

*Before the*

**INTER-AMERICAN COMMISSION ON HUMAN RIGHTS**

**Henry Hill, et al.**

**vs.**

**The United States of America**

Case No. 12.866

**WRITTEN COMMENTS OF AMICUS CURIAE**

**HUMAN RIGHTS WATCH**

**March 19, 2014**

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Submitted: March 19, 2014

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## STATEMENT OF INTEREST OF *AMICUS CURIAE*

Human Rights Watch is a non-profit, independent organization and the largest international human rights organization based in the United States. For more than 30 years, Human Rights Watch has investigated and exposed human rights violations and has challenged governments to protect the human rights of all persons, including youth and prisoners. To fulfill its mission, Human Rights Watch investigates allegations of human rights violations in the United States and more than 80 other countries throughout the world, gathering information from governmental and other sources, interviewing victims and witnesses, and issuing detailed reports. Where human rights violations have been found, Human Rights Watch advocates for the proper enforcement of human rights before government officials and in the court of public opinion.

In 2004, Human Rights Watch published *Thrown Away*, its report on youth offenders sentenced to life without parole in Colorado. In 2005, Human Rights Watch co-published *The Rest of Their Lives*, a national report on the sentencing of youth offenders to life without parole in the United States. In 2008, Human Rights Watch published *When I Die They'll Send Me Home*, on the same topic in California. In 2009, the organization published updated national statistics on youth offenders serving life without parole throughout the United States. In 2012, Human Rights Watch published *Against All Odds*, a nationwide examination of prison conditions for youth offenders serving sentences of life without parole. Human Rights Watch has a forthcoming report, to be published in April of 2014, on Florida's prosecution of children as adults under the state's direct file statute. The organization has also advocated on these issues before the Committee Against Torture, the United Nations Human Rights Committee, and the Committee on the Elimination of Racial Discrimination.<sup>1</sup>

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<sup>1</sup> The Committee Against Torture is a body of human rights experts that monitors the implementation of the United Nations Convention Against Torture. U.N. Human Rights, Committee Against Torture, *Introduction*,



# I

## INTRODUCTION

The international community, including the Inter-American human rights system,<sup>2</sup> has long recognized that children are fundamentally different from adults, and in legal contexts are entitled to special procedures and protections that take into account their unique needs at all stages of the judicial process. This right to special protection is codified in Article VII of the American Declaration on the Rights and Duties of Man (the “American Declaration”). And that right is established in the jurisprudence of the Inter-American Court of Human Rights (the “Inter-American Court”), which requires that the best interests of the child be taken into account and recognizes that special protective measures are of “fundamental importance” because “children are at a critical stage in their physical, mental, spiritual, moral, psychological and social development.”<sup>3</sup> The United States itself recognizes the special status of children: juveniles categorically are morally less culpable in the eyes of the U.S. Supreme Court,<sup>4</sup> and all

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<http://www.ohchr.org/EN/HRBodies/CAT/Pages/CATIndex.aspx> (last visited Feb. 11, 2014). The United Nations Human Rights Committee is a body of 18 experts that meets to consider yearly reports submitted by UN member states on their compliance with the International Covenant on Civil and Political Rights. U.N. Human Rights, Human Rights Committee, *Introduction*, <http://www.ohchr.org/EN/HRBodies/CCPR/Pages/CCPRIndex.aspx> (last visited Feb. 11, 2014). The Committee on the Elimination of Racial Discrimination monitors the implementation of the Convention on the Elimination of All Forms of Racial Discrimination by its State parties. U.N. Human Rights, Committee on the Elimination of Racial Discrimination, *Introduction*, <http://www2.ohchr.org/english/bodies/cerd/> (last visited Feb. 11, 2014).

<sup>2</sup> The Inter-American human rights system consists of the international treaties, conventions, courts, and organizations that oversee the development and implementation of international law in the Americas, including the American Declaration of the Rights and Duties of Man, the American Convention on Human Rights, the Inter-American Commission on Human Rights, the Inter-American Court of Human Rights, and the Organization of American States.

<sup>3</sup> “Juvenile Reeducation Institute” v. Paraguay Case, 2004 Inter-Am. Ct. H.R. (ser. C) No. 112, ¶172 (Sept. 2, 2004) (“Juvenile Reeducation Institute”); Juridical Condition and Human Rights of the Child, Advisory Opinion OC-17/2002, Inter-Am. Ct. H.R. (ser. A) No. 17, ¶ 57 (Aug. 28, 2002) (“IACHR Advisory Opinion OC-17/2002”) Inter-Am. Ct. H.R., *Juvenile Justice and Human Rights in the Americas*, OEA/Ser.L/V/II., doc. 78, ¶447 (Jul. 13, 2011) (“Derechos”).

<sup>4</sup> See, e.g., *Graham v. Florida*, 560 U.S. 48, 68 (2011); *Roper v. Simmons*, 543 U.S. 551, 571-573 (2005).

50 states have established juvenile justice systems separate and apart from their respective adult criminal justice systems.

The existence of separate juvenile justice systems, however, has not ensured special protective measures in practice. Despite the well-established right of children to special protection, every state in the United States, including Michigan, systematically denies such protection to hundreds of thousands of children under the age of 18 every year, by trying, sentencing, and incarcerating them as adults in the adult criminal justice system. The U.S. Department of Justice (“DOJ”) Office of Juvenile Justice and Delinquency Prevention (“OJJDP”), the organ of the U.S. government charged with supporting local and state efforts to prevent delinquency and improve the juvenile justice system, has recognized that at least 200,000 children under the age of 18 were processed as adults in the adult criminal justice system in the United States in 2007.<sup>5</sup> An estimated 140,000 children were incarcerated in adult jails or prisons in the United States in 2010.<sup>6</sup> The United States is the only country in the world to impose sentences of life without the possibility of parole on juvenile offenders.<sup>7</sup>

Nowhere is the United States’ failure to specially protect children by treating them the same as adult criminals more egregiously apparent than in the juvenile-life-without-

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<sup>5</sup> Patrick Griffin, et al., U.S. Department of Justice, Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention, *Trying Juveniles as Adults: An Analysis of State Transfer Laws and Reporting*, 20-21 (2011), available at <https://www.ncjrs.gov/pdffiles1/ojjdp/232434.pdf> (“Griffin”).

