficial moratorium occurred during the peak of the first cascade, and may have strengthened efforts to limit the penalty around the globe. By the time the United States began executing child offenders again (in the mid-1980s) and began vociferously to reject the norm (with its ratification of the ICCPR in 1992 and its failure to ratify the CRC in 1990), the first cascade had already ended and the second cascade was under way. The peak of the second cascade was in 1990 when the CRC came into force.

The United States' delay in engaging the international community, its failure to participate in the persuasion and debate characteristic of international norm development at the United Nations and other international fora, drastically limited its power to shape the norm. The United States was a hegemonic laggard in this norm's diffusion not simply because it continued to execute child offenders after most other states had stopped the practice; rather, the norm succeeded *without the hegemon* because the United States did not decide its position until late in the 1970s (with *Gregg v. Georgia*, in 1976) and did not promote it until much later. It was not so much the decoupling of the norm from the practice in the United States as a lack of decisiveness and will that allowed the norm to cascade.

Furthermore, the case studies of China and Pakistan suggest that the national laws of both countries reflect the international norm against the penalty, but that there are difficulties in its application: For China, the difficulty is in the precise determination of the age of offenders, with INGOs like Amnesty International claiming that certain offenders are under the age 18, contradicting Chinese claims. Pakistan also has issues

determining the age of offenders, but the main impediment to compliance is the central government's lack of control over particular tribal areas that continue the practice of executing child offenders.

AUTHORITY

The development of the modern ideal of childhood extends from the early period of state consolidation of control over children's protection to the late period of international authority over children's rights. Authority over children has shifted in the last two to three centuries from the father, who was sovereign of the family, to the state. The last half of the 20th century witnessed a second shift of authority from the state to the international community. This second shift was not regulatory in that there was no enforcement of children's rights at the international level. Rather, the authority of the international community was and is ideological.

Ideological authority over childhood can be understood as the authority to determine what childhood means; when it begins and ends; what specific responsibilities it demands of adults; what special protections it affords; how children should be educated; what their health care should entail, etc. Material authority over childhood is the ability to control children's actions. Even today, parents possess primary material authority over children, in determining what they should do during their day, what they eat and wear, and where and how they are educated or work. If parents fail to meet their obligations according to the ideological model of childhood (as defined by the state), the material authority over children can in many societies be taken from parents and given to the state.

By articulating the standard of childhood, the international community asserts the power to define childhood, thus establishing the scope of protections and the nature and adjudication of violations. The ability to define the problem and the solution, qualities of ideological power, is an important organizing principle in international relations. Table 1.2 below expands on the qualities of authority for the father, the state and the international community.

TABLE 1.2: QUALITIES OF AUTHORITY FOR THE FATHER, STATE AND INTERNATIONAL COMMUNITY

Authority	**Father**	**State**	**International community**
Scope	Ideological with regulation Material	Ideological with regulation Material in certain circumstances	Ideological
Historical period	Beginning in the 18th century	19th through 21st centuries	Since World War II, most extensively since 1990
Source of authority	God, Western philosophy and law	God, law, efficiency, science, expertise, rationality, bureaucracy	Universal values, science, expertise, law
Challenges to authority	State, children, religion, NGOs, international community, science, expertise	Family, children's rights, parental rights, international community, NGOs, religion, local custom	Parental rights, familial rights, state sovereignty, NGOs, religion, local custom

As the table above demonstrates, the source of authority over childhood has been highly contested. Until reforms for children were adopted by the state and the state began to monitor childhood through its expanded bureaucracy, paternal authority was absolute by the late 19th century. It included ideological authority that was regulated through

violence. This authority was considered the right of fathers as conferred by God, philosophy, law and custom. Reformers, many affiliated with religious institutions, particularly Protestantism, first challenged this authority, as demonstrated by the U.S. and the U.K. cases. Later, the state, INGOs, IGOs and the international community joined efforts to usurp paternal power.

Michel Foucault, among other authors, has theorized the transition of the state from a monarchy to a new form of "governmentality" that required the creation of new forms of expertise and legitimacy to "categorize, differentiate, and normalize populations."[200] State authority began to usurp paternal authority because state institutions were seen as more efficient monitors of childhood. As the U.S., U.K. and French cases especially demonstrate, parents came to be perceived as untrustworthy, ill-suited guardians of children, as the burgeoning field of social scientific studies indicated that the greatest locus of abuse and neglect was the home. The state stepped in to monitor the material aspect of childhood as it sought to ensure that children were given proper nutrition, education, protection from unsuitable or excessive labor and were free from abuse and neglect. The idea of childhood grew more multifaceted under state authority, and the state developed an increasingly complex bureaucratic organization to accommodate it. This bureaucracy would add to and further expand the idea of childhood, as evidenced by the growing attention in the West in the 19th century to issues of child nutrition, hygiene, welfare and psychological well-being, suggesting a co-

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[200] Bloch, *Governing Children, Families, and Education : Restructuring the Welfare State*. Jacques Donzelot and Robert Hurley, *The Policing of Families* (Baltimore: Johns Hopkins University Press, 1997), Michel Foucault, *Madness and Civilization; a History of Insanity in the Age of Reason* (New York: Pantheon Books, 1965), ———, *The History of Sexuality, Volume I: An Introduction*, trans. Robert Hurley (New York: Vintage Books, 1981), Foucault, "Governmentality.", Michel Foucault, *Discipline and Punish : The Birth of the Prison*, 2nd Vintage Books ed. (New York: Vintage Books, 1995).

constitutive relationship between the state and the child. The state was (and still is) challenged from all sides. The U.S. case, for example, indicates that state authority over children has, at times, been affirmed by some U.S. courts while undermined by others.

The greatest threat to state authority over childhood is the international community. Although the international community's authority over childhood is ideological (as opposed to material), it nonetheless plays an important role in determining how states should treat children. Through instruments such as the *State of the World's Children*, a yearly UNICEF publication, and international declarations and conventions, the ideological authority of the international community is powerful, commanding the attention and respect of sovereign states. *The State of the World's Children* cites the current goals of international institutions (such as the U.N. Millennium Development Goals), and offers a detailed report on the performance of each country as measured against both the globalized model of childhood and its established benchmarks and goals.[201]

Indeed, there is precedent for this phenomenon. The shift in authority from the parent to the international community recalls an instance in early American society, as documented by de Tocqueville, when "society cohered, despite weak central authority, because informal associations and democratic loyalty made Americans at least pretend to be alike and to posture as good, participatory citizens."[202] Today, INGOs pressure states to accept the ideological authority of the international community over children so that they can participate as equals in modern, liberal global society.

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[201] The most recent edition can be found at http://www.unicef.org/sowc07/.
[202] Meyer, "The Nation as Babbitt: How Countries Conform," 43.

One final caveat: I do not present a teleological argument in this dissertation. I do not conclude that international authority will eventually result in the type of authority possessed by the father in the Western family prior to the 20th century, a regulated authority over childhood. I only draw attention to the phenomenon that states acquired regulatory authority over childhood in the 19th and 20th centuries, akin to, and at the expense of, paternal authority. Whether or not the international community ultimately develops regulatory authority over children is beyond the scope of this dissertation. I am primarily interested in how ideological authority over childhood has evolved, and what specific processes and precise mechanisms shaped the development of a globalized childhood that, as this dissertation demonstrates, has been institutionalized in important and meaningful ways.

PATTERN OF DIFFUSION

Three mechanisms of diffusion are found in the case studies in this dissertation. First, constructivists, liberal theorists and legal scholars all point to the role of norm entrepreneurs, who can adopt or create an issue and work domestically or internationally to promote it, often through campaigns.[203] Norm entrepreneurs can be distinguished from norm leaders, or states (usually more influential) that adopt norms and then promote them in the international sphere.[204] Although extremely important to a norm's advancement, these states usually become advocates because of the work of domestic agents. A more in-depth discussion of norm entrepreneurs for children's protection is found in Chapter 3.

[203] Finnemore and Sikkink, "International Norm Dynamics and Political Change.", Keck and Sikkink, *Activists Beyond Borders*, Cass R. Sunstein, "Social Norms and Social Rules," *Columbia Law Review* 96 (1996).
[204] Finnemore and Sikkink, "International Norm Dynamics and Political Change," p. 255.

One type of principled actor, epistemic communities, defined by Peter M. Haas as "network[s] of professionals with recognized expertise and competence in a particular domain and an authoritative claim to policy-relevant knowledge within that domain or issue-area," may also be powerful transmitters of ideas globally.[205] These experts can take the form of doctors, researchers, child advocates, lawyers, professors or diplomats. Expertise in children's protection and the child death penalty came from international development organizations such as UNICEF, although other experts weighed in about children's rights in greater numbers after the 1970s. These developments will be discussed in more detail in chapters 4 and 5.

Second, law itself can serve as a vehicle for acceptance by publicizing a norm. Many legal scholars, such as Cass Sunstein, suggest that law has an expressive function that contributes to a norm's acceptance. Law, the primary method of diffusion evaluated in this dissertation, expresses meaning in the form of "attitudes and commitments."[206] Law addressing children was coercively diffused in the colonies of the British and French empires. In this process, these colonies were acculturated to Western norms about children and to the state's role in guaranteeing their rights and protection.

Third, sociological institutionalists suggest that the most effective method of diffusion is the state system itself, which advanced a particular model of the nation-state with pervasive authority over citizens. As this model spread, state authority increasingly regulated the daily life of citizens. Through regulation, states diffused particular norms throughout the world; norms about children were arguably among these.

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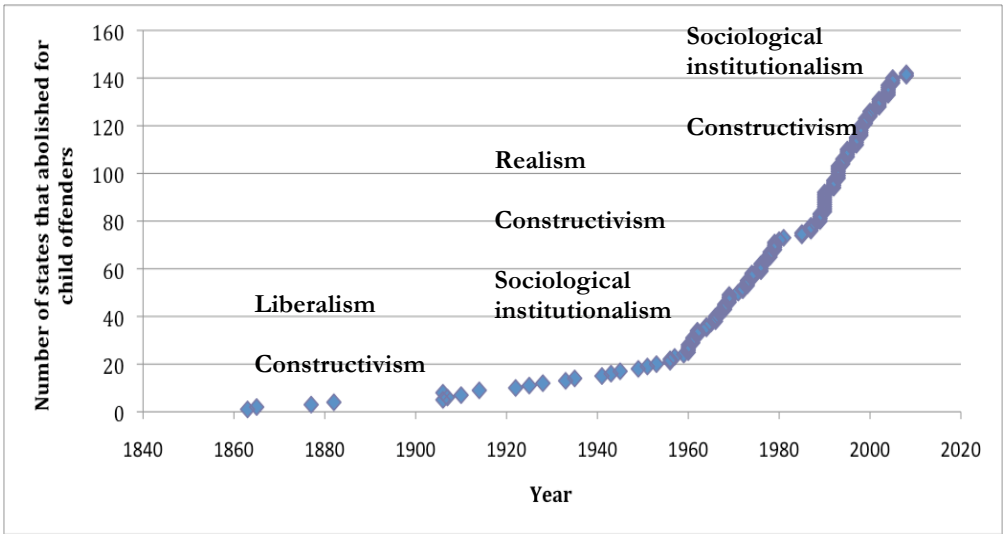
[205] Peter M. Haas, "Introduction: Epistemic Communities and International Policy Coordination," *International Organization* 46, no. 1 (1992): p. 3.
[206] Cass Sunstein, *Free Markets and Social Justice* (New York: Oxford University Press, 1997), p. 45.

Organizational platforms were key to the process of diffusion. In the case of children, a global community of child advocacy emerged with the League of Nations and the Save the Children International Fund. Organizational advocacy was further advanced by the development of international law, the establishment of the United Nations and the eventual involvement of UNICEF, Amnesty International and other legal and/or human rights organizations that adopted the cause of children's rights in the 1980s, as discussed in chapters 3, 4 and 5.

To summarize the theoretical findings of the dissertation, Figure 1.3 below presents the mechanisms of diffusion and the corresponding theoretical approaches in international relations. Principled actors diffused the norm of abolition of the child death penalty domestically prior to the development and maturation of the globalized model of childhood after World War II. Constructivism and liberalism adequately explain this process.

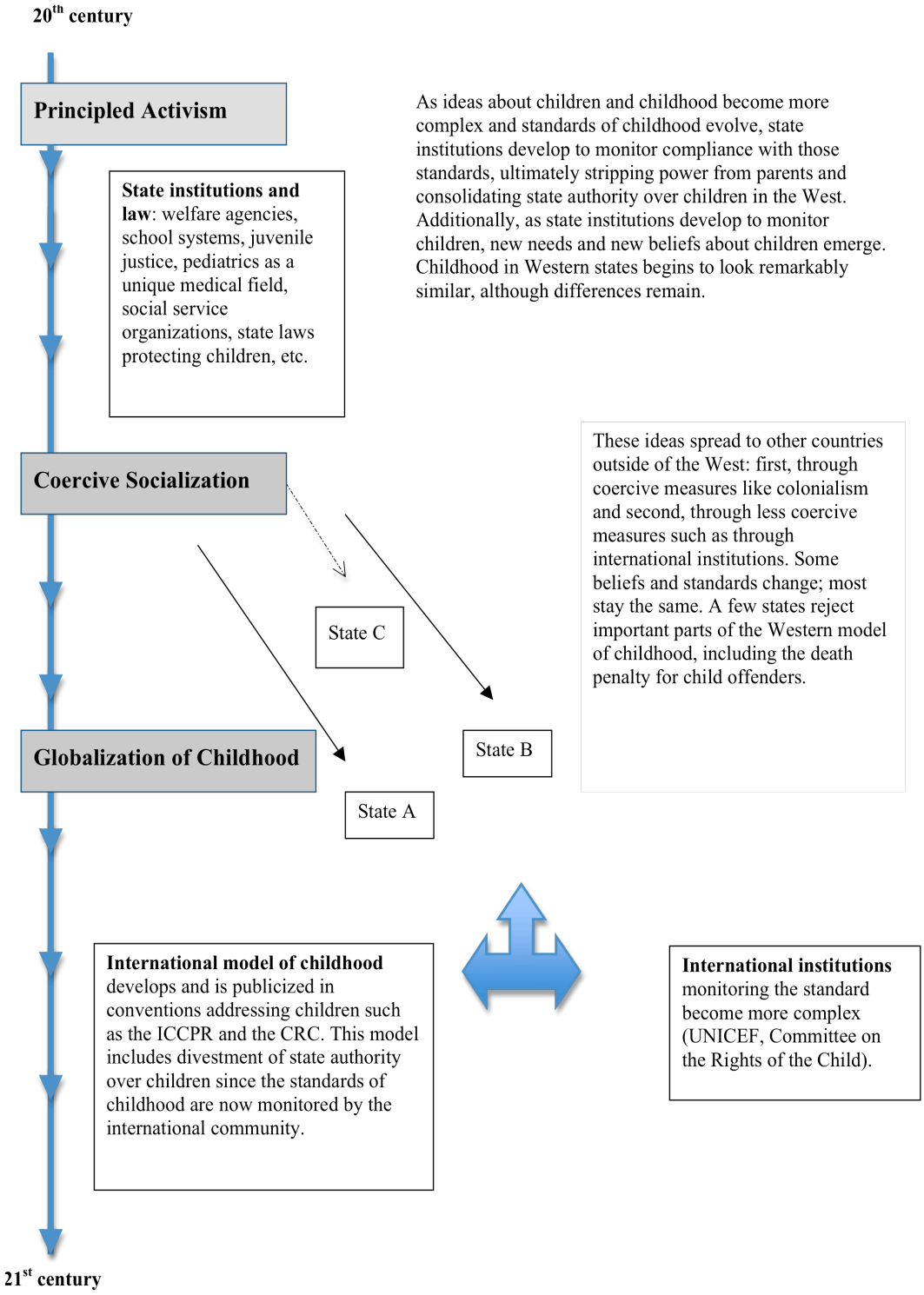
FIGURE 1.3: THEORETICAL APPROACHES TO THE DIFFUSION OF THE NORM PROHIBITING THE DEATH PENALTY FOR CHILD OFFENDERS



The coercive socialization of colonies in Africa and the Middle East can be adequately addressed by realist theories of compulsory and structural power and constructivist conceptions of productive power. Sociological institutionalist theories explain the globalization of childhood after World War II, when the model of the Western liberal state, which included a specific Western construction of childhood, became the global norm. The presence of hegemonic laggards and the success of nonstate actors in shaping and reshaping the model itself are best explained by constructivist theories of transnational activism and global civil society. As depicted in Figure 1.2 earlier in the chapter, this is not a process that can be easily broken down by time period since mechanisms of diffusion co-exist and overlap.

Drawing on the dataset and case studies, I argue that the abolition of the child death penalty was part of a larger dynamism surrounding authority over childhood in general. This in turn was part of a greater shift in authority over the treatment of human beings in general, changes reflected in the promotion of human rights after World War II. Authority over childhood and the determination of how children should be treated shifted from parents (especially fathers) to the state to an emerging, yet powerful, international regime. See Figure 1.4 below for a summary of the process of diffusion of the norm against the death penalty for child offenders under age 18.

FIGURE 1.4: SUMMARY OF THE PROCESS OF DIFFUSION OF THE NORM AGAINST THE DEATH PENALTY FOR CHILD OFFENDERS UNDER AGE 18



The norm's diffusion involved a complicated series of steps, best demonstrated by the case studies of the United Kingdom and France (chapter 3). First, child advocates began to argue for better treatment of children, including child offenders. Second, scientists and other experts began to turn their attention to childhood and juvenile delinquency as subjects of scientific inquiry. Child advocates and, eventually, state, local and regional bodies that monitor the treatment of children, used these studies and the developing body of research and knowledge generated by the growing field to bolster their claims and buttress their arguments. Third, as knowledge about children expanded and the regulation of childhood became more complex, the state consolidated its control over children, primarily in the areas of health, education and juvenile reform, and thus usurped ideological (and at times, material) authority over childhood from parents.

Fourth, the conception of childhood adopted in the West was spread throughout the international system through coercive measures, such as colonialism, and less coercive measures, such as international institutions and aid efforts. Finally, international law codified the standard of childhood, as seen most precisely in the 1990 CRC. International law on children's rights, in important ways, usurps state authority over the ideology of childhood, establishing complicated and exacting standards that all countries should adopt. Although international law about children is without means of enforcement, the law nonetheless serves as a means of confronting states about their child policies and forces them to engage with these norms as they participate in international institutions and relief and humanitarian efforts. The process of international consolidation over children's rights and the parameters of childhood mirrors the post-World War II

international consolidation over human rights in general, as the international community increasingly became the arbiter of acceptable treatment of citizens by states.

CHAPTER OVERVIEW

Although I am certain that the idea of childhood did *not* originate in the West, as at least some type of recognition of the differences between very young children and adults appears to be common across cultures, it is evident that age-based legal norms about children diffused globally because the West adopted them, advocated for them and enforced them in their colonies. This model of childhood, characterized by the immaturity, vulnerability and reduced culpability of children (biologically, psychologically, intellectually), by the upper age limit of 18 years old, and by a relationship between the state and the child in which the state assumed responsibility for the child's welfare, became the international model found in the CRC and advanced by U.N. organs such as UNICEF.

In the next six chapters, I examine the history of childhood through the diffusion of the norm against executing child offenders. In chapter 2, I present my dataset in order to flesh out the international arc of abolition for child offenders along with an evaluation of key findings in the diffusion, death penalty and history of childhood literatures. In chapter 3, I investigate the process of early adoption through the British and French case studies—and determine that the primary mechanism of adoption by these states was the work of principled domestic actors.

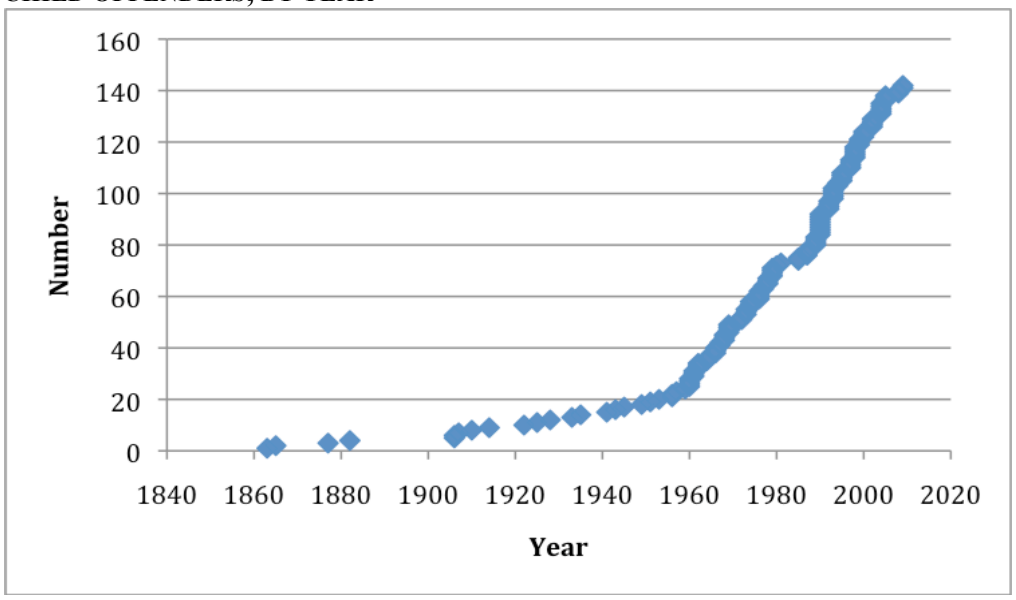
In chapter 4, I investigate the role that colonialism and legal acculturation had on the former colonies of Algeria, Kenya, Tanzania and Tunisia and the influence of the

West on the legal protection of children in Japan and Ethiopia. I argue that legal acculturation was the key socializing mechanism of these states to Western ideas of childhood. In Chapter 5, I examine the process of internationalization in more depth, considering through the case studies of UNICEF and Amnesty International how international law and institutions spread or supported the Western idea of childhood in developing states. Chapter 6 evaluates the role of laggards through an examination of the United States, Pakistan and China cases. Finally, in Chapter 7, I consider how my findings can be generalized to other norms and other instances of diffusion.

CHAPTER 2
DATA AND CASE SELECTION

At least 142 states banned the death penalty for child offenders over the course of the last two centuries. The trend toward abolition of the death penalty for child offenders is presented in Figure 2.1 below.

FIGURE 2.1: THE NUMBER OF STATES THAT ABOLISHED THE DEATH PENALTY FOR CHILD OFFENDERS, BY YEAR[207]



The data in figure 2.1 above reveals a sequence of two dramatic sequential spikes in the number of states that abolished the death penalty for child offenders over this time period. The diffusion pattern of the norm of abolition captured by the data presents a puzzle, which is: What happened in these states over the course of this period to produce such an important and widespread policy change regarding society's least sympathetic children? By arranging the diffusion of the norm abolishing the penalty into three

[207] In Figure 2.1, I include both abolition of the death penalty in general and abolition of the penalty for child offenders. Where states abolished first for child offenders and then later for the death penalty in general, I use the earlier date

temporal stages – the early period, first cascade period and second cascade period, as outlined in chapter 1 – other questions emerge. What do these states have in common, if anything? What norms do they share? Conversely, what qualities do states that reject the norm of abolition for child offenders share? This chapter will begin with a brief summary of the argument and methodology presented in chapter 1 before considering the norm of abolition of the child death penalty through a wide lens. In doing so, I will consider a range of independent variables that may shed light on the norm's mechanisms of diffusion, as well as lend support to efforts to generalize the findings of the dissertation beyond the case studies found in chapters 3 through 6.

BRIEF REVIEW OF THE ARGUMENT AND METHODOLOGY

As discussed in chapter 1, the abolition of the death penalty for child offenders is a difficult history to trace. There has been very little historical research on children outside of the West and even less research on child offenders and the death penalty. It is therefore nearly impossible to determine precisely how many child offenders have been put to death by their respective governments. Many governments themselves, nongovernmental organizations (NGOs) and academics did not keep record of these deaths prior to the 1970s and 1980s, when human rights NGOs such as Amnesty International began to take an interest in the subject.[208]

[208] Save the Children Fund conducted research into the child death penalty in the 1920s and found ten countries that had abolished the death penalty for child offenders under the age of 18. These states were all in Europe: Albania, Belgium, Bulgaria, Czechoslovakia, Estonia, Germany, Latvia, Lithuania, Switzerland and Hungary. However, Save the Children did not supply names or dates of passage of these laws. The data is therefore difficult to confirm. Fuller, *An International Yearbook of Childcare and Protection*, ———, "The International Handbook of Child Care and Protection, V. 3.", ———, "The International Year Book of the Child Care and Protection, V. 2."

When a country chooses to restrict its application of the death penalty, it can do so in a number of different ways: First, it can limit the penalty by abolishing it for classes of people, such as women and children; second, for types of crimes; third, by age, such for as children or the elderly ;and fourth, for all crimes (general abolition). When a state chooses this route – general abolition -- it is difficult to determine the motivation behind the policy change. However, since general abolition also bans the death penalty for child offenders, it has the same result as abolition solely for child offenders for the purposes of this study.

In terms of methodology and approach, I trace the diffusion of the norm abolishing the death penalty for child offenders internationally through the study of national law and legal histories. The dataset that I have compiled includes all the states for which I have verifiable dates of abolition and/or laws and cases. These dates refer to the *first instance* of the abolition of the death penalty for child offenders, usually found in penal codes or in codes of criminal procedures, although these can also be found in national case law or in the accession of previous codes and laws by newly formed states. Although both general abolition and abolition of the penalty solely for child offenders end the penalty for child offenders in practice, only the latter is analytically useful for researching trends in norms regarding children. While the universe of cases of abolition of the child death penalty should include states that abolished the penalty in general as well as those that abolished solely for child offenders, the case studies of this dissertation will focus exclusively on states that abolished solely for child offenders under age 18. The principal rationale for this selection was that only these states sent a clear message

about children's culpability for their crimes and, through abolition, affirmed norms of child protection.

This chapter will present the database for the dissertation and a summary of its interesting features for the field of international relations and comparative politics. It will then explore some of the theories addressed in chapter 1, including my argument about how the norm abolishing the death penalty for child offenders diffused throughout the world. From the death penalty literature discussed in chapter 1 and my own analysis of diffusion, I will examine the following independent variables: region, population, regime type, recent transition, colonial heritage, religion and the ratification and timing of international law.

DATA

Based on data found in the archives of Amnesty International USA and reports to the UN Human Rights Committee (HRC) and the Committee on the Rights of the Child, I found that at least 142 countries have national laws prohibiting the death penalty for child offenders. See Appendix A for a complete review of my dataset. Although there are other cross-national legal studies of childhood, these predominately tend to examine national constitutions, a far easier endeavor than studying national legislation, which tends to be difficult to compile, translate and analyze and which may employ diverse legal terminology. [209] Moreover, norms about children tend to emerge in domestic legislation long before they appear in national constitutions. The paucity of literature on children and the death penalty required me to rely on data and information collected by NGOs like

[209] See for example: John Boli-Bennett and John W. Meyer, "The Ideology of Childhood and the State: Rules Distinguishing Children in National Constitutions, 1870-1970," *American Sociological Review* 43, no. 6 (1978): p. 800.

Amnesty International to measure compliance with the norm against the death penalty for child offenders.[210]

In the next section, I evaluate some of the theories described in chapter 1, my own included, through a number of independent variables. First, however, it is worth pointing out some of the broad contours of the database. As described in more detail in Appendix A, the database consists of the first instance when states abolished the death penalty for child offenders. States either did this through general abolition or through abolition specifically for those under age 18 (or even older). In my database of 142 countries, seventy-five abolished only for child offenders either *in lieu of* general abolition or *before* general abolition. An additional 67 states abolished the penalty for all crimes and all offenders without abolishing first for child offenders. Table 2.1 below separates the two types of abolitionist states.

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[210] As such, I assume that countries that have national legislation are in compliance with that legislation unless evidence is discovered to the contrary. Some states, like Iraq and Nigeria, adopted legislation many decades ago and may have been compliant at one time. I have left these states (those that may not be compliant in the second cascade but abolished during an earlier period) in the database, since their adoption of laws abolishing the death penalty for child offenders, usually shortly after independence, says something about the state's national mood, the zeitgeist surrounding independence and the adoption of international norms. Other states, such as Pakistan, Sudan and China, have adopted laws restricting the application of the penalty according to different age limits more recently (during the second cascade), but continue to execute Hands Off Cain, "The 2005 Report," (2005; reprint).Hands Off Cain, "The 2005 Report," (2005; reprint).Hands Off Cain, "The 2005 Report," (2005; reprint).Hands Off Cain, "The 2005 Report," (2005; reprint).Hands Off Cain, "The 2005 Report," (2005; reprint).Hands Off Cain, "The 2005 Report," (2005; reprint).Hands Off Cain, "The 2005 Report," (2005; reprint).Hands Off Cain, "The 2005 Report," (2005; reprint).Hands Off Cain, "The 2005 Report," (2005; reprint).Hands Off Cain, "The 2005 Report," (2005; reprint).child offenders under age 18 and therefore are not included in the dataset. With the exception of Pakistan, violations of the norm are reported by AI. Moreover, since this dataset draws heavily on UN reports, these dates are based primarily on the self-reporting of countries, replete with all of the problems this system entails. Whenever possible, I have searched for supporting documentation to increase confidence in these reports. Overall, I have found few examples of false reporting. However, when I did find evidence that calls into question the veracity of UN reports or AI documents, I excluded these states from the dataset.
Amnesty International, "Stop Child Executions!," (New York2006; reprint). Hands Off Cain reports that Pakistan executed a child offender in 2004. Hands Off Cain, "The 2005 Report.", Amnesty International, "USA: Supreme Court Outlaws Executions of Child Offenders," (New York2005; reprint).

TABLE 2.1: LIST OF STATES THAT ABOLISHED THE DEATH PENALTY FOR CHILD OFFENDERS UNDER AGE 18, WITH DATES OF ABOLITION IN LAW; WHERE (G) MEANS GENERAL ABOLITION OR ABOLITION FOR ALL CRIMES AND ALL OFFENDERS.

VENEZUELA (G)	1863
SAN MARINO (G)	1865
COSTA RICA (G)	1877
BRAZIL (G)	1882
ECUADOR (G)	1906
FRANCE	1906
URUGUAY (G)	1907
COLOMBIA (G)	1910
PARAGUAY	1914
PANAMA (G)	1922
TRINIDAD	1925
ICELAND (G)	1928
UNITED KINGDOM	1933
MAURITIUS	1935
ITALY	1941
LEBANON	1943
DENMARK	1945
JAPAN	1949
JAMAICA	1951
GRENADA	1953
HONDURAS (G)	1956
TUNISIA	1956
ETHIOPIA	1957
NIGERIA	1959
AZERBAIJAN	1960
GHANA	1960
KUWAIT	1960
UKRAINE SSR	1960
ARMENIA	1961
NEW ZEALAND	1961
TANGANYIKA	1961
MADAGASCAR	1962
MONACO (G)	1962
USSR	1962
TANZANIA	1964
UGANDA	1964
SIERRA LEONE	1965
ALGERIA	1966
DOMINICAN REPUBLIC (G)	1966
GAMBIA	1966
CAMEROON	1967
KENYA	1967
AUSTRIA (G)	1968
BULGARIA	1968
JORDAN	1968
BELARUS	1969
BENIN	1969
POLAND	1969
VATICAN CITY STATE (G)	1969
ISRAEL	1971
FINLAND (G)	1972
SWEDEN (G)	1972
AUSTRALIA	1973
CZECHOSLOVAKIA	1973
HUNGARY	1973
EGYPT	1974
IRAQ	1974
SYRIA	1974
BAHRAIN	1976
PORTUGAL (G)	1976
UNITED ARAB EMIRATES	1976
YEMEN PEOPLE'S REPUBLIC (SOUTH)	1976
ALBANIA	1977
RWANDA	1977
CONGO	1978
NETHERLANDS	1978
ROMANIA	1978
LUXEMBOURG (G)	1979
NICARAGUA (G)	1979
NORWAY (G)	1979
SRI LANKA	1979
COOK ISLANDS	1980

CAPE VERDE (G)	1981
SINGAPORE	1985
VIETNAM	1985
GERMANY (G)	1987
HAITI (G)	1987
LIECHTENSTEIN (G)	1987
SOUTH KOREA	1988
BARBADOS	1989
CAMBODIA (G)	1989
SLOVENIA (G)	1989
TUNISIA	1989
ANDORRA (G)	1990
CROATIA (G)	1990
CZECH REPUBLIC (G)	1990
IRELAND (G)	1990
MOZAMBIQUE (G)	1990
NAMIBIA (G)	1990
SAO TOME AND PRINCIPE (G)	1990
SLOVAK REPUBLIC (G)	1990
SOUTH AFRICA	1990
MACEDONIA (FORMER YUGUSLAV REPUBLIC) (G)	1991
ANGOLA (G)	1992
FORMER REPUBLIC OF YUGOSLAVIA	1992
PERU	1992
SWITZERLAND (G)	1992
GUINEA-BISSAU (G)	1993
MYANMAR	1993
PHILIPPINES	1993
RUSSIA	1993
SEYCHELLES (G)	1993
SLOVAKIA	1993
UZBEKISTAN	1994
ZIMBABWE	1994

DJIBOUTI (G)	1995
MOLDOVA (G)	1995
NORTH KOREA	1995
SPAIN (G)	1995
BELGIUM (G)	1996
GEORGIA (G)	1997
INDONESIA	1997
NEPAL (G)	1997
TANZANIA	1997
CANADA (G)	1998
ESTONIA (G)	1998
LATVIA	1998
LITHUANIA (G)	1998
TAJIKISTAN	1998
TIMOR-LESTE (G)	1999
TURKMENISTAN (G)	1999
UKRAINE (G)	1999
COTE D'IVOIRE (G)	2000
INDIA	2000
MALTA (G)	2000
BOSNIA-HERZEGOVINA (G)	2001
CYPRUS (G)	2002
MONTENEGRO (G)	2002
SERBIA (G)	2002
ST. VINCENT AND THE GRENADINES	2002
THAILAND	2003
BHUTAN (G)	2004
GREECE (G)	2004
SAMOA (G)	2004
SENEGAL (G)	2004
TURKEY (G)	2004
LIBERIA (G)	2005
MEXICO (G)	2005
USA	2005
ARGENTINA (G)	2008
UZBEKISTAN (G)	2008
BURUNDI (G)	2009
TOGO (G)	2009

My research supports the finding that the norm abolishing the child death penalty has been institutionalized throughout the world, even though more states may yet ban the practice. The norm's institutionalization is evident because customary law now applies to the practice and because very few states have executed child offenders in the 21st century. Moreover, with the United States' abolition in 2005, legal scholars and laggard states no longer challenge the norm's status of *jus cogens*, meaning that the norm is now the subject of such widespread international consensus that it does not require states to have signed a treaty in order to be bound by it, that it "permits no derogation," and that it can only be modified by the emergence of a new norm "of the same character" and caliber.[211] Once a norm becomes *jus cogens,* it is preemptory, and it immediately renders all treaties in contradiction with it void.

What is clear from the research conducted by human rights organizations since the late 20th century is that there is *de facto* abolition of the death penalty for child offenders in most countries in the world, save for the handful of laggards discussed below. Thus, even though my research identified 142 states that have national laws prohibiting the child death penalty*, almost no states practice the penalty regardless of whether there is legal codification of the norm.* The overwhelming compliance with the norm even in the absence of law enshrining it underscores its global legitimacy.

[211] David Weissbrodt, Joan Fitzpatrick, and Franck Newman, *Human Rights: Law, Policy and Process* 3rd ed. (Anderson Publishing Company, 2001), p. 23.

DIFFUSION OF ABOLITION OF THE DEATH PENALTY FOR CHILD OFFENDERS

As discussed in chapter 1, the diffusion of the norm of abolition of the child death penalty can be divided into three periods – early, first cascade and second cascade. Each of these is taken in turn below.

EARLY PERIOD: NORM EMERGENCE

Laws abolishing the death penalty for child offenders under age 18 were first codified in the national laws of Venezuela, San Marino, Costa Rica and Brazil in the 19th century. These first adopters would be joined in the early period by a wide variety of states from around the world (see Table 2.2 below), before the period ended in 1959 and the first norm cascade began.

TABLE 2.2 EARLY ADOPTERS (IN ORDER OF ABOLITION)[212]

VENEZUELA	UNITED KINGDOM
SAN MARINO	MAURITIUS
COSTA RICA	ITALY
BRAZIL	LEBANON
ECUADOR	DENMARK
URUGUAY	JAPAN
COLOMBIA	JAMAICA
FRANCE	GRENADA
PARAGUAY	HONDURAS
PANAMA	TUNISIA
TRINIDAD	ETHIOPIA
ICELAND	NIGERIA

Although international human rights law regarding the death penalty for child offenders was not enshrined in binding treaties prior to 1976, there were nonetheless international declarations about children in 1924, 1948 and 1959. Although none of these treaties mention the child death penalty, the content of these declarations is nonetheless

[212] Additionally, there is one state, Mexico, which likely abolished the death penalty for child offenders under age 18 before 1960, though I do not have an exact date.

revealing of the position of these countries vis-à-vis norms regarding children and state protection.

As discussed in chapter 1, social scientists and legal theorists that study diffusion argue that states that adopt norms early tend to be influenced by domestic actors, or norm entrepreneurs, who advocate for the adoption of particular norms within the state.[213] Norm entrepreneurs are likely to be more successful in advancing norms if their society is democratic and tolerates the influence of nongovernmental actors on issues of government policy. Thus, regime type is one of the key independent variables considered below.

THE FIRST CASCADE

A norm's development from emergence to widespread acceptance is separated by a threshold period, commonly called a norm cascade, when "a critical mass of relevant state actors adopt the norm."[214] For the norm abolishing the death penalty for child offenders, the norm cascades twice, first from 1960-1981 and then from 1985-2005. These two cascades have different features, the first being different causes. The first cascade appears to have been triggered primarily by the rapid decolonialization and democratization that took place in the 1960s and 1970s, as well as by the ideological cascades in the former Soviet Union. The second cascade occurred in response to the fall of the Soviet Union and the rise of the European Union as a new (or renewed) moral

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[213] Finnemore and Sikkink, "International Norm Dynamics and Political Change.", Sunstein, *Free Markets and Social Justice*, Ramirez, Soysal, and Shanahan, "The Changing Logic of Political Citizenship: Cross-National Acquisition of Women's Suffrage Rights, 1890 to 1990."

[214] Sunstein, *Free Markets and Social Justice*, p. 38, Finnemore and Sikkink, "International Norm Dynamics and Political Change," p. 255.

authority. There are other points of difference between the cascades; these will be discussed below.

The norm's first cascade was a period of particularly rapid adoption. In the 20 years between 1960 and 1981, 49 states abolished for child offenders – more than twice as many as abolished in the previous 96 years. See the list of first cascade adopters in Table 2.3 below.

TABLE 2.3: FIRST CASCADE ADOPTERS (IN ORDER OF ABOLITION)[215]

AZERBAIJAN	VATICAN CITY STATE
GHANA	ISRAEL
KUWAIT	FINLAND
UKRAINE SSR	SWEDEN
ARMENIA	AUSTRALIA
NEW ZEALAND	CZECHOSLOVAKIA
TANGANYIKA	HUNGARY
MADAGASCAR	EQYPT
MONACO	IRAQ
USSR	SYRIA
TANZANIA	BAHRAIN
UGANDA	PORTUGAL
SIERRA LEONE	UNITED ARAB EMIRATES
ALGERIA	YEMEN PEOPLE'S REPUBLIC (SOUTH)
DOMINICAN REPUBLIC	ALBANIA
GAMBIA	RWANDA
CAMEROON	CONGO
KENYA	NETHERLANDS
AUSTRIA	ROMANIA
BULGARIA	LUXEMBOURG
JORDAN	NICARAGUA
BELARUS	NORWAY
BENIN	SRI LANKA
POLAND	COOK ISLANDS
	CAPE VERDE

Social scientists cite a number of explanations for cascades, including the power of international pressure, or recent transition or global zeitgeist.[216] Among the

[215] Ten additional states likely abolished during the first cascade, but I do not have specific dates and/or laws for them. These are: Afghanistan, Botswana, Georgia, Guyana, Guernsey Lesotho, Libya, Samoa, St. Lucia and Swaziland.
[216] Sunstein, *Free Markets and Social Justice*, Finnemore and Sikkink, "International Norm Dynamics and Political Change."

independent variables I consider below for the cascade of the norm abolishing the child death penalty are colonial heritage, regional clustering and recent transition.

THE SECOND CASCADE

The second cascade period of normative diffusion occurred between 1985-2005. States that abolished the child death penalty during the second cascade are listed in Table 2.4 below

TABLE 2.4: SECOND CASCADE ADOPTERS (IN ORDER OF ABOLITION)[217]

SINGAPORE	SLOVAK REPUBLIC	DJIBOUTI	INDIA
VIETNAM	SOUTH AFRICA	MOLDOVA	MALTA
GERMANY	MACEDONIA	NORTH KOREA	BOSNIA-HERZEGOVINA
HAITI	(FORMER YUGOSLAV	SPAIN	CYPRUS
LIECHTENSTEIN	REP.)	BELGIUM	MONTENEGRO
SOUTH KOREA	ANGOLA	GEORGIA	SERBIA
BARBADOS	FORMER REPUBLIC OF	INDONESIA	ST. VINCENT
CAMBODIA	YUGOSLAVIA	NEPAL	THAILAND
SLOVENIA	PERU	TANZANIA	BHUTAN
TUNISIA	SWITZERLAND	CANADA	GREECE
ANDORRA	GUINEA-BISSAU	ESTONIA	SAMOA
CROATIA	MYANMAR	LATVIA	SENEGAL
CZECH REPUBLIC	PHILIPPINES	LITHUANIA	TURKEY
IRELAND	RUSSIA	TAJIKISTAN	LIBERIA
MOZAMBIQUE	SEYCHELLES	TIMOR-LESTE	MEXICO
NAMIBIA	SLOVAKIA	TURKMENISTAN	USA
SAO TOME AND PRINCIPE	UZBEKISTAN	UKRAINE	
	ZIMBABWE	COTE D'IVOIRE	

With regard to cause, I suggest that this second cascade was the result of a unique sequence of events: the third wave of democratization (as documented by Samuel Huntington), a period of rapid democratization beginning in 1973; the fall of the Soviet Union in 1989; and the rise and expansion of the European Union. Moreover, as the Cold War fizzled, security and military concerns decreased, allowing human rights issues and

[217] In addition to these 67 second cascade states, there are another eight states that likely abolished the death penalty for child offenders as during the period, but for which I do not have exact dates: Brunei Darussalam, Kyrgyzstan, Lithuania, Mauritania, Morocco, Serbia and Montenegro, Tonga, and Turks and Caicos.

humanitarian reform to play a larger role in state policy. In 1990, nine states abolished the death penalty for child offenders, more so than in any other year in history.

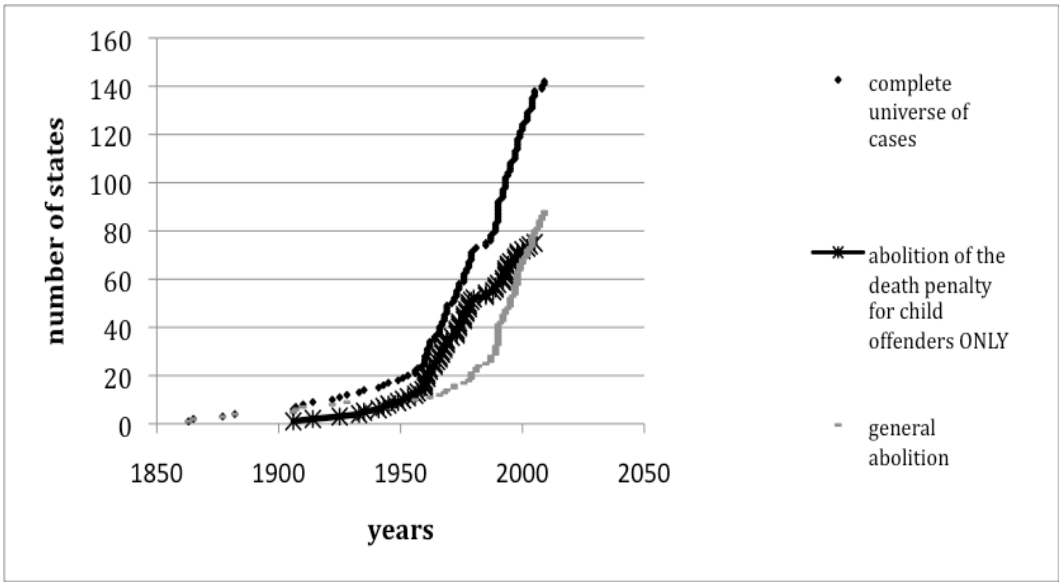
There are also eight states that are not in compliance with international law abolishing the penalty for child offenders, meaning that they maintain the penalty in practice (according to Amnesty International). These are: China, Democratic Republic of the Congo, Iran, Pakistan, Nigeria, Sudan, Saudi Arabia and Yemen.[218] Constructivist scholars, especially, vigorously debate the reasons that laggard states ultimately comply with international law and norms, suggesting causes ranging from international soft pressure to hegemonic coercion to the intrinsic power of international law.[219] Since the end of the cascade in 2005, four states have abolished the death penalty for all crimes and all criminals: Argentina, Burundi, Togo and Uzbekistan.

TRENDS IN THE DATA

The pattern of abolition both for general abolition and for child offenders *only* is compared with the complete universe of cases in Figure 2.2 below.

[218] Amnesty International, "Executions of Child Offenders since 1990," (2007).
[219] As an example: Ruggie, "What Makes the World Hang Together? Neo-Utilitarianism and the Social Constructivist Challenge.", Franck, "Legitimacy in the International System.", Krasner, "Sovereignty, Regimes, and Human Rights."

FIGURE 2.2: THE NUMBER OF STATES THAT ABOLISHED THE DEATH PENALTY FOR CHILD OFFENDERS *ONLY*; THE NUMBER THAT ABOLISHED IN GENERAL; AND THE COMPLETE UNIVERSE OF CASES (STATES THAT ABOLISHED IN GENERAL AND THOSE THAT ABOLISHED ONLY FOR CHILD OFFENDERS), BY YEAR[220]



The data mapped in Table 2.1 and Figure 2.2 – the table of early adopters -- above permits a couple of observations: First, in contrast to other cases of norm diffusion, the first states to abolish the death penalty for child offenders did so by abolishing for all crimes and all criminals (general abolition), arguably the most radical type of abolition. The trend began in Venezuela, San Marino, Costa Rica, Brazil and Ecuador, and in a handful of other countries that followed shortly afterward. Ramirez et. al argue, in their study of the diffusion of the norm of women's suffrage, that suffrage was first extended

[220] For this figure, I used 142 cases for the complete universe of cases (see Appendix B, table B.1, set A), including both states that abolished for the child death penalty only and those abolished in general, while excluding those that abolished in general if it *first* abolished for child death penalty. In other words, I used the date that they first abolished in the complete universe of cases. For general abolition, I used all 91 states (see Appendix B, table B.1, set E) that abolished generally even if they had previously abolished for the child death penalty. This was done to reflect the actual cascades of each individual norm in comparison with the complete universe of cases.

to men in most states and was only later extended to women, until a point was reached when most states that introduced suffrage automatically conferred it on both women and men.[221] This is the typical progression of human rights norms: First, they are narrowly granted to include some social groups (the most vulnerable, elites, dependents, etc.) before being offered more broadly to the population at large. [222]

The diffusion of the norm against the death penalty for child offenders progressed differently, however. First, it began predominantly in Latin America in the 19th century with general abolition for all offenders. Then abolition narrowed to include child offenders *only* in mid-century (from about 1933 till 1979). Then, in the last two decades of the 20th century and into the 21st century, there was a sudden spike in general abolition again, as states around the world, particularly in Europe, quickly abolished the death penalty for all crimes and all offenders.

Second, when the complete universe of cases is divided into two categories, general abolition and abolition solely for child offenders, it is apparent that diffusion of the norm abolishing the penalty for child offenders cascaded two to three decades before the norm of general abolition (see Figure 2.2 above). There are several possible explanations for this phenomenon: First, the norm cascade in the 1960s and 1970s abolishing the child death penalty may have foretold of more radical abolition later in the century in a couple of different ways: Excluding children from the penalty may have underscored the penalty's inhumane nature, leading some states to abolish outright. Second, limiting the penalty to adults may have served as a first step toward general

[221] Ramirez, Soysal, and Shanahan, "The Changing Logic of Political Citizenship: Cross-National Acquisition of Women's Suffrage Rights, 1890 to 1990."
[222] see Lynn Hunt for a broad survey of this trend. Hunt, *Inventing Human Rights: A History*.

abolition, bracing a skeptical public for later, more wholesale, reforms. Third, the cascade of general abolition that began in the early 1990s was primarily the result of a single regional cascade, the outcome of European convergence on the death penalty and other human rights issues. The rise (renewal) of Europe as a moral authority in this period led many states to look to the region for guidance on human rights issues. This regional cascade was the result of a number of factors, including the fall of the Soviet Union and the integration of the European Union. I found evidence that all three of these developments partly explain the cascade of general abolition beginning in the 1990s.

Finally, the norm against the death penalty for child offenders is particularly interesting because the trend itself began in the periphery, in Latin America in the 19th century. The hegemon at the time, the United Kingdom, and one of the most powerful states, France, adopted the norm relatively early in the first third of the 20th century, but did not lead the norm's emergence. Peripheral emergence provides a challenge to theories of international relations, law and sociology that suggest the West should lead norm emergence and expansion.

INDEPENDENT VARIABLES

In this section, I use the database that I have created to explore some of the theories presented in chapter 1. Given the literature on international determinants of the death penalty in general and my study of the death penalty for child offenders, I identified eight independent variables that may shed light on the diffusion of the norm abolishing the death penalty for child offenders: region, population, regime type, colonial heritage, recent transition/regime change, religion, and ratification and timing of relevant

international law. Other variables, like a history of slavery (Anckar) and centralized decision-making (Bae), have proved difficult to explore, and although the literature refers to them as additional death penalty variables, I do not address them in this study.[223]

My argument, described in detail in chapter 1, is that there were three principal mechanisms of diffusion for the norm abolishing the child death penalty: principled activism, coercive socialization and the globalization of childhood. Of these, only the mechanism of coercive socialization can be preliminarily evaluated at a macro-level. I can accomplish this through consideration of the variables of region, colonial heritage and recent transition. Since principled activism relies on the actions and beliefs of individuals and groups, its mechanics require case exploration, carried out in chapter 3. The globalization of childhood and the phenomenon of hegemonic laggards are also mechanisms that are best explored through case studies, although the ratification and timing of international law may illuminate some aspects of the mechanics of the cascades. In chapters 5 and 6, I track the creation, development and eventual institutionalization of the globalized child and investigate the motivations for noncompliance by those states that choose to reject it.

REGION

To categorize states by region, I employ, with a few alterations, the regional classifications of the World Bank.[224] The abolition of the child death penalty by region and by period is presented in Figure 2.3 below.

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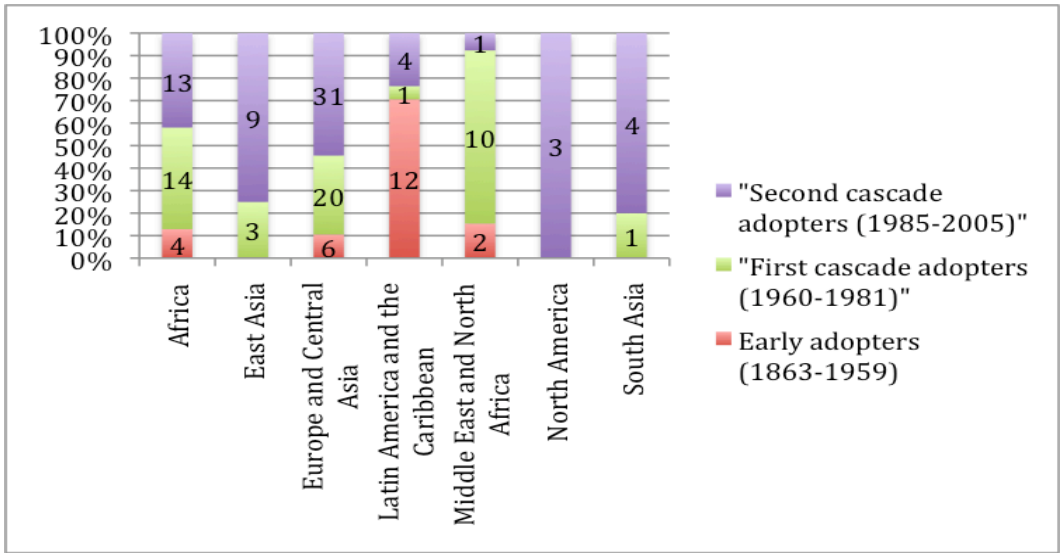
[223] Anckar, *Determinants of the Death Penalty : A Comparative Study of the World*, 83-88, Bae, *When the State No Longer Kills : International Human Rights Norms and Abolition of Capital Punishment*, 123.

[224] Where a state was not listed as a country with an active World Bank program, I assigned it to the region in which it would fall based on its location. I also added the category "North America" to include the United States in the database.

FIGURE 2.3: REGIONAL AND PERIOD DISTRIBUTION OF ABOLITION FOR STATES IN EACH OF THE SEVEN REGIONS. [225]



The distribution of states that abolished the child death penalty by region and by period thus breaks down as follows: Of all the African states that would abolish the child death penalty, most did so after the tipping point, that is, after 1960, in the first cascade or second cascade period. Of all the East Asian states that would abolish, none did so in the early period, and the majority abolished in the second cascade period. European states predominately abolished in the first and second cascade periods, while Latin American and Caribbean states largely abolished in the early period. States from the Middle East and North Africa overwhelmingly abolished during the first cascade period, while states from North America only abolished in the second cascade period. Additionally, Figure 2.3 above sheds light on trends within the periods. The early period is dominated by Latin American states, while the first cascade period featured adoption by African, European and Central Asian, and Middle Eastern and North African states. Europe and Central Asia dominate the second cascade period, which includes fewer African and East Asian states.

[225] Argentina (2008) Uzbekistan (2008), Burundi (2009) and Togo (2009) are excluded because they adopted after the second cascade.

The regional clustering in the early period in Latin America illustrates the dominance of peripheral states in the period, a phenomenon that challenges the claims of both realists and sociological institutionalists that argue that norms should emerge in the West. Most importantly, Latin American states abolished the death penalty well before their former colonizers, with Portugal abolishing in 1976 and Spain abolishing in 1995. The regional clustering in the 1960s and 1970s lends support to my claim that decolonization sparked the first cascade, underscoring the importance of states from Africa and the Middle East and North Africa to the first cascade period. The other major contributor to the first cascade period was Europe, although it is noteworthy that more than half of the European states that abolished during the period were either Soviet satellite states or were otherwise part of the Soviet Union.[226]

The regional clustering in the second cascade period reveals a different pattern: Europe and Africa made up the bulk of these adopters. Only about one-third of the European states that would abolish during this period were former Soviet states. Those that were, however, predominately acceded to legal protections for child offenders already established in their criminal codes. Most of the European states that abolished were Central European states, and the majority of these abolished the death penalty altogether rather than just for child offenders. The African states, too, overwhelmingly abolished the penalty altogether during this period, even though they were not directly affected by European pressure to do so. These findings lend support to my suggestion

[226] Technically, all of the Soviet satellite states should not be considered independent because there was direct coercion from the Soviet Union regarding these protections, however, I have chosen to keep them in the database for two reasons: First autonomy from the Soviet Union (though never complete until 1990) varied by state, period, and leadership. The degree of autonomy regarding this particular law is not known as accurate record-keeping describing each state's motivation has not been located and may not exist. Second, I wanted to make it clear that when states like the Czech Republic adopted laws protecting child offenders from the death penalty that they actually acceded to laws already adopted while under the control of the Soviet Union.

that second cascade adopters largely acted in response to the triumph of the Western liberal state model, demonstrated by the fall of the Soviet Union and the rise and expansion of the European Union. This zeitgeist is addressed in chapters 5 and 6.

POPULATION

Carsten Anckar has found that states with larger population sizes tend to apply the death penalty more than states with smaller populations do, and that these states thus have a more positive view of the penalty.[227] The average population size for states that abolished the death penalty for child offenders (including those that abolished for all crimes) is 26,623,000, while the average state population size per period is: early period, 13,625,000; first cascade period, 12,714,000; and second cascade period, 41,573,000.[228] If these averages are compared with average state population sizes in the world during these periods, the average sizes of early-adopter and first-cascade-adopter states are significantly smaller than the world averages. For example, in 1922, the average state population size was roughly 29 million people, while the average population size for early adopters was about 13.5 million people. The average state population size in 1973 was about 32 million, while the average population size for first-cascade adopters was approximately 13 million.[229] States that adopted the norm in the second cascade period

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[227] Anckar, *Determinants of the Death Penalty : A Comparative Study of the World*, 165-166.

[228] Population data is from Angus Maddison's dataset with the exception of Iceland and Mauritius, which was taken from the Statistical Yearbook of the League of Nations. Angus Maddison, "Statistics on World Population, Gdp, and Per Capita Gdp, 1-2006 Ad," (2008; reprint),http://www.ggdc.net/maddison/, League of Nations, "Statistical Yearbook of the League of Nations," ed. Economic and Financial Section (Geneva: League of Nations, 1927-1945; reprint). The averages do not include San Marino and Vatican City because they were not included in the dataset. Yemen was also removed because it was not evident for which Yemen (North or South) there was population data. Population data for Costa Rica from 1870 was used because data as of its abolition date (1877) was not available. Population data for Lebanon from 1950 was used because data as of its abolition date (1943) was similarly not available. These numbers exclude late adopters: Argentina (2008), Uzbekistan (2008), Burundi (2009), and Togo (2009) to date.

[229] Average world population per state was determined by dividing the world population for a given year from Angus Maddison's database by the number of states in the system according to Samuel Huntington's study. There are some

had on average about the same population size as the world average. In 1990, the approximate average state population size was 40.5 million, and the approximate average state population size in 2008 was 35 million. Second-cascade adopters have populations that are only slightly larger, with an average of about 41 million people per state.[230]

In sum, even though the average state population size in the world in general increased between the early and first-cascade periods, the population size of states that abolished the child death penalty remained about the same, well below average.[231] The states that abolished in the second cascade period had slightly larger than average state population sizes. My findings therefore present a challenge to Anckar's assertion that a large state population is associated with a positive view of the death penalty. I found that small population size (on average) is associated with abolition of the child death penalty in the early and first cascade periods, but that average to above average population size is associated with abolition of the child death penalty in the second cascade period.

problems with this approach in that Huntington does not include states with a population of less than one million, but Huntington's study nonetheless provides an approximate point of reference for population size comparison. Maddison, "Statistics on World Population, Gdp, and Per Capita Gdp, 1-2006 Ad." Samuel P. Huntington, *The Third Wave : Democratization in the Late Twentieth Century*, Julian J. Rothbaum Distinguished Lecture Series. (Norman: University of Oklahoma Press, 1991).

[230] Given the large range of population sizes in the second cascade period, which includes India, the United States, Cyprus and Samoa, the median population size of second cascade adopters may be a more useful indicator of the population size of abolitionist states in the second cascade period. The median population size of second cascade period states is about 8.9 million.

[231] As described above, the states that abolished the child death penalty could have done so in two ways: First, they could have abolished the death penalty altogether (for all crimes and all criminals). Second, these states could have abolished the death penalty *only* for child offenders. If I only include the latter states in population averages, I have similar findings for the early and cascade periods, at about 21 and 15 million per state on average, respectively. Although excluding states that abolished the death penalty generally results in higher average populations for each period, population sizes for states that abolished generally are still smaller than the world averages of 29 and 32 million respectively. States that only abolished for child offenders in the second cascade tend to be larger than average, at about 53 million per state compared with a 35-40 million range on average among all states.

REGIME TYPE

The inclusion of regime type in the set of independent variables considered provides insight into what types of government adopt international norms. Anckar and Neumayer both argue that a greater degree of democracy is related to greater restrictions of the death penalty.[232] For this variable, I employ the dataset *Polity IV Project: Political Regime Characteristics and Transitions, 1800-2007*.[233] This dataset codes democratic and autocratic regimes on a +10 to -10 scale with +10 being full democracy and -10 being full autocracy. The average regime type for the entire dataset of states that abolished the death penalty for child offenders under age 18 is +0.6, while the averages of the early, first cascade and second cascade periods all similarly tend toward the center of the scale, at -0.5, -1.47 and 2.6, respectively.[234]

If the average regime type of the states that abolished in each of the periods is considered in light of governance trends in the international system at the time, the findings somewhat undermine the arguments of Anckar and Neumayer. In Samuel Huntington's study of waves of democracies, he found that the percentage of democracies between 1942 and 1962 increased from 19.7 percent of all states to 32.4 percent, although the percentage would decline to 24.6 by 1973 (still an increase from 1942).[235] My dataset found that states that abolished during the first cascade period were

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[232] Anckar, *Determinants of the Death Penalty : A Comparative Study of the World*, Neumayer, "Death Penalty: The Political Foundations of the Global Trend Towards Abolition."

[233] Monty G. Marshall and Keith Jaggers, "Polity Iv Project: Political Regime Characteristics and Transitions, 1800-2007," (Center for Systemic Peace, 2007; reprint). Data was not available for the following states: San Marino, Trinidad, Iceland, Mauritius, Japan, Jamaica, Grenada, Tunisia, Nigeria, Azerbaijan, Kuwait, Ukraine SSR, Armenia, Monaco, Belarus, Vatican City State, Luxembourg, Nicaragua, Cook Islands, Cape Verde, Liechtenstein, Barbados, Slovenia, Andorra, Croatia, Sao Tome and Principe, Seychelles, Timor-Leste, Malta, Bosnia-Herzegovina, Montenegro, Serbia, St. Vincent, Samoa, Argentina, and Chile.

[234] Averaging the regime types of states that *only* abolished for child offenders, excluding those that abolished for all crimes and all offenders, yields a total average of -1.5 and period averages of 1.3, -3.2, and +0.19 for the early, first cascade and second cascade periods, respectively.

[235] Huntington, *The Third Wave : Democratization in the Late Twentieth Century*, 26.

on average slightly more authoritarian than those that abolished in the early period (by about one point), even though the number of democracies in the international system markedly increased during this time.[236] While a one-point change is not a large shift on a 20-point scale, it nonetheless indicates that democracy is *not* positively associated with abolition of the child death penalty to the same degree that it may be associated with the death penalty in general.[237]

Data on regime type from the second cascade period, however, somewhat supports the arguments of Anckar and Neumayer. States that abolished the child death penalty in the second cascade period were on average about four points more democratic than those that abolished in the first cascade period.[238] It is important to note, however, that the international system had become far more democratic overall by the second cascade period; Huntington classifies 45.4 percent of all states as democratic as of 1990.[239] The more than 20 percent increase in democratic states is roughly equal to a 4-point change on a 20-point scale, thus suggesting a more tenuous and uncertain relationship between the trend toward democracy and the trend toward abolition of the child death penalty.

COLONIAL HERITAGE

As later chapters will demonstrate, British and French colonialism was important both to the standardization of criminal law around the world and to the expansion of

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[236] Albeit to different degrees across the first cascade period—1960 to 1979.
[237] The authoritarian trend in the cascade period is even more noticeable in the case of states that abolished only for child offenders, not the death penalty in general, as evident in the data in footnote x above.
[238] The shift in regime type from the first cascade to the second cascade period among states that abolished only for child offenders is about a 3.4-point positive change.
[239] Huntington, *The Third Wave : Democratization in the Late Twentieth Century*, 26.

protections for children as (eventual) rights bearers. Indeed, colonialism played a large part in the histories of the majority of states that abolished the child death penalty. Anckar argues that the absence of a colonial heritage results in a negative view of the penalty.[240] One explanation that Anckar provides to support this claim is the acclimation of colonies to violence during colonial rule.[241] In my study, I found that 81 percent of states that abolished the child death penalty had a history of colonialism. The breakdown of these numbers by period is presented in Table 2.5 below.

TABLE 2.5: PERCENTAGE OF STATES WITH A COLONIAL HERITAGE THAT ABOLISHED THE CHILD DEATH PENALTY, FOR EACH OF THE THREE PERIODS[242]

	Early period	**First cascade period**	**Second cascade period**
Colonial heritage	75	80	85
No colonial heritage	25	20	15

The percentage of states with a colonial history that abolished the penalty increased as the norm of abolition for child offenders spread. Where 75 percent of states in the early period had a history of colonialism, 85 percent of states in the second cascade had such a history.

Where Anckar found that some empires diffuse laws and norms supporting the penalty through acclimation to violence, I found evidence that some colonial powers also diffused protections from the death penalty for child offenders. To better approach this phenomenon, however, it is important to specify which empires had the potential to influence colonies regarding the child death penalty.

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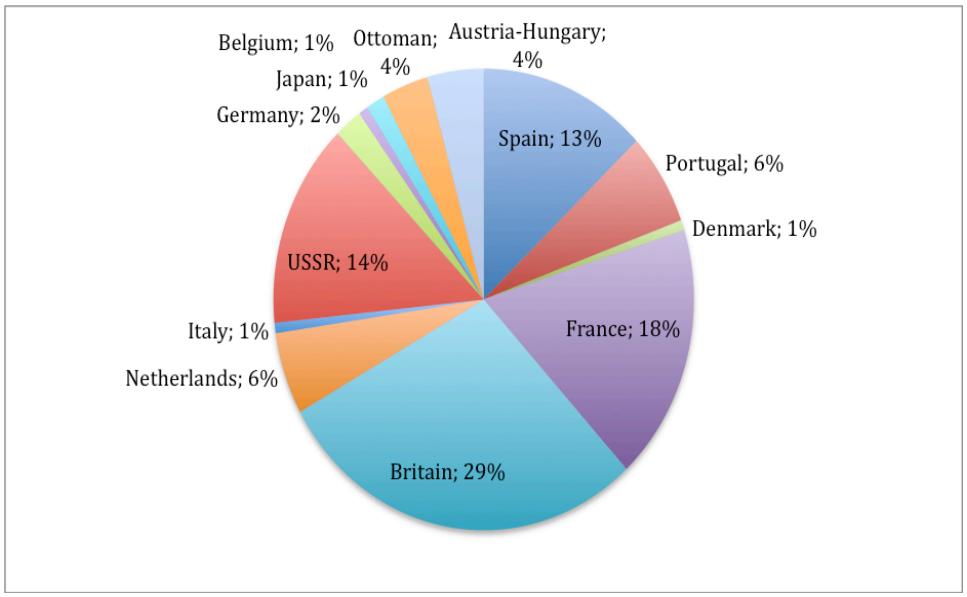
[240] Anckar, *Determinants of the Death Penalty : A Comparative Study of the World*, 166-167.
[241] Ibid., 167.
[242] This excludes late adopters: Argentina (2008), Uzbekistan (2008), Burundi (2009), and Togo (2009) to date.

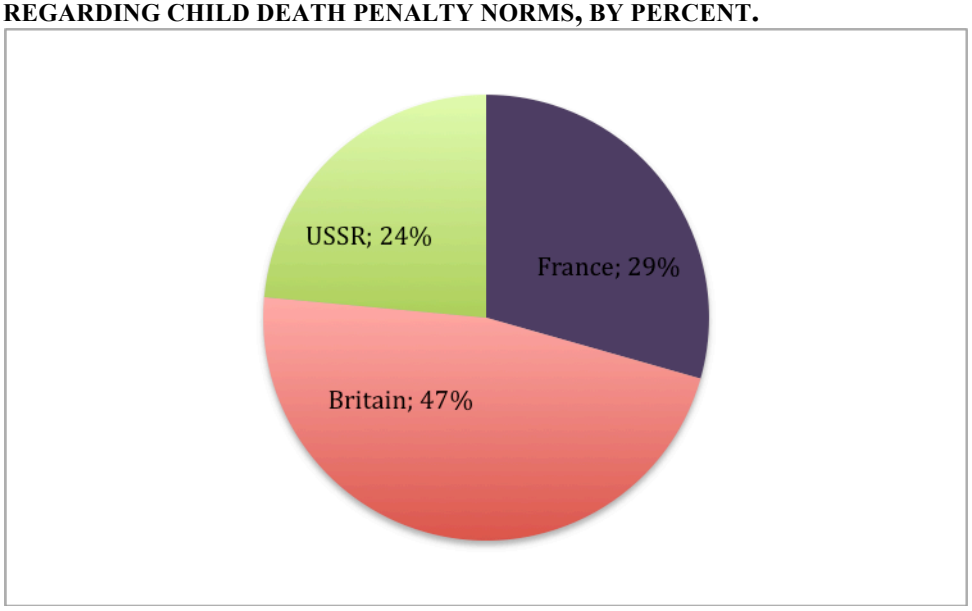
Figure 2.4 below presents the empires that *could have* influenced the states that abolished the child death penalty. It illustrates the colonial powers of all former colonies that abolished the penalty.

FIGURE 2.4: COLONIAL POWERS FOR ALL STATES THAT ABOLISHED THE DEATH PENALTY FOR CHILD OFFENDERS



At first blush, it appears that many empires could have shaped norms against the death penalty for child offenders in their colonies. If, however, we exclude empires that never abolished the death penalty for child offenders under 18 years of age; empires that abolished the penalty for child offenders under 18 years of age *after* their former colonies had already abolished, and empires of states where the colonial power abolished *after* the state gained independence, the list is much smaller. In other words, if only those states that could have influenced their colonies by abolishing the death penalty for child offenders *before or during* colonialization are included, then only the empires of Britain, France and the Soviet Union remain. See Figure 2.5 below.

FIGURE 2.5: THREE EMPIRES THAT HAD THE POTENTIAL TO INFLUENCE COLONIES REGARDING CHILD DEATH PENALTY NORMS, BY PERCENT.



Of the 114 states with a colonial history, eighty of these had the potential to be influenced by the child death penalty policies of the British, French and Soviets. Of these, almost 50 percent were part of the British Empire; about an additional 25 percent were part of the Soviet empire, and about one-third were part of the French empire. None of the other colonial powers helped to diffuse the norm abolishing the child death penalty for offenders under age 18.

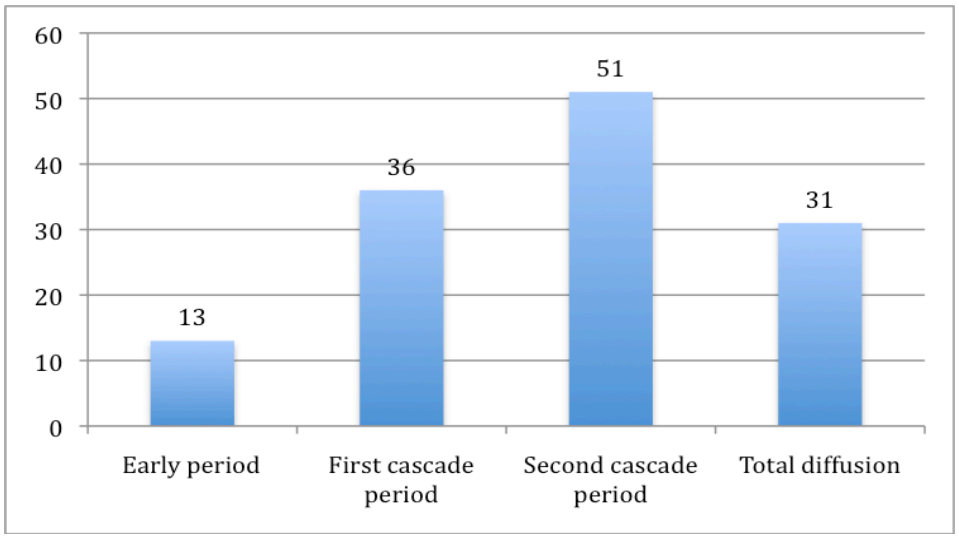
REGIME CHANGE

My research has found that the widespread decolonization that took place after World War II and the fall of the Soviet Union in 1989 may explain the regional clustering of abolition in the first and second cascades. Moreover, scholarly work on windows of political opportunity suggests that periods of radical transition provide openings for shifts

in state policies.[243] Below, I consider whether the states that abolished the death penalty for child offenders did so following a recent political transition such as independence, major regime change or an end to foreign occupation in the five years preceding abolition.

As with regime type above, I use Polity IV project data to measure recent transition.[244] I consider a state to have experienced a recent transition if it registers a 5-point change in regime type in any direction in the five years preceding abolition. Additionally, if Polity IV data is unavailable, I also consider a recent transition to have taken place if a state became independent before abolishing the penalty or if a foreign occupation ended in the five years preceding abolition. This data is presented in figure 2.6 below.

FIGURE 2.6: PERCENTAGE OF ABOLITIONIST STATES THAT EXPERIENCED A POLITICAL TRANSITION IN THE FIVE YEARS PRECEDING ABOLITION, BY PERIOD AND TOTAL DIFFUSION[245]



[243] Rita K. Noonan, "Women against the State: Political Opportunities and Collective Action Frames in Chile's Transition to Democracy," *Sociological Forum* 10, no. 1 (1995), Gay W. Seidman, "Gendered Citizenship: South Africa's Democratic Transition and the Construction of a Gendered State," *Gender and Society* 13, no. 3 (1999), Bae, *When the State No Longer Kills : International Human Rights Norms and Abolition of Capital Punishment.*

[244] Marshall and Jaggers, "Polity Iv Project: Political Regime Characteristics and Transitions, 1800-2007."

[245] This excludes late adopters: Argentina (2008), Uzbekistan (2008), Burundi (2009), and Togo (2009) to date.

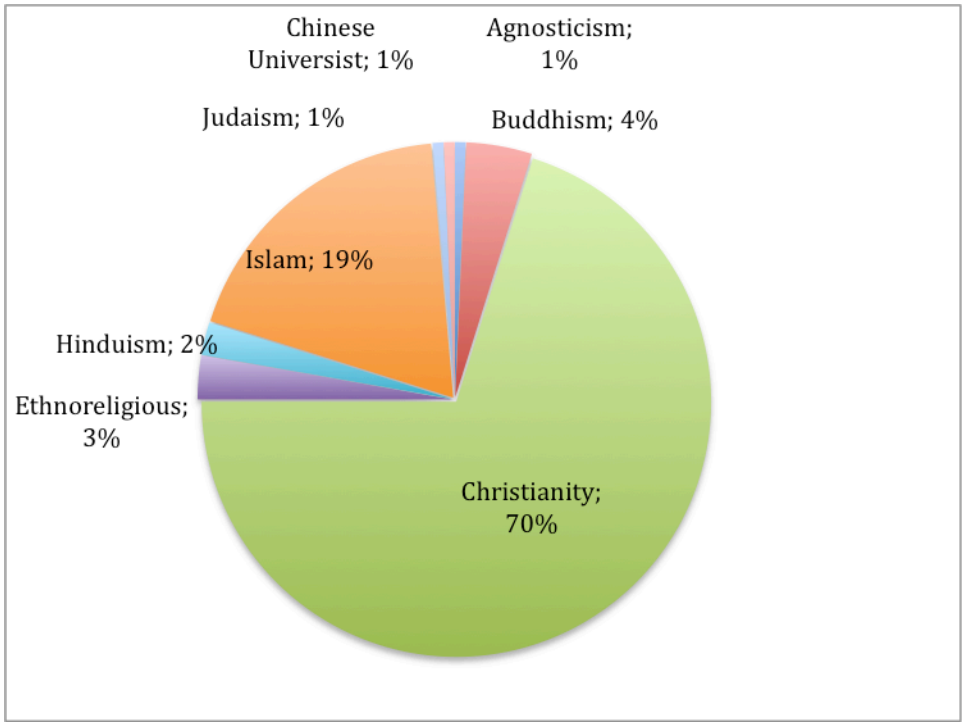
As the figure makes evident, thirty-one percent of states that abolished death penalty for child offenders experienced a political transition in the five years preceding abolition. For the first and second cascades, the numbers are even higher, at 36 and 51 percent, respectively. The numbers suggest that a political window of opportunity facilitating a shift in state policy opened for about one third of states that abolished the penalty; moreover, these windows of opportunity became more common among abolitionist states as the norm diffused. The numbers thus support Bae's findings that radical transformation is associated with death penalty abolition, and they further support my assertion that the cascades were responses to decolonization in the 1960s and 1970s and to democratization in the 1990s.[246]

RELIGION

Anckar found that religion was a determinant of general abolition of the death penalty. In this study, I compiled a list of the dominant religion in states that abolished the penalty for child offenders, using the Association of Religious Data Archives.[247] Figure 2.7 below presents these findings.

[246] Bae, *When the State No Longer Kills : International Human Rights Norms and Abolition of Capital Punishment*, 123.
[247] http://www.thearda.3om/internationalData/3ountries/Country_238_1.asp Accessed June 11, 2009

FIGURE 2.7: PERCENTAGE OF STATES THAT ABOLISHED THE CHILD DEATH PENALTY, BY RELIGION



The two largest religions among states that abolished the child death penalty are Christianity (70 percent) and Islam (18 percent). Anckar found that Christianity was positively associated with a negative view of the death penalty.[248] Considering that about one-third of the world is Christian, Christianity is clearly overrepresented among states that abolished.[249] About 19 percent of the world is Muslim, and therefore, Islam is well represented among abolitionist states and not positively associated with use of the penalty. Likewise, about 6 percent of the world population is Buddhist, but only 4 percent of abolitionist states are Buddhist. Anckar found that Buddhism is positively associated with the use of the penalty, but to a lesser degree than Islam.[250] My dataset demonstrates

[248] Anckar, *Determinants of the Death Penalty : A Comparative Study of the World*, 165.
[249] http://www.religioustolerance.org/worldrel.htm.
[250] Anckar, *Determinants of the Death Penalty : A Comparative Study of the World*, 165.

that Buddhism may be slightly underrepresented in the database among abolitionist states.

RATIFICATION OF INTERNATIONAL LAW

International law has abolished the death penalty for child offenders under 18 years of age in three major conventions, as discussed in chapter 1. These are: the 1950 Fourth Geneva Convention Relative to the Protection of Civilian Persons in Times of War, the 1976 ICCPR and the 1990 CRC. The states that abolished the death penalty for child offenders overwhelmingly ratified the conventions that outlaw the penalty, although the three treaties that address the child death penalty also have a high rate of ratification among states that did not abolish the penalty in national legislation. Among the states that abolished, only one did not ratify the CRC: the United States. The only other state that has not ratified the CRC, Somalia, has yet to abolish the death penalty for child offenders. As such, the ratification rate for the CRC among abolitionist and non-abolitionist states alike is similar at 99 and 98 percent, respectively.

Among the states that abolished, only five did not ratify the ICCPR: Bhutan, Myanmar, Sao Tome and Principe, Singapore and the United Arab Emirates. Overall, eighty-five percent of all states in the international system have ratified the ICCPR, while among those that abolished for child offenders, the percentage is 96.[251] The Geneva Conventions enjoy practically universal support through ratification.

[251] As of April 23, 2009, 164 out of 192 states have ratified the ICCPR. The official state count by the United Nations is 192 but this excludes territories that must ratify treaties apart from their territorial power. For example, the Isle of Man must ratify the ICCPR separately from the UK, but it is not included in the official state list of the United Nations.

TIMING

If international law is important for the diffusion of the norm of abolition of the child death penalty, then its creation, entrance into force and ratification should precede abolition in national legislation. There are three types of timing that I explore here: First, whether the cascades came before or after the international conventions abolishing the child death penalty were drafted and opened for signature; second, whether the cascades came before or after the conventions came into force; third, to what extent individual states ratified the conventions prior to abolition. For this particular set of questions, I narrowed my focus to states that abolished the death penalty *only for* child offenders under age 18 (as opposed to the entire dataset), as these legal instruments are specific to the child death penalty.

I found that the 1950 Geneva Conventions opened for signature and came into force an average of 22 and 21 years, respectively, *before* Geneva signatory states abolished the death penalty for child offenders only.[252] In other words, by subtracting the dates that individual states signed the Geneva Conventions from the date of child death penalty abolition for each state, and by averaging the differences, I found that Geneva signatories abolished 22 years after they signed, on average. When I subtracted the date that the Geneva Conventions came into force (in 1950) from these dates of abolition and averaged the difference, I found that the Geneva Conventions came into force 21 years before average abolition. This indicates that signing the Geneva Conventions and the

[252] This excludes Czechoslovakia and Yemen.

coming into force of the conventions preceded the trend in abolition, but by such a degree that it is likely not directly related.

However, when I examined the relationship between actual ratification of the Geneva Conventions by individual states and the abolition of the child death penalty, by subtracting the individual dates of abolition from the individual ratification dates of the conventions and averaging the numbers, I found that ratification of the Geneva Conventions preceded abolition in national law by about 6.5 years, on average. This suggests that the actual ratification of the Geneva Conventions, with its ban on the death penalty for child offenders under age 18, by individual states may have influenced state policy and was likely a factor in the cascades.

The impact of the ICCPR on state-level policy is less clear. The ICCPR opened for signature in 1966, preceding individual state abolition, on average, by about 4.5 years. By the time it came into force in 1977, it lagged behind state abolition by about 5.5 years, on average. If the date of individual state ratification of the ICCPR is subtracted from the date of individual state abolition, ratification lags behind state abolition by about 12 years on average. The numbers thus suggest that, overall, the ICCPR potentially led state policy while it was in the drafting process, essentially during the argumentation and discussion that occurs as part of the crafting of a convention. This drafting process, from 1948 to 1966, may have publicized and bolstered norms contained within the ICCPR, the norm of abolition of the child death penalty among them. Actual ratification of the ICCPR and the date the convention came into force, or became binding, appear to have had little direct effect on abolition, as many states had already abolished the penalty either before ratification or before the treaty became binding.

At first glance, the 1990 CRC appears to be a catalyst for the second cascade, setting off the most rapid spurt of abolition to date beginning in 1990. The second cascade, however, was dominated by states that abolished the death penalty altogether, making the link to the CRC tenuous. For those states that abolished the child death penalty *only*, a more complex picture emerges. The CRC lagged behind state abolition on average between 18.5 and 21 years in all three categories: drafting and opening for signature, coming into force, and actual state ratification. This suggests that the majority of states that would abolish the death penalty *only* for child offenders did so, on average, about two decades before the CRC came into force. There may, however, be a link between the CRC and the wave of states abolishing the death penalty altogether in 1990, although such a link is difficult to demonstrate without significant additional case studies.

What these findings mean is that international law banning the death penalty for child offenders was ratified and became binding after most states that would abolish the penalty only for child offenders had already done so. These findings, however, do not suggest that these legal instruments did not influence state behavior in other ways, such as leading states toward general abolition or resulting in other limitations to the penalty. They suggest instead that international law may be most effective in the drafting stage, when states debate, defend and refute principles of law. Law may serve to reinforce existing global norms or principles but not necessarily to induce compliance with them.

SUMMARY OF FINDINGS

The diffusion of the norm abolishing the death penalty for child offenders under age 18 was unique for two reasons: First, the norm emerged in the periphery, contrary to

the expectations of realists and sociological institutionalists. Second, the norm began as part of the more sweeping policy of ending the death penalty for all crimes and all offenders. This period of emergence was followed by about half a century dominated by states that abolished *only* for child offenders before the pattern reverted, returning to a roughly 20-year period consisting primarily of states that abolished the death penalty in general. This pattern of diffusion appears unique among successful human rights norms, which tend to be characterized by a progressive trend from less radical to more radical measures over time.

Regional clustering lends some support to my argument that decolonization and democratization account for the caliber of the cascades, making the cascades more dense by compelling more states to join them. States from Africa, the Middle East and North Africa, and the Soviet Union largely make up the first cascade, demonstrating the impact of particular empires, specifically the British, French and Soviet empires, on first cascade adopters. Western European and African states make up the bulk of second cascade adopters, providing support for the notion that systemic changes in international politics and the value placed on human rights after the Cold War were powerful motivators in the second cascade.

I found mixed support for Anckar's assertion that states with large populations tend to have a more positive view of the death penalty. Early and first cascade adopters tended to have smaller populations than average, while adopters in the second cascade had larger populations than average. These population averages, however, can be explained by the heavy cases in the period—especially India, Indonesia and the United States, which have large populations.

My exploration into regime type somewhat refutes Anckar's and Neumayer's findings, since the average degree of democracy of abolitionist states either kept pace with global trends in democratic change or fell slightly below world averages. In no period did the degree of democracy of abolitionist states exceed systemic global democratic trends, as would be expected by arguments that positively associate democracy with abolition.

A history of British, French, and Soviet colonialism is associated with abolition of the death penalty for child offenders, as 70 percent of former colonies that abolished were subject to the influence of the British, French or Soviet empires. Britain had the greatest power by far to shape law and norms in these states, and had a fairly consistent influence over the three periods. These findings challenge Anckar's. Whereas Anckar found that a colonial heritage may lead to greater use of the death penalty, as colonies were accustomed to the violence of colonial law, I found that a specific type of colonial heritage (British, French and Soviet) actually led to restrictions of the child death penalty, as these colonial powers diffused norms of protection for children.

Evidence from a review of recent political transition or regime change in the five years prior to abolition supports my argument that radical transformation or political opportunity is associated with abolition of the child death penalty. About one-third of states abolished the penalty following a transition in the preceding five years over the course of the entire diffusion. This rate was even higher during the cascades, when 36 and 51 percent of states experienced a transition in the five years before abolition. These findings support Bae's argument linking political transformation with abolition and

bolster my argument that decolonization and democratization gave the cascades much of their force.

I found evidence to support Anckar's assertion that Christianity is associated with greater restrictions on the death penalty and some support for the claim that Buddhism is associated with a positive view of the penalty. With 70 percent of abolitionist states predominantly Christian, Christianity is overrepresented in my database. I found no evidence that Islam is associated with a positive view of the child death penalty, as Muslim states make up about one-fifth of my database, on par with world populations as a whole.

States that abolished the child death penalty tended to ratify conventions calling for the penalty's abolition at the same or at a greater rate than states in general. The CRC and Geneva Conventions experienced similar ratification rates among states that abolished in national law and those that did not. More abolitionist states than non-abolitionist states have ratified the ICCPR, a finding that supports the role of international law in state policy determinations.

These findings are tempered, however, by further findings on the timing of the conventions' drafting, coming into force and ratification. (For these findings, I only looked at states that abolished the death penalty for child offenders, not those that abolished for all offenders). I found that only the Geneva Conventions actually preceded on average abolition of the penalty for child offenders, in terms of when it was drafted and opened for signature, when it came into force, and when it was ratified by states that would abolish. I found that only the drafting of the ICCPR preceded the average date of abolition of the child death penalty. In other words, the ICCPR came into force and was

ratified by states only *after* those states had abolished the penalty, on average. The CRC greatly lagged behind state abolition on average, opening for signature, coming into force and being ratified almost two decades after most states had abolished the death penalty for child offenders.

CASE SELECTION

As discussed in chapter 1, the case studies for this dissertation were selected based on temporal period, yet the organization of the dissertation proceeds differently. Through the case studies, I identified three primary mechanisms of diffusion: principled activism, coercive socialization, and globalized childhood. From the list of states that abolished the death penalty for child offenders in the early period (before the first cascade), I selected two major cases, the United Kingdom and Tunisia, and three minor cases: France, Japan and Ethiopia. The selection of cases was based on regional diversity, but limited to the availability of primary or secondary sources. Unfortunately, reliable sources could not be found for any of the Latin American cases. Major and minor cases were determined based on the availability of scholarly material.

Case selection for the cascade period is more complicated than early-period case selection and requires greater explanation. Of the 49 states that abolished during the first cascade, fourteen were from Africa; twenty from Europe and Central Asia; ten from the Middle East and North Africa; three from East Asia; and one each from Latin America and the Caribbean and South Asia. All together, sixty percent were either from Africa or the Middle East. Although Europe accounted for the largest number of states that abolished during the first cascade, the majority of these states were part the Soviet Union,

where diffusion was clearly coercive, and not much of a puzzle. The vast majority of the states that abolished during the cascades were former colonies, indicating that abolition is strongly linked with the decolonization of Africa and the Middle East. Additionally, the majority of states that abolished during the first cascade were former colonies of either the British or the French. The data therefore suggests that the story of the first cascade for this norm is actually a story of colonialism and specifically, a story of British and French colonialism. As such, I selected two former British colonies from Africa: Kenya and Tanganyika/Tanzania. The former French colonies were more evenly divided between MENA and Africa, but I selected Algeria as a MENA state to compare it with the African cases and to complement the French MENA state of Tunisia selected for the early period.

The selection of case studies from the late period was based first on regional hegemony; second, on the type of laggard state (compliant versus noncompliant with international law); third, on regional diversity; and fourth, on the availability of primary and secondary sources. As a result, I selected the United States as a major case (compliant) and two minor cases, Pakistan (not compliant) and China (not compliant). Major and minor cases were determined according to the availability of scholarly material.

MECHANISMS OF DIFFUSION

The dissertation is organized not by temporal period but by mechanism of diffusion for two reasons: First, I found that there can be several mechanisms of diffusion across temporal periods. For example, in the early period, I found cases that were based on domestic principled activism (United Kingdom, France); coercive socialization,

discussed in chapter 4 (Japan, Tunisia); and, what I refer to in chapter 4 as voluntary socialization (Ethiopia, a state that invited Westerners to craft its criminal law code). Second, I am more interested in the mechanics of diffusion as a dependent variable. After compiling my case studies, I organized them according to the primary mechanism of diffusion: principled activism, coercive socialization, and globalized childhood. The organization of the dissertation is presented visually in figure 2.8 below.

FIGURE 2.8: CASE STUDY SELECTION BASED ON TEMPORAL PERIOD AND DISSERTATION ORGANIZATION BASED ON MECHANISM OF DIFFUSION

Selection of cases

Temporal period	**Case Studies**
Early period	Major cases: United Kingdom Tunisia Minor cases France Ethiopia Japan
Cascade periods	Major cases Algeria Tanganyika/ Tanzania Kenya
Late Period	Major case United States Minor cases Pakistan China

Organization of the Dissertation

Mechanism of Diffusion	**Case Studies**	**Chapter**
Principled activism	Major case United Kingdom Minor case France	3
Coercive Socialization	Major Cases Algeria Kenya Tanganyika/T anzania Minor cases Ethiopia Japan	4
Globalized childhood	Major cases United States Amnesty International UNICEF Minor cases Pakistan China	5, 6

Conclusion

This chapter sought to provide a context for the case studies in the following four chapters. It presented the characteristics of the universe of states that abolished the death penalty for child offenders under age 18, and it found that region, population size, regime type, history of colonialism, recent history of political transition, and the ratification and influence of international law differed by temporal period and mechanism of diffusion. The next chapter will address principled domestic activism, a mechanism of diffusion associated with early-period adoption. Through the case studies of the United Kingdom and France, I will address the actions and motivations of death penalty reformers and child welfare advocates that resulted in an end to the penalty for child offenders under age 18 in those states.

CHAPTER 3
PRINCIPLED ACTIVISM AS A MECHANISM OF DIFFUSION

Of the three types of diffusion examined in this dissertation – principled activism, coercive socialization and the globalization of childhood – only the first is predominately practiced at the domestic or state level. As described in the preceding two chapters, the dissertation argues that the norm abolishing the death penalty for child offenders gradually spread through the international system primarily because it was part of the template of the modern liberal state, along with other protections for children. This template became the prevalent form of state organization in the post-World War II era, as states around the world gained independence and sought legitimacy in an international system of equal states committed (ostensibly) to democracy and human rights.

The liberal, democratic model requisite for legitimacy in the new international system did not, however, emerge out of thin air. Rather, states were socialized to, negotiated, contested and confirmed principles and policies of the model. This process of socialization, contestation and confirmation predominately took place in Latin America and the West prior to World War II and in the decades following, although the process expanded in the last few decades of the 20th century to include other parts of the developing world and nongovernmental sectors of global society.

In this chapter, I examine the adoption and expansion of protections for children, including passage of a ban on the death penalty for child offenders, in two Western states: England (1933)[253] and France (1906). Both of these states were key actors in the diffusion of the norm, because both, to varying degrees, enshrined protections for

[253] In this chapter, the case study is of England, not the United Kingdom or Great Britain. That being said, when it is certain that a law or historical fact is applicable to the United Kingdom or Great Britain, I reference them accordingly.

children in the law they crafted for or applied to their colonial empires, and both eventually outlawed the death penalty for child offenders under the age 18. Although France preceded England in abolition by 27 years, the process of abolition in France appears to have been less contested than in England. As a result, there are far fewer primary and secondary sources on the subject for France than there are for England. The size of the case studies reflects this difference.

EXPECTATIONS OF PRINCIPLED ACTIVISM AS A MECHANISM OF DIFFUSION

As described in chapter one, the literature on normative spread tends to divide the period of diffusion into three stages: early, cascade/middle and late. For each of these periods, a different mechanism of diffusion prevailed. For the early period, sociologists, political scientists and international legal theorists contend that the motivation to adopt laws and norms should be the result of domestic factors, such as agency by committed individuals who petition the government and society to alter their behavior and adopt new norms. In the later periods, the struggle over norms shifts from the domestic level or the individual state to the international sphere, as the motivation for adoption is determined less by domestic factors and more by a desire to emulate other states in the international system.[254]

The early period, this time of principled activism and normative agency that precedes the cascade, is not set against a backdrop of international law or global consensus, as neither the law enshrining the norm nor the consensus leading to

[254] Finnemore and Sikkink, "International Norm Dynamics and Political Change.", Meyer et al., "World Society and the Nation-State.", Ramirez, Soysal, and Shanahan, "The Changing Logic of Political Citizenship: Cross-National Acquisition of Women's Suffrage Rights, 1890 to 1990." Sunstein, *Free Markets and Social Justice.*

codification of law yet exist. In the absence of international law or international pressure, state-level change during the early period is not the result of a combination of international and domestic factors or a confluence of variables, but is instead the unequivocal result of a domestic movement to advance a given norm. In these states at this time, social change comes from within.

That being said, not all states that adopt new norms during the early period of diffusion are isolated or even act of their own volition, driven to change by a few lonely moral campaigners. As the next chapter will demonstrate, some states that abolished early (Ethiopia, Japan and Tunisia) were shaped by foreign activism and/or coercion. Ethiopia voluntarily invited Western legal scholars to draft laws that included abolishing the death penalty for child offenders. Japan adopted death penalty protections after World War II, during the foreign occupation that followed the war's end. Tunisia adopted protections against the death penalty for child offenders under France's colonial regime. These states tended to abolish, however, toward the end of the early period, in 1957 (Ethiopia), 1949 (Japan), and 1956 (Tunisia). Because of this pattern, among other reasons, I have organized the dissertation by mechanism of diffusion as opposed to temporal period.

The principled activism that led to abolition in England and France began in the 19th century. Before the death penalty could be abolished for child offenders, dramatic and substantive changes had to take place in the areas of penal reform, restriction of the death penalty and child welfare. These changes were initiated by groups of dedicated individuals motivated by a variety of considerations, prime among them protections for children and the betterment of society. Over the course of the 19th and early 20th centuries, changes in penal reform and beliefs about children eventually resulted in a

widely recognized and standardized ideal childhood that both families and the state were obligated to recognize and provide. Science, especially the development of pediatrics and advances in hygiene, legitimated the new standard and led to the substitution of paternal authority with state authority to monitor deviance from the requisite standard of childhood.

The findings of the English and French cases suggest that in contrast to some states that abolished the death penalty for child offenders during the cascades, such as the United States, norms about abolition and child criminals nested easily within other norms already adopted in England and France that defined the purpose of justice, the power of the state and the nature of the child. In essence, the story of the emergence of a particular understanding of childhood and the changes it demanded is one of shifting authority from the father to the state to the international system and mirrors (indeed, is part of) a larger historical trend toward international moral authority that increasingly transcends national boundaries and alters state behavior.

ENGLISH CASE STUDY

Through a case study of England, this section will present the early legislative and cultural history that preceded abolition. It will begin with a historical introduction to the case, followed by a discussion of empirical evidence of executions of child offenders in the 19th century. The section will then trace three relevant legislative trends: penal reform, abolition and child welfare, that led to the abolition of the death penalty for child offenders in the 1933 Children and Young Persons Act. It is important to note that I do not attempt to give a complete history of children in the U.K. in this chapter. Rather, I

offer a working view of the subject in order to understand the process of state intervention in children's lives and to provide a basis for explaining the shift toward international authority over children in later chapters.

HISTORICAL CONTEXT

The country that Queen Victoria inherited in 1837 was remarkably different from the one she left upon her death in 1901. The population explosion begun before her ascension helped bring about a number of changes during her reign, including extensive industrial expansion and the development of an advanced transportation system as well as overcrowded cities and urban slums. Her reign was also notable for the increasing enfranchisement of men over the course of the century. The reform acts of 1832,[255] 1867[256] and 1884[257] pushed the United Kingdom toward greater democracy as the franchise was extended to working-class men and to men in rural areas. Moreover, the 19th century was notable for the launch of humanitarian campaigns, including the abolition of slavery, the reform of working conditions in factories and mines, and the reform of Parliament.[258]

The British Empire, acquired over five centuries and occupying a vast swath of the world, began to decline in the late 19th century as competition for the acquisition of raw materials increased and industrial production by other European states and the United States accelerated. This ushered in a period known as the 'new imperialism,' when Africa

[255] 1832 Representation of the People Act (2 & 3 Will. IV, c. 45)
[256] 1867 Representation of the People Act (30 & 31 Vict., c. 102)
[257] 1884 Representation of the People Act (48 & 49 Vict., c. 3)
[258] Elizabeth Orman Tuttle, *The Crusade against Capital Punishment in Great Britain* (London: Stephens & Sons Limited, 1961), p. 140.

became the object of domination and colonialism, often justified by claims of racial superiority.

Although efforts to assist poor and homeless children were first introduced in the 16th century in the United Kingdom, it was the 19th century that truly marked the birth of the child protection movement. In the 19th century alone, there were 33 major acts addressing children. By contrast, the three previous centuries produced approximately eight major pieces of legislation altogether. See Appendix B for a complete list of British legislation addressing children in this period.

The rise in attention to children in the 19th century was a precursor to the rights-based approach to child welfare and protection in the 20th century. During the early period of abolition, an international movement for the rights of children produced countless advocates, established multiple institutions to care for, study and advance the welfare of children, and yielded three international declarations on the rights of the child, one for the League of Nations and two for the United Nations. Although these three declarations – the 1924, 1948 and 1959 Declaration on the Rights of the Child – were not binding international law, they nonetheless signaled a growing, global consensus about the relationship between the state and the child.

The greatest and most widely known advocate for children's rights, Save the Children's International Union (hereafter Save the Children), was founded in the United Kingdom by Eglantyne Jebb in 1920.[259] A pioneer in child protection, her experiences during World War I and other wars caused her to conclude, "Every war is a war against

[259] Fuller, *The Right of the Child: A Chapter in Social History*, pp. 24-26.

the child."[260] Dedicated to the issues of child rescue, child welfare and child development, Save the Children organized itself around the model first employed by the International Red Cross Committee.[261] Historically, Save the Children carried out its mission in a variety of ways, including collecting and disseminating information about children and their rights throughout the world, sending teams of doctors and nurses with expertise in child welfare and maternity work abroad, and soliciting support from politicians, church leaders and society for their efforts.

Shortly after Save the Children was founded, Jebb began work on what would become the first Declaration of the Rights of the Child. The declaration's name was a misnomer; it did not grant rights to children, but rather imposed obligations on adults regarding children's welfare. Jebb suggested that:

> The only way to [continue working for children] seems to be to evoke a co-operative effort of the nations to safeguard their children on constructive rather on charitable lines. I believe we should claim Rights for children and labour for their universal recognition, so that everybody—not merely the small number of people who are in a position to contribute to relief funds, but everybody who in any way comes into contact with children, that is to say the majority of mankind—may be in a position to help forward the movement.[262]

The League of Nations adopted the declaration in 1924 with no dissent. The declaration was reaffirmed by the League in 1934, and in 1946 the United Nations "gave it renewed authority by resolution."[263] The declaration helped to establish, by the end of the early period, the framework of children's protection from which later efforts to advance the rights of children would model themselves.

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[260] Peter Willetts, *"The Conscience of the World:" The Influence of Non-Governmental Organizations in the U.N. System* (Washington, D.C.: Brookings Institution, 1996), 215.
[261] Fuller, *The Right of the Child: A Chapter in Social History*, p. 12.
[262] Willetts, *"The Conscience of the World:" The Influence of Non-Governmental Organizations in the U.N. System*, 215-216.
[263] Fuller, *The Right of the Child: A Chapter in Social History*, p. 73.

EMPIRICAL EVIDENCE OF CHILD EXECUTIONS

Prior to the 19th century and the routine collection of statistics on crime, no accurate data exists on the rate of child executions in England.[264] When scholars speak about executions of children prior to the 20th century, they are referencing executions of children under the age of 14, the age of culpability until the reforms of the 19th and early 20th centuries. Children under age seven were not culpable for their crimes, and children between the ages of seven and 14 were only culpable if evidence of malice or *mens rea* (criminal intent) was found.[265] There is virtually no data on the execution of children between the ages of 14 and 17 before the 20th century because this class of offenders was not characterized as children until child welfare advocates and penal reformers suggested in the mid-19th century that they have diminished culpability.[266] The only confirmed exceptions to this data gap are the executions of 14-year-old John Any Bird Bell in 1831 and of 17-year-old Joseph Morely in 1887, believed to be the last child under the age of 18 put to death in England.[267]

Additionally, these discussions of executions do not address offenders that committed their crimes as children and were executed as legal adults. This is not believed to present a problem in the study of England, however, since there was typically very little time between sentencing and execution, usually only a few days.

A.W.G. Kean has suggested that the search for "age-lines"—or firm distinctions between classes of individuals liable for the penalty and those who were not— in the study of children by modern scholars misunderstands the way childhood was interpreted

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[264] Radzinowicz and Hood, *A History of English Criminal Law*, p. 91.
[265] Arthur Koestler, *Reflections on Hanging* (London: Victor Gollancz Ltd., 1956), p. 20.
[266] Mary Carpenter first argued in the mid-19th century that children under the age of 16 could not be held culpable for their actions. Radzinowicz and Hood, *A History of English Criminal Law*, p. 168.
[267] Ibid., p. 679.

by British courts prior to the 17th century.[268] Judges possessed great discretion when dealing with children, such that:

> in his early years a child was too young to be punished at all, and that later, and until the age of puberty, special *dolus* had to be proved; whether a child was old enough to be convicted or not, and whether he was of the age of puberty or not, were questions of fact to be decided by the judge in each case.[269]

Additionally, without reliable birth registrations, age was difficult to determine and there was great incentive to deceive when punishments were so steep.[270] It was not until the 16th century that fixed age-lines were sought, although agreement was not reached until the 17th century, when criminal liability was fixed at age seven. Kean contends that it was probably not coincidental that age-lines crystallized when birth registrations became more systematic.[271]

Because it is impossible to find accurate data on the number of executions of children between the ages of 14 and 17 before the 19th century, it is difficult to develop a sophisticated understanding of children and justice with any degree of confidence. A number of authors, however, contend that the practice of executing children was common prior to the 19th century: James Christoph has suggested that the practice "was by no means unusual."[272] V.A.C. Gatrell estimates that approximately 90 percent of 'men' hanged in the 1780s in London were under the age of 21.[273] John Laurence Pritchard argues, "In the days of George II [1727-1760] it was no uncommon thing for children under the age of ten years to be hanged, and on one occasion ten of them were strung up

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[268] Kean, "The History of the Criminal Liability of Children," p. 368.
[269] Ibid.
[270] Ibid.: p. 370.
[271] Ibid.
[272] James B. Christoph, *Capital Punishment and British Politics: The British Movement to Abolish the Death Penalty 1945-57* (Chicago: The University of Chicago Press, 1962), p. 15.
[273] V.A.C. Gatrell, *The Hanging Tree: Execution and the English People 1770-1868* (Oxford: Oxford University Press, 1994), p. 8.

together, as a warning to men and a spectacle for the angels."[274] Other scholars refute the degree to which children were executed, especially in the 18th century. Arthur Koestler claims that toward the end of the 18th century, judges demonstrated an increasing uneasiness in sentencing to death children under the age of 14.

Data on the 19th century, even though relatively better documented, is also contentious. Multiple scholars suggest that there were at least eleven child executions in the 19th century, including the executions of two children age seven. See Appendix C for the list of possible 19th-century child executions in England.[275] On the other hand, Harry Potter and B.E.F. Knell argue that children under the age 14 were rarely executed in England in the 19th century.[276] Knell examined the administration of executions of children under age 14 at one location, Old Bailey, between the years 1801 and 1836.[277] Knell found no evidence that children under the age 14 were executed at the location during these years, although there were a number of death sentences that were later reprieved.[278] Systematically, Knell attacks the claims of Christoph, Pritchard, Koestler and others who contend that child executions were common in the early 19th century. On the contrary, Knell states, child executions were rare in the 19th century, and he casts doubt on their frequency in prior centuries as well. Knell is quick to point out, however,

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[274] John Laurence Pritchard, *A History of Capital Punishment* (New York: Citadel Press, 1960), p. 18.
[275] Koestler, *Reflections on Hanging*, Pritchard, *A History of Capital Punishment*, Christoph, *Capital Punishment and British Politics: The British Movement to Abolish the Death Penalty 1945-57*, Ivy Pinchbeck and Margaret Hewitt, *Children in English Society, Volume Ii: From the Eighteenth Century to the Children Act of 1948*, 2 vols., vol. II (London: Routledge and Kegan Paul, 1973), Negley K. Teeters, *"...Hang by the Neck...": The Legal Use of Scaffold and Noose, Gibbet, Stake, and Firing Squad from Colonial Times to the Present* (Springfield: Charles C. Thomas Publisher, 1967), Radzinowicz and Hood, *A History of English Criminal Law*.
[276] Harry Potter, *Hanging in Judgment* (London: SCM Press, 1993), p. 7. Knell, "Captial Punishment: Its Administration in Relation to Juvenile Offenders in the Nineteenth Century and Its Possible Administration in the Eighteenth."
[277] Knell, "Captial Punishment: Its Administration in Relation to Juvenile Offenders in the Nineteenth Century and Its Possible Administration in the Eighteenth," p. 199.
[278] Ibid. Knell found 103 cases of children under age 14 sentenced to death at Old Bailey between 1801 and 1836, but could not find their deaths noted in the criminal register. Knell found evidence that all but eight had been reprieved. For the eight for which no record of reprieve was found, Knell concluded that they must have been reprieved since there were no deaths recorded.

that due to the lack of any real data, his findings outside the Old Bailey and prior to the 19th century are "inferential."[279]

The one early 19th-century execution on which scholars, including Knell, agree was the hanging of John Any Bird Bell, age 14, for murder. Bell was hanged at Old Bailey in August 1831. Newspapers from the period give contradictory impressions of the reaction to his execution and provide insight, albeit limited, into general public support for child executions.[280] Transcripts from the murder trial of Bell documented that juries rejected a sentence of death "on account of his extreme youth, and the profligate and unnatural manner in which he had been brought up."[281] At the time, children 14 and older were considered adults and fully culpable for their crimes. The fact that this jury challenged the wisdom of this statutory provision and blamed the parents, an idea that would become increasingly prevalent in the 19th century, signaled a change in the way child offenders were viewed.

In addition, when the judge sentenced Bell to death anyway, he felt the need to give a lengthy justification for doing so. However, only two papers, *The London Times* and *The Kent and Essex Mercury*, ran the story. The *Times* ran two stories, one for the sentence and one for the execution, both toward the middle of the paper. The fact that the sentence and subsequent execution did not inspire any public editorials or commentaries indicates that they did not provoke outrage.[282] The *Times* article of Bell's trial reported that he "showed no outward symptoms of feeling," depicted his eyes as "deeply sunk in the head, a strong expression of cunning," and remarked that "he showed no marks of

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[279] Ibid.: p. 203.
[280] The London Times, a. July 30, 1831. "Summer Assizes." 14(604), The London Times, b, August 2, 1831. "Execution of John Any Bird Bell." 14(606), 4a.
[281] London Times, 1831 a
[282] Ibid., London Times, 1831 b

feeling […] until the dissection of his body was mentioned, and then dropped a solitary tear."[283] The *Times* article about the hanging, interestingly, waffles between insults to Bell's character, making reference to the "wretched youth" and "wretched malefactor" at different times, and sympathy to his "tender age," his "trembling anxiety" at his impending death, and the "sad spectacle" of his hanging.[284] Although there is little evidence of public outrage, the judge points to the "intense interest" in the case as measured by the "excessively crowded state of the court by all classes."[285]

In sum, it can be concluded that there is evidence of child executions in England in the 19th century, but that these executions are probably more rare than many authors suggest. Child executions prior to the 19th century are poorly documented and limit firm conclusions on the practice. It is likely, however, that child executions experienced the same decline in the 18th century as other types of executions, indicating that the practice was more common prior to the 18th and 19th centuries.

THE CREATION OF CHILDREN AND CHILDHOOD

Unlike the hard-won victories and defeats in the late period of legislative spread, there was little, if any, controversy in the adoption of legislation abolishing the death penalty for child offenders in the United Kingdom in 1933. This is not surprising given the public reception to previous penal reform efforts for children in the preceding decades. First, the 1908 Children's Act that increased the age limit for the death penalty to 16 inspired no written articles or commentary in *The London Times*. Nor did the failed

[283] London Times, 1831 a
[284] London Times, 1831 b
[285] London Times, 1831 a

Children's Bill in 1910, which attempted to raise the age of eligibility for the penalty to 21 but failed, result in any *Times* articles. Finally, a study of major newspapers, magazines, penal reform newsletters and Parliamentary debates of the time reveals that the provision in the 1933 Children and Young Persons Act[286] reserving the penalty for those 18 years of age and older inspired little criticism or comment.

Even though legislation abolishing the death penalty for children in the United Kingdom did not elicit opposition at the time, the path to abolition was not easy or quick. The consensus that children under age 18 are less culpable for their actions and deserve different treatment than adults required the acceptance of preceding norms about children and childhood within which the new norm of abolition could nest. In particular, it required the development of 'childhood' as a distinct stage of life (ending at age 18) that merits special protections and attention, including protections from punitive measures. These grew over the course of centuries.

Even though children were not specifically protected in international law until the 20th century, the groundwork for 20th-century advances was laid in the 19th century, a boon period for children. States enacted extensive legislation regarding their protection and welfare, including universal compulsory education, limits to employment, punishments for abuse and neglect, separate housing for juvenile criminals and lighter punitive measures. The remainder of this section will examine in more detail the three key legislative trends of the 19th and early 20th centuries that led to abolition in 1933: penal reform, abolition and child welfare.

[286] 23 &24 Geo. V, c. 12, s. 19.

PENAL REFORM

Very little is known about child offenders in England in the 16th and 17th centuries; however, it is evident that there was little legal distinction between vagrancy and delinquency or between children and adults. Adolescents were first distinguished from younger children in terms of punishment in the 1572 Poor Law Act,[287] which assigned lesser penalties to children than to adolescents (those 14 or older) who were "idlers, rogues and vagabonds."[288] This was also the first step toward a penal system that treated children differently from adults. The act also identified 18 as a key age in that repeat offenders older than 18 could have their crimes classified as felonies, whereas those younger than 18 could not.

The suggested decline in death sentences for child offenders in the 18th century was due in part to the increase in the use of transportation as punishment beginning in 1717, when male children between the ages of 15 and 18 could be transported to work on plantations in America.[289] When the American Revolution succeeded, transportation to America came to an end. As a result, large numbers of boys sentenced to transportation were put in the Hulks, old ships moored in the Thames River, which were filled with hundreds of prisoners in squalid conditions. The first calls for the segregation of young prisoners from adults emerged out of these conditions. In 1825, on the orders of Sir Robert Peel, boys were placed into a separate ship, the Euryalus.[290] Although conditions improved little for these boys, the Euryalus marked only the beginning of a century of

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[287] 14 Eliz. I, c. 5
[288] Pinchbeck and Hewitt, *Children in English Society, Volume 1: From Tudor Times to the Eighteenth Century*, p. 97.
[289] Ibid., p. 107.
[290] Radzinowicz and Hood, *A History of English Criminal Law*, p. 143.

institutional reform. In 1835, the Hulks were condemned and a separate penitentiary for young offenders was established.[291]

Although efforts to curb child crime began in the 16th century, serious concerns about child crime did not emerge until the end of the 18th century and the beginning of the 19th century, when England, Scotland and Wales experienced a population boom from an estimated 7,250,000 persons in 1751 to more than 16,000,000 by 1831.[292] London's population alone almost doubled between 1801 and 1831, from one to 1.7 million people.[293] This explosive growth resulted in large migrations of rural people to urban slums and corresponded, at the very least, with the perception that crime was on the rise. These concerns were increasingly directed at youth, who constituted between 48 and 49 percent of the population of England and Wales in 1821.[294]

In 1815, the first systematic inquiry into the source of juvenile delinquency was conducted by the Society for Investigating the Causes of the Alarming Increase of Juvenile Delinquency in the Metropolis,[295] launched in response to the perceived rise of delinquency. The study found that in addition to environmental factors such as poor parenting and lack of employment and educational opportunities, the severity of the criminal code—a product of 18th-century reaction to a perceived increase in crime—was the central cause of the perception of delinquency.[296]

The 19th and 20th centuries saw a decline in the severity of punishments, including declines in the number of sentences to death and to transportation. The prison regime

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[291] Ibid., p. 148.
[292] Pinchbeck and Hewitt, *Children in English Society, Volume Ii: From the Eighteenth Century to the Children Act of 1948*, p. 387.
[293] Gatrell, *The Hanging Tree: Execution and the English People 1770-1868*, p. 18.
[294] Pinchbeck and Hewitt, *Children in English Society, Volume Ii: From the Eighteenth Century to the Children Act of 1948*, p. 388.
[295] Ibid., p. 431.
[296] Ibid., pp. 434-437.

radically changed during this period as well. Prisons were the "first resort" at the beginning of the 19th century, designed to reform the criminal, but by the end of the 19th century, they were considered places of last resort, as society turned to a range of alternatives to control crime.[297] Out of early efforts to study crime and criminality in a scientific manner came new ideas about children and crime: Children were perceived to be "malleable" and capable of reform.[298] A central promoter of these new ideas toward child offenders was Mary Carpenter, a Unitarian who argued that children under the age 16 could not be held responsible for their crimes.[299] To her chagrin, the 1838 Parkhurst Prison Act, which established a separate prison for children ,[300] was passed. Although an improvement on earlier prison systems that housed children of all ages with adults and offered little supervision or care, a prison for children was an idea that was nonetheless considered antiquated. Carpenter spent many years lambasting Parkhurst or any system that imprisoned children. Eventually, her efforts paid off.[301] After the 1854 Reformation of Youthful Offenders Act[302] and other acts of this period establishing reform and industrial schools, the numbers of boys at Parkhurst rapidly decreased until it closed in 1864.

The establishment of reform schools in the Youthful Offenders Act has been described by child advocates as the "Magna Carta of Juvenile Delinquents" in that it simultaneously emphasized the rehabilitation of child offenders over retributive punishment and communicated the "duty of the parent to maintain his offspring, and not

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297 Taylor, *Crime, Policing and Punishment in England, 1750-1914*, p. 145.
298 Pinchbeck and Hewitt, *Children in English Society, Volume Ii: From the Eighteenth Century to the Children Act of 1948*, p. 441.
299 Radzinowicz and Hood, *A History of English Criminal Law*, p. 168.
300 1 & 2 Vict. c. 82
301 Radzinowicz and Hood, *A History of English Criminal Law*, p. 169.
302 17 & 18 Vict. c. 86

to cast the burden on the public."[303] Industrial schools, first founded in 1857, offered educational opportunities and were created for children age seven to 14 who were convicted of vagrancy.[304] Within four years, there were over 50 reformatories throughout England; however, the quality of the education provided remained poor until compulsory education laws were passed 20 years later.[305]

Concern with child criminals rose steadily in the first half of the 19th century. David Taylor has suggested that the preoccupation with child criminals during this time was largely "manufactured" by reformers such as Peel who criminalized a wide range of activities.[306] Peel's reforms, which began in 1827, were "defensive," meant to address the shortcomings or loopholes in the law, and were enacted to restore "credibility and the effectiveness of the law."[307] Concern with crime could also be explained by the fact that there was a greater tendency to prosecute and a higher success rate of prosecution since more delinquency was tried summarily.[308] Although concern with delinquency waxed and waned throughout the 19th century, it reached its peak in the 1840s and 1850s and began to decline thereafter.[309]

The last three decades of the 19th century were characterized by a series of important efforts at penal reform that, among other changes, resulted in drastic declines in the number of death sentences and granted discretionary power to magistrates to

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[303] Matthew Davenport Hill as qtd. in Pinchbeck and Hewitt, *Children in English Society, Volume Ii: From the Eighteenth Century to the Children Act of 1948*, p. 477.
[304] Taylor, *Crime, Policing and Punishment in England, 1750-1914*, p. 156.
[305] Pinchbeck and Hewitt, *Children in English Society, Volume Ii: From the Eighteenth Century to the Children Act of 1948*, p. 483.
[306] Taylor, *Crime, Policing and Punishment in England, 1750-1914*, p. 66.
[307] Ibid., p. 133.
[308] Ibid., p. 66. 1879 Summary Jurisdiction Act (42 & 43 Vict. c. 49)
[309] Ibid., p. 62-63.

release juveniles on their own recognizance.[310] In 1836, for example, only three percent of penalties for indictable offences were death sentences.[311] In 1896, the percentage was even lower (0.8 percent), and by 1912 the percentage of death sentences among all penalties for indictable offences was 0.4 percent.[312] Buttressing the reformist trend was the establishment in the 19th century of reform-minded societies.[313]

It was not until the 20th century, however, that penal policy began to deal with child offenders older than 16.[314] In 1908, the Children's Act[315] established separate courts for child offenders, reflecting a paradigm shift in attitude from the preceding period when the child was seen as a "small adult, fully responsible for his crime."[316] Most importantly for this study, the Children's Act abolished the death penalty for children under the age 16. The Lord Advocate of the Bill declared:

> There was a time in the history of this House when a Bill of this kind would have been treated as a most revolutionary measure; and, half a century ago, if such a measure had been introduced it would have been said that the British Constitution was being undermined. Now a Bill of this kind finds itself in smooth water from the outset. This measure is not the development of the political ideas of one party, but the gradual development of a quickened sense on the part of the community at large of the duty it owes to the Children.[317]

The Children's Act was followed 25 years later by the 1933 Children and Young Persons Act, which abolished the death penalty for child offenders less than 18 years of age as well as addressed the treatment, education and "social training" of child offenders.[318]

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[310] 1887 An Act to Permit the conditional Release of First Offenders in Certain Cases (50 & 51 Victoria, c. 25). Further reforms of the probation system were enacted in the 1901 Youthful Offenders Act (1 Edw. 7, c. 20) and the 1907 Probation Act (7 Edw. VIII, c. 17).
[311] Radzinowicz and Hood, *A History of English Criminal Law*, p. 775.
[312] Ibid.
[313] The Howard Association merged with the Penal Reform League in 1921 to form the Howard League for Penal Reform. Tuttle, *The Crusade against Capital Punishment in Great Britain*, p. 28.
[314] Radzinowicz and Hood, *A History of English Criminal Law*, p. 376.
[315] 8 Edw.7 c. 67
[316] Pinchbeck and Hewitt, *Children in English Society, Volume Ii: From the Eighteenth Century to the Children Act of 1948*, p. 492.
[317] As qtd. in Ibid., p. 612.
[318] Ibid., p. 495.

These two acts were not perceived as revolutionary because they were "merely making statutory what since 1887 had become the standard practice of reprieving all those under eighteen."[319]

ABOLITION

The movement toward abolishing the death penalty began in the United Kingdom in 1808 when Sir Samuel Romilly asked Parliament to abolish the more than 200 capital crimes in English law at the time.[320] It would take an additional 190 years for the death penalty to be abolished in the United Kingdom for all crimes.[321] However, throughout the 19th and 20th centuries, the application of the death penalty was slowly restricted, such that by the mid-19th century, only four capital crimes remained: murder, treason, piracy with violence, and arson in the royal dockyards.[322] By 1957, murder was separated into capital and non-capital offences in the Homicide Act,[323] which strongly limited the penalty's application.[324] The legislative trend toward the restriction of the death penalty is a type of penal reform, but one that deserves special attention because of its relation to the abolition of the penalty for children.

In Britain, criminal law is passed by Parliament, and therefore all efforts to change criminal law must be directed at Parliament.[325] Although most countries in Europe have a civil law system inherited from Roman law, only the United Kingdom has maintained a common law system. The British common law system has four sources of

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[319] Potter, *Hanging in Judgment*, p. 109.
[320] Tuttle, *The Crusade against Capital Punishment in Great Britain*, p. 1.
[321] Amnesty International, "Abolitionist and Retentionist Countries," http://web.amnesty.org/pages/deathpenalty-countries-eng.
[322] Tuttle, *The Crusade against Capital Punishment in Great Britain*, p. 1.
[323] 5 & 6 Eliz. II c. 11
[324] Tuttle, *The Crusade against Capital Punishment in Great Britain*, p. 127.
[325] Christoph, *Capital Punishment and British Politics: The British Movement to Abolish the Death Penalty 1945-57*, p. 26.

law: custom, precedent, royal prerogative and legislation. Acts of Parliament, the judicial interpretation of acts and the precedent of case law are very important in the development of English law.[326] The history of the abolitionist movement in England is primarily a history of Parliament, members of Parliament and societies organized to lobby those in Parliament.[327]

The 18th century saw such drastic increases in the number of capital crimes that by the century's end, there were more than 200 of them. The collection of laws that became known as the Bloody Code was a patchwork that was often repetitive and draconian. "Stealing turnips, consorting with gypsies, damaging a fish-pond, writing threatening letters, impersonating out-pensioners at Greenwich Hospital, being found armed or disguised in a forest park, or rabbit warren, cutting down a tree, poaching, forging, picking pockets and shoplifting" were all capital offences.[328] Yet as the number of capital crimes increased, the number of persons actually executed declined. Interestingly, as capital crimes began to be repealed at the end of the 18th century and in the early 19th century, death sentences and executions spiked again.[329] Not coincidentally, this spike corresponds with the sharp population increase in England and Wales and the related perception of a crime wave.[330]

According to Sir James Fitzjames Stephen, it was never the intention of British justice to carry out every death sentence.[331] Taylor has suggested that reprieves were necessary in order to keep the number of those killed at an "acceptable (and practicable)

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326 Taylor, *Crime, Policing and Punishment in England, 1750-1914*, p. 7.
327 Christoph, *Capital Punishment and British Politics: The British Movement to Abolish the Death Penalty 1945-57*, p. 26.
328 Ibid., p. 14.
329 Gatrell, *The Hanging Tree: Execution and the English People 1770-1868*, p. 7.
330 Ibid., p. 18.
331 Sir James Fitzjames Stephen, *A History of the Criminal Law of England*, 3 vols., vol. 1 (London: Macmillan and Co., 1882).7t

level."[332] The pardon was thus "supplemental" to the death sentence in England, with the king playing the role of pardoner.[333] Taylor contends that the uncertainty of punishment "reinforced or enhanced" the sentence's terror.[334] By arbitrarily selecting some criminals over others for pardon, "the discernment and magnanimity of the ruling elite" was emphasized.[335]

Not until 1810, at the behest of Romilly, were crime statistics collected. The number of capital offences began to decline in the 1820s.[336] The Bloody Code was repealed in the 1832 Reform Act, which 100 members of Parliament supported. In 1837, by which time most capital statutes had been repealed, only eight people were executed in England; the next year saw only six executions.[337] Gatrell portrays the collapse of this "ancient killing system" as dramatic, brought on primarily by the Whigs coming into power in 1830.[338]

Early abolitionist efforts aimed to eliminate the death penalty for offences relating to property.[339] Romilly's abolitionist efforts had an early success in 1808 with the removal of pickpocketing from the list of capital crimes, without opposition in Parliament.[340] Early abolitionists adopted a novel strategy, first used by Romilly, that allowed the lengthy list of capital crimes to be reduced to four by the mid-19th century: They allied themselves with merchants, manufacturers, bankers and businessmen who

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[332] Taylor, *Crime, Policing and Punishment in England, 1750-1914*, p. 130.
[333] This ended with the reign of William IV. Sir James Fitzjames Stephen, *A History of the Criminal Law of England*, 3 vols., vol. 2 (London: Macmillan and Co., 1882), p. 88.
[334] Taylor, *Crime, Policing and Punishment in England, 1750-1914*, p. 127.
[335] Ibid.
[336] Steven Lynn, "Locke and Beccaria: Faculty Psychology and Capital Punishment," in *Executions and the British Experience from the 17th Century : A Collection of Essays*, ed. William B. Thesing (Jefferson, North Carolina: McFarland & Company, Inc., 1990), p. 29.
[337] Gatrell, *The Hanging Tree: Execution and the English People 1770-1868*, p. 9.
[338] Ibid.
[339] Tuttle, *The Crusade against Capital Punishment in Great Britain*, p. 141.
[340] Ibid., p. 3.

recognized that the severe punishment of death for minor crimes meant that few of these criminals were found guilty. Shifts in public opinion against the death penalty for minor offences meant that juries would not "systematically" convict.[341] As a result, penalties for stealing cloth, for example, were not enforced because the penalty was death.

Romilly argued that if the punishment were less severe, juries would be more likely to convict and crime would be reduced.[342] In a speech to the House of Commons in 1810, he stated:

> There is probably no other country in the world in which so many so great a variety of human actions are punishable with loss of life as in England. These sanguinary statutes, however, are not carried into execution. For some time past the sentence of death has been executed on more than a sixth part of all the person on whom it has been pronounced.[343]

In the words of John Bright, a Quaker abolitionist, the "certainty of punishment was more important than severity" of a punishment that was rarely enforced.[344] Some of these attempts, such as at reducing the penalties for theft of cloth, pickpocketing and vagrancy for a sailor or soldier, succeeded easily.[345] Others, such as for forgery, were defeated in the first attempt, but some of these defeats had the effect of ending all executions for these crimes (*de facto*) even if retained in law.[346]

One of the most widely researched examples of death penalty restriction, the 1868 ban on public executions,[347] had little to do with abolitionist sentiment and more to do with the uncivilized and bawdy environment surrounding public executions. Crowds were portrayed as vehicles of vice, inciting observers to crime, and numbered between

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[341] Christoph, *Capital Punishment and British Politics: The British Movement to Abolish the Death Penalty 1945-57*, p. 16.
[342] Tuttle, *The Crusade against Capital Punishment in Great Britain*, p. 4.
[343] Sir Samuel Romilly, *Observations on the Criminal Law of England as It Relates to Capital Punishments, and the Mode in Which It Is Administered* (London: T. Cadell and W. Davies, Strand, 1810), 3.
[344] Tuttle, *The Crusade against Capital Punishment in Great Britain*, p. 10.
[345] Ibid., p. 5.
[346] Ibid., p. 9.
[347] 1868 Law of Capital Punishment Amendment Act (31 Vict. c. 24)

3,000 and 100,000.[348] Nonetheless, the justification for public executions was that the death penalty functioned as a deterrent to crime. Abolitionists, realizing that this assumption was the primary reason the public and Parliamentarians supported the death penalty, set out to demonstrate that it was a false assumption. Nineteenth-century abolitionists looked to studies to bolster their position, many of them international surveys of death penalty practices and the effect of abolition on crime rates, such as the 1819 Select Committee, the 1833 Royal Commission and the 1864 Royal Commission.[349] Influenced by these and other studies, Parliamentarians including J.W. Pease, a Quaker and staunch abolitionist, argued that the death penalty was archaic and not a deterrent to crime.[350] He argued, "The punishment must pass away from our land...It belongs to a much earlier day than ours, and it is no longer needed for the civilization of the age in which we live."[351] Drawing to some degree on these arguments and on widespread support for an end to the lewd and unruly behavior surrounding these executions, Parliament outlawed public executions altogether in the 1868 Law of Capital Punishment Amendment Act.[352] Some abolitionists feared that taking the death penalty out of public view would also push the debate off the public agenda.[353] Taylor contends that "sanitizing" the death penalty shifted the locus of debate to "specific 'problem' groups"

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[348] Gatrell, *The Hanging Tree: Execution and the English People 1770-1868*, p. 7.
[349] Select Commissions differ from Royal Commissions in that the former consist only of Parliamentary members appointed by party whips and are proportional to strength of party in the House of Commons. Tuttle, *The Crusade against Capital Punishment in Great Britain*, p. 38.
[350] Ibid., p. 21.
[351] Brian P. Block and John Hostettler, *Hanging in the Balance* (Winchester, England: Waterside Press, 1997), 76.
[352] 31 Vict. c. 24 Taylor, *Crime, Policing and Punishment in England, 1750-1914*, p. 138.
[353] Ibid.

such as the insane and children.[354] Indeed, the only important advances in abolition in the early part of the 20th century were limitations of the death penalty for children.[355]

Members of Parliament, activists and penal reform societies made certain the death penalty remained on the legislative agenda. Nonetheless, successes for death penalty abolitionists in the late 19th century were few, although Pease tried to pass bills in 1878 and 1881.[356] Advances toward the complete abolition of the death penalty would not come until the 20th century, when public opinion began to oppose the penalty.[357]

In 1908, the Children's Act abolished the death penalty for child offenders under the age 16. The passage of the Children's Act was then followed by ongoing activism in the 1920s and 1930s by societies for abolition, such as the Howard League for Penal Reform,[358] a charity still active today in England, and the National Council for the Abolition of the Death Penalty (NCADP), a relatively young anti-death penalty NGO that would be absorbed by the Howard League in 1948. These societies waged a well-orchestrated propaganda campaign in newspapers, books, magazines, radio stations, pamphlets, novels and theatres.[359] Their efforts succeeded in producing the "first full-scale debate" on abolition in the 20th century in the 1929 Parliament, resulting in the formation of the 1930 Select Committee on Capital Punishment.[360] The Committee recommended, among other things, a five-year moratorium on the death penalty as a definite recommendation and the abolition of the death penalty for those under 21 as a

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354 Ibid., p. 140.
355 Although the execution of expectant mothers was outlawed in 1931 [The Sentence of Death (Expectant Mothers)] and the death penalty was restricted in the armed forces in the 1930 Army and Navy Act to treason and desertion to the enemy. Potter, *Hanging in Judgment*, p. 242 n.235.
356 Tuttle, *The Crusade against Capital Punishment in Great Britain*, pp. 23-24.
357 Ibid., p. 29.
358 See footnote 25.
359 Tuttle, *The Crusade against Capital Punishment in Great Britain*, pp. 31, 45.
360 Ibid., p. 33.

conditional recommendation.[361] Finally, in 1933, the Children and Young Persons Act abolished the death penalty for those under the age of 18, three years after the Committee made its recommendations.

The abolition of the death penalty for child offenders in England illustrates a larger pattern in English legislative history – the gap between criminal codes and the actual practice of criminal justice. It is evident that the practice of executing children under the age of 18 had ceased 45 years before it was codified in law.[362] As demonstrated above, even when efforts to remove crimes from the list of capital offences failed, the practice of executing individuals who committed these crimes was often discontinued. The Infanticide Act of 1922 is another example of this phenomenon: The 1864 Royal Commission recommended that the crime of infanticide receive the punishment of life imprisonment rather than death if the infant was less than one week old.[363] Parliament did not act on the recommendation in 1864, but did so in 1922. The 1922 Act, however, had little effect because reprieves were "uniformly […] given in such cases" for a significant time before the act's passage.[364] Moreover, abolitionists were aware of this phenomenon. In the 1957 debates over the Homicide Act, it was suggested that based on prior experience with infanticide and the execution of children, death penalty restrictions were often granted in practice if not in law. The result was that practice and statute were sometimes as much as 50 years apart.[365]

It can thus be concluded that restrictions to the death penalty in the 19th and 20th centuries were "due more to the increased use of the reprieve power than to any notable

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[361] Ibid., p. 43.
[362] Potter, *Hanging in Judgment*, p. 109.
[363] Tuttle, *The Crusade against Capital Punishment in Great Britain*, p. 18.
[364] Ibid., p. 28.
[365] Ibid., p. 138.

change in the criminal law."[366] More than 45 percent of death sentences between 1900 and 1949, for example, were "commuted or respited."[367] Christoph argues, "Such modifications of the law were not the product of a groundswell of sentiment favourable to abolition. They came instead in the course of rather routine examinations of the criminal law and were unrelated to agitation against capital punishment."[368] Christoph further suggests that attention to death penalty policy in the 1920s was the result of two influences that "reviv[ed] public interest and encouraged abolitionists to press for renewed action": campaigns by NGOs such as the Howard League for Penal Reform and the NCADP; and the rise of the Labour Party, which formed minority governments in 1924 and 1929.[369]

CHILD WELFARE

There are two schools of thought on the issue of children's welfare in England: the received view and, what I will call the critical view. The most common view found in the literature on the history of childhood is the received view: Children were marginalized and exploited in homes, places of employment and public spaces, about which the state and parents were ambivalent. These parental attitudes were in large part the result of the high rates of infant and child death, which parents curiously took in stride; and at some point (likely in the 18th or 19th century), there was a turning point in the treatment of children, made evident by those that sought to trace parental attitudes

366 Christoph, *Capital Punishment and British Politics: The British Movement to Abolish the Death Penalty 1945-57*, p. 17.
367 Ibid., p. 25.
368 Ibid., p. 19.
369 Ibid.

and attachment toward children via diaries, newspapers and other public sources.[370] Ivy Pinchbeck and Margaret Hewitt represent this school of thought, arguing that evidence from diaries, memoirs, letters and other historical documents indicates that due to the high rates of child death, parents "preserved and bred a curiously detached attitude to the deaths of children."[371]

All of these contentions are disputed in the critical view of the history of childhood, most notably in the work of Linda Pollock.[372] Certainly, the child death rate was exorbitantly high by today's standards: The national rate of infant mortality in England between 1839 and 1840 was 153 per 1000 live births and stayed relatively constant for forty years; by 1876-1880, it had fallen to 144, and it was at 139 per 1000 live births between 1881-1885. It peaked again in 1899 at a high of 163[373] before falling in the 20th century.[374] By 1901, the rate was 130 per 1000 live births and had fallen to 80 by 1923 and 53 by 1938.[375] Pollock challenges the assertion by historians that parents were indifferent to children's illness and death because it was so commonplace.[376] She

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370 Robert H. Bremmer, ed. *Children and Youth in America: A Documentary History*, vol. I, Part I, 1660-1865 (Cambridge, MA: Harvard University Press,1970), ———, ed. *Children and Youth in America: A Documentary History*, III vols., vol. II, 1866-1932 (Cambridge, MA: Harvard University Press,1971), ———, ed. *Children and Youth in America: A Documentary History*, III vols., vol. III, 1933-1973 (Cambridge, MA: Harvard University Press,1974), Pinchbeck and Hewitt, *Children in English Society, Volume Ii: From the Eighteenth Century to the Children Act of 1948*, Linda A. Pollock, *Forgotten Children : Parent-Child Relations from 1500 to 1900* (Cambridge [Cambridgeshire] ; New York: Cambridge University Press, 1983), 52-65, David Hunt, *Parents and Children in History; the Psychology of Family Life in Early Modern France* (New York,: Basic Books, 1970), Pinchbeck and Hewitt, *Children in English Society, Volume 1: From Tudor Times to the Eighteenth Century*, De Mause, ed. *The History of Childhood*, Stone, *The Family, Sex and Marriage in England*.

371 Pinchbeck and Hewitt, *Children in English Society, Volume 1: From Tudor Times to the Eighteenth Century*, p. 7.

372 Pollock, *Forgotten Children : Parent-Child Relations from 1500 to 1900*.

373 The infant mortality rate rose in the 1890s due to a number of factors including hot summers combined with poor sanitation and hygiene that resulted in plagues of flies and "vermin" and diarrhea. Pamela Horn, *The Victorian Town Child* (New York: New York University Press, 1997), p. 128.

374 Ibid., p. 127-128.

375 Fuller, *An International Yearbook of Childcare and Protection*, pp. vi-vii. Hendrick, *Children, Childhood and English Society 1880-1990*, p. 49.

376 Pollock, *Forgotten Children : Parent-Child Relations from 1500 to 1900*, 127.

argues that parental grief is evident across the centuries and for all ages of children and among all classes.[377]

Moreover, Pollock identifies legal changes in children's welfare during the industrial revolution, which she argues brought increased wealth that made humanitarian legislation "affordable."[378] Children, according to Pollock, were merely one part of a general trend toward humanitarian intervention by the state.[379] She suggests that there was not radical transformation in the treatment of children by parents from the 16th to 19th centuries: "It is possible that mothers and fathers have always had the concept of childhood."[380]

Indeed, child welfare reformers sought restrictions on child labor and increased educational opportunities for children in the early 19th century, advances that created spaces for children separate from those inhabited by adults. Child labor began to be restricted with the 1819 Factory Act and continued to be limited incrementally throughout the 19th and 20th centuries.[381] These restrictions had support from working-class men, who believed their wages suffered as a result of child labor, and opposition from those that thought child labor prevented married women from working in factories.[382] Technological advances also reduced the need for child labor, especially in the mining industry.[383] Formal education became free and compulsory for all children in

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377 Ibid., 133.
378 Ibid., 60.
379 Ibid.
380 Ibid., 64.
381 Lavalette, "The Changing Form of Child Labour *Circa* 1880-1918: The Growth of 'out of School Work'," p. 123, Pinchbeck and Hewitt, *Children in English Society, Volume Ii: From the Eighteenth Century to the Children Act of 1948*, p. 404.
382 Pinchbeck and Hewitt, *Children in English Society, Volume Ii: From the Eighteenth Century to the Children Act of 1948*, p. 405.
383 Lavalette, "The Changing Form of Child Labour *Circa* 1880-1918: The Growth of 'out of School Work'," p. 121, Peter Kirby, "The Historic Viability of Child Labour and the Mines Act of 1842," in *A Thing of the Past? Child Labour in Britain in the Nineteenth and Twentieth Centuries*, ed. Michael Lavalette (New York: St. Martin's Press, 1999), p. 101.

1870.[384] This change served to separate children from adults during large portions of the day.

Legislation limiting employment, making education compulsory and protecting children from abuse meant the state was playing an increasingly important role regulating the lives of children and families. State control came at the expense of parental, especially paternal, control. In the early part of the 19th century, paternal rights were "paramount."[385] Mothers had little legal power over their children. Until the 19th century:

> No court in England ever regarded itself as entitled entirely to extinguish a father's right to custody. Moreover, the principle of 'benefit of child' was much more narrowly interpreted than it would be today, and whenever this principle came into direct conflict with the 'sacred right of the father over his own children', the Court of Chancery came down heavily on the side of the father.[386]

Holly Brewer has suggested, however, that the parental authority over children that was usurped in the late 19th century by the state had not been recognized for very long.[387] Sporadically in the 17th and 18th centuries and certainly by the early 19th century, parental authority had become widespread among all classes. Prior to this, only wealthy children and heirs under the age of 14 had custodians.[388] The implication here is that childhood and children have repeatedly been naturalized throughout history: Parental authority in the early 19th century was asserted by legal commentators, rendering children property of the father, before being reduced in favor of state control.

Prior to the education and labor laws of the late 19th century, state intervention into families was reserved only for certain types of families. Since only poor families tended to have children who were beggars, vagrants or criminals, only these families

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[384] 1870 Education Act (33 & 34 Vict., c. 75)
[385] Pinchbeck and Hewitt, *Children in English Society, Volume Ii: From the Eighteenth Century to the Children Act of 1948*, p. 362.
[386] Ibid., p. 364.
[387] Brewer, *By Birth or Consent: Children, Law, & the Anglo-American Revolution in Authority.*
[388] Ibid., pp. 231-232, 250, 260, 271, 277.

experienced intervention. As a result, protections for children, ironically, were only applied to poor children before the 19th century.[389]Additionally, since prior to the application of the education laws – when only the children of wealthy parents attended school – only these families experienced state regulation of the nature, duration and content of education.

The first legal limitation to paternal authority in the 19th century was the 1839 Infants Custody Act.[390] The 1839 Act had the revolutionary effect of making absolute paternal authority dependent upon the discretion of a judge, and was the "first statutory intervention in the common law rights of a father in [England]."[391] Other acts, such as the Matrimonial Causes Act of 1857, the 1886 Custody of Infants Act, the 1925 Guardianship of Infants Act[392] and the 1928 Administration of Justice Act, further eroded paternal authority. Not all of these laws that divested paternal authority were based on concerns for child welfare; many were in response to a rising women's movement that demanded more protection and rights for women, including the rights of women to parent.[393]

The most significant shift and direct challenge to paternal authority came with the rise of the child welfare movement in laws that were established to prevent cruelty and neglect. Child welfare reform followed a similar trajectory to education reform—it too was religiously motivated, especially by evangelical philanthropy.[394] The 1889

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389 Pinchbeck and Hewitt, *Children in English Society, Volume Ii: From the Eighteenth Century to the Children Act of 1948*, p. 367.
390 2 &3 Vict., c. 54
391 Pinchbeck and Hewitt, *Children in English Society, Volume Ii: From the Eighteenth Century to the Children Act of 1948*, p. 376.
392 9 & 10 Geo. V, c. 71
393 Pinchbeck and Hewitt, *Children in English Society, Volume Ii: From the Eighteenth Century to the Children Act of 1948*, p. 383.
394 Fuller, *The Right of the Child: A Chapter in Social History*, p. 16.

Prevention of Cruelty to Children Act[395] was the central piece of legislation addressing this issue. Like the 1870 Education Act, the 1889 Act addressed all children (at least in theory) irrespective of class. These two acts marked a shift in thinking about the young: The class of individuals referenced as 'children' was now defined solely by age.

Fox Harding has argued that attention to children had waned by the 1920s and 30s, but "officials *were* enthusiastic about tackling juvenile delinquency."[396] The 1933 Children and Young Persons Act not only abolished the death penalty for child offenders, but also, as a consolidating act, codified widespread changes in the treatment of children in the justice system.[397] Regardless of the motivations behind the act,[398] the sections addressing the death penalty passed without debate, indicating the adoption of norms about children's reduced culpability for their actions.

In sum, this section has suggested not that behavior and attitudes toward children changed in the 19th century, but rather that concerns about children's welfare materialized as a public expression. State intervention into issues of child welfare began at a particular point in history, but this in no way implies that state intervention created concerns about child welfare. Rather, as Pollock has suggested, the state "had to learn not so much what a child is, but that its helplessness could be exploited by society and it therefore required state protection."[399]

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395 52 & 53 Vict., c. 44
396 Hendrick, *Children, Childhood and English Society 1880-1990*, p. 51.
397 Ibid.
398 For a debate of the motivations, implications and analysis of the Act please consult Pinchbeck and Hewitt, *Children in English Society, Volume Ii: From the Eighteenth Century to the Children Act of 1948*, Heywood, *Children in Care: The Development of the Service for the Deprived Child*, Nick Frost and Mike Stein, *The Politics of Child Welfare: Inequality, Power and Change* (New York: Harvester Wheatsheaf, 1989), Nikolas Rose, *The Psychological Complex: Psychology, Politics and Society in England 1869-1939* (London: Routledge & Kegan Paul, 1985), Victor Bailey, *Delinquency and Citizenship : Reclaiming the Young Offender, 1914-1948* (Oxford: Oxford University Press, 1987).
399 Pollock, *Forgotten Children : Parent-Child Relations from 1500 to 1900*, 64.

FRENCH CASE STUDY

France's experience with the death penalty and child offenders was considerably more convoluted than England's. The 19th-century *Code Penal* defined a minor as an individual younger than 16; this was raised in 1906 to age 18 (Law of 12 April 1906). By raising the age of minority to 18, other articles in the penal code addressing the treatment of minors now applied to those under 18 as well, including the laws governing the death penalty.[400] Technically, the new code abolished the death penalty for offenders under the age 18 in 1906, but not explicitly.[401] The article abolishing the death penalty was never amended to specifically ban the penalty for those under age 18, although the general understanding was that child offenders under age 18 could no longer be legally executed by the state. The public's reaction to the law was negative, but the state nonetheless supported reform and rehabilitation over more punitive measures.[402]

Article 66,[403] the provision abolishing the child death penalty, was influenced by the practices of other states, much like the entire slate of reforms for children in the 19th and 20th centuries. The French reforms were compared with the "more enlightened and modern systems" of the United States and Belgium."[404] The United States was especially important, "attracting French admiration and jealousy," and influencing the character of its juvenile justice system.[405] Nonetheless, the trajectory of reform in France differed drastically from the trajectory in the United States.[406] Whereas the United States was a leader in the rehabilitation and reform of child offenders in the early 20th century, by the

[400]Dr. Sarah Fishman, July 9 2008.
[401] Ibid.
[402] Sarah Fishman, *The Battle for Children : World War Ii, Youth Crime, and Juvenile Justice in Twentieth-Century France* (Cambridge, Mass.: Harvard University Press, 2002), 25.
[403] The article abolishing the child death penalty would later become Article 67 in a revision of the Penal Code.
[404] Fishman, *The Battle for Children : World War Ii, Youth Crime, and Juvenile Justice in Twentieth-Century France*, 32.
[405] Ibid., 224-225.
[406] Ibid., 13.

century's end, its policies toward these offenders had degenerated into a punitive system based largely on public fear. France, on the other hand, adopted a more progressive approach, moving from a fear of child offenders to a system based on rehabilitation.[407]

Although France did not amass the imperial power of the United Kingdom and had less impact on world society, its diffusion of norms about children was still significant. France had unparalleled influence in Northern Africa and East Asia, and helped to build state protection for children into the global model of legitimate statehood. As will be discussed in more detail in chapter 4, French legal acculturation varied tremendously by colony, making it difficult to generalize across colonies. The French colonial case studies of this dissertation, Algeria and Tunisia, however, shed some light on the process of diffusion for norms involving children. Criminal law in Algeria and Tunisia, both during French rule and after independence, expressly forbade executions for child offenders under the age 18.

STATE INTERVENTION INTO CHILDHOOD

The protections for children enacted in the 19th century came out of a highly contested discourse about children in France. Catholic tradition, dominant in France, suggested that all individuals are born of original sin, and that children needed punishment and rigid supervision to quell desires to sin. This doctrine conflicted with ideas coming out of the Enlightenment after the revolution in 1789, embodied in the work of John Locke and Jean-Jacques Rousseau. Enlightenment thinkers stressed the ideas that human beings are shaped by experience and that education is required to create good

[407] Ibid.

citizens.[408] These ideas were further contested by other ideas about children. Romanticism "idealized childhood as a period of natural innocence," while other schools of thought held that children were "precociously perverse."[409]

Prior to the changes in the 18th and 19th centuries, responsibility for the family's welfare belonged to the father alone, and he had state institutions at his disposal to back up his authority.[410] Restrictions on paternal correction, whereby a father could order imprisonment for a rebellious child, existed before the 19th century (based on ordinances passed in 1673, 1678 and 1697), but this system did not involve an outright or permanent transfer of authority from the father to the state.[411] Limits in age (25 being the oldest a rebellious child could be detained) were slowly replaced by class-based restrictions, with poor and working-class fathers unable to remove children from detention. This early form of state intervention, whereby only some fathers were allowed to retain control over their children, became state policy in the mid-18th century as concerns were raised about abuses of parental correction.[412]

Beginning around 1760, reformers began advocating for a state system of public assistance that would make the social welfare of French nationals the responsibility of the state rather than of the Church or private charities.[413] For the most part, however, the late 18th century was marked by laissez-faire ideology that was hostile to social legislation.[414] The French Revolution was a sudden and radical shift away from laissez-faire ideology.