<sup>6</sup> Human Rights Watch & The American Civil Liberties Union, *Growing Up Locked Down: Youth in Solitary Confinement in Jails and Prisons Across the United States*, Appendix 1: Mapping Youth in Adult Jails and Prisons, 106 (2012), available at <http://www.hrw.org/sites/default/files/reports/us1012ForUpload.pdf> (“*Growing Up Locked Down*”).

<sup>7</sup> See Connie de la Vega, Amanda Solter, Soo-Ryun Kwon, & Dana Marie Isaac, Univ. of San Francisco School of Law, *Cruel and Unusual: U.S. Sentencing Practices in a Global Context*, 61 (2012), available at <http://www.usfca.edu/law/clgj/criminalsentencing>. See also Final Observations Regarding the Merits of the Case, *Hill, et al. v. United States*, Case 12.866, Inter-Am. Comm’n H.R., Report No.18/12, 42-43 (2012) (“Final Observations Regarding the Merits of the Case”).

parole (“JLWOP”) sentences imposed by 39 states in the United States<sup>8</sup>—including the State of Michigan and the JLWOP sentences at issue in this matter.<sup>9</sup> JLWOP sentences are fundamentally incompatible with a child’s right to special protection, because they eliminate any possibility of rehabilitation and release, and result in the incarceration of children in adult facilities, where they are likely to receive fewer health, educational, and rehabilitative opportunities than in specialized juvenile facilities and to be victimized by other prisoners. As the U.S. Supreme Court recently noted, a JLWOP sentence “cannot be justified by the goal of rehabilitation” because “[t]he penalty forswears altogether the rehabilitative ideal.”<sup>10</sup>

JLWOP sentences are a direct result, but are only one manifestation, of a broad and pernicious trend of “adultification” that has infiltrated juvenile justice systems across the United States over the past 30 years. Beginning in the 1980s and accelerating more recently, the rehabilitative model of juvenile justice in the United States has given way to a more punitive model that increasingly uses the adult criminal justice system to charge, try, sentence, and incarcerate child defendants for even minor or non-violent offenses.<sup>11</sup>

Many states, including Michigan, allow children aged 14 or even younger to be prosecuted as adults in the adult criminal system—some states have no lower age limit at all for

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<sup>8</sup> See National Conference of State Legislatures, *Juvenile Life Without Parole (JLWOP) Chart* (February 2010), available at <http://www.ncsl.org/documents/cj/jlwopchart.pdf>. The fact that many such sentences are a result of prosecutions by state, as opposed to federal, authorities is of no moment. It is settled law that a nation-state cannot avoid its obligations under international law by having a subsidiary unit act in contravention of the member state’s international legal obligations—a conclusion that even the U.S. Government does not dispute. See, e.g., *Zschering v. Miller*, 389 U.S. 429, 436-41 (1968).

<sup>9</sup> Amicus incorporates by reference the factual and procedural background set forth in the Final Observations Regarding the Merits of the Case, submitted to the Inter-American Commission on Human Rights (“the Commission”) on September 4, 2012.

<sup>10</sup> *Graham*, 560 U.S. at \*23; see also David S. Tanenhaus & Steven A. Drizin, “Owing to the Extreme Youth of the Accused”: *The Changing Legal Response to Juvenile Homicide*, 92 J. Crim. L. & Criminology 641, 664-65 (2003) (noting that policies requiring the imposition of a JLWOP sentence are based on the assumption that these individuals cannot be reformed).

<sup>11</sup> Elizabeth S. Scott & Laurence Steinberg, *Rethinking Juvenile Justice*, 5-9 (Harvard Univ. Press 2008).

adult prosecution. Once a child enters the adult criminal system, which typically occurs with little or no oversight from a specialized juvenile court, that child is treated just like any other adult defendant—with the same attorneys, same judges, and same judicial procedures as any adult would experience—to the child’s great disadvantage. If the child is detained before trial, he or she is likely to be held in a facility with adults, often exposed to the influences and abuses of seasoned adult criminals. Upon conviction, the child is more likely to be sentenced to imprisonment for a longer period of time than if he or she had been tried in a juvenile court, and in some circumstances is likely to be sentenced even more harshly than adults convicted of the same offense. The child also is likely to serve the sentence in an adult detention facility, where he or she will be a target for abuse, is likely to experience solitary confinement, is at a high risk of suicide, and will likely receive fewer health, educational, and rehabilitative opportunities than he or she would have received in a juvenile detention facility. If the child is African-American, the sentence is likely to be more severe than if he or she were white.

This *amicus* submission demonstrates in detail how the United States, including the State of Michigan, fails to provide special protection to hundreds of thousands of children under the age of 18 every year, in violation of human rights that have long been recognized by the Inter-American human rights system. *Amicus* specifically urges the Commission to find that the United States has violated its obligations with respect to the rights of children in the Inter-American human rights system, as well as under international law more generally. By recognizing the fundamental human rights of all children, including their right to special protection, and finding the regressive trend of adultification of juvenile justice procedures in the United States to directly conflict with that right, the Commission will encourage all Organization of American States (“OAS”) member States—particularly the United States—to review their

laws to ensure that they conform with the international standards for the treatment of juvenile offenders, in line with jurisprudence from this Commission and the Inter-American Court.

## II

### JUVENILE LIFE WITHOUT PAROLE SENTENCING IN THE UNITED STATES

Children in the United States can enter the adult criminal system through any one of a number of transfer mechanisms. Once children are transferred to the adult system, they are treated as adults for the purposes of trial, sentencing, and imprisonment. The United States fails to comply with its obligations under international law—particularly the obligation to provide children with special protections—at each stage of this process. This series of failures culminates in the United States’ imposition of sentences of life without parole on juveniles, the country’s most flagrant violation of its legal duties with respect to children accused of crimes.

#### A. Sentencing

Once juveniles have been transferred to the adult criminal system, they are subject to the same sentencing standards as adults.<sup>12</sup> Despite a general lack of data concerning the sentences juveniles receive in adult criminal courts due to the states’ failure to report such data,<sup>13</sup> sentencing disparities have been demonstrated in four important areas: (1) transferred juveniles are sentenced more harshly than non-transferred juveniles; (2) transferred juveniles are sentenced at least as harshly as adults, and in some types of cases may be sentenced more harshly than adults for the same offenses; (3) unlike children in every other country in the Inter-American

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<sup>12</sup> Liz Ryan, Campaign for Youth Justice, *Youth in the Adult Criminal Justice System*, 7 (2012), available at [http://www.campaignforyouthjustice.org/documents/FR\\_YACJS\\_2012.pdf](http://www.campaignforyouthjustice.org/documents/FR_YACJS_2012.pdf) (“Youth in the Adult Criminal Justice System”).

<sup>13</sup> As with other areas of juvenile justice, deficient data-collection practices impair analysis of the sentencing of transferred juveniles. See Griffin, *supra* note 5, at 24.

human rights system—and, indeed, the world<sup>14</sup>—children in the United States can still receive JLWOP sentences; and (4) African American juveniles are sentenced more harshly than whites and receive JLWOP sentences more often than white juveniles.

### **1. Children Are Sentenced More Harshly In Adult Criminal Court**

Several studies have found that children tend to be sentenced more frequently and to longer terms of incarceration in the adult criminal system than in juvenile courts.<sup>15</sup> For example, one study found that adult courts sentenced 68% of transferred juveniles to jail or prison, while juvenile courts imposed sentences involving placement in juvenile correctional facilities in only 44% of cases.<sup>16</sup> The study found marked disparities even within offense categories: for violent offenses, 79% of children were incarcerated by adult courts versus 40% by juvenile courts; for property offenses, 57% versus 35%; for drug offenses, 50% versus 41%; and for public order offenses, 60% versus 46%.<sup>17</sup> These disparities may be due to the fact that the transfer decision in itself stigmatizes a juvenile as unusually deserving of harsh treatment.<sup>18</sup>

### **2. Children Are Sentenced At Least As Harshly As—And Sometimes More Harshly Than—Adults In Adult Criminal Court For The Same Offenses**

Studies also reveal that children are often sentenced at least as harshly as adults in the adult criminal system—and may even be sentenced more harshly than adults, as some

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<sup>14</sup> Final Observations Regarding the Merits of the Case, *supra* note 7, at 5; Connie de la Vega, Amanda Solter, Soo-Ryun Kwon, & Dana Marie Isaac, Univ. of San Francisco School of Law, Center for Law and Global Justice, *Cruel and Unusual: U.S. Sentencing Practices in a Global Context*, 61 (2012), available at <http://www.usfca.edu/law/clgj/criminalsentencing>.

<sup>15</sup> Griffin, *supra* note 5, at 24.

<sup>16</sup> Kevin J. Strom, Steven K. Smith and Howard N. Snyder, U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics *Juvenile Felony Defendants in Criminal Courts: State Court Processing Statistics, 1990–94*, 6, Tables 12 and 13 (1998), available at <http://www.bjs.gov/content/pub/pdf/jfdcc.pdf>.

<sup>17</sup> *Id.*

<sup>18</sup> Edward P. Mulvey & Carol A. Schubert, U.S. Department of Justice, Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention, *Transfer of Juveniles to Adult Court: Effects of a Broad Policy in One Court*, 4 (2012), available at <http://www.ojjdp.gov/pubs/232932.pdf>.

juveniles received longer prison sentences than adults for certain offenses. One study by the DOJ found that transferred juveniles received longer sentences for weapons offenses than adults did; were more likely to be sentenced to prison for burglary, larceny, and weapons offenses; and were less likely to be sentenced to probation for property and larceny offenses.<sup>19</sup> A 2008 Human Rights Watch report on JLWOP in California found that in 56 percent of cases in which there was an adult codefendant, the juvenile received a longer sentence than the adult.<sup>20</sup> Another study found that over a 17-year period, juveniles convicted of murder were more likely to receive life-without-parole sentences than similarly-situated adults in 11 of those 17 years.<sup>21</sup> Two separate DOJ studies have shown that transferred juveniles convicted of violent felonies as a general matter were about as likely to be incarcerated as similarly-situated adults.<sup>22</sup>

### **3. Unlike Children In Every Other Country In The World, Children In The United States Still Receive And Serve JLWOP Sentences**

The United States is the only country in the world to impose sentences of life without the possibility of parole on juvenile offenders.<sup>23</sup> The United States' regressive trend, from a system that, with few exceptions, adjudicated criminal charges against children in juvenile courts, to one in which states easily and frequently transfer juveniles to adult courts for adult sentencing, has resulted in the incarceration of thousands of children for life without the

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<sup>19</sup> David J. Levin, Patrick A. Langan, and Jodi M. Brown, U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, *State Court Sentencing of Convicted Felons, 1996*, 46 (2000), available at <http://www.bjs.gov/content/pub/pdf/scscf96.pdf> (“*State Court Sentencing*”).

<sup>20</sup> Human Rights Watch, *When I Die, They'll Send me Home: Youth Sentenced to Life Without Parole in California*, 36 (2008), available at <http://www.hrw.org/reports/2008/us0108/us0108web.pdf> (“*When I Die*”).

<sup>21</sup> Human Rights Watch, *The Rest of Their Lives: Life without Parole for Youth Offenders in the United States in 2008*, 2 (2008), available at <http://www.hrw.org/sites/default/files/reports/us1005execsum.pdf> (“*The Rest of Their Lives*”) (analyzing data from the National Corrections Reporting Program, which is sponsored by the Bureau of Justice Statistics.) During the 17 years studied, juveniles could still receive the death penalty; when death and LWOP sentences were analyzed together, juveniles were still more likely than adults to receive one of the two sentences in 4 of the 17 years. *Id.*

<sup>22</sup> Griffin, *supra* note 5, at 24.

<sup>23</sup> Final Observations Regarding the Merits of the Case, *supra* note 7, at 42-43.

possibility of parole.<sup>24</sup> As of 2009 (the most recent data available), approximately 2,500 individuals are serving life sentences for crimes that were committed before their eighteenth birthdays. In Michigan, there are 362 juveniles serving life without the possibility of parole.<sup>25</sup>

#### **4. Minority Juveniles Are Sentenced More Harshly Than White Juveniles**

Finally, African American and Latino juveniles generally receive harsher sentences than similarly-situated Caucasians. African American juveniles particularly receive JLWOP sentences more often than white juveniles.