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408 Ibid., 15.
409 Ibid., 16.
410 Philippe Meyer, *The Child and the State : The Intervention of the State in Family Life* (Cambridge [Cambridgeshire] ; New York: Cambridge University Press, 1983), 28.
411 Ibid., 28-29.
412 Ibid.
413 Rachel Ginnis Fuchs, *Abandoned Children : Foundlings and Child Welfare in Nineteenth-Century France*, Suny Series in Modern European Social History (Albany: State University of New York Press, 1984), 17.
414 Colin Heywood, *Childhood in Nineteenth-Century France : Work, Health, and Education among the 'Classes Populaires'* (Cambridge ; New York: Cambridge University Press, 1988), 221.

The Revolution further undermined the role of the private sector and the Church as providers of social welfare, as the wealth of Church and clergy was largely nationalized.[415] The new Constitution of France in 1791 affirmed the state's commitment to caring for abandoned children and codified these practices in the decree of January 19, 1811.[416] This decree expressed the shift in responsibility for child welfare from the father to the state that would characterize the 19th century.[417] State intervention into child welfare was not uncontested, however. Restrictions on child labor were challenged by liberal economists who believed that all economic issues could be resolved by free market policies as opposed to government regulation.[418]

Although we tend to think of child welfare reform as progressively expanding to protect older and older children, in France, the opposite was the case. Organizing children by *classes d'age* was actually more common before the 19th century as young, single men were clearly demarcated from adults during the *ancien regime*.[419] For example, the age of civil majority in France was lowered to 21 (from 25 in 1792).[420] As age categories became less important, they were replaced by class and social divisions.[421]

The first modern criminal code, in which regulation of the death penalty is codified, was the Napoleonic Penal Code of 1810.[422] Within this code, Article 66 defined 16 as the age of penal majority, but did not establish separate courts or prisons for

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415 Fuchs, *Abandoned Children : Foundlings and Child Welfare in Nineteenth-Century France*, 17.
416 Ibid., 18.
417 Ibid., 18, 26.
418 Heywood, *Childhood in Nineteenth-Century France : Work, Health, and Education among the 'Classes Populaires'*, 221.
419 Ibid., 82.
420 Hunt, *Inventing Human Rights: A History*, 62, Heywood, *Childhood in Nineteenth-Century France : Work, Health, and Education among the 'Classes Populaires'*, 319.
421 Heywood, *Childhood in Nineteenth-Century France : Work, Health, and Education among the 'Classes Populaires'*, 82.
422 Fishman, *The Battle for Children : World War Ii, Youth Crime, and Juvenile Justice in Twentieth-Century France*, 13.

minors.[423] Yet the Code was not the first legal text addressing child criminals. Since 1719, a "plea of minority"[424] was heard by French courts, but the Code was by far the most significant effort until that time. Historians have argued that Napoleon "was obsessed with reinforcing the father's authority in the family," and the 1803 Civil Code, in which civil majority begins at age 21, continued the practice of paternal correction.[425]

Protections for children in criminal codes and practice continued during the Bourbon Restoration (1814-1830), as Louis XVIII established separate quarters for minors within established prisons. [426] The July Monarchy (1830-1848) took these protections even further by creating the first prison in France specifically for minors, La Petite-Roquette in Paris, and an agricultural youth colony, Mettray.[427] La Petite-Roquette housed boys between the ages of six and 16 that were "most susceptible to reform."[428] Around the mid-19th century, studies began to suggest that child criminals came from "broken or otherwise 'defective' families," leading advocates to argue for rehabilitation and reform over punishment.[429] Reform schools, largely run by philanthropic societies, were established in the 1850s as a result of these studies.[430] As in most societies in the 19th (and 20th) centuries, French concern for children was mixed with fear of crime and child criminals.[431]

Philanthropic societies and charities addressing child welfare continued to proliferate in the 19th century, working to pass legislation and ameliorate some of the

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[423] Ibid., 14.
[424] Meyer, *The Child and the State : The Intervention of the State in Family Life*, 18.
[425] Fishman, *The Battle for Children : World War Ii, Youth Crime, and Juvenile Justice in Twentieth-Century France*, 14.
[426] Ibid., 16.
[427] Ibid., 16-17.
[428] Ibid., 16.
[429] Ibid., 32.
[430] Meyer, *The Child and the State : The Intervention of the State in Family Life*, 19.
[431] Fishman, *The Battle for Children : World War Ii, Youth Crime, and Juvenile Justice in Twentieth-Century France*, 18.

problems of child abuse, prostitution and vagrancy.[432] *L'Assistance Publique*, the state social welfare system, was institutionalized in 1849, and provided evidence of an increasing interest by the state in issues of child welfare.[433]

State protection of children further increased after France's defeat in the Franco-Prussian war in 1870 and with the beginning of the Third Republic (1870-1940). Social theorists in France sought explanation for the defeat and located it in two conditions: depopulation and poor health among army recruits.[434] Although children under age 19 made up about one-third of the population and were recognized as a distinct social group, their percentage of the population was on the decline.[435] Concerns about child labor had been linked with concerns about children's health as early as the 1820s, but the fear of an unfit military following France's defeat was a powerful catalyst for change.[436]

Child protection measures were undertaken by state and nonstate actors alike in France in the last few decades of the 19th century. Abandoned children and child criminals, once thought to burden state social programs and the public, were now accorded greater sympathy, their survival linked to the future of a country that could ill-afford to "waste a single child."[437]

As in other countries in the West, France began to take up issues of education and child labor in the early-to-mid 19th century, and by the end of the 19th century, children would mostly cease to be laborers and become students.[438] Colin Heywood, in a brief

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[432] Fuchs, *Abandoned Children : Foundlings and Child Welfare in Nineteenth-Century France*, 48.
[433] Ibid.
[434] Ibid., 50, Heywood, *Childhood in Nineteenth-Century France : Work, Health, and Education among the 'Classes Populaires'*, 146-149, Fishman, *The Battle for Children : World War Ii, Youth Crime, and Juvenile Justice in Twentieth-Century France*, 19.
[435] Fuchs, *Abandoned Children : Foundlings and Child Welfare in Nineteenth-Century France*, 50.
[436] Heywood, *Childhood in Nineteenth-Century France : Work, Health, and Education among the 'Classes Populaires'*, 146-149.
[437] Fuchs, *Abandoned Children : Foundlings and Child Welfare in Nineteenth-Century France*, 40, Fishman, *The Battle for Children : World War Ii, Youth Crime, and Juvenile Justice in Twentieth-Century France*, 12.
[438] Heywood, *Childhood in Nineteenth-Century France : Work, Health, and Education among the 'Classes Populaires'*, 3.

survey of French historians on the subject, writes that many scholars combine economic arguments with humanitarian impulses, suggesting that changes in industry, such as the introduction of steam power, allowed adult males to replace women and children in factories, and that this shift, together with an emerging ideology of education as a birthright, would change the lives of children in working-class and poor families.[439] Most of these scholars also cite state intervention as the main driver of change.[440] Phillippe Meyer, for example, contends, "Official charity, real compassion, statistics and study all combined with speculation (also very real) and the industrial boom, to increase massive intervention on the part of the State."[441] The first child labor law was passed in 1841, but not effectively enforced until the subsequent laws of 1874 and 1892.[442] What is clear is that as early as the 1830s, France was looking to the labor laws and educational practices of European and other states, closely scrutinizing the systems in the United Kingdom, United States, Switzerland and Germany.[443] By limiting labor by age beginning in 1841, even though the law was only spottily enforced, France was emulating other countries in the West.[444]

The labor law of 1841 was a top-down measure, and the public response to it was largely hostile.[445] The origins of the law, like other aspects of child protection and welfare in France, were "in the minds of a small group of middle-class reformers."[446] Although there were clearly humanitarian concerns behind state intervention to protect

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439 Ibid., 3-5.
440 Ibid., 6.
441 Meyer, *The Child and the State : The Intervention of the State in Family Life*, 6.
442 Fishman, *The Battle for Children : World War Ii, Youth Crime, and Juvenile Justice in Twentieth-Century France*, 18, Heywood, *Childhood in Nineteenth-Century France : Work, Health, and Education among the 'Classes Populaires'*, 3-6.
443 Heywood, *Childhood in Nineteenth-Century France : Work, Health, and Education among the 'Classes Populaires'*, 230.
444 Ibid.
445 Ibid., 228, 231.
446 Ibid., 231.

children, the main motivation was a desire for a "quality labour force" with a "rational exploitation of child labour" in order to "improve productivity."[447] Trade competition with Britain in the mid-19th century increased concerns about industrial education, but again it was principally the defeat by the Prussians in 1870 that provided the final push for state intervention in education.[448] The result was that the Third Republic focused more on children "than perhaps any other regime in France's history."[449]

The 1874 law actually met with little opposition, as factory owners and parents had adopted the belief that "young children were more usefully occupied in schools than in the workshops."[450] The Third Republic also regulated the employment of wet nurses (a key health issue for infants) in 1874, and in 1880 created a free, secular educational system that mandated school attendance until age 13.[451]

Efforts to protect children led to a significant increase in state intervention in the lives of families toward the end of the 19th century.[452] Nowhere was this more evident than in the Law of 14 July 1889, *On the Protection of Ill-Treated and Morally Abandoned Children*, which conferred on the state the power to terminate the parental rights of abused children (*decheance de puissance paternelle*).[453] Protection was extended to children labeled "*moralement abandonnes,"* allowing the state to deny parental authority "in cases of perceived immorality—vice, drunkenness, crime."[454] The law stated that the children of parents who exhibited '"habitual drunkenness, their

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[447] Ibid., 232.
[448] Ibid., 262-264.
[449] Fishman, *The Battle for Children : World War Ii, Youth Crime, and Juvenile Justice in Twentieth-Century France*, 19.
[450] Heywood, *Childhood in Nineteenth-Century France : Work, Health, and Education among the 'Classes Populaires'*, 313.
[451] Fishman, *The Battle for Children : World War Ii, Youth Crime, and Juvenile Justice in Twentieth-Century France*, 19, Heywood, *Childhood in Nineteenth-Century France : Work, Health, and Education among the 'Classes Populaires'*, 260.
[452] Heywood, *Childhood in Nineteenth-Century France : Work, Health, and Education among the 'Classes Populaires'*, 260.
[453] Ibid, Fishman, *The Battle for Children : World War Ii, Youth Crime, and Juvenile Justice in Twentieth-Century France*, 21.
[454] Fuchs, *Abandoned Children : Foundlings and Child Welfare in Nineteenth-Century France*, 58.

infamous and scandalous conduct, or their child abuse, compromise with the security of the health and morality of their children' become wards of the state with an official of *l'Assistance Publique* as their guardian."[455] This law, combined with the Law of 19 April 1898, *On the Suppression of Violence, Assault and Battery, Acts of Cruelty and Attempted Murder Committed Toward Children*, indicated a greater will to intervene in families where children were threatened.[456]

Beginning in 1877, doctors were sent to the countryside and spread new ideas about health and sanitation to parents there, a development that allowed for an increase in supervision of and state and professional influence over families.[457] Compulsory attendance at schools also increased the supervision of children by teachers, nurses and school psychologists.[458] The Third Republic expanded its authority and supervision of all areas of children's lives "through intermediaries—doctors, teachers, psychologists, social workers, juvenile judges, legislators—who regulated education and the rights of parents."[459] Intervention was also carried out through the systematization of health care, poor relief and policing.[460]

The state was perceived as the "protector of the weak."[461] As in England, state intervention was premised on the fear of parents, as the home became the most dangerous place for children. Through the changes institutionalized during the Third Republic, the child was understood to be the "essential part of the family," and parental authority over

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455 Ibid., 58-59.
456 Fishman, *The Battle for Children : World War Ii, Youth Crime, and Juvenile Justice in Twentieth-Century France*, 21.
457 Fuchs, *Abandoned Children : Foundlings and Child Welfare in Nineteenth-Century France*, 57.
458 Ibid.
459 Ibid., 49.
460 Meyer, *The Child and the State : The Intervention of the State in Family Life*, 6-7.
461 Fuchs, *Abandoned Children : Foundlings and Child Welfare in Nineteenth-Century France*, 49.

the child required the approval of the state.[462] Moreover, what the state can give, the state can retract. The threat to remove children from the family became the state's most powerful weapon of intervention.[463] The laws governing the treatment of children in the last quarter of the 19th century were largely "dependent upon the inspection--and hence the standardization of—working-class education," as reform through education in criminal and civil law matters "became the central point of legal action."[464]

As state responsibility for children increased, paternal power over children declined. Almost immediately, the Third Republic restricted parental correction in 1870, and further modified it in 1889 and 1904.[465] Unlike earlier in the century, the state no longer made extensive efforts to keep families together and instead sought to protect children that were neglected and abused by their parents.[466] The family, during the Third Republic:

> was removed from its pedestal as the all-important socializing agency. To middle-class bureaucrats, not all working-class families—whether biological or foster—could be trusted to raise law-abiding, hard-working citizens without help from 'experts." The protection of children's health and lives, not the increased expenditures such protection would cost, was the overriding concern of the legislators.[467]

As in other parts of the West, the 19th century in France ended with an empowered state bent on protecting children not only from environmental hazards in the public sphere, such as protecting children from the dangers of factory employment, but most readily from danger at home.

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462 Meyer, *The Child and the State : The Intervention of the State in Family Life*, 11-12.
463 Ibid., 12.
464 Ibid., 42.
465 Fishman, *The Battle for Children : World War Ii, Youth Crime, and Juvenile Justice in Twentieth-Century France*, 37, Hunt, *Inventing Human Rights: A History*, 61-62.
466 Fuchs, *Abandoned Children : Foundlings and Child Welfare in Nineteenth-Century France*, 59.
467 Ibid., 60-61.

The 20th century began with a bold statement by the French State: The Law of 1904 gave the state full responsibility for the welfare and protection of children. This was followed shortly thereafter by the 1906 Law, which raised the age of criminal majority to 18 and banned the death penalty for those younger.[468] By the end of the 19th century, parents had begun to see education as necessary for both girls and boys, and children were sent to school for longer hours and for more years than in earlier decades.[469] The free time allotted to children by parents and society meant that children had more opportunity to form peer groups that would inhabit public space. The nationwide placement of children in school precipitated another shift in how children were perceived: Children became a "potentially dangerous group of neglected or delinquent youths that needed to be supervised," and the state "became preoccupied with child abuse, neglect, and juvenile delinquency."[470]

NONSTATE ACTORS

As described above, charities and churches suffered after the Revolution when the state nationalized the churches' wealth. The state gradually usurped many of the responsibilities of these institutions and, as the 19th century progressed, became the primary provider of child-saving activities. Philanthropic organizations were very active, however, in the late 19th century and were the impetus behind many child protection laws and the ideological home of many child advocates who pushed for their enactment.[471] Louis Villermé and Jean-Jacques Bourcart, two important reformers, were absolutely key

[468] Ibid., 60.
[469] Ibid., 53.
[470] Ibid.
[471] Ibid., 59.

to reforms for child laborers.[472] Villermé, who was active in many areas of child welfare, documented the working conditions of child laborers all over France, providing support for legislators who sought state protection for children.[473] Bourcart, also a campaigner for child labor laws, gave an influential speech expressing concern for the health of children who labor that was much cited by advocates at the *Société Industrielle de Mulhouse*, a child labor pressure group.[474]

French philanthropic organizations were vital to 19th and 20th century reforms, serving the objectives of state intervention, reporting cases of mistreatment and abuse, as well as 'taking in' the children removed from 'abnormal' families.[475]*Patronage de l'Enfance et de l'Adolescence* (Child and Youth Patronage), *Société pour l'Enfance Abandonnée et Coupable* (Society for Abandoned and Guilty Children), and *Union Française pour le Sauvetage de l'Enfance* (the French Union for the Rescue/Salvation of Children) pushed for protections for children from exploitation, abuse, vagrancy and prostitution. In the last few decades of the 19th century, child protection organizations shared responsibility for these children with other private organizations and the public sector. The emergence of these groups corresponds closely with the child-saving movement in the United States around the same time, discussed in chapter 6.[476]

The *Société de Protection des Apprentis et des Enfants employes dan les Manufactures* (Society for the Protection of Apprentices and Factory Children) was especially important to getting child labor laws passed in France. The *Société* supported the efforts of labor writers and activists critical of child labor policies, including Jules

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[472] Heywood, *Childhood in Nineteenth-Century France : Work, Health, and Education among the 'Classes Populaires'*, 323.
[473] Ibid., 2, 7-8.
[474] Ibid., 146, 224.
[475] Meyer, *The Child and the State : The Intervention of the State in Family Life*, 37.
[476] Fuchs, *Abandoned Children : Foundlings and Child Welfare in Nineteenth-Century France*, 59.

Simon and Armand Audiganne, beginning in 1866.[477] Organizations such as the *Union Francaise pour le Sauvetage de L'Enfance* and the *Comité de défense des enfants traduits en justice* (Committee to Defend Children in the Justice System) were influenced by reform initiatives in the United States, in particular, by the founding of the first juvenile court in Illinois in 1899 and in other U.S. states and cities that followed suit.[478] These organizations called for France to emulate the U.S. juvenile justice system, while advocates in other areas of child protection also sought models in the United States and throughout Europe.[479] The *Comité* would eventually expand to a number of cities throughout France, monitoring local courts and private and public institutions, along with advising judges and even serving as probation officers.[480] Finally, France created its own children's court in 1912.[481]

A CHALLENGE TO THE NORM: THE VICHY REGIME

The norm against the child death penalty in France was contested in 1942 during German occupation when there was an attempt to abrogate the 1906 law.[482] A new law was proposed that would lower the age of majority (established in the 1906 law) from 18 to 16, allowing child offenders between the ages of 16 and 18 to be eligible for the death penalty, among other (previously) adult punishments.[483] When the proposed new law was published in the *Official Journal*, the dean of the law faculty at Toulouse, Joseph Magnol, wrote to the Ministry of Justice expressing his indignation and confusion: "Perhaps it was

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[477] Heywood, *Childhood in Nineteenth-Century France : Work, Health, and Education among the 'Classes Populaires'*, 261.
[478] Fishman, *The Battle for Children : World War Ii, Youth Crime, and Juvenile Justice in Twentieth-Century France*, 23-24.
[479] Ibid., 23.
[480] Ibid., 23-24.
[481] Meyer, *The Child and the State : The Intervention of the State in Family Life*, 42.
[482] Fishman, *The Battle for Children : World War Ii, Youth Crime, and Juvenile Justice in Twentieth-Century France.*
[483] Ibid., 169.

an oversight of the project's editor or typographical error."[484] "Must I suppose," he continues, "that minors could, under this hypothesis, be sentenced as adults?"[485] Joseph Barhélemy (the Minister of Justice at the time) responded, "such criminal penalties in principle are applicable to minors who have incurred them, without any legal attenuation," but courts "would, however, never apply the criminal penalty."[486]

The Penal Administration's "assurances must have rung hollow" during a period of fascist rule, and no application degree was passed by the regime.[487] Indeed, resistance fighters under the age 18 were executed by Germany during the war, the most famous being Guy Moquet. Additionally, in the department of Charente-Maritime alone (on the West coast of France), the Germans deported 69 individuals under the age 18 to German camps; of these children, forty-seven did not survive the war.[488] The path to death penalty reform in France would eventually come to an end in 1981, when France outlawed the penalty for all crimes and all offenders.

FINDINGS

The three legislative trends that led to the abolition of the death penalty for child offenders in England—penal reform, abolition and child welfare—illustrate that restrictions of the death penalty were part of a larger trend toward the development of a standardized childhood.[489] The passage of universal education, employment limitations and protections from abuse and neglect meant that children's lives were becoming more

[484] Ibid., 173.
[485] Ibid., 173-174.
[486] Ibid., 174.
[487] Ibid., 174, 185.
[488] W. D. Halls, *The Youth of Vichy France* (Oxford
New York: Clarendon Press ;
Oxford University Press, 1981), 54.
[489] C. John Sommerville, *The Rise and Fall of Childhood* (Beverly Hills, CA: Sage Publications, 1982).

homogenous. In France, a similar march toward state intervention occurred as well. The standardization of childhood had two dominant components: First, childhood, replete with standards of care, education, employment, hygiene, welfare and morality, was legitimated and institutionalized by science, the medical profession, schools and social welfare programs. Second, the creation of children as objects of scientific study and the discovery that the most dangerous place for children is in the home required a shift in authority over children from the father to the state.

The standardization of childhood, however, was dependent upon the vision of norm entrepreneurs who introduced and fostered norms about children. Science merely provided the justification for the standard; the state provided enforcement. In other words, a standardized childhood is only half of the story. The other half belongs to the men and women who advocated for children, fought to restrict the death penalty and sought to reform the penal and judicial system in England and in France.

THE SCIENCE OF CHILDHOOD

A shift toward the scientific study of childhood began most notably in England with the 1815 study on the causes of juvenile crime, which found that delinquency could be frequently attributed to poor parenting, and in France a few decades later. The findings of the study reveal changing ideas about children and child offenders in the 19th century, most importantly, that they are products of their environment. This proposition would lead to concerted efforts over the course of the 19th and 20th centuries to control the environments that shape children and the adults they would become. The home,

workplace, school and even playground were increasingly subject to new regulations enacted to protect children and promote their development.

Advocates for children and penal reform crafted and introduced new legislation that advanced certain ideas and norms about children over others. As the 19th century progressed, an ideal, standardized childhood more fully developed. Childhood, according to these emerging norms, was not an experience for only the young of a certain class; rather, childhood was a vulnerable period of life when children needed protection, structure and guidance. Protection came in the form of statutes that outlawed neglect and abuse; structure and guidance were provided by educational institutions, reformatories, industrial schools, church and, decreasingly, employment.

Deviation from the standard, however, was difficult to gauge without benchmarks. Advocates, long quick to use science to inform their actions, encouraged and supported the attention paid to children by science. Doctors established guidelines for nutrition, hygiene, welfare and psychological well-being.[490] Social scientists developed curricula, investigated the effects of child labor, abuse and neglect, and advanced theories about children's nature and motivations. Developmental psychology, in particular, "offered new, scientifically constructed indices by which 'normal development' could be quantitatively as well as qualitatively distinguished from the 'subnormal' or 'abnormal.' "[491] These guidelines progressively became part of the dogma of childhood as competing norms, especially those not legitimized by science, were discarded.

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[490] Hendrick, *Children, Childhood and English Society 1880-1990*, p. 12, Baistow, "From Sickly Survival to the Realisation of Potential: Child Health as a Social Project in Twentieth Century England," p. 22, Fuchs, *Abandoned Children : Foundlings and Child Welfare in Nineteenth-Century France*, 49.

[491] Baistow, "From Sickly Survival to the Realisation of Potential: Child Health as a Social Project in Twentieth Century England," pp. 26-27, Fuchs, *Abandoned Children : Foundlings and Child Welfare in Nineteenth-Century France*, 49.

Schools served as a vehicle for a standardized childhood by providing a routinized space, apart from the adult world (especially the father), where children were made available to science.[492] Education allowed for the monitoring of children, in terms of abuse and neglect, by school doctors and nurses.[493] Mandatory education also increased the commonalities in children's experiences by making full-time work difficult. The result was that poor and upper class children, as the 20th century progressed, had increasingly similar daily routines.[494] The standardization of childhood, according to John Sommerville, provided a "childhood for everyone, even if it meant squeezing some of them into the mould."[495]

Most importantly, mandatory school attendance was a boon to the nascent field of pediatrics and its guidelines for nutrition, hygiene, psychiatry and health, which now had captive subjects to study.[496] The child became the "object of the medical gaze," according to David Armstrong, "which provided the intellectual justification for the creation and identification of children's distinctive attributes."[497] Efforts to improve child health were "piecemeal" in the 19th century, but were much more centralized and routinized by the 20th.[498]

The investigation of infant mortality was key to creating the child as an object of study. Although infant mortality rates had been estimated prior to the late 19th century,

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[492] Fuchs, *Abandoned Children : Foundlings and Child Welfare in Nineteenth-Century France*, 49, Lavalette, "The Changing Form of Child Labour *Circa* 1880-1918: The Growth of 'out of School Work'," 126.
[493] Hendrick, *Children, Childhood and English Society 1880-1990*, p. 41, Lavalette, "The Changing Form of Child Labour *Circa* 1880-1918: The Growth of 'out of School Work'," p. 126.
[494] Lavalette, "The Changing Form of Child Labour *Circa* 1880-1918: The Growth of 'out of School Work'," p. 126.
[495] Sommerville, *The Rise and Fall of Childhood*, p. 189.
[496] Garrison M.D., "History of Pediatrics."
[497] David Armstrong, *Political Anatomy of the Body: Medical Knowledge in Britain in the Twentieth Century* (Cambridge: Cambridge University Press, 1983), p. 12, Hendrick, *Children, Childhood and English Society 1880-1990*.
[498] Baistow, "From Sickly Survival to the Realisation of Potential: Child Health as a Social Project in Twentieth Century England," p. 23.

infant mortality only became a widespread public concern in the second half of the century.[499] Some authors have linked declines in infant deaths to a rise in the value of children, but evidence from the English case suggests that this is not completely accurate.[500] Rather, it was the documentation and monitoring of infant mortality *itself* that indicated a newfound social preoccupation with children. David Armstrong has suggested that the concern with infant mortality also marks the "social recognition of the infant as a discrete entity."[501] Moreover, Harry Hendrick argues that infant mortality was "invented" in the late 19th century because "infant deaths only appeared in the Census as 'infant mortality rate' in 1877."[502] Hendrick contends that it was this new "medical problem" that "signified the emergence of the infant as an object of sociological and medical interest."[503] Furthermore, the study of the infant served to create the infant in social consciousness; Armstrong argues that the "analysis and object are mutually constitutive, that the infant is as much a product of the analysis as the analysis is a reflection of the infant."[504]

Michel Foucault's work on "biopower" is relevant to an understanding of the relationship between the child and the state.[505] Biopower can be understood as the effort to control life in order to maximize individual potential. According to Foucault, biopower began with measures to monitor the life process through birth and death registrations.[506] The use of the death penalty, Foucault suggests, was replaced by other and increasing

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499 Pinchbeck and Hewitt, *Children in English Society, Volume Ii: From the Eighteenth Century to the Children Act of 1948*, p. 349.
500 Zelizer, *Pricing the Priceless Child: The Changing Social Value of Children*, Cunningham, *Children and Childhood in Western Society since 1500*.
501 David Armstrong, "The Invention of Infant Mortality," *Sociology of Health and Illness* 8, no. 3 (1986): p. 212.
502 Hendrick, *Children, Childhood and English Society 1880-1990*, p. 43. Armstrong, "The Invention of Infant Mortality," p. 212.
503 Hendrick, *Children, Childhood and English Society 1880-1990*, p. 43.
504 Armstrong, "The Invention of Infant Mortality," p. 227.
505 Foucault, *The History of Sexuality, Volume I: An Introduction*.
506 Michel Foucault, *The Birth of the Clinic:An Archeology of Medical Perception* (London: Tavistock, 1963), p. 211, Armstrong, "The Invention of Infant Mortality."

means of controlling the body.[507] Controlling the processes of life required justification by science and the establishment of state institutions to monitor populations.[508]

In England and France, prior to the changes to the conception of childhood in the late 19th century, laws— in text and practice—tended to distinguish among classes of children. For the most part, formal education was limited to upper- and middle-class children, and the regulation of education only applied to them.[509] Class continued to guide state intervention in family life. Intervention principally affected poor families because only children from these families worked or begged outside the home and were vulnerable to regulation by the state. The class of 'children' that emerged in the late 19th century was a class defined *solely by age*; there were no other qualifiers (at least in law). This idea of childhood in the late 19th century, one that is familiar to readers today, truly marks the birth of a standardized childhood because it was applied to *all* children regardless of class or status. Twentieth-century laws, including the 1933 Children and Young Persons Act, were borne of this standard.

THE CHILD AND THE STATE

The history of child welfare is a history of the divestment of paternal authority over children by the state. The early examples of this divestment in the English acts of 1549, 1572 and 1774, discussed above, primarily targeted poor families. Likewise in

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[507] Foucault, *The History of Sexuality, Volume I: An Introduction*, p. 140.
[508] Ibid., p. 144, Baistow, "From Sickly Survival to the Realisation of Potential: Child Health as a Social Project in Twentieth Century England," p. 21.
[509] Heywood argues that in the Middle Ages, children were distinguished by age, but that class distinctions slowly displaced these categories. Age then displaces class beginning in the 19th century, in a process that is yet to be completed today in some areas of state intervention. Heywood, *Childhood in Nineteenth-Century France : Work, Health, and Education among the 'Classes Populaires'*, 82.

France, early efforts at social welfare by the state were focused solely on the poor.[510] It was not until the 19th and 20thcenturies, with the advent of restrictions on child labor, the passage of compulsory education and of efforts to protect children from neglect and abuse that paternal authority was truly undermined for all families.

As the standard of childhood grew more specific and complex in the mid-to-late 19th century, the state began to take on a greater role in monitoring it. Compulsory education, for example, created the need for a force of state-controlled truant officers to monitor attendance.[511] Norms that depicted children as property were discarded through the initiatives of norm entrepreneurs and replaced by new norms. Significant among these were the ideas that children were trusts and that the state functioned as trustee. This shift in thought came about at the expense of a decline in paternal authority. Hendrick posits, "Parental authority began to be reduced as it found itself in conflict with the state over such issues as infant life protection, compulsory schooling, and child rearing practices."[512] The justification for the decline of paternal authority was provided by science. The government had oversight in issues of health and safety during the late Victorian era,[513] while parents, the possible source of abuse, neglect and criminality, were not to be trusted.[514] Only the state could gauge deviance from the standard of childhood.[515]

Restrictions to the child death penalty were also dependent upon the divestment of paternal authority. In order for the state to take into consideration the benefit of the child,

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[510] Fuchs, *Abandoned Children : Foundlings and Child Welfare in Nineteenth-Century France*, 17.
[511] Lavalette, "The Changing Form of Child Labour *Circa* 1880-1918: The Growth of 'out of School Work'," p. 126.
[512] Hendrick, *Children, Childhood and English Society 1880-1990*, p. 45.
[513] Taylor, *Crime, Policing and Punishment in England, 1750-1914*, p. 44.
[514] Fuchs, *Abandoned Children : Foundlings and Child Welfare in Nineteenth-Century France*, 49.
[515] Lavalette, "The Changing Form of Child Labour *Circa* 1880-1918: The Growth of 'out of School Work'," p. 126.

and thus treat child offenders differently from adult criminals, the state had first to divest the father of his authority. This began in the early 19th century when children's behavior and character, and thus crime, were linked to family life and paternal influence. In order to reduce the culpability of children, in other words, alternative sources of fault had to be identified; the divestment of paternal authority was a requirement for minimizing the guilt of children and thus restricting the punishments for which they were liable.

The rise of nationalism and depictions of British and French children as the future of the nation had a powerful impact on the relationship between the child and the state. The concern for children's health was directly linked to concern for the health of the nation.[516] The sorry shape of recruits for the Boer War, when 40 percent had been rejected because they were physically unfit for service, and the defeat of the French by the Prussians underscored the link between healthy children and "the health of the body politic."[517] The family and the child, then, became a focal point of public policy and a key priority for the state.[518] Infant mortality, for example, was an increasing concern for the state in the late 19th and early 20th centuries because the threat of a declining population was connected to the state's ability to protect itself.[519] Additionally, both Hendrick and Hopkins argue that it was a new push for the "truly *national* childhood" in

[516] Baistow, "From Sickly Survival to the Realisation of Potential: Child Health as a Social Project in Twentieth Century England," p. 20, Heywood, *Childhood in Nineteenth-Century France : Work, Health, and Education among the 'Classes Populaires'*, pp. 148-149.
[517] Baistow, "From Sickly Survival to the Realisation of Potential: Child Health as a Social Project in Twentieth Century England," p. 24.
[518] Ibid, Fuchs, *Abandoned Children : Foundlings and Child Welfare in Nineteenth-Century France*, pp. 60-61.
[519] Baistow, "From Sickly Survival to the Realisation of Potential: Child Health as a Social Project in Twentieth Century England," p. 30, Heywood, *Childhood in Nineteenth-Century France : Work, Health, and Education among the 'Classes Populaires'*, pp. 148-149.

England that allowed all other divisions of children, such as class and rural/urban distinctions, to fall away.[520]

NORM ENTREPRENEURS

The above case studies underscore the role of norm entrepreneurs in England and France. The motivations of these advocates were complex, although there is ample evidence from the cases that they at least viewed their actions as humanitarian. Science, for many advocates of penal reform, abolition and child welfare, was merely a tool for change, a method of informing their humanitarianism so that it was more effective in achieving particular desired ends. The new science of humanitarianism deplored appeals to emotion. Roy Calvert, a prominent abolitionist and founder of the NCADP, sought, for example, to rid the movement of "futile emotion and sentiment,"[521] and to combine "the passion of the religious humanitarian with the empiricism of the social scientist."[522]

Evidence from the English and French cases indicate that while power and control over children were important in shaping policy, normative changes in penal reform, restriction of the death penalty and advances in child welfare all depended upon norm entrepreneurs who packaged and marketed their message using scientific findings and humanitarian rhetoric. That the state stepped in to monitor those successful norms, bolstering them in the process, is not in doubt; sociological institutionalists have exhaustively demonstrated the role of state consolidation in advancing particular norms

[520] As qtd. in Hendrick, *Children, Childhood and English Society 1880-1990*, p. 12.
[521] Tuttle, *The Crusade against Capital Punishment in Great Britain*, p. 48.
[522] Christoph, *Capital Punishment and British Politics: The British Movement to Abolish the Death Penalty 1945-57*, p. 31.

and institutions.[523] Foucault and those that employ his theories have successfully illustrated the role of power and knowledge in regulating state subjects through science.[524] These theorists, however, have not done an effective job at accounting for emergence: In other words, sociological institutionalists can explain the spread of the standard; Foucault, the process; neither is complete without explaining emergence.

Additionally, science offered qualitative and quantitative benchmarks and the means to construct children by distinguishing them from adults, tools to measure and address deviation from this construction, and legitimacy for greater state control over their lives. Science may have advanced norms about reduced child culpability, shaped them, fostered them and spread them; the state may have regulated and enforced them; but it was the norm entrepreneur that created them.

The origin of the standard of childhood was the work of normative agents whose personal sense of morality drove them to press for restrictions to the death penalty for child offenders, even in the face of rising crime rates in the 20th century. Put differently, child advocates could have pushed for compulsory education for middle-class children only, penal reform just for girls, or sought to abolish the death penalty only for homeless children. Their advocacy for reform for all children created the subjects of both science and the state.

This is not to say that science and humanitarian ideas in 19th-century England and France did not, in turn, shape the entrepreneur or her decisions. As with other social

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[523] Ramirez, Soysal, and Shanahan, "The Changing Logic of Political Citizenship: Cross-National Acquisition of Women's Suffrage Rights, 1890 to 1990.", Boli-Bennett and Meyer, "The Ideology of Childhood and the State: Rules Distinguishing Children in National Constitutions, 1870-1970.", Meyer et al., "World Society and the Nation-State.", Francisco O. Ramirez and Marc Ventresca, "Building the Institution of Mass Schooling," in *The Political Construction of Education*, ed. B Fuller and R Rubinson (New York: Praeger, 1992).

[524] Hendrick, *Children, Childhood and English Society 1880-1990*, p. 5.

movements, ideas about science and humanitarianism co-constituted both childhood and its advocates. Even so, it was the entrepreneur who founded the mission, the entrepreneur that nurtured and supported the idea of childhood in the face of increasing delinquency in the 20th century.

Finally, a study of children as objects of science distracts from the most significant method of standardization in the 19th century: law. Both in England and France, laws protecting children proliferated as the 19th and 20th centuries progressed. Legislative acts have their origin in individual initiative. Individuals made decisions to compose, advance and defend bills that addressed all children regardless of class or other status.

CONCLUSION

This chapter has examined the emergence of the norm restricting the death penalty to those 18 and older through a major case study of England and the smaller case study of France. It has argued that abolition was part of a larger standardization of childhood developed by norm entrepreneurs, legitimated by science and enforced by the state. For the state to monitor children, however, the father had to be divested of his authority over the child. Through an investigation of three legislative trends in England: penal reform, abolition and child welfare, this chapter has demonstrated that by the time England abolished the death penalty for child offenders under the age 18 in 1933, the standard of childhood requisite for abolition had already been adopted. Norms qualifying child culpability nested within other norms regarding penal reform, the restriction of the death penalty and the welfare of children, with relative ease.

The next chapter examines coercive socialization as a method of diffusion. It will consider how the adoption of a standardized childhood, outlined in this chapter, created a consistent and compelling narrative for reducing child culpability. Coercive socialization was the dominant method of spread in the decades following World War II, as many former colonies gained their independence during the development of binding international human rights law that clearly expresses the norm against executing child offenders.

CHAPTER 4
COERCIVE SOCIALIZATION AS A MECHANISM OF DIFFUSION

Of the three mechanisms of diffusion examined in this dissertation, coercive socialization is, by far, the least explored in the sociology and international relations literature. Legal pluralism, as a subject of research in law, is the closest that legal scholars typically get to the phenomenon. The literature on legal pluralism is immense, but there is little overlap between this literature and literature on social norms and diffusion.[525]

Through an examination of four former colonies: Algeria, Kenya, Tanganyika/Tanzania and Tunisia; and two additional states, Ethiopia and Japan, I investigate the diffusion of the norm against the child death penalty. This chapter covers two types of diffusion: voluntary diffusion, which occurs because states voluntarily elect to bring in foreign jurists to craft a new legal system or model their legal system after a foreign system of law; and coercive socialization or forced socialization. This chapter

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[525] Sally Falk Moore, "Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study," *Law and Society Review* 719 (1973), ———, "Legal Systems of the World," in *Law and the Social Sciences*, ed. Leon Lipson and Stanton Wheeler (New York: Russell Sage Foundation, 1986), Gunther Teubner, "Faces of Janus: Rethinking Legal Pluralism," *Cardozo Law Review* 13, no. 1443 (1992), Brian Z. Tamanaha, "The Folly of the 'Social Scientific' Concept of Legal Pluralism," *Journal of Law and Society* 20, no. 192 (1993), Sally Engle Merry, "Legal Pluralism," *Law and Society Review* 22, no. 869 (1988), Masaji Chiba, *Legal Pluralism : Toward a General Theory through Japanese Legal Culture* (Tokyo, Japan: Tokai University Press, 1989), Jørgen Dalberg-Larsen, *The Unity of Law, an Illusion? : On the Legal Pluralism in Theory and Practice*, Mobility and Norm Change V. 2 (Glienicke/Berlin ; Cambridge, Mass.: Galda + Wilch, 2000), Baudouin Dupret, Maurits Berger, and Laila Al-Zwaini, *Legal Pluralism in the Arab World*, Arab and Islamic Laws Series 18 (The Hague ; Boston: Kluwer Law International, 1999), Kayleen M. Hazlehurst, *Legal Pluralism and the Colonial Legacy : Indigenous Experiences of Justice in Canada, Australia, and New Zealand* (Aldershot ; Brookfield, Vt.: Avebury, 1995), M.B. Hooker, *Legal Pluralism: An Introduction to Colonial and Neo-Colonial Laws* (London: Oxford University Press, 1975), Warwick Tie, *Legal Pluralism : Toward a Multicultural Conception of Law* (Aldershot, Hants, England ; Brookfield, Vt.: Ashgate/Dartmouth, 1999), Robert L. Kidder, "Toward an Integrated Theory of Imposed Law," in *The Imposition of Law*, ed. Sandra B. Burman and Barbara E. Harrell-Bond (New York: Academic Press, 1979), Boaventura de Sousa Santos, *Toward a New Legal Common Sense : Law, Globalization and Emancipation*, 2nd ed., Law in Context (London: Butterworths LexisNexis, 2002), Boaventura de Sousa Santos and César A. Rodríguez Garavito, *Law and Globalization from Below : Towards a Cosmopolitan Legality*, Cambridge Studies in Law and Society. (Cambridge, UK ; New York: Cambridge University Press, 2005), Gunther Teubner, *Global Law without a State*, Studies in Modern Law and Policy. (Aldershot ; Brookfield, USA: Dartmouth, 1997), John Griffiths, "What Is Legal Pluralism?," *Journal of Legal Pluralism and Unofficial Law* 24, no. 1 (1986), William Burke-White, "International Legal Pluralism," *Michigan Journal of International Law* 25, no. 963 (2004), Nico Krisch, "The Pluralism of Global Administrative Law," *European Journal of International Law* 17, no. 247 (2006), David Sugarman, *Legality, Ideology, and the State*, Law, State, and Society Series. 11 (London ; New York: Academic Press, 1983).

argues that coercive socialization was the primary mechanism by which the norm spread from the British and French empires to their colonies. The process of diffusion was gradual and took place in stages: First, through the establishment of bureaucratic administrative structures that institutionalized Western legal principles and systems, British and French colonial powers coercively diffused Western norms about children, including the norm prohibiting the child death penalty. Coercive methods were partly justified, at least in the British Empire, by the treatment of women and children by native men and by cultural restrictions imposed on women and children in native societies. The position of women and children in these societies was starkly juxtaposed with Western norms of protection in England and elsewhere in Europe. Native children, especially, were made available for study through various state-run apparatuses, such as orphanages and reformatories, and these studies demonstrated to the colonizers the inability of native people to properly raise and care for children, thus justifying colonial rule.

Second, upon independence, the former colonies of Britain and France maintained protections for children and even increased them in the first few decades of statehood. This occurred because the newly minted states had internalized key parts of the colonial state model that not only recognized the validity of children's protection, but could not imagine a means of ensuring this protection outside of law. When the British and the French colonized Africa and the Middle East, they altered, to varying degrees, the legal systems and criminal codes of the colonized states. Over time, these systems established a legal relationship between the child and the state that was internalized and retained following independence.

Like most former colonies, all four African and Middle East and North African countries included in these case studies abolished the death penalty for child offenders upon independence, maintaining the British and French colonial policy against the punishment for those under age 18. While Algeria and Kenya continued the ban, Tanganyika (which merged with Zanzibar to become the United Republic of Tanzania in 1964) and Tunisia later reversed their statutes and reauthorized the penalty for child offenders under age 18. Yet all four cases illustrate the mechanism of coercive socialization. The smaller case studies of Japan and Ethiopia provide comparison to the colonial cases, demonstrating that different forms of socialization occurred outside the colonies. In the case of Ethiopia, there was a 'voluntary socialization' whereby the country's leaders enthusiastically invited Western legal scholars to draft laws that included restricting the death penalty to those over age 18. Although Japan abolished the penalty shortly after World War II while under Western occupation, the policy nonetheless complemented previous efforts in Japan to protect children.

In sum, I selected six case studies in order to evaluate the mechanism of coercive socialization. These cases are: Algeria, Ethiopia, Japan, Kenya, Tanzania/Tanganyika and Tunisia. Of these cases, four countries – Algeria, Ethiopia, Japan and Kenya – have never reversed their policies. The other two, Tanganyika (then as Tanzania) and Tunisia later reversed, Tunisia during the first cascade and Tanzania in the second. Algeria and Tunisia *and* Kenya and Tanganyika, as neighbors, share important historical, economic and political qualities that make them well-suited for comparative study. By analyzing the process of abolition in these case studies, it is expected that both coercive socialization as a mechanism of diffusion and the British and French colonial influence

on law and norms about children in Africa and the Middle East can be better understood and, within limits, generalized to other former colonies (of the British and French) and other processes of legal diffusion.

DATA DISCLAIMER

The history of the child death penalty in Africa and the Middle East before and during colonialism is difficult to research. Where criminal law and historical studies mention the death penalty, there is little information about restrictions (such as age) or about prevalence. Although found in every colony in the British Empire, the death penalty in general was used only about 20 times per year on average (outside of Nigeria, where it was more common).[526] However, since there is very little data on child offender executions in colonial Africa, research for this chapter had to be cobbled together from unlikely sources for a comparative politics and international relations study of Africa and the Middle East: English literature, the study of gender in colonial India, colonial marriage laws, etc. The paucity of primary materials (and rarity of secondary sources) on the child death penalty in these regions indicates that the process of restricting the penalty by age, both during and after colonialism, was perhaps not contentious.[527] I argue in this paper that the intervention in family law by the British and French introduced, among other things, an age–based measurement of childhood into their colonies that preceded restrictions on the penalty. These protections for children established a legal relationship between the child and the state that would become important for post-independence child protection policies.

[526] Hynd, "Killing the Condemned: The Practice and Process of Capital Punishment in British Africa: 1900-1950s," 406.
[527] Fourchard, "Lagos and the Invention of Juvenile Delinquency in Nigeria," 126.

CASE STUDIES

The death penalty in Africa and the Middle East, as stated above, is a difficult subject to research. Scholars seem to agree that the death penalty was typically avoided before colonialism in the regions; punishment was intended to "re-establish equilibrium in the community," rather than to serve as retribution.[528] Even where it was practiced prior to colonialism, British and French colonial powers drastically altered the way the penalty was used. The introduction of the "principles of retribution and deterrence" forever changed the objective and nature of the penalty in Africa (and possibly also the Middle East).[529] Age limits on the penalty appear to be a Western invention, as will be argued below, since distinctions between children and adults in both regions prior to colonialism were based more on rites and responsibilities than on age. Whether or not the absence of particular rites and responsibilities would protect a child from the penalty requires further study.

This paper argues that norms about children spread throughout the colonies primarily through coercive means: The British and French empires (especially) colonized much of Africa and the Middle East and established legal systems modeled on Western norms, laws and bureaucratic organization. These legal systems varied among states and colonial powers, but all, to some degree, established a specific legal relationship between the state and the child by restricting the age at which children could engage in particular activities such as sex, marriage, employment and to what degree and how they could be

[528] Issa G. Shivji et al., *Constitutional and Legal System of Tanzania* (Dar Es Salaam: Mkuki Na Nyota Publishers Ltd., 2004), 258. Lilian Chenwi, *Death Penalty in African: A Human Rights Perspective* (Pretoria: Pretoria University Law Press, 2007), 30.
[529] Chenwi, *Death Penalty in African: A Human Rights Perspective*, 30.

punished. These systems, over time, acclimated states to certain ideas and values endemic to Western law, ideas and norms about children among them. After independence, many states struggled to rid their societies of Western influence, but certain norms and values, including the norm against the child death penalty, were difficult to jettison, in part because they had become accepted to the extent that they were simply taken for granted. Socialization, then, was the main mechanism of diffusion during the first cascade period, as most states maintained colonial policies limiting the death penalty to those older than 18.

To provide a point of comparison to states with a colonial past, I chose two states that have many characteristics in common with Algeria, Kenya, Tanzania and Tunisia, but that lack a colonial past: Ethiopia, a state that never experienced colonial rule, save for a brief occupation by Italy in World War II, but that nonetheless modeled its laws on Western legal systems, and Japan, a state occupied by Allied forces after World War II, and which is similar to the former colonies in that Western occupation greatly shaped its legal system. The relationship was not 'colonial' per se, but it was coercive. Both states were therefore socialized to Western legal norms and principles, but in Ethiopia, socialization was voluntary. Voluntary socialization would later become the dominant method of diffusion, but not in the unusual manner of Ethiopia. As states recognized emerging norms of child protection and prohibitions on the child death penalty, especially in the CRC, they voluntarily altered their domestic law to reflect these norms and the growing regime.

KENYA AND TANGANYIKA

After independence, the former British colonies of Kenya and Tanganyika both maintained the colonial policy against executing those that commit capital crimes while under age 18. Kenya, which gained independence in 1963, abolished the death penalty for child offenders in 1967, in its post-independence Penal Code in Section 25 (2). This provision in the code was challenged by a juvenile death sentence in 1967 and upheld in the case considering the law, *Turon v. R.*[530] The Penal Code of Tanganyika under British rule banned the death penalty for child offenders under age 18 in Article 26 (2). Upon independence in 1961, the code was maintained, but the prohibition was eventually challenged in a 1977 court case, *R v. Lubasha Maderenya and Tejai Lubasha*. The law was upheld and the prohibition on the penalty's application to offenders under age 18 remained.[531] The ruling was repealed, however, in 1979, reversing the 1977 decision.[532] Both mainland Tanzania and Zanzibar (now one country) abolished the penalty for children under age 18 in 1997.[533] There is little information on the pre-colonial history of the penalty in these states, although there is some indication that it was typically avoided before colonialism, especially in Tanganyika.[534]

British rule in Kenya began in the 19th century and was notably indirect. Although they originally established a presence in Kenya to curb the slave trade, the British controlled the area beginning in 1895, calling it the East African Protectorate.[535] The relatively small number of colonial administrators relied on local intermediaries to

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530 E.A. 789 (CA) Ibid., 41.
531 High Court of Tanzania at Mwanza Criminal Sessions case no. 143 of 1977
532 No. 32 of 1979
533 Shivji et al., *Constitutional and Legal System of Tanzania*. The most recent abolition is found in the Written Laws (Miscellaneous Amendment) Act No. 31 of 1997.
534 Ibid., 258.
535 Charles Mwalimu, *The Kenyan Legal System: An Overview* (Washington, D.C.: Law Library of Congress, 1988), 5.

govern the area, usually on indigenous elites that were 'loyal' to the British for multiple reasons. This method of rule was common throughout the empire and served to establish a highly bureaucratic system that would persist after colonialism.

The annexation of Kenya in 1920 by the British increased the political activity of Africans who sought reform of colonial rule and organized in the interwar years. Protests in Kenya were mostly localized until 1944, but there was widespread resentment of economic and political policies even where there was no organized resistance.[536] The end of World War II brought some minor reforms, including some African representation in the Legislative Council (the Kenyan Parliament), but these changes did little to quell the rising anger toward the settlers and the colonial government.[537]

By 1951, the reformers grew more militant, resulting in the Mau Mau revolt the following year, when those opposed to British policies began a violent rebellion. The government responded with mass arrests and detentions, declarations of emergency, torture and capital punishment.[538] All told, the British hanged 1090 men for their part in the Mau Mau revolt.[539] Of these, only 346 were convicted of murder; the rest were convicted of possessing arms and ammunition, consorting with terrorists and the administration of oaths (oaths taken under the aegis of tribal spirits declaring loyalty to Mau Mau leaders).[540] Winston Churchill himself gave permission for the mass application of the death penalty.[541] The revolt, which lasted for eight years, ultimately may have taken as many as 50,000 African lives, more than half of them children under

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536 W.R. Ochieng, *A Modern History of Kenya 1895-1980* (Nairobi: Evans Brothers Limited, 1989), 182.
537 Mwalimu, *The Kenyan Legal System: An Overview*, 9.
538 Joanna Lewis, "Nasty, Brutish and in Shorts? British Colonial Rule, Violence and the Historians of Mau Mau," *The Round Table* 96, no. 389 (2007): 293, David Anderson, *Histories of the Hanged: The Dirty War in Kenya and the End of Empire* (New York: W.W. Norton & Company, 2005).
539 Anderson, *Histories of the Hanged: The Dirty War in Kenya and the End of Empire*, 291.
540 Ibid. Elie Kedourie, *Nationalism in Asia and Africa* (New York: World Pub. Co., 1970), p. 115.
541 Anderson, *Histories of the Hanged: The Dirty War in Kenya and the End of Empire*, 291.

the age of 10 through violence, illness, starvation and relocation.[542] The violence carried out by the British was the worst in any Anglophone colony, and it would damage the reputation of the empire for years to come.[543] David Anderson has argued that violence in Kenya was so widespread because of the bureaucratization of British rule. The order of the system, with clear rules and regulations, lent a normalcy to the violence, conferring a sense of legality and acceptability on the enterprise.[544] Interestingly, Mau Mau revolutionaries under age 18 were given a reprieve from the death penalty—evidence that even the enemy's children were still recognized as children.[545]

A state of emergency was declared during the revolt and political organization was outlawed. As a result, a peaceful path to independence would not be possible until the right to organize was restored in 1959.[546] The British Empire, weakened by decolonization after World War II, called two new constitutional conferences in 1961 and 1962, the latter establishing a National Assembly.[547] In June 1963, Kenya was granted internal self-government, followed by full independence by the end of the year. [548]

Prior to 1964, what is now Tanzania was in fact two separate countries under British rule, Tanganyika and Zanzibar. In 1888, Germany possessed the imperial charter for Tanganyika, having annexed territory from the Omani Sultan, and allowed the German East African Company to exploit the area.[549] Rebellions caused the German government to administer the area beginning in 1891. German rule was hardly any

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[542] John Blacker, "The Demography of Mau Mau: Fertility and Mortality in Kenya in the 1950s: A Demographer's Viewpoint," *African Affairs* 106, no. 423 (2007): 205.
[543] Lewis, "Nasty, Brutish and in Shorts? British Colonial Rule, Violence and the Historians of Mau Mau," 208.
[544] Ibid.
[545] Anderson, *Histories of the Hanged: The Dirty War in Kenya and the End of Empire*, 7.
[546] Mwalimu, *The Kenyan Legal System: An Overview*, 11.
[547] Ibid.
[548] Ibid., 12.
[549] Foreign Area Studies at the American University and Irving Kaplan, *Tanzania: A Country Study* (Washington, D.C.: American University, 1978), 34-35.

better for the region, however, and rebellions against the Germans began in 1905 with the Maji Maji rebellion, which took the lives of approximately 26,000 Africans by German count.[550] The British took control of Tanganyika as a "mandated territory" after the German loss in World War I.[551] As in Kenya, the method of indirect rule allowed the British to maintain traditional social and political systems of government and to adapt them to the needs of the British colonial enterprise.[552] The system allowed local chiefs to remain in power, as the British believed they would be more effective administrators than other intermediaries.

The independence struggle in Tanganyika began in 1954 with the rise of a new political party, the Tanganyika African National Union (TANU), led by the future president, Julius Nyerere.[553] Tanganyika had been placed under U.N. trusteeship in 1946, and this allowed Nyerere to address the Trusteeship Council at the United Nations in person regarding British rule.[554] The British had initiated reforms after World War II, many of these relating to children and education, and also increased African representation in the Legislative Council.[555] African representation further increased through the years before independence, with TANU taking most elected positions.[556] As TANU became more popular, the British increased harassment of its leaders, arresting many, including Nyerere.[557] A new governor in 1958 introduced reforms that allowed the

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[550] Ibid., 38-39.
[551] Martin Bailey, *The Union of Tanganyika and Zanzibar: A Study in Political Integration* (Syracuse: Syracuse University, 1973), 7, Foreign Area Studies at the American University and Kaplan, *Tanzania: A Country Study*, 43.
[552] Foreign Area Studies at the American University and Kaplan, *Tanzania: A Country Study*, 44.
[553] Bailey, *The Union of Tanganyika and Zanzibar: A Study in Political Integration*, 6, Foreign Area Studies at the American University and Kaplan, *Tanzania: A Country Study*, 49.
[554] Foreign Area Studies at the American University and Kaplan, *Tanzania: A Country Study*, 49.
[555] Ibid., 51, 53.
[556] Ibid.
[557] Ibid., 61, M.H.Y. Kaniki, "The End of the Colonial Era," in *Tanzania under Colonial Rule*, ed. M.H.Y. Kaniki (London: Longman Group Limited), 353.

opposition to take many important positions in the government.[558] Independence in Ghana in 1957 and elsewhere in the British Empire raised the morale of TANU leaders.[559] When general elections were held in 1958 and 1959, only TANU candidates [and TANU-supported candidates] won.[560] Elections in 1960 resulted in a TANU win of 70 of 71 seats.[561] In May 1961, Tanganyika was granted internal self-rule, followed by full independence by the end of the year.[562]

At independence, Tanganyika and Kenya were similar in terms of their economic structure and capacity for progress and economic growth; yet the two countries subsequently took widely divergent paths.[563] Tanganyika, which became independent in 1961, two years before Kenya, embarked on a path of socialist development.[564] Kenya, on the other hand, changed very little and only later Africanized parts of the political and judicial systems it had inherited from the British.[565] Kenya instead spent these formative years focusing its efforts on capitalist development and sought entrance to lucrative Western markets.[566]

In some ways, however, the two countries' objectives were not dissimilar. They both sought to manage political conflict, expand and Africanize the civil service, build on the existing infrastructure left by the British, develop a social welfare system, encourage economic growth, improve relations with the British and adopt a foreign policy of

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[558] Bailey, *The Union of Tanganyika and Zanzibar: A Study in Political Integration*, 6-7.
[559] Kaniki, "The End of the Colonial Era," 363.
[560] Ibid., 366.
[561] Ibid., 367.
[562] Bailey, *The Union of Tanganyika and Zanzibar: A Study in Political Integration*, 7.
[563] Joel D. Barkan, "Comparing Politics and Public Policy in Kenya and Tanzania," in *Politics and Public Policy in Kenya and Tanzania*, ed. Joel D. Barkan and John J. Okumu (New York: Praeger Publishers, 1979), 3-4.
[564] Ibid., 4.
[565] Ochieng, *A Modern History of Kenya 1895-1980*, 194-195.
[566] Barkan, "Comparing Politics and Public Policy in Kenya and Tanzania," 4.

nonalignment (at least very early on).[567] Thus, not only were policy goals in the two countries nearly identical, they were also similar to policy goals in almost every other African state after independence, with the exception of Guinea and possibly Ghana.[568]

The policies of the two countries began to diverge quickly after independence. Kenya was distracted in its first few years by divisions both within the ruling party and outside of it. This, combined with land shortages, meant that the young government had "few chances to reflect upon development policy, other than to endorse existing policies...that had been set in place prior to independence."[569] In the case of Tanganyika, its main problem was financing the new government and attracting foreign investors.[570] President Julius Nyerere, Tanganyika's first president, desired a policy of self-reliance and, beginning in 1967, sought a "complete break with the institutional legacies it inherited at independence."[571] While Kenya sought to develop ties with the West and to win entry to overseas markets, develop a tourist industry and increase foreign investment, Tanganyika (and later Tanzania) chose nonalignment, military assistance from China and supported liberation movements in other parts of Africa, to the chagrin of the West.[572]

Kenya maintained much of the bureaucratic structure and law it had inherited at independence. Its criminal code even states that it should "be interpreted in accordance with the principles of legal interpretation obtaining in England," and that the laws themselves should be "used with the meaning attached to them in English criminal

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567 Ibid.
568 Ibid.
569 Ibid., 5.
570 Ibid.
571 Ibid., 6, 10.
572 Ibid., 10.

law."[573] Tanganyika, and later Tanzania, on the other hand, sought after independence to change the very foundation of society, beginning with land reform in the early 1960s. Its interim Constitution of 1965 established one-party rule on the mainland and left Zanzibar legally autonomous.[574] As Tanzania adopted more socialist policies, its relationship with the West became strained, thus increasing calls for self-reliance.[575]

Nonetheless, both Kenya and Tanganyika (Tanzania after 1964) continued their policies of protection for children. In Kenya, the young government initiated a number of measures that demonstrated its "progressive concern" for women and children.[576] Many of these measures, including increased rights for women and illegitimate children, were criticized for their incompatibility with African traditions.[577] Nonetheless, a number of protections were enacted within the first two decades of independence that dealt with issues including age of majority, marriage, education, employment and child welfare. [578] The minimum age for marriage in Kenya after independence was 16 for females and 18 for males.[579] In Tanganyika and Tanzania, a number of laws were passed to protect children and codify norms within the first two decades of independent rule.[580] The new laws addressed such issues as age of majority, marriage, education, employment,

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573 Tudor Jackson, *The Law of Kenya; an Introduction* (Nairobi: East African Literature Bureau, 1970), 85.
574 Foreign Area Studies at the American University and Kaplan, *Tanzania: A Country Study*, 74, 77-78.
575 Ibid., 81.
576 James D. Keeney, "Review: Report of the Kenya Commission on the Law of Succession," *University of Pennsylvania Law Review* 119, no. 6 (1971): 1074.
577 Ibid.
578 The Children and Young Persons Act of 1964, the Succession Act of 1972, the Education Act of 1968 (Cap. 211), the Age of Majority Act of 1974 (establishing 18 as the age of majority) (Cap. 33), Immigration Act of 1972 (Cap. 172), Citizenship Act of 1967 (Cap. 170), Magistrate's Courts Act of 1967 (Cap. 10), Employment Act of 1976 (Cap. 226), and the Matrimonial Causes Ordinance of 1962 (Cap. 152), among others.
579 Arthur Phillips and Henry F. Morris, Marriage Laws in Africa (London: Oxford University Press, 1971), 43.
580 The Age of Majority Ordinance (Cap. 431), Age of Majority (Citizenship Laws) Act of 1970, Law of Contract Ordinance (Cap. 433), Law of Marriage Act (1971), Affiliation Ordinance (Cap. 278), Births and Deaths Registration Ordinance (Cap. 108), Adoption Ordinance, Employment Ordinance (Cap. 366), Evidence Act of 1967 (Cap. 6), Customary Law Declaration Orders of 1963, National Education Act of 1978, Children and Young Persons Ordinance (Cap. 13), Children's Homes (Regulation) Act of 1968, Prisons Act of 1967 (Cap. 58), and the Probation of Offenders Ordinance (Cap. 247).

adoption, child welfare and criminal procedure. [581] A minor in Tanzania is defined as a person under age 18, according to the Interpretation of Laws and General Clauses Act in 1972. [582] A survey of the age parameters in Kenyan and Tanganyikan (and Tanzanian) law after independence indicates that 18 was a key age in many areas of law, including majority, definition of a child and employment, but numerous statutes addressing child criminals specify ages varying from 16 to 21.

Both Kenya and Tanzania acceded to the ICCPR in 1972 and 1976, respectively. Again, both Kenya and Tanganyika maintained colonial policies against the child death penalty following independence. Tanzania, however, later reversed its policy in 1979, three years after acceding to the ICCPR, and would not re-abolish until 1997. In acceding to the ICCPR, Tanzania did not reserve on article 6§5, which banned the child death penalty.

ALGERIA AND TUNISIA

Algeria and Tunisia, like Kenya and Tanganyika, also maintained the colonial policy against child executions following independence, in 1962 and 1956, respectively. Like Tanzania, however, Tunisia also reversed the policy later on by lowering the age of eligibility for the penalty to 16. Algeria abolished the penalty for child offenders under age 18 in the 1966 Penal Code,[583] based largely on the penal code in effect under the French. Tunisia's experience with the juvenile death penalty was markedly more convoluted than Algeria's, however. As in Algeria, the Tunisian colonial penal code

581Robert V. Makaramba, Children Rights in Tanzania (Sic) (Unknown: Friedrich Ebert Stiftung, 1998), 77, 79, Shivji et al., Constitutional and Legal System of Tanzania, 168-169.
582 Makaramba, *Children Rights in Tanzania (Sic)*, 79.
583 Article 50 of the Ordinance no. 66-156 of June 8, E.A, JORA, June 11, 1966.

banned the penalty for those under age 18. After Tunisia gained independence, it retained the ban. In 1966, however, the penal code was changed so that only minors under age 16 would be protected, thus lowering the age limit from 18.[584] The 1991 Penal Code restored the age limit for the penalty[585] to 18, but by 2007 (and maybe as early as 2005), the age limit again became 16.

The French began their occupation of Algeria in 1830, and France came to view Algeria differently than it did other French territories, perceiving it to be an extension of France itself. From its annexation in the 1830s, France used force to subdue the territory, only introducing civil rule in 1870 after its defeat in the Franco-Prussian War. Unlike other French colonies, Algeria was a province of France, and it was administered under the Ministry of Interior as opposed to the Ministry of Foreign Affairs.[586] Nonetheless, Algerians were not citizens or nationals, but French subjects.[587] Citizenship reform was enacted as part of the World War II reforms, discussed below, but they affected few Algerians.

Because of the position of Algeria in the French popular imagination, the rule of Algeria was much more direct than the rule of any of the other former colonies examined in this study. The French sought to embed their culture in Algerian society and to accomplish "long-range domination" of the population through the "development of bureaucratic administration."[588] This approach centralized the administration of Algeria

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584 Jeswald W. Salacuse, *French-Speaking Africa*, vol. 2, *The Legal Systems of Africa* (Charlottesville, VA: Michie Company Law Publishers, 1975), 508.
585 This change likely happened in 1989.
586 Salacuse, *French-Speaking Africa*, 34, Mounira M. Charrad, *States and Women's Rights: The Making of Postcolonial Tunisia, Algeria, and Morocco* (Berkeley: University of California Press, 2001).
587 J.L. Miege, "Legal Developments in the Magrib: 1830-1930," in *European Expansion and Law: The Encounter of European and Indigenous Law in the 19th- and 20th-Century Africa and Asia*, ed. W.J. Mommsen and J.A. De Moor (New York: Berg Publishers, 1992), 103.
588 Charrad, *States and Women's Rights: The Making of Postcolonial Tunisia, Algeria, and Morocco*, 123.

and had a profound effect on both the capabilities of and choices available to Algeria in the post-independence period.[589] As with many other aspects of its rule, France extended its Penal Code and Code of Criminal Instruction to Algeria and applied these codes to all Algerians.[590] France's policy of assimilation in Algeria differed strongly from its less direct and extensive rule over the rest of Maghreb. Even so, France allowed Algeria to maintain customary law in family matters, such as marriage and inheritance, until the war for independence.

The call for independence began with the fall of the Vichy regime in 1942.[591] From the beginning of their struggle, Algerians sought international recognition. Reforms were granted by Charles DeGaulle after the war, but these were insufficient to satisfy the Algerians.[592] Even as France was making arrangements to release Tunisia and Morocco, it was gearing up for a decidedly personal war with the Algerians.[593] The French interest stemmed largely from the massive cultural investment in Algeria for more than 100 years and from the belief that Algeria was an extension of France proper. Other considerations increased France's resolve, for example, the discovery of oil in the Sahara and the promise of empty desert for nuclear experiments. Moreover, France's impending defeat in Indochine meant that Algeria would face a different struggle than other territories in the Maghreb.[594]

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589 Ibid.
590 Salacuse, *French-Speaking Africa*, 191.
591 Ibid., 42.
592 Ibid., 43.
593 Charrad, *States and Women's Rights: The Making of Postcolonial Tunisia, Algeria, and Morocco*, 171.
594 Ibid.

The war was brutal and long. It lasted until 1962 and took between one and 1.5 million lives in a country of nine million.[595] More than two million were in war camps by the war's end.[596] The French grew weary of the violence and international criticism and in a 1961 referendum, a large majority approved self-determination for Algeria, resulting in the Evian negotiations that ended the war. [597]

In 1962, even with the brutal war for independence over, Algeria still faced a difficult transition to statehood: The French constituted 10-13 percent of Algeria's population before the war, and the nearly one-million strong exodus left only 50,000 Europeans in Algeria by the end of the decade.[598] It was not just the numbers of departing French, but the positions they held in Algerian society that caused the greatest loss. The French were the doctors, administrators, teachers and judges; large swaths of the professional and state infrastructure in Algerian society were dominated by the French. The exodus, along with the war, left the state in tatters.

At independence, a heterogeneous elite took power in Algeria and, with few resources, attempted to initiate reforms and quell conflict.[599] Ahmed Ben Bella was elected president in 1963, with the job of organizing and training an entirely new administration following the French exodus.[600] The Algerian Revolution sought to purge all things French from the country and to destroy the French system of governance, but this proved nearly impossible after colonial rule for more than 100 years.[601] The French exodus meant that the Algerians had to quickly re-establish government control and

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595 Ibid.
596 Ibid.
597 Salacuse, *French-Speaking Africa*, 48-49.
598 Ibid., 15, Charrad, *States and Women's Rights: The Making of Postcolonial Tunisia, Algeria, and Morocco*, 115.
599 Charrad, *States and Women's Rights: The Making of Postcolonial Tunisia, Algeria, and Morocco*, 180.
600 Ibid., 181.
601 Salacuse, *French-Speaking Africa*, 8.

reconstruct bureaucracy in a time of increasing tension. The new government's strategy was to simplify the system of criminal justice so that it could be easily maintained.[602] Jeswald Salacuse has argued, "After some hesitation, independent Algeria decided to maintain its colonial legislation in force provisionally, but at the same time it declared void all legislation of colonialist inspiration."[603] This appears to have been largely cant. Since the French went to great lengths to destroy any vestiges of Algerian traditional law in the administrative bureaucracy, the government merely paid lip service to purging the system of French influence. In many ways, the government not only tolerated French norms in the legal system, but perpetuated them through codification in the first decade of independence.

Conflict among Algerian groups intensified after the war and after Colonel Houari Boumediene initiated a *coup d'etat* against Ben Bella in 1965. [604] The coup hurt Algeria's reputation abroad and isolated it from many allies, such as Cuba, Egypt and Eastern European countries.[605] Boumediene cared deeply about what the world thought of him as a leader and sought to appear progressive and a true revolutionary,[606] yet he feared radical change and enacted no reforms or new initiatives during the first two years of his rule.[607] International media reports expressed concern about human rights abuses, especially the torture of political prisoners and the treatment of Ben Bella.[608] Although

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602 Ibid., 116.
603 Ibid., 8.
604 Ibid., 58, John P. Entelis, *Algeria: The Revolution Institutionalized* (Boulder, CO: Westview Press, 1986), 61-62.
605 David Ottaway and Marina Ottaway, *Algeria; the Politics of a Socialist Revolution* (Berkeley,: University of California Press, 1970), 230-231.
606 Arslan Humbaraci, *Algeria: A Revolution That Failed; a Political History since 1954* (London,: Pall Mall P., 1966), 249, 262, Ottaway and Ottaway, *Algeria; the Politics of a Socialist Revolution*, 231-232, 246.
607 Entelis, *Algeria: The Revolution Institutionalized*, 60.
608 Humbaraci, *Algeria: A Revolution That Failed; a Political History since 1954*, 256.

Boumediene flirted with some Western support after the coup, he became vehemently anti-Western after the 1967 Arab-Israeli War.[609]

In 1966, as part of reform measures, a new penal code and criminal procedure code was enacted by the Boumediene regime.[610] Although not a "slavish copy" of the former French code, the new code nonetheless greatly resembled the French code and used almost identical language in Article 50, the provision banning the child death penalty.[611] The reasons the Algerians maintained many important parts of the Penal Code, even in light of a powerful nationalist movement, probably has as much to do with the French exodus as with norms about children and the death penalty. As stated above, post-independence Algeria was forced to quickly simplify its judicial system following the war, and large-scale, fundamental changes were likely not feasible at the time.

Tunisia had a radically different experience with the French than the Algerians did. French rule in Tunisia began in 1881 with the Al Marsa Convention, after France ended its initial military occupation of Algeria. Learning from its experience in Algeria, and unable to repeat it, France ruled Tunisia more indirectly. Unlike Algeria, Tunisia was governed by the Ministry of Foreign Affairs under the assumption that it was a separate state.[612] In 1883, Tunisia became a French protectorate, and France simply "grafted upon the traditional system new institutions" to facilitate governance.[613]

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609 Ottaway and Ottaway, *Algeria; the Politics of a Socialist Revolution*, 247.
610 Salacuse, *French-Speaking Africa*, 192.
611 Ibid., 193.
612 Hooker, *Legal Pluralism: An Introduction to Colonial and Neo-Colonial Laws*, 199.
613 Salacuse, *French-Speaking Africa*, 365.

There were fewer French settlers in Tunisia than in Algeria, and they preferred a more structured system of "European corporate development of the land."[614] The French merely worked within the existing Tunisian infrastructure of services, administration and judiciary, but installed French directors or supervisors.[615] France also expanded the Tunisian bureaucracy and further centralized the political system, allowing for better collection of taxes, enforcing the rule of law, establishing a social security infrastructure, and stimulating growth in the country's economy.[616] Instead of direct rule, France chose to co-opt Tunisian officials and to rule the country via supervision of local leaders.[617] The Tunisian legal system was strongly shaped by French rule, nonetheless, as France imposed its own criminal law, enacted a number of legal reforms and embedded many French legal principles in the Tunisian system.[618]

Nationalism in Tunisia began in the late 19th century and was from the beginning "a movement rooted in the schools."[619] The French-educated, elite character of the Tunisian nationalist movement never waned, drawing much of its inspiration from French liberal thought.[620] Minor reforms were initiated by the French after World War I, but they failed to placate the groups pressing for change.[621] In 1938, the French responded to increasingly radical nationalist protests by arresting Habib Bourguiba, the leader of the main nationalist party and Tunisia's future president, on several occasions. Guerrilla movements in Tunisia began in 1954, resulting in repressive measures by the French,

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614 Foreign Area Studies at the American University and Harold D. Nelson, eds., *Tunisia a Country Study* (Washington, D.C.: United States Government,1986), 32.
615 Salacuse, *French-Speaking Africa*, 366-367.
616 Charrad, *States and Women's Rights: The Making of Postcolonial Tunisia, Algeria, and Morocco*, 119, 143, Foreign Area Studies at the American University and Nelson, eds., *Tunisia a Country Study*, 32.
617 Charrad, *States and Women's Rights: The Making of Postcolonial Tunisia, Algeria, and Morocco*, 116-117.
618 Salacuse, *French-Speaking Africa*, 356, 393.
619 Foreign Area Studies at the American University and Nelson, eds., *Tunisia a Country Study*, 38.
620 Ibid., 39.
621 Ibid., 41.

including more arrests.[622] Resistance was short-lived, however, and Tunisia was granted self-rule in 1955 and full independence seven months later in 1956.[623]

Bourguiba became the first president of Tunisia and, along with a number of French-trained elites, launched widespread reforms affecting most aspects of government and social life.[624] Tunisia adopted a political system similar to the United States' and reorganized national institutions after independence.[625] These changes were part of large-scale social reforms initiated predominately by European-educated Tunisians with the aim of liberating Tunisia from the "beliefs and practices they saw as obsolete in the modern world and as deterrents to development."[626] Economic issues were the primary focus of reforms, and the state adopted measures to industrialize and modernize Tunisian industry.[627] These elite-led changes resulted in many tensions within Tunisia, especially coming from the powerful nationalists, conservative Muslims, and others that opposed European influence in the young state.[628]

Centralization of the government administration was greater in Tunisia than in Algeria under colonial rule, although the French made a concerted effort in all of its territories to weaken tribal orders to increase state bureaucratization.[629] The urban elite that inherited Tunisia sought "to consolidate the authority of the state and develop nationwide institutions."[630] Unlike Algeria, Tunisia was respected throughout the West and Africa in the early years of independence, and Tunisia sought to cultivate these

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622 Salacuse, *French-Speaking Africa*, 370.
623 Ibid., 370-372.
624 Kenneth J. Perkins, *A History of Modern Tunisia* (Cambridge: Cambridge University Press, 2004), 7.
625 Salacuse, *French-Speaking Africa*, 375, 395.
626 Perkins, *A History of Modern Tunisia*, 7.
627 Ibid., 8.
628 Ibid., 7.
629 Charrad, *States and Women's Rights: The Making of Postcolonial Tunisia, Algeria, and Morocco*, 143.
630 Ibid., 202.

relationships.[631] Tunisia prized its U.N. membership and, with the support of the French, it sought "associated status" within the European Economic Community.[632]

Following independence, Tunisia worked hard to reform much of its legal tradition, a task that proved difficult, however, after 75 years of colonial rule.[633] Tunisia's aim after independence was to "modernize, unify, and laicize the judicial system."[634] It not only banned French courts after independence, but *sharia* courts as well.[635] Unlike Algeria, Tunisia did not reaffirm its criminal code after independence, leaving its 1913 Penal Code in force until 1975, although the code was amended several times.[636]

Land reform was a central concern of the new Tunisian government. As early as 1892, more than 20 percent of Tunisia's arable land was owned by the French, but 90 percent of this land belonged to just a few owners and to "companies engaged in capital-intensive agriculture."[637] Bourguiba initiated land reform in 1964, ruling that only people, and not corporations, could own land, and he nationalized the land owned by the corporations and the French.[638] France responded by canceling development loans, suspending technical assistance and establishing high quotas for Tunisian goods.[639] Although the government adopted socialist methods of central planning shortly after independence, it was not until the end of the 1960s that the land collectives were widely expanded, marking a sharp shift to the left.[640]

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631 Perkins, *A History of Modern Tunisia*, 140.
632 Foreign Area Studies at the American University and Nelson, eds., *Tunisia a Country Study*, 53-54.
633 Salacuse, *French-Speaking Africa*, 356.
634 Ibid., 401, 409.
635 Ibid., 409.
636 Decree of July 9, 1913, JOT, Oct. 1, 1913 Ibid., 504.
637 Foreign Area Studies at the American University and Nelson, eds., *Tunisia a Country Study*, 37.
638 Ibid., 55.
639 Ibid.
640 Ibid., 59.

Tunisia would later challenge the norm abolishing the death penalty for child offenders, but there is significant evidence that Algeria never did and that Algeria even went on to codify other norms about children consistent with Western ideology. The same Algerian law that maintained the prohibition against the child death penalty established that minors between the ages of 13 and 18 may qualify for reduced punishment or re-education measures.[641] In 1966, the age of criminal majority was established at 18 in the Code of Criminal Procedure.[642] This was then raised to 21 in ordinances in 1972 and 1975.[643] A 1963 law raised the minimum marriage age for girls to 16, raising by one year the age established by the French.[644] A 1976 ordinance made education compulsory to age 16.[645] Additionally, under both Ben Bella and Boumediene, education took up the largest percentage of the state budget, at 21.5 percent in 1966 compared with national security at only 15 percent.[646] The minimum age for employment was 16, according to a 1975 ordinance, and the military call-up age was established at 19 (unless deferred to age 27) by a 1974 ordinance.[647] The age of civil majority was set at 19 in 1975.[648] In May 1976, a Commission for the Protection of Children and Young People was established by decree.[649]

Unlike Algeria, Tunisia enacted a new family code shortly after independence when Bourguiba set out to "eliminate religious regulations and customs that were

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641 Committee on the Rights of the Child, "Second Periodic Report: Algeria Crc/C/93/Add.7," (2003; reprint).
642 Ordinance No. 66-155 of 8 June 1966, Art. 442 Ibid.
643 Ordinance No. 72-03 of 10 February 1972 and Ordinance No. 75-64 of 26 September 1975 Ibid.
644 Salacuse, *French-Speaking Africa*, 136.
645 Article 5 of the Ordinance of 16 April 1976, Committee on the Rights of the Child, "Second Periodic Report: Algeria Crc/C/93/Add.7."
646 Humbaraci, *Algeria: A Revolution That Failed; a Political History since 1954*, 264. Makaramba, *Children Rights in Tanzania (Sic)*, 77.
647 Ordinance No. 75-31 of 29 April 1975 and Ordinance No. 74-103 of 15 November 1974. Committee on the Rights of the Child, "Second Periodic Report: Algeria Crc/C/93/Add.7."
648 Civil Code Ordinance No. 75-58 of 26 September 1975 and Ordinance of 16 April 1976. Ibid.
649 Decree No. 76-101 of 25 May 1976 Ibid.

considered 'obsolete.'"[650] The 1956 Code of Personal Status, the new family code, outlawed polygamy, gave the state more control over marriage and established the highest minimum age for marriage in the region, age 20 for both men and women—five years higher than under the French.[651] Although a 1964 amendment lowered the marriage age to 17 for women, the age was nonetheless higher than it had been under the French.[652] Tunisia used family law like the French had, as a tool to marginalize tribal power and to centralize state bureaucracy.[653] Tunisia protected children under age 18 from indecent assault in a 1958 amendment to the Criminal Code.[654] The young country also focused on education, especially on increasing educational opportunities for girls.[655] Protection for children also applied to alcohol consumption, as children under the age 16 were prohibited in a 1959 law from drinking.[656] Bourguiba increased money for education to one-fifth of the total budget and supported universal primary education, although education to age 16 was not made compulsory until 1991.[657] Adoption and guardianship of children were addressed in the 1958 Personal Status Code, with further protections enacted in 1967.[658]

Both Algeria and Tunisia would later sign the ICCPR in 1968. Tunisia would ratify the treaty the following year, while Algeria would not ratify until 1989. Tunisia, however, would later reverse its policy in 1966, allowing the death penalty for child

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650 Foreign Area Studies at the American University and Nelson, eds., *Tunisia a Country Study*, 51.
651 Salacuse, *French-Speaking Africa*, 7, Charrad, *States and Women's Rights: The Making of Postcolonial Tunisia, Algeria, and Morocco*, 225.
652 Foreign Area Studies at the American University and Nelson, eds., *Tunisia a Country Study*, 107.
653 Charrad, *States and Women's Rights: The Making of Postcolonial Tunisia, Algeria, and Morocco*, 201.
654 Act No. 58-15 of 4 March 1958 Committee on the Rights of the Child, "Second Periodic Report: Algeria Crc/C/93/Add.7."
655 Perkins, *A History of Modern Tunisia*, 138-139.
656 Act No. 59-147 of 7 November 1959 Committee on the Rights of the Child, "Second Periodic Report: Tunisia Crc/C/83/Add.1," (2001; reprint).
657 Perkins, *A History of Modern Tunisia*, 139-140.
658 Act No. 58-27 of 4 March 1958 and Act No. 67-47 of 21 November 1967. Committee on the Rights of the Child, "Second Periodic Report: Tunisia Crc/C/83/Add.1."

offenders age 16 and older. Three years later, when Tunisia ratified the ICCPR, it did not reserve on article 6§5 of the convention.

THEMATIC SUMMARIES

In this chapter, I argue that the British and French empires spread Western values and norms through colonial legal systems and, in the case of the British, homogenized criminal codes. It was state intervention into traditional law, however, that most drastically altered the position of children in colonial societies. This section addresses all three of these thematic areas: acculturation by the West through colonial law, criminal codes, and the intervention into traditional law. It demonstrates the ways in which ideas about children and childhood were diffused in Africa and the Middle East, and contributed to the endurance of these norms following independence.

COLONIAL LAW

The British and French were by no means the first foreign powers to rule in East Africa or the Maghreb. East Africa was ruled at various times by the Portuguese, Omani Arabs and Germans. The Maghreb was ruled by the Romans, Spain, the Ottoman Empire and various Arab dynasties. All of the case study states in this chapter had pre-colonial experiences with Islam and Islamic law in addition to other types of traditional and indigenous law. Due to this complicated history, research into pre-colonial African and Middle Eastern law is very difficult. The task is all the more complex because the methods used to recognize law have been greatly influenced by legal positivism with its

bias against unwritten law that is not backed by a coercive authority.[659] As a result, oral law and culturally embedded duties and social roles, rules that may limit behavior to the same extent as written law, may be overlooked by researchers, misunderstood, or even lost. Moreover, a search for African and Middle Eastern law itself implies a monolithic, shared corpus that did not emerge from the hundreds of cultures that inhabit these regions. For the purposes of this and later sections, traditional law is defined as the local and/or indigenous law in place at the time that colonial law was introduced.

Because of these complications, this section focuses on law and legal systems imposed during colonialism. The objective of this section is to demonstrate the degrees of acculturation the colonies experienced through their interaction with imperial legal codes. It reveals two important processes involving colonial rule: first, the colonial domination of Africa and the Middle East through law and state organization; and second, the internalization by colonial societies of certain Western norms and values contained within these legal systems and types of state order.

European law was typically not applied to the colonies until the mid-19th century. Rule was primarily applied to coastal areas, and indigenous communities were left alone so long as they did not inhibit the colonial extraction of resources.[660] Although there is great variety in the degree and nature of colonial law, some generalizations can be made: There typically were dual systems of law in the colonies, one for the colonial powers, their administrators and other protected persons, and one for the general population.[661] Traditional law was permitted to varying degrees so long as it did not grossly violate

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[659] Werner Menski, *Comparative Law in a Global Context* (Cambridge: Cambridge University Press, 2006), 380-381.
[660] W.J. Mommsen, "Introduction," in *European Expansion and Law: The Encounter of European and Indigenous Law in 19th- and 20th-Century Africa and Asia*, ed. W.J. Mommsen and J.A. De Moor (New York: Berg Publishers, 1992), 4.
[661] Ibid., 5.

colonial values and laws (judged in relation to the needs of the colonial power). Although there was a type of legal pluralism – or a system whereby two or more systems of law exist side by side – evident in the colonies, laws enacted in the colonies were often not exact replicas of metropolitan law.[662] Colonial law was often a hybrid of metropolitan law, traditional law and law adapted to the specific demands of the colonial enterprise. Martin Chanock has suggested that the legal system of the British colonies was not legal pluralism, but more "one language, perhaps spoken with many different accents, rather than a plurality of tongues."[663] It became an "Anglo-colonial system."[664]

English law in the colonies generally began with what was known as the 'reception statute' found in the Order-in-Council, whereby laws in force in England on the day a territory was obtained were made to apply in the colony as well.[665] Laws passed in England after the Order-in-Council had "no extraterritorial application" unless the colony enacted them.[666] The original purpose of law in the colonies was to keep the peace and to allow Britain to extract resources with little resistance. Eventually, law in the British colonies was shaped by the English Dual Mandate (articulated by Lord Lugard, but applicable to French territories as well), according to which there were two imperatives of colonial rule, to benefit the metropolitan economy and to "uplift the 'savage races.' "[667] Additionally, the British wanted to guarantee that Europeans would

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662 Ibid., 10. Martin Chanock, "The Law Market: The Legal Encounter in British East and Central Africa," in *European Expansion and Law: The Encounter of European and Indigenous Law in the 19th- and 20th-Century Africa and Asia*, ed. W.J. Mommsen and J.A. De Moor (New York: Berg Publishers, 1992), 302.
663 Chanock, "The Law Market: The Legal Encounter in British East and Central Africa," 302.
664 Ibid., 303.
665 Robert B. Seidman, "Law and Economic Development in Independent, English-Speaking Sub-Saharan Africa," in *Africa and Law: Developing Legal Systems in African Commonwealth Nations*, ed. Thomas W. Hutchison (Madison: University of Wisconsin Press, 1968), 10.
666 T. Olawale Elias, *British Colonial Law: A Comparative Study of the Interaction between English and Local Laws in British Dependencies* (London: Stevens & Sons Limited, 1962), 35.
667 Seidman, "Law and Economic Development in Independent, English-Speaking Sub-Saharan Africa," 15.

not be governed by traditional law.[668] For the most part, the British allowed their colonies to maintain traditional law, especially in areas of family law such as marriage, land tenure and inheritance, and a legal system quickly developed whereby English law governed non-Africans and traditional law governed Africans, although English criminal law applied to all, as will be discussed later. [669]

In Kenya and Tanganyika, the British had full jurisdiction over all persons, all matters and all civil and criminal law through the Kenyan and Tanganyika reception clauses, with the exception of the coastal strip in what is now Kenya, which was then still under the dominion of the Sultan of Zanzibar.[670] Even where the British had complete jurisdiction, local courts could apply traditional law if it was "not repugnant to justice and morality or inconsistent with any Order in Council or Ordinance, or any regulation or rule made under [these]."[671] But British law would gradually expand into areas of traditional family law as it became increasingly difficult to justify colonial rule without liberating certain classes of society such as women and children, as will be seen below.

As the above case studies make evident, the French method of rule was far more direct than the British method, although this varied by colony. Like the British, though, the French allowed certain aspects of traditional law, especially family law, to remain until late in their rule.[672] As with British colonial law, there were generally two types of law in French colonies, one for French nationals (mostly the French in Algeria and

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668 Menski, *Comparative Law in a Global Context*, 37.
669 Seidman, "Law and Economic Development in Independent, English-Speaking Sub-Saharan Africa," 13, Elias, *British Colonial Law: A Comparative Study of the Interaction between English and Local Laws in British Dependencies*, 5.
670 J.N.D. Anderson, *Islamic Law in Africa* (London: Colonial Research Publication: Her Majesty's Stationery Office, 1954), 81.
671 Ibid.
672 Salacuse, *French-Speaking Africa*, 77.

various protected persons), and one for French subjects (most everyone else).[673] In theory, ordinary subjects could become citizens in Algeria, but in practice, this was very difficult and relatively uncommon.[674] As was the case in the British Empire, there is some evidence that at least in the East Asian colonies of the French Empire, the *mission civilatrice* revolved around motherhood, adoption and education—all institutions to which children are central.[675]

Not unexpectedly, Tunisia was able to retain its traditional courts while Algeria was not; yet even in Tunisia, customary law and traditional courts had limited power.[676] The French controlled the legal process and "drafted all legislative proposals."[677] The French also enacted a number of legal reforms based largely on French law and legal principles.[678] Since Tunisia was a protectorate, French law did not automatically apply without additional enactment.[679] It was France, however, that decided which laws should apply within the context of the needs of its rule.[680] An "elaborate jurisprudence developed," since some French laws applied while some Tunisian laws remained in effect.[681] This hybrid system was highly complicated, and some confusion exists as to the authority of the French Parliament over the laws of particular territories. M.J. Hooker, an expert in legal pluralism, contends that it is not clear "how far any individual colony

673 Ibid., 73.
674 Lauren Benton, *Law and Colonial Cultures: Legal Regimes in World History, 1400-1900* (Cambridge: Cambridge University Press, 2002), 164.
675 Micheline R. Lessard, "Civilizing Women: French Colonial Perceptions of Vietnamese Womanhood and Motherhood," in *Women and the Colonial Gaze*, ed. Tamara L. Hunt and Micheline R. Lessard (New York: New York University Press, 2002).
676 Salacuse, *French-Speaking Africa*, 109.
677 Ibid., 393.
678 Ibid.
679 Ibid., 394.
680 Ibid.
681 Ibid., 395.

came under the metropolitan laws of France," as this depended on the context, the temporal period and the individual territory.[682]

The French were far more ambitious in their acculturation of the colonies than the British were. The French sought assimilation in Algeria especially, or at the very least, they sought association, whereby the territory existed for French benefit, but the French had the "duty to the colonial population to develop their institutions and to secure their well-being."[683] The French made attempts in Algeria to codify Islamic law, most famously with the Code Morand.[684] This was done to assist the French courts, especially in issues of family law, although the code never became law itself. The French undertook reforms after World War II that encroached upon family law and other traditional law as part of their *mission civilisatrice,* as will be discussed below.

Following independence, most former colonies did not seek to enact traditional law, and rather "preferred state law with its centralized structure…as it would help to create a new unified nation."[685] Centralized state law allowed the nascent governments to inherit much of the order and discipline of the colonial state while engaging in reform, and also served to modernize the new countries by facilitating economic planning. The bureaucracies established by the colonial powers also proved useful, as many of the newly independent states took advantage of colonial infrastructure to enact elite-driven reforms.

In sum, pragmatism reigned. The British and French empires institutionalized aspects of metropolitan law that suited their needs in the colonies. Newly independent

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[682] Hooker, *Legal Pluralism: An Introduction to Colonial and Neo-Colonial Laws*, 201.
[683] Ibid., 197.
[684] Benton, *Law and Colonial Cultures: Legal Regimes in World History, 1400-1900*, 135.
[685] Mommsen, "Introduction," 13.

states, in turn, adopted aspects of these legal systems that suited their own needs. Importantly, the former colonies maintained the centralized bureaucracies they had inherited – hallmarks of the colonial enterprise – even after winning independence.

CRIMINAL CODES

This section demonstrates that the coercive diffusion of the norm against the death penalty for child offenders was part of a larger process of homogenizing criminal codes in the colonies. The elaborate yet remarkably similar legal codes institutionalized across the British and French empires included systems of criminal law. These colonial legal codes would in turn shape the codes of the newly independent states, which came to accept the norms and values embedded in the systems of law they had inherited. This phenomenon explains the similar courses of action taken by former colonies in maintaining key parts of their colonial legal systems, including age restrictions on the death penalty. In the case of the British, most of the age restrictions on the penalty would come years after the homogenized criminal codes were enacted in many of the colonies, as amendments to the original codes. These codes, and the French practice of directly applying French criminal law (albeit inconsistently), homogenized legal systems across colonies and imbued these systems with many of the principles, norms and values important in Western law. The gradual internalization of these values by the colonial states rendered them susceptible to the logic of the Western legal system and led them to maintain many important facets of the system after independence, age restrictions on the death penalty among them.

Criminal law was one of the most widely homogenized types of law advanced in the colonies, especially by the British. Criminal codes were also usually the first type of law to be introduced by colonial powers, whose central goals were to maintain order during their rule, to extract resources and to advance 'the savage races.' Moreover, although colonial powers avoided intervention into traditional law, intervention was greatest in the area of criminal justice because the colonial powers needed to police and control the population for effective rule.[686] Although there was pressure on colonial administrations by Europeans to curtail "the brutal justice exercised by allegedly uncivilized indigenous peoples,"[687] criminal law in the colonies was "severe and authoritarian," and, at least in the case of the British, relied on corporal punishment more so than in England.[688] One of the key legal ideas the colonial powers in Africa sought to impart was that a criminal act was an act against the public, rather than against a private individual.[689] Private wrongs were previously resolved in some compensatory manner, such as exchanges of goods between tribes and families.[690] With public wrongs, the act of punishment was properly carried out by a centralized state.

Colonial criminal codes and criminal procedure codes reflected metropolitan values and needs and included age restrictions on the death penalty akin to those found in metropolitan law. Since England limited its death penalty in 1933 to those over age 18 and France abolished in 1906 when it raised its age of majority to 18, these laws were found in the legal corpus of the former colonies examined in this chapter (although implemented in colonial criminal codes many decades later). There is some evidence to

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686 Ibid., 10.
687 Ibid.
688 Chanock, "The Law Market: The Legal Encounter in British East and Central Africa," 283.
689 Ibid., 282.
690 Shivji et al., *Constitutional and Legal System of Tanzania*, 258.

indicate that many British and French former colonies that gained independence in the 1960s and 1970s (and some even earlier) gained independence with some version of the norm against child executions codified in their law.[691]

One somewhat unique quality of criminal law in the 19th and 20th centuries is the way in which it spread. Criminal codes written in one part of the world were subsequently adopted as models in another, resulting in a large degree of similarity in criminal codes around the world.[692] This in itself explains much of the identical language found in the colonial criminal codes of both the British and the French. This is especially true for the British, who sought a single uniform system of criminal law in all of their colonies and dependencies. A single criminal code applicable to all colonies had great appeal for the British, although it created deep suspicion among the European settlers and African intelligentsia.[693] The British also sought to homogenize their policies and practices regarding child offenders, convening committees to survey colonial practices, assigning a Social Welfare Officer to the colonies, and applying some reforms enacted at home to the colonies.

The first English criminal law introduced in Africa was in the Gold Coast in 1853.[694] The Indian Penal Code was then drafted in 1860, after the Indian Rebellion of 1857, principally by Scottish advocates.[695] Britain transplanted the Indian Penal Code to the colonies of Kenya, Nyasaland (Malawi), Tanganyika, Uganda, Northern Rhodesia (Zambia) and Zanzibar in the late 19thand early 20th centuries, but allowed for traditional

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691 Hynd, "Killing the Condemned: The Practice and Process of Capital Punishment in British Africa: 1900-1950s," footnote 4, p. 405.
692 H.F. Morris, "A History of the Adoption of Codes of Criminal Law and Procedure in British Colonial Africa," *Journal of African Law* 18, no. 1 (1974): 6-7.
693 Ibid.: 6.
694 Seidman, "Law and Economic Development in Independent, English-Speaking Sub-Saharan Africa," 14.
695 Elias, *British Colonial Law: A Comparative Study of the Interaction between English and Local Laws in British Dependencies*, 147, Hooker, *Legal Pluralism: An Introduction to Colonial and Neo-Colonial Laws*, 62.

law and local court control for minor offences so long as they did not conflict with repugnancy standards or with British standards of justice and morality.[696] The settlers and administrators disliked the code at first, but gradually grew to accept it and eventually resisted efforts to change it.[697] After cases in both Kenya and Tanganyika in which settlers killed African employees and were given sentences of only a few years, an import from the Indian Penal Code, interest in adopting a new criminal code increased.[698]

In the 1930s, the Indian Penal Code was replaced by the Colonial Office Model Code, adapted from the Queensland Code of 1889 which was, in turn, adapted from the English Criminal Code of 1880 (which never became law) and, interestingly, from the Penal Code of New York.[699] The code was enacted in Kenya, Tanganyika and other parts of Africa.[700] As with other forms of colonial law, the codes were altered after adoption to reflect the needs of the individual colonial administrations. For example, harsh penalties for agricultural offences are found in the codes of countries where there is a shortage of livestock or food, but not in other codes.[701] By 1935, however, all criminal codes in Africa, except for the Gold Coast, had an original source, the 1889 Queensland Code.[702]

Criminal law in England was the site of "public redefinitions of class boundaries" in the 18th century, a purpose that carried over into the colonies.[703] As seen in chapter 3 of this dissertation, beginning in the 16th century, English law criminalized poor children and families by declaring public spaces zones where certain children could be accused of vagrancy and theft. These laws justified intervention into families by the state. There is

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[696] Shivji et al., *Constitutional and Legal System of Tanzania*, 260.
[697] Morris, "A History of the Adoption of Codes of Criminal Law and Procedure in British Colonial Africa," 13.
[698] Ibid.: 14.
[699] J.J.R. Collingwood, *Criminal Law of East and Central Africa* (London: Sweet & Maxwell, 1967).
[700] Morris, "A History of the Adoption of Codes of Criminal Law and Procedure in British Colonial Africa," 15-16.
[701] Elias, *British Colonial Law: A Comparative Study of the Interaction between English and Local Laws in British Dependencies*, 151.
[702] Morris, "A History of the Adoption of Codes of Criminal Law and Procedure in British Colonial Africa," 23.
[703] Benton, *Law and Colonial Cultures: Legal Regimes in World History, 1400-1900*, 14.

no doubt that these laws were not aimed at children of wealthy families, but at those who could be mistaken for vagrants and thieves. Criminal law then reinforced class boundaries under the pretense of civilizing and charitable behavior. Likewise in the colonies, "shifting definitions of criminality" was a key strategy of domination by the British.[704]

French criminal law in the colonies and protectorates followed a similar pattern. French criminal law was introduced in Algeria in 1842 and made applicable to all.[705] The French were much more interested in transplanting French legal principles to Algeria than to other territories, but applied French criminal law everywhere. The Algeria Code of 1902-3 allowed for French criminal law to be applied directly to Algeria, and the Code was eventually adopted in Tunisia and Morocco as well.[706]

There is evidence that the British (and, to some extent, the French) applied and enforced criminal law in the colonies to a much greater degree than any other type of law. Criminal law serves a unique purpose in society, as it determines what conduct is permitted by the state based on a morality that is highly subjective, but presented as just and universal. In effect, it controls the population by establishing boundaries of legality and illegality (according to the colonizer's needs). Because of its unique power to shape social organization, it is expected that criminal law has a greater effect on the acculturation of a society to norms than other types of law do. Age restrictions on the death penalty were among these norms.

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[704] Ibid.
[705] Hooker, *Legal Pluralism: An Introduction to Colonial and Neo-Colonial Laws*, 209, Salacuse, *French-Speaking Africa*, 191.
[706] Hooker, *Legal Pluralism: An Introduction to Colonial and Neo-Colonial Laws*.

STATE INTERVENTION INTO TRADITIONAL LAW

This section evaluates intervention into traditional law by the colonial powers, which established an age-based system of maturity, introduced Western norms about children and childhood into the colonies and, in some cases, justified colonial rule by 'protecting women' and children from native men who would corrupt them. The section examines the particular ways these norms were introduced and spread, first coercively by intervention in traditional law and then through acculturation as these interventions became routine and bureaucratized and were continued after independence. The section explores how a key part of the legal system of colonial rule became the protection of child 'brides' from native men, a subject replete with metropolitan concerns about gender, sex and maturity.

Both the British and the French avoided family, religious and traditional law for the most part early on in their rule, but both empires also found it increasingly difficult to do so as time went on. Their intervention in traditional law (such as by passing laws establishing age limits for marriage) often sparked resistance from colonies and lent fuel to the nascent independence movements. These forays into traditional law, however, established a precedent for state intervention, in some states institutionalizing a particular type of relationship between the state and the family. The relationship between the state and children (and the state and women), in particular, took on paternalistic characteristics. By independence, these relationships had been firmly internalized and continued. Ironically, the same state intervention in families that sparked outcries from the general population during colonial rule also acclimated colonial societies to

intervention in traditional law and families, thus allowing for the perpetuation and gradual expansion of protections for children (and women) after independence.

It is impossible to identify with any degree of confidence ideas about children that were common and widely subscribed to in pre-colonial Africa. More recent history, especially since the introduction of Islamic rule in Africa and the Middle East, suggests that the parameters of childhood were between age seven and puberty for boys and age nine and/or whenever married for girls.[707] In some places like Zanzibar, a child was defined by "purpose and context," implying a very fluid definition of childhood.[708]

Studies of British colonialism in India demonstrate an important phenomenon likely applicable to the cases in this chapter: The British imported an age-based understanding of childhood in India, but the idea did not diffuse easily. Not only were the ages of Indian children difficult to determine with much accuracy, but many colonialists, especially those that worked with young criminals, believed that the ages of European children did not correspond with those of Indian children.[709] It was thought that many Indian children, including those who worked as prostitutes, displayed a maturity, or corruption, that belied their numerical age. Nonetheless, the issue was settled by 1922, when the Indian Jails Committee established a young person to be between the ages of 14 and 16; childhood was determined by age alone and "not on the 'depravity' of the individual child, the 'heinousness' of the offence, the notoriety or poverty of the child's social environment, or the discretion of the judge or local government."[710] This was not the first time the British government used age to mark the boundaries of childhood, nor

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[707] Shivji et al., *Constitutional and Legal System of Tanzania*, 167, Salacuse, *French-Speaking Africa*, 453.
[708] Shivji et al., *Constitutional and Legal System of Tanzania*, 167.
[709] Sen, *Colonial Childhoods: The Juvenile Periphery of India 1850-1945*, 67.
[710] Ibid., 68.

was the age limit reached in India the highest age limit for childhood to date: As early as the 1860s, famine relief efforts drew a distinction between adults (18 years and older) and children (under 18 years).[711]

There is a great deal of evidence, presented below, that the British and French imposed an age-based conception of childhood on their colonies in Africa and the Middle East, much as the British had done in India. Since the pre-colonial history of childhood in Africa and the Middle East is not readily available, this section will begin with some modest assumptions. The boundaries of childhood in Africa and the Middle East before colonialism were not based on age, but rather on experience or the carrying out of particular rites. The idea of protection for those under age 18 likely did not exist; girls and boys tended to marry below the age of 18 and were, in most parts of Africa and the Middle East, allowed to take on many responsibilities that today would be reserved for adults, especially in the West.

Colonial governments faced a predicament with traditional law, or with those aspects of traditional law that typically governed marriages, inheritance, the maintenance (of wives and children) and divorce. On the one hand, imperial powers recognized the sacred nature of traditional law and the link between traditional law and local religion. Both the British and the French steered clear of intervention in traditional law for fear of sparking anti-colonial sentiment. On the other hand, colonial governments found it increasingly difficult to justify colonial rule and not to intervene in traditional law. Since colonialism was justified by the notion that empires were benevolent enterprises,

[711] Ibid.

spreading 'civilization' to the 'uncivilized,' [712] it became impossible to ignore the widespread abuse of women and children as the issues of child brides and forced marriages began to receive increased attention in Europe.[713] Child labor also raised concerns, as the practice was linked to slavery, a particularly passionate issue for the British.[714] Gender issues, especially, were a sticking point for Europeans.[715] Compulsory marriage, genital mutilation (often performed on young girls) and child marriage upset metropolitan sensitivities and ultimately forced colonial governments to change the very laws they sought to avoid.

In the British colonies, precedent for changes in traditional law came from the 1857 Indian rebellion, often referred to as the Mutiny. Britain promised after the Mutiny never to intervene in traditional law again.[716] The policy could not be maintained, however, and Britain began to make changes to Indian traditional law toward the end of the 19th century in response to concerns about child marriage, as discussed in more detail below. Intervention in African traditional law generally began much later, in the first few decades of the 20th century.

There is very little written on the norms of childhood under the British or French in Africa and the Middle East. The information available on childhood in the colonies mostly comes from studies on India and child marriage or the practices of orphanages and juvenile reform homes. Since much of Indian penal law was carried into Africa by the

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712 Pagden, "Human Rights, Natural Rights, and Europe's Imperial Legacy," 183-184.
713 Mommsen, "Introduction," 4-5.
714 Beverly Grier, "Invisible Hands: The Political Economy of Child Labour in Colonial Zimbabwe, 1890-1930," *Journal of Southern African Studies* 20, no. 1 (1994).
715 Antoinette Burton, "From Child Bride To "Hindoo Lady": Rukhmabai and the Debate on Sexual Respectability in Imperial Britain," *The American Historical Review* 103, no. 4 (1998), Fourchard, "Lagos and the Invention of Juvenile Delinquency in Nigeria.", Ann L. Stoler, "Making Empire Respectable: The Politics of Race and Sexual Morality in 20th-Century Colonial Cultures," *American Ethnologist* 16, no. 4 (1989).
716 Mommsen, "Introduction," 8-9.

British, especially into East Africa, an argument can be made that at least some scholarly findings are generalizable to British rule there. This is especially true since the treatment of children in the colonies is less important for the argument of this chapter than the colonial justification for intervention based on trends in London and elsewhere in Europe. The objective of the remaining part of this section is thus to demonstrate that protections for women and children increasingly provided a justification for colonialism, as part of the 'civilizing mission' and 'white man's burden.' A propensity to justify colonialism on the basis of protecting women and children emerged less from evidence of actual abuse in the colonies and more from events and ideas prevalent in Europe, such as fears of sexual promiscuity in young women and a new interest in the science of race. As a result, many of the findings about India are relevant to East Africa. As for the French Empire, there is little information about French rule and children other than the list of child protection measures the French took in the 20th century in Algeria and Tunisia (listed below). There is ample evidence, however, that similar protections were enacted in the French colonies in response to concerns about child marriage.[717]

Orphanages and reform schools were particular places of interest in colonial India for those researching children and childhood. They were sites of intense study of children since the researchers had few guardians to contend with who could object to these studies.[718] After the Mutiny of 1857, the colonial state began to take on "overtly paternal functions, identifying and gradually occupying various theatres of child-control."[719] The studies of children allowed the British to scientifically evaluate many of the racial

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[717] Julia Ann Clancy-Smith and Frances Gouda, *Domesticating the Empire: Race, Gender, and Family Life in French and Dutch Colonialism* (Charlottesville, VA: University Press of Virginia, 1998).
[718] Sen, "The Orphaned Colony: Orphanage, Child and Authority in British India," 465, ———, "A Juvenile Periphery: The Geographies of Literary Childhood in Colonial Bengal."
[719] Sen, "The Orphaned Colony: Orphanage, Child and Authority in British India," 464.

theories that supported colonialism.[720] The results of these studies would often "render colonialism necessary and rewarding."[721]

In the 1860s, race was entering a "scientific-bureaucratic phase."[722] Children were the key to understanding the racial hierarchy that supported colonialism. Satadru Sen argues, "The discovery of a location, a diet, a uniform, a curriculum, and a routine of work, play, sleep and study that might suit the race was a discovery of the race itself."[723] The question that these social scientists were seeking to answer gets to the very root of colonial childhood: If "given 'equal advantages,' " would children of color "grow up to be 'nearly as intelligent as Europeans?' "[724] Essentially, these social scientists were trying to "discover the 'childhood' … of natives."[725] At stake was the assumption that children were naturally adaptable and innocent.[726] Either way, colonial society could not lose: If the children of colonized peoples were inherently less intelligent and capable, then the racial order in colonial society was sound. If they were in fact capable of equal intelligence when separated from their countrymen and raised and educated by Europeans, then the colonial project was not only sound, it was justified. The colonial mission would have a *raison d'être* in children.

When the Western idea of childhood was first introduced in the colonies in the mid-19th century, it did not fare well. There was a "widespread conviction that 'native childhood' was an oxymoron."[727] Norms of childhood clashed with assumptions that

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[720] Ibid.: 463.
[721] Ibid.: 464, 469.
[722] Ibid.: 478.
[723] Ibid.: 471.
[724] Ibid.: 473-474.
[725] ———, "A Separate Punishment: Juvenile Offenders in Colonial India," 83.
[726] ———, "The Orphaned Colony: Orphanage, Child and Authority in British India," 480-481, ———, *Colonial Childhoods: The Juvenile Periphery of India 1850-1945*, 1.
[727] Sen, *Colonial Childhoods: The Juvenile Periphery of India 1850-1945*, 1.

'native' children were "small, perverse adults."[728] This attitude began to change in the late 19th and early 20th centuries.

Mary Carpenter, the reformer discussed in chapter 3, was also interested in reform efforts in the colonies and carried out an 1866 "tour" of orphanages and reform schools in India. Finding the boys in male orphanages apathetic and dependent, she blamed this trait on the hiring of Indian servants who served as a source of "sexual and racial contamination."[729] Although optimistic about the white children, Carpenter found the Eurasian children less than promising.[730] She supported the creation of a reformatory system in India. Individual sub-sets of Indian society (Parsis, Brahmin, Christians and Jews) agreed with Carpenter's proposed reforms for child offenders and "competed for the badges of civilization and modernity with each other."[731]

Carpenter also found, and salaciously reported, the phenomenon of child brides, which would become "one of the key ideological and material sites for female colonial reform intervention."[732] Child marriage was seen as clear evidence of barbarism and as "the biggest barrier to the intellectual and social progress that was thought to flow from Western education."[733] Carpenter sought to "expose the …native family to the moral searchlight of middle-class colonialism."[734]

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[728] Ibid.
[729] ———, "The Orphaned Colony: Orphanage, Child and Authority in British India," 471-472.
[730] Ibid.: 472.
[731] ———, "A Separate Punishment: Juvenile Offenders in Colonial India," 94.
[732] Burton, "From Child Bride To "Hindoo Lady": Rukhmabai and the Debate on Sexual Respectability in Imperial Britain," 1126.
[733] Ibid.: 1127.
[734] Sen, "A Separate Punishment: Juvenile Offenders in Colonial India," 93.

In England, the age of consent was raised from 13 to 16 in the 1880s.[735] This act was in direct response to new anxiety about child prostitution in London, a "moral panic"[736] over a phenomenon seen as a greater "threat to civilization than…delinquent boys." [737] New concerns about child marriage in India led some to dismiss British claims to be a civilizing power as "hollow."[738] The juxtaposition of increasing protections for children and rights for women in England, especially in terms of age of consent and efforts to curb child prostitution, against the ongoing problem of Indian child brides on Britain's watch meant that the British could no longer ignore calls to change traditional law. The campaign to protect children and women in colonial societies provided a new lens through which to view the colonies.

By challenging the treatment of Indian young girls and women, Britain was challenging the Indian man's capacity for self-rule.[739] Only the British, as benevolent rulers, could protect Indian women and young girls from Indian men. As a result, British colonialism found a new civilizing mission to justify British rule. The helplessness of Indian girls and women "shored up the need for intervention by a chivalrous English state and appeared to confirm the inadequacies of indigenous political protest."[740] The age of consent was raised from 10 to 12 in the 1891 Indian Age of Consent Act; the reaction in India was "fierce."[741]

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735 Burton, "From Child Bride To "Hindoo Lady": Rukhmabai and the Debate on Sexual Respectability in Imperial Britain," 1124.
736 Louise A. Jackson, *Child Sexual Abuse in Victorian England*, Women's and Gender History (London ; New York: Routledge, 2000), 41.
737 Sen, "A Separate Punishment: Juvenile Offenders in Colonial India," 85.
738 Burton, "From Child Bride To "Hindoo Lady": Rukhmabai and the Debate on Sexual Respectability in Imperial Britain," 1121.
739 Ibid.: 1122.
740 Ibid.: 1144.
741 Ibid.: 1120-1121.

Britain also enacted penal reform for Indian children, an essential part of reform measures at home. 'Juvenile offender' became a legal category in India in the mid-19th century, and an apprenticeship act came into force in 1850.[742] Reformatories were also founded in the 1850s. The Reformatory Schools Act of 1876 and 1897 and a children's act in the 1920s demonstrated an increasing concern with young criminals.[743] A central idea behind the removal of children from families in India, as in England in the 19th century, was that parents were the source of children's delinquency.[744]

Concern for young girls broadened into a concern for children in general in the late 19th and early 20th centuries, as both Britain and France enacted a number of protections for children in their territories in Africa and elsewhere.[745] Education in British colonies was commonly left to missionaries before the 20th century, who used education to fight against African customs commonly thought repugnant, such as genital mutilation.[746] Independent schools were established in Kenya in the 1920s and 1930s after national protests.[747]

There is far less written on the study of childhood in the French colonies. The French, like the British, steered clear of family law in Algeria and Tunisia for the majority of their rule.[748] France even granted some recognition for traditional family law in parts of Algeria, such as the Kabyle law in the Berber region.[749] When France finally altered Algerian traditional law, it tried to couch these changes in terms of Islamic law in

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742 Sen, "A Separate Punishment: Juvenile Offenders in Colonial India," 86.
743 Ibid.: 83.
744 Ibid.: 89.
745 David Pomfret, "'Raising Eurasia'" Race, Class and Age in Hong Kong and Indochina," *Comparative Studies in Society and History* 51, no. 2 (2009): 326.
746 Beth Maina Ahlberg, *Women, Sexuality and the Changin Social Order* (Philadelphia: Gordon and Breach, 1991), 75-78.
747 Ibid., 79.
748 Charrad, *States and Women's Rights: The Making of Postcolonial Tunisia, Algeria, and Morocco*, 114.
749 Ibid., 133.

an attempt to avoid increasing anti-colonial sentiment.[750] The French finally changed traditional law during the war for independence, raising the age of majority to 18 or 21 (depending on the location) in 1957.[751] In a 1959 law, marriage became a public act that must be registered, along with births, deaths and divorces.[752] The same law set the minimum age for marriage at 18 for men and 15 for girls.[753] These changes allowed France to exert greater control over the Algerian population and to prove its concern with child marriage.[754] The same law also required consent of women in marriage, undermining male power in patrilineage and making child marriage more difficult.[755]

Similar changes were enacted in Tunisia, albeit for different reasons and with a different post-independence outcome.[756] Family law was left alone in Tunisia during most of the French colonialization because they could achieve their objectives without altering it.[757] In Algeria, the French had uprooted large swaths of the indigenous population, resulting in changes in family structure. This made the regulation of family law in Algeria a necessity.[758] In Tunisia, colonization was primarily carried out by commercial and industrial interests, which did not necessitate intervention in family law.[759] Intervention finally came with the war for independence, as efforts were made to curb child marriage and reduce the power of fathers to consent for women in marriage.[760] Unlike changes in Algeria, interventions in family law in Tunisia were much more

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[750] Ibid., 132.
[751] Ibid., 137.
[752] Ibid., 137-138.
[753] Ibid., 138.
[754] Ibid., 137-138.
[755] Ibid., 138.
[756] Ibid., 132.
[757] Yaw Oheneba-Sakyi and Baffour K. Takyi, "Introduction to the Study of African Families: A Framework of Analysis," in *African Families at the Turn of the 21st Century*, ed. Yaw Oheneba-Sakyi and Baffour K. Takyi (Westport, CT: Greenwood Publishing Group, 2006), 28.
[758] Ibid., 29.
[759] Ibid.
[760] Charrad, *States and Women's Rights: The Making of Postcolonial Tunisia, Algeria, and Morocco*, pp. 137-138.

modest. The changes were used, however, by Tunisian nationalists to stoke independence efforts.

As in many colonies of both the French and the British, family and laws governing the structure of family were seen in Tunisia as the last vestige of independence from colonial power.[761] The Tunisian nationalist movement opposed French rule and over time was able to unify both the liberal elite and conservative Tunisian forces under the banner of independence. Both liberals and conservatives supported the retention of traditional customs and identity.[762] Upon independence, these factions recognized their ideological differences and fought for control of the new sovereign state.[763] Bourguiba, a liberal reformer, received help from the French to establish his rule. To shore up his power, he established state agencies in rural areas in order to intervene in formerly autonomous communities and to undermine efforts to enforce traditional religious law.[764] Shortly after independence, Bourguiba enacted the Code Personal Status that codified much of the liberal vision of a reformed Tunisian society and made a powerful statement about the role of the state in family law, revising much of Islamic family law.[765] These reforms continued throughout the 1960s until more conservative forces asserted greater control over family law beginning in the 1970s.[766]

Issues involving children were often a part of these interventions in all four of the colonial cases. Many of the reforms involved registration (birth, marriage, divorce, death) and marriage restrictions. The colonial powers needed registration laws to monitor the

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761 Oheneba-Sakyi and Takyi, "Introduction to the Study of African Families: A Framework of Analysis," 30.
762 Ibid.
763 Ibid., 31.
764 Ibid., 32.
765 Ibid.
766 Ibid., 35-36.

population and maintain control. Marriage reform (especially age restrictions and consent laws) had more to do with the discourses about sexuality and women's rights, discussed above. Various children's acts were passed establishing juvenile courts and other measures of protection for children, including ordinances in Kenya in 1933, 1934 and 1948 and amendments to the ordinances in 1935 and 1936,[767] and in Tanganyika in 1937 and 1945.[768] The Kenyan 1934 Ordinance established a young person as between the ages 14 and 18. A Birth and Registration Act was enacted in Kenya in 1928. In Algeria and Kenya, the age of majority was raised to 18 or 21, depending on the location and circumstance: Kenya in the Age of Majority Ordinance 1933, Cap. 33;[769] and Algeria in 1957. Requirements for marriage registration and limitations of marriage age were also found in both French and British colonies. In Tunisia, marriage registration was required by the 1957 Civil Status Act. In Algeria, the 1959 Marriage Ordinance[770] established the marriage age as 18 for boys and 15 for girls. Before independence, eligibility for marriage in Kenya was set at 16 for both boys and girls.[771] A 1951 amendment to the Marriage Act in Kenya required consent from a parent or guardian for marriages in which one party was under age 18.[772] There is also evidence that rules were established for guardianship and adoption in the British colonies, adoption being a particularly sensitive subject in Islam because it concerns legitimacy. These rules include: the Kenya Adoption

[767] Kenya: Young People and Children's Ordinance 1933, Juvenile Ordinance 1934. Anderson, *Islamic Law in Africa*, Chloe Campbell, "Juvenile Delinquency in Colonial Kenya, 1900-1930," *The HIstorical Journal* 45, no. 1 (2002): 139.
[768] Tanganyika Children and Young Persons Act of 1937, Cap. 13 and the Approved Schools Decree Cap. 59 of 1945
[769] Anderson, *Islamic Law in Africa*, 92.
[770] Ordinance no. 59-274 of Feb. 4, 1959 JORF Feb. 11, 1959
[771] Mwalimu, *The Kenyan Legal System: An Overview*, 30.
[772] Act 26 of 1951

of Children Ordinance 1933, [773] the Kenya Guardianship of Infants Act of 1959[774] and the Tanganyika Adoption of Infants Ordinance 1942.[775]

Attention to delinquent and street children increased after World War II as the justifications for colonialism unraveled, and it became increasingly evident that empires could not be maintained. Young men in particular became a threat to the colonial order in Tanganyika.[776] Unlike the French, who sought to destroy tribal bonds in Algeria, the British in Tanganyika and Kenya feared the widespread urbanization and detribalization that appeared to break down social norms of control by reducing the influence of tribes on young men.[777] Children, previously an important part of the civilizing rescue mission, were now constructed as its greatest enemy. There also appears to have been a gender dimension to Britain's concerns, as young men were constructed as threats while young women were constructed as victims. As stated in chapter 1, Fourchard contends that a judicial and administrative machinery in British colonies created 'juvenile delinquency' based largely on the metropolitan fears of female promiscuity and child marriage.[778] This development, Fourchard and others argue, took place in the colonies of France, Belgium and Portugal as well.[779] Indeed, there is a fair amount of literature examining the French concern regarding the *metis*, or children of mixed parentage—implying 'illustrious' relationships, especially in East Asia.[780]

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[773] Anderson, *Islamic Law in Africa*, 92.
[774] Mwalimu, *The Kenyan Legal System: An Overview*, 38.
[775] Anderson, *Islamic Law in Africa*, 129.
[776] Mario I. Aguilar, *Rethinking Age in Africa : Colonial, Post-Colonial, and Contemporary Interpretations of Cultural Representations* (Trenton, NJ: Africa World Press, 2007), 45-50.
[777] Ibid., 46. Campbell, "Juvenile Delinquency in Colonial Kenya, 1900-1930," 131-132.
[778] Fourchard, "Lagos and the Invention of Juvenile Delinquency in Nigeria," 116, 132-134.
[779] Ibid.: 116, John Iliffe, *The African Poor: A History* (Cambridge: Cambridge University Press, 1987), 188.
[780] Pomfret, "'Raising Eurasia'" Race, Class and Age in Hong Kong and Indochina.", Ann L. Stoler, "Sexual Affronts and Racial Frontiers: European Identities and the Cultural Politics of Exclusion in Colonial Southeast Asia," *Comparative Studies in Society and History* 34, no. 3 (1992), Owen White, *Children of the French Empire: Miscegenation and Colonial Society* (Oxford: Clarendon Press, 1999).

In sum, this section has demonstrated that a key part of the coercive establishment of colonial law, and thus of the establishment of norms about children, was the intervention of the state into traditional law. Through this intervention, colonial powers were able to codify a primarily age-based system of child protection and institutionalized a relationship between the state and the child that was paternalistic and decidedly Western. These norms about children often clashed with racial 'scientific' beliefs, and much time was spent deciphering the nature of children, especially by the British. The underlying justification for colonialism, the *mission civilatrice* of France and the British 'white man's burden,' meant that the colonial powers faced pressures to enact protections for children (especially young girls in areas of sex and marriage), forcing these powers to justify their rule through these protections, among other ways.[781] This intervention, however, increased resentment toward the empires and hastened calls for independence. Yet intervention also firmly established a role for the state in family life and institutionalized child welfare as a concern of the state, to such an extent that law and norms of children's protection were maintained after the colonies gained independence. Restrictions on the death penalty for child offenders were a part of these norms and law.

OTHER CASES

This section examines more briefly the case studies of Japan and Ethiopia and the nature of socialization regarding norms of child protection in each state. The section

[781] Pomfret, "'Raising Eurasia'" Race, Class and Age in Hong Kong and Indochina.", Fourchard, "Lagos and the Invention of Juvenile Delinquency in Nigeria.", Saheed Aderinto, "'the Girls in Moral Danger': Child Prostitution and Sexuality in Colonial Lagos, Nigeria, 1930s to 1950," *Journal of Humanities and Social Sciences* 1, no. 2 (2007), Burton, "From Child Bride To "Hindoo Lady": Rukhmabai and the Debate on Sexual Respectability in Imperial Britain.", Stoler, "Making Empire Respectable: The Politics of Race and Sexual Morality in 20th-Century Colonial Cultures.", Jackson, *Child Sexual Abuse in Victorian England.*

provides a point of comparison to the colonial cases, as Japan had previously enacted measures protecting child offenders before the American occupation, while Ethiopia voluntarily adopted Western legal principles after World War II.

JAPAN

Japan abolished the death penalty for child offenders under age 18 in the Juvenile Law of 1948 during the Shōwa Period (1926-1989).[782] This was a period of Japanese history marked by a sharp rise in nationalism, defeat in World War II and economic growth in the 1970s and 1980s.

Efforts to develop a modern Japanese legal system began during the Meiji restoration, beginning in 1868, when the new Emperor Mutsuhitu sought to replace the shogunate, or military rule, with more democratic rule.[783] The number of capital crimes was reduced during this period with the 1873 Reformed Penal and Administration Laws,[784] a policy change attributed to the influence of European and North American legal principles.[785] The number of capital offences was further reduced with the 1882 Penal Code, also thought to have been influenced by the American and European legal systems.[786] The legal changes adopted during the Meiji period did not necessarily reflect a desire to emulate the West; instead they were enacted primarily in response to fears of Western domination and "to break away from unequal treaties with western powers [sic]."[787] The militarization of Japan, associated with the rise of nationalism and wars in

[782] Shōnen Hō, Law no. 168 of 1948
[783] Weixia Chen, "The Death Penalty in Japan and China: A Comparative Study" (M.A., University of California, 2003), p. 4.
[784] 1873 Kaitei Ritsurei
[785] Chen, "The Death Penalty in Japan and China: A Comparative Study", p. 5.
[786] Ibid.
[787] Ibid., p. 11.

the first half of the 20th century, led to the increased use of the death penalty.[788] Since the Meiji period, hanging has been the only method of execution allowed in Japan.[789]

Until 1947 and the post-war period, trials in Japan were modeled after the Continental legal system. After 1947, the Japanese trial process began to take on characteristics of the Anglo-American common law system.[790] The U.S. Constitution, for example, largely influenced the Japanese Constitution of 1947.[791] The criminal procedure code that existed prior to World War II was based primarily on German Law, but was then "modified to reflect Anglo-American legal concepts in contexts important to the protection of human rights."[792] The occupation period resulted in an unprecedented number of common law legal advisers that set out to reconstruct the Japanese state and reshape its legal practices.[793] The legal system in Japan in general is now a mix of civil and common law, representing the influence of American and British *and* Continental legal sources.[794]

The death penalty was applied much more frequently at the beginning of the Showa period than at its end. Prior to World War II, the number of death sentences ranged between 12 and 37 per year.[795] Crime began to rise steadily after the outbreak of the Sino-Japanese War in 1937, but declined during World War II with the exception of rape and sexual assault.[796] The decline of crime in general during the War can probably

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[788] Ibid., p. 5.
[789] Ibid., p. 15.
[790] Minoru Shikita and Shinichi Tsuchiya, *Crime and Criminal Policy in Japan: Anaylsis and Evaluation of the Showa Era, 1926-1988* (New York: Springer-Verlag, 1992), pp. xiii-xiv.
[791] Chen, "The Death Penalty in Japan and China: A Comparative Study", p. 11.
[792] Shikita and Tsuchiya, *Crime and Criminal Policy in Japan: Anaylsis and Evaluation of the Showa Era, 1926-1988*, p. xviii.
[793] Chen, "The Death Penalty in Japan and China: A Comparative Study", pp. 52-53.
[794] Shikita and Tsuchiya, *Crime and Criminal Policy in Japan: Anaylsis and Evaluation of the Showa Era, 1926-1988*, p. xvii.
[795] Ibid., p. 331.
[796] Ibid., p. 43.

be attributed to the drafting of men in the age group most likely to commit crime.[797] The number of executions during this period is unknown.[798] At the war's end, the death penalty surpassed its prewar rates, reaching a peak of 116 per year in 1948 before declining.[799] Heinous crimes by juveniles after the war more than doubled pre-war rates.[800] By 1951, however, the execution rate had declined to 45 per year before falling to its prewar level in the mid-1960s.[801] Since the 1970s, there have been fewer than 10 executions per year, on average.[802] In 1967, the number of capital crimes was reduced to three: murder, death during robbery and death by explosives.[803]

Prior to World War II, there were efforts in Japan to distinguish child offenders from adults, and prosecutors had great discretion, including the choice to consider age as a mitigating factor when it came to types and degrees of punishment.[804] These efforts began during the Meiji period (1868-1912) with the enactment of the 1880 Penal Code, which stipulated that children under the age 12 were without criminal responsibility (*doli incapax)*.[805] In 1900, the Child Reform Law introduced the first public reform schools for those up to age 15. This was followed by the 1908 Penal Code, which raised the age of criminal responsibility to 14. That same year, the Child Reform Law Amendment raised the age limit for reform schools to 18, and in 1917, the National Reform School Ordinance established a separate reform system for those older than 14.[806] The 1923 Juvenile Law created a legal system for offenders under the age 18 and exempted those

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797 Ibid.
798 Ibid., p. 1.
799 Ibid., p. 331.
800 Ibid., p. 240.
801 Ibid., p. 150.
802 Ibid., p. 331.
803 Chen, "The Death Penalty in Japan and China: A Comparative Study", p. 14.
804 Shikita and Tsuchiya, *Crime and Criminal Policy in Japan: Anaylsis and Evaluation of the Showa Era, 1926-1988*, p. xv.
805 Ibid., p. 253.
806 Ibid.

younger than 16 from the death penalty.[807] The Poor Relief Law of 1929 and the Maternal and Child Protection Law of 1937 both gave assistance to needy children, though the laws' objectives were more "to ensure an adequate supply of high-quality manpower for industrial and military needs, rather than to improve the lives of children as individuals."[808] In 1933, efforts to curb child neglect and abuse culminated in the Law to Prevent Child Abuse and the 1934 Child Education and Training Law, which among other stipulations, created a state organ for the scientific study of children and child behavior.[809] A more comprehensive child welfare law was passed in 1947.[810]

The 1948 Juvenile Law, which abolished the death penalty for those under age 18, increased protections for juvenile offenders in many other ways: The Law defined juveniles as offenders under the age of 20, established family court procedures separate from the procedures for adults, and established rehabilitation rather than punishment as the state's penal philosophy toward juvenile offenders.[811] The system to implement the Juvenile Law was developed over the ten years following the war, when juvenile crime was at its highest. [812]

Both juvenile crime rates and general crime rates rose after World War II, amid the chaos of post-war Japan. It was a time of record-high inflation rates, rampant food shortages and high unemployment. Manufacturing facilities had been destroyed in the war; the economy was in shambles; and there was widespread social instability.[813] The number of juveniles (age 20 and younger) who were convicted of penal code violations in

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807 Ibid., p. 254.
808 Kathleen S. Uno, "Japan," in *Children in Historical and Comparative Perspective*, ed. Joseph M. Hawes and N. Ray Hiner (New York: Greenwood Press, 1991), p. 400.
809 Shikita and Tsuchiya, *Crime and Criminal Policy in Japan: Anaylsis and Evaluation of the Showa Era, 1926-1988*, p. 255.
810 Ibid., p. 256.
811 Ibid., p. xxvvii.
812 Ibid., p. 258.
813 Ibid., p. 43.

1940 was 3,030.[814] By 1946, the number of juvenile convictions had increased to 17,436, despite a relatively constant percentage of juveniles in the total population during the period. By 1951, the juvenile conviction rate had declined to 7,577.[815] The very next year, 1952, the number fell even more, to 2,305.[816] The majority of juvenile offenders convicted during this period were either 18 or 19, old enough to incur a capital sentence, yet only one offender between the ages of 18 and 20 was executed between the adoption of the 1948 Juvenile Law and the end of the Shōwa period.[817]

The surge of violent crime following the end of the war and the restraint shown by the Japanese criminal system in punishing these perpetrators without resorting to the death penalty indicates that the legal acculturation to norms against the child death penalty was complete. Japan abolished the child death penalty even without a consensus in Anglo-American law regarding the norm. The abolition of the child death penalty nested well within previously institutionalized ideas about children's protection in Japan and, as will be argued in chapter 6, the United States did not vociferously reject the norm until the late 1980s and early 1990s. As a result, Japan adopted a policy that reflected European law and was consistent with norms of childhood it had already institutionalized.

Ethiopia

Ethiopia abolished the death penalty for those under age 18 in the 1957 Penal Code, article 118. The earliest law dealing with 18-year-olds that I was able to identify

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[814] Ibid., p. 279.
[815] Ibid.
[816] Ibid., p. 280.
[817] Ibid., pp. 279-281.

was the Vagrancy and Vagabondage Proclamation of 1947, which established that children under age 18 could be placed in detention if they were found to be vagrants or unlawful.[818] The law was repealed with the passage of the 1957 Penal Code, but age 18 continued to serve as an important benchmark for distinguishing adult criminals from child offenders.[819]

The penal code was drafted by a Swiss jurist, Jean Graven, and replaced the earlier 1930 Penal Code, written when the Emperor Haile Selassie came to power. Although the Penal Code had numerous foreign influences, large parts of it were based on the U.S. Constitution and its safeguarding of rights for persons accused of a crime.[820] These provisions were first included in the 1955 Ethiopian Constitution (which influenced the 1957 Penal Code), for which the American jurist Edgar Turlington was a central drafter.[821] Again, the norm nested well within emerging ideas of child protection seen (now) throughout the world: both in Europe and (increasingly) in British and French colonies. The child death penalty in the United States was at odds with these increasingly prevalent ideas about juvenile justice, especially those with their origins in the U.S. justice system. As chapter 6 will demonstrate, the United States was unique among Western powers in its continuation of the child death penalty into the 21st century.

Unlike the other African cases in this dissertation, Ethiopia is unique because it was not subject to foreign rule, except for the Italian occupation during World War II. Nonetheless, the influence of foreign law on the Ethiopian legal system after World War II was not a new phenomenon. Foreign influence on Ethiopian law dates back to the reign

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818 Steven Lowenstein, *Ethiopia*, ed. Alan Milner, *African Penal Systems* (New York: Frederick A. Praeger, 1969), p. 49.
819 Ibid., p. 49-50.
820 Franklin F. Russell, "The New Ethiopian Penal Code," *American Journal of Comparative Law* 10 (1961): p. 267.
821 Ibid.

of Emperor Menilik II (1889-1913), who was advised by foreign jurists, but under whom little law was written that directly referenced foreign legal systems.[822] One exception is the 1908 decree on land registration that references the French civil code.[823]

The use of foreign law and the influence of foreign jurists on Ethiopian legal development proliferated during the reign of Haile Selassie, both as regent to the Empress Zauditu and as Emperor from 1930 to 1974. Selassie set out to modernize his kingdom and to establish ties with Western and African powers; he played an important role in the establishment of the Organization of African Unity (the predecessor of the African Union). When asked about the sources and development of Ethiopian law, Selassie suggested, "[The Ethiopians] have never hesitated to adopt the best that other systems of law can offer, to the extent that they respond and can be adapted to the genius of our particular institutions."[824]

Prior to the 1950s, Ethiopian law was an "amorphous mix."[825] Traditional law was commonly employed, but there was no comprehensive source for the drafters of new laws to draw from.[826] An important feature of criminal procedure in traditional law prior to the Italian occupation was that there was no prosecutorial agency. As such, the injured party both initiated the complaint and prosecuted the offender. A convicted murderer would be handed over to the victim's family for punishment, which could consist of

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[822] J Vanderlinden, "Civil Law and Common Law Influences in the Developing Law of Ethiopia," *Buffalo Law Review* 16 (1966-7): p. 252.
[823] Ibid.
[824] Steven Lowenstein, *Materials on Comparative Criminal Law as Based Upon the Penal Code of Ethiopia and Switzerland* (Addis Ababa: Oxford University Press, 1965), p. 61.
[825] John H. Beckstrom, "Transplantation of Legal Systems: An Early Report on the Reception of Western Laws in Ethiopia," *The American Journal of Comparative Law* 21, no. 3 (1973): 559.
[826] Ibid.

anything they desired—money or gruesome death.[827] Over time, the emperor sought more control over the practice, monopolizing the determination of capital sentences and requiring mediation before such blood revenges could occur.[828] Later, the government tried to assert even greater control by limiting the type of punishments allowed and by requiring that they occur at government-supervised locations.[829]

The influence of foreign legal systems on Ethiopian legislative development was primarily Continental, mostly French, prior to World War II. During the war, Selassie went into exile in the United Kingdom for five years. After the war, with the presence of British forces in Ethiopia following liberation from the Italians, the country's legal system became increasingly based on the British common law model. The post-war period was a vibrant time of legal development, with the drafting of the 1955 Constitution and six additional codes in the 10 years that followed. All of the codes either were crafted by foreign lawyers or "inspired by foreign sources," including British, French, Indian, Israeli, Italian and Swiss.[830] The court system took on a particularly British character, especially following the Italian occupation, when English replaced French as the country's second language, and there was a greater reception to British legal thought among Ethiopian jurists.

Nonetheless, there remained a number of inconsistencies in the Ethiopian system, as some of the codes, including the Penal Code, were drafted in French by Continental

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827 Stanley Z. Fisher, "Traditional Criminal Procedure in Ethiopia," *The American Journal of Comparative Law* 19, no. 4 (1971): 742-743.
828 Ibid.: 742.
829 Ibid.: 743.
830 Vanderlinden, "Civil Law and Common Law Influences in the Developing Law of Ethiopia," p. 257, Stanley Z. Fisher, *Ethiopian Criminal Procedure: A Sourcebook* (Addis Ababa: Oxford University Presss, 1969), p. ix.

lawyers.[831] Réné David, the French law professor who drafted the Ethiopian Civil Code, has argued that the Ethiopian system, with its blend of Continental and common law characteristics, was a strategy by the Ethiopians "against the predominant Anglo-American influence on its general development since the liberation."[832] Stanley Fisher, on the other hand, has suggested that in some cases, Continental jurists were replaced by drafters that were trained in the common law system. For example, Jean Graven, the drafter of the Penal Code, was also originally asked to draft the Criminal Procedure Code. He was replaced by Sir Charles Matthew, a British jurist, in an effort to "abandon the initial project of an evenly 'mixed' continental-common law procedure for an overall design more substantially adversary and thus less continental."[833]

Ethiopia was not content to merely copy civil or common law models. The country rejected a juvenile court initially as well as a number of statutes in the Penal Code that were suggested by Graven. The punishment of flogging, which was left out of the draft 1957 Penal Code, for example, was reinserted by the Parliament and the Codification Commission of the Penal Code.[834] Also, Graven recognized that certain provisions of the penal system, such as the total abolition of the death penalty, would have been an impossible feat because "it is based on the very deepest feelings of the Ethiopian people for justice and for atonement."[835]

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831 Vanderlinden, "Civil Law and Common Law Influences in the Developing Law of Ethiopia," p. 258.
832 Ibid.
833 Fisher, *Ethiopian Criminal Procedure: A Sourcebook*, p. xi.
834 Lowenstein, *Ethiopia*, p. 40.
835 ———, *Materials on Comparative Criminal Law as Based Upon the Penal Code of Ethiopia and Switzerland*, p. 62.

FINDINGS

The case studies in this chapter demonstrate that there were at least two types of legal acculturation in the diffusion of the norm against the child death penalty: voluntary socialization, as demonstrated by the Ethiopian case study; and the more common, coercive socialization, as demonstrated by the cases of Algeria, Kenya, Tanganyika/Tanzania, Tunisia and (significantly less so) Japan. The case studies of Algeria, Kenya, Tanganyika and Tunisia indicate that abolition of the death penalty for juvenile offenders under age 18 was the result of two broad phenomena: First, British and French colonial powers spread norms about children, including the prohibition of the child death penalty, coercively through the enshrinement of protections for children in colonial law. These laws established a relationship between the state and the child that would ultimately be embedded in the logic of the state itself. Second, states maintained death penalty prohibitions in their domestic law after independence because they had not only been socialized to accept state responsibility over children, but because state responsibility over children had become part of a larger cosmopolitan legal framework.

The cases of Japan and Ethiopia provide an interesting point of comparison to the colonial cases. Japan had a history of age-based child protection policies dating back to the 19th century. The imposition of Western norms regarding child offenders was in fact quite compatible with Japanese norms. Thus, while the Japanese case demonstrates the practice of coercive socialization, it is also an exceptional, stand-alone case. In Ethiopia, on the other hand, it is uncertain what protections traditional law afforded child offenders. Selassie had his eye on Western legal practices some time before the 1957 law, and children under age 18 were protected from some legal practices as early as 1947. The

mechanism of diffusion in the Ethiopian case can best be thought of as 'voluntary socialization,' whereby the state enthusiastically and proactively sought out Western aid in the development of its legal system. The degree to which this system conflicted with traditional law is not known.

COERCIVE NORMS IN A COSMOPOLITAN LEGAL FRAMEWORK

In the late 19th and early 20th centuries, colonial powers commonly cited the right and duty to " 'civilize' the more backward, barbarian places they governed." [836] The development of legal systems in the colonies was seen as a gift and a tool: It was the gift of civilization wrapped in the needs and objectives of colonial power. As Lauren Benton has argued in the context of Spanish law in the Americas, "The formal extension of legal jurisdiction in and of itself created a clear cultural boundary between the colonizers and the colonized by casting only one as the possessor of law, and of civility."[837] This process of legal development involved acculturation to the values and principles embedded in the laws and to the administrative structures of the colonial states. A central part of this acculturation was the idea that the state would serve a paternalistic role, ensuring the protection of subjects under the law.

This Western legal tradition began to include protections for children in British and French colonial law in the late 19th and early 20th centuries. Among these protections were laws limiting the death penalty for children through age limits at or near age 18. As such, the norm against executing child offenders as well as other Western norms about children spread through Africa and the Middle East via colonialism in the early-to-mid

[836] Hunt, *Inventing Human Rights: A History*, 193.
[837] Benton, *Law and Colonial Cultures: Legal Regimes in World History, 1400-1900*, 12.

20th century. The French and English norms of childhood not only diffused to the territories of France and Britain, but in many ways helped to justify and confer legitimacy on the civilizing mission and served to bolster support for colonialism. This normative diffusion further established the relationship between the state and the child, acclimating colonial societies to state intervention in traditional law in the name of children.

In a study of the diffusion of sexual harassment law from the United States to Austria, Mia Cahill found that one of the main ideas was that sexual harassment was a legal problem with a legal solution.[838] The diffusion of the legal model gave sexual harassment a legal definition, so that it could not be divorced from a legal framework.[839] Drawing on Cahill's findings, I would argue that the most important idea that the West diffused to these colonies was that the provision of children's welfare and protection was the responsibility of the state in general and should be ensured through legislation, in particular. In other words, throughout history, societies have solved issues involving children in multiple ways, via the family, the community, etc. The West diffused the idea that state bureaucracy, acting through law, was the appropriate location for solutions to children's issues.

Japan's legal acculturation to norms of child protection began well before the U.S. occupation after World War II. Beginning in the 19th century, Japan had modeled its legal system after those in the West. Although Japan's actions were voluntary, they were nonetheless a result of coercion. Japan's move was tactical, as the country sought to avoid Western domination and to maneuver in a world increasingly governed by legal

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[838] Mia Cahill, "The Legal Problem of Sexual Harassment and Its International Diffusion," in *How Claims Spread: Cross-National Diffusion of Social Problems*, ed. Joel Best (New York: Walter De Gruyter, 2001), 254.
[839] Ibid., 244.

treaties based on Western norms and principles.[840] Death penalty restrictions and child protection policies emerged from these efforts. Under occupation, Japan reformed its criminal law based largely on its occupiers' Anglo-American legal system. Although the child death penalty had only been abolished in the United Kingdom at the time and not in the United States, Japan's abolition of the penalty corresponded closely with child protection trends in the West in general and complemented child protection efforts from Japan's pre-war history. The United States, after all, was an anomaly in the West, as will be discussed in chapter 6.

Legal acculturation to Western norms and principles had a profound impact on the ways that post-independence Africa would construct its new systems of government and criminal justice. J.W. Mommsen has suggested that:

> The introduction of basic principles of European law into colonial society, like equality before the law or free access to the courts by anybody, had a considerable effect at least in the long term. Though effective implementation may well have been minimal, these principles eventually provided arguments for the indigenous elites in their struggle for independence which could not be easily ignored.[841]

These emerging states articulated their claims for independence in rights-based language, drawing on the Universal Declaration of Human Rights (UDHR) and the United Nations. Charter as well as on other principles in French and English law. Their right to statehood was based on a cosmopolitan legal framework, one that possessed a logic and a language which allowed all legitimate claims to be voiced. Japan, also, was greatly shaped by legal acculturation to Western norms about children, and its restoration to independence and end to occupation were dependent upon its embrace of the Western liberal state model.

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[840] Chen, "The Death Penalty in Japan and China: A Comparative Study", 11.
[841] Mommsen, "Introduction."

THE SOCIALIZATION TO CHILDHOOD

The process of socialization to international norms about children, combined with the legal acculturation to Western institutions, led to the continuation of child-protective policies in Algeria, Kenya, Tanganyika and Tunisia after independence. Algeria, Kenya, Tanganyika and Tunisia maintained the provisions in their law banning the death penalty for children following independence, though Tunisia and Tanganyika later reversed their policies, in 1966 and 1979 respectively. The puzzle is why, when these countries were contending with rising nationalist pressures and anti-French and anti-British sentiment, did they continue the ban? Many leaders like Boumediene and Nyerere vociferously insisted that they would weed out the foreign influence from state institutions and law. Moreover, the establishment of age parameters for children has always been a sensitive subject in Islamic countries, since *Sharia* law bestows many more responsibilities on children at a much younger age than is common in non-Islamic cultures.

Japan and Ethiopia, as well, were socialized to Western legal norms about children. At least in the case of Japan, these norms did not conflict with pre-occupation norms, but they nonetheless were part of a liberal state model that was imposed upon Japan following the War. The legal socialization of Ethiopia, though voluntary, also had a great effect on the culture of the country and its forays into Western liberalism. Voluntary socialization would become a common method of legal acculturation to norms about children around the world in the first and second cascade periods, although not commonly in the particular way chosen by Ethiopia. As norms of child protection became part of the Western liberal state model requisite of all members of the international

system and as states came to internalize these norms, they would voluntarily adopt measures to protect children without coercion.[842]

The end of World War II and the international institutions that emerged from it created a nascent cosmopolitan legal regime that would provide the foundation for independence movements around the world. The building blocks of a cosmopolitan legal framework in Africa and the Middle East were laid when French and English legal norms and principles were embedded in colonial legal systems and when independence movements drew their legitimacy from these very principles. David Hirsch has even suggested that there is a "cosmopolitan criminal law" with authority based on "supra-national principles, practices and institutions."[843] Although certainly not fully formed when these countries gained independence in the 1950s and 1960s, the defining features of a normative framework for criminal justice were being articulated.

Protections for children were included within this framework, as seen in the two prior Declarations, the Geneva Convention and UDHR. NGOs and IGOs like UNICEF further carried Western norms about childhood into countries seeking assistance. UNICEF's focus on development in the 1960s and 1970s created "a watershed in nations' views on how to help their most vulnerable citizens."[844] Children were powerfully connected with ideas of prosperity, economic growth and development. Governmental and nongovernmental reports investigated the health, welfare and well-being of children in these young countries and assisted NGOs and IGOs in monitoring the state of children

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[842] Financial coercion is another story altogether although I found no evidence of this type of coercion in the case of the death penalty for child offenders.
[843] David Hirsch, *Law against Genocide: Cosmopolitan Trials* (London: Glasshouse Press: Cavendish Publishing, 2003), XIII.
[844] UNICEF, "1946-2006 Sixty Years for Children," (UNICEF, 2006; reprint)11.

worldwide. International law called for states to refrain from imposing the death penalty on children and for other judicial protections.