As a general matter, studies show that young African American and Latino males receive harsher sentences than any other population.<sup>26</sup> Minorities are at a disadvantage across a range of legal processes, including pretrial detention, attorney quality, receiving sentence reductions for assisting law enforcement authorities with investigations, and the “trial penalty,” whereby judges and (in death penalty cases) juries mete out harsher sentences to individuals who choose to contest the charges against them rather than plead guilty.<sup>27</sup> African Americans who are convicted of committing crimes against whites receive harsher punishments than African Americans who are convicted of committing the same types of crimes against other groups, or white defendants who harm whites.<sup>28</sup> African Americans also tend to receive harsher sentences than white defendants for less serious crimes, especially drug and property crimes.<sup>29</sup>

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<sup>24</sup> Final Observations Regarding the Merits of the Case, *supra* note 7, at 43.

<sup>25</sup> Final Observations Regarding the Merits of the Case, *supra* note 7, at 47.

<sup>26</sup> See generally, Tushar Kansal, *The Sentencing Project, Racial Disparity in Sentencing: A Review of the Literature*, 2. (Marc Mauer eds., 2005), available at [http://www.sentencingproject.org/doc/publications/rd\\_sentencing\\_review.pdf](http://www.sentencingproject.org/doc/publications/rd_sentencing_review.pdf).

<sup>27</sup> *Id.* See also Human Rights Watch, Decades of Disparity, <http://www.hrw.org/reports/2009/03/02/decades-disparity>; Human Rights Watch, Targeting Blacks, <http://www.hrw.org/node/62236/section/6>

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*



Relative to their population, African American youth are more likely to serve a JLWOP sentence. In 2008, African American juveniles were serving JLWOP sentences at a national per capita rate 10 times that of white juveniles, and the disparity was far worse in many individual states.<sup>30</sup> In California, Connecticut, and Pennsylvania, for example, black youth are serving JLWOP sentences at a rate that is more than 17 times higher than the rate for white youth.<sup>31</sup> In Michigan, although African Americans accounted for only 15% of the youth population in March 2012,<sup>32</sup> 69% of juveniles serving JLWOP sentences were African American.<sup>33</sup>

Some have argued that the overrepresentation of African American children serving JLWOP sentences does not necessarily evince discriminatory sentencing practices, and may instead reflect higher crime rates among that particular demographic.<sup>34</sup> However, persuasive evidence of racial discrimination exists: data collected and analyzed by Human Rights Watch show that across 25 U.S. states, African American juveniles arrested for murder received JLWOP sentences at 1.56 times the rate of white juveniles arrested for murder.<sup>35</sup> In California, the rate was even higher: African American juveniles arrested for murder received JLWOP sentences nearly six times as frequently as white juveniles.<sup>36</sup> These data strongly

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<sup>30</sup> *The Rest of Their Lives*, *supra* note 21, at 5.

<sup>31</sup> Human Rights Watch, *Submission to the Committee on the Elimination of Racial Discrimination During its Consideration of the Fourth Fifth, and Sixth Periodic Reports of the United States of America*, vol. 20 p.21 (February 2008) (“*Submission to the CERD*”).

<sup>32</sup> ACLU of Michigan, *Second Chances: Juveniles Serving Life Without Parole in Michigan Prisons*, 3 (2004), available at <http://www.aclumich.org/sites/default/files/file/Publications/Juv%20Lifers%20V8.pdf>.

<sup>33</sup> John Barnes, *Judgment Day for Michigan's Juvenile Lifers: The U.S. Supreme Court Considers Banning Life Without Parole for Minors*, MLive (March 12, 2012), available at [http://www.mlive.com/news/index.ssf/2012/03/judgment\\_day\\_for\\_michigans\\_juv.html](http://www.mlive.com/news/index.ssf/2012/03/judgment_day_for_michigans_juv.html).

<sup>34</sup> *Submission to the CERD*, *supra* note 31, at 18.

<sup>35</sup> *Submission to the CERD*, *supra* note 31, at 24.

<sup>36</sup> *Id.*

suggest that the disparity in JLWOP sentences issued to African American and white juveniles is not explained by mere differences in crime rates; if racial discrimination played no part in the sentencing of juveniles to JLWOP sentences, one would expect African American and white juveniles arrested for murder to receive JLWOP sentences at very close to the same rate.

## **B. Incarceration**

The United States is the only country in the world to impose sentences of life without the possibility of parole on juvenile offenders.<sup>37</sup> According to the most recent data,<sup>38</sup> approximately 2,500 prisoners currently serving life sentences were convicted of crimes committed before their eighteenth birthdays, and Michigan's prison population accounts for 362 of these JLWOP inmates.<sup>39</sup> Data collected by Human Rights Watch suggest that a significant portion of the United States' life-without-parole population entered adult prison while still children.<sup>40</sup> In 2009, 43 state prison systems held 2,778 inmates under the age of 18, and many more young offenders enter adult prisons having only recently turned 18.<sup>41</sup> The effect of adult prison on the lives of these children can be devastating: such juveniles are more likely to harm themselves, or to be harmed by other inmates or staff.<sup>42</sup>

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<sup>37</sup> Final Observations Regarding the Merits of the Case, *supra* note 7, at 42-43.

<sup>38</sup> See *supra*, note 25 and accompanying text.

<sup>39</sup> Final Observations Regarding the Merits of the Case, *supra* note 7, at 47.

<sup>40</sup> Human Rights Watch, *Against All Odds: Prison Conditions for Youth Offenders Serving Life without Parole Sentences in the United States*, 8 (2012), available at [http://www.hrw.org/sites/default/files/reports/us0112ForUpload\\_1.pdf](http://www.hrw.org/sites/default/files/reports/us0112ForUpload_1.pdf) (“*Against All Odds*”).

<sup>41</sup> *Id.*

<sup>42</sup> H. Ted Rubin, Campaign for Youth Justice, *Return Them to Juvenile Court*, 12-13 (2007), available at <http://www.campaignforyouthjustice.org/documents/ReturnThem.pdf> (quoting a Youth Transition Funders Group publication reporting that “studies show that youth held in adult facilities are eight times more likely to commit suicide, five times more likely to report being a victim of rape, twice as likely to report being beaten by staff and 50 percent more likely to be attacked with a weapon.” Youth Transition Funders Group, *A Blueprint for Juvenile Justice Reform*, ¶ 9 (2005), available at [http://www.ytfg.org/documents/Platform\\_Juvenile\\_Justice.pdf](http://www.ytfg.org/documents/Platform_Juvenile_Justice.pdf) (“*A Blueprint for Juvenile Justice Reform*”).