Even though children were considered relatively unimportant in the face of Cold War pressures and economic concerns, norms about children nonetheless developed throughout the 1960s and 1970s. These norms would eventually serve as the basis for a powerful international regime that, beginning in the 1990s, monitored the whole child. The leaders of states after World War II were well aware of these norms about children. From the civilizing mission of colonialism, children were becoming part of the civilizing mission of the international community. Any new state drafting a constitution or new laws after World War II had to address such issues as family and maternal protection, assistance and protection for children, protections from discrimination, including discrimination on the basis of parentage (legitimate versus illegitimate births), and labor restrictions and protections for children.[845]

Laws protecting children in the six countries examined in this chapter were not only retained in the years after independence (or adopted in the case of Ethiopia), they increased. The laws were, in essence, accepted as legitimate by the countries themselves. Ian Hurd defines legitimacy as "the normative belief by an actor that a role or institution ought to be obeyed."[846] Legitimacy cannot be equated with any single norm, according to Ian Clark; rather, it "takes place within an explicitly normative structure," such that "specific international norms become the dominant language through which the practice of international legitimacy is conducted."[847] As such, children's law should be looked at

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[845] Philip Alston and John Tobin, "Laying the Foundation for Children's Rights," ed. UNICEF Innocenti Research Centre (UNICEF, 2005; reprint)24.
[846] Ian Hurd, "Legitimacy and Authority in International Politics," *International Organization* 53, no. 2 (1999): 381.
[847] Ian Clark, *International Legitimacy and World Society* (New York: Oxford University Press, 2007), 4.

as a single normative body in order to understand particular, individual norms. The laws on the books protecting children at the time these former colonies became independent possessed legitimacy. This did not necessarily entail, however, that the specific norm against the child death penalty was seen as legitimate. Rather, norms protecting children in general were seen as legitimate because they accomplished two things: First, these norms defined childhood in a particular way that demanded protection. Second, this need for protection assigned a specific role to the state. Childhood's protected status and the state's role in providing that protection were seen as legitimate. Limiting the death penalty to those over age 18 was simply a product of these two ideas.

In essence, norms against the death penalty for child offenders were congruent with norms about children and the role of the state in protecting children. Jeffrey Checkel contends that diffusion is more likely to occur where there is a cultural match, defined as "a situation where the prescriptions embodied in an international norm are convergent with domestic norms, as reflected in discourse, the legal system (constitutions, judicial codes, laws), and bureaucratic agencies (organization ethos and administrative procedures)."[848] The norm prohibiting the child death penalty found a cultural match in Algeria, Ethiopia, Japan, Kenya, Tanganyika and Tunisia because these countries had already been acculturated to a legal relationship between the state and the child.

This is *not* to say that the leaders of the newly independent states cared especially about children; indeed, there is no evidence of any domestic pressure to maintain the prohibition on the child death penalty or other protections for children. The laws themselves may never have been debated or discussed. Certainly, reforms to child law

[848] Jeffrey Checkel, "Norms, Institutions, and National Identity in Contemporary Europe," *International Studies Quarterly* 43, no. 1 (1999): 87.

were likely last on the list of priorities that leaders faced when trying to maintain order and govern a new country. The fact that they retained laws about children, however, says something about the power of these norms. As is evident from the long list of protective measures for children following independence, these states, at the very least, had accepted the idea that children deserve protected status within state administrative structures and guaranteed by law.

Coercion and socialization explain the adoption and retention of death penalty measures, but do not explain noncompliance. Tunisia and Tanganyika kept the prohibition of the child death penalty in the 1950s and 1960s before reversing their policies at a later date. This was not unique for the period or region. Other countries, like Nigeria, also maintained the prohibition of the child death penalty in the first cascade period. Yet Nigeria has not only altered its laws, but has actually executed child offenders since 1990.[849] Although some policies were changed during the first cascade period (as in Tunisia), most acts of reversal, however, took place during the second cascade period, from 1985 to 2005. All the more interesting, Tunisia and Tanzania were some of the earliest states to ratify the ICCPR, in 1969 and 1976, respectively, when the norm against executing child offenders was first codified. This should not come as a surprise. Oona Hathaway has argued that countries with poor democratic practices "will be no less likely to commit to human rights treaties if they have poor human rights records."[850] Without the domestic institutions in place to enforce the treaties or the presence of "collateral consequences," states have little incentive to abide by their treaty obligations.[851] The

[849] Human Rights Watch, "Iran Leads the World in Executing Children," (2007; reprint),http://hrw.org/english/docs/2007/06/20/iran16211.htm.
[850] Hathaway, "Why Do Countries Commit to Human Rights Treaties?," 588.
[851] Ibid.: 602, 613.

subject of second cascade period contestation, when some states fought international pressure to maintain death penalty provisions, is addressed in chapter 6.

Finally, the roles of the states in Latin America and the Soviet Union, regions where colonialism was also widespread, are also important, but less interesting, narratives for this norm's diffusion. Many states in Latin America abolished the death penalty for all crimes and all criminals, in some cases a century before their colonial powers did. Although this had very little, if anything, to do with the child death penalty, this trend of general abolition nonetheless affected the norm against the child death penalty by establishing the scope of possible policy changes presented to Western countries when they were reforming their death penalty statutes in the early 20th century. Why these colonies and the colonial empires of Spain and Portugal were so different with regard to child law is a subject of further study; one likely explanation has to do with timing: Juvenile justice reforms, as a separate component of criminal justice systems, did not emerge and diffuse until the 20th century, years after most states in Latin America gained independence.

The Soviet Union, on the other hand, abolished the child death penalty during the height of the Cold War in 1962. This was a time when the Soviet Union was keen on demonstrating the superiority of communism, which included proving a more just and fair society in comparison with the United States. The exact manner in which abolition was enshrined in the criminal codes of satellite states is also an area in need of further study, but it is clear that many such reforms were imposed upon these puppet governments. These satellite states gained their independence in the early 1990s, at the pinnacle of the victory of the liberal state model after the Cold War. The European

community symbolized legitimacy for these newly-minted countries, which saw no need to challenge a norm that was not only widely accepted by Europeans, but had also been part of these countries' own laws since the 1960s and 1970s.

CONCLUSION

Coercive socialization functioned as a method of diffusion for the norm abolishing the child death penalty both by imposing Western norms upon colonies and by acclimating colonial societies to the principles of a Western legal system. Through colonialism, many states in Africa and the Middle East adopted state models that included paternalistic methods of regulation over children and protections for children guaranteed in law. The legal systems imposed by the British and French colonial powers socialized states to internalize many norms about children, childhood, and the relationship between the state and the child. Upon independence, these states maintained colonial norms because the legal relationship and guarantees they enshrined were built into the state model itself. Japan, a country with no colonial heritage, also experienced occupation and was subject to Western law after World War II. The socialization was a relatively easy sell, however, since norms of child protection by the state had historical precedent in Japan. Ethiopia voluntarily sought out Western input in crafting its legal system, shaping its child policies in the Western image.

The next two chapters investigate the mechanism of the globalized child as a means of diffusion of the norm against the child death penalty. In chapter 5, I examine the historical development of the globalized child through international organizations, NGOs and law. Through a case study of UNICEF, I consider how organizations imposed

a globalized model of childhood on states, and how the child death penalty was selected as a key campaign for children's rights in the late 20th century, through a case study of Amnesty International and its American chapter. I examine, in particular, the role that moral authority played in these efforts and how these organizations fostered and used this authority to advance the protection and rights of children.

CHAPTER 5
THE MODEL OF A GLOBALIZED CHILDHOOD AS A MECHANISM OF DIFFUSION

The international system as we know it today – characterized by global institutions, a steadily expanding body of international law and the prevalence of the liberal democratic state – began in the years following World War II. In the aftermath of the Holocaust, authoritarian rule lost any legitimacy it might have had, and a state model based on the consent of the governed and a respect for human rights, a decidedly Western construction, emerged at war's end as the ideological winner. The United Nations, with its membership of sovereign and equal states, was the defining institution of the new international order, and the UDHR, adopted by the U.N.'s General Assembly in 1948, was the signature document of a new era premised on the pursuit of human dignity and fundamental freedoms for all. As Lynn Hunt has argued, the UDHR ended the long winter of imperialism and nationalism that characterized the 19th and early 20th centuries and ushered in a period of decolonization and independence movements.[852] These movements began quickly after the war's end, with most former colonies gaining independence over the following three decades. Attention to children's issues was a part of the new era, too. Concern for children's welfare was evident in the war relief efforts, as the case study of UNICEF below explains, and by the end of the 1960s, children were a primary target of international development efforts.

This chapter begins with the role of UNICEF in the creation of the globalized child, as it incorporated state protection for children into the liberal model in the postwar system. It considers how Western norms about children regarding age, development,

[852] Hunt, *Inventing Human Rights: A History*.

maturity and culpability came to shape the model of childhood that would be applied to all children in all states, economies and cultures. In my findings, I suggest that there were three sources of authority behind UNICEF's postwar initiatives. These were: the natural sciences (in areas such as child development, nutrition, immunology, etc.); the social sciences (especially economics, development studies and education); and international law (particularly the CRC). I then examine the activism by Amnesty International (AI) and particularly by its American chapter (AIUSA) against the child death penalty, a central struggle in the emerging children's rights regime in the last 20 years. AI turned its attention to children's rights much later than UNICEF did, focusing on the death penalty for child offenders only in the mid-1980s, but its initiatives in the United States and abroad made the penalty an important and highly contested children's rights issue. In my findings, I suggest that it was AIUSA's moral authority, use of international law and stark comparisons between 'civilized' and 'uncivilized' members of the international community that allowed it to raise public consciousness of the penalty. Finally, I trace the legislative development of the CRC and the convention's Article 37 (covering children deprived of their liberty), focusing on how diverse states, IGOs and NGOs helped to enshrine into law the globalized model of childhood in the last few decades of the 20th century.

UNICEF CASE STUDY

Although other international organizations would focus their energies on the protection of children following World War II, no organization was more important to the establishment of a globalized childhood than UNICEF. Through its campaigns targeting

health, sanitation issues and education, UNICEF diffused an idea of the global child—one with identical needs of nutrition, disease prevention and vocational and educational support. This global child was supported initially by the natural sciences through studies that determined the physical needs of children. In this way, the global child that emerged from UNICEF initiatives was an objective child, one that required an ideal childhood with adequate nutrition, sufficient vaccines and standardized educational opportunities. As the standards for this global childhood were steadily raised, especially as the mandate and interests of the international community in children spread to other areas beyond health, sanitation and education, the social sciences and rights-based approaches to child protection supported new claims about the global child, including reduced culpability. This case study investigates this process.

The creation of a U.N. agency for children began immediately after World War II as a deliberate and cautious enterprise. Although postwar recovery was different throughout Europe, children across the continent suffered particularly in the aftermath of the war. A bitter winter in 1946-47 contributed to the increased mortality of young children especially; in some areas, half of all babies born alive died before the age of one.[853] Relief in the final years of the war was carried out by the U.N. Relief and Rehabilitation Administration (UNRRA), which assisted people in Eastern as well as Western Europe. By 1946, hostilities between the East and West had increased to the point that the United States refused to continue funding "neutral relief."[854] At the final meeting of the UNRRA, Poland and Norway, in particular, proposed that the agency's residual funds be put toward assisting children.

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[853] Maggie Black, *Children First: The Story of Unicef, Past and Present* (New York: Oxford University Press, 1996).
[854] Ibid., 7.

UNICEF was then formed in 1946 using the UNRRA's remaining funds. In establishing the fund, the Third Committee of the General Assembly stated that:

> The children of Europe and China were not only deprived of food for several cruel years, but also lived in a constant state of terror, witnesses of the massacre of civilians and of the horrors of scientific warfare, and exposed to the progressive lowering of standards of social conduct. The urgent problem facing the United Nations is how to ensure the survival of these children….The hope of the world rests in the coming generations.[855]

The establishment of UNICEF moved the United Nations beyond its previous role of providing "information, research, and advisory services"[856] to the provision of "practical help."[857] It was the "first instance of the creation of a grant-in-aid program for material assistance and an organizational form in the social field not specifically envisaged in the [1948] Charter."[858] The original conception of UNICEF was as an organization that would facilitate state responsibility for child welfare by providing assistance to states either to develop new or to expand existing national programs.[859]

By 1953, UNICEF was a permanent part of the United Nations, as its mandate was extended indefinitely.[860] UNICEF quickly adopted an "emergency needs approach" and focused its work on providing food and clothing and ensuring children's health, predominately in Europe.[861] State contributions were not automatic, and so the young organization had to raise funds, making it "sensitive to the public mood" early on.[862]

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[855] United States Department of State and John J. Charnow, "The International Children's Emergency Fund, Publication 2787," in *United States--United Nations Information Series 15* (Washington, D.C.1947; reprint)1.
[856] Ibid.
[857] United Nations, *Journal of Economic and Social Council* 25 (1946): 364.
[858] United States Department of State and Charnow, "The International Children's Emergency Fund, Publication 2787," 2.
[859] Ibid.
[860] UNICEF, "About Unicef." (Accessed on May 24, 2008), http://www.unicef.org/about/who/index_history.html.
[861] Nobelprize.org, "United Nations Children's Fund: The Nobel Peace Prize 1965: History of the Organization," (1971; reprint),http://nobelprize.org/nobel_prizes/peace/laureates/1965/unicef-history.html.
[862] Black, *Children First: The Story of Unicef, Past and Present*, 9.

Maurice Pate, the first executive director, argued that the organization's dependency on voluntary contributions of U.N. member states was a positive arrangement since:

> The needs of the world's children speak for themselves….What the governments of the world want, more than anything, is the demonstration that something can be done about those needs. The better we demonstrate, the more they give. I am convinced that it is not only morally imperative, but economically and politically essential for the better off countries to help the children of less well favoured nations grow into better, stronger, more able adults.[863]

Fundraising also elevated the organization's profile, as did celebrity endorsements by Hollywood stars like Danny Kaye. The organization further developed a unique method of carrying out its mandate: Rather than giving orders from remote headquarters and governing bodies, UNICEF developed a hands-on, fieldwork-based approach that quickly gave the agency a credibility that many other U.N. agencies lacked.[864]

The 1950s and 1960s were characterized by a marked shift in UNICEF's approach, as the organization adjusted its main focus from disaster relief to support for programs designed to benefit the children of developing countries over the long term.[865] Its mission expanded to include campaigns against diseases like tuberculosis; efforts to raise standards of nutrition and sanitation and to increase education in maternal and child health care; the funding of daycare and youth centers; and the training of mothers in the areas of "child rearing and home improvement."[866] This new and wider focus developed partly in response both to the large number of former colonies gaining independence

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[863] Robert L. Heilbroner, *Mankind's Children: The Story of Unicef* (New York: The Public Affairs Committee, 1959), 18.
[864] Black, *Children First: The Story of Unicef, Past and Present*, 9.
[865] UNICEF, "About Unicef: Who Are We: Maurice Pate Biography,"http://www.unicef.org/about/who/index_bio_pate.html. ———, *The Needs of Children: A Survey of the Needs of Children in the Developing Countries*, ed. Georges Sicault (New York: Macmillan, 1963), 3.
[866] Nobelprize.org, "United Nations Children's Fund: The Nobel Peace Prize 1965: History of the Organization."

throughout the world and to the Cold War fear that these new states would ally with the Soviets if aid were not forthcoming.[867]

Corresponding with the U.N. Decade of Development in the 1960s, a new "country approach" allowed the organization to address national development needs by concerning itself with the intellectual, psychological, vocational and physical needs of children.[868] This new "comprehensive view of the child" meant that few aspects of a child's life were beyond the reach of the agency – or of the international community. [869] This comprehensive view promulgated the idea that "children are an integral part of the population," and, at a time when young states were hungry for access to international markets and coveting international recognition, children's welfare and progress were directly linked to national development and economic prosperity.[870]

The history of UNICEF is important to the diffusion of the norm against the child death penalty because as former colonies in Africa and the Middle East were gaining independence, children increasingly became a key focus of development efforts in these regions. As newly minted states set about the business of governance, international organizations, such as UNICEF, were calling attention to the necessity of child protection and welfare. The new states largely accepted the state-child relationship embedded in the legal systems they had inherited from the colonial powers, as they contended with increasing international attention to their child policies.

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[867] Black, *Children First: The Story of Unicef, Past and Present*, 10.
[868] Nobelprize.org, "United Nations Children's Fund: The Nobel Peace Prize 1965: History of the Organization."
[869] Ibid.
[870] Nobelprize.org and Zena Harman, "United Nations Children's Fund: The Nobel Peace Prize 1965: The Nobel Lecture," (1965; reprint),http://nobelprize.org/nobel_prizes/peace/laureates/1965/unicef-lecture.html.

Through development programs premised on a "whole child" approach, UNICEF diffused norms about the international model of childhood to new states that were writing their constitutions and drafting civil, family, commercial and criminal laws.[871] UNICEF argued, "national policies for children should embrace all children, and do so across sectoral lines—health, agriculture, education, water and sanitation."[872] UNICEF's resources were impressive in the 1960s, with 120 governments contributing to the fund. In 1964 alone, private individuals and groups raised $6 million dollars for UNICEF.[873] The organization received a major boost in 1965 when it received the Nobel Peace Prize.

In 1976, UNICEF began to take a new approach to its work, the "basic service approach," whereby it began to train ordinary individuals from host countries to deliver services in the field. This indirect method of service delivery allowed UNICEF to help more children and families and also served to spread norms about children and childhood deeper into societies. The organization also led a new trend in developing and promoting an international scientific model of childhood. As with early-period scientists, government workers, and volunteer and aid agencies, UNICEF began early on to select a set of indicators that would assist it in monitoring and evaluating the state of the world's children. Starting in the 1950s and 1960s, it began to produce reports drawing on the data it had collected about the condition of children throughout the world. In 1979, UNICEF first published the *State of the World's Children*, a yearly summary of data according to hundreds of indicators that has been published every year since.[874] The *State of the*

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[871] UNICEF, "1946-2006 Sixty Years for Children."
[872] Black, *Children First: The Story of Unicef, Past and Present*, 10.
[873]Nobelprize.org and Harman, "United Nations Children's Fund: The Nobel Peace Prize 1965: The Nobel Lecture."
[874] Asher Ben-Arieh and Robert Goerge, "Beyond the Numbers: How Do We Monitor the State of Our Children?," *Children and Youth Services Review* 23, no. 8 (2001): 603.

World's Children publications focus on the whole child and on countries' success in meeting the organization's standards of child welfare.[875] By 1982, these yearly publications would become UNICEF's "main advocacy platform," with the entire world as its target audience.[876] Other organizations that published reports in the last half of the 20th century were the World Health Organization, the Organization of Education Co-operation and Development, international NGOs such as Childwatch and Save the Children, as well as various international and national organizations and projects, including the European Center for Social Welfare Policy and Research and the national Committees on the Rights of the Child.[877] This trend in data collection was indicative of a movement to establish and move toward global standards of an ideal childhood.

The 1970s were a particularly active period for international children's issues. The highlights included the U.N.-sponsored International Year of the Child in 1979, an initiative of children's INGOs that marked the promotion of children's issues as a key concern of the international community.[878] The U.N. General Assembly suggested that 1979 would be a year of "practical action," and at least 148 countries established national committees for the Year of the Child.[879] Children's issues garnered substantial press that year, and new national and international NGOs were formed.[880]As discussed below, UNICEF was slow to embrace the new rights-based paradigm of child protection, facilitating the drafting of the CRC but not explicitly supporting it until 1987. Although UNICEF was only lukewarm about the new children's rights focus coming out of the

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875 Ibid.: 612.
876 Black, *Children First: The Story of Unicef, Past and Present*, 19.
877 Ben-Arieh and Goerge, "Beyond the Numbers: How Do We Monitor the State of Our Children?," 612-621.
878 Black, *Children First: The Story of Unicef, Past and Present*, 13.
879 Ibid.
880 Ibid.

drafting committee for the CRC—seeing children's rights as tangential to its international aid and development efforts—the Year of the Child was nonetheless a boon to the agency's finances. UNICEF's income rose 25 percent between 1978 and 1979, from $211 to $285 million, and the upward trend continued into the next decade.[881]

UNICEF's profile was further raised when it was given lead agency status in a number of U.N. emergency efforts, including in Kampuchea in 1979.[882] The agency further provided disaster relief during the Democratic Republic of the Congo's civil war in the early 1960s, in Yugoslavia in 1963 and in Morocco in 1969. It provided famine relief in India in the late 1960s and relief from the damage of a cyclone in 1970 in East Pakistan and Bangladesh.[883] UNICEF was able to enter Nigeria to help the victims of that country's civil war in the late 1960s, a time when other agencies were not allowed entry.[884] As a result, UNICEF gained legitimacy both within the United Nations and in world opinion for its work for children in the countries where it carried out its relief operations.

The proliferation of organizations devoted to children in the last 50 years is astounding. The Child Rights Information Network, a coalition of NGOs and IGOs for children's rights, counts 2,095 members.[885] And many of the organizations emerging in the last 20 years were founded on the principles of the CRC. Yet despite this recent organizational mass on behalf of children, UNICEF's role in developing and diffusing the now globalized model of childhood stands apart. Although other INGOs and IGOs

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[881] Ibid.
[882] Ibid.
[883] UNICEF, "1946-2006 Sixty Years for Children," 12.
[884] Ibid.
[885] http://www.crin.org/index.asp

(primarily AI and the Committee on the Rights of the Child) have taken the lead in monitoring states' compliance with international law against the child death penalty, UNICEF was the main actor in shaping and globalizing a single standard of childhood after World War II.

As far as the child death penalty was concerned, however, UNICEF appears never to have given the issue much, if any, consideration prior to the 1990 CRC and its participation in its drafting in the late 1980s. There is evidence, as the next chapter will demonstrate, that UNICEF helped toward the beginning of the 21st century to draft some national laws for children in countries like Pakistan that explicitly forbid the child death penalty. These efforts were likely a reflection of UNICEF'S eventual adoption of the children's rights framework in the 1990s. In subsequent UNICEF handbooks on the implementation of the CRC, the penalty's illegality is mentioned, albeit briefly.[886]

AI CASE STUDY

AI was launched in 1961 with a mission to free prisoners of conscience.[887] Made up of members from all over the world who were committed to transnational activism, AI's organizational structure was unique among human rights organizations.[888] Although its core leadership, research and support staff worked in London at the International Secretariat, AI organized into national sections shortly after its founding. The International Secretariat continued to provide (in theory) a unifying voice for AI,

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[886] UNICEF, Rachel Hodgkin, and Peter Newell, "Implementation Handbook for the Convention on the Rights of the Child," (New York: UNICEF House, 1998; reprint)494, ———, "Implementation Handbook for the Convention on the Rights of the Child," (New York: UNICEF House, 2002; reprint)547.
[887] Amnesty International USA and A. Whitney Ellsworth, "Background Paper for Aiusa Agm Working Party on Death Penalty," (University of Minnesota: Archives of David Weissbrodt, Unknown year; reprint).
[888] Clark, *Diplomacy of Conscience: Amnesty International and Changing Human Rights Norms*, p. 9. Ann Marie Clark has pointed out that the NGO, Anti-Slavery International, is also grassroots and older than Amnesty.

ensuring that the organization kept to its mandate, and developing and maintaining credibility within the international system. AI's expertise in the beginning was in mobilizing against the persecution of peaceful individuals based on their ideology or identity. The organization's scope expanded over the years to include many issues concerning the relationship between the state and the individual, but focusing especially on those related to bodily integrity and basic human dignity.

AI was also distinguished from other human rights organizations by the strict guidelines and adherence to mandate that characterize its advocacy: independence and objectivity.[889] Unlike UNICEF, AI does not accept funding from any government and makes concerted efforts to demonstrate geographical and regime-type diversity in its campaigns.[890] For example, campaigns during the Cold War typically included a country from the First, Second and Third world. Although this requirement of 'threes' has been relaxed due to changes in the international system, target countries are still selected with attention to diversity in location and regime type.[891]

Additionally, both to protect the organization's membership and to maintain independence, AI activists in the past were strictly forbidden to work on issues within their own country.[892] This rule, too, has been relaxed, though not discarded, based in part

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[889] Clark refers to these guidelines as "attributes" that assist the organization in influencing the creation of global human rights norms. As Stephen Hopgood has argued, it is better to think of these as original intentions or aspirations, some of which have been successfully challenged by changes both within and outside of Amnesty in the last few decades. Ibid. Stephen Hopgood, *Keepers of the Flame* (Ithaca: Cornell University Press, 2006).

[890] Clark has pointed out that Amnesty has accepted funding from intergovernmental organizations, like the European Community, for particular relief efforts. Clark, *Diplomacy of Conscience: Amnesty International and Changing Human Rights Norms*.

[891] Ibid.

[892] Ibid. Stephen Hopgood has pointed out that this rule against working on your own country meant that Amnesty tended not to attract grassroots organizers. The rule also resulted in a predominantly Western organization, the subject of a quote from one African staff member at the International Secretariat about the rule: "Human rights in the south is domestic. Human rights in the north is foreign policy. You've got to decide

on the insistence of American members to work on U.S. violations. AI has also carefully guarded its independence and objectivity by refusing to take a stand on political questions. Since 1966, the organization has advocated that all AI publications "should 'avoid emotive or abusive expressions.' "[893]

AI researchers tend to be country experts and have long viewed their expertise as essential to AI's authority.[894] There is an increasing trend, again somewhat driven by the U.S. section, to branch out into other human rights issues and to launch campaigns that are more theme-driven, mobilizing against the child death penalty or police brutality, for example.[895] Researchers at AI claim that such an approach produces less reliable information since it requires breadth of knowledge of violations in multiple countries as opposed to in-depth, country-specific expertise based on personal connections, on-the-ground legwork and informants. Nonetheless, theme-based advocacy is more consistent with changing perceptions of the international sphere as the increasing interdependence of states and the porous nature of borders in an age of globalization has challenged the traditional organizational structure of AI and fueled this trend toward more diverse, theme-based campaigns.

AI opposed the death penalty in its original charter, but only for prisoners of conscience.[896] Over the next 16 years, a growing consensus developed within AI that the organization should call for the total abolition of the penalty. There was some resistance,

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where you're going to be. If you're going to be a real human rights organization, it's gotta be domestic issues." This practice has meant that countries outside of the West were treated as "objects to be researched from the outside." Hopgood, *Keepers of the Flame*, p. 98.

[893] Hopgood, *Keepers of the Flame*, p. 74. Hopgood provides an excellent example on pages 74-5 of the difference in language between Amnesty reports and the material that is released to the public.

[894] Ibid., p. 14.

[895] Ibid., p. 11.

[896] Amnesty International USA and Ellsworth, "Background Paper for Aiusa Agm Working Party on Death Penalty."

however, as some AI members did not see the death penalty as a human rights issue, but rather as a criminal issue. By 1975, the debate was resolved in favor of total abolition, and an amendment was made to Article 1 of the AI statute. In the 1977 Declaration of Stockholm, AI announced the organization's "unconditional opposition" to the death penalty for all crimes and all offenders. Yet it would take another decade for AI to begin a sustained effort to end child offender executions. Although the idea of working for "groups of people sentenced to death" was raised in a pre-Stockholm meeting in September 1977, substantive efforts would not take place until much later.[897]

Throughout the 1960s and 1970s, AI drew on international law to support its position and to publicize international standards of human rights. In the late 1970s and early 1980s, it worked diligently on death penalty cases throughout the world, issuing 'Urgent Actions' on imminent executions in order to get international attention and to solicit letters in support of commutations. But as executions increased in the United States, AI was not able to keep up. In 1985, the Americas Research Department of AI announced that the organization would no longer issue urgent actions on U.S. executions. Additionally, lawyers and experts in the United States advised, "Given the present climate of opinion, a large number of international appeals at the time of an imminent execution is not always the most effective means of preventing executions."[898]

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[897] Amnesty International, International Council, and Working Party B, "Pre-Council Meeting on Death Penalty Held on Thursday 15 September," (University of Minnesota Law School: private archives of Professor David Weissbrodt, 1977; reprint).
[898] Amnesty International et al., "The Death Penalty in the USA: Urgent Action Appeals Amr 51/03/85," (University of Minnesota: Archives of David Weissbrodt, 10 January 1985; reprint).

AIUSA

AI consists of discrete, national sections, each with its own constitution, rules for membership, and ability to submit resolutions at international meetings.[899] The U.S. section, or AIUSA, was established in the mid-1960s. Although only a chapter in a larger NGO, AIUSA would grow in size and wealth over the years, and would come to wield disproportionate influence in larger AI politics.[900] The decision by AIUSA to engage the United Nations directly on particular sub-themes of human rights was a main reason for the increased prominence of the U.S. section because it altered the position of NGOs vis-à-vis the United Nations.[901]

AIUSA has often had a contentious relationship with the International Secretariat.[902] In AIUSA's early years, its members tended to be "graduates of the fight for civil rights, civil liberties, and the anti-Vietnam protests," movements with different strategies, objectives and philosophies than those of AI in general.[903] By the 1980s, AIUSA was a growing force in the movement, having increased its contribution to the International Secretariat from $1000 in 1972 to $1,000,000 by 1981.[904] By 1987, AIUSA's membership exceeded membership in Western Europe as a whole, even though its number of chapters (and active members)[905] was only a fraction of Western Europe's.[906] The United States subsequently lost the lead in membership numbers, but is

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[899] Hopgood, *Keepers of the Flame*, p. 69.
[900] Clark, *Diplomacy of Conscience: Amnesty International and Changing Human Rights Norms*, pp. 7-8.
[901] Ibid., p. 13.
[902] Hopgood, *Keepers of the Flame*, chapter 5.
[903] Ibid., p. 107.
[904] Ibid., p. 108.
[905] Hopgood notes a debate in Amnesty about membership, distinguishing between donors, or those that merely give money, and members, those that are active (and may also give money). Ibid., pp. 108-109.
[906] Ibid., pp. 109-110.

still the largest individual section.[907] In 2004, AIUSA's contribution to the International Secretariat was almost 25 percent of AI's total income collected from all sections.[908]

AIUSA members commonly work on issues within the United States as well as outside it. AIUSA began to focus on death penalty issues in the United States in the 1970s, when the International Secretariat began allowing individual sections to request exemptions from the rule.[909] Official changes to the prohibition against working within one's own country came in 1995, when the International Secretariat allowed individual sections to be consulted on strategy and actions within their own countries. The U.S. section was the principal driver of this shift.[910]

Another key point of contention within AIUSA regarding the death penalty concerned its proposed incrementalist strategy of focusing on specific applications of the penalty for which a critical mass of opposition already existed, as with executions of children or of the mentally retarded. For many within AI, the 1977 Declaration meant that the organization opposed the penalty for all crimes and all offenders. Opposition to a ban on executions solely for child offenders was therefore common, and was based largely on concerns that limiting the penalty would have the effect of 'sterilizing' it, watering down support for an eventual total ban and making the practice of execution of a less sympathetic group of offenders more palatable to the American public. Although supporters of incrementalism could be found throughout the international membership of AI, the U.S. chapter expressed greater support for a broader strategy as well as for a pre-

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[907] Ibid., p. 110.
[908] Ibid., p. 197.
[909] Linda M. Thurston and Amnesty International USA, "A Strategic Plan for Effective Work to Abolish the Death Penalty," (University of Minnesota Law School: Private Archives of Professor David Weissbrodt, 1995; reprint)p. 8.
[910] Ibid. p. 9. Hopgood, *Keepers of the Flame*, p. 100.

emptive one.[911] The tactic of pre-emption meant that activists within AIUSA would seek to end a state's general practice of violating human rights by targeting the state through multiple methods. Pre-emption went against the grain of AI's activism, one based on the image of the lone member writing letters *in response* to violations around the world. Although it maintained its practice of writing and petitioning for individual victims of human rights violations, the organization sought a more pro-active approach to changing state policy. This shift in tactics would be crucial to ending the death penalty for child offenders, as will be seen later.

In 1979, AIUSA began calling attention to U.S. death penalty policy and practice, which included the execution of offenders under 18 years of age. By this time, the United States had signed the ICCPR, which explicitly banned the death penalty for child offenders.[912] The International Secretariat also participated in early efforts to create safeguards for particular classes of individuals such as children under the age 18 and the mentally ill, but these efforts stopped short of launching campaigns to end the death penalty *only* for these classes of individuals.[913]

There were currents of unrest within the AIUSA Board of Directors that laid the groundwork for a shift in death penalty strategy away from total abolition and toward incrementalism. The 1984 Strategy against the Death Penalty, an AIUSA document, called for a "major shift in emphasis … to move away from crisis work around individual

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[911] Thurston and Amnesty International USA, "A Strategic Plan for Effective Work to Abolish the Death Penalty." See Strolovitch for a discussion of tactical pluralism. Dara Z. Strolovitch, *Affirmative Advocacy : Race, Class, and Gender in Interest Group Politics* (Chicago: University of Chicago Press, 2007).
[912] David Weissbrodt and Amnesty International, "Memorandum to Martin Ennals, Re: Justice Department Visit," (University of Minnesota Law School: private archives of Professor David Weissbrodt, 1979; reprint).
[913] Amnesty International and International Secretariat, "Death Penalty Handbook: External, Part 2: International Legal Standards on the Death Penalty Act 05/17/82," (University of Minnesota: Archives of David Weissbrodt, 1982; reprint).

cases and toward changing policy."[914] The strategy document, which further stated that the "focus will be fixed on eroding death penalty statutes in increments,"[915] was approved by the board.

The document suggested that legislation limiting the age of eligibility for the death penalty be advanced in receptive U.S. states.[916] The Death Penalty Report to the AIUSA Board of Directors for 1984-1985 stated that the incrementalist strategy was developed to "[build] momentum for total abolition by weakening and restricting state death penalty laws, as well as abolishing such laws where possible."[917]

Support for an incrementalist strategy came from a 1986 study that indicated that the American public was steadfast in its support for the death penalty, but that most did not support the penalty for juvenile offenders or the mentally ill.[918] AIUSA, recognizing that not all countries will achieve abolition in the same way, sought to implement a strategy that took U.S. public opinion into consideration.[919] Larry Cox, Deputy Secretary General of the International Secretariat, supported the incrementalist strategy, and suggested that incrementalism may be the "most effective strategy on certain countries [sic]."[920] The plan was to foment public opposition to the penalty for child offenders and

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914 Charles Fulwood, Campaign Against the Death Penalty, and Amnesty International USA, "Strategy against the Death Penalty, Approved by the Board of Directors," (University of Minnesota Law School: Private Archives of David Weissbrodt, Novemeber 18, 1984; reprint)p. 2.
915 Ibid. pp. 4-5.
916 Ibid. p. 17.
917 John G. Healey and Amnesty International USA, "Memorandum: 1984-1985 Death Penalty Report, To: Aiusa Board of Directors," (Archives of the University of Colorado at Boulder Libraries, AIUSA NY 378-171985; reprint).
918 Cambridge Survey Research, "An Analysis of Political Attitudes Towards the Death Penalty in the State of Florida," (Amnesty International 1986; reprint).
919 Amnesty International, "Report of the International Meeting on the Death Penalty 27-29 March 1987 Act 05/24/87," (University of Minnesota Law School: private archives of Professor David Weissbrodt, 1987; reprint)p. 20.
920 Ibid.

the mentally ill while maintaining the goal of total abolition.[921] In 1987, AIUSA hired a full-time death penalty coordinator, committing to a strategy of incrementalism.[922]

The AI death penalty campaign of 1989 was the first to address child executions. The campaign included a total of 51 countries. Eight of these were selected as sites of high-level campaigns and an additional 43 countries were targeted in limited-appeals campaigns in two stages over the course of 1989.[923] The eight high-level countries – China, Iran, Iraq, Nigeria, Pakistan, South Africa, the United States and the U.S.S.R. – were chosen for their high numbers of death sentences and executions and because of widespread concern over the application of the penalty in these countries.[924] Although a 1988 strategy document about the 1989 campaign did not mention child offenders, it is likely not a coincidence that the countries chosen for high-level campaigns executed child offenders below the age 18, with the exceptions of South Africa and the U.S.S.R.[925] The inclusion of the U.S.S.R. was likely a result of concern for Cold War objectivity, one of the three core principles guiding AI's advocacy efforts, as well as for geographical diversity. South Africa may have been included for similar reasons, though attention to the country also came in the wake of increasing concerns over apartheid measures and police brutality. While the 1988 strategy document did not mention child offenders, by March 1989, child executions were listed as a specific point of appeal to U.S. state

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[921] Ibid. pp. 19-20.
[922] Thurston and Amnesty International USA, "A Strategic Plan for Effective Work to Abolish the Death Penalty," p. 4.
[923] Amnesty International, "Campaign against the Death Penalty (1989) Circular No. 4: Plan for Activity on Category "A" And "B" Countries Act 51/06/88," (London: University of Minnesota Law School: Private archives of Professor David Weissbrodt, 1988; reprint).
[924] Ibid. Pakistan was later dropped from the high-level campaign list, leaving only seven high-level targeted countries. ———, "1989 Campaign against the Death Penalty: Country Appeals Series, Circular No. 17f: Recommended Actions and Addresses on USA, Amr 51/09/89," (University of Minnesota Law School: Private Archives of David WeissbrodtMarch 1, 1989; reprint).
[925] South Africa abolished in 1959. The U.S.S.R. abolished in either 1922 or 1958. See chapter 3 for the discussion of the Soviet Union's abolition of the death penalty for juvenile offenders.

legislatures in the campaign, on par with other concerns such as racial discrimination in the application of the penalty and executions of the mentally ill and the mentally retarded.[926]

The executions of three men in the mid-1980s (Charles Rumbaugh in 1985, J. Terry Roach in 1986 and Jay Pinkerton in 1986) for crimes they committed as children focused AIUSA's attention on the death penalty for child offenders and served to catalyze its advocacy efforts.[927] A 1988 internal report makes note of AI's strategy in these cases: to publicize the fact that only five other countries in the world (Pakistan, Bangladesh, Barbados, Rwanda and possibly Iran) had executed child offenders since 1979.[928] AIUSA began its campaign against the child death penalty in February 1987, after the executions of Rumbaugh, Roach and Pinkerton. Just four days after the campaign's launch, the U.S. Supreme Court announced that it would hear *Thompson v. Oklahoma*.[929] In AI's amicus brief in the *Thompson* case, it cited international law and the death penalty practices of U.S. states. Moreover, AIUSA widely publicized the 1987 Inter-American Commission on Human Rights decision, which found that in executing Roach and Pinkerton, the United States had violated its obligations under the American Declaration of Human Rights.

Although the death penalty coordinator position was modified throughout the next decade, AIUSA's commitment to the incrementalist strategy remained intact. The strategies of the 1990s, however, were not supported by the International Secretariat,

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[926] Amnesty International, "1989 Campaign against the Death Penalty: Country Appeals Series, Circular No. 17f: Recommended Actions and Addresses on USA, Amr 51/09/89."
[927] Victor L. Streib, "The Juvenile Death Penalty Today: Death Sentences and Executions for Juvenile Crimes, January 1, 1973--February 28, 2005," (Ohio Northern University College of Law, 2005; reprint)p. 4.
[928] Amnesty International, "Country: United States of America: Subect Title: The Death Penalty: Developments in 1987 Amr 51/01/88," (University of Minnesota: Archives of David Weissbrodt, 1988; reprint).
[929] Ibid.

which instead pushed for a "traditional emphasis on letter-writing at the clemency stage and … cautioned AIUSA about its pre-emptive work."[930] Nonetheless, AIUSA's commitment to pre-emption, which included "court monitoring, research on cases, and dialog with prosecutors and others in the legal system" remained steadfast.

THE CONVENTION ON THE RIGHTS OF THE CHILD

The road to a convention for children began in 1979 when the United Nations declared the International Year of the Child. The previous year, Poland submitted an agenda request to the United Nations for a convention on the rights of the child that would "take further and more consistent steps" than the 1959 Declaration by enshrining these rights in a convention, or a legally binding international instrument.[931] Weighing the merits of a convention over a declaration, the Soviet delegate, Mr. Zorin, argued that a binding convention "would therefore be particularly valuable for the rights of children, since it was children who suffered most from wars, from privileges given to others, etc."[932]

The text suggested by Poland was essentially an updated version of the 1959 Declaration,[933] and was supported in principle by NGOs in a written statement to the United Nations.[934] These NGOs, among them the International Council of Women, the International Federation for Human Rights, and the International Union for Child Welfare, requested that sufficient time be allotted to consider the multiple studies and

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[930] Thurston and Amnesty International USA, "A Strategic Plan for Effective Work to Abolish the Death Penalty," p. 13.
[931] E/CN.4/1284 (18 January 1978).
[932] E/CN.4/SR.1471 (13 March 1978).
[933] E/CN.4/L.1366 (7 February 1978)
[934] E/CN.4/NGO/225 (23 February 1978)

vast expertise available on child protection.[935] Not anticipating the enthusiasm and controversy the treaty would cause, Poland's delegate, Mr. Lopatka, suggested that a convention be adopted in 1979 during the International Year of the Child, arguing that while he respected the views of the NGOs, he "did not think they needed several years to make their opinions known on questions which they had long had under consideration."[936] In response, the International Union for Child Welfare countered that since the 1959 Declaration had been adopted at a time when most states in Africa and Asia were colonies and therefore had little input in the declaration's drafting, a new convention should acknowledge that many of the principles of child protection "might not be acceptable to them."[937] The Union had sent out questionnaires to 170 members in 14 states to determine national principles regarding children; other NGOs were conducting similar studies pertaining to the focus of their work.[938] The Union argued that a consensus was needed in order for the convention to be successfully implemented in "every region and every community."[939] The concern was that a hastily drafted convention might fail to be fully comprehensive in terms of rights covered or fully inclusive in terms of region, leaving children in large swaths of the world without protection.[940]

A number of delegates began to express concern that the declaration did not address many current issues confronting children. Among the issues listed for addition to

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[935] Ibid.
[936] Ibid.
[937] Ibid.
[938] ibid.
[939] Ibid.
[940] Ibid.

a new convention was the age of criminal responsibility.[941] Protection from the death penalty for children under the age 18 was first included in Article 20 of Poland's revised draft convention in 1979.[942] A prior reference to special treatment for "asocial" children was made by Columbia in 1978, although the death penalty was not mentioned specifically.[943] The abolition of the child death penalty in Article 20 (and later, Article 19) would be incorporated into a broader article covering children deprived of their liberty (Article 37). Article 37[944] was considered and adopted by the CRC Working Group in 1986.[945] For a complete list of state, IGO and NGO participants in the Working Group, see Appendix D.

A collection of NGO co-sponsors to a joint proposal and an Ad Hoc NGO group supported the ban on the child death penalty in both the 1982 and 1983 Working Group sessions.[946] The Ad Hoc NGO group—lasting from 1983 to 1989—was responsible for the increase, both in number and diversity, of the NGOs now claiming a stake in the drafting of the convention. From an initial 20 NGOs, the group grew exponentially and

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941 E/CN.4/L.1468 (12 March 1979).
942 E/CN.4/1349 (10 October 1979).
943 E/CN.4/1324/Add.2
944 Article 37: States Parties shall ensure that: *(a)* No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age; *(b)* No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time; *(c)* Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances; *(d)* Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.

945 United Nations, "Legislative History of the Convention on the Rights of the Child," (New York: United Nations, 2007 reprint)739.
946 E/CN.4/1982/WG.1/WP.1, page 6; E/CN.4/1985/WG.1/WP.1/pages 12-14.

would eventually include AI, the International Commission of Jurists and Save the Children Alliance, among others.[947] The group met regularly and lobbied delegates and state officials to support its proposals. Notably, at least 13 of the Ad Hoc group proposals, paragraphs or entire articles are included in the Convention.[948] When disagreements among government delegates emerged, one NGO member of the Ad Hoc group, Rädda Barnen, would regularly invite UN officials, delegates and NGO leaders to discussions over Swedish pea soup.[949]

The Ad Hoc group was the first to specify in 1985, "Capital punishment shall not be imposed for acts committed by persons under the age of 18."[950] This language differed from the 1979 Polish revised declaration that stated, "The child shall not be liable to capital punishment."[951] The first statement seems to suggest that *child offenders* be protected from the penalty, while the second only protects children. Said differently, Poland's 1979 statement appears to protect children from the death penalty only while they are under 18, thus allowing executions to take place for juvenile crimes committed after these offenders reach adulthood. A revised article was proposed by Canada in 1986 that more closely resembled Poland's revised version: "No child shall be sentenced to death."[952] An informal working group that included interested NGOs, Canada and other states suggested new language: "The following sentences shall not be imposed for crimes

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[947] United Nations, "Legislative History of the Convention on the Rights of the Child," Annex III B.
[948] Ibid.
[949] Ibid.
[950] E/CN.4/1985/WG.1/WP.1, pages 12-14.
[951] E/CN.4/1349 (10 October 1979)
[952] E/CN.4/1986/39, para. 90.

committed by persons below eighteen years of age: (a) capital punishment; (b) Life imprisonment."[953]

The definition of a child, as a person below the age of 18, became an increasingly contentious issue in the Working Group when discussing Article 37. The U.S. delegation in 1986 voiced its first specific objection to the definition in the drafting of the convention, arguing that the reference, "persons below eighteen years of age," was arbitrary and suggesting it be deleted.[954] Citing international agreements and UN resolutions, both AI and the International Commission of Jurists disagreed and argued for the subparagraph stay as it was.[955] The U.S. delegation backed down, claiming that it

> would not insist on [its] amendment and block consensus, provided it was understood that the United States maintained its right to make a reservation on this point and that it was implicitly understood that a child committing an offence which, if committed by an adult, would be criminal could be treated as an adult.[956]

As it had during the first reading, the definition of a child remained a point of dispute in the second reading of the convention, from 1988 to 1989. India suggested that "persons below 18 years of age" be replaced with "a child" with regard to the death penalty—an obviously ambiguous and culturally variable category.[957] An open-ended drafting group was appointed (and included most of the Working Group countries), and the final version of the text was adopted in 1989: "Neither capital punishment nor life imprisonment [without the possibility of release] shall be imposed for offences

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[953] E/CN.4/1986/30/para. 93.
[954] E/CN.4/1986/30/para. 105
[955] Ibid.
[956] Ibid.
[957] E/CN.4/WG.1/WP.15.

committed by persons below 18 years of age."[958] The United States again reserved its right to enter reservations on the Article.[959]

UNICEF did not take a leadership role in the drafting of the CRC, in large part because it believed a rights-based path to children's protection was not the most effective way to achieve its goals. In the early years of the drafting process, UNICEF was focused on its new initiative targeting children in especially difficult circumstances (CEDC), including victims of violence, trafficking, exploitation and war.[960] The organization was then largely out of step with INGOs that were more concerned with advocacy and international legislation. Finally, in 1987, UNICEF recognized the "potential convergence" between development and child survival *and* children's rights.[961] Eventually, UNICEF would expand the CEDC category to include delinquents.[962] Although it was slow to embrace the new model of children's protection, by the 1990s, UNICEF had fully embraced the new rights-based approach. One of the impacts that children's rights had on UNICEF's direction in the 1990s was to refocus its attention on children in the developed world, as the CRC shed new light on violations in these countries. [963]

The hard work of these IGOs and NGOs finally bore fruit in the 1990s, when children became a central concern of international politics. Despite the glacial pace of the

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[958] E/CN.4/1989/WG.1/Wp.67/Rev. 1 There are some very minor difference between this version and the final version, namely the spelling out of 18 as eighteen and the removal of the brackets around "without the possibility of parole." Interestingly, the United States was one of the countries that argued "without the possibility of release" be left in the Article, even though the United States remains one of the greatest violators of this Article.
[959] E/CN.4/1989/48 para.544.
[960] UNICEF, "1946-2006 Sixty Years for Children," 21.
[961] Ibid.
[962] United Nations and Secretary-General Kofi Annan, "We the Children: Meeting the Promises of the World Summit for Children," (New York: UNICEF House 2001; reprint)79.
[963] UNICEF, "1946-2006 Sixty Years for Children," 26-27.

drafting process, the 1990 CRC came into force quicker than other prior conventions and had almost universal support. For a brief period in September 1990, children's rights enjoyed the undivided attention of world leaders from more than 70 countries attending the World Summit for Children, the largest gathering at the time of heads of state ever convened.[964] Although the United States was present at the summit, its participation was strikingly minimal.[965] The event represented a unique moment of clear consensus that crystallized the now-global idea of childhood and inspired an increasingly complex system of analysis, oversight and advocacy designed to study, safeguard and promote the globalized child. Following its entry into force, the convention became the last word in child protection and advocacy. In effect, the CRC codified the globalized child, to the extent that almost all international advocacy on the part of children today makes reference to it. The participation of highly diverse countries in the Working Group (see Appendix D) indicates that the document that emerged from these debates was the result of a truly global consensus.

However, as discussed in chapters 3 and 4, these ideas and principles about children did not appear out of thin air. The drafting of the CRC took place in the 1980s, by which time the liberal state model was one of the few legitimate models of statehood remaining. The expansion of human rights to specific groups – to children, the disabled, refugees, etc., – seemed a natural extension of this phenomenon as rights-based approaches to human progress and well being were seen as increasingly successful. The content of some of these norms about children had previously been enshrined in

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[964] Norman Lewis, "Human Rights, Law and Democracy in an Unfree World," in *Human Rights Fifty Years On: A Reappraisal*, ed. Tony Evans (New York: Manchester University Press, 1998), pp.77-78.
[965] Barbara Frey and Mike Brehm, "20 Years Later: An Assessment of the Continuing Reticence of the United States to Ratify the United Nations Convention on the Rights of the Child," (Working paper, 2010; reprint).

international law and institutionalized in the international community through the ICCPR, the Geneva Conventions, and, in the case of the child death penalty, in national practice. For most other norms about children, the CRC enshrined them in binding international law, marking a key moment in the crystallization of the now-global idea of childhood.

FINDINGS

This section considers how the global model of childhood served as a mechanism for the diffusion of the norm against the child death penalty. First, I examine the model itself, and particularly how UNICEF developed its ideas of childhood based on the authority attributed to the natural sciences, later on economics and the study of development, and finally on international law. Second, I consider the role of moral authority for both organizations reviewed in this chapter, UNICEF and AIUSA, beginning with a discussion of the mechanics of moral authority itself. Since moral authority is a tool that can be used differently by different organizations, this section will consider the agency of these actors to select their issue areas: Precisely, why did the child death penalty become a key children's rights issue in the late 20th century?

I then consider the roles that international law and arguments about civilization played in diffusing the norm against the child death penalty. Finally, I suggest that the agency demonstrated by UNICEF and AIUSA marks a return to earlier types of principled activism seen in Europe and the United States (and discussed in detail in chapter 3). The principled activism of UNICEF and AIUSA primarily manifested through the selection of initiatives and campaigns by these organizations. Unlike earlier types of principled activism that were motivated by enlightenment ideals and humanitarian

impulses, the principled activism of these organizations was inspired by the global model of childhood, as these organizations directed their initiatives toward a global child (in the case of UNICEF) and chose the death penalty for child offenders as the focus of new rights-based campaigns in the last few decades of the 20th century (in the case of AIUSA).

THE MODEL AS A MECHANISM

As the case study demonstrates, UNICEF was a principal actor in the creation, dissemination and monitoring of the globalized child. The model of the globalized child was a specific construction of childhood with many Western attributes, including the age parameters of birth (or conception) to age 18;[966] dependency upon adults; less developed mental, physical, emotional and intellectual capabilities; a profound lack of agency; a need for protection from adults; and a reduced level of culpability for actions taken. The model includes modern legal protections, including rights against discrimination based on gender, race, ethnicity, religion and nationality. I suggest that there have been three sources of authority for the model of the globalized child, as seen in the development of UNICEF programs and those of other organizations: the natural sciences, economics and development studies, and law. Each is addressed in turn below.

In the early years after World War II, the former allies saw their responsibilities as moral actors to be to provide for people's basic needs, such as food, clothing and good health, an interpretation reflected in the emergency focus of UNICEF's early initiatives.

[966] The question as to whether childhood begins at birth or at conception is still a point of debate, as many predominately Catholic countries see childhood as beginning at conception, a view that would make abortion a human rights crime. This is one example of how the model of childhood has not shored up all its loose ends and is still an evolving idea.

During these years, UNICEF's efforts to help children targeted the lowest common denominator, including a sanitary environment and protection from disease. The first sources of authority cited by UNICEF in its determination of children's needs were scientific, as the organization drew from scientific studies of child development, immunology and nutrition.[967] Science thus endowed the model of childhood with the authority needed to compel states either to fund these programs or be the recipient of them.

The model of childhood expanded in the 1960s and 1970s, as organizations like UNICEF adopted a 'whole child' approach that included education and development efforts. This expanding interpretation of children's needs thus added new features to the fast diffusing model of the globalized child. The new, wider focus included issues of education, family, child and youth welfare services, vocational training, and even delinquency in addition to existing concerns of disease and nutrition.[968] The globalized child that emerged in the 1960s was seen as essential to the development and progress of nations. An increased interest in the girl child also emerged during this period as it became increasingly evident that women and girls were important to development. A girl's education (and that of her mother), health, nutrition, equality and employment were critical to efforts to bring the developing world into capitalist markets. The model of childhood, once justified by the natural sciences, was now also justified by the social sciences: economics, development, political science, sociology, anthropology, etc. Economics, arguably the most objective of the social sciences, was especially key to the

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[967] Nobelprize.org, "United Nations Children's Fund: The Nobel Peace Prize 1965: History of the Organization."
[968] Ritchie Calder, *Growing up with Unicef*, Public Affairs Pamphlet No. 330 (New York: Public Affairs Committee, 1962), 13-14.

development of the model as a whole. As the model steadily broadened in scope in the 1960s and 1970s, its adoption and fulfillment increasingly became part of – and were eventually inseparable from – the project of state-building itself.

Linking children's needs to the needs of the state was not a new concept. Chapter 3, for example, examines how both the British and the French recognized the connection between the health of children and the ability to win wars. This new connection between postwar development and the well being of children was not simply a strategy on the part of international organizations to promote children's issues (though it may have been this as well), but was also seen as critical to state building and national development. The relationship between children's needs and state needs has also been one of the few sub-areas of children's rights to receive attention in the international relations literature. Scholars that have addressed children's rights issues (from a theoretical and critical perspective) cite the link between human rights and economic progress in general and between economic progress and children's rights in particular.[969] One common argument in critical theory approaches to childhood examines the "new moral imperialism" of children's rights or the "moral rehabilitation of imperialism,"[970] in which the inability of Southern countries to protect children according to the demands of international law exposes them to intervention by international organizations.[971]

The model of childhood entered its most recent phase with the coming into force of the CRC. Since then, international law has become the definitive voice and key source

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[969] Lewis, "Human Rights, Law and Democracy in an Unfree World.", Alison M.S. Watson, "Children and International Relations: A New Site of Knowledge?," *Review of International Studies* 32 (2006).
[970] Vanessa Pupavac, "Misanthropy without Borders: The International Children's Rights Regime," *Diasasters* 25, no. 2 (2001): p. 107.
[971] Ibid, Lewis, "Human Rights, Law and Democracy in an Unfree World.", Erica Burman, "Developing Differences: Gender, Childhood and Economic Development," *Children & Society* 9, no. 3 (1995), Watson, "Children and International Relations: A New Site of Knowledge?."

of authority in children's protection and rights globally. Although science and economics still serve as sources of authority for the model, the CRC has codified the model of a globalized childhood. As evident in the case studies of UNICEF and AIUSA, international law in itself serves to justify their initiatives and campaigns. In no campaign to date has this been more evident than in AIUSA's campaign against the child death penalty addressed below and in the next chapter.

THE ROLE OF MORAL AUTHORITY

As the model of childhood grew in complexity and diffused globally, the norms contained within the model (such as the ban on the child death penalty) also diffused and gained legitimacy. Organizations like UNICEF and AIUSA held an institutional moral authority based on their own records of accomplishment and principled positions as well as on the records of their parent organizations, the United Nations and AI, respectively. The norm against the child death penalty was bolstered by the moral authority of the institutions that diffused the norm by diffusing the model of which it was a part.

Theoretical variants of moral authority as a form of power have been discussed in international relations literature for some time: Judith Goldstein and Robert Keohane considered the causal power of 'principled beliefs,' while Kathryn Sikkink referred to the power of 'principled ideas.' [972] The impact of religion on decision-making is also a theme of scholarship related to moral authority and principled ideas, although it is grossly

[972] Judith Goldstein, Robert O. Keohane, and Social Science Research Council (U.S.). Committee on Foreign Policy., *Ideas and Foreign Policy : Beliefs, Institutions, and Political Change*, Cornell Studies in Political Economy (Ithaca: Cornell University Press, 1993), p. 591, Kathryn Sikkink, "Human Rights, Principled Issue-Networks, and Sovereignty in Latin America," *International Organization* 47, no. 3 (1993).

neglected in the international relations literature.[973] Richard Price has argued in a review of the transnational civil society literature that activists "derive their authority from three principal sources: expertise, moral influence and a claim to political legitimacy."[974] Activists must demonstrate, as the discussion of UNICEF and AI below attests, that they are knowledgeable about their cause (expertise), that they hold the moral high ground and can use their position effectively (moral influence), and that they represent the interests of the public as opposed to private or corporate interests (political legitimacy).[975] Sikkink adds the perception of accountability to this list, as well as the transparency needed to hold groups accountable.[976]

Transnational moral authority is also not a new idea. Rodney Bruce Hall has argued that it has its roots in pre-sovereign Europe, but can be seen at work throughout the 20th century.[977] Beginning with Woodrow Wilson's justification for entering World War I and throughout the Cold War (in both the East and the West), moral authority has been a powerful tool for states. After World War II, the locus of moral authority shifted from "colonial paternalism" to a struggle for the "allegiance of peripheral peoples" through competing claims of support for "peripheral self-determination."[978] As Price and others have made clear, moral authority has been a highly effective tool for activists and organizations as well. Hall contends that transnational moral authority has been used as a

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[973] Jonathan Fox, "Religion as an Overlooked Element in International Relations," *International Studies Review* 3 (2001).
[974] Richard Price, "Transnational Civil Society and Advocacy in World Politics," *World Politics* 55 (2003): p. 587.
[975] Ibid.: pp. 589, 591, Ann Florini, *The Third Force: The Rise of Transnational Civil Society* (Tokyo and Washington: Japan Center for International Change and Carnegie Endowment for International Peace, 1999), Clark, *Diplomacy of Conscience: Amnesty International and Changing Human Rights Norms*.
[976] Kathryn Sikkink, "Restructuring World Politics: The Limits and Asymmetries of Soft Power," in *Restructuring World Politics: Transnational Social Movements, Networks, and Norms*, ed. Sanjeev Khagram, James V. Riker, and Kathryn Sikkink, *Social Movements, Protest, and Contention* (Minneapolis: University of Minnesota Press, 2002).
[977] Rodney Bruce Hall, "Moral Authority as a Power Resource," *International Organization* 51, no. 4 (1997).
[978] Ibid.: pp. 619-620.

power resource by those seeking to affect political outcomes.[979] Drawing on the work of Alex Wendt and Frederich Kratochwil, Hall argues that moral authority is thus a "shared convention … one that acquires utility as a power resource to the extent that it is institutionalized as a convention."[980] Moral authority, Hall says, can be a game-changer, with the power to shape political outcomes when it "becomes socially embedded in a system of actors whose social identities and interests impel them to recognize it as a power resource."[981] In the case of the child death penalty, the international system of states committed to progress and justice provides the context for children's rights, though it is also the shared convention that the state should be the primary site of protection for children. This shared convention provides the leverage for UNICEF and AI to target state-level change from above and below.

The ideal type of moral authority of international law is one whereby states feel compelled to obey law regardless of its content. This sense of obligation is rare. In practice, norms and law rarely possess this degree of authority. Moral authority often requires persuasion over time to develop the sense of obligation necessary to result in policy change. Even with universal moral principles within human rights, like the right to life, the moral authority to judge the application of these principles within countries must be developed over time. For example, the death penalty for child offenders clearly violates the right to life, as the state causes the death of a child offender. But even in this

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[979] Ibid.
[980] Ibid.: pp. 593-594. Alexander Wendt, "Anarchy Is What State Make of It: The Social Construction of Power Politics," *International Organization* 46, no. 2 (1992), Yosef Lapid and Friedrich V. Kratochwil, *The Return of Culture and Identity in Ir Theory*, Critical Perspectives on World Politics. (Boulder, Colo.: Lynne Rienner Publishers, 1996).
[981] Hall, "Moral Authority as a Power Resource," p. 594.

case, principled actors had to build moral authority in order to induce compliance with international legal principles.

AIUSA's and UNICEF's moral authority and use of international law

AIUSA, along with other NGOs, waged a successful campaign against the death penalty for child offenders in the United States. The campaign's success can be attributed, in part, to the moral authority and respect accorded to AI, an organization that has nurtured its reputation as an objective advocate for human rights. Ann Marie Clark considers the moral authority of AI and argues that AI endows human rights declarations with authority by spotlighting the discrepancies between human rights ideals and country practice.[982] AI's original intention was more functional: to free prisoners of conscience. Although AI used the arguments put forth by international law, it sought to increase the authority of human rights principles by giving them something international law could not: transcendence over time, ideology and geographical space, what Clark calls "impartial application."[983]

Clark contends that the hard part for AI in ensuring compliance with human rights norms is not the application of ideas to practice, but rather the development of a sense of obligation on the part of states.[984] AI's founder Peter Benenson believed that public condemnation of human rights violations, not international law, would serve to change states' behavior.[985] In fact, AI's original mission was not directed at advancing international standards of human rights, and it would not take on this mission until well

[982] Clark, *Diplomacy of Conscience: Amnesty International and Changing Human Rights Norms*, p. 19.
[983] Ibid.
[984] Ibid., p. 128.
[985] Ibid., p. 5.

into its second and third decades.[986] The evolution of the relationship between AI and international law says something about how human rights change works, or, at the very least, how it is perceived to work by AI strategists. It further testifies to the gradually expanding role of international law within the international system and how this contributed to the moral authority of AI and AIUSA.

In AIUSA's campaign against the death penalty for child offenders, the campaign material almost always referenced international law and (implicitly) the international community by listing those countries that have positioned themselves outside this community by their failure to comply with international standards of human rights. International legal arguments were almost always employed in AI and AIUSA's campaigns against the death penalty for child offenders, suggesting that these arguments were expected to resonate with the campaigns' target audiences. Several international legal avenues were pursued in the campaign against the child death penalty in the United States; one case was brought before the Inter-American Court of Human Rights.[987] AIUSA further sought to include international law in oral arguments and petitions of death penalty cases throughout the country.

Yet the citation of international law in these arguments was carried out on a strategic basis. In an AIUSA memo from 1986, lawyers from several organizations active

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[986] Ibid., p. 8.

[987] *Case 9647 (Roach)*, OEA/Ser.L/V/II.71, doc. 9 rev. 1(1987). A U.N. Economic and Social Council resolution 1503 [Economic and Social Council Resolution 1503 (XLVIII), 48 U.N., ESCOR (No. 1A) at 8, U.N. Doc. E/4832/Add.1 (1970)] complaint was not filed because the death penalty for child offenders would likely not have qualified (or received sufficient support) under the procedure's standards, which require that the complaint "appear to reveal a consistent pattern of gross and reliably attested violations of human rights." Mary E. McClymont, "Personal Letter to David Weissbrodt," (Washington, D.C.: University of Minnesota Law School: Private Archives of David Weissbrodt, September 19, 1985; reprint). The rejection of the 1503 procedure was not from McClymont but from notes written on letter by Weissbrodt.

in child death penalty cases[988]were advised *not* to include international legal arguments in all U.S. cases.[989] Rather, the memo suggested that AIUSA "seed the argument and pick … cases very selectively." Lawyers defending children faced with the death penalty should be contacted and asked "to put the international law argument in."[990] In order to make certain that "they do it, and to be sure they do it in the way [AIUSA] want[s]," AIUSA drafted a legal template of pleadings to be used in briefs.[991] Without this template, which included the international law argument, the memo argues, "Lawyers won't want to push the argument, take up pages and time, etc. if it's not a good forum."[992] The memo further suggested that AIUSA stay away from state courts that are "inherently more resistant to international law arguments."[993] In these cases, federal judges should instead be encouraged to write about the international legal issues to force their consideration.

Another 1986 memo detailing the minutes of an AIUSA Legal Support Network (LSN) meeting listed Mary McClymont of the ACLU as co-counsel in the Roach and Pinkerton case at the Inter-American Court on Human Rights, and Cheryl Polydor, the LSN coordinator in Washington, D.C., as the authors of a "paragraph" that would be "distributed to attorneys representing juveniles in capital cases."[994] The paragraph aimed

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[988] Paul Hoffman (AI?), Jane (?), David Weissbrodt (Amnesty International and the University of Minnesota), Mary McClymont (ACLU) and Joan Fitzpatrick (organization? And University of Washington)
[989] Jessica and Amnesty International USA, "Memo To: Paul Hoffman, Jane ?, David Weissbrodt, Mary Mcclymont, Joan Hartman Fitzpatrick, Re: Meeting with Jack Boger," (New York: University of Minnesota Law School: Private archives of Professor David Weissbrodt, 1986; reprint).
[990] Ibid.
[991] Ibid.
[992] Ibid.
[993] Ibid.
[994] Jane Rocamora, "Memo To: Lsn Coordinators and Attendees of the Lsn Death Penalty Meeting, Re: Minutes of Death Penalty Meeting on October 27, 1986," (University of Minnesota Law School: Private Archives of David WeissbrodtNovember 3, 1986; reprint).

to "preserv[e] the international law issue in the event an attorney-of-record does not want or know how to raise the issue in depth."[995]

In a survey I conducted of AI and AIUSA publications and memos from 1987 to 2004 on the death penalty for children, I found that AI lawyers, researchers and strategists constructed their campaigns based on four assumptions about international law:

1. Human rights standards found in international law provide a good foundation for human rights advocacy and should be supported.

2. Traditional legal avenues for international human rights norms are valuable in themselves. For example, AI advocates continue to use international fora even when these institutions are unsympathetic to remedying certain violations or are ineffectual at ending the violations, because there is a benefit in itself to the pursuit of remedy in these institutions. International legal arguments were also "seeded" in oral and written arguments in U.S. cases.

3. There is a "compliance pull" to international law.[996] The fact that AI sought to "seed" cases with international law and the prevalence with which AI used international law in its campaign publications indicate that it believed international legal arguments to be compelling to its target audiences. It is also possible that by using international law even when it was not likely to be dispositive, AI and AIUSA were attempting *to create a compliance pull* for law—to construct a pull through its repetitive use in legal briefs.

4. The compliance pull of international law is insufficient to produce change on its own. Instead, international legal arguments have often been paired with references to the consensus of the *civilized* (my term) international community—as evident in the dissemination of lists of violating countries. In other words, evidence of the consensus was believed to be found not only in the number of states that prohibit executions of child offenders but also, more importantly, in the types of states that do and do not execute children.

Moreover, the list of violating states underscores the fact that this prohibition is not in word only, but also in deed; unlike some other prohibitions in international law, no states executed child offenders except for the United States and a handful of states that are considered to be outside of the international community. International legal

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[995] Ibid.

[996] Franck, "Legitimacy in the International System."

prescriptions are reinforced by the association promoted by AI between the death penalty for child offenders and the uncivilized, rogue state.

In campaigns addressing child offenders, AI's success was in linking obligation with international law. To do so, it had to draw on the moral authority it possessed in other areas, particularly its expertise and independence, and use these to support a campaign that essentially argued that only uncivilized states execute child offenders. The path the United States took to compliance, although convoluted because of the federal system, responded to this critique in stages over the course of two decades. Compliance was partially a result of AI campaigns that connected the protection of child criminals *with* the United States' belief that it is civilized and distinct from other countries that execute child offenders.

Another scholar who examines the moral authority of AI, Stephen Hopgood, draws a distinction between moral and political authority. Moral authority, for Hopgood, is powerful because it is not associated with any identity or political interest.[997] Political authority rests upon identity and is linked to an interest. Moral authority requires that the speaker lack national, racial, class-based, or geographical attachment to any group. Hopgood contends that we can recognize moral authority because it can provide expertise and prescription without the need to persuade. Persuasion is characteristic of politics and "is a signal that authority does not exist."[998] International legal prescriptions about human rights, Hopgood argues, "rely on persuasion."[999]

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[997] Hopgood, *Keepers of the Flame*, pp. 13-14.
[998] Ibid., p. 73.
[999] Ibid.

Yet Hopgood's conception of AI's moral authority is flawed. Empirically speaking, AI does not possess the ability to shape state behavior with mere prescriptions. Evidence abounds that AI must use persuasion to produce political change. AI's authority requires persuasion and is often unique to particular themes or violations and to particular countries. Sometimes authority in one area may spillover into another, or authority accepted in or about one country may be accepted in or about other countries or regions. Evidence from my survey of AI and AIUSA documents, discussed above, demonstrates that AI gradually employed international law as a way to persuade states to end the child death penalty. In fact, it appears that AI and AIUSA were attempting to create a compliance pull of international law. In effect, they sought to bolster their own moral authority by increasing the authority of international law through the systematic inclusion and citation of international law and norms in legal briefs.

A key theme in these discussions of AI's moral authority is expertise. AI possesses expertise in a variety of human rights issues within countries and across regions. Hopgood suggests this expertise is contingent upon the independence and objectivity characteristic of AI's research and campaigns, as discussed above. Clark suggests that through its "position as a disinterested and autonomous 'third party' actor," AI "deploys expertise" to support its norm creation and development.[1000] Expertise is also essential to UNICEF's moral authority. Unlike AIUSA, however, UNICEF's expertise is derived from science: social science (political science, economics, geography, education) for development issues, and medical science in the areas of child health, nutrition, disease and development, as discussed above. Although it is clear from the English case study

[1000] Clark, *Diplomacy of Conscience: Amnesty International and Changing Human Rights Norms*, 11.

(and in the U.S. case study in the next chapter) that the development of the science of childhood was not apolitical, science possesses an aura of objectivity nonetheless. For example, when UNICEF began to focus on the 'whole child,' and health, education and sanitation issues became an important platform for advocacy, it constructed the global child as one who primarily needed good health, a decent education and clean living conditions at the expense of other needs. It could have, for example, also advocated for spiritual salvation or parental emancipation or any number of other issues of concern for children around the world. Holloway and Valentine argue that the child constructed by the West is "less developed, less able and less competent than adults," and it was this child that was promoted by UNICEF in development projects in the second half of the 20th century.[1001] In fact, by choosing to advocate on the basis of certain issues over others, the child that UNICEF constructed and diffused was decidedly political. But because the model had scientific support, and was even a scientific construction, it had the appearance of objectivity and was therefore seen as legitimate.

Another source of UNICEF's moral authority is its parent organization, the United Nations.[1002] The United Nations' role as a representative for its member states lends it a legitimacy not found with other transnational IGOs and NGOs. Yet while UNICEF benefits from the U.N.'s institutional legitimacy, it is also affected by its reputational harms. Scandals involving abuse by peacekeepers and corruption in the Oil-for-Food program have eroded the U.N.'s legitimacy. Attacks on UNICEF staff in Sudan

[1001] Sarah Holloway and Gill Valentine, *Children's Geographies : Playing, Living, Learning*, Critical Geographies (London ; New York: Routledge, 2000), p. 2.
[1002] Kent J. Kille, ed. *The Un Secretary-General and Moral Authority* (Washington, D.C.: Georgetown University Press,2007), p. 10.

and Iraq reflect upon the U.N.'s legitimacy in general and suggest reputational harm to agencies within the United Nations, such as UNICEF.

As with AI, UNICEF's organizational effectiveness depends upon its powers of persuasion. In its case, it must convince governments to accept its recommendations and assistance. Its pillar issues – health, education and sanitation – have the appearance of impartiality, but UNICEF still struggles to carry out its programs in the world's most conflict-prone regions. The Democratic Republic of the Congo (DRC) and Sudan, for example, are two places that UNICEF faces serious resistance. Genocides have always proven especially difficult for intervention, and it is not a coincidence that these are two of the states where AI has sought to end the child death penalty. The presence of child soldiers, found in both the DRC and Sudan, indicates a belief that children are old enough to kill, easier than adults to control, and that their ability to empathize may be compromised. Protecting these children from the death penalty is a much more difficult task than protecting children in countries without child soldiers.

UNICEF, however, has a carrot that AI does not: money. UNICEF's budget in 2007 was $3.013 billion (U.S) dollars.[1003] This funding is pumped into child health and protection programs, programs that in many ways help those in power by providing services that governments are unable to provide. Compliance with UNICEF's recommendations and international law, then, is part of the return on UNICEF's investment. As such, UNICEF's moral authority is buttressed by its economic power.

Like AI, UNICEF also entered the rights arena somewhat reluctantly. It did not, as the case above makes clear, assume leadership on or even overtly support children's

[1003] http://www.unicefusa.org/about/faq/how-is-unicefs-budget-allocated.html

rights initiatives at first, viewing this direction as ineffectual to its larger mission of international development. It helped facilitate the drafting of the CRC nonetheless, and now employs the language of the CRC in its documents as one source of its moral authority. For UNICEF, international law provided another source of authority for the model of childhood it promoted. UNICEF's use of international law to advance its agenda for children made a great deal of sense, given that law, like science, possesses a perceived objectivity. International law, especially, carries a legitimacy that it is universal; like the laws of gravity, international law applies in every state and to every person. Although UNICEF was initially skeptical about the utility of a convention for children, it nonetheless has used its content as a central justification for its programs, policies and publications.

CIVILIZATION AS A POINT OF REFERENCE

Although never directly referencing civilization, AI in its publications about the death penalty commonly referenced the list of states that continued to execute children as well as the global consensus against the practice. In the course of my survey of publications from AI and AIUSA between 1987 and 2004, I ranked the order of arguments made in each publication. I found that the most common argument was that the United States was in the disreputable company of the DRC, China, Iran, Iraq, Nigeria, Pakistan and Yemen, among others. It is reasonable to assume that strategy documents are drafted with care and purpose and that they place arguments in an order that advocates believe will be persuasive to the target audience. Stronger arguments or arguments the organization particularly wishes to advance will be used in multiple

documents and made early within publications. The principal arguments made in AIUSA and AI publications addressing the death penalty in general or for child offenders were: The United States is one of a few rogue states that execute child offenders; international law condemns the practice of executing child offenders; children possess unique characteristics, including reduced culpability for their actions; and there are concerns about the way the death penalty is carried out in the United States.