Even a short detention with adults can have pernicious and long-lasting effects on children’s physical and mental health, their engagement with the criminal process, and their future development. The dangers children face in adult detention facilities were recognized in the 2003 Prison Rape Elimination Act (“PREA”), which requires that children be separated from adults in housing units, but state and local compliance with PREA is not mandatory.<sup>43</sup> Furthermore, PREA does not require separation in “areas outside of housing units,” as long as there is “direct staff supervision when youthful inmates and adult inmates have sight, sound, or physical contact.”<sup>44</sup> In many states, children detained in adult facilities need not be separated from adults; in 2012, only 28 states restricted contact between youth and adults at adult facilities.<sup>45</sup>

Due to the mental and physical vulnerabilities that typically accompany youth, juveniles incarcerated in adult facilities are more likely to be victims of rape, to be attacked with a weapon, to be beaten or sexually abused by staff, and to commit suicide.<sup>46</sup> As a general matter, younger inmates report the highest rates of sexual victimization, particularly victimization perpetrated by facility staff.<sup>47</sup> According to DOJ data, between one-third and one-half of victims

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<sup>43</sup> Prison Rape Elimination Act National Standards 28 CFR §115. States that do not comply with PREA standards “are subject to a five percent reduction in funds they would otherwise receive for prison purposes from the [Department of Justice] unless the governor certifies that five percent of such funds will be used to enable compliance in future years.” Press Release, U.S. Department of Justice, Office of Public Affairs, *Justice Department Releases Final Rule to Prevent, Detect and Respond to Prison Rape* (May 17, 2012), available at <http://www.justice.gov/opa/pr/2012/May/12-ag-635.html>.

<sup>44</sup> 28 CFR §115.14(b).

<sup>45</sup> National Standards to Prevent, Detect, and Respond to Prison Rape, 37, 105 Fed. Reg. 37,128 (June 20, 2012) (to be codified at 28 C.F.R. pt. 115); Campaign for Youth Justice, *Jailing Juveniles: The Dangers of Incarcerating Youth in Adult Jails in America*, 26-37 (2007), available at [http://www.campaignforyouthjustice.org/documents/CFYJNR\\_JailingJuveniles.pdf](http://www.campaignforyouthjustice.org/documents/CFYJNR_JailingJuveniles.pdf) (“*Jailing Juveniles*”).

<sup>46</sup> “Studies show that youth held in adult facilities are eight times more likely to commit suicide, five times more likely to report being a victim of rape, twice as likely to report being beaten by staff and 50 percent more likely to be attacked with a weapon.” Rubin, *supra* note 42, at 12-13 (quoting *A Blueprint for Juvenile Justice Reform*, *supra* note 42, at ¶ 9).

<sup>47</sup> *Against All Odds*, *supra* note 40, at 14 (2012).

of inmate-to-inmate sexual abuse in prisons in the United States are under 25.<sup>48</sup> Moreover, underreporting undoubtedly obscures the true level of physical and sexual violence juveniles experience in adult jails and prisons: although they are often the victims of assault, juveniles rarely report it.<sup>49</sup> In a 2011-2012 survey, the DOJ found that, outside the survey, only 15.4% of 16- to 17-year-old inmate victims had reported specific instances of sexual assault perpetrated by fellow inmates.<sup>50</sup> That number dropped to 9% in cases where the perpetrator was a staff member.<sup>51</sup>

## 1. Sexual Violence

In interviews conducted from 2004 to 2009 by Human Rights Watch with youth serving life without parole sentences, almost every one of hundreds of youth raised the issue of sexual assault.<sup>52</sup> Billy G., 17 years old when convicted, described his physique at the time: “At trial, I was 5’5” and 119, 120 pounds.” He said he entered prison “scared, confused, and intimidated.”<sup>53</sup> Brian B. entered a Pennsylvania prison and began a sentence of life without parole at the age of 17 and was “housed in an open poorly supervised unit.”<sup>54</sup> In a letter to Human Rights Watch Brian B. described being assaulted by “a group of large men [who] rushed into my cell, holding me down . . . pulling my clothes off while another took a syringe. . . . [and]

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<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> Allen Beck, et al., U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Sexual Victimization in Prisons and Jails Reported by Inmates, 2011-2012*, 23 (2013), available at <http://www.bjs.gov/content/pub/pdf/svpjri1112.pdf> (“*Sexual Victimization in Prisons and Jails*”).

<sup>51</sup> *Id.*

<sup>52</sup> *Against All Odds*, *supra* note 40

<sup>53</sup> *Against All Odds*, *supra* note 40, at 15 (citing Interview by Human Rights Watch with Billy G. (pseudonym) (June 29, 2007)).

<sup>54</sup> *Id.* at 16 (citing Interview by Human Rights Watch with Brian B. (pseudonym) (August 28, 2004) (on file with Human Rights Watch)).

drew up whatever was in the spoon. I were then injected with whatever it were. And then raped.”<sup>55</sup>

Almost every male inmate serving a life without parole sentence for an offense committed as a child interviewed by Human Rights Watch described having been approached by other prisoners for sexual favors, or having to fight to protect themselves from rape.<sup>56</sup> Warren P. wrote that when he first came to prison, at the age of 15, to begin his life without parole sentence, he “was the target of covert sexual predators. Adults would pretend to be your best friend to get close to you, then they would try you.”<sup>57</sup> Warren P. added that “[o]fficers would be hard on me more so than the adults for they believe that the younger inmates need rougher treatment.”<sup>58</sup> Eric R., who began to serve his JLWOP sentence in a Michigan prison at the age of 16, described “attempts . . . made to lure me into out of the way places so that I could be sexually assaulted.”<sup>59</sup> Tyler Y. described being “stalked” by sexual predators: “at all times I expected to be attacked.”<sup>60</sup> Predictably, the problem of sexual violence lessens as youth offenders age in prison.<sup>61</sup> As Addison R., another juvenile who entered a Michigan prison at age 16, explained after serving his first 20 years: “I’ve gotten older, a little bit more mature, a little

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<sup>55</sup> *Id.* (citing Interview by Human Rights Watch with Brian B. (pseudonym) (August 28, 2004) (on file with Human Rights Watch))

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* (citing Letter from Warren P. (pseudonym) to Human Rights Watch (Mar. 2, 2004) (on file with Human Rights Watch)).