The most telling aspect of these reports is that whenever arguments are made about child offender executions in the United States, the list of states that continue to execute is *always* included in the publication. The suggestion is that these states are widely considered to be rogue states that fail to measure up to international human rights standards. None of these states are industrialized; none are in the West. One-quarter are in Africa; three-eighths are in the Middle East, and an additional three-eighths are in Asia. All but one are former colonies. Moreover, only one publication did not mention the incompatibility of U.S. practice with international law.

Since AIUSA uses these arguments in almost all of the reports surveyed on the death penalty for child offenders, it can be assumed that it believes the arguments will persuade the target audiences, presumably, the American public, legislators, lawyers and judges. Although these publications demonstrate AI's commitment to campaign diversity by discussing all countries that continue to execute child offenders, many provide significantly more page space for the U.S. case study than for the other cases. For example, a report on child executions worldwide since 1990 surveys national practices and customary law before summarizing the practices of each state that continues to perform child executions. The document, while covering all noncompliant states, is

clearly focused on the United States. The DRC, Iran, Nigeria, Pakistan, Saudi Arabia and Yemen are summarized in two and a half pages *altogether*, while the U.S. summary alone takes up four pages.[1004]

The underlying message of these publications is that the U.S. practice of executing child offenders is not only in violation of customary law, but that its treatment of children is on par with the treatment of children in the world's least developed, least democratic states. That these countries are listed by name is suggestive of reputation and status – or the lack thereof. The message is that because it executes child offenders, the United States is in the company of less civilized nations.

AI and AIUSA are not the only organizations invested in these comparisons. The United Nations, after all, is the ultimate civilizing institution. Emerging out of the Hobbesian chaos of World War II, the U.N. represents the triumph of human dignity over barbarism. Although war and human rights violations clearly did not end with the U.N.'s founding in 1948, its founding is nonetheless an affirmation of liberal values. The U.N. began to focus on children in the developing world through UNICEF. Although these efforts were not coercive, UNICEF brought with it relatively deep pockets (along with milk, food, vaccines and penicillin) and the promise of lifting young countries out of poverty, famine and disease. Regardless of intent, these efforts echo the discourse of colonialism and mark the return of state intervention in non-Western states by 'friendly visitors' through a range of child-saving efforts.

The (unsubstantiated) belief that child protection in general emerged in the West is apparent in mid-century publications about UNICEF in the United States. In a public

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[1004] Amnesty International, "Children and the Death Penalty: Executions Worldwide since 1990, Act 50/007/2002," (2002; reprint).

affairs pamphlet in 1959 with prefaces by both Dag Hammarskjold (Secretary-General of the United Nations) and Maurice Pate (executive director of UNICEF), the author asks why it is possible to believe that children of developing countries could one day have the same chance for life and health as children in the West. The pamphlet concludes that one reason is that "the peoples of Asia and Africa and South America have *come to want* for their children the same life horizons that the people of Europe and North America have come to expect [my emphasis]."[1005] The implication here is that regardless of whether parents in developing regions wanted their children to live healthy lives before Western organizations came on the scene, the notion of universal standards of child welfare had its origins in the West and was introduced and diffused by UNICEF. The pamphlet goes on to implore young countries (in the "backwaters of civilization," to use the pamphlet's words)[1006] to "accept the advice and help of more experienced" states.[1007] Even UNICEF's own documents express the belief that the idea of childhood in general diffused from the West to the periphery, from "richer neighbors" to the developing countries of Africa.[1008]

THE AGENCY OF ORGANIZATIONS: A RETURN TO PRINCIPLED ACTIVISM

Although the death penalty for child offenders had been prohibited in international law since the ICCPR came into effect in 1976, it took another decade for NGOs, activists and advocates to push the issue into the national spotlight in the United States. Of all the U.S. violations of human rights codified in the ICCPR, the death penalty

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[1005] Heilbroner, *Mankind's Children: The Story of Unicef*, 3.
[1006] Ibid., 13.
[1007] Ibid., 4.
[1008] UNICEF, "1946-2006 Sixty Years for Children," 10-11.

for child offenders seemed an unlikely subject for an international campaign. As will be discussed in more detail in the next chapter, the number of child offenders sentenced to death in the United States was relatively small, less than seven per year on average between 1980 and 1985. Moreover, a child offender had not been executed since 1964.[1009] The benefits of such a campaign seemed to be outweighed by the opportunity costs. Rising urban crime and juvenile delinquency meant that there was little sympathy for child criminals, especially violent ones. Yet the death penalty for child offenders was put on the international agenda in the late 1980s by a collection of individuals and organizations in the United States and abroad, including AI, the ACLU and the National Association for the Advancement of Colored People's Legal Defense Fund (NAACP-LDF). Additionally, a coalition of nonprofit organizations and foundations stepped up efforts in 2002 to wage a collective campaign directed at a potential ruling by the U.S. Supreme Court. This effort is documented in chapter 6.

AIUSA, and other organizations such as the NAACP-LDF and ACLU, succeeded in placing the death penalty for child offenders on the national as well as the international agenda (see preceding page) and in mobilizing international opposition to its continued practice in the United States. Still, compared to other human rights violations in the United States, the number of children affected by the juvenile death penalty was relatively small. For the NAACP-LDF, defending clients facing discrimination was part of its founding mission. For AI, the motivations were likely more rooted in international strategy, since the ongoing U.S. practice of the juvenile death penalty provided cover for other countries to continue the practice as well. Moreover, abolishing the penalty for

[1009] Amnesty International, "United States of America: The Death Penalty and Juvenile Offenders, Amr 51/23/91," p. 62.

child offenders in the United States offered a means to 'chip away' at the death penalty at large, and a campaign focusing on child offenders was believed to be easier than a campaign focusing on older, more culpable adults. The issue also possessed a clarity— the killing of children by the state— not seen in other potential campaigns by AI.

Perhaps most important for AI and AIUSA, a campaign against the child death penalty in the United States reinforced their organizations' independence and impartiality. By targeting a U.S. violation of human rights, in addition to focusing on violations in the global South, AI and AIUSA underscored their political neutrality in campaigns against human rights violators. The inclusion of the United States in a major campaign also gave political cover to AI and AIUSA's other campaigns in other parts of the world, lending the appearance of balance and fairness in the selection of campaigns.[1010]

The findings suggest that despite the breadth of the model of the globalized child, actors have tremendous leeway within the model to select where they will focus their efforts. The execution of three child offenders in the United States in the 1980s and the entry into force of the CRC in 1990 provided a policy window, or an "opportunity for action on given initiatives," within which AIUSA and others could organize.[1011] John Kingdon contends that "advocates lie in wait … waiting for a development in the political stream they can use to their advantage."[1012] Through "tactical pluralism,"[1013] namely, drafting *amici* briefs; petitioning legislators; seeding arguments; publishing legal theory

[1010] This discussion of the motivation of AI and AIUSA in conducting a campaign against the U.S. child death penalty benefited greatly from conversations with Barb Frey.
[1011] John W. Kingdon, *Agendas, Alternatives, and Public Policies* ([S.l.]: HarperCollins, 1984), p. 174.
[1012] Ibid., p. 173.
[1013] Strolovitch, *Affirmative Advocacy : Race, Class, and Gender in Interest Group Politics*, p. 144.

and crafting defense efforts using international law arguments; initiating studies about the death penalty and about the development of children; and employing comparisons with 'rogue' states, AIUSA took advantage of the policy window that opened in the late 1980s and 1990s.

The United States was, in the language of Anne Schneider and Helen Ingram, a "proximate" or "first-order receptor" of AIUSA's ultimate goal of ending the death penalty for all crimes and all offenders internationally.[1014] AIUSA's and AI's campaign against U.S. death penalty policy and practice associated U.S. practice with that of states largely considered to be outside of the international community. The idea was that this classification, this grouping with disreputable states, would shame the United States to change its policy and to comply with international law.

Within the United States, AIUSA had to re-construct the perception of its target population (child offenders). Schneider and Ingram develop a typology that is useful here. They suggest that there are two types of target groups that are socially constructed, the deserving and the undeserving, which possess differing degrees of political power.[1015] Of those groups that have little political power, there are those that are meritorious or deserving, such as most children, and those that are undeserving, such as criminals.[1016] Child criminals straddle these categories since they are both dependents and deviants. Over the course of the 20th century, as will be discussed in more detail in the next chapter, child criminals were socially constructed more as deviants than as innocents in

[1014] Anne L. Schneider and Helen M. Ingram, *Policy Design for Democracy*, Studies in Government and Public Policy. (Lawrence, Kan.: University Press of Kansas, 1997), p. 86.
[1015] Ibid., pp. 108-109.
[1016] Ibid., p. 109.

U.S. policy and society. It was the main task of AIUSA and other groups to reshape the social construction of young criminals from undeserving to deserving.

As the case study makes clear, the decision to focus on the child death penalty was the result of many years of organizational handwringing at AIUSA, which took place as the model of childhood was maturing and becoming internationalized. The selection of the child death penalty as an important policy goal of AIUSA and other organizations was itself a social construction of a problem. After all, the legal execution of twenty or so child murderers in a representative democracy over the course of two decades would not seem to constitute a radical human rights violation on par with the attention it received. Yet AIUSA and other organizations made the issue a key campaign between 1985 and 2005. To put AIUSA's unlikely choice of policy targets in perspective, at least three genocides occurred during this period.[1017] This is not to say that AI or AIUSA did not campaign against these genocides or that they should have done more, only that international campaigns are expensive and time-consuming and that their selection involves hard choices or trade-offs. The 1980s was a period of widespread human rights violations in the Americas, with disappearances and scorched-earth campaigns in Latin America. A large-scale campaign for a few child offenders siphoned valuable resources that might have been used to address other human rights violations that were much in evidence in the 1980s and that were occurring on a far greater scale. The resources of time, effort and money that AIUSA and other organizations poured into this campaign at the expense of other possible initiatives made the opportunity costs of its choice during these two decades enormous.

[1017] There are least three genocides that occurred between 1985 and 2005, Bosnia, Rwanda and the Sudan, although scholars point to others such as the Iraqi Kurdish and Liberia.

Why then focus on child criminals? I suggest two reasons: First, the United States was in violation of human rights norms, and American activists were motivated to bring it to account for its actions. This commitment is not unlike today's efforts by AIUSA and other human rights organizations to close Guantanamo prison. American activists chose to engage their government on an issue of widespread international consensus, and the democratic, grassroots nature of AIUSA lent itself to this kind of campaign. Second, American activists could not tolerate such a blatant aberration from the model of childhood institutionalized over the course of these decades. Activists, especially those vehemently opposed to the death penalty in any context, focused on the incompatibility between the execution of children and the state's obligation to protect dependents. Both of these reasons suggest a high level of agency on the part of AIUSA and other organizations.

Understood in this context, AIUSA's agency recalls the principled activism of child advocates in the 19th and 20th centuries. Early successes in reforms for child offenders and efforts to protect children from abuse and neglect were the result of the tireless work of norm entrepreneurs, principled actors who during this time championed the cause of children and insisted upon the duty of adults to protect them. Principled activism as a mechanism of diffusion became less important for the norm as it diffused via colonial imposition and coercive socialization, discussed in chapter 4. The creation and development of human rights organizations and campaigns, like AI and AIUSA and their campaign against the child death penalty, marks the return of principled activism as a key mechanism of the diffusion of the norm against the child death penalty alongside (and as a part of) the globalization of the model of childhood.

The AIUSA case demonstrates that even though the model of childhood has been enshrined in the international system, there are still opportunities for agency and principled activism. There are differences as well, of course, between the efforts of principled actors in the early campaigns and the later campaign to end the child death penalty in the United States. AIUSA's campaign was transnational and referenced international human rights law and norms as its primary source of authority. While early principled activists cited the nature of children and the moral demands of charity as their motivation, later activists cited the international order and the legitimacy of state protection over children.

The strategy of publicizing and creating a compliance pull of international law, fomenting international opposition and condemnation, commissioning multiple studies and launching multiple actions resulted in a 'blitzkrieg' approach to catalyzing change. The campaigns to abolish the death penalty for child offenders likely pushed U.S. policy- and decision-makers to acknowledge, argue against, refute and ultimately adopt international standards in the treatment of child offenders. The case study of AI and AIUSA and the death penalty for child offenders suggests that while the campaign linking civilization to the protection of child criminals was necessary for U.S. compliance, it was not sufficient to produce change. International law put the issue on the NGO agenda and provided the consensus by which to judge U.S. policy and practice.

CONCLUSION

This chapter has argued that the model of the globalized child was institutionalized through the efforts of international organizations like UNICEF that drew

on the natural and social sciences and international law to develop and promote a decidedly Western construction of childhood, as measured by a single, universal, and increasingly detailed set of standards of child welfare and protection. Later, AIUSA would use its moral authority (also justified by science[1018] and law) to make the child death penalty an important issue in international children's rights. Through claims about civilized and uncivilized behavior, AIUSA (among other organizations) connected the practice of the child death penalty with the practices of states outside the international community of states. The agency of UNICEF and AIUSA demonstrated in these case studies suggests the return of principled activism as a key mechanism of norm diffusion. The next chapter considers laggard states that did not adopt the norm against the death penalty for child offenders during the first or second cascade. The chapter will also return to the role of AI and AIUSA and other NGOs as they struggled to bring the United States into compliance with international law. Additionally, it will present minor case studies of two other laggard states, China and Pakistan.

[1018] As the next chapter discusses, a key argument of AIUSA against the child death penalty was that the brains of teenagers have not fully developed, especially the part of the brain that analyzes the consequences of actions and provides impulse control.

CHAPTER 6
LAGGARDS IN THE GLOBAL AGE OF THE CHILD

Through the three mechanisms of diffusion discussed in chapters 3, 4 and 5—principled activism, coercive socialization and the globalization of childhood, the norm abolishing the death penalty for child offenders successfully diffused in the 20th century. There remained, however, a handful of states that continued to execute child offenders, including the United States, whose abolition of the penalty in 2005 signaled the end of the second cascade period. As of March 2010, eight states have executed child offenders in the 21st century, with 62 executions among them. The eight are: China (2), the Democratic Republic of the Congo (1), Iran (41), Pakistan (2), Saudi Arabia (4), Sudan (2), the United States (9) and Yemen (1). [1019]

In this chapter, I discuss one major case study, the United States, and two minor case studies, China and Pakistan. The U.S. case poses a particular puzzle for some theories of international relations because it has been the hegemon at least since the end of World War II. The presence of hegemonic laggards in norm diffusion conflicts with the expectations of realists, neoliberal institutionalists and sociological institutionalists. These theorists expect Western states (especially the hegemon) to lead norm diffusion. The other two states considered in this chapter, China and Pakistan, have both made some progress toward ending the death penalty for child offenders, but have nonetheless

[1019] Amnesty International, "Executions of Juveniles since 1990," http://www.amnesty.org/en/death-penalty/executions-of-child-offenders-since-1990.

executed four offenders between them in the 21st century. As laggard cases, these states provide an interesting juxtaposition to the cascades in the last half of the 20th century.

As I argued in chapters 1, 2 and 5, the abolition of the death penalty for child offenders in the United States (in 2005) marks the end of the second cascade period and ushers in the norm's late period. I base this demarcation point on the number of states that continue to execute children, on the importance (expressed by legal theorists) of the United States' abolition on the norm's diffusion as a whole,[1020] and on the global consensus against the norm expressed in other fora. For example, there is evidence that states recognize the global consensus against the practice when they conceal their activities. In the past, many states (Barbados, Democratic Republic of the Congo, Iran, Yemen and Zaire) have failed to report to the former United Nations Commission on Human Rights child executions or laws that allow such executions, while others have misstated their laws (Nigeria). The United States, however, has been the only country to openly and routinely admit its execution of child offenders and the only country to defend its right to do so well into the 21st century.[1021]

In addition to the CRC and ICCPR (discussed in earlier chapters), a number of regional treaties forbid the penalty for child offenders. The American Convention of Human Rights (ACHR), which also entered into force during the first cascade period (in

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[1020] Connie de la Vega and Jennifer Fiore, "The Supreme Court of the United States Has Been Called Upon to Determine the Legality of the Juvenile Death Penalty in Micheal Domingues V. State of Nevada," *Whittier L.Rev* 215 (1999), Geoffrey Sawyer, "Comment: The Death Penalty Is Dead Wrong: Jus Cogens Norms and the Evolving Standard of Decency," *Penn. St. Int'l L. Rev* 2, no. 459 (2004), Alice Miller and Joan Fitzpatrick, "International Standards of the Death Penalty: Shifting Discourse," *Brooklyn Journal of International Law* 19, no. 273 (1993), Stephanie Kleine-Ahlbrandt, "The Prohibition of the Death Penalty for Juvenile Offenders in International Law," (University of Geneva, 1996; reprint), Weissbrodt, Fitzpatrick, and Newman, *Human Rights: Law, Policy and Process*

[1021] Amnesty International, "The Exclusion of Child Offenders from the Death Penalty under General International Law, Act 50/004/2003," (2003; reprint)p. 7.

1978), states that children whose crimes were committed when they were below the age 18 cannot be executed (Article 4§5). A total of 25 countries have ratified the convention. Article 5 of the African Charter on the Rights and Welfare of the Child prohibits death sentences on children under age 18 and has 21 ratifications. Protocol No. 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), which came into effect in 2002, abolishes the death penalty for all crimes and all criminals; thirty-seven countries have ratified the protocol.

This chapter will first examine the United States as the norm's hegemonic laggard, followed by the noncompliant cases of China and Pakistan. A discussion of the domestic and international factors in abolition will follow, including the roles of race, science and the state in protections for children and the continuation of the penalty.

THE U.S. CASE

This section will present the history of the death penalty for child offenders in the United States, including the historical development of American ideas about children and childhood; trends in race and geography; relevant Supreme Court rulings; the role of international law in Supreme Court decisions; and the NGO activities that helped to bring about an end to the practice. It will demonstrate that the United States was socialized to international standards of juvenile justice by international and domestic actors. These actors drew on norms about children previously adopted by the United States and the international community to demonstrate the incongruity between these norms and the death penalty for child offenders.

EMPIRICAL EVIDENCE OF EXECUTIONS OF CHILD OFFENDERS

The first recorded execution of a child offender in the United States was 16-year-old Thomas Graunger of Plymouth, Massachusetts in 1642, although he was hardly considered a child at the time.[1022] Since 1642, at least 366 child offenders under the age 18 have been executed in the United States, according to Victor Streib.[1023] The primary dataset for executions in the United States, the Espy data from 1608-1991, only contains information about the 'age at the time of the execution,' not the age of the offender at the time of the crime.[1024] Therefore, although Streib identifies at least 366 executions of child offenders in the United States since 1642, the Espy file shows that only 160 children were executed *while* they were still under the age 18.[1025] I have supplemented the Espy data with data on the executions carried out since 1985, resulting in Figure 6.1 below and including 182 of the 366 child offender executions. Much of the missing data is likely from the mid-20th century, as the duration between crime and execution increased over the century. Although the dataset may not include some 19th-century executions of child offenders (mostly 17-year-olds who weren't executed until age 18), these omissions are likely few, and the data before the 20th century is relatively complete. As the period between crime and execution grew in the 20th century, fewer children were executed while they were still under the age 18. Even though the Espy data likely misses a number of mid-20th century child executions, it still demonstrates the spike in executions of

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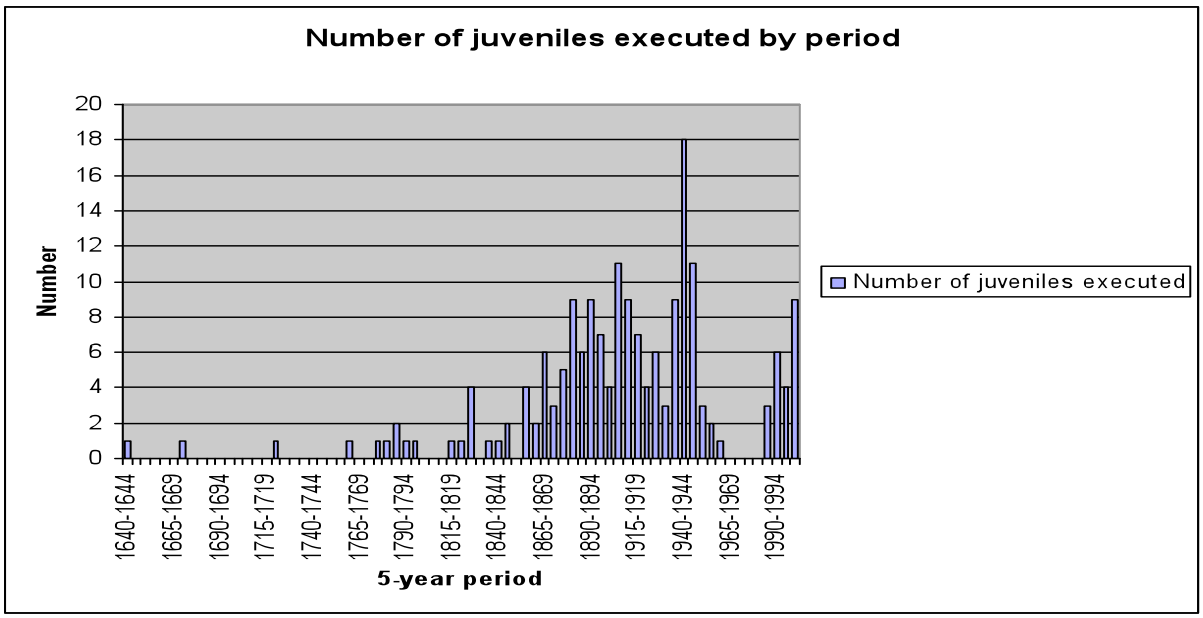
[1022] Victor L. Streib, "The Juvenile Death Penalty Today: Death Sentences and Executions for Juvenile Crimes, January 1, 1973-December 31, 2004," (Ohio Northern University College of Law, 2005; reprint)p. 3.
[1023] Ibid. p. 4.
[1024] M. Watt Espy and John Ortiz Smykla, "Executions in the U.S. 1608-1991: The Espy File [Computer File]," (Inter-university Consortium for Political and Social Research, 1992; reprint).
[1025] Streib, "The Juvenile Death Penalty Today: Death Sentences and Executions for Juvenile Crimes, January 1, 1973--February 28, 2005."

offenders who were under age 18 *at the time* of their execution. Robert Hale has argued that the actual number of child offender executions topped 141 between 1922 and 1962, almost three times what the Espy dataset reports.[1026]

FIGURE 6.1: CHILD OFFENDER EXECUTIONS BY PERIOD IN THE UNITED STATES



As the figure above demonstrates, child executions were rare in the 17th and 18th centuries before becoming more common in the 19th century and spiking dramatically in the mid-20th century. Yet there were other patterns as well. As in the United Kingdom, the death penalty for child offenders under age 14 became increasingly rare in the 18th and 19th centuries. The last execution of an individual under age 14 in the United States was Fortune Ferguson in 1927, at age 13.[1027]

[1026] Robert L. Hale, *A Review of Juvenile Executions in America*, *Criminology Studies Vol. 3* (Lewiston: Edwin Mellen Press, 1997), p. 92.

[1027] The Espy data does not list any child offenders executed below the age 14 in the 20th century; although Ferguson's execution is listed, his age is not. Amnesty International, "United States of America: The Death Penalty and Juvenile Offenders, Amr 51/23/91," p. 62. Fortune Ferguson's age was not listed in the ESPY dataset, but has been added to the dataset in Table 2.

In 1972, the Supreme Court ruled in *Furman v. Georgia*[1028] that the death penalty as it was then applied was arbitrary and violated the Eighth and Fourteenth amendments to the Constitution. The last child offender executed in the years before the *Furman* ruling was James Andrew Echols, a 17-year-old, in Texas in 1964 for rape.[1029] There were no executions of child offenders below the age 18 between 1965 and 1985.[1030] Twenty-two executions of child offenders have occurred since 1985; all of those executed were male and 17 years old at the time of their crimes except for one 16-year-old.[1031] Nine of these executions occurred between 2000 and 2003.

In the 1976 case *Gregg v. Georgia*[1032], the Supreme Court found the death penalty to be constitutional under the Eighth and Fourteenth amendments – as amended by the requirements from *Furman*. Child offender executions and death sentences remained low in the post-*Furman* years, although some spikes are evident. (See Table 6.1 below.)

TABLE 6.1: TOTAL CHILD OFFENDER EXECUTIONS AND DEATH SENTENCES BY YEAR FROM 1980-2003 IN THE UNITED STATES

Year	Executions of child offenders	Child offender death sentences[1033]
1980	0	6
1981	0	6
1982	0	13
1983	0	6
1984	0	4
1985	1	5

[1028] 408 United States 238 (1972).
[1029] Amnesty International, "United States of America: The Death Penalty and Juvenile Offenders, Amr 51/23/91," p. 62.
[1030] Streib, "The Juvenile Death Penalty Today: Death Sentences and Executions for Juvenile Crimes, January 1, 1973-December 31, 2004," p. 4. Opinion Justice Stevens, "*Thompson V. Oklahom*a 487 U.S. 815 " (U.S. Supreme Court, 1988; reprint).
[1031] Streib, "The Juvenile Death Penalty Today: Death Sentences and Executions for Juvenile Crimes, January 1, 1973-December 31, 2004," pp. 3, 5. Sean Sellers was 16 when he committed his crime. He was executed in Oklahoma in 1999 when he was 20 years old.
[1032] 428 United States 153 (1976).
[1033] Fagan and West, "The Decline of the Juvenile Death Penalty: Scientific Evidence of Evolving Norms," pp. 17-18.

1986	2	8
1987	0	2
1988	0	5
1989	0	1
1990	1	8
1991	0	5
1992	1	6
1993	4	6
1994	0	15
1995	0	12
1996	0	12
1997	0	8
1998	3	10
1999	1	14
2000	4	7
2001	1	5
2002	3	3
2003	1	1

Death sentences are more numerous than actual executions because of a lengthy appeals process and a general reluctance of some U.S. states to use the penalty.

Jeffrey Fagan and Valerie West argue that after 1994, child offender death sentences significantly declined, after controlling for murder rates and rates of child offender homicide.[1034] The rate of death sentences per homicide for child offenders declined almost 73 percent between 1994 and 2002.[1035] Prior to 1999, child offender and adult death sentences moved almost in "lockstep," rising and falling together.[1036] Since 1999, however, the rate of decline in death sentences for child offenders has been more than 87 percent, while the rate of decline in adult death sentences has been less than 36

[1034] Ibid.: pp. 429-430.
[1035] Ibid.: p. 466.
[1036] Ibid.: p. 472.

percent.[1037] Fagan and West conclude that the decline in child offender death sentences since 1989 offers evidence of an emergent norm against these sentences.[1038]

Although the minimum age for the death penalty has historically varied, the minimum age of eligibility derived from English law was seven. Children under the age fourteen could legally be executed if intent (*mens rea*) could be proved. Even as late as the 1988 Supreme Court ruling in *Thompson v. Oklahoma*,[1039] in which the court ruled that executions of child offenders who committed their crimes when they were under age 16 violated the Eighth and Fourteenth Amendments, many U.S. states did not have a minimum age of eligibility for the penalty. Thus, as late as 1988, the minimum age for the penalty in these states was seven or 14 depending on precedent and practice. No U.S. state specifically set its minimum age at seven, although some did set their minimum age below thirteen; one state, Indiana, even set its minimum age at ten.[1040]

A number of studies have looked at the relationship between Southern states and the administration of the death penalty. The penalty, in general, is a Southern phenomenon, but it is even more so in terms of child offender executions.[1041] Seven U.S. states have executed child offenders since the *Furman* ruling. These states are: Georgia, Louisiana, Missouri, Oklahoma, South Carolina, Texas and Virginia, all Southern.[1042] Globally, the U.S. South carried out a large percentage of all child offender executions;

[1037] Ibid.
[1038] Ibid.: p. 494.
[1039] 487 United States 815 (1988).
[1040] Arizona, Delaware, Florida (if the defendant has prior convictions), Oklahoma, Pennsylvania, South Carolina, South Dakota and Washington had no minimum age at the time of the *Thompson* ruling. Indiana's minimum age was ten; Mississippi's was 13; and Montana's was 12. Amnesty International, "United States of America: The Death Penalty and Juvenile Offenders, Amr 51/23/91," p. 64. Seligson, "Are They Too Young to Die?," p. 5. Conflicting sources indicate there was no minimum age by statute for Idaho and Utah in 1994. Bedau, ed. *The Death Penalty in America: Current Controversies*.
[1041] Zimring and Hawkins, *Capital Punishment and the American Agenda*, pp. 30, 32.
[1042] By one historical definition, Missouri and Oklahoma would not be considered Southern since they were not states in the Confederacy, although both offered some support for the Confederacy.

five U.S. states put to death two-thirds of all child offenders executed *in the world* between 1993 and the *Roper v. Simmons* decision in 2005.[1043] Since 1994, only three U.S. states have executed child offenders; these are Oklahoma, Texas and Virginia.

Of the 22 child offenders executed between the *Furman* ruling and the *Roper* ruling, 13 were executed in Texas. As a result, Texas had a "distorting effect" on the practice of the child death penalty in the United States and in the world.[1044] Texas accounts for 7.4 percent of the total U.S. population, but for almost 60 percent of the child executions in the United States since *Furman*.[1045] As a result, the death penalty for child offenders in the post-*Furman* era can be thought of not only as a Southern phenomenon but as a Texas phenomenon.

Of those child offenders on death row at the time of *Roper*, more than two-thirds were African-American or Latino, a greater percentage than in adult death sentences.[1046] There is a great deal of support for arguments that race and geography have a profound impact on severity in sentencing. Ronald Farrell and Victoria Swigart found that the degree of severity in sentencing was highly correlated with a particular type of offender/victim relationship such that perpetrators of low social status who kill victims of higher social status get the most severe punishments.[1047] Both studies support the claim that the death penalty serves to enforce the U.S. social hierarchy.

[1043] Amnesty International, "United States of America: Indecent and Internationally Illegal, Amr 51/144/2002," (2002; reprint)p. 9.
[1044] Ibid. p. 10.
[1045] Population taken from the 2000 Census by the U.S. Census Bureau. <http://quickfacts.census.gov/qfd/states/48000.html>.
[1046] National Coalition to Abolish the Death Penalty, "Human Rights, Human Wrongs: Sentencing Children to Death
," (*National Coalition to Abolish the Death Penalty*, 2003; reprint)p. 12.
[1047] Ronald A. Farrell and Victoria L. Swigert, "Legal Disposition of Inter-Group and Intra-Group Homicides," *The Sociological Quarterly* 19 (1978).

In their study investigating the relationship between social hierarchy and the death penalty, Michael Mitchell and Jim Sidanius argue that members of society with high status will support the death penalty *because* it is unequally applied.[1048] Their argument may explain why Caucasians on average support the death penalty more than people of color do.[1049] Mitchell and Sidanius found that social hierarchy is positively associated with the rate of execution in society; their findings offer support for the theory that execution rates are higher in the South because of the disparities in status for people of different races.[1050] An additional variable, political conservatism—an ideology that seeks to maintain the status quo and therefore aims to enforce the existing social hierarchy—was also consistently correlated with the use of the death penalty.[1051] Finally, violent crime was sporadically related to death penalty rates in some U.S. states.[1052]

According to Hale, race disparities in the application of the death penalty began to emerge in the early 19th century in response to the movement to abolish slavery.[1053] The transition to freedom for slaves produced social upheaval in the South, leading to increased violence. Newly freed slaves experienced tremendous poverty, resulting in an increase in crime, especially by children.[1054] Interestingly, if instability in social hierarchy and race relations leads to more executions of people of color, then the execution rates for people of color vis-à-vis white people should have been highest during the period of emancipation toward the end of the Civil War, when the South's slave-based economy

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[1048] Mitchell and Sidanius, "Social Hierarchy and the Death Penalty: A Social Dominance Perspective," p. 593.
[1049] Adam Liptak, "Ruling Likely to Spur Convictions in Capital Cases," *The New York Times*, June 9 2007.
[1050] Mitchell and Sidanius, "Social Hierarchy and the Death Penalty: A Social Dominance Perspective," pp. 591-592, 600.
[1051] Ibid.: pp. 593, 608.
[1052] Ibid.: p. 608.
[1053] Hale, *A Review of Juvenile Executions in America*, pp. 61-62.
[1054] Ibid., pp. 72, 81.

was dismantled. Yet the post-Civil War period had a lower percentage of executions of juvenile African-American offenders than the preceding period, actually resulting in a reduction by more than 27 percent. See Table 6.2 below.

TABLE 6.2: ESPY DEATH PENALTY DATA ON EXECUTIONS OF CHILD OFFENDERS BY PERIOD AND RACE, 1640-2003[1055]

Period	African-Ameri-can	Asian-Pacific	Latino	Native Ameri-can	White	Unknown	Percen-tage non-white	Total
Colonial Period (1640-1729)	0	0	0	0	3	0	0	3
Revolution-ary Period (1730-1819)	4	0	0	2	2	0	75%	8
Pre-Civil War Period (1820-1859)	9	0	0	0	4	0	69%	13
Post-Civil War Period (1860-1889)	13	1	1	3	12	1	60%	31
Progressive Era (1890-1919)	38	0	1	0	8	0	83%	47
Pre-*Furman* Era (1920-1972)	50	0	2	0	6	0	89.6%	58
Post-*Furman* Era (1973-2003)	11	0	1	0	10	0	54.5%	22

Three explanations are possible for the decrease in the percentage of child offenders of color executed following the Civil War: 1) The violence against African-Americans that characterized the period was not directed at children; 2) The violence against African-Americans in response to emancipation was not directed at children until later. In other words, the increased racial disparity in the application of the child death penalty during the Progressive Era is directly related to emancipation but, for some

[1055] The data in this chart was supplemented by my research; it is predominately derived from the Espy database.

unknown reason, a lag occurred between emancipation and the increased use of the penalty; 3) The death penalty for children continued (and possibly even increased), but in the form of lynching. Since accurate data on the age of lynching victims is not available, the extent to which the practice may have replaced or even surpassed the official execution rate in other periods is unknown. There were hundreds of victims of lynching following the Civil War, some of them children.

Although the number of cases (*n*) in Table 6.2 above is too small to compare among periods effectively, the *n* for the entire sample is not too small to look at the effect of race on the penalty's application. Racial disparities in the use of the penalty did not sharply rise until the Progressive Era. The highest period of disparity between the executions of white and non-white child offenders was in the pre-*Furman* period, when for decades the only recorded child executions were of African-American males. Racial disparities among those executed are more pronounced for child offenders overall, with whites making up 45 percent of those executed since *Furman*, while 57 percent of executed adult offenders are white (between *Furman* and 2004).[1056] Whites also make up 81 percent of the victims of child offenders and 80 percent of the victims of adult offenders.[1057] As with adult offenders, evidence suggests that crimes with a particular offender/victim relationship are more likely to incur the death penalty, especially the combination of an African-American, male offender and a white, female victim.[1058]

[1056] Streib, "The Juvenile Death Penalty Today: Death Sentences and Executions for Juvenile Crimes, January 1, 1973-December 31, 2004," p. 5.
[1057] Ibid.
[1058] Farrell and Swigert, "Legal Disposition of Inter-Group and Intra-Group Homicides." Streib, "The Juvenile Death Penalty Today: Death Sentences and Executions for Juvenile Crimes, January 1, 1973--February 28, 2005," p. 5.

Of the 29 child offenders executed for rape alone[1059] when they were under the age 18, all were African-American, according to the Espy data. Of the two child offenders executed while under the age 18 for attempted rape, both were African-American, according to the Espy data. There were no white child offenders executed for rape alone in the United States, according to the data. 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 color, have been executed in the United States.[1060] Finally, within the dataset above, only 45 of 182 child offenders executed between 1642 and 2003 were white (a total of 24.7 percent). African-Americans account for 125, or 68.6 percent, of those executed. Additionally, five Latinos and five Native Americans were executed, according to this data set, constituting 0.027 percent each of total child executions. One person of Asian/Pacific Islander descent was executed (0.0054 percent), and one child whose race was not provided.

Since 1972, there have been 228 death sentences for child offenders under the age 18, 72 of which remained in force at the time of *Roper* and were subsequently commuted. Of the remaining 156 sentences, twenty-two were carried out and an additional 134 were reversed or commuted.

THE HISTORY OF CHILDHOOD IN AMERICA

Not unexpectedly, the history of the child death penalty in the United States closely follows trends in attitudes and beliefs about children. To illustrate this

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[1059] Other juveniles were executed for rape *and* other crimes such as murder.
[1060] National Coalition to Abolish the Death Penalty, "Human Rights, Human Wrongs: Sentencing Children to Death
," p. 12.

relationship, I have parsed the history of children and childhood in the United States into seven periods, loosely based on the work of Mark Harrison Moore and George Kelling. These are: the Colonial period ranging from 1640-1729; the Revolutionary period from 1730 to 1819; the Pre-Civil War period from 1820 to 1859; the Civil War period from 1860 to 1889; the Progressive Era from 1890 to 1919; the Pre-*Furman* era from 1920 to 1972; and the Post-*Furman* era from 1973 to 2003. The numbers of executions that correspond with these periods are presented in Table 6.3 below.

TABLE 6.3: KNOWN EXECUTIONS OF CHILD OFFENDERS IN THE UNITED STATES BY PERIOD, 1640-2003

Period	Total
Colonial period (1640-1729)	3
Revolutionary period (1730-1819)	8
Pre-Civil War period (1820-1859)	13
Civil War period (1860-1889)	31
Progressive Era (1890-1919)	47
Pre-*Furman* period (1920-1972)	59
Post-*Furman* period (1973-2003)	22

The summary of these periods below will demonstrate that American ideas about children and childhood are social constructions developed over the last four centuries. An important part of this construction is the state's role in child protection, which gradually expanded in power over children and families through the usurpation of parental control. The social construction of American childhood can be thought of as a collection of norms about the role of children in American culture and the corresponding responsibilities toward children of parents and the state. The child death penalty, it will be demonstrated, conflicts with many of these norms.

COLONIAL PERIOD (1640-1729)

The early colonists imported much of their understanding of children and childhood from Europe, with some alterations. Poor Laws passed in England in the 16th century were enacted in certain colonies in the 17th century and were used to intervene in families with children that begged or stole.[1061] Fathers had virtually exclusive rights over their children during the Colonial period.[1062] They were, in the words of Thomas Hobbes, "absolute Sovereigns in their own Families."[1063] Parental rights (that is to say, paternal rights) were "sacred and inviolable," even though there was some variation of familial organization throughout what would become the United States.[1064]

Intervention (by a variety of sources) existed, but only when the family failed to meet its responsibilities to raise children by appropriate social standards.[1065] One way that colonial America experienced intervention was via a class of officers created in 1675 by the General Court of Massachusetts called the "tithing men," whose job was to inspect families in the community.[1066] Since social ills were blamed on "defects in family government," parents were held responsible for the health of the community.[1067] Parents who neglected their children, for example, those who failed to teach their children to read or to socialize them properly, were brought before the court. Charges against parents

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[1061] Hale, *A Review of Juvenile Executions in America*, p. 42.
[1062] Mark Harrison Moore and George L. Kelling, "The Historical Legacy," in *From Children to Citizens: The Mandate for Juvenile Justice*, ed. Mark Harrison Moore (New York: Springer-Verlag, 1987), p. 28.
[1063] Thomas Hobbes and W. G. Pogson Smith, *Hobbes's Leviathan* (Oxford,: Clarendon Press, 1909).
[1064] Moore and Kelling, "The Historical Legacy," p. 29.
[1065] Ibid.
[1066] Bremmer, ed. *Children and Youth in America: A Documentary History*, p. 28.
[1067] Ibid., p. 39.

were difficult to enforce, yet there is evidence that some children were removed from unsuitable homes.[1068]

The colonies had an elaborate apprenticeship system based on the apprenticeship system of medieval England. In contrast to England, however, where apprenticeships were used to regulate competition among craft guilds, apprenticeships in the colonies addressed a labor shortage and emphasized general education. Masters were required to teach basic reading, writing and arithmetic, based on laws that originated in 1642.[1069] By the revolutionary period, around 1730, laws were passed that required both parents and masters to provide instruction to children.[1070]

Linda Pollock has suggested that many of the claims by historians about 16th- and 17th-century children are difficult to confirm.[1071] Children were certainly recognized as "physically and mentally immature" and dependent upon adults for care, but their position in society as a whole is difficult to gauge.[1072] From 16th-century diaries, it is clear that parents valued their children and had a familiar, informal relationship between them.[1073]

Child offender executions were rare in the early years of the colonies. Of the four children executed between 1642 and 1763, none were under the age 16 and thus were not considered children by the standards of the time. Three of those executed were white, while one was African-American, although this count only includes official executions,

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[1068] Ibid., pp. 28, 41.
[1069] Ibid., p. 105.
[1070] Ibid.
[1071] Pollock, *Forgotten Children : Parent-Child Relations from 1500 to 1900*, p. 99.
[1072] Ibid., pp. 98-99.
[1073] Ibid., p. 99.

as lynching was not commonly recorded.[1074] The death penalty was avoided during the early years of the colonies because of the scarcity of labor. The first two executions, in 1642 and 1674, were for bestiality, a spiritual crime in a puritanical society.[1075] The third execution, in 1722, was an "economic crime"; the offender was convicted of three counts of arson for the murder of his caretaker's three children.[1076] The fourth execution, in 1763, was of a slave for the murder of a white woman. The reluctance of colonial society to use the death penalty speaks not only to the value of human labor, but also to the seriousness of death-eligible crimes in colonial communities. The historical record reveals that spiritual crimes, economic crimes and race-related crimes met this standard and were death-eligible.

REVOLUTIONARY PERIOD (1730-1819)

The revolutionary period (1730 to 1819) ushered in remarkable changes to the relationship between children and fathers. The realization that 'men' should be free from the Crown radically altered the philosophy of dependence in America in general.[1077] Whereas Hobbes emphasized parental sovereignty, John Locke now argued that children possessed the capacity to reason.[1078] As a result of this shift in thought, an increasing receptivity in America to children's independence developed, something foreign and widely remarked upon by Europeans.[1079]Alexis de Tocqueville, for example, observed that in America, the child as he "approaches manhood" is "master of his thoughts" and

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[1074] Hale, *A Review of Juvenile Executions in America*, pp. 46-47.
[1075] Ibid., pp. 36-37.
[1076] Ibid., p. 44.
[1077] Moore and Kelling, "The Historical Legacy," p. 30.
[1078] As qtd. in Ibid.
[1079] Ibid.

his "conducts."[1080] "The language addressed by a son to his father," Tocqueville continued, "is always marked by a mingled freedom, familiarity, and affections which at once show that new relations have sprung up in the bosom of the family."[1081]

Middle-class families in America were markedly different from their European counterparts: They embraced individualism and laissez-faire government and, as a result, the father and the hierarchy within the family were "undermined and finally leveled by the force of democratic social principles."[1082] Children themselves were "more independent, individualistic and socially precocious" and were "less polite and deferential to adults."[1083]

This new independence was further supported by religious movements such as the (first) 'Great Awakening,' a religious revival of evangelical Calvinism.[1084] The belief in personal religious conversions, a fundamental tenet of some forms of Protestantism, required that children have religious experiences of their own and reduced the authority of parents, at least in theory, over the religious choices of their children.[1085] Since the afterlife of either heaven or hell was contingent upon the individual's decisions and deeds, this type of Calvinism allowed children to participate in religious life in ways not previously seen.[1086] Before the Great Awakening, children were expected to adopt the

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[1080] Alexis de Tocqueville, Henry Reeve, and John Carrington Spencer, *Democracy in America*, 2nd American ed. (New York: G. Adlard, 1838). As qtd. in Bremmer, ed. *Children and Youth in America: A Documentary History*, p. 347.
[1081] Tocqueville, Reeve, and Spencer, *Democracy in America.* As qtd. In Moore and Kelling, "The Historical Legacy," p. 30.
[1082] Bremmer, ed. *Children and Youth in America: A Documentary History*, pp. 343-344.
[1083] Ibid., p. 344.
[1084] Ibid., p. 131.
[1085] Moore and Kelling, "The Historical Legacy," p. 30.
[1086] Bremmer, ed. *Children and Youth in America: A Documentary History*, p. 131.

faith of their parents.[1087] The experiences of the Great Awakening created children as "active seekers of redemption."[1088]

Contradicting historians that suggest that children were not valued before the 19th century, Pollock found evidence that children were not only desired, but were a source of great satisfaction.[1089] Diaries during this period indicate that parents recognized the developmental stages of childhood and sought to assist children through education and advice, although many also expressed frustration in childrearing.[1090] Childhood became more of an abstract concept in the 18th century in some diaries reviewed by Pollock, although this likely has more to do with the abilities of the writers to express themselves in general compared with earlier centuries.[1091] The most interesting change in the 18th century is the construction of children as 'innocents,' although it is unclear whether this notion developed in reaction to puritanical trends that viewed children as depraved or from the ideas of Enlightenment thinkers like Locke and Rousseau.[1092]

Around the time of the American Revolution, Enlightenment philosophies began to have an impact on society and debates about the criminal justice system.[1093] Espy data shows an increase from three child executions in the Colonial period to eight child executions in the Revolutionary period, although Hale has argued that as many as 33 children were executed from 1762 to 1842.[1094] The population under the age 18 increased

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[1087] Ibid., p. 132.
[1088] Ibid. It is interesting that one of the most problematic articles of the Convention of the Rights of the Child for fundamentalist Christians in America has been the right to religion and freedom of thought. This idea is not only very American, it stems from a uniquely American evangelical Protestant experience.
[1089] Pollock, *Forgotten Children : Parent-Child Relations from 1500 to 1900*, p. 103.
[1090] Ibid., pp. 102-103.
[1091] Ibid., pp. 106-107.
[1092] Ibid., 107.
[1093] Hale, *A Review of Juvenile Executions in America*, p. 49.
[1094] Ibid.

greatly during this period, along with a corresponding increase in crime.[1095] The use of the death penalty for adults became more common toward the end of the Revolution, although many of these executions were for treason—a response to the frequent uprisings that characterized the era. Importantly, no children were executed for treason.[1096]

Developing states in the South and West had higher numbers of child executions. One explanation is that these regions were significantly more heterogeneous than the original colonies were.[1097] Later colonies and U.S. states were also more influenced by Enlightenment ideas of free will and by the idea that responsibility was largely based on the child's age. Executions of children aged 12 and 13 peaked between 1762 and 1782, never to reach the same level again.[1098] Executions of older children continued to rise during the period, however, with the oldest child offenders outpacing all other age groups.[1099]

Child offenders were increasingly seen as victims of their environment, and efforts were made to remove them from jails and to place them into apprenticeships.[1100] Some individual colonies statutorily exempted children from punishments: For example, in Pennsylvania, whipping was reserved only for those offenders older than age 16.[1101] Eighteenth-century America had no facilities for juvenile correction or reform, but the growing economic and social independence of children as well as the revolutionary spirit

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[1095] Ibid., pp. 50-51.
[1096] Ibid., pp. 51-52. Espy data does list one David Dodd executed in Arkansas in 1864 for spying and espionage.
[1097] Ibid., p. 58.
[1098] Ibid.
[1099] Ibid., pp. 58-59.
[1100] Moore and Kelling, "The Historical Legacy," p. 32.
[1101] Bremmer, ed. *Children and Youth in America: A Documentary History*, p. 307.

of rejecting injustice resulted in the development of a justice system for child offenders decidedly different from European models.[1102]

PRE-CIVIL WAR PERIOD (1820-1859)

The Industrial Revolution, straddling both the revolutionary and pre-Civil War period, had as large an impact on the American family as it did on the English family. In the colonial period, children participated in family chores with little distinction among family members by age, and parents were the primary source of instruction for children in society. Industrialization separated parental authority from labor instruction. Factory owners, unlike apprentice masters, were not required to educate child employees, although this period saw a number of initiatives to get factories to provide some basic education.

Voluntaristic (especially religious) societies stepped in to supplement the family's care of and instruction for children.[1103] These societies based their intervention on the idea that children's development was dependent upon their social environment as opposed to their fate or moral character.[1104] Religious denominations sought to expand by founding schools.[1105] This development also inspired debates about the value of publicly funded education, based on the belief that healthy democracies require an informed citizenry.[1106] Judges became increasingly willing to protect children by intervening in families, and in the first half of the 19th century, child welfare began to be established as

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[1102] Moore and Kelling, "The Historical Legacy," p. 32.
[1103] Ibid., p. 34.
[1104] Ibid.
[1105] Bremmer, ed. *Children and Youth in America: A Documentary History*, p. 186.
[1106] Moore and Kelling, "The Historical Legacy," p. 32.

the new standard for intervention by the state, one that overrode the rights and interests of parents.[1107] The welfare of children began to trump the rights of parents, especially in custody cases.[1108] Laws were enacted to protect children from social vices such as alcohol and prostitution. Child labor legislation was enacted, although not enforced consistently until much later.

The United States began to focus to a greater extent on education in the pre-Civil War period. Support for publicly funded education spread throughout the country, and educational systems became increasingly homogenous, with standard curricula, standard class and age separation, and evaluation through grades.[1109] Employment restrictions for children, especially children who were not being educated, began in states in the mid–19th century.[1110] Maine in 1836, for example, passed a compulsory attendance law that stipulated that children could not be employed if they were under the age 15 unless they were receiving an education as well.[1111]

The pre-Civil War era saw a developing concern for child health and hygiene. The first comprehensive study on child health in a scientific manner was conducted in the 1820s.[1112] Epidemics in the 1820s such as yellow fever, small pox, typhoid fever, cholera and tuberculosis fueled interest in children's health. By the 1850s, there were two children's hospitals in New York and Philadelphia. Nonetheless, in 1850, children under the age five had the same proportional rate of death as children in 1789.[1113] Moreover, the relationship between children's health and sanitary conditions was examined in multiple

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[1107] Ibid., p. 35.
[1108] Bremmer, ed. *Children and Youth in America: A Documentary History*, p. 345.
[1109] Moore and Kelling, "The Historical Legacy," pp. 35-36.
[1110] Bremmer, ed. *Children and Youth in America: A Documentary History*, p. 621.
[1111] Ibid.
[1112] Dewees, *A Treatise on the Physical and Medical Treatment of Children*.
[1113] Bremmer, ed. *Children and Youth in America: A Documentary History*, p. 759-760.

studies in the mid-19th century, prompting changes in community space and in curricula in the schools.[1114] The period was also characterized by tremendous heterogeneity – racial, ethnic, national and economic – in its population. 5,000,000 people immigrated to the United States between 1815 and 1860; the number of immigrants reached 31 million by 1860.[1115]

The pre-Civil War period also saw increased concern about juvenile delinquents and correctional facilities. The first House of Refuge, an alternative facility for delinquents, was established in New York City in 1825.[1116] The New York school was followed quickly by the founding of similar institutions in Philadelphia and Boston. By 1867, there were seven reform schools in New York as well as schools in Providence, Cincinnati, Louisville, Baltimore, St. Louis and Chicago.[1117] This early type of alternative institution emerged out of the belief that delinquents were not wholly responsible for their crimes and that correctional facilities treated them "cruelly and corrected them unsatisfactorily."[1118] The philanthropists that built these alternative institutions, many of them governors, mayors and congressmen, believed that "childhood diminished responsibility for crime."[1119] These philanthropists saw opportunity for delinquents to become "independent moral agents" through religion, hard work and education.[1120] In

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[1114] John H. Griscom, *The Sanitary Condition of the Laboring Class of New York, with Suggestions for Its Improvement* ([New York]: Arno, 1970). Massachusetts. Sanitary Commission and Lemuel Shattuck, *Report of a General Plan for the Promotion of Public and Personal Health, Devised, Prepared, and Recommended by the Commissioners Appointed under a Resolve of the Legislature of Massachusetts, Relating to a Sanitary Survey of the State* (Boston,: Dutton & Wentworth, 1850). Horace Mann, "The Study of Physiology in the Schools--Dissertation Upon the Subject; Report for 1842," *Annual Reports on Education* (1868), Bremmer, ed. *Children and Youth in America: A Documentary History*, pp. 801-802. Chapter 229, *Acts and Resolves Passed by the General Court of Massachusetts*, 1850 (Boston).
[1115] Moore and Kelling, "The Historical Legacy," p. 34.
[1116] Bremmer, ed. *Children and Youth in America: A Documentary History*, p. 671.
[1117] Ibid., p. 672.
[1118] Ibid., p. 671.
[1119] Ibid.
[1120] Ibid.

1853, the New York Children's Aid Society formed with the goal of preventing rather than correcting juvenile delinquency.[1121] The society pioneered a new philosophy toward juvenile delinquency that was anti-institutional and focused on rural placement as opposed to correctional or reform facilities.

To establish refuges and reformatories, however, the directors needed legal protection against parents, some of whom fought the schools for custody.[1122] The decisions by some U.S. states to reject the interests of parents in favor of those of children were some of the earliest instances of *parens patriae*—or the legal idea that the state may assume the role of parent when needed to achieve the best interest of the child.[1123]

POST-CIVIL WAR PERIOD (1860-1889)

The post-Civil War period saw the maturation of child welfare efforts. Two approaches emerged during this time to address urban crime and reform efforts: both of these resulted in the unprecedented compilation of social data on families during the period. First, based on the work of Mary Richmond, a 19th-century social worker and reformer, the Charity Organization Society blamed urban poverty on the character flaws and moral shortcomings of the poor. To combat these ills, the organization arranged for middle- and upper-class women volunteers, known as "friendly visitors," to visit families and "provide the elevating influence of a moral superior"; this included instruction in

[1121] Ibid., p. 672.
[1122] *United States v. Green*, 26 Fed. Cas.30 (1824), *State v. Richardson*, 40 N.H. 272 (1860).
[1123] Bremmer, ed. *Children and Youth in America: A Documentary History*, p. 671.

morals, childrearing and cleanliness.[1124] Via these visits, elaborate data on the individuals and families was collected and the 'problems' of the families were 'diagnosed' and 'treated.' Richmond also created links among social service providers, both public and private, resulting in a coordinated effort to address concerns of poverty and moral degeneration.

The second approach originated in turn-of-the-century Chicago at the Hull House through the work of Jane Adams, founder of the settlement movement in the late 19th century. This approach drew on earlier ideas that poverty had environmental rather than moral causes. The settlement workers at Hull House focused on community-based efforts and collected data on these communities and neighborhoods.[1125]

During the post-Civil War period, positivist theories that stressed the physiological and psychological causes of crime gained popularity. Psychological explanations for crime gradually became dominant and produced new approaches to penology that were less deterministic than previous approaches.[1126] These theories emphasized the importance of children's upbringing and environment and advocated for treatment and rehabilitation over retribution. They also advocated for the separation of child criminals from adults.[1127]

Reformers from England and elsewhere came to America during this period to observe its reforms just as Charles Dickens, the Duke of Saxe-Weimer, Gustave de Beaumont and de Tocqueville had done earlier.[1128] The English philanthropist and

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[1124] Moore and Kelling, "The Historical Legacy," pp. 37-38.
[1125] Ibid., pp. 38.
[1126] Ibid., p. 39.
[1127] Ibid.
[1128] Bremmer, ed. *Children and Youth in America: A Documentary History*, pp. 683-685.

juvenile prison reformer Mary Carpenter, mentioned in chapters 3 and 4, visited U.S. prisons and reformatories in 1873 and criticized them.[1129] These visits suggest a great deal of exchange between European and U.S. reformers. Moreover, there is evidence that many English and French reformers as well as the English Parliament looked to the United States for guidance on reforms for child criminals—often remarking on the high quality and progressive character of juvenile justice in the United States.

A population boom after the Civil War continued well into the next century, although the percentage of young people declined. In 1860, there were 17 million individuals below the age 20; by 1930, there were 47.6 million.[1130] The actual percentage of people below the age 20 in 1860 was 51, however, compared with only 38 in 1930.[1131] As a result, children became "more visible," more aware of themselves as a distinct class, and tremendous energy in the late 19th century went into securing special protective status for them.[1132] Children now spent more time in school in greater numbers. The state and private philanthropists went to great lengths to protect children from dangerous and premature labor and from abuse, disease and unsanitary conditions. Education became publicly funded during this period, though the adoption and enforcement of compulsory education laws varied widely across U.S. states.[1133] The earliest organizations concerned with child abuse and protection came out of humane efforts for animals; the first such organization was the New York Society for the Prevention of Cruelty to Children in

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[1129] _____, ed. *Children and Youth in America: A Documentary History.*
[1130] Ibid., p. vii.
[1131] Ibid.
[1132] Ibid.
[1133] Moore and Kelling, "The Historical Legacy," p. 39.

1874, which developed out of the successful efforts by the American Society for the Prevention of Cruelty to Animals to extend protection to children.[1134]

Diaries in the 18th and 19th centuries reflect an increasing concern with the condition of children, although, again, this is may be attributable to the developing abilities of the writers to express their attitudes about children more articulately.[1135] Advocates also began to employ the language of exploitation when speaking about child labor. Although greater attention was now paid to child labor, the practice actually spread during this period, especially into new parts of the country like the South. Its visibility increased with the development of labor bureaus in the U.S. states in the mid-to-late 19th century and with the 1870 census that included a category registering child laborers under the age 15.[1136] It became evident by 1900 that more than one-third of Southern mill workers were children, and that one in six children was employed.[1137] Importantly for the child labor movement, more than 50 percent of child laborers were immigrants. This demographic would greatly affect the general protest against child labor by the working class at the turn of the century.[1138]

The state's increasing attention to child welfare greatly "diminished the power of parents" vis-à-vis their children.[1139] Parents, manufacturers and religious groups did not give up their power easily, however. The state met with concerted opposition from groups that sought to maintain traditional parental authority, and to preserve the

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[1134] Bremmer, ed. *Children and Youth in America: A Documentary History*, p. 171, Mary Renck Jalongo, "The Story of Mary Ellen Wilson: Tracing the Origins of Child Protection in America," *Early Childhood Education Journal* 34, no. 1 (2006): p. 1.
[1135] Pollock, *Forgotten Children : Parent-Child Relations from 1500 to 1900*, p. 110.
[1136] Bremmer, ed. *Children and Youth in America: A Documentary History*, p. 601.
[1137] Ibid.
[1138] Ibid.
[1139] Ibid., p. vii.

economic benefits of child labor.[1140] By the 1880s, however, calls for state control of education, even exclusive control of education, became more common. Many of these efforts were directed at newly freed slaves.[1141]

The child health movement made strides in the years after the Civil War, continuing pre-War efforts at studying disease and hygiene. The first Board of Health was established in New York one year after the war and by 1877, fourteen U.S. states had a health department.[1142] The pediatric section of the American Medical Association was founded in 1880, and the first English-language journal on children's health was produced in 1884.[1143] Beginning in the 1890s, public schools began playing a larger role in detecting and controlling childhood illnesses.[1144]

The use of the death penalty for child offenders continued to rise after the Civil War, though not as much as in later periods. The rhetoric of the period called for less severe penalties and expressed greater concern for the welfare of child offenders. Despite these concerns, child executions began to climb.[1145] It should be noted, however, that the trend of executing older children rather than younger ones continued into this period.[1146]

As discussed above, lynching increased after the Civil War. More than 241 African-Americans were killed by lynch mobs between 1888 and 1903 in the social instability that followed the war. The period also witnessed a rise in exclusion laws directed at immigrants and more stringent requirements for entry and citizenship.[1147]

[1140] Ibid.
[1141] Ibid., pp. 1104-1152.
[1142] Ibid., p. 811.
[1143] Ibid.
[1144] Ibid., p. 812.
[1145] Hale, *A Review of Juvenile Executions in America.*
[1146] Ibid., p. 83.
[1147] Ibid., p. 72.

Moreover, the highest number of female offenders was executed during this period, with six of the seven girls recorded in the Espy files put to death between 1844 and 1912. The sharp rise in the execution of girls may be related to the growing demands by women for equal rights, possibly either because of an increase in the perception of women's ability to reason or because women and girls who failed to conform to social norms were punished more severely.[1148]

PROGRESSIVE ERA (1890-1919)

The Progressive Era saw the construction of adolescence as a discrete period of life separate from early childhood and adulthood.[1149] The era was also characterized by an increasing homogenization of childhood across ethnic, racial and economic lines as compulsory education and labor laws were better enforced. Another development was the advent of the 'child-saving' movement, a moral crusade that was premised on theories of social Darwinism and the innate moral degeneracy of the poor.[1150] Like the Charity Organization Society in the preceding period, the child-saving movement of the Progressive era was dominated by middle- and upper-class women who sought to foster traditional values. Child-saving efforts included promoting child welfare and universal education, preventing abuse and corruption (broadly defined to include liquor use and prostitution), restricting labor, and increasing the supervision of children and the efficiency of law enforcement.[1151]

[1148] Ibid., pp. 72-73. The only other female juvenile execution under the age of 18 in the ESPY data is of Ocuish in 1786.
[1149] Moore and Kelling, "The Historical Legacy," pp. 40-41.
[1150] Ibid., p. 41.
[1151] Ibid., 41.

Efforts to combat child labor became increasingly organized during the Progressive era. Twenty-eight U.S. states had some form of legislation abolishing or limiting child labor by 1899.[1152] Most of these laws, however, regulated only the manufacturers and limited employment for children under the age 12. New ideologies about child labor gained strength during the era: Prime among these were the ideas that labor exploited children and that children's protection was necessary for human progress.[1153] Theodore Roosevelt attacked child labor in 1912, calling for the "conservation of childhood."[1154] The movement successfully legislated many of its child-saving goals: All child labor was regulated by the 1930s thanks in large part to the efforts of progressives.[1155] Additionally, by 1900, every state outside the South had compulsory education, and by 1918, every state in the country had some form of compulsory education statute.[1156]

As a result of the legislative changes in the late 19th and early 20th centuries, intervention into families took on a different character. Prior public intervention was commonly informal and passive, usually taking the form of gossip or advice by members of the child's community.[1157] As private organizations grew (especially in the post-Civil War era and later), intervention became more impersonal. Eventually, publicly funded state institutions developed to regulate the lives of children and provide assistance to families.[1158] Growing concern for children, especially in terms of abuse, gave the state justification to intervene into families and protect children. As a result, specialized

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[1152] Bremmer, ed. *Children and Youth in America: A Documentary History*, p. 601.
[1153] Ibid., pp. 601-602.
[1154] Ibid., p. 602.
[1155] Moore and Kelling, "The Historical Legacy," p. 41.
[1156] Hale, *A Review of Juvenile Executions in America*, p. 88.
[1157] Moore and Kelling, "The Historical Legacy," p. 45.
[1158] Ibid.

institutions – schools, child protection societies and welfare agencies – developed to enable the state to carry out these functions.[1159] These institutions eroded parental control over children and changed the perception of their capacities.[1160]

State interest in children led to the first White House Conference on the Care of Dependent and Neglected Children in 1909.[1161] The conference emphasized the family as the central unit of society and invited 216 child welfare workers to attend. Out of this conference emerged the 1912 United States Children's Bureau, which institutionalized the state's responsibility to its children.[1162]

State intervention, however, meant that children were increasingly forced to "conform to public norms of behavior and obligation."[1163] The child welfare movement's efforts to free children from machines did not mean that children were necessarily freer. Children merely changed masters, and the shift in responsibility from parents to the state "required an elaboration of administrative and judicial techniques of investigation, decision, and supervision."[1164]

The government in the early years of the 20th century also focused more on infant mortality, with the Children's Bureau conducting its first study in 1913.[1165] The lack of reliable statistics on infant mortality prompted the government to call for better birth registries, as U.S. registries lagged behind European ones in accuracy and uniformity.[1166]

[1159] Ibid., p. 27.
[1160] Ibid., p. 33.
[1161] Bremmer, ed. *Children and Youth in America: A Documentary History*, p. 341.
[1162] ———, ed. *Children and Youth in America: A Documentary History*, p. viii.
[1163] Ibid., p. 117.
[1164] Ibid.
[1165] Duke, "Infant Mortality; Results of a Field Study in Johnstown, Pa, Publication No. 9."
[1166] Bremmer, ed. *Children and Youth in America: A Documentary History*, p. 815.

The state took control of children's health in the Progressive era, and by 1926, 47 U.S. states had divisions for child hygiene in their bureaucracies.[1167]

Public concern with urban juvenile delinquency, especially in the form of gangs, led to studies in the early 20th century.[1168] The Department of Sociology at the University of Chicago led the way in these efforts, investigating gangs and other forms of urban crime by juveniles.

The reformatory movement spread in the late 19th century, mostly outside the Deep South.[1169] Government institutions addressing concerns about children underscored the lack of uniform treatment of child offenders by the judicial branch.[1170] Founded on the belief that children's delinquency is caused by their environment and that children are redeemable, the first juvenile courts in the United States emerged in Illinois is 1899.[1171] By 1920, all but three states had created juvenile courts. The Illinois court introduced the doctrine of *parens patriae,* giving the state the authority to make decisions regarding children when parents are deemed incapable for a variety of reasons.[1172] To facilitate the exercise of its power over children, the court was specifically designed as a non-criminal

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[1167] Ibid.

[1168] Chicago Recreation Commission. Committee on Recreation and Juvenile Delinquency. et al., *Recreation and Delinquency, a Study of Five Selected Chicago Communities, Made for the Chicago Recreation Commission under the Supervision of Its Committee on Recreation and Juvenile Delinquency, Ernest W. Burgess* ([Chicago]: Chicago recreation commission, 1942). Thrasher, *The Gang*. Frederic Milton Thrasher, *The Gang : A Study of 1,313 Gangs in Chicago*, 2nd rev. ed. (Chicago, Ill.,: The University of Chicago Press, 1936).

[1169] Bremmer, ed. *Children and Youth in America: A Documentary History*, p. 439.

[1170] Ibid., p. 117.

[1171] Moore and Kelling, "The Historical Legacy," p. 41.

[1172] Sol Rubin and Irving J. Sloan, *Juvenile Offenders and the Juvenile Justice System*, Legal Almanac Series ; No. 22 (Dobbs Ferry, N.Y.: Oceana, 1986), p. 39. Mark Harrison Moore et al., "The Contemporary Mandate," in *From Children to Citizens: The Mandate for Juvenile Justice*, ed. Mark Harrison Moore (New York: Springer-Verlag, 1987), p. 52.

court that would serve in the best interest of children and was not concerned with children's rights as they are understood today.[1173]

As protectors of children under the doctrine of *parens patriae,* these early courts did not offer the same procedural safeguards, such as a trial by a jury of one's peers, access to counsel and other evidentiary procedures.[1174] Since the courts privileged the needs of children over efforts to determine guilt, the state got "unfettered power for both presentencing investigations and postsentencing supervision."[1175] Although the reforms in many ways advanced protections for children, they did so by increasing the state's authority over children through law with respect to familial intervention. By 1932, every state except for Maine and Wyoming had a juvenile court.[1176]

Although the juvenile courts reformed the treatment of child offenders in many ways, they did not affect the death penalty for child offenders in any significant way. Juvenile courts were precluded from giving the death sentence, but child offenders accused of crimes that were death-eligible were transferred to adult court. There was, however, a trend toward executing older rather than younger children.[1177] Ironically, child executions spiked just as demands for differential treatment for children were increasing.[1178] Espy data indicates that 47 children were executed in this 30-year period, although this is likely a gross underestimate.

[1173] Bremmer, ed. *Children and Youth in America: A Documentary History*, p. 440.
[1174] Moore and Kelling, "The Historical Legacy," p. 42. These would be introduced later in the ruling *In re Gault* and those that drew on *Gault*.
[1175] Ibid.
[1176] Bremmer, ed. *Children and Youth in America: A Documentary History*, p. 440.
[1177] Hale, *A Review of Juvenile Executions in America*, p. 83.
[1178] Ibid., p. 70.

PRE-*FURMAN* ERA (1920-1972)

Children in the mid-20th century began to demand a greater voice in American society as they became increasingly aware of their identity, potential, and the demands placed on them by society. The youth movement organized in the 1930s, with the American Student Union and the American Youth Congress both forming in 1935.[1179] Later, during the Vietnam War, young people began to regard themselves (and were regarded by certain others) as "the conscience of the nation."[1180] Their mandatory sacrifice in war led to demands to lower the age of majority and the voting age to 18.[1181] These efforts were supported by an aging population in the country as a whole that began to look at youth in a different light. The median age of the U.S. population in 1960 was 30.3, while in 1820 it was only 16.7.[1182] Declining fertility since the 19th century had only recently been countered by rising birth rates after World War II and more lax immigration policies.[1183]

As child labor laws began to be widely enforced throughout the country in the 1930s and 1940s, the focus of children's advocates shifted from child labor to juvenile unemployment in the wake of the Great Depression.[1184] Unemployment for youths aged 15 to 24 rose to five million in 1933[1185] before decreasing to four million by 1937, although youths still constituted 36 percent of the total unemployed population.[1186]

[1179] Bremmer, ed. *Children and Youth in America: A Documentary History*, p. 41.
[1180] Ibid., p. 1.
[1181] Upheld in *Oregon v. Mitchell* 400 United States 112 (1970)
[1182] Bremmer, ed. *Children and Youth in America: A Documentary History*, pp. 3-5.
[1183] Ibid., p. 156.
[1184] Ibid., pp. 299-301.
[1185] Ibid., p. 1987.
[1186] Ibid., p. 1988.

The Federal Juvenile Delinquency Law of 1938 defined a juvenile as an individual younger than 18. This definition raised the standard age from 16, first set by the 1899 Illinois juvenile court and widely adopted across the country. The catch was, however, that 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.[1187] While other states in Europe were increasingly protecting child offenders, the United States was slowly chipping away at protections for children, including those that had so recently been established.

Legal rulings in the mid-20th century reinforced a commitment to the *parens patriae* doctrine. *In re Holmes* (1954)[1188] denied juveniles civil rights in court proceedings on the grounds that juvenile courts were not criminal courts. The Standard Juvenile Court Act (SJCA) of 1959 was based on the doctrine,[1189] and a series of court cases institutionalized *parens patriae* as the prevailing school of thought about children in the United States. These cases included *Kent v. United States* (1966),[1190] *In re Gault* (1967), *McKiever v. PA* (1971),[1191] and *Schall v. Martin* (1984).[1192] *Kent* warned against the court's arbitrariness in conferring judicial waivers. *Gault* found that constitutional protections such as the right to cross-examination afforded adults should also apply to children in juvenile court.[1193] 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 favor of the state's interest in

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[1187] Ibid., p. 1118.
[1188] 109 A.2d 523 (Pa. 1954)
[1189] Rubin and Sloan, *Juvenile Offenders and the Juvenile Justice System*, p. 42.
[1190] 383 United States 541 (1966)
[1191] 403 United States 528 (1971)
[1192] 467 United States 253
[1193] Rubin and Sloan, *Juvenile Offenders and the Juvenile Justice System*, pp. 18-19.

protecting both the juvenile and society.[1194] Ultimately, the ruling in *Gault* was the most influential, suggesting:

> that a child, unlike an adult, has a right 'not to liberty, but to custody' […] If his parents default in effectively performing their custodial functions—that is, if the child is 'delinquent'—the state may intervene. In doing so, it does not deprive the child of any rights, because he has none.

In terms of the death penalty, both state-sanctioned and extrajudicial killing increased in the United States during the interwar period. According to Hale, between 1920 and 1940, more than 3,300 individuals were executed, officially and unofficially, during these years.[1195]

The years from 1922 to 1962 saw the greatest spike in child offender executions. According to Hale, a total of 141 child offenders were put to death during this period; almost 91 percent were non-white offenders.[1196] Espy data indicates that the period from 1935 to 1949 was the most active, with 38 child executions in 15 years. Hale has argued that the spike stemmed from the crime waves of the 1930s and the economic downturn of the Great Depression.[1197]

The period also saw the same trend of executing older children as well as child offenders after they had reached the age of majority. The last person to be executed *while* they were younger than 18 occurred in 1959, when Leonard Shockley, an African-American male, was executed for murder and robbery committed at age 16.[1198] The last child offender execution in the pre-*Furman* era was James Echols in 1964 at age 17.[1199]

[1194] Ibid., pp. 21-22.
[1195] Hale, *A Review of Juvenile Executions in America*, p. 9.
[1196] Ibid., pp. 92-96.
[1197] Ibid., pp. 92.
[1198] Ibid., pp. 99-100.
[1199] Amnesty International, "United States of America: The Death Penalty and Juvenile Offenders, Amr 51/23/91."

As discussed above, the period also witnessed the greatest degree of racial disparity in the penalty's administration, according to the Espy data. For almost 20 years, from 1945 until the last child execution in 1964 (pre-*Furman*), the only executions were those of African-Americans. From 1934 to 1964, all of the child executions were of African-Americans with the exception of four Caucasians and one Latino.