<sup>58</sup> *Id.* (citing Letter from Warren P. (pseudonym) to Human Rights Watch (Mar. 2, 2004) (on file with Human Rights Watch)).

<sup>59</sup> *Id.* (citing Letter from Eric R. (pseudonym) to Human Rights Watch (Mar. 18, 2004) (on file with Human Rights Watch)).

<sup>60</sup> *Id.* (citing Letter from Tyler Y. (pseudonym) to Human Rights Watch (Mar. 16, 2004) (on file with Human Rights Watch)).

<sup>61</sup> *Id.* at 17.

bit bigger in physical size, and the older prisoners have stopped preying on me for sex. . . .

[Before] I've had to stab other prisoners for preying on me for sex."<sup>62</sup>

## 2. Physical Violence

Youth offenders are frequently the victims of nonsexual violence as well, and perpetual witnesses to it. Juveniles in adult facilities must survive a psychologically damaging atmosphere in which the threat of violence is constant and they are forced to witness extreme violence inflicted on those around them. Almost all youth offenders serving life without parole interviewed or surveyed by Human Rights Watch suffered physical violence at the hands of other inmates.<sup>63</sup>

In a 2007 survey of juveniles imprisoned in adult facilities, almost half reported witnessing stabbings, and some described murders, rapes, strangulations, and severe beatings.<sup>64</sup> "Someone tried to cut my throat with a razor knife," Gary J. told Human Rights watch.<sup>65</sup> "I've seen more death in here than I did when I was living in the inner city," Rudy L. said.<sup>66</sup> Bilal R. wrote, "I have seen stabbings, rapes, robberies, and many other things. I've been stabbed more than once."<sup>67</sup> According to youth testimonials, other inmates are not the only source of violence: guards also assaulted youth offenders, or purposefully left youth offenders vulnerable to abuse

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<sup>62</sup> *Id.* (citing Letter from Addison R. (pseudonym) to Human Rights Watch (Mar. 20, 2004) (on file with Human Rights Watch)).

<sup>63</sup> *Id.* at 18.

<sup>64</sup> *When I Die*, *supra* note 20, at 14.

<sup>65</sup> *Against All Odds*, *supra* note 40, at 18 (citing Survey Response from Gary J. (pseudonym) to Human Rights Watch (July 26, 2007) (on file with Human Rights Watch)).

<sup>66</sup> *Id.* at 19 (citing Survey Response from Rudy L. (pseudonym) to Human Rights Watch (July 29, 2007) (on file with Human Rights Watch)).

<sup>67</sup> *Id.* (citing Survey Response from Bilal R. (pseudonym) to Human Rights Watch (July 24, 2007) (on file with Human Rights Watch)).

from other inmates in spite of complaints.<sup>68</sup> Whether facility staff or fellow inmates meted out the violence, nearly every youth offender described receiving injuries as the result of prison violence.

### 3. Psychological Harm

In the name of self-preservation, juveniles have resorted to self-harm and violence, attempting suicide, smearing feces on themselves, claiming they hear voices and assaulting staff—all in the hope that prison officials will be forced to isolate them from the adult inmates they fear.<sup>69</sup>

Although juveniles in adult facilities may seek isolation when faced with physical and sexual violence, isolation is itself damaging. In isolation, juveniles commonly experience intense loneliness, anxiety, paranoia and depression, even when held for relatively brief periods.<sup>70</sup> The experience can also exacerbate preexisting mental health issues and suicidal impulses, and has long-term psychological implications.<sup>71</sup> One recent study analyzing incidents of self-harm in New York City jails found that, while only 7.3% of people admitted to jail were

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<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 13.

<sup>70</sup> *Id.*; *Jailing Juveniles*, *supra* note 45, at 4, 14.

<sup>71</sup> See *Growing Up Locked Down*, *supra* note 6, at 2, 23-24; Craig Haney, *Mental Health Issues in Long-Term Solitary and 'Supermax' Confinement*, 49 *Crime & Delinquency* 1, 124-156 (2003); Holly A. Miller & Glenn R. Young, *Prison Segregation: Administrative Detention Remedy or Mental Health Problem?*, 7 *Crim. Behav. & Mental Health* 1, 85 (1997); Hans Toch, *Mosaic of Despair: Human Breakdown in Prison* (1992); Richard Korn, *The Effects of Confinement in the High Security Unit at Lexington*, 15 *Social Justice* 1, 8 (1988); Stanley L. Brodsky & Forrest R. Scogin, *Inmates in Protective Custody: First Data on Emotional Effects*, 1 *Forensic Reports* 4, 4, 267 (1988); Stuart Grassian, *Psychopathological Effects of Solitary Confinement*, 140 *Am. J. of Psychiatry* 1450 (1983). Expert Report of Professor Craig Haney, *Coleman v. Schwarzenegger*, 922 F.Supp.2d 882, 145-46 n.119 (E.D. Cal./N.D. Cal. 2008); see also Expert Report of Professor Craig Haney, *Plata v. Schwarzenegger*, 603 F.3d 1088 (9th Cir. 2010).

placed in solitary confinement, “53.3% of acts of self-harm and 45.0% of acts of potentially fatal self-harm occurred within this group.”<sup>72</sup>

Thoughts of suicide are by no means confined to those in isolation cells. A child in an adult facility is far more likely to contemplate and attempt suicide than one in a juvenile facility.<sup>73</sup> The U.S. Congress has recognized that youth are 19 times more likely to commit suicide in jail than youth in the general population and 36 times more likely to commit suicide in an adult jail than in a juvenile detention facility.<sup>74</sup> Moreover, the danger is immediate: nearly half of suicides in jails occur during the first week spent in custody.<sup>75</sup> The consequences of holding juveniles with adults while they await prosecution are grave and lasting, and begin the moment a juvenile passes through the doors of an adult jail.