POST-*FURMAN* ERA (1972-2005)

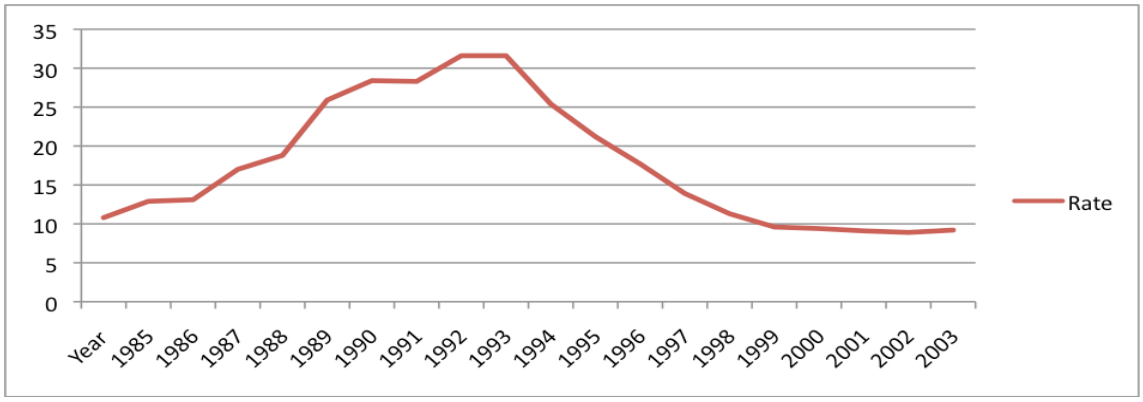
Even after the *de facto* moratorium on the death penalty ended in 1977, U.S. states were still reluctant to execute child offenders. It took eight years and the state of Texas to resume these executions in the United States. Texas executed child offenders in 1985 and 1986. South Carolina also executed a child offender in 1986.

Child offender executions peaked in the post-*Furman* era in 1993 and again in 2000, while the rate of child offenders sentenced to death reached its post-*Furman* peak in 1994 and 1999. The 1990s was also a period of great public concern about crime, especially juvenile crime. The 'superpredator' whose image saturated the American media was young, male, urban and often of color.[1200] Violent crime dominated the local and national news and was commonly the random crimes of strangers, such as carjacking. The response by legislators was to appear tough on this type of crime by introducing the 'war on crime' and the 'war against drugs' into the American lexicon.

Juvenile crime actually did increase during this period. (See Figure 6.2 below).

[1200] See Richard Lacayo and Richard Behar, "When Kids Go Bad," *Time*, September 19 1994, Paul Kaihla, "Kids Who Kill," *Maclean's*, August 15 1994. G. Witkin and S.J. Hedges, "Kids Who Kill," *U.S. News & World Report*, April 8 1991, Alexandra Marks, "Unusual Unity on Youth Crime," *Christian Science Monitor*, February 20 1997.

FIGURE 6.2: HOMICIDE OFFENDING RATES PER 100,000 BY YEAR IN THE UNITED STATES FOR JUVENILE OFFENDERS



In 1993, the 15 to 19 age group had the second-highest number of individuals arrested for criminal homicide, only slightly behind the 20 to 24 age group.[1201] Those 19 and under made up almost 31 percent of all those arrested in 1993 for criminal homicide.[1202] Gang killings almost quadrupled between 1989 and 1991, while juvenile gang killings increased by more than 1.5 times in the same period.[1203] By 1993, the rate of juvenile gang killings was more than double that of 1989, with 1,147 in 1993.[1204] Violent juvenile crime corresponded with high death penalty rates, with the South having both a comparatively high death penalty rate for child offenders and some of the highest juvenile crime rates in the country.[1205]

One of the major hurdles to the development of systems of juvenile justice and children's rights is the unique position of children as legal subjects. On the one hand, there has been a growing tendency (especially since the late 1970s) to recognize children's human rights. On the other hand, children are dependent upon adults to

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[1201] Bedau, ed. *The Death Penalty in America: Current Controversies*, p. 61.
[1202] Ibid.
[1203] Ibid., p. 64.
[1204] Ibid.
[1205] Peter Elikann, *Superpredators: The Demonization of Our Children by the Law* (New York: Insight Books, 1999), p. 152.

provide for their needs. This leaves children in what Franklin Zimring has called a state of "semi-autonomy," whereby they possess "liberty interests," but exist in relationship to adults who assume responsibility for achieving these interests.[1206]

ABOLITION OF THE DEATH PENALTY IN THE UNITED STATES

Of the more than 15,500 individuals officially executed in the United States since 1608, more than 1000 have been executed in the post-*Furman* era.[1207] Although the European system is today commonly considered among the most advanced in terms of death penalty abolition, the United States was a leader in abolition in the 19th century.[1208] Michigan was the first U.S. state to abolish the death penalty in 1846 for all crimes except treason, before any state in the world and more than 20 years before any state in Europe.[1209] Wisconsin abolished the penalty for *all* crimes in 1853, ten years before any other state in the world and 13 years before the first European state, San Marino, abolished in 1865.[1210] Moreover, Wisconsin abolished the penalty for all offenders 119 years before any current member state in the European Union.[1211] (See Table 6.4 below for the dates of abolition for U.S. states).

Other efforts to limit the death penalty in the United States took place prior to most attempts by European governments. In 1794, the Pennsylvania Act distinguished

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[1206] Zimring, *The Changing Legal World of Adolescence*, pp. x-xi.
[1207] Death Penalty Information Center, "Executions in the U.S. 1608-1987: The Espy File," http://www.deathpenaltyinfo.org/article.php?scid=8&did=269.
[1208] Tuscany, Austria and Russia all suspended the death penalty for periods during the 18th century. Roger Hood, "The Death Penalty: A Worldwide Perspective," (Oxford: Council of Europe, 2002; reprint).
[1209] Zimring and Hawkins, *Capital Punishment and the American Agenda*, p. x. Amnesty International, "Facts and Figures on the Death Penalty." Portugal was the first European state to abolish for ordinary crimes in 1867.
[1210] Venezuela was the first country to abolish in 1863. Wisconsin restored the death penalty in 2006.
[1211] Amnesty International, "Facts and Figures on the Death Penalty." Sweden and Finland were the first countries in the E.U. to abolish the death penalty for all crimes in 1972.

between degrees of murder, limiting the death penalty's scope[1212]—something the United Kingdom would not do until a century and a half later. In 1834, Pennsylvania became the first U.S. state to end public executions by moving them inside prison grounds, thirty-four years before the United Kingdom would do the same.[1213]

TABLE 6.4: ABOLITION OF THE DEATH PENALTY IN U.S. STATES BY YEAR [1214]

1846: Michigan (abolished for all crimes except treason in 1846 and for all crimes in 1963)
1852: Rhode Island (abolished for all crimes except murder of a prison guard, restored in 1882)
1853: Wisconsin (restored in 2006)
1872: Iowa (restored in 1878, abolished again in 1965)
1876: Maine (restored in 1883, abolished again in 1887)
1897: Colorado (restored in 1901)
1907: Kansas (restored in 1935, abolished again in 1973 and restored again in 1994)
1911: Minnesota
1913: Washington (restored in 1919)
1914: Oregon (restored in 1920, abolished again in 1964 and restored again in 1984)
1915: North Dakota
South Dakota (restored in 1939, abolished again in 1977 and restored again in 1979),
Tennessee (retained for rape and restored in 1919)[1215]
1916: Arizona (abolished for all crimes except treason, restored in 1918)
1917: Missouri (restored in 1919)
1957: Alaska, Hawaii
1958: Delaware (restored in 1961)
1965: West Virginia
Vermont (retained for some ordinary crimes)
1966: New York (retained for some ordinary crimes, restored in 1995)
1969: New Mexico (retained for some ordinary crimes)
1973: District of Columbia
1984: Massachusetts

[1212] Zimring and Hawkins, *Capital Punishment and the American Agenda*, p. 78.
[1213] Hale, *A Review of Juvenile Executions in America*, p. 9. Other authors claim the first public execution was in Rhode Island in 1833. Michael H. Reggio, "History of the Death Penalty," in *Society's Final Solution: A History and Discussion of the Death Penalty*, ed. Laura E. Randa (Lanham, MD: University Press of American, Inc., 1997).
[1214] I have excluded the information on states that stopped executions because of *Furman v. Georgia (*1972) *and* that reinstated after *Gregg v. Georgia (*1976*)*. This list is compiled from Zimring and Hawkins, *Capital Punishment and the American Agenda*. and supplemented with more recent information.
[1215] Zimring puts the reinstatement date at 1917. Ibid.

EARLY ABOLITIONISTS EFFORTS

Like the abolitionist movement in England, the movement in the United States emerged out of penal reform efforts. The death penalty was used far less often in the colonies than in England because of the shortage of labor as well as the lack of prisons in the New World.[1216] There were few abolitionist victories before William Penn's Great Act of 1682, which reserved the penalty for premeditated murder. The colonial period was characterized by tremendous variation in the use of the death penalty. Death penalty practices were made more uniform during England's Bloody Code in the 18th century, as England required the colonies to adopt harsher penalties.[1217]

In 1764, Cesar Beccaria's essay *On Crime and Punishment* was translated into English and influenced abolitionists and penal reformers in Europe and the Americas. Other reformers also greatly influenced the American movement, including John Howard (a well-known English prison reformer), Charles-Louis de Secondat (Montesquieu), Voltaire and Jeremy Bentham.[1218]

By the time of the Revolution, similar capital punishment statutes could be found in most colonies. The crimes included in these statutes were: murder, arson, treason, piracy, rape, robbery, sodomy, as well as counterfeiting, horse-theft and slave rebellion, depending on the jurisdiction and circumstances.[1219] A number of abolitionist and penal reform societies were formed during this time, including the *Philadelphia Society for Relieving Distressed Prisoners* (first formed in 1776 but postponed due to the war) and

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[1216] Louis Filler, "Movements to Abolish the Death Penalty in the United States," *Annals of the American Academy of Political and Social Science* 284 (1952): p. 124.
[1217] Hale, *A Review of Juvenile Executions in America.*
[1218] Filler, "Movements to Abolish the Death Penalty in the United States," p. 124.
[1219] Hale, *A Review of Juvenile Executions in America*, p. 16.

the *Philadelphia Society for Alleviating the Miseries of Public Prisons* (hereafter, Society for Public Prisons) in 1787.[1220]

The death penalty in England was mandatory for certain crimes, though clemency on the part of the crown was an important aspect of English jurisprudence. The U.S. colonies primarily rejected the English model.[1221] Many jurisdictions in the colonies gave judges the power of discretion in sentencing.[1222] Although this discretionary power was removed in some states like Massachusetts around the time of the Revolutionary War, it was reinstated in 1809 for many crimes. Other U.S. states followed suit.[1223]

Although there were a number of influential penal reformers and abolitionists in the 18th century, a couple of individuals stand out, particularly William Bradford and Benjamin Rush. Bradford, who served as attorney general both of Pennsylvania and the United States, did not advocate for total abolition of the death penalty, but did press for extensive reforms.[1224] In 1793, Bradford proposed dividing murder into degrees based on intent, whereby only first-degree murder would be eligible for the death penalty.[1225] This division would eventually become a hallmark of American jurisprudence, as almost all other U.S. states adopted criteria within the next century for degrees of murder.[1226] Rush, a member of the *Society for Public Prisons*, became a prominent penal reformer in the 1780s, during which time he read a paper in the home of Benjamin Franklin (in 1787) that critiqued current penal laws. Rush is considered to have given the first "reasoned

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[1220] Filler, "Movements to Abolish the Death Penalty in the United States," p. 124.
[1221] Hale, *A Review of Juvenile Executions in America*, p. 18.
[1222] Ibid.
[1223] Ibid.
[1224] Filler, "Movements to Abolish the Death Penalty in the United States," p. 125.
[1225] Hale, *A Review of Juvenile Executions in America*, pp. 14-15.
[1226] Ibid., p. 15.

argument favoring the abolition of capital punishment and influenced many of his generation."[1227]

The work of Bradford, Rush and other 18th-century reformers laid the foundation for 19th-century abolitionists, who saw some success in their efforts at penal reform and at reducing the use of the death penalty. Criminal courts meted out punishment for murder according to degrees of intent; public executions were banned in many U.S. states; juries were given discretion in capital cases; and the list of capital crimes was substantially reduced by the end of the 19th century. The abolitionist movement in the United States was dominated by groups active in England as well, including Quakers, Unitarians and other liberal Christians.[1228]

Key reformers in the 19th century included Edward Livingston and John O'Sullivan. Livingston, future secretary of state and minister to France in the Jackson administration, published a report in 1821 that challenged support for the death penalty. Livingston's efforts influenced generations of abolitionists as well as the policies of many South American countries, many of which abolished for all crimes in the 19th century.[1229] O'Sullivan was secretary of the *New York Society for the Abolition of Capital Punishment.* He engaged in a famous debate with George Barrell Cheever in 1843 and advocated abolition in New York and throughout the country.[1230]

The high point for reform efforts came in the 1840s, when Michigan became the first state to abolish for ordinary crimes and organizations devoted solely to abolition began to crop up across the country. Rhode Island and Wisconsin soon abolished as well.

[1227] Filler, "Movements to Abolish the Death Penalty in the United States," p. 125.
[1228] Bedau, ed. *The Death Penalty in America: Current Controversies*, p. 7.
[1229] Filler, "Movements to Abolish the Death Penalty in the United States," pp. 126-127.
[1230] Hale, *A Review of Juvenile Executions in America*, p. 60.

In 1844, anti-death penalty societies formed in Massachusetts and New York, followed by a national society in 1845. By the end of the decade, there were state societies in Ohio, Alabama, Indiana, Iowa, Louisiana and Tennessee.[1231]

The early part of the 20th century offered great promise for death penalty reform, especially between 1907 and 1917. Within these 10 years, seven U.S. states abolished the death penalty for all crimes: Kansas, Minnesota, Washington, Oregon, North Dakota, South Dakota and Missouri; Arizona abolished for ordinary crimes; and Tennessee abolished for all crimes but rape. The year 1917 seemed the most promising: Twelve states had abolished the death penalty, leaving only 12 states with a mandatory death penalty for murder, while an additional eight states – West Virginia, Indiana, North Carolina, Pennsylvania, New York, New Hampshire, Illinois and Nebraska – were considering abolitionist legislation.[1232] Ultimately, though, reform was short-lived: Five states would restore the penalty before 1920, and an additional two would restore before 1940.

The use of the death penalty reached its peak in the 1930s and 1940s as the United States entered World War II. The Great Depression had caused mass unemployment, an epic stock market crash, bank failures and crime waves.[1233] Christopher Adamson argues that the use of the death penalty increases in certain periods not because of crime, necessarily, but in response to economic cycles.[1234] He contends that during boom times, prison populations have been used as labor, an observation that certainly held true during

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[1231] Filler, "Movements to Abolish the Death Penalty in the United States," pp. 128-129.
[1232] Ibid.
[1233] Bedau, ed. *The Death Penalty in America: Current Controversies*, p. 9.
[1234] Christopher Adamson, "Toward a Marxian Penology: Captive Criminal Populations as Economic Threats and Resources," *Social Problems* 31, no. 435 (1984).

the colonial period.[1235] During recessions, crime waves and economic insecurity may increase a community's willingness to apply the penalty. Support for this argument is found in the cycles of abolition, according to John Galliher, Gregory Ray and Brent Cook, as abolitionist legislation was generally passed during boom times and repealed during recessionary periods.[1236]

The 1950s and 1960s saw another period of promise for abolition. Four U.S. states – Delaware, Oregon, Iowa and West Virginia – abolished within eight years, between 1958 and 1965. Michigan abolished for all crimes within the same period. Although Delaware and Oregon would reinstate within a few years, the 1950s and 1960s saw a marked decline in executions.[1237] By the end of 1967, there was an unofficial moratorium on capital punishment in the United States as states awaited the Supreme Court's ruling on the constitutionality of the death penalty in the *Furman* case. Aggregate death penalty data suggests that the changes of the 1950s and 1960s were the culmination of a century-long trend in the decreased use of the death penalty. (See Table 6.5 below.)

TABLE 6.5: NUMBER OF EXECUTIONS IN THE UNITED STATES IN FIVE-YEAR INTERVALS [1238]

Year	Number of Executions
1935	199
1940	124
1945	117
1950	82
1955	76
1960	56
1965	7
1970	0

[1235] As qtd. in John F. Galliher, Gregory Ray, and Brent Cook, "Abolition and Reinstatement of Capital Punishment During the Progressive Era and Early 20th Century," *The Journal of Criminal Law and Criminology* 83, no. 3 (1992): p. 543.
[1236] Ibid.
[1237] Bedau, ed. *The Death Penalty in America: Current Controversies*, p. 13.
[1238] Zimring and Hawkins, *Capital Punishment and the American Agenda*, p. 30.

Yet Zimring and Hawkins suggest that aggregate data is misleading because executions in the United States are a regional phenomenon. Executions between 1930 and 1968 took place in only 14 U.S. states, ten of which are in the South, such that the South "largely determined the national pattern in executions."[1239] The decline in executions in the 1960s was largely the result of a decline in executions in the South.[1240]

The Eighth Amendment prohibiting cruel and unusual punishment and the Fourteenth Amendment guaranteeing Eighth Amendment protections to citizens of U.S. states were at the center of the death penalty debate. In 1958, the Supreme Court in *Trop v. Dulles* [1241] held in a 5-4 decision that loss of citizenship as a form of punishment by the United States was unconstitutional under the Eighth Amendment. The ruling interpreted the Eighth Amendment as drawing "its meaning from the evolving standards of decency that mark the progress of a maturing society."

Finally, in *Furman v. Georgia* (1972),[1242] the Supreme Court found in a 5-4 decision that the death penalty was unconstitutional under the Eighth Amendment given problems with current state legislation. *Furman* was a narrow ruling, addressing the lack of clear and consistent standards for the penalty's application. Concurring opinions in *Furman* referenced *Trop*. By 1976, thirty-five U.S. states had enacted new laws addressing the lack of standards cited in the *Furman* decision.[1243]

[1239] Ibid., pp. 30, 32.
[1240] Ibid., p. 32.
[1241] 356 United States 86 (1958)
[1242] 408 US 238 (1972)
[1243] Contrary to popular belief, there was not a backlash to the *Furman* decision, according to Zimring and Hawkins. The authors contend that all of the states that allowed the death penalty prior to *Furman* changed their laws in response to the decision. Only one state, Oregon, did not have the death penalty prior to *Furman* but enacted it in the debate on state's rights following *Furman*.

In *Gregg v. Georgia* (1976),[1244] the Supreme Court rejected arguments that the death penalty violates the Eighth and Fourteenth Amendments. Although not overturning *Furman*, *Gregg* laid out the standards for death sentences lacking in the pre-*Furman* era: New death penalty statutes must contain provisions dictating criteria in sentencing, such as allowing for the consideration of personal character and history. In 1977, with the death of Gary Gilmore, executions resumed in the United States after almost ten years of legal battles. Executions remained a rarity, however, in the years following the Gilmore execution. There were none in 1978, two in 1979, none in 1980 and one in 1981.[1245] Death sentences, however, increased to more than 200 per year, even though the number of those executed was less than two percent of those sentenced to death.[1246] Moreover, after *Furman,* the death penalty became even more of a Southern phenomenon, as states outside the South were reluctant to administer the penalty.[1247]

In the late 1960s and 1970s, the death penalty would become a highly politicized issue in the United States.[1248] Before Richard Nixon's campaign in 1968, neither the Republican nor the Democratic Party took an official position on the penalty, but that would soon change. Ronald Reagan's gubernatorial campaign in 1972 recast the penalty as an electoral issue.[1249] Pro-death penalty advocates painted abolitionists as weak in the face of rising crime, so much so that no open advocate for abolition was able to hold a nationally elected position for several decades.[1250]

[1244] 428 United States 153 (1976). *Gregg*'s companion cases included: *Proffitt v. Florida, Jurek v. Texas, Woodson v. North Carolina* and R*oberts v. Louisiana.*
[1245] Zimring and Hawkins, *Capital Punishment and the American Agenda*, p. 46.
[1246] Ibid., p. xi.
[1247] Ibid., pp. 46-47.
[1248] Bedau, ed. *The Death Penalty in America: Current Controversies*, pp. 17-18.
[1249] Ibid.
[1250] Ibid.

The political shift favoring the death penalty has begun to change in the last few years in the wake of concerns about the possible innocence of those sentenced to death, as DNA evidence has freed a number of prisoners on death row. Illinois has issued a moratorium on the penalty over concerns about the innocence of individuals on death row, and the death penalty was declared unconstitutional in 2004 in New York[1251] and outlawed in New Jersey (2007) and New Mexico (2009).[1252] A number of U.S. states have also expressed concern over lethal injection, fearing that the procedure is more painful than previously known and could violate the Eighth Amendment.[1253] Other trends indicate that support for the death penalty is strengthening in some parts of the country: Six states in recent years have made the rape of a child a death-eligible crime. The first U.S. state to abolish the death penalty for all crimes, Wisconsin, reinstated in 2006.

THE SUPREME COURT AND THE ABOLITION OF THE DEATH PENALTY FOR CHILD OFFENDERS

The U.S. Constitution does not mention children, yet in the 2005 Supreme Court decision in *Roper v. Simmons,* the court interpreted the Constitution's Eighth and Fourteenth amendments to prohibit the execution of child offenders, ending the practice of the child death penalty in the United States. Prior to *Roper*, in the post-*Furman* era, the first state to abolish the death penalty for child offenders was Tennessee in 1984. More than half of all U.S. states that would abolish the penalty for child offenders did so in the 1980s, even as the public became increasingly concerned about juvenile delinquency.

[1251] The state legislature voted in 2007 that the 2004 ruling applied to those already on death row.
[1252] New Mexico repealed the penalty in 2009, but the repeal does not apply to those already on death row.
[1253] Ohio being the most recent state to exhibit concern over the drug combination administered.

(See Table 6.6 below.) Appendix E provides specific information on legislation in each state.

TABLE 6.6: U.S. STATE ABOLITION BY DATE AND JURISDICTION

1984: Tennessee
1985: Nebraska
1986: Colorado
1987: Illinois, New Mexico, Ohio, Oregon
1988: California, Maryland, New Jersey
1989: Connecticut
1993: Indiana, Washington
1994: Federal
1995: Kansas
2003: Montana, Wyoming
2004: New York, South Dakota

The five Supreme Court cases involving child offenders and the death penalty all support the doctrine of *parens patriae,* the legal idea that the state should act in the best interest of the child. These cases are: *Eddings v. Oklahoma, Thompson v. Oklahoma, Stanford v. Kentucky, Wilkins v. Missouri,*[1254] *Roper v. Simmons*. The first Supreme Court case to consider age as a mitigating factor in the determination of guilt was *Eddings v. Oklahoma* in 1982, a case involving the death sentence of 16-year-old Monty Lee Eddings.[1255] 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.[1256] Although the court did not rule on the constitutionality of the death

[1254] 482 United States 361. *Wilkins* and *Stanford* were joined in one Supreme Court case and shared the same ruling.
[1255] 455 United States 104 (1982)
[1256] The judge did allow youth as a mitigating factor, but not the defendant's upbringing and emotional disturbance.

penalty as applied to 16-year-olds, it nonetheless prohibited any barriers to the consideration of mitigating factors in sentencing.[1257]

The first Supreme Court case to rule on the constitutionality of executing child offenders was *Thompson v. Oklahoma* (1988).[1258] In a 5-3 decision, the court found that executing minors under age 16 was unconstitutional under the Eighth and Fourteenth amendments. The second Supreme Court case came the following year with a 5-4 decision in *Stanford v. Kentucky,*[1259] in which the court 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.

Three years before the 2005 *Roper* decision, the court in *Atkins v. Virginia*[1260] ruled that executing mentally retarded offenders was unconstitutional under the Eighth Amendment; the ruling would have an important effect on the outcome of *Roper*. In *Atkins*, the court revisited *Penry v. Lynaugh* (1989), decided the same year as *Stanford*, and found that a national consensus against executing the mentally retarded had emerged in the 13 years since the 1989 ruling. The cognitive functioning of mentally retarded offenders was also dispositive, and the decision referenced the opinion of the world community.

Finally, in 2005, the Supreme Court in *Roper v. Simmons* found in a 6-3 decision that the death penalty for child offenders under the age 18 was unconstitutional under the 'evolving standards of decency' of the Eighth Amendment. Employing logic similar to

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[1257] 438 United States 586 (1978). As argued in *Beard v. Banks* 542 United States 406 (2004) and based on *Eddings* and a previous ruling in *Lockett v. Ohio* 438 United States 56 (1988).
[1258] 487 United States 815 (1988)
[1259] 492 United States 361 (1989)
[1260] 536 United States 304 (2002)

that in *Atkins*, *Roper* held that a national consensus against the child death penalty had emerged in the 16 years since the *Stanford* decision. *Roper* commuted the death sentences of 72 17-year-olds around the country and brought the United States into compliance with international law.[1261] See Table 6.7 for the changing national consensus between *Penry* and *Atkins* and between *Stanford* and *Roper*.

TABLE 6.7: COMPARISON BETWEEN *ATKINS* AND *ROPER* IN TERMS OF A CHANGING NATIONAL CONSENSUS

	Atkins		**Roper**	
	Penry (1989)	*Atkins* (2002)	*Stanford* (1989)	*Roper* (2005)
National consensus for abolition against the death penalty	2 states had abolished for the mentally retarded 14 states had abolished for all crimes _____ 16 states total that had abolished the death penalty for mentally retarded offenders at the time of *Penry*.	18 states abolished for the mentally retarded 12 states abolished for all crimes _____ 30 states total as well as federal legislation that abolished the death penalty for mentally retarded offenders at the time of *Atkins*	12 states had abolished for child offenders under 18 years of age 13 states had abolished for all crimes _____ 25 states total that had abolished the death penalty for child offenders at the time of *Stanford*	18 states abolished for child offenders under 18 years of age 12 states abolished for all crimes, plus D.C. _____ 30 states total plus D.C. as well as federal legislation that abolished the death penalty for child offenders at the time of *Roper*
States that execute		5 states had executed mentally retarded offenders since *Penry*		6 states had executed child offenders since *Stanford*
States that restored punishment		None		None

Whereas the change from *Penry* to *Atkins* was a gain of 16 states that adopted legislation abolishing the death penalty for mentally retarded individuals (for a net gain of 14

[1261] Streib, "The Juvenile Death Penalty Today: Death Sentences and Executions for Juvenile Crimes, January 1, 1973-December 31, 2004," p. 11.

jurisdictions and the federal government), the change from *Stanford* to *Roper* was only an additional six states that abolished the penalty for child offenders (a net gain of five states plus the federal government).

The majority opinion by Justice Anthony Kennedy in *Roper* made note of the 'error' in the *Stanford* ruling, which did not count the 13 U.S. states that abolished the death penalty for all crimes. Justice Kennedy rectified this by including in *Roper* the 12[1262]states that had abolished for all crimes in the new count to support the claim of a national consensus. Although the degree of change was not as great in *Roper* as in *Atkins*, Justice Kennedy concluded, "We think the same consistency of direction of change has been demonstrated."[1263] The only justice that voted differently in *Stanford* than in *Roper* was Kennedy, as shown in Table 6.8 below.

[1262] One state, Kansas, had since reinstated.

[1263]AI documents and Supreme Court briefs in the *Roper* case argue that no state has lowered age limits for the death penalty, lending support to the "direction of change" cited by Kennedy. Yet, AI documents in 1991 and the *Stanford* ruling list New Hampshire as one of the states requiring defendants be 18 years of age to be eligible for death. New Hampshire is not listed, however, in the *Roper* decision. Amnesty International, "United States of America: The Death Penalty and Juvenile Offenders, Amr 51/23/91." ———, "United States of America: Indecent and Internationally Illegal, Amr 51/144/2002." In a draft version of the *amicus* brief in *Stanford*, AI suggests that New Hampshire does prohibit these executions, but recognizes that the language of the statute has "contradictory wording." ———, "Draft Version of 'Interest of Amicus Curiae for Stanford V. Kentucky 492 U.S. 361 (1989)'," (University of Minnesota Law School: Private archives of Professor David Weissbrodt1989; reprint). One unattributed AIUSA memo found in the private archives of David Weissbrodt at the University of Minnesota Law School indicates that there may be some re-interpretation of New Hampshire's classification by AIUSA members, possibly in order to maintain the claim that there have been no reversals. Unknown author and Amnesty International, "Dear Jo," (University of Minnesota Law School: Private archives of Professor David Weissbrodt1988; reprint).

TABLE 6.8: JUSTICE VOTING RECORDS IN *THOMPSON*, *STANFORD* AND *ROPER*

	Thompson[1264](1988) (under 16)	***Stanford*** (1989) (under 18)	***Roper*** (2005) (under 18)
Unconstitutional under the Eighth Amendment	Stevens, Blackmun, Brennan, Marshall, (O'Connor)[1265]	Brennan, Blackmun, Marshall, Stevens	Kennedy, Stevens, Souter, Ginsburg, Breyer
Constitutional under the Eighth Amendment	Scalia, Rehnquist, White	Scalia, Rehnquist, White, O'Connor, Kennedy	Scalia, Rehnquist, Thomas, O'Connor

A number of legal commentaries have identified Kennedy as the critical swing vote on the court.[1266] Erwin Chemerinsky, in an analysis of the 2005 term, found that Kennedy joined conservative justices in a number of instances, helping them establish conservative rulings in cases including: *Garcetti v. Ceballos*,[1267] *Kansas v. Marsh*[1268] and *League of United Latin American Citizens v. Perry*.[1269] In other cases, Kennedy joined more liberal justices to produce more progressive rulings: *Hamdan v. Rumsfeld*[1270] and *House v. Bell*.[1271] In some of these cases – *Hamdan*, *Rapanos v. United States*[1272] and *Hudson v. Michigan* – as well as others, Kennedy wrote separately and established the scope of the decision.[1273] Other commentators have noted that Kennedy often writes separately in

[1264] Kennedy did not participate.
[1265] O'Connor did not decide on the cruel and unusual standard of the Eighth Amendment. Rather, she makes a narrow ruling that the Oklahoma legislature may not have meant to make 15-year-olds death-eligible in their death penalty statute: "There is a considerable risk that the Oklahoma Legislature either did not realize that its actions would have the effect of rendering 15-year-old defendants death-eligible or did not give the question the serious consideration that would have been reflected in the explicit choice of some minimum age for death eligibility."
[1266] Erwin Chemerinsky, "The Kennedy Court: October Term 2005," *The Green Bag: An Entertaining Journal of Law* 9, no. 2 (2006), Bob Egelko, "Kennedy--the New Point Man/No Surpises from Bush's Appointees," *San Francisco Chronicle* 2006. Julie DelCour, "Opinion: The Kennedy Court?," *Tulsa World*, July 2 2006, David Cole, "The 'Kennedy' Court," *Nation*, July 31 2006.
[1267] 126 S. Ct. 1951 (2006)
[1268] 126 S. Ct. 2516 (2006)
[1269] 126 S. Ct. 2594 (2006)
[1270] 126 S. Ct. 2749 (2006)
[1271] 126 S. Ct. 2064 (2006)
[1272] 126 S. Ct 2208 (2006)
[1273] 126 S. Ct. 2159 (2006)

order to "moderate" the ruling.[1274] In the more recent 2008-2009 term, Kennedy voted with the "majority 92 percent of the time and in all but 5 of the 23 decisions in which the justices split 5-to-4."[1275] Sixteen of these decisions put the liberal and conservative blocs of justices on opposite sides. Of these, Kennedy voted with the liberal bloc (Ginsberg, Souter, Breyer and Stevens) five times and with the conservative bloc (Alito, Roberts, Scalia and Thomas), 11 times.[1276]

BETWEEN STANFORD AND ROPER

Kennedy's majority opinion in *Roper* made note of the national consensus that had emerged since *Stanford*. Eight U.S. states, in addition to the federal government, had abolished the death penalty for child offenders under age 18.[1277] (See Table 6.9 below).

TABLE 6.9: U.S. JURISDICTIONS THAT ABOLISHED THE DEATH PENALTY FOR CHILD OFFENDERS BETWEEN *STANFORD* AND *ROPER*.

1993	Washington
1994	Kansas
	Federal government
1995	New York
1999	Montana
2002	Indiana
2003	Missouri
2004	South Dakota
	Wyoming

[1274] Cole, "The 'Kennedy' Court," p. 6.
[1275] Adam Liptak, "Roberts Court Shifts Right, Tipped by Kennedy," *New York Times*, July 1, 2009 2009.
[1276] Ibid.
[1277] The *Roper* Court did not count Washington in the national consensus because abolition was decided by judicial ruling as opposed to statute (Fagan and West, p. 4). Missouri was also not counted in the national consensus in the *Roper* decision because the state did not take up the issue by review, but instead awaited remand by the Supreme Court (*Simmons v. Roper* [112 S.W. 3d 397 (Mo 2003)]).

Both Kansas and New York reinstated the death penalty in 1994 and 1995, respectively, after almost 20 years of debate.[1278] Yet in reinstating, both states restricted the penalty to individuals who commit their crimes when they are older than 17. Wyoming and South Dakota appear to have abolished in 2004 in response to the growing national consensus against the penalty and especially to the pending *Roper* case in the Supreme Court. The sponsor of Wyoming's legislation, Rep. Jane Warren (D-Laramie), cited Justice Stevens' opposition to the penalty and mentioned Iran's use of the penalty for children.[1279]

The U.S. states that abolished in the post-*Stanford* years were not ones that executed extensively. Before January 1993, Washington had not put anyone to death in 30 years and had only executed two child offenders and none since 1932, according to the Espy data.[1280] Kansas, South Dakota and Wyoming had never executed a child offender, according to the data. The Kansas legislature reinstated after 22 years of abolition, after not having executed anyone since 1965.[1281] South Dakota had not executed anyone since 1947.[1282] Even Missouri and New York, the two states (of the group of eight states) that had carried out the most executions of child offenders, had only put to death nine child

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[1278] For example, in *each* of the 19 legislative sessions in New York between 1977 and 1995, both the Senate and the Assembly passed legislation reinstating the death penalty. Every year the governor (Governors Carey and Cuomo) vetoed it. James M. Galliher and John F. Galliher, "A 'Commonsense' Theory of Deterrence and the 'Ideology' of Science: The New York State Death Penalty," *Journal of Criminal Law and Criminology* 92, no. 1/2 (2001-2): p. 309.

[1279] "Death Penalty for Those under 18 Would Be Outlawed under House Bill" *Associated Press*, February 18, 2004.

[1280] Wallace, James. "Appeal Fails; Dodd Hanged; Killer of 3 Boys Is First Felon Executed in State in 30 Years," *Seattle Post-Intelligencer,* January 5, 1993, A1.

[1281] Dvorak, John. "Kansas Approved Death Penalty after 22 Years; Governor Says She Won't Fight Law," *Kansas City Star*, April 9, 1994.

[1282] Ducheneaux, Karen. "Governor Signs Bill to Ban Execution of Juveniles" *Associated Press*, March 4, 2004.

offenders altogether, according to Espy data, and only one (Missouri in 1993) in the post-*Furman* era. New York had not executed anyone since the 1960s.[1283]

Nonetheless, the policy shift in these states was meaningful, according to the majority in *Roper*. Two of the eight states had a minimum age lower than 14 for the penalty before the *Thompson* ruling: Indiana (10) and Montana (12).[1284] Two others had no age limit in 1987: South Dakota and Washington.[1285] Another two, New York and Kansas, were abolitionist or *de facto* abolitionist (New York) in 1987. Additionally, Missouri, Indiana and Washington had collectively sentenced a total of eight child offenders to death since *Furman*.[1286]

Many of these eight states abolished in response to international and national pressure. The National Coalition against the Death Penalty and AIUSA waged campaigns in Wyoming and South Dakota, as will be discussed below. New York received international attention from organizations like Hands Off Cain in Italy.[1287] Indiana had long been the target of international criticism, beginning with the campaign to get Paula Cooper off death row in the 1980s.[1288] AIUSA focused its attention in the late 1980s on

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[1283] New York was ranked second in number of official executions before *Furman*. Galliher and Galliher, "A 'Commonsense' Theory of Deterrence and the 'Ideology' of Science: The New York State Death Penalty," p. 308. The juvenile death penalty was first addressed in New York in 1948, when Governor Dewey raised the age of eligibility from seven to 15. A revision of the penal code in 1963 further raised the age to 18, which was reaffirmed in the 1965 revised penal code. The 1963 decision was largely influenced by the Model Penal Code, discussed above, that recommended the death penalty be reserved for offenders over the age 18. Additionally, a court case in 1973, *People v. Fitzpatrick,* repealed the state's death penalty. Salvatore J. Modica, "New York's Death Penalty: The Age Requirement," *St. John's Journal of Legal Commentary* 13, no. 585 (1998-9): pp. 586-587, 594-584.

[1284] M.A. Ogloff, James R.P., "The Juvenile Death Penalty: A Frustrated Society's Attempt for Control," *Behavioral Sciences & the Law* 5, no. 4 (1987): p. 450.

[1285] Ibid.

[1286] Bedau, ed. *The Death Penalty in America: Current Controversies*, p. 67.

[1287] Hands Off Cain, Campaign: "New York, New York," <http://www.handsoffcain.info/chisiamo/index.php?iddocumento=2000085>.

[1288] Amnesty International, "Amicus Brief of Amnesty International for Paula Cooper Appellant, Case No. 45500-8701-Cr-61," (Supreme Court of Indiana, 1988; reprint).

the Cooper case as well as on the Indiana statute allowing offenders as young as 10 to receive the death penalty.[1289] Cooper became a well-known figure in Europe, with NGOs soliciting support from all over the continent. Opposition to Cooper's sentence resulted in boxes of letters from Italy, Belgium, the Netherlands and West Germany;[1290] petitions from Italy alone solicited some two million signatures.[1291]

The federal government had not executed a child offender since 1874, according to Espy data. There was even more reason to believe that the practice was a thing of the past when the federal death penalty was reinstated in 1988 by President Ronald Reagan in the Anti-Drug Abuse Act. The Act provided for death sentences for murders related to traffic in illegal drugs, but excluded offenders under age 18.[1292] In 1994, President Bill Clinton signed the Federal Death Penalty Act, which expanded the penalty from the narrow statute of the 1988 law to include more than 50 offences.[1293] Yet even though the country was in the midst of a juvenile crime wave, the 1994 Act also excluded offenders who committed their crimes when they were less than 18 years of age. The federal government's reaffirmation of age 18 as the eligibility age for the death penalty contributed to the perception of a national consensus in *Roper*.

[1289] _____, "USA: Developments on the Death Penalty: Amr 51/Wu 03/87/External " (1987; reprint).
[1290] Indiana Historical Society, "Paula Cooper Case Records, 1986-1989; Collection #M 565," (1990; reprint).
[1291] Jerry White, "Death Penalty Opponents Speak in Detroit," (World Socialist Web Site: International Committee of the Fourth International, 1999; reprint),http://www.wsws.org/articles/1999/mar1999/deat-m23.shtml.
[1292] Amnesty International, "United States of America: Indecent and Internationally Illegal, Amr 51/144/2002," p. 6.
[1293] Ibid. pp. 5-6.

There are two primary approaches to international law: monism and dualism. States with a monist legal system consider international law a key part of national law and do not require additional legislation in order to implement international obligations. States with a dualist approach require the passage of additional domestic legislation in order for treaty obligations and other instruments of international law to take effect. The United States is a hybrid of these two approaches.[1294] The U.S. Constitution holds that "all Treaties made, or which shall be made, under the Authority of the United States shall be the supreme Law of the Land,"[1295] which would appear to be monist, though judicial precedent is mixed.[1296] Although most human rights treaties ratified by the United States include a declaration stating that they are not self-executing, or effective without additional legislative action, there is precedent in U.S. courts for implementing norms found in international law, for example cases brought under the Alien Tort Claims Act.[1297]

The United States has a long history of referencing international and foreign law in its opinions.[1298] The Eighth Amendment, especially, has resulted in multiple Supreme Court rulings that have attempted to define 'cruel and unusual punishment' via both

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[1294] Weissbrodt, Fitzpatrick, and Newman, *Human Rights: Law, Policy and Process* p. 26.
[1295] Article 6, section 2
[1296] See *Foster v. Neilson*, 27 United States (2 Pet.) 253, 314 (1829) reversed by *United States versus Percheman*, 32 United States (7 Pet..) 51, 88 (1833)
[1297] Although these are civil cases as opposed to criminal ones. Weissbrodt, Fitzpatrick, and Newman, *Human Rights: Law, Policy and Process* p. 27. See the Alien Tort Claims Act 28 United States C. § 1350, *Filartiga v. Pena-Irala,* 630 F. 2d 876 (2d. Cir. 1980), *Kadic v. Karadzic,* 74 F.3d 377 (2d Cir. 1995).
[1298] *Kennedy v. Mendoza-Martinez,* 372 United States 144 (1963), *Miranda v. Arizona,* 384 United States 436, 488 (1966), *Lackey v. Texas,* 514 United States 1045 (1995), *Knight v. Nebraska,* 120 S.Ct. 459 (1999), *Atkins v. Virginia,* 536 United States 304 (2002), *Lawrence v. Texas,* 539 United States 588 (2003), *Grutter v. Bollinger,* 539 United States 306, 344 (2003)

foreign and national standards. In *Weems v. United States* (1910), the court found that the meaning of the clause was not static.[1299] Justice McKenna stated in his majority opinion:

> The clause of the Constitution, in the opinion of the learned commentators, may be therefore progressive, and is not fastened to the obsolete, but may acquire meaning as public opinion becomes enlightened by a humane justice.

In *Trop*, as discussed above, the court found that the meaning of the Eighth Amendment is drawn from "evolving standards of decency that mark the progress of a maturing society." In effect, *Trop* opened the door for consideration of international standards in the interpretation of the Eighth Amendment. Referencing U.N. surveys of domestic law in 84 countries, eight justices in *Trop* found the practices of other nations to be relevant to their interpretation of 'cruel and unusual.'[1300] In the *Furman* decision, the court cited abolitionist trends around the world. In *Coker v. Georgia* (1977),[1301] the court, addressing the constitutionality of the death penalty for rape, held that the majority in *Trop:*

> took pains to note the climate of international opinion concerning the acceptability of a particular punishment. It is thus not irrelevant here that out of 60 major nations in the world surveyed in 1965, only 3 retained the death penalty for rape where death did not ensue.

The decision drew from U.N. reports to establish international opinion.[1302] Similar references are found in the court's ruling in *Enmund v. Florida* (1982), which considered the constitutionality of the death penalty for felony murder.[1303]

The use of foreign law in Supreme Court oral arguments is increasing. In a study of the use of foreign law in litigant briefs submitted to the court in 2002 and 2003, Jerry

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[1299] 217 United States 349 (1910)
[1300] Weissbrodt, Fitzpatrick, and Newman, *Human Rights: Law, Policy and Process* p. 740.
[1301] 433 United States 584, 596 (1977)
[1302] Weissbrodt, Fitzpatrick, and Newman, *Human Rights: Law, Policy and Process* p. 741.
[1303] 458 United States 782, 788-89 (1982)

Goldman and Timothy Johnson found that a significant minority of cases cited foreign law, thus indicating that attorneys believed the citations might influence the justices' decisions.[1304] Although a number of important cases skewed the data,[1305] the sources of the foreign law cited were predominately international law (40 percent), followed by English law (25 percent), and small percentages of European Community law and Austrian law (seven and four percent, respectively).[1306] The same study found that even though the majority of oral arguments before the court do not reference foreign law, the practice is becoming more common. In the 1980s, there were 31 foreign law references in oral arguments in 1,475 cases. The 1990s saw 14 references in the 916 cases decided that decade. From 2000 to 2004, however, there were 75 references to foreign law in just 342 cases.[1307]

The Goldman and Johnson study also found that Supreme Court justices have cited foreign law 105 times in 6,079 cases.[1308] While the practice is still rare, forty-eight percent of these citations are from the years 2000 to 2004.[1309] These citations commonly involved the interpretation of statutes in light of international legal conventions and treaties. Other studies have supported the finding that international law is primarily used "to support key positions in major rulings on wholly domestic social issues."[1310] Ten percent of the references to foreign law discuss international opinion or public opinion in

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[1304] Jerry Goldman and Timothy R. Johnson, "Exploring the Use of Foreign Law and Foreign Sources in the United States Supreme Court's Decision Making Process," (Paper presented at the 2005 annual meeting of the American Political Science Association conference, Washington, D.C., September 1-4, 2005; reprint)p. 10.
[1305] Goldman and Johnson found significant references to foreign law in two cases: *Rasul v. Bush* (2004) and *Hamdan v. Rumsfeld* (2004). Ibid.
[1306] Ibid. pp. 10-11.
[1307] Ibid. p. 12.
[1308] Ibid. p. 14.
[1309] Ibid.
[1310] J. Harvie Wilkinson III, "The Use of International Law in Judicial Decisions," *Harvard Journal of Law & Public Policy* 27, no. 2 (2004): p. 1.

particular countries about a given issue.[1311] Justices that cite foreign law are not confined to one end of the ideological spectrum. The three justices that have cited foreign law most often – Justices Stevens, Souter and Kennedy–-are ideologically diverse. The three justices after these that have cited foreign law most frequently–-Justices Brennan, Breyer and Powell–-are also diverse in ideology and political orientation.[1312]

Goldman and Johnson found that the "vast majority" of references to foreign law in justices' decisions are in cases involving the death penalty.[1313] The debate about the role of international and foreign law in U.S. rulings has been particularly contentious in cases involving the death penalty for child offenders. In his majority opinion in *Thompson,* Justice John Paul Stevens wrote that the execution of child offenders under the age 15 offended "civilized standards of decency," and went on to detail the national practices of multiple countries in terms of the death penalty for child offenders.[1314] Moreover, Justice Stevens cited the ICCPR, the American Convention on Human Rights and the Fourth Geneva Convention. Justice Antonin Scalia, in his dissent, argued:

> …where there is not first a settled consensus among our own people, the views of other nations, however enlightened the Justices of this Court may think them to be, cannot be imposed upon America through the Constitution.

Moreover, Scalia argued that the reliance by the majority on AI's "civilized standards of decency in other countries […] is totally inappropriate as a means of establishing the fundamental beliefs of this nation."

[1311] Goldman and Johnson, "Exploring the Use of Foreign Law and Foreign Sources in the United States Supreme Court's Decision Making Process," pp. 14-15.
[1312] Ibid. pp. 15-16.
[1313] Ibid. p. 15.

As stated above, the court in *Stanford* found that executing child offenders who were 16 or 17 years old at the time of their crime was constitutional under the Eighth Amendment. Justice Scalia, writing for the majority, argued that the practice of other nations "cannot serve to establish the first Eighth Amendment prerequisite, that the practice is accepted among our people." In dissent, Justice Brennan (joined by Justices Marshall, Blackmun and Stevens) countered, "Contemporary standards of decency in the form of legislation in other countries is also of relevance to Eighth Amendment analysis." The dissent continues with an overview of state legislation and national practices. In 2002, the Supreme Court denied *writ of certiorari* in *Patterson v. Texas*,[1315] another case involving a child offender on death row in Texas. In his dissent, Justice Stevens contended that since *Stanford*, executions of child offenders have been a subject of debate in "civilized nations," and that a consensus had developed opposing the practice.

In the 2005 *Roper* ruling, Justice Kennedy extensively cited international law, arguing that the court has referenced international law in other key decisions since *Trop*. Kennedy demonstrated an international consensus on the abolition of the child death penalty by citing the CRC, the ICCPR, the American Convention on Human Rights and the African Charter as well as national practices around the world. He argued:

> It is proper that we acknowledge the overwhelming weight of international opinion against the juvenile death penalty, resting in large part on the understanding that the instability and emotional imbalance of young people may often be a factor in the crime […] The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions.

Scalia's dissent continued his long-standing position against including international law in Supreme Court decision-making.

[1315] 123 S Ct. 24 (2002)

The day after the *Roper* ruling, Rep. Bob Goodlatte (R-Va.) responded to the decision by announcing in the House of Representatives:

> Yesterday's opinion flies in the face of the rule of law in our country. It is a dangerous precedent, indeed, to blatantly cite foreign law when interpreting the original meaning of the Constitution, and it is high time that these justices be reminded that their duty is to interpret the Constitution, not to impose the will of foreign entities on the people of the United States.[1316]

The ruling was also followed by two congressional actions. The first, a non-binding Sense of the Congress resolution, was introduced by Rep. Tom Feeney (R-Fla.), and was called the "Reaffirmation of American Independence Resolution" (H.R. 97, Feeney Resolution). Originally introduced in 2004, the resolution called for judicial decisions not to be based on "any foreign laws, court decisions, or pronouncements of foreign governments" unless approved by Congress.[1317] Second, legislation titled the "Constitution Restoration Act of 2005" (S. 520 and H.R. 1070), would limit federal court jurisdiction and prohibit U.S. courts from relying on:

> any constitution, law, administrative rule, Executive order, directive, policy, judicial decision, or any other action of any foreign state or international organization or agency, other than English constitutional and common law up to the time of the adoption of the Constitution of the United States[1318]

Neither effort was successful, although both had 50 cosponsors.

NGO EFFORTS

Like AI and AIUSA, discussed in chapter 5, other NGOs were crucial to the abolition of the child death penalty. Early on, the American Civil Liberties Union

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[1316] Hadar Harris, "'We Are the World'--or Are We? The United States' Conflicting Views on the Use of International Law and Foreign Legal Decisions," *Human Rights Brief* 12, no. 5 (2005): p. 7.
[1317] Cole, "The 'Kennedy' Court," p. 7.
[1318] Harris, "'We Are the World'--or Are We? The United States' Conflicting Views on the Use of International Law and Foreign Legal Decisions," p. 8.

(ACLU) and National Association for the Advancement of Colored People Legal Defense Fund (LDF) focused on particular aspects of the penalty that were especially problematic, such as racial bias and the denial of equal protection. When NGOs joined forces after the *Atkins* ruling (2002) and devised complementary strategies for outlawing the penalty, they met with eventual success.

The ACLU, like many other NGOs that would take up the child death penalty in the post-*Furman* era, did not originally oppose the death penalty at all.[1319] By 1965, however, the ACLU had taken a position against the death penalty in keeping with the common sentiment at the time.[1320] The ACLU's main concerns about the penalty were that it denied equal protection to offenders, that it was a form of cruel and unusual punishment, and that it removed the guarantee of due process.[1321] Like AI, discussed in the previous chapter, the ACLU sought to increase its legitimacy through a commitment to neutrality, and sought to distance itself from partisan politics.[1322]

In the post-*Furman* era, the ACLU became increasingly involved in death penalty work, beginning with the Capital Punishment Project and efforts to prevent the execution of Gary Gilmore.[1323] The ACLU, along with AIUSA and other activist groups, took up the cause of the juvenile death penalty with the resumption of the practice in the mid-1980s and joined many child death penalty defense teams. Unlike AI, however, the ACLU did not appear to have internal conflict among its members regarding the direction and nature of death penalty activism.

[1319] William A. Donohue, *Twilight of Liberty : The Legacy of the Aclu* (New Brunswick, U.S.A.: Transaction Publishers, 1994), p. 266.
[1320] Ibid., p. 267.
[1321] Ibid.
[1322] Ibid., p. 4.
[1323] Ibid., p. 268.

The LDF began its opposition to the death penalty in the 1950s and 1960s.[1324] Its strategy in the 1960s was to push for a moratorium on the penalty and to defend clients facing imminent death by presenting multiple anti-death penalty arguments. The LDF's logic was that a long period of abstention from the death penalty would weaken arguments made by supporters that the penalty was a necessary component of the U.S. justice system. The organization sought to create a 'logjam' on death row, which by some accounts was extremely successful.[1325] The logjam that can be (at least) partly attributed to the LDF's efforts put pressure on the Supreme Court to resolve the death penalty's constitutionality in *Furman* in 1972.[1326]

Beginning in the 1960s, the LDF sought to employ social scientific research to back its claims, especially in cases like *Witherspoon v. Illinois* (1968)[1327] and *Maxwell v. Bishop* (1970)[1328] that included the elements of racial discrimination, scientific evidence of child development, the practices of other nations (particularly of rogue states) and international condemnation of the death penalty.[1329] Many of the LDF's tactics would later be adopted by AIUSA in its campaign against child executions.

COALITION TO END JUVENILE EXECUTIONS

After the decision in *Atkins*, when the Supreme Court declared the execution of mentally retarded individuals to be unconstitutional, a number of NGOs working on

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[1324] Zimring and Hawkins, *Capital Punishment and the American Agenda*, p. 33.
[1325] Ibid., p. 34. Zimring contends that the success of the logjam strategy was difficult to measure since the pile-up began before the beginning of the LDF's campaign.
[1326] Ibid., p. 38.
[1327] 391 United States 510 (1968)
[1328] 398 United States 262 (1970)
[1329] National Coalition to Abolish the Death Penalty, "Human Rights, Human Wrongs: Sentencing Children to Death
," p. 35, Zimring and Hawkins, *Capital Punishment and the American Agenda*.

juvenile justice issues recognized the implications of the ruling for the constitutionality of the death penalty for child offenders. Gearing up for a future Supreme Court case, a number of nonprofit organizations and professional groups met to develop a strategy. Participants included the American Bar Association, Juvenile Justice Center, National Coalition Against the Death Penalty (NCADP), Justice Project, Death Penalty Information Center, ACLU, Physicians for Human Rights, National Juvenile Defender's Center and AIUSA.[1330] Their strategy revolved around one key idea: the recognition of a national consensus against the juvenile death penalty, similar to the consensus found in *Atkins*.[1331]

The campaign itself had three parts: developing the central message, grassroots organizing, and creating a legal strategy.[1332] The message of the campaign was that "kids are different," a message that the Justice Project assumed primary responsibility for promoting and disseminating in the media.[1333] The Death Penalty Information Center, along with other nonprofits, conducted public education and outreach.[1334] Grassroots organizing was primarily carried out by the Juvenile Justice Center, the NCADP and AIUSA, with the NCADP and AIUSA splitting up the U.S. states that had yet to abolish and launching grassroots campaigns. Wyoming and South Dakota, as discussed above, changed their policies in response to the campaigns and to the pending *Roper* case in the Supreme Court.[1335]

[1330] Adam Conner and Betsy William, "Banning the Juvenile Death Penalty: Success through Funding of Nonprofit Advocacy and Coalition Work," *Responsive Philanthropy: The NCRP Quarterly* 2005, p. 12.
[1331] Ibid.
[1332] Ibid.
[1333] Ibid., pp. 12-13.
[1334] Ibid., p. 12.
[1335] Ibid., pp. 12-13.

The campaign's legal strategy involved recruiting a diverse set of *amici* briefs, sixteen in all, including one from Nobel laureates. The *amici* made three core arguments: Children differ from adults; international law and human rights norms condemn the death penalty for child offenders; and a national consensus had developed against the practice. Justice Kennedy would draw on all three core arguments in his majority opinion in *Roper*.[1336]

After the *Roper* case was accepted by the Supreme Court, the coalition approached a variety of foundations for project support. The increase in juvenile crime in the early 1990s had already received widespread attention from foundations. The John D. and Katherine T. MacArthur Foundation, for example, began funding projects for juvenile justice reform in 1996, and by 2000, had invested more than $23 million in reform initiatives.[1337] Smaller funders, like the Tides Foundation, joined them in funding these projects.[1338] The MacArthur Foundation, Open Society Institute, JEHT Foundation and Atlantic Philanthropies joined with NGOs to form a rare philanthropic-nonprofit coalition.[1339] The grants themselves were mostly general operating grants, allowing organizations the autonomy to manage their own resources and campaigns.[1340] The funding from the Open Society Institute, JEHT and Atlantic Philanthropies for the campaign totaled $1.55 million, while $4.4 million was set aside for other work against the death penalty.[1341]

[1336] Ibid., p. 13.
[1337] Ibid.
[1338] Ibid.
[1339] Ibid., p. 12.
[1340] Ibid.
[1341] Ibid., p. 14.

What made the philanthropic-nonprofit coalition special was that nonprofit groups, which commonly compete with one another for grant funding, joined forces with philanthropic organizations for maximum impact, and that impact was tremendous. The group effort increased the number of states that abolished the child death penalty, fostered a grassroots constituency in these states as well as nationally and internationally, provided the international legal and political arguments for abolition, and starkly demonstrated the similarities between *Atkins* and *Roper*. The campaign against the death penalty for child offenders is a flagship example of the power of collaborative or joint enterprise, in this case by foundations and nonprofits to achieve shared goals. The next section presents the China case study, a remarkably different struggle with a different outcome, in part because of the lack of civil society in China.

CHINA CASE STUDY

Current death penalty policy in China must be understood in the context of the post-Mao era. Juvenile delinquency contributed to a crime wave in 1980s, with the rate of delinquency increasing from 1.4 percent of total crime in 1977 to 23.8 percent by 1989.[1342] In response, a campaign known as "severe blows" or *yanda,* a harsh attempt to rid society of criminals and to deter future crime through the application of severe penalties, was launched in 1983.[1343] The death penalty was widely used during the campaign.[1344] The theory behind *yanda* was that "bringing evil to justice for all to see…will lead to a decrease in crime," which meant that executions were extensively

[1342] Borge Bakken, "Crime, Juvenile Delinquency and Deterrence Policy in China," *The Australian Journal of Chinese Affairs* 30 (1993): pp. 31, 36, 38-39.
[1343] Ibid.: pp. 31, 50.
[1344] Ibid.: 31.

publicized.[1345] In 1985, the age of criminal responsibility was lowered so that 14- and 16-year-olds could be held responsible for their crimes.[1346] A Juvenile Protection Law was passed in 1991 by the National People's Congress, and efforts were made to standardize the juvenile justice system, especially the Criminal Procedure Code (1996) and the Criminal Law (1997), which outlawed the child death penalty.[1347] The 1991 Juvenile Protection Law defined a juvenile as an individual younger than 18.[1348] In 1999, the Tenth Standing Committee Conference of the Ninth National People's Congress passed the Juvenile Delinquency Prevention Law, emphasizing ways of preventing delinquency through educational efforts as opposed to punishment.[1349] The shift from the policies of *yanda* to the 1999 law is extraordinary.

Although the 1997 law in the Criminal Code (Article 44) ended the legal execution of child offenders, China has struggled to appropriately determine the age of some criminal defendants. This is a common problem in states that did not precede death penalty restrictions with extensive and effective birth registration. Prior to the abolition of the death penalty for child offenders *in law*, Chinese criminal law allowed the penalty to be imposed on offenders who commit their crimes when they are between the ages of 16 and 18, but with a two-year suspension.[1350] To make things more difficult, China's justice system is decentralized, highly political and poorly funded.[1351] These challenges are compounded for international human rights researchers, such as those in AI, because

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[1345] Ibid.: p. 50.
[1346] Ibid.: p. 52.
[1347] Zhang Lening and Jianhong Liu, "China's Juvenile Delinquency Prevention Law: The Law and the Philosophy," *International Journal of Offender Therapy and Comparative Criminology* 51, no. 541 (2007): p. 544.
[1348] Ibid.: 544.
[1349] Ibid.: pp. 541-546.
[1350] Bakken, "Crime, Juvenile Delinquency and Deterrence Policy in China," p. 52.
[1351] Amnesty International, "People's Republic of China: Executed "According to the Law?" The Death Penalty in China/N/N," (2004; reprint)p. 53.

of the lack of candor and transparency on the part of the Chinese government regarding the penalty. Reliable national statistics on the penalty's application in China are difficult to come by, forcing researchers to often rely on local newspapers for announcements.[1352]

Since 1997, AI reports that child offenders continue to be executed by China because of insufficient efforts to verify the age of offenders.[1353] Two child offenders have been executed since 2003, according to AI: Zhao Lin, who was found guilty of murder in 2000 when he was 16 and executed in 2003; and Gao Pan, executed for murder and robbery committed when he was under 18 years of age.[1354] In 2004, China denied in a response to the U.N. Commission on Human Rights that it executed offenders who commit their crimes when they are under 18 years of age.[1355] China is in compliance with the norm against the child death penalty *in law,* though it has not effectively implemented it. Without a vibrant civil society, there is no domestic-level force to push the state to comply.

PAKISTAN CASE STUDY

In 2000, Pakistan passed a Juvenile Justice System Ordinance that banned the death penalty for child offenders under the age 18 at the time of their crime, but protections for children were implemented considerably earlier. As a former part of the British Empire, the age of majority was established in colonial law at 18 in the Majority

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[1352] _____, "People's Republic of China: The Olympics Countdown--Broken Promises," (2008; reprint)p. 6.
[1353] Amnesty International USA, "Which Countries Still Use the Death Penalty against Child Offenders?,"http://www.amnestyusa.org/death-penalty/stop-child-executions/abolish-the-death-penalty/page.do?id=1101107 July 19, 2009.
[1354] Ibid.
[1355] United Nations Economic and Social Council, "Civil and Political Rights, Including the Question of Disappearances and Summary Executions: Extrajudicial, Summary or Arbitrary Excutions: Report of the Special Rapporteur, Philip Alston: Addendum: Summary of Cases Transmitted to Governments and Replies Received," (Commission on Human Rights, 2005; reprint)p. 41.

Act of 1876.[1356] With the introduction of *sharia* law by President Zia-ul-haq in the late 1970s, the Pakistan Penal Code was brought into accordance with Islamic law, as interpreted by the new regime.[1357] Puberty was established as the new age of majority.[1358] Individual provinces established a higher age of eligibility for the death penalty, 16 in Sindh province[1359] and 15 in Punjab.[1360] During this period, the use of the penalty was remarkably high: About 800 individuals were hanged in 1979, according to the government's count, the highest number in Asia for that year.[1361] In the 1980s, a National Commission for Child Welfare and Development was created to coordinate protections for children, focusing in particular on children in conflict with the law. [1362]

Following Pakistan's ratification of the CRC in 1990, the U.N. began to apply pressure to raise the age of eligibility for the death penalty. UNICEF helped to draft a juvenile justice act that raised the minimum age but, as will be seen later, the legal system in Pakistan was marked by contradiction between federal and provincial laws and the varying interpretations and legal practices of courts at different levels and in diverse locations.[1363]

Death sentences against child offenders (those not covered by the ordinance) were commuted by President Pervez Musharraf in 2001 in the Presidential Commutation Order, but this order excluded those offenders given the penalty for *qisas*, retaliatory or

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[1356] Andrea Geiger, "International Law--Juvenile Justice in Pakistan; Notes," *Suffolk Transnational Law Review* 23 (1999-2000): 726-727.
[1357] Ibid.: 726.
[1358] Amnesty International, "Pakistan: Death Penalty for Juveniles," (1995; reprint)p. 6.
[1359] Sindh Children Act of 1955, section 68 (1).
[1360] Punjab Youthful Offenders Ordinance of 1983, section 45 (1). Amnesty International, "Pakistan: Death Penalty for Juveniles," p. 6.
[1361] Amnesty International USA, "The Pakistan Campaign 1981," (University of Colorado at Boulder AIUSA archives, 1981; reprint)2.
[1362] UniCEF Regional Office South Asia, "Juvenile Justice in South Asia: Improving Protection for Children in Conflict with the Law," (Kathmandu2006; reprint)100.
[1363] Amnesty International, "Pakistan: Death Penalty for Juveniles," p. 5.

corrective law, or *hadd* crimes, severe crimes with prescribed punishments from the Koran.[1364] Musharraf passed the ordinance only after a meeting with AI's Secretary General, Irene Khan, in which Khan encouraged the commutations.[1365] The ordinance was not applicable to tribal areas located in the North and West of the state, however, and in 2001, a child offender was executed for a crime he committed at age 13.[1366] In 2004, the Juvenile Justice Ordinance was extended to the tribal areas, but the Federally Administered Northern Areas and Azad Jammu and Kashmir remained outside its authority.[1367] Even British colonial law, the 1860 Penal Code for example, did not always extend to tribal areas.[1368] This is one reason why parts of Pakistan never internalized the norm against the child death penalty while under British control.

As in China, inadequate birth registration records hinder Pakistan's efforts to enforce the penalty restrictions effectively.[1369] With only 29.5 percent of births registered, child offenders undergo great difficulty in proving they were children at the time of the crime.[1370] Moreover, much of the legal infrastructure necessary for the implementation of the Juvenile Justice Systems Ordinance is not in place.[1371] The promised commutation by presidential order was especially difficult to implement given the difficulty in determining the age of offenders.[1372]

[1364] Human Rights Watch, "The Last Holdouts: Ending the Juvenile Death Penalty in Iran, Saudi Arabia, Sudan, Pakistan and Yemen," (New York 2008; reprint)14. M. Mukarram Ahmed and Muzaffar Husain Syed, *Encyclopaedia of Islam*, 25 vols. (Batu Caves, Selangor Darul Ehsan, Malaysia: Crescent News, 2005), p. 303.
[1365] Amnesty International, "Pakistan: Death Penalty for Juveniles Reintroduced," (2004; reprint).
[1366] Ibid.
[1367] Ibid.
[1368] ———, "Pakistan: Death Penalty for Juveniles," p. 5.
[1369] Human Rights Watch, "The Last Holdouts: Ending the Juvenile Death Penalty in Iran, Saudi Arabia, Sudan, Pakistan and Yemen," p. 10.
[1370] Ibid.
[1371] Ibid.
[1372] Amnesty International, "Pakistan: Death Penalty for Juveniles Reintroduced."

In 2004, the High Court in Lahore declared the Juvenile Justice Systems Ordinance to be "unreasonable, unconstitutional and impractical," and revoked the ordinance.[1373] The High Court ruled that the application of age parameters, specifically the age 18, to assess the culpability of child offenders was "arbitrary."[1374] Citing social, economic, climatic and even dietary factors, the court found that children in Pakistan matured at an accelerated rate compared with Western children:[1375]

> We have every reason to understand that a child [in Pakistan] starts understanding the nature and consequences of his conduct sooner than a child in the West. Growing up in close proximity and interaction with adults due to social and economic conditions, doing odd jobs, and getting employed at a relatively young age…hot climate and exotic and spicy food all contribute towards a speedy physical growth and an accelerated maturity of understanding of a child in our society.[1376]

The court also ruled that Islamic law associated the age of majority with puberty, and that differential treatment of offenders by age violated constitutional guarantees of equality before the law.[1377] The similarity between the Lahore court's claims about the nature of children and those made by British colonialists discussed in chapters 3 and 4 is notable. At its core, this argument about children affiliates "nature" with race, assigning a greater degree of culpability (even cunning) to children of color.

An appeal of the Lahore ruling was filed by the federal government and the children's rights NGO, SPARC (Society for the Protection of the Rights of the Child), and the Supreme Court temporarily reinstated the ordinance until a decision was

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[1373] International Federation for Human Rights and Human Rights Commission for Pakistan, "Slow March to the Gallows: Death Penalty in Pakistan," (Paris 2007; reprint)p. 38.
[1374] Amnesty International, "Pakistan: Death Penalty for Juveniles Reintroduced."
[1375] Ibid.
[1376] Khabir Ahmad, "The Battle for Children's Rights in Pakistan," *The Lancet* 365, no. 9468 (2005).
[1377] Amnesty International, "Pakistan: Death Penalty for Juveniles Reintroduced."

made.[1378] Child offenders continued to be sentenced to death during this period. In 2006, Mutaber Khan, allegedly 16 years old at the time of his crime, was executed for murders in the Swat province.[1379] The situation remains problematic, as birth registration issues cloud definitive determinations of age. Twelve child offenders remain on death row in Pakistan, according to an article published in October 2008.[1380]

Children's rights NGOs in Pakistan proliferated in the 1990s and now form an important part of a robust civil society. Global Juvenile Justice Indicators, designed by the United Nations, have been used as a guide by NGOs and IGOs to measure Pakistan against international legal standards.[1381] District-based monitoring systems are being established all over Pakistan, and the National Commission on Child Welfare and Development has been tasked with identifying appropriate indicators of child protection.[1382]

SPARC remains a leader in juvenile justice and publishes a yearly report on the *State of Pakistan's Children*. Begun in 1992, SPARC draws its inspiration from the CRC.[1383] The organization sent an alternative report to the Committee on the Rights of the Child in 2003 while the committee was reviewing Pakistan's Second Report. It also worked to enact the Juvenile Justice Systems Ordinance, and has established children's rights committees that are tasked with monitoring and publicizing children's rights in

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[1378] International Federation for Human Rights and Human Rights Commission for Pakistan, "Slow March to the Gallows: Death Penalty in Pakistan," p. 38.
[1379] Ibid.
[1380] Akhtar Amin, "Following in Footsteps of Other Nations: Rights Groups Want End to Death Penalty," *Daily Times*, October 11 2008.
[1381] UniCEF Regional Office South Asia, "Juvenile Justice in South Asia: Improving Protection for Children in Conflict with the Law," 100.
[1382] Ibid. p. 100.
[1383] http://www.sparcpk.org/about_sparcs_history.php

more than 40 districts throughout Pakistan.[1384] A key actor in Pakistan's civil society, SPARC plays an important role in diffusing international human rights norms about children, including norms about the child death penalty.

Along with SPARC and UNICEF, other organizations have pressured Pakistan's government for change in the juvenile justice system as well. These include AMAL, a youth-focused organization that works on HIV/AIDS prevention and has partnered with the Consortium for Street Children to shed light on street children and juvenile justice; Save the Children; Lawyers for Human Rights and Legal Action; and Law Associates Legal Aid Cell. These latter two legal groups have provided counsel for offenders.[1385] As with China, Pakistan is in compliance with the norm against the child death penalty *in law,* but has not successfully or effectively implemented it in all parts of the country.

FINDINGS

This section considers the theoretical issues regarding normative laggards in the diffusion of the death penalty for child offenders. It will address the characteristics and theory relating to laggards in general before focusing on hegemonic laggards in particular. Next, this section will consider the role of the state, science and regime type (specifically federalism) in laggard states as well as the role of race in countries that did not abolish the death penalty until after the cascades or that have yet to abolish. Finally, I consider the process of socialization and the effect of the model of a globalized childhood on laggard states.

[1384] http://www.sparcpk.org/about_sparcs_history.php

[1385] UniCEF Regional Office South Asia, "Juvenile Justice in South Asia: Improving Protection for Children in Conflict with the Law," 101.

LAGGARDS

Laggards are states that did not abolish the death penalty for child offenders during the cascade periods, or before 2005. The presence of laggards in normative diffusion is partly explained by theories of sociological institutionalism, which expect some states to seek the reputational benefits of compliance with international law as opposed to actually complying with it.[1386] Given this phenomenon, the cases of China and Pakistan make sense. Both states ratified international law governing the treatment of children and brought their domestic criminal codes into compliance with international law. However, the law's implementation in both states was not complete because either their legal systems were insufficiently developed to ensure compliance or their systems of birth registration were woefully inadequate, making it difficult to determine the actual age of offenders. From earlier chapters, it is clear that as legal protections for children diffused through the West in the late 19th century, birth and death registrations were an important tool for scientists and the government, and their widespread introduction coincided with and facilitated legal protections for children. Moreover, imperial powers sought to implement mandatory birth and death registration in colonies as part of their efforts to intervene in family law. (See chapters 3 and 4 for a discussion of these efforts by England and France).

There is, of course, also the issue of political will. In most cases, the procedural roadblocks to commuting the death sentences of offenders whose age is contested are few. If international law and the reputational benefits of compliance with international

[1386] Meyer, "Globalization: Theory and Trends," p. 264.

law influenced the decisions of China and Pakistan to abolish the child death penalty, then the refusal of these states to commute the sentences of those whose age is contested suggests the limits of international law.

By definition, laggard states are those that were able to resist the pressure of the cascades and, in particular, reject or contest the link between child protection and a legitimate state. Both constructivists and sociological institutionalists have difficulty explaining why norms (and scripts) are powerful enough to garner *almost* universal support, but not to bring the last holdouts into compliance. One would think that as the global model of childhood became ever more encompassing and as norms against the child death penalty became institutionalized around the world, states would find it increasingly difficult to thwart international expectations. Cases like Iran, Saudi Arabia and Sudan, which unapologetically continue to execute child offenders, present a challenge to normative theorists.

For sociological institutionalism, as well as realism in international relations, hegemonic laggards such as the United States present an even greater challenge to their core theories. These theorists expect powerful Western states to create and diffuse norms. In the case of the British and French empires, this pattern is evident. The United States, however, presents a paradox in the context of rights for children. At the turn of the 20th century, the United States was a leader in child protection, especially in the protection of child offenders. With the founding of the first juvenile court and the implementation of numerous other reform and rehabilitation practices, child offenders in the United States enjoyed protections far superior to child offenders in most other countries. Yet by the end of the 21st century, the juvenile justice system in the United States had fallen out of step

with the rest of the world and was widely seen as archaic and draconian; nothing illustrated this better than the ongoing practice of the child death penalty. Given the United States' early leadership on juvenile justice issues, it is contradictory for sociological institutionalists to expect both hegemonic *leaders* and hegemonic *laggards*. If scripts and models emerge out of the West and are diffused and promoted by the West, how can the hegemon reject a defining norm of these scripts and models? Realism struggles with a similar issue. Realist theories expect the dominant norms in society to be promoted by and for the hegemon. Yet the success of the norm against the death penalty for child offenders, despite the lack of support – and at times, the direct opposition – of the United States demonstrates the inadequacy of these theories.

CAUSES OF NONCOMPLIANCE: RACE, FEDERALISM AND REGION

The U.S. path toward recognizing children's rights and abolishing the death penalty for child offenders was similar to the United Kingdom's. The American father's control over his children was greatly diminished in the 19th century. As concerns about child labor, neglect, nutrition and health increased, a growing number of institutions cropped up to protect, study and regulate childhood. The state increasingly took control of these institutions toward the end of the 19th century until, by the mid-20th century, the state regulated nearly every part of children's lives.

Yet protections for children in the United States – unlike in the United Kingdom – were limited by their crimes. A child in the United States who committed particular crimes such as rape and murder could be divested of the protections afforded children and treated as an adult by the state, and could thus be eligible for adult penalties, including

death.[1387] That this conditional understanding of childhood lasted as long as it did, more than 105 years after the establishment of the first juvenile court, is as puzzling as why it ended in 2005.

Domestic factors explain why the United States did *not* comply with international law *until* 2005 and partly explain why the United States came to comply with international law in 2005. Some evident causes: NGO attention, racial issues, a fear of child criminals, the U.S. federal system and regional practices; each is addressed in turn below. Domestic factors also explain why China and Pakistan have failed to comply with the norm against the child death penalty. A poor system of birth registration (in both China and Pakistan), a juvenile justice system that is dysfunctional (Pakistan), a lack of control over large regions of the state (Pakistan), and a lack of civil society (China), results in a contradictory approach to juvenile justice. While both states have accepted the norm's legitimacy through the ratification of international treaties and the passage of national legislation, domestic factors hinder full compliance.

Evidence from the U.S. case points to five factors that contributed to the failure to abolish the child death penalty prior to 2005. Some of these are also evident in the China and Pakistan cases: First, norm entrepreneurs such as AIUSA did not begin their campaigns against the child death penalty until 1987, and the coalition of NGOs and philanthropies that influenced the *Roper* court in 2005 did not form until 2002. AI, AIUSA, UNICEF and other local-level NGOs (in the cases of the United States and Pakistan) have made concerted efforts to bring these countries into compliance. Although the child death penalty campaign by AI and AIUSA focused its efforts on the United

[1387] Even after *Roper*, children that commit particular crimes can be tried in adult courts and imprisoned in adult facilities, but they cannot be given the death penalty.

States, other campaigns targeted China and Pakistan. Nonetheless, AI does not have a ground presence in China and Pakistan at this time. Given the importance of AIUSA to the U.S. case, the absence of a leading international NGO like AI in these countries may affect their ability to continue to the thwart international pressure.

Second, race matters. An offender in the United States is more likely to get the death penalty if *he* is of color and if his victim is a white female than with any other victim/offender combination.[1388] Espy data on children executed in the United States demonstrates the extreme racial disparities in executions and death-eligible crimes. Mitchell and Sidanious argue that the dominant group in a social hierarchy should support the death penalty precisely because it is unequally applied.[1389] Support for the penalty, although variable, remains strong, especially among white Americans. The Lahore Court in Pakistan threw out the legislation abolishing the child death penalty, in part because the court considered Pakistani children to be more mature at a younger age than Western children. This argument is familiar to students of colonialism, as it was the justification for differential treatment of native children by the British and French colonialists. This view of Pakistani children by the country's highest court requires further analysis. The race and minority status of all four of the child offenders executed in China and Pakistan this century were not mentioned by any NGOs or government or by any newspaper articles reviewed for this dissertation, leading me to draw the conclusion that the individuals were likely of the majority.

Third, a unique fear of child criminals swept the United States in the late 1980s and early 1990s. The country experienced a wave of juvenile crime that was exploited by

[1388] Farrell and Swigert, "Legal Disposition of Inter-Group and Intra-Group Homicides."
[1389] Mitchell and Sidanius, "Social Hierarchy and the Death Penalty: A Social Dominance Perspective," p. 593.

the media through the constant dissemination of images of young, male, urban, often African-American 'superpredators' committing stranger-on-stranger violent crimes. As a result, child offenders who committed violent crimes received little sympathy from the American public. Politicians pandered to these fears by adopting policies that were tough on crime and criminals. China experienced a similar crackdown in the 1980s with the *yanda* measures, which made the global model of the vulnerable and less culpable child a harder sell to the Chinese public and policymakers.

Fourth, the U.S. federal system hindered compliance with international law in three ways: First, the Supreme Court is the branch of the U.S. government least affected by international pressure. The Supreme Court's decision in *Furman* was very narrow, and its rejection of the norm against executing child offenders under the age 18 in *Stanford* set the abolitionist movement back. Second, the *Furman* ruling fueled calls for U.S. states' rights. Although Zimring argues that there was no actual backlash against the ruling since only one additional state reinstated after *Furman*, the decision nonetheless motivated supporters of the death penalty and contributed to the issue's politicization in the 1970s.[1390] If the *Furman* decision had been less narrow, the United States would have abolished the death penalty in 1972 during the first cascade period. If the U.S. government had jurisdiction to set death penalty policy for the entire country, as is the case in many non-federal systems, child offenders would have been excluded from the death penalty in 1988. Third, the unusual characteristics of the U.S. legal system, which has both monist and dualist aspects to its treatment of international law and its system of treaty ratification, as discussed above, makes the ratification of treaties more difficult in

[1390] Zimring and Hawkins, *Capital Punishment and the American Agenda*, p. 43.

the United States than in other states that adopt a purely monist approach. This is made even more difficult by the strict ratification rules for international treaties, which require approval by two-thirds of the Senate. As seen in the Pakistani case, federalism is a key reason for noncompliance with the norm, as some areas are outside the authority of the central government.

Finally, region trumps all. Were it not for a handful of U.S. states, most of them Southern, the child death penalty would have ended in the mid-20th century, early enough in the norm lifecycle for the United States to have been considered an early-period abolitionist state. Texas alone led the trend, not just nationally but internationally as well. Furthermore, in the United States, racism (especially in sentencing) is closely linked to region. Noncompliance in Pakistan is also due to region. The child death penalty has only been carried out in the SWAT district of Pakistan where the government holds little, if any, sway.

Causes of Compliance: the process of international socialization

If domestic factors alone explain why the United States, China and Pakistan abolished (in legislation), that would suggest that actors within these countries agitated for penal change based on the content of the norm against the death penalty for child offenders. In other words, the norm's content, and specifically, its rejection of the penalty for child offenders as barbaric, persuaded local actors to change domestic policy. Indeed, while international law in the ICCPR and later in the CRC may have established the scope of human rights activism, norm entrepreneurs in the 1980s set the agenda. In the United States, norm entrepreneurs such as AIUSA, ACLU and LDF recognized the death

penalty for child offenders as one of the few areas in which advances in death penalty reform could be achieved. Moreover, abolitionists, child advocates, diplomats, NGOs and foundations concerned with juvenile justice diligently worked in the period between *Stanford* and *Roper* to solidify the national consensus, isolate the states that continued to execute child offenders, employ international legal instruments in national and international cases, petition international institutions and mobilize opposition to the penalty.

I suggest, however, that what resonated with the American public, as suggested by the widespread opposition to the child death penalty noted in the 1986 AIUSA study, was that executing children was inconsistent with the globalized model of childhood developed, in part, in the United States in the late 19th and early 20th centuries. The inconsistency is evident in many key markers of the transition from childhood to adulthood: Child offenders who could be executed in the United States were, depending on the jurisdiction, unable to vote, to serve on a jury, to marry or to consent to sex. They could not work in hazardous occupations, buy alcohol or cigarettes or fight in wars.

Exempting children from the death penalty had a compliance pull all its own, because it nested within other ideas about children already accepted in American society. Abolition for child offenders fit within the American model of childhood: The contradiction between the greater vulnerability and reduced culpability ascribed to children *and* a policy that executes them when they commit certain acts was irreconcilable. Evidence of this conflict is found in the rarity of the practice (nationally and internationally) and in the inequality endemic to the penalty's application. Evidence from the U.S. case suggests that although domestic factors account for the content and

trajectory of the U.S. abolition movement, they do not alone explain why the United States abolished in 2005.

If international factors alone could explain why the United States abolished in 2005, it would mean that the United States perceived a profound sense of obligation to obey international law and norms, regardless of their content. If this were the case, the United States should have abolished when the norm first became binding law in the 1976 ICCPR or when the consensus was first expressed during the drafting process. Instead, the U.S. rejection of the specific article in the ICCPR prohibiting these executions, detailed below, demonstrates that the United States interpreted the norm as a contested site of authority. In other words, the United States recognized both the authority of customary law and the binding obligation of the ICCPR, but believed that these sources of authority did not trump its own.

The U.S. case bears some resemblance to the China and Pakistan cases. China abolished the child death penalty in law during a period of increasing concern about children. On the heels of the *yanda* measures, China outlawed child execution, even though the very foundation of *yanda* was punishment as a method of deterring crime. There appears to have been no domestic movement to end the punishment. In Pakistan, human rights NGOs sought to expand legal protections for children, but these NGOs were assisted by important international actors such as Irene Khan of AI, who made personal appeals to President Musharraf to bring the state into compliance with international law.

The Pakistan case also demonstrates the necessity of both domestic and international sources of pressure, even though the NGO presence in Pakistan is not as

robust as that found in the United States in the transnational collaboration that targeted the ruling in *Roper*. In China's case, since its reforms to its juvenile justice system resemble protections found in the CRC and were adopted, for the most part, after the CRC came into effect, it is likely that international factors, such as China's desire to enhance its international reputation, played a large role in its decision to abolish the penalty.

All three states were persuaded to comply with international law via four socializing processes, at times occurring simultaneously. These four processes were: the adoption of a universal model of childhood, publication of the model and its principles, the monitoring of compliance with those principles, and rebuke by the international community for noncompliance. (See Table 6.10 below).

TABLE 6.10: PROCESS OF SOCIALIZATION IN INTERNATIONAL LAW[1391]

Stages of international socialization	**As applied to the prohibition of the death penalty for child offenders in the United States, China and Pakistan**
Adoption of a universal model of childhood that includes intervention in state practice by way of external guidelines created by international law and institutions.	UNITED STATES: The United States was a leader in child protection in the 19th and early 20th centuries. It therefore embraced a *general* international model of childhood that included reduced culpability and that accepted the age 18 as the key age of majority in a number of important areas.[1392] As an international consensus developed around the specific prescriptions of the model, such as the exclusion of child offenders from the death penalty, the United States was forced to reference the model to determine appropriate standards of behavior toward children. When the United States flouted these standards, it justified its behavior within the framework of international law itself, acknowledging its authority, rather than denying the validity of international law or rejecting the model of childhood altogether.

[1391]This elaboration of the socialization process is based upon the model offered by Thomas Risse, Stephen Ropp and Kathryn Sikkink in *The Power of Human Rights*. In this work, they provide a spiral model of human rights change whereby some states respond to and reject international, transnational and domestic pressure before finally complying. Risse, Ropp, and Sikkink, eds., *The Power of Human Rights: International Norms and Domestic Change*.

[1392] See appendices in *Thompson* and *Roper* that include the minimum ages for jury service, marriage, voting, etc.

	CHINA: China ratified the CRC in 1992, but has not ratified the ICCPR. The first juvenile court was established in China in 1984. The Juvenile Protection Law was passed in 1991 by the National People's Congress, and efforts have been made to standardize the juvenile justice system. The law also established a juvenile as an individual younger than 18.
	PAKISTAN: British colonial law protected child offenders beginning in the late 19th century. Pakistan demonstrated its acceptance of international norms of childhood by ratifying the CRC in 1990, but made its ratification contingent upon Islamic law. It has not ratified the ICCPR. The Juvenile Justice System Ordinance was passed in 2001, but is currently under appeal.
International and domestic publication of the model and its principles	The model of childhood was publicized by the ICCPR and the CRC and reiterated by NGOs and IOs such as AIUSA, the coalition in *Roper*, UNICEF and SPARC (Society for the Protection of the Rights of the Child) in Pakistan.
Monitoring compliance	International and national organizations developed standards for compliance with the model, which required the prohibition of the child death penalty. U.N. organs (such as UNICEF) and NGOs (AI, AIUSA, SPARC, etc.) monitored compliance of these states with international obligations.
Rebuke and stigmatization of persistent violators	UNITED STATES: Numerous organizations and institutions criticized the United States over a 20-year period, forcing the country to engage in a debate in which it first denied the normative consensus and then denied its applicability to the United States. Finally, in 2005, the United States complied.
	CHINA: The rebuke of China continues even though the state has abolished in law. The U.N. Commission on Human Rights has questioned China specifically about the two child offenders executed in the 21st century. China claims to be compliant with international law.
	PAKISTAN: The rebuke of Pakistan continues even though the state has abolished in law. The government has ended the penalty where it has authority, but some districts remain outside its control.

ADOPTION OF THE MODEL

Although a human rights convention specifically for children did not come into force until 1990, other treaties established rights and protections for children, protection

from the death penalty among them. This prohibition fit well within the existing model of childhood adopted in Western countries (and sporadically throughout the world) in the 19th and 20th centuries. By adopting a model of childhood that includes external monitoring and (non-coercive) intervention, international law and institutions shape state-level policies on children, without the use of force. The model includes the idea that the treatment of children by national governments is limited by current standards of human rights.

Sociological institutionalists have argued that as ideas about children and childhood grew more complex and came to include notions such as reduced culpability,[1393] state institutions including the juvenile justice system developed to monitor the evolving standards. The state thus grew in tandem with an increasingly complex idea of childhood. Similarly, as the model of childhood adopted in the West spread throughout the world, international institutions developed to facilitate its adoption and monitor its implementation. These institutions, many of which are U.N. agencies like UNICEF or committees monitoring compliance with the particular treaties that address children (such as the CRC), also grew in number and complexity as the standard of treatment for children developed.

INTERNATIONAL AND DOMESTIC PUBLICATION OF THE MODEL

NGOs publicized the model of childhood and sought to use international law to leverage state action. The publication of the prohibition of the death penalty for child

[1393] Boli-Bennett and Meyer, "The Ideology of Childhood and the State: Rules Distinguishing Children in National Constitutions, 1870-1970."

offenders in many ways established the scope of human rights activism in the 1980s. Tools for promoting the model included reports and press releases by NGOs like AIUSA.

Monitoring

Benchmarks of childhood (in areas including health, well being, recreation, etc.) are quantified, and countries are measured against these standards in publications by international and domestic agents, such as UNICEF's *State of the World's Children* or AIUSA's multiple reports about the death penalty for child offenders. AIUSA has routinely published the list of child executions since 1990. In Pakistan, SPARC has institutionalized a complex system of monitoring, reported violations of the CRC and published a yearly report on the state of Pakistan's children, while government agencies employ U.N. guideposts and indicators to monitor the rights of child offenders throughout Pakistan. These monitoring systems and the well-publicized reports and publications they produce are intended to shame recalcitrant states into compliance with international standards by linking compliance with legitimacy and characterizing noncompliance as backward and uncivilized.

Rebuke and stigmatization

Rebuke of states that continued to execute child offenders by AI, AIUSA, the U.N., and other NGOs and governments began early, although rebuke was by no means directed equally at noncompliant states. A series of U.N. General Assembly resolutions, beginning in 1980, affirmed the norm's widespread acceptance and *opinio juris*, or the

legal obligation to obey the norm.[1394] 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), reaffirming a global prohibition of the practice, and the U.N. Commission on Human Rights issued several other resolutions over the course of two decades.[1395]

Additionally, the reservation by the United States to Article 6§5 of the ICCPR elicited vehement rebuke from states in Europe. The E.U. urged the United States to withdraw the reservation immediately.[1396] Belgium, Denmark, Finland, France, Germany, Italy, the Netherlands, Norway, Portugal, Spain and Sweden made individual declarations criticizing the United States' reservation. The Human Rights Committee, which monitors implementation of the ICCPR, found that the reservation offended the "object and purpose of the treaty."[1397]

By the time the United States abolished the child death penalty in 2005, the norm against executing child offenders had gained such widespread acceptance that it was considered customary law. Customary law can be defined as the customs and practices of

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[1394] Weissbrodt, Fitzpatrick, and Newman, *Human Rights: Law, Policy and Process* pp. 714-717. 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).

[1395] 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 The U.N. Sub-Commission on the Promotion and Protection of Human Rights adopted resolutions E/CN.4/SUB.2/RES/1999/4 and E/CN.4/SUB.2/RES/2000/17, reaffirming the international legal ban abolishing the practice. Ibid. Additionally, the U.N. Special Rapporteur on Extrajudicial, Summary and Arbitrary Executions criticized the United States in E/CN.41993/46 (1992), E/CN.4/1994/7 (1993), E/CN.4/1995/61 (1994), A/51/457 (1996), E/CN.4/1997/60 (1996), 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) Former U.S. Diplomats, "Supreme Court Brief of Amici Curiae Former U.S. Diplomats; *Roper V. Simmons*; No. 03-633," (2005; reprint).

[1396] Weissbrodt, Fitzpatrick, and Newman, *Human Rights: Law, Policy and Process* p. 717.

[1397] United Nations Human Rights Committee, "Consideration of Reports Submitted by States Parties under Article 40 of the Covenant: Comments of Human Rights Committee 53d Sess., 1413th Mtg. Para. 14, at 4 U.N. Doc. Ccpr/C/79/Add.50 (1995)," (1995; reprint)., U.N. Human Rights Committee, General Comment 24, UN Doc CCPR/C/21/Rev 1/Add 6 para 10 (1994)

nations that are "widespread, rather than unanimous," and, as such, are a "source of international law."[1398] All governments are bound to customary law regardless of their recognition of a given norm (even in treaties or national legislation) unless they have persistently objected to it during its development.[1399] Although the U.S. Supreme Court first declared in 1900 that customary law is part of national law and is considered on par with other sources of international law, such as treaty law,[1400] customary law has been most successfully employed in U.S. courts when it affirms a national consensus regarding standard practices. The opinion in *Roper*, discussed above, demonstrates this.[1401] Both domestic and international NGOs, such as AI, the ACLU and LDF, pressured the United States and other states that had continued to violate prohibitions against executing child offenders since the 1980s, and, in the U.S. case, these organizations helped to shape a national consensus against the practice.

The focus on the United States by NGOs and INGOs forced the United States to enter into a 20-year debate with opponents of the child death penalty, including the U.N., domestic and international human rights groups and diplomats.[1402] This debate had two stages: First, during the 1980s and early 1990s, the United States denied there was an international consensus in the form of customary law. The most important part of this denial is what the United States did *not* say: The United States did not say that customary law did not exist, that it did not apply to states, and that it did not apply to the hegemon. Rather, the United States said that an international consensus about the child death

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[1398] Weissbrodt, Fitzpatrick, and Newman, *Human Rights: Law, Policy and Process* p. 22.
[1399] Ibid.
[1400] *The Paquette Habana*, 175 United States 677, 700 (1900); 1 Restatement (Third) of the Foreign Relations Law of the United States § 111 (1987).
[1401] 543 United States 551 (2005)

penalty had not yet formed. Its line of argument thus suggested that customary law was indeed legitimate law and had jurisdiction in U.S. courts, but in this particular case, there was no customary law to apply.

Second, the United States denied the norm's applicability to itself. In the 1990s, the United States began to argue that even if there were customary law against executing child offenders, it had been a persistent objector to the law and was thus exempt from compliance. Although one regional court found the U.S. claim of persistent objector status plausible,[1403] the claim was nonetheless difficult to support given that the United States did not object to the norm during the drafting of the 1949 Geneva Convention (Article 68),[1404] was not present during the debates over Article 6 of the ICCPR, did not list the provisions of Article 6 in its later list of articles of concern,[1405] and did not register an official reservation either to Article 4 (prohibiting the execution of children under the age 18) of the American Convention on Human Rights or to Article 37 of the CRC (because it was never ratified).

The point bears repeating: The important part of the debate was what the United States did *not* say. The United States, in this second stage, did not say that customary law did not apply to the it. Rather, the United States said that in customary law, a loophole existed whereby it could claim exemption. The exemption was not based on hegemony or on a rejection of the legitimacy of international law by the United States, but rather on the

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[1403] Inter-American Commission on Human Rights, "Pinkerton and Roach V. United States, Annual Report of the Inter-American Commission on Human Rights, 147, Oea/Ser.L/V/Ii/71, Doc. 9, Rev. 1, Para. 56," (1986-7; reprint). The Inter-American Commission, however, found that although a customary norm had yet to be established, there was a norm of *jus cogens* within the Organization of American States. An agreed-upon age limit for death-eligibility, however, had yet to be determined.

[1404] Although it did suggest that "careful consideration" be given the age limit of 18. Weissbrodt, Fitzpatrick, and Newman, *Human Rights: Law, Policy and Process* p. 722.

[1405] Although it did reserve on that article when it ratified the ICCPR in 1992.

rules of international law itself. Its rejection of international customary law, the United States argued, was in fact legal within international law. Essentially, the second stage of this denial reaffirmed the legitimacy and relevance of customary law in general and further acknowledged that customary law against the death penalty for child offenders existed and applied to states.

As international opposition to the penalty consolidated, some legal theorists suggested that the norm against executing child offenders was one of *jus cogens*,[1406] meaning that it was the basis of such widespread international consensus that it did not require states to have signed treaties in order to be bound by them, that it "permits no derogation," and can only be modified by the development of a new norm "of the same character" and caliber.[1407] Once a norm becomes *jus cogens,* it is preemptory, and it immediately renders all treaties in contradiction with it void.[1408] Therefore, if the norm was one of *jus cogens*, the United States would be bound by it regardless of its claim of persistent objector status.[1409]

The Coalition against the Juvenile Death Penalty organized in response to the pending *Roper* case and encouraged the drafting of multiple *amici* briefs in support of

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[1406] de la Vega and Fiore, "The Supreme Court of the United States Has Been Called Upon to Determine the Legality of the Juvenile Death Penalty in Micheal Domingues V. State of Nevada." Sawyer, "Comment: The Death Penalty Is Dead Wrong: Jus Cogens Norms and the Evolving Standard of Decency."
[1407] Weissbrodt, Fitzpatrick, and Newman, *Human Rights: Law, Policy and Process* p. 23.
[1408] "Vienna Convention on the Law of Treaties, 115 U.N.T.S. 331, Articles 53 and 64," (1980; reprint).
[1409] Vienna Convention on the Law of Treaties, "115 U.N.T.S. 331, Articles 53 and 64," (1980; reprint). Whether or not the execution of child offenders was a norm of *jus cogens* prior to U.S. abolition is debatable. While I do not think that a norm needs the support of the hegemon to qualify as *jus cogens*, I think very few norms can be considered to have this type of international consensus and moral weight. Norms that are commonly listed as non-derogable, such as the global condemnation of torture, genocide, crimes against humanity and war crimes, would not require the United States' support (although the United States has supported them) to be considered *jus cogens*. Whether or not the norm against executing child offenders is a norm of *jus cogens* largely depends on the similarity between this norm and norms against torture and genocide. Given that the United States adopted the norm against child executions in 2005, there is certainly now more to support a claim that the norm is one of *jus cogens* regardless of its status prior to the 2005 ruling.

abolition. Former U.S. diplomats with expertise on the impact of U.S. domestic policy on foreign relations petitioned the federal government about the international effects of the child death penalty in the United States. They argued that the continued practice of child executions leads to a diminished capacity on the part of diplomats to promote U.S. values and policies when U.S. domestic practices were at such odds with international norms.[1410] Other communities of critics also developed, including Nobel Peace Prize winners and child advocates and agencies. NGOS, especially AIUSA and other members of the coalition, elicited the help of foreign governments and individuals to write to states with child offenders on death row. Lawyers, some associated with AIUSA, the ACLU and LDF, took on the cases of child offenders, almost always *pro bono*, and used the international condemnation of the practice in their defense strategy.

These critics focused on the cost to the United States in terms of diminished legitimacy and moral authority resulting from the ongoing U.S. practice of executing children. They underscored the United States' deviance from the now-established global model of childhood. They drew similarities between the United States and other states widely considered to be rogue nations, and they cited the differences between the United States and more 'civilized' states. It was an effective strategy. By engaging the United States through U.N. agencies, diplomats, NGOs and nation-to-nation rebuke, the United States was forced to continually interact with critics who opposed its policies and practices and who obliged it to acknowledge the international consensus and alter its behavior. The results of international rebuke were clear: The imposition of death

[1410] Former U.S. Diplomats, "Supreme Court Brief of Amici Curiae Former U.S. Diplomats; Roper V. Simmons; No. 03-633." Richard Gibson, "Europeans Criticize America for Putting Minors to Death," *The Blade*, September 27 1987.

sentences began to decline by 1999, and by the time of *Roper*, death penalty rates for child offenders were at their lowest in 15 years.[1411] The number of U.S. states executing children had also declined to three by the time of *Roper*. The United States was increasingly defensive when forced to address the practice and changed its argument for denying the norm (as described above). By the time the Supreme Court heard *Roper*, both the justices of the Supreme Court and the states that continued to execute child offenders were well aware of the weight of international opinion supporting abolition.

As international opinion against the death penalty for child offenders solidified, individual U.S. states voluntarily adopted laws prohibiting the penalty. Even states that maintained the penalty in law drastically reduced the practice. This trend indicates that the process of socialization that shaped U.S. federal policy had an equal, and arguably even more powerful, effect at the state level. Thus, the national consensus recognized by the court in *Roper* reflected this process of socialization at the U.S.-state level.

China and Pakistan brought their death penalty laws into compliance with the CRC long before the United States did, in 1997 and 2001, respectively. In Pakistan's case, there was strong pressure from civil society to end the penalty for child offenders, but these activists were assisted by international organizations, especially by UNICEF. I can find no evidence in the China case of any domestic pressure to abolish, especially given the lack of civil society.

[1411] Streib, "The Juvenile Death Penalty Today: Death Sentences and Executions for Juvenile Crimes, January 1, 1973-December 31, 2004," p. 3.

CONCLUSION

The adoption of the prevailing model of childhood by the United States, China and Pakistan, one that limited state practice in accordance with international law and norms, left these states vulnerable to international pressure. In the U.S. case, the increased citation of international and foreign law in Supreme Court decisions, beginning with *Trop*, contributed to the United States' vulnerability to this pressure, as did the escalating rebuke of the United States by U.N. agencies, diplomats, NGOs and other nations and the successful campaigns at the U.S. state-level that helped to create a national consensus on the issue. The United States could not simultaneously accept the increasingly global model of childhood and reject the moral authority of international law addressing children. China and Pakistan likely felt similar pressure following their ratification of the CRC.

Change in the United States came first in the form of legal prohibitions by individual U.S. states that were reluctant to maintain a penalty at odds with international opinion, second in the prohibition by the federal government for crimes that are within federal jurisdiction, and finally, with the Supreme Court that recognized the "unusual" nature of the penalty, both at home and abroad. A very different pattern of diffusion appears to have taken place in Pakistan (and to a degree in China), as the decision to abolish the penalty was made at the national level and as some districts continue to resist the norm.

The publication of the model, the monitoring of state practice, and the rebuke of states that fail to comply with its standards are all important aspects of international change. However, the internationalization of the model of childhood—a phenomenon that

established state treatment of children as an issue of international concern—was *the* primary mechanism of influence in the eventual compliance of laggard states with international legal standards. Finally, without the work of activists, especially concerted action by a formidable coalition of INGOs, domestic nonprofits, professional organizations and foundations following *Atkins*, the ruling in favor of abolition might not have happened.

Beginning with AI's decision in the 1980s to target countries that violate the norm against executing child offenders, other NGOs and numerous other human rights lawyers joined in these campaigns and launched efforts of their own. A great deal of attention was directed at the United States, especially in campaigns orchestrated by AIUSA. Death penalty opponents and child advocates active in the late period were able to use the increasing condemnation by the international community to bolster their position. Their tactics suggest that theories of socialization, especially constructivist theories of persuasion and argumentation, best explain the path to abolition in the United States.

More research needs to be conducted in order to determine what aspect of international pressure resonated most with the leaders of China and Pakistan—the model of childhood or the need for legitimacy by the rest of the world. As sociological institutionalists make clear, however, these are one and the same. States can only claim legitimacy if they protect children according to the standards articulated in international law. The ultimate power of the globalized model of childhood is its investment of responsibility for the protection of children in the international community by way of international law and institutions. The model transferred authority over children to the

international community from traditional sources, including the family, the community and eventually, the state.

The next chapter summarizes the mechanisms of diffusion of the norm abolishing the child death penalty. While the norm is in many ways unique, I suggest that its diffusion sheds light on processes of normative diffusion in general and on the diffusion of human rights norms in particular. Through a consideration of the ways in which children's rights and protections for child offenders were institutionalized globally, supporters of other human rights norms may find some guidance.

CHAPTER 7
CONCLUSION

This dissertation examines how an idea that begins in one part of the world becomes a global norm that almost all states in the international system obey. The development of the norm of abolition for child offenders presented several puzzles: First, how did the particular construction of childhood that prevailed in the late 20th century come about? Why, for example, was childhood defined by age rather than by behavioral or intellectual markers? Why did children come to be viewed as less culpable for their crimes and thus ineligible for adult penalties such as death? Second, how did this particular construction of childhood, one characterized by reduced culpability and increased vulnerability, diffuse throughout the world? How did an ideal childhood—the childhood that governments and parents aim to provide for their children—come to look the same in almost every country? Third, how did this happen given that the ban on the child death penalty had the distinction of being opposed by the United States throughout its development? How did the norm diffuse despite opposition from the hegemon?

By considering how states incorporate a specific norm into their domestic value system and legal framework, I have sought to understand how such factors as state structure, international pressure, non-state actors and law produce human rights change and catalyze international transformation. My research has revealed clear diffusion patterns, suggesting that the international spread of ideas may be an important explanation for the global trend toward isomorphism among domestic legal systems and the increasing alignment of these domestic frameworks with international law and norms.

The norm against the child death penalty has several important features: First, it grew out of a specific Western construction of childhood, developed over the course of centuries, as a distinct period of human life separate from adulthood (denoted by age), a period of increased vulnerability and reduced culpability for one's actions. By the early 20th century, norms of child protection by the state prevailed in many Western countries, including England, France and the United States. England and France abolished the death penalty for child offenders under the age 18 early in the century, consistent with other norms about children in these states. England and France then spread this construction of childhood, including the norm against the child death penalty, to their colonies: first, through coercive measures that established a state order and a legal system based on the objectives of these colonial powers; and second, through the legal acculturation by which these states were socialized to norms of state protection for children. The coercive socialization that took place in British and French colonies greatly shaped state protection for children after these colonies won independence.

Second, the boundaries of the norm against the child death penalty have shifted considerably over time. The norm first emerged in more radical form in the 19th century, as part of the emerging trend of general abolition for all crimes and all offenders, including children. It then lost its radicalism as the trend toward general abolition waned over the 20th century and was overtaken by a more modest, conservative trend of abolition for certain classes of people only, child offenders among them. By the 1990s, the norm regained its radicalism, as most states again abolished the penalty for all crimes and all offenders, including child offenders.

The norm has other distinct characteristics as well. The earliest states to abolish the penalty were predominantly in the South. Venezuela, Costa Rica and Brazil abolished the penalty for all crimes and all offenders beginning in 1863. Realists and sociological institutionalists expect dominant global norms to have emerged from powerful actors, not from states on the periphery of the international system. It is also noteworthy that in contrast to other human rights norms, the diffusion of the norm against the child death penalty had two distinct cascades, rather than just one, in the late 20th century. The first began in the 1960s and ended in 1981; the second cascade started in 1985 and ended in 2005 with U.S. abolition.

Yet the abolition of the death penalty for child offenders also likely has much in common with other successful human rights norms, including the use of the rhetoric of civilization to effect change. Following World War II, children fast became part of the civilizing rhetoric of the international community, and the momentum of the postwar zeitgeist helped to spread protections for children, even though international law was slow to develop in this area. An international children's rights regime began modestly with the ICCPR in the 1960s and 1970s and then strengthened and broadened in scope with the ratification of the CRC in the 1990s. The development of rights and protections for children in international law meant that states no longer had complete control over the way children were treated. Childhood was now an international idea. In a very real way, the state was divested of full authority over children since state policies and practices were now seen as a legitimate international concern. As discussed in chapter 1, the shift in authority over children from the state to the international community in fact marked the completion of a greater and more gradual pattern of divestment from the father, who

was sovereign of the family, to the state and finally from the state to the international community.

Moreover, this power over childhood was and is ideological**.** By articulating standards of childhood, the international community assumes the power to define childhood, which includes identifying areas of protection, setting the scope of protections, identifying violations of those protections and establishing processes of adjudication when violations occur. This postwar pattern, whereby the international community took ideological control over the content, scope and measure of human rights norms and principles, contributed to the successful adoption of several human rights norms, including norms against the child death penalty.

KEY CONTRIBUTIONS

Although a number of legal and international relations studies have focused on compliance with human rights norms once they are codified in international law, few studies to date have shed light on the origins of specific rights and their evolution toward global acceptance. This dissertation makes several contributions to the international relations literature on norms, international and comparative law, diffusion theory and human rights. It expands on previous work on the international spread of norms by illuminating micro-level processes of legal diffusion and political change, and it makes five key theoretical contributions. First, while legal theorists, sociologists and political scientists have distinguished between early adopters and other states, they have not paid sufficient attention to the phenomenon of late adopters. The literature often assumes that the same mechanics and processes of diffusion apply whether states adopt norms during

cascades or whether they adopt norms in the late period, after they have been institutionalized. Yet in my research, I found a distinct logic or pattern of late adoption whereby some late adopters of the norm against the child death penalty were brought into compliance through a combination of domestic-level principled activism *and* international systemic-level pressure to meet the demands of the now globalized model of childhood. In effect, this pattern of late period adoption combines the dynamics of early-period diffusion with the international pressure characteristic of the cascade. Although the principled activism of the late period differs from the principled activism of the early period in that it draws on international law and norms found in global civil society, it nonetheless has much in common with its predecessor. Most importantly, the rhetoric of civilization was successfully employed in both periods of domestic activism, and was used to claim that child protection was an essential part of humanitarianism that was a moral imperative for civilized people and states.

Second, in contrast to the expectations of realists, the norm against the death penalty for child offenders had a hegemonic laggard. Beginning in 1985 with the post-*Furman* executions of child criminals, the United States – once a key actor in developing and promoting protections for children – not only opposed the norm of abolition of the child death penalty, but also sought to justify its opposition in international and national fora. Further investigation into the U.S. case, however, revealed that federal courts had been in compliance with the norm possibly as early as 1875, the year after the last federal execution of a child offender, according to the Espy data, even though the practice was not prohibited in law in federal jurisdiction until 1994. If it had not been for pressure from U.S. states such as Texas and Oklahoma that supported the child death penalty and

carried out child executions, the United States might have abolished much earlier than it did. The case therefore suggests that it was the federal system of government, one that allows for great variation in U.S. state practice, which contributed to the United States' late adoption of the norm.

Additionally, the United States was a laggard because of the timing of its international legal opposition to the norm. The United States initially went along with global trends in death penalty practice, with U.S. states abiding by a self-imposed moratorium on the penalty as the Supreme Court weighed its constitutionality in the *Furman* case in the late 1960s and early 1970s. By the time the United States began to challenge the norm in the late 1970s (with the *Gregg ruling),* re-introduce the practice of executing child offenders in the mid-1980s, and vociferously oppose the norm in the 1990s (through reservations to the ICCPR and a refusal to ratify the CRC), the first cascade had already ended and the second cascade was well under way. The lag in the United States' opposition thus allowed the norm to be enshrined in international law and adopted by a majority of states in the international community without the hegemon's support. The timing of U.S. opposition to the norm was thus critical. Had U.S. opposition been voiced earlier, such as during the drafting of the ICCPR, the pattern of diffusion could very well have been radically different.

Third, in contrast to realist notions of power, the coercive spread of the norm against the child death penalty socialized developing countries to Western ideas of childhood and state responsibility. While sociological institutionalism downplays the role of colonialism in this process, I found that British and French colonialism were crucial to the diffusion of the norm to large parts of the world. This process of coercive

socialization introduced the colonies of Britain and France to a Western construction of childhood and acculturated them to Western legal traditions by establishing the state as the central authority in setting standards of child protection and enforcing compliance with those standards. This differed from the pattern in Latin America, where former colonies abolished the death penalty (including for child offenders) decades before Portugal, Belgium and Spain, their former colonial powers. As a result, I discovered a pattern of diffusion through coercive socialization that was unique to the British and French colonial powers.

Fourth, international law brings actors into compliance with norms through a process similar to that found in domestic law. In the U.S. case, I found that domestic laws requiring compulsory education in U.S. states in the 19th and 20th centuries were effective in securing state compliance sometimes 50 years before the government was willing to enforce these laws. This finding undermines arguments by realists and legal positivists that law needs teeth to be effective. Like domestic laws for children in the United States around the turn of the 20th century, international law today may have a similar impact on state behavior even without means of coercion. The role of particular international legal instruments, such as the ICCPR and CRC, in achieving state compliance with the norm ending the child death penalty varied tremendously, but the drafting stage of these instruments seemed to be the most important for inducing compliance. International law about children's rights now often serves as the sole justification of principled actors who seek to bring states into compliance with contemporary international understandings of childhood.

Finally, the emergence of a globalized childhood after World War II was itself a key mechanism of normative spread and state compliance. As an important part of the liberal state model in the second half of the 20th century, laws and norms protecting children and ensuring a standardized childhood are necessary for international legitimacy and membership in a community of equal states. In the decades after the war, the meaning of an acceptable childhood and the state's responsibility for ensuring that childhood grew exponentially. This phenomenon was similar to the pattern seen in the 19th century in England, France, Japan and the United States, where the standard of childhood grew in scope to encompass nearly all aspects of children's lives and where state institutions developed to measure, monitor and punish those families and institutions that did not live up to the standard.

As an increasingly complex and detailed model of childhood was adopted by the international community and publicized through international conventions such as the ICCPR and CRC, international, transnational and national institutions, along with NGOs and INGOs, emerged to regulate the condition of children globally. As with changes in the 19th century, it is not entirely clear which came first: the expansion of an international idea of childhood or the institutions established to ensure children's protection. UNICEF and Amnesty International were among the many organizations that used their moral authority to incorporate children's issues into the canon of liberal protections: UNICEF, by expanding the idea of children's welfare from one of basic material needs to a "whole child" approach that covered all areas of children's lives, and Amnesty International, by selecting the child death penalty as a key issue of contestation in the children's rights regime in the last few decades of the 20th century.

AN IMPERFECT MODEL

As child advocates and scholars who study childhood know only too well, protection for children around the world is grossly imperfect. In 2004, there were approximately 214 million child laborers, more than half of these employed in hazardous work. About 5.7 million children were in forced servitude or bonded labor globally (2004 data).[1412] Child soldiers numbered about a quarter of a million at last count, and approximately 1.2 million children are trafficked worldwide *every year* (2004 data).[1413] Previous chapters have already documented the continued use of the death penalty for child offenders in Iran and elsewhere. These facts pose the question: How can a model powerful enough to dictate both national and international law not be powerful enough to demand compliance with the standards of child welfare that comprise the model? How can the international community wield ideological authority over children's lives and yet be unable to end some of the most egregious violations of their human rights? How does a globalized model of childhood coexist with child abuse, prostitution, trafficking, torture and execution?

I would first argue that the apparent limitations of the model of childhood in the face of continued violations of children's rights do not reflect a failure on the part of the model *per se*, but rather speak more to the nature of human rights change through law in general. Norms do not have to be perfectly applied to be an important mechanism of global change; on the contrary, change in human rights, as this study and countless others attest, is incremental. Moreover, deviations from a norm should not be taken to mean that

[1412] UNICEF, "Facts on Children," http://www.unicef.org/media/media_35903.html.
[1413] Ibid.

a norm is not widespread or powerful or that it does not work to shape human rights practice. We would never say, for example, that there is no norm against torture simply because of events at Abu Gharib. Rather, we emphatically affirm norms against torture through international public outcry over incidents of torture. Likewise, the prevalence of child soldiers in certain parts of the world and the continued executions of a handful of child offenders worldwide do not mean that these norms are not robust.

That being said, all norms within the globalized model of childhood are not created equal. The variation in norm compliance within the children's rights regime is the result of a number of factors, including the content of particular norms and the compatibility of certain norms with other prevailing norms in a given culture or society, as well as the ease of implementation and the centrality of decision-making. First, the content of norms about children matters, and the class of children most likely to benefit from protections may affect compliance. The norm against the child death penalty demands protection for the least sympathetic children—usually those that commit rape and murder—society's hardest cases. By contrast, norms curtailing the abuse and neglect of children are directed at much more sympathetic children, resulting in a much easier path to legalization and state compliance. Chapters 3 and 5 document this process in England, France and the United States.

State resources and infrastructure are also important. The child death penalty is actually one of the easiest prohibitions materially to implement. Ending the penalty itself requires no additional infrastructure, as prisons and other facilities to house criminals already exist. And even though international legal standards require that child offenders be placed in special institutions and segregated from adults, states could technically end

the penalty without complying with other norms of child protection. Compared with norms that require free, universal primary school—a huge financial burden on developing countries—the child death penalty is virtually without cost. No state executes enough child offenders to argue that the cost of their imprisonment in terms of food, shelter and facilities imposes too great a financial burden on the state.

The centrality of decision-making is another factor that varies widely. Campaigns against child labor and child soldiers, for example, must address the practices of numerous non-state actors. By contrast, campaigns to end the child death penalty target a single actor: the state. Although the level of centralization varies somewhat (chapter 6 details the challenges of regional authority in China and Pakistan and the difficulties inherent in the federal system in the United States), the norm against the child death penalty, being state- and policy-specific, is generally far more centralized than other issues and areas of child protection. More centralized norms, *ceteris paribus*, should lend themselves to greater compliance with less effort.

Finally, the model of a globalized childhood is an ideal. It does not, as chapter 1 makes clear, wield material authority over childhood; it cannot back most of its principles with coercion. As a result, the ideal of childhood coexists with egregious violations of that ideal. Nonetheless, ideological models—especially those supported by international law, national practice and a global consensus—are powerful vehicles of change in the international system. Remarkable change in the lives of children has occurred in the last few centuries. Yet the quality of that change, the actual improvement in the lives of children around the world, is contentious, as the next section makes clear.

THE NEW MORAL 'IMPERIALISM'

In the international relations literature, there have been two major critiques of the international human rights regime: its presumed Western origins, and the inability of developing states to shape human rights norms themselves, thus denying or calling into question the agency necessary for a truly global consensus. The norm against the child death penalty helps to unpack these critiques. First, it is a point of debate where the idea of childhood first emerged, when children began to be treated differently from adults, and when special consideration was first given in judging their actions. According to my research, however, it is clear that an age-based understanding of childhood, marked by the parameters of birth (or conception) to age 18, spread throughout the world because some Western states, principally Britain and France, adopted it and because the British and French advanced it in their colonies and promoted its acceptance (along with other countries) in the international legal order after World War II.

As such, the West did not *create* or *construct* childhood. Rather, a particular conception of childhood and construction of child protection emerged in some Western states—a childhood based on age rather than on ritual, rite, ability or responsibility—that was consistent with other ideas of Western political order, including democracy and individual rights. Age as a marker of childhood became a tool of states that required uniform standards to regulate the treatment and welfare of children, standards that could be consistently applied by multiple bureaucracies. The size and complexity of the state as a regulatory power required a clear and simple classification of childhood, a system not subject to the arbitrary discretion of untold numbers of state employees and disparate agencies individually determining if certain rites had occurred or if a degree of mental

maturity and intellectual acumen had been reached. The British and French in their colonies and, later, the international community, needed the same large-scale classification system; age-based parameters of childhood were well-suited to these objectives.

The key distinction here is between the origins of child protection *in general* and the origin of a particular type of child protection that was age-based; there is no evidence to suggest that the former had its origins in the West, while the latter was likely a unique Western construct of child protection in societies that required the establishment of common standards to facilitate state regulation. It is evident from my research that the West interpreted child protection in a way that would become dominant throughout the world by the end of the 20th century.

This distinction is important for other areas of human rights and other critiques of the international human rights regime. Various forms of protection for people and groups (such as religious tolerance and protection for minorities) are not specific to Western civilization, but a particular model of these protections – one that valued individual rights via membership in a state (civil rights) and through birth (human rights) – emerged in the West and diffused because the West adopted them. The case study of a globalized childhood reveals the import of genealogical studies of human rights as an effective counter to blanket critiques of the regime.

The agency of the global South

The norm against the child death penalty also suggests a nuanced understanding of the agency of the developing world. When norms about childhood and the child death

penalty were first adopted in international law (such as in the ICCPR), newly independent states like Algeria and Kenya were not in a position to influence the norms' content to any meaningful degree. Just as the United States was at a disadvantage in the timing of its opposition to the norm against the child death penalty, developing counties may have been similarly disadvantaged in the timing of the human rights regime in general. The regime began in the decades after World War II, a time when some states in the global South were still in their formative years and unable to shape these emerging norms. As a result, many norms became embedded in the modern international system before a great many states gained a voice in the international arena.

Nonetheless, these same states played important roles in the drafting of the CRC and influenced the selection of norms included in the convention. Although I found no opposition to the ban on the child death penalty from former colonies during the drafting process, some former colonies did shape the children's rights regime in other areas. For example, Algeria, Iraq and Morocco successfully argued against the inclusion of specific protections against discrimination for children born out of wedlock in debates taking place in the Working Group (that drafted the CRC) in 1986. Despite strong support from West and East Germany, Spain and China for these protections, these former colonies were able to prevent the codification of these norms in the CRC.[1414] Norms are also emerging from these regions in other ways. Constructivists (and now sociological institutionalists) suggest that some norms from the developing world may be publicized and diffused by a new kind of agency: INGOs (many from the South) may be able to

[1414] E.CN.4/1986/39, E/CN.4/1989/48, E/CN.4/1324, E/CN.4/1988/WG.1/WP.3, E/CN.4/1984/71, annex 11

effectively navigate the human rights regime and to shape norms and institutions that were previously dominated by just a few powerful actors.

Civilization

References to civilization were characteristic of all three methods of diffusion and every temporal period of the normative spread. Early principled activists relied on the language of humanitarianism and a civilized social order in their efforts to enact domestic change. Later principled activists made inflammatory comparisons between countries like the United States for its practice of the child death penalty and states not considered part of international society, such as Iran, Nigeria and the DRC. British and French colonialists used protections for women and children to justify colonialism, spreading Western "civilization" to the colonies. Finally, the liberal state model with its monopoly on legitimacy in today's international system requires that states protect children in accordance with the standards of the globalized child. Membership in the international community of states and global society is the ultimate badge of civilization, denoting a shared set of values, including a commitment to humanitarianism, and to the common goals of progress and justice.

The successful use of civilizing rhetoric in all mechanisms of diffusion and temporal periods reviewed in this dissertation indicates that the discourse of civilization may be instrumental in the diffusion of human rights ideas and norms more generally. It is principally on this basis that critical theorists raise concerns about the "new moral imperialism of childhood" and concerns about the homogenization of children's abilities

across the world.[1415] Critical theorists suggest that children have become part of the civilizing mission of the international community, and that an inability to meet the standards of childhood established by the international community makes these states vulnerable to intervention.[1416] Indeed, developing states that fail to meet the standards for a globalized childhood increase their risk of intervention, a risk already high due to weak international standing. Children have been part of intervention rhetoric in numerous recent conflicts, including those in Afghanistan, Sudan, the DRC and Liberia.

Nonetheless, many critiques of international children's rights and human rights in general are off the mark. First, the term 'moral imperialism' suggests a normative imposition by the West upon the rest of the world, yet evidence from this dissertation reveals other patterns at work. The United States—the current hegemon—opposed the norm against the child death penalty and sought to limit its global acceptance and codification in law beginning in the late 1980s and early 1990s. In the context of the death penalty in general, Belgium, Portugal and Spain were relative laggards compared with their colonies in Latin America, some of which abolished the penalty in the 19th century. Colonialism was certainly important to the spread of the norm against the child death penalty, but only a certain type of colonialism had a part—that of the British and

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[1415] Pupavac, "Misanthropy without Borders: The International Children's Rights Regime.", Karen Valenin and Lotte Meinert, "The Adult North and the Young South: Reflections on the Civilizing Mission of Children's Rights," *Anthropology Today* 25, no. 3 (2009), Watson, "Children and International Relations: A New Site of Knowledge?.", Alison Watson, "Saving More Than the Children: The Rope of Child-Focused Ngos in the Creation of Southern Security Norms," *Third World Quarterly* 27, no. 2 (2006), Jo Boyden, "Childhood and the Policy Makers: A Comparative Perspective on the Globalization of Childhood," in *Constructing and Reconstructing Childhood: Contemporary Issues in the Sociological Study of Childhood*, ed. Allison James and Alan Prout (New York: The Falmer Press, 1990), Bloch, *Governing Children, Families, and Education : Restructuring the Welfare State*, Bloch and ebrary Inc., "The Child in the World/the World in the Child Education and the Configuration of a Universal, Modern, and Globalized Childhood."

[1416] Pupavac, "Misanthropy without Borders: The International Children's Rights Regime.", Lewis, "Human Rights, Law and Democracy in an Unfree World.", Watson, "Children and International Relations: A New Site of Knowledge?."

the French. The distinction is reminiscent of Ruggie's between *American* hegemony and American *hegemony*.[1417] It was not British and French *colonialism* that diffused the norm of abolition, but the particular character, values and institutions of the *British* and *French* colonial enterprises.

Moreover, the more recent intervention in conflicts involving child soldiers, for example, comes not from specific countries or regions, but from the international community at large though country tribunals and the International Criminal Court. As such, 'imperialism' may be a misnomer for normative pressure by the international community.

A more nuanced look at the agency behind these norms also allows for an honest assessment of the value of British and French colonial efforts in fostering and diffusing norms about children. Chapter 4 demonstrated that it was not simply the motivation to shore up power or to facilitate administrative efficiency that shaped the colonial policies toward children in the British and French empires. The colonizers also had a social purpose, namely, to improve the lives of the colonized, a purpose known as the white man's burden or the *mission civilisatrice*. Without a social purpose, there was no motivation for Britain or France to intervene in family law to ensure children's and women's protection and risk their empires. Social purpose limited and shaped the exercise of power in these colonies.

It is precisely this social purpose—the protection of children by the state—that should be evaluated. Although these efforts cannot be entirely separated from their historical connection to colonialism, exploitation and violence, they can be ideologically

[1417] Ruggie, "Multilateralism: The Anatomy of an Institution."

divorced from their dubious roots in coercive power. For example, chapter 3 demonstrated that child protection by the English state pre-dated colonial exercises in Africa, and although it began with efforts to control poor populations, its genealogical origins are hardly imperial. Examining child protection then, not as manisfestation of Western dominance, but as a social purpose by the state that was further advanced, at times, by principled actors and humanitarian efforts, provides a cleaner slate with which to assess the value of child protection efforts: Namely, do children's rights lead to better lives for children? With regard to the particular norm addressed in this dissertation—an end to the child death penalty—the answer is an emphatic "yes." For other norms, such as those that regulate street children and claim broad prohibitions against any type of child labor, the answer is more complicated.

CONCLUSION

Finally, this dissertation is about social change. The study of the norm abolishing the child death penalty matters because norms matter. Although there is much room in the study of childhood and the diffusion of norms about children for further research, I am enthusiastic about using what is known about successful normative spread and the social promotion of childhood in the last few centuries. to advance human rights causes that have yet to diffuse and find acceptance. I have demonstrated that remarkable social change can begin with the ideas and convictions of individuals. And as seen in the U.S. case, principled activism is not an obsolete notion in international affairs—one that could only exist prior to the formation of the modern international system. Principled actors

continue to shape and reshape our very conception of the possible in terms of human rights and a just society.

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APPENDIX A
DATASETS

Of the 142 cases in the dissertation (Set A in Table A.1 below), 75 abolished the death penalty first for child offenders (Set B below), and an additional 67 abolished the penalty for all crimes and all criminals, known as general abolition (Set F below). I found some evidence that an additional 62 states abolished the penalty for child offenders under age 18, apart from general abolition, but I was not able to identify specific dates or laws for these states (Set C below). Of these, there are 18 states that various sources have indicated abolished during a particular period or decade, enough information for me to identify the specific period (early, cascade, late), but not enough information to enable me to include these states in the exploration of independent variables in chapter 2. There are also a number of states that abolished the penalty for child offenders age 17 and younger. [1418] These are not included unless they subsequently abolished for child offenders age 18 and younger. Finally, there are eight states that continue to execute child offenders or have done so in the recent past, according to Amnesty International (Set G). Table A.1 below summarizes the division and number of states into sets of cases: the complete universe of cases, states that abolished the death penalty only for child offenders and states that abolished the penalty for all crimes and all offenders.

[1418] Bahamas (17), Bahrain (14), Bangladesh (16) Barbados (16), Belgium (16), Bulgaria (17, later 21), Burma (16), Cape Verde (16), Ceylon (16), Chile (16), China (16), Columbia (12 before abolition in 1910), Comoros (16), Cyprus (16), Democratic Republic of the Congo (16), Egypt (16, then 17), Figi (16), France (16), Gambia (16), Ghana (16), Greece (14, later 15 and 16), Grenada (7, later 16), Guinea (13), Guyana (16), Honduras (16), Hong Kong (16), Iran (9 and 15), Irish Free State (16), Israel (17), Jamaica (16), Japan (16), Liberia (16), Luxemburg (16), Madagascar (16), Malaysia (16), Mauritania (16), Mauritius (16), Morocco (16), North Korea (17), Nyasaland (16), Poland (17), Qatar (16), Seychelles (16), Somliland (16), Southern Rhodesia (16), St. Vincent and Grenadines (16), Tanganyika (16), Thailand (15), Togo (16), Trinidad (16), United Kingdom (16), Virgin Islands (16), Zaire (15) and Zanzibar (12). This list was compiled from UN data from Human Rights Commission reports and from Amnesty International's archives in Boulder, Colorado, as well as from reports from Save the Children Fund: Fuller, "The International Handbook of Child Care and Protection, V. 3.", ——, "The International Year Book of the Child Care and Protection, V. 2."

TABLE A.1: SETS OF CASES FOR GENERAL ABOLITION AND THE DEATH PENALTY FOR CHILD OFFENDERS

Set A	Complete universe of cases for which I have exact dates (general abolition and abolition for child offenders)	142 (Set B + Set F)
Set B	The number of these that abolished the penalty for child offenders and for which I have exact dates and laws	75
Set C	The number of additional territories that abolished the penalty for child offenders apart from general abolition, but for which I do not have exact dates or laws	62
Set D	Number of these territories for which I have temporal periods	18
Set E	Territories that abolished the death penalty in general	89
Set F	Number of these states that did not abolish the death penalty for child offenders before general abolition and for which I have exact dates and laws	67
Set G	Number of states that are currently not compliant with law abolishing the death penalty for child offenders	8

APPENDIX B
BRITISH LEGISLATION RELATED TO CHILDREN (1536-1933)

1536	Apprenticing of Parish Poor Children (27 Hen. VIII, c. 25)
1549 1562	Apprenticeship under the Elizabethan Statute of Artificers (5 Eliz., c. 4)
1572	Poor Law Act (14 Eliz., c. 5)
1601	Futher Provision for Apprenticing Pauper Children (43 Eliz., c. 2)
1661	Poor Relief Act (13 & 14 Car. 2, c. 12)
1744	Vagrancy Act (17 Geo. II, c. 5)
1796	The Manchester Board of Health on Child Labor. Resolutions for the Consideration of Manchester Board of Health.
1802	Regulation of the Employment of Apprentices (42 Geo. III, c. 73)
1819	Nine Years Made the Legal Minimum Age in the Cotton Mills (59 Geo. III, c. 66)
1831	The Mill Owners on the Regulation of Child Labor. Resolutions Adopted at Meeting of Influential Mill Owners, March 5, 1831
	The Act of 1831 (1 & 2 Will. IV, c. 39)
1833	The Act of 1833
1834	Poor Law Amendment Act
1838	Parkhurst Prison Act (1 & 2 Vict., c. 82)
1842	The Act of 1842 Regulating Employment in Mines (5 & 6 Vict., c. 99)
1847	Juvenile Offenders Act (10 & 11 Vict., c. 57)
1850	Act for the Further Extension of Summary Jurisdiction in Cases of Larceny (13 & 14 Vict., c. 37)

1854	Reformatory Schools Act (17 & 18 Vict., c. 74)
	Middlesex Industrial Schools Act (Local) (17 & 18 Vict., c. 169)
	Reformation of Youthful Offenders Act (17 & 18 Vict., c. 86)
1855	Youthful Offenders Amendment Act (18 & 19 Vict., c. 87)
1856	Reformatory and Industrial Schools Amendment Act (19 & 20 Vict., c. 109)
1857	Industrial Schools Act (20 & 21 Vict., c. 48)
	Reformatory Schools Act (20 & 21 Vict., c. 55)
1861	Industrial Schools Act (24 & 25 Vict., c. 113)
1866	Reformatory Schools Act (29 & 30 Vict., c. 117)
	Industrial Schools Act (29 & 30 Vict., c. 118)
1870	Elementary Education Act (33 & 34 Vict., c. 75)
1873	Regulation of the Employment of Children in Agriculture (36 & 37 Vict., c. 67)
1874	Births and Deaths Registration Act
1876	Elementary Education Act (39 & 40 Vict., c. 79)
1879	Summary Jurisdiction Act (42 & 43 Vict., c. 49)
1885	Criminal Law Amendment Act (48 & 49 Vict., c. 69)
1887	An Act to Permit the Conditional Release of First Offenders in Certain Cases (50 & 51 Vict., c. 25).
1889	Poor Law Act
1891	Reformatory and Industrial Schools Act (54 & 55 Vict., c. 23) Custody of Children Act
1893	Reformatory Schools Act (56 & 57 Vict., c. 48)

1894	Prevention of Cruelty to Children Act (57 & 58 Vict., c. 27)
	Industrial Schools Act Amendment (57 & 58 Vict., c. 27)
1897	Infant Life Protection Act (60 & 61 Vict., c. 57)
1899	Reformatory Schools Act (62 and 63 Vict., c. 12)
	Summary Jurisdiction Act (62 & 63 Vict., c. 22)
	Elementary Education (Defective and Epileptic Children) Act (62 & 63 Vict., c. 32)
1901	Youthful Offenders Act (1 Edw. VII, c. 20)
1904	Prevention of Cruelty to Children Act (4 Edw. VII, c. 15)
1907	Probation Act (7 Edw. VII, c. 17). Notification of Births Act
1908	Children Act (8 Edw. VII, c. 67)
	Prevention of Incest Act
	Prevention of Crime Act (8 Edw. VII, c. 23)
1918	Maternity and Child Welfare Act Education Act
1920	Employment of Women, Young Persons, and Children Act
1921	Education Act
1922	Infanticide Act (12 & 13 Geo. 5, c. 18)
1923	Bastardy Act
1925	Widows,' Orphans,' and Old Age Contributory Pensions Act
1926	Adoption of Children Act Legitimacy Act Birth and Deaths Registration Act
1929	Infant Life (Preservation) Act (19 & 20 Geo. V, c. 34)

APPENDIX C
DOCUMENTED DEATHS OF CHILDREN IN ENGLAND

1800		boy (10) for "secreting notes at the Chelmsford Post Office"[1419]
1801		Andrew Brenning--boy (13) stealing a spoon[1420]--possibly commuted.[1421]
1808	at Lynn	girl (7)[1422]
	at Lynn	Michael Hamond (7) and sister (11)--felony[1423]
1814	at Old Bailey	4 boys: Morris (8), Solomons (9), Fusler (12) and Wolfe (12)[1424] for burglary[1425]
		Burrel-boy (11)—stealing a pair of shoes[1426]
1831	at Chelmsford	boy (9) setting a house on fire[1427]
	at Maidstone	boy (13)[1428] *(Probably John Bell)*
1833		Nicholas White--boy (9)—reprieved—pushing stick through window and stealing[1429]
		Boy (14) executed for stealing[1430]
1887		Joseph Morely (17)[1431] for murder

[1419] Koestler, *Reflections on Hanging*, p. 20.
[1420] Christoph, *Capital Punishment and British Politics: The British Movement to Abolish the Death Penalty 1945-57*, p. 15. Koestler, *Reflections on Hanging*, p. 21.
[1421] Potter, *Hanging in Judgment*, p. 7.
[1422] Christoph, *Capital Punishment and British Politics: The British Movement to Abolish the Death Penalty 1945-57*, p. 15.
[1423] Pritchard, *A History of Capital Punishment*, p. 18.
[1424] Pinchbeck and Hewitt, *Children in English Society, Volume Ii: From the Eighteenth Century to the Children Act of 1948*, p. 352.
[1425] Teeters, *"...Hang by the Neck...": The Legal Use of Scaffold and Noose, Gibbet, Stake, and Firing Squad from Colonial Times to the Present*, p. 319.
[1426] Ibid.
[1427]Teeters places this execution in Plemscourt. Christoph, *Capital Punishment and British Politics: The British Movement to Abolish the Death Penalty 1945-57*, p. 15. Koestler, *Reflections on Hanging*, p. 21, Pritchard, *A History of Capital Punishment*, p. 18. Teeters, *"...Hang by the Neck...": The Legal Use of Scaffold and Noose, Gibbet, Stake, and Firing Squad from Colonial Times to the Present*, p. 13.
[1428] Koestler, *Reflections on Hanging*, p. 21.
[1429] Ibid.
[1430] Potter, *Hanging in Judgment*, p. 7.
[1431] Radzinowicz and Hood, *A History of English Criminal Law*, p. 679.

APPENDIX D
MEMBERS OF THE WORKING GROUP FOR THE CRC, 1981 – 1989[1432]

(An asterisk next to a state indicates it was an observer. All IGOs and NGOs were observers.)

1. 1981

a. *States*: Argentina, Australia, Brazil, Bulgaria, Byelorussian Soviet Socialist Republic, Canada, Cuba, Denmark, Egypt*, France, Federal Republic of Germany, Holy See*, India, Ireland*, Italy*, Netherlands, Norway*, Pakistan, Philippines, Poland, Portugal, Turkey*, Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland, United States of America, Yugoslavia, Zaire.

b. *IGOs and NGOs*: International Labour Organization, International Catholic Child Bureau, International Association of Penal Law, International Union for Child Welfare, World Association for the School as an Instrument of Peace.

2. 1982

a. *States:* Argentina, Australia, Brazil, Bulgaria, Byelorussian Soviet Socialist Republic, Canada, China, Colombia*, Cuba, Denmark, France, Federal Republic of Germany, German Democratic Republic*, Holy See*, India, Italy, Japan, Netherlands, Norway*, Philippines, Poland, Senegal, Sweden*, Switzerland*, Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland, United States of America, Yugoslavia.

b. *IGOs and NGOs:* International Labour Organization, Office of the United Nations High Commissioner for Refugees, United Nations Children's Fund, Associated Country Women of the World, International Association of Juvenile and Family Court

[1432] Members of the Working Group before 1981 are not listed in the annual reports. United Nations, "Legislative History of the Convention on the Rights of the Child," Annex III A.

Magistrates, International Federation of Women in Legal Careers, International Association of Penal Law, International Catholic Child Bureau, International Commission of Jurists, International Council on Social Welfare, International Federation of Women Lawyers, International Union for Child Welfare, Minority Rights Group, World Movement of Mothers, Rädda Barnen's Rikförbund.

3. 1983

a. *States*:

Algeria*, Argentina, Australia, Bangladesh, Belgium*, Brazil, Canada, China, Costa Rica, Cuba, Denmark*, Finland, France, Federal Republic of Germany, Holy See*, India, Islamic Republic of Iran*, Italy, Japan, Morocco*, Netherlands, Nicaragua, Norway*, Pakistan, Peru*, Poland, Senegal, Sweden*, Switzerland*, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland, United States of America, Venezuela*, Yugoslavia.

b. *IGOs and NGOs:* Office of the United Nations High Commissioner For Refugees, United Nations Children's Fund, Amnesty International, Anti-Slavery Society, Associated Country Women of the World, Baha'i International Community, International Association of Juvenile and Family Court Magistrates, International Catholic Child Bureau, International Commission of Jurists, International Federation of Women in Legal Careers, International Union for Child Welfare, Minority Rights Group, Rädda Barnen Sweden, Zonta International.

4. 1984

a. *States:* Argentina, Australia*, Brazil, Bulgaria, Canada, China, Cuba, Cyprus, Denmark*, Finland, France, Federal Republic of Germany, German Democratic Republic, Greece*, Holy See*, India, Islamic Republic of Iran*, Italy, Japan, Lebanon*, Morocco*, Netherlands, Norway*, Poland*, Peru*, Spain, Sweden*, Switzerland*, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland, United States of America, Venezuela*.

b. *IGOs and NGOs:* International Labour Organization, United Nations Children's Fund, Amnesty International, Baha'i International Community, Defence for Children International Movement, Four Directions Council, Friends World Committee for Consultation, Human Rights Internet, International Abolitionist Federation, International Association of Juvenile and Family Court Magistrates, International Catholic Child Bureau, International Commission of Jurists, International Committee of the Red Cross, International Council of Jewish Women, International Council of Women, International Federation of Women in Legal Careers, International Social Service, International Union for Child Welfare, Rädda Barnen International, Zonta International.

5. 1985

a. *States*: Algeria*, Argentina, Australia, Austria, Bangladesh, Belgium*, Bolivia*, Brazil, Bulgaria, Canada*, China, Cuba*, Denmark*, Egypt*, Finland, France, Gabon*, Federal Republic of Germany, German Democratic Republic, Guinea*, Haiti*, Holy See*, India, Iraq*, Italy*, Japan, Liberia, Mexico, Morocco*, Netherlands, New Zealand*, Nicaragua, Norway*, Pakistan*, Panama*, Peru, Poland*, Senegal, Spain, Sri Lanka, Sweden*, Switzerland*, Turkey*, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland, United States of America.

b. *IGOs and NGOs*: International Labour Organization, United Nations Children's Fund, Amnesty International, Baha'i International Community, Defence for Children International Movement, Four Directions Council, Friends World Committee for Consultation, Human Rights Internet, International Abolitionist Federation, International Association of Juvenile and Family Court Magistrates, International Catholic Child Bureau, International Commission of Jurists, International Committee of the Red Cross,

International Council of Jewish Women, International
Council of Women, International Federation of Women in Legal Careers, International Social Service, International Union for Child Welfare, Rädda Barnen International, Zonta International.

6. 1986

a. *States*: Algeria, Argentina, Australia, Austria, Bangladesh, Belgium, Brazil, Bulgaria, Byelorussian Soviet Socialist Republic, Canada*, China, Cuba*, Cyprus, Denmark*, Ethiopia, Finland*, France, German Democratic Republic, Holy See*, India, Iraq*, Japan, Mexico, Morocco*, Netherlands*, New Zealand*, Norway, Peru, Poland*, Senegal, Sri Lanka, Sweden*, Switzerland*, Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland, United States of America, Venezuela.

b. *IGOs and NGOs*: International Labour Organization, United Nations Children's Fund, Amnesty International, Associated Country Women of the World, Baha'i International Community, Defence for Children International Movement, Four Directions Council, Human Rights Internet, International Abolitionist Federation, International Catholic Child Bureau, International Commission of Jurists, International Committee of the Red Cross, International Council of Jewish Women, International Council of Women, International Federation of Women in Legal Careers, International Federation of Women Lawyers, International Social Service, Rädda Barnen International, Save the Children Fund, World Association for the School as an Instrument of Peace, World Organization for Early Childhood Education, Zonta International.

7. 1987

a. *States***:** Algeria, Argentina, Australia, Austria, Bangladesh, Belgium, Brazil, Bulgaria, Canada*, China, Colombia, Cyprus, Denmark*, Finland*, France, Federal Republic of

Germany, German Democratic Republic, Holy See*, India, Islamic Republic of Iran*, Iraq, Italy, Japan, Mexico, Morocco*, Netherlands*, New Zealand*, Norway, Pakistan, Peru, Poland*, Senegal, Sweden*, Switzerland*, Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland, United States of America, Venezuela, Yemen Arab Republic*, Yugoslavia.

b. *IGOs and NGOs:* International Labour Organization, Office of the United Nations High Commissioner for Refugees, United Nations Children's Fund, Amnesty International, Anti-Slavery Society for the Protection of Human Rights, Associated Country Women of the World, Baha'i International Community, Defence for Children International Movement, Four Directions Council, Human Rights Internet, International Abolitionist Federation, International Association of Democratic Lawyers, International Association of Juvenile and Family Court Magistrates, International Catholic Child Bureau, International Commission of Jurists, International Committee of the Red Cross, International Council of Jewish Women, International Council of Women, International Council on Social Welfare, International Federation of Women in Legal Careers, International Federation of Women Lawyers, International Movement ATD Fourth World, International Movement for Fraternal Union among Races and Peoples, Rädda Barnen International, Save the Children Fund, World Association for the School as an Instrument of Peace, World Organization for Early Childhood Education, Zonta International.

8. **1988**

a. *States***:** Algeria, Argentina, Australia*, Austria*, Bangladesh, Belgium, Brazil, Bulgaria, Canada*, China, Colombia, Cuba*, Cyprus, Czechoslovakia*, Denmark, Egypt*, Finland*, France, Federal Republic of Germany, German Democratic Republic, Holy See*, India, Iraq, Italy, Japan, Jordan*, Kenya*, Mexico, Morocco*, Netherlands*, New Zealand*, Nigeria, Norway, Pakistan, Peru, Philippines,

Poland*, Portugal, Senegal, Spain, Sweden*, Switzerland*, Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland, United States of America, Venezuela, Yemen*, Yugoslavia, Zimbabwe*.

b. *IGOs and NGOs:* International Labour Organization, Office of the United Nations High Commissioner for Refugees, United Nations Children's Fund, Inter-American Children's Institute of the Organization of American States, Amnesty International, Associated Country Women of the World, Baha'i International Community, Caritas Internationalis, Defence for Children International Movement, Friends World Committee for Consultation, Human Rights Internet, Indian Council of South America, International Abolitionist Federation, International Association of Democratic Lawyers, International Association of Juvenile and Family Court Magistrates, International Association of Penal Law, International Catholic Child Bureau, International Committee of the Red Cross, International Council of Jewish Women, International Council on Social Welfare, International Federation of Human Rights, International Federation of Women in Legal Careers, International Movement ATD Fourth World, International Right to Life Federation, Rädda Barnen International, Save the Children Alliance, Save the Children Fund (UK), World Association for the School as an Instrument of Peace, World Federation of Democratic Youth, World Federation of Methodist Women, Zonta International.

9. 1989

a. *States***:** Algeria, Angola*, Argentina, Australia*, Austria*, Bahrain*, Bangladesh, Belgium, Bhutan*, Brazil, Bulgaria, Canada*, China, Colombia, Cuba*, Cyprus, Czechoslovakia*, Denmark*, Egypt*, Ethiopia, Finland*, France, Federal Republic of Germany, German Democratic Republic, Holy See*, Honduras*, India, Iraq, Ireland, Italy, Japan, Jordan*, Kuwait*, Lebanon*, Libyan Arab Jamahiriya*, Malta*, Mexico, Morocco*, Mozambique, Nepal*, Netherlands*, New Zealand*, Nicaragua, Norway, Oman*,

Pakistan, Panama*, Peru, Philippines, Poland*, Portugal, Romania*, Senegal, Spain, Sweden*, Switzerland*, Tunisia*, Turkey*, Ukrainian Soviet Socialist Republic*, Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland, United States of America, Venezuela, Yemen*, Yugoslavia.

b. *IGOs and NGOs:* Centre for Social Development and Humanitarian Affairs of the United Nations Secretariat, International Labour Organization, Office of the United Nations High Commissioner for Refugees, United Nations Children's Fund, United Nations Educational, Scientific and Cultural Organization, World Health Organization, Inter-American Children's Institute of the Organization of American States, League of Arab States, Amnesty International, Associated Country Women of the World, Baha'i International Community, Co-ordinating Board of Jewish Organizations, Defence for Children International Movement, Foster Parents Plan International, Grand Council of the Crees of Quebec, Human Rights Internet, Indian Council of South America, International Association of Juvenile and Family Court Magistrates, International Association of Penal Law, International Catholic Child Bureau, International Committee of the Red Cross, International Council of Jewish Women, International Council on Jewish Social and Welfare Organizations, International Council of Women, International Federation of Women in Legal Careers, International Movement ATD Fourth World, Inter-Parliamentary Union, International Right to Life Federation, International Social Service, Rädda Barnen International, Save the Children Fund (UK), World Association of Girl Guides and Girl Scouts, World Association for the School as an Instrument of Peace, World Council of Indigenous Peoples, World Federation of Methodist Women, World Jewish Congress, Zonta International.

APPENDIX E
JURISDICTIONS THAT ABOLISHED THE DEATH PENALTY FOR CHILD OFFENDERS UNDER THE AGE 18 PRIOR TO ROPER V. SIMMONS

California
Cal. Penal Code Ann. §190.5 (West 1988)
Colorado
Colo. Rev. Stat. §1611-103(1)(a) (1986)
Connecticut
Conn. Gen. Stat. § 53a-46a(g)(1) (1989)
Illinois
Ill. Rev. Stat., ch. 38, 119-1(b) (1987)
Indiana
Ind. Code Ann. §35—50—2—3 (1993)
Kansas
Kan. Stat. Ann. §21—4622 (1995)
Maryland
Md. Ann. Code, Art. 27, § 412(f) (Supp. 1988)
Montana
Mont. Code Ann. §45—5—102 (2003)
Nebraska
Neb. Rev. Stat. §28-105.01 (1985)
New Jersey
N.J. Stat. Ann. §2A:4A-22(a) (West 1987) and 2C:11-3(g) (West Supp. 1988)
New Mexico
N.M. Stat. Ann. §§ 28-6-1(A), 31-18-14(A) (1987)
New York
N.Y. Penal Law Ann. §125.27 (West 2004)
Ohio
Ohio Rev. Code Ann. §2929.02(A) (1987)
Oregon
Ore. Rev. Stat. §§161.620 and 419.476(1) (1987)
South Dakota
2004 S.D. Laws ch. 166 to be codified in S.D. Codified Laws §23A—27A—42
Tennessee
Tenn. Code Ann. §§37-1-102(3), 37-1-102(4), 37-1103, 37-1-134(a)(1) (1984 and Supp. 1988)
Washington
Minimum age of 18 established by judicial decision. *State* v. *Furman*, 122 Wash. 2d 440, 858 P.2d 1092 (1993)
Wyoming
Wyo. Stat. §6—2—101(b) (Lexis 2003)
Federal
18 United States C. § 3591(a)(2)(D), 18 United States C. § 3591 (b)(2) (1994)