The psychological harm of incarcerating juveniles alongside adults is especially evident in recidivism rates. Children tried as adults<sup>76</sup> reoffend at a higher rate than children processed through the juvenile justice system,<sup>77</sup> likely because adult facilities expose juveniles to negative role models and opportunities for criminal training.<sup>78</sup> In addition, juveniles sentenced

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<sup>72</sup> Fatos Kaba et. al., *Solitary Confinement and Risk of Self-Harm Among Jail Inmates*, 104 Am. J. Pub. Health 3, 443 (2014).

<sup>73</sup> *Jailing Juveniles*, *supra* note 45, at 4; Christopher J. Mumola, U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Suicide and Homicide in State Prisons and Local Jails*, 5 (2005) (“Mumola”) (“Jail suicide rates also increased with inmate age. . . . The youngest jail inmates were the exception to this pattern; jails inmates under 18 had the highest suicide rate in local jails [.]”).

<sup>74</sup> Juvenile Justice and Delinquency Prevention Reauthorization Act of 2009, S. 678, 111th Cong. § 101(9) (2009).

<sup>75</sup> *Jailing Juveniles*, *supra* note 45, at 10; Mumola, *supra* note 73, at 8.

<sup>76</sup> *See infra* Part III.A.

<sup>77</sup> Rubin, *supra* note 42, at 13; *see also* Amanda Burgess-Proctor, et al., Campaign for Youth Justice, *Youth Transferred to Adult Court: Racial Disparities*, 4-5 (2007), available at <http://www.campaignforyouthjustice.org/Downloads/KeyResearch/MoreKeyResearch/AdultificationPolicyBriefVol2.pdf>.

<sup>78</sup> *Id.* at 5.



as adults often feel stigmatized and experience a sense of resentment and injustice.<sup>79</sup> Moreover, adult prisons change children. One youth offender described the coping mechanism that imprisonment alongside adults forced him to develop: “It has affected me because I now feel I am two separate people. One being the [Joseph Thomas] everyone knows, loves, would not hurt anyone and two being the man who puts on the mask and does what he has to do to survive.”<sup>80</sup>

#### 4. Other Deprivations

In addition to these abuses, juveniles serving JLWOP sentences are subject to additional denials of rights and services in the adult criminal system. Adult prisons deprive juveniles of rehabilitation opportunities they would have received in juvenile detention centers,<sup>81</sup> and also provide fewer mental health services.<sup>82</sup> “While children adjudicated delinquent in the juvenile justice system have had a statutory and constitutional right to treatment since the 1970s, children prosecuted in the adult system do not.”<sup>83</sup>

Moreover, few adult facilities provide specialized training for managing juveniles serving JLWOP sentences, let alone JLWOP-specific rehabilitation and education, instead justifying their inaction by reference to the JLWOP status itself: because these children will

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<sup>79</sup> Richard E. Redding, U.S. Department of Justice, Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention, *Juvenile Transfer Laws: An Effective Deterrent to Delinquency?*, 7 (2010), available at <https://www.ncjrs.gov/pdffiles1/ojjdp/220595.pdf> (“Redding”).

<sup>80</sup> *Against All Odds*, *supra* note 40, at 21 (citing Survey response from Thomas N. (pseudonym), serving life without parole in California, to Human Rights Watch, July 24, 2007 (on file with Human Rights Watch)).

<sup>81</sup> Emily Gaarder & Joanna Belknap, *Tenuous Borders: Girls Transferred to Adult Court*, 40 *Criminology* 481, 481-517 (2002); Marcy Podkopacz & Barry C. Feld, *The Back-Door to Prison: Waiver Reform, Blended Sentencing, and the Law of Unintended Consequences*, *J. of Crim. L. and Criminology* 91, 997-1072 (2000-2001); Rubin, *supra* note 42, at 2,9.

<sup>82</sup> M. Schindler & J. A. Arditti, *The Increased Prosecution of Adolescents in the Adult Criminal Justice System: Impacts on Youth, Family, and Community*, *Marriage & Family Review* 32, 165-187 (1988); Rubin, *supra* note 42, at 2,9.

<sup>83</sup> Using *Graham* to Challenge Juvenile Transfer Laws; *See also* Neelum Arya, Campaign for Youth Justice, *State Trends: Legislative Victories from 2005 to 2010: Removing Youth from the Adult Criminal Justice System*, 123 (2011), available at [http://www.campaignforyouthjustice.org/documents/CFYJ\\_State\\_Trends\\_Report.pdf](http://www.campaignforyouthjustice.org/documents/CFYJ_State_Trends_Report.pdf) (“*State Trends*”).

never leave prison, resources are not devoted to them.<sup>84</sup> Class space is often limited, and juveniles serving JLWOP sentences are generally at the bottom of the waiting list.<sup>85</sup> Intake tools contribute to the problem by counting against prisoners factors typically associated with youth. In California, for example, never having been married, not having a General Education Development certification (“GED”), and not having spent more than six months with one employer are all factors that increase an inmate’s security rating. The higher an inmate’s rating, the less access he or she has to rehabilitation and education opportunities.<sup>86</sup>

Recognizing the collective failure of states across the United States to adequately regulate the detention of juveniles in adult prisons, the federal government has ostensibly attempted to intervene by way of the federal Juvenile Justice & Delinquency Prevention Act (“JJDP Act”). The JJDP Act generally requires, as a condition of federal funding for state juvenile justice systems, that juveniles not be confined in jails or other facilities in which they have contact with adults. Despite Congress’s clear recognition of the problems of detaining children in adult jails before trial, however, the JJDP Act itself contains broad loopholes that eviscerate its protections. Critically, the JJDP Act and related federal regulations allow the detention of children in adult prisons whenever a child is prosecuted in or transferred to the adult criminal system.<sup>87</sup> As every state in the United States allows the prosecution of children in the adult system in at least some circumstances, the JJDP Act provides no help to hundreds of

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<sup>84</sup> *Against All Odds*, *supra* note 40, at 26-27.

<sup>85</sup> *Id.* at 27-28 (citing interviews conducted by Human Rights Watch with officials in state corrections departments in 22 states).

<sup>86</sup> *Id.* at 28-29.

<sup>87</sup> 28 CFR § 31.303(d)(1)(v) (The statute “neither prohibits nor restricts the waiver or transfer of a juvenile to criminal court for prosecution, in accordance with State law, for a criminal felony violation, nor the detention or confinement of a waived or transferred criminal felony violator in an adult facility.”). *See also State Trends, supra* note 83, at 15 (2011); *Youth in the Adult Criminal Justice System, supra* note 12, at 5.

thousands of children.<sup>88</sup> While PREA does apply to children prosecuted and incarcerated in the adult system, as discussed above, compliance with PREA is not mandatory.

### III

#### **BROADER CONTEXT OF TREATMENT OF JUVENILES AS ADULTS IN THE UNITED STATES' CRIMINAL JUSTICE SYSTEM**

Juvenile life without parole sentences represent the culmination of an insidious and regressive process that has transformed juvenile justice in the United States. To be sure, JLWOP sentences are the United States' most egregious violation of its international law obligations to children in the criminal justice system, but these sentences are made possible by a chain of other violations. In a process known as "adultification," children are diverted from the juvenile justice system and channeled into the adult criminal system, where they are tried and sentenced as if they were adults, and in many cases imprisoned with adults for life, and without the possibility of parole.

The United States itself recognizes that approximately 200,000 children under age 18 were processed as adults in an adult criminal justice system in the United States in 2007.<sup>89</sup> In 2010, an estimated 140,000 youths were incarcerated in adult jails or prisons.<sup>90</sup> These statistics reveal a vast number of children in the United States who do not receive special protection at all in major stages of the criminal justice system, including initial contacts, pretrial detention, trial, sentencing, and incarceration. But the American Declaration of the Rights and Duties of Man, the jurisprudence of the Inter-American Court, and international law generally demand otherwise.

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<sup>88</sup> See *infra* Part III.

<sup>89</sup> Griffin, *supra* note 5, at 20-21.

<sup>90</sup> *Growing Up Locked Down*, *supra* note 6, at 106.

## **A. Initial Contacts With The Adult System**

A juvenile’s encounter with the adult criminal justice system in the United States typically begins with one of several forms of transfer mechanisms—laws that allow a child under the age of 18 to be transferred to, or charged directly in, adult criminal court. As discussed below, these transfer mechanisms generally are not restricted to the oldest children or the most serious offenses, and may be used regardless of what would be in a particular juvenile defendant’s best interest.

### **1. Transfer Laws**

The oldest type of transfer mechanism is the so-called “judicial waiver” proceeding, in which jurisdiction over a child defendant may be transferred from the specialized juvenile justice system to the adult criminal system upon request by the government and following a hearing before and order by a juvenile court judge.<sup>91</sup> While judicial waiver laws have existed since the 1950s and are now in effect in 46 states and the District of Columbia,<sup>92</sup> every state has more recently adopted one or more alternative transfer mechanisms that make it significantly easier to prosecute children in the adult criminal system, by substantially limiting—or entirely circumventing—juvenile court oversight of the transfer process.<sup>93</sup> In addition to judicial waiver laws, these alternative transfer mechanisms include:

- laws that automatically withdraw juvenile court jurisdiction over certain offenses and age groups;
- “mandatory waiver” laws that require a juvenile court to transfer children to adult criminal court for certain offenses and age groups;

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<sup>91</sup> See Griffin, *supra* note 5, at 2.

<sup>92</sup> See Appendix.

<sup>93</sup> *Id.*

- laws that grant prosecutors discretion to charge juveniles directly in adult criminal court;
- “reverse transfer” laws that allow juveniles to be charged in adult criminal court in the first instance, and place the burden on the child if he or she seeks to be transferred back to juvenile court;
- “presumptive waiver” laws that place the burden on the juvenile to demonstrate why he or she should remain in juvenile court; and
- “once an adult, always an adult” laws that require juveniles always to be prosecuted as adults if they have been previously prosecuted as adults.

Transfer laws represent a violation of children’s right to special protection, but the true extent of their use, and the harms they inflict, is obscured by the general failure of state and federal governments to systematically collect and publish data on children in the adult criminal justice system. Transfer laws enable the ultimate imposition of JLWOP sentences. For many children, transfer to adult court marks the first step toward a lifetime in prison, with no hope of release.

*a. Judicial Waiver*

When a juvenile’s case is brought before a juvenile court in the first instance, 46 states and the District of Columbia allow the juvenile court to waive jurisdiction over some categories of cases or defendants and to transfer the juvenile to adult criminal court, usually following a motion from the prosecution.<sup>94</sup> The specific requirements of judicial waiver statutes vary by state, but they generally are not limited to consideration of the child’s best interests, and

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<sup>94</sup> Figure cited reflects the current status of state laws, as compiled in the Appendix. *See* Appendix; *see also* Griffin, *supra* note 5, at 2.

instead direct the juvenile court to consider the nature of the crime and the age, maturity, history, and rehabilitative prospects of the juvenile.<sup>95</sup>

In Michigan, for example, a juvenile court will consider the following factors before waiving jurisdiction over a juvenile: (1) the seriousness of the alleged offense; (2) the juvenile's prior record of delinquency; (3) the culpability of the juvenile in committing the alleged offense; (4) the juvenile's rehabilitative programming history; (5) the adequacy of punishment or programming available in the juvenile justice system; and (6) the dispositional options available for the juvenile.<sup>96</sup> The first two factors are to be given greater weight than all the rest, and thus the child's best interests are not the primary consideration.<sup>97</sup> In Kansas, to take another example, the juvenile court may consider whether the interests of the juvenile or the community would be better served by criminal prosecution as an adult, among other factors.<sup>98</sup> An insufficiency of evidence pertaining to any one factor is not determinative; therefore the juvenile court's transfer decision need not consider the child's best interests at all.<sup>99</sup>

In many states, judicial waivers are not reserved for the oldest juvenile offenders. Nationwide in 2007, 12% of transfers from juvenile to adult court involved children age 15 or younger.<sup>100</sup> In Michigan, a 14-year-old child can be judicially transferred to adult criminal court if accused of a felony, which generally includes any offense punishable by imprisonment for more than one year.<sup>101</sup> In other states, the minimum age for judicial waiver is even lower: in

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<sup>95</sup> *Id.*

<sup>96</sup> Mich. Comp. Laws § 712A.4 (West 1998).

<sup>97</sup> *Id.*

<sup>98</sup> Kan. Stat. Ann. § 38-2347 (West 2012).

<sup>99</sup> *See id.*

<sup>100</sup> *See Griffin, supra* note 5, at 10.

<sup>101</sup> Mich. Comp. Laws § 712A.4 (West 1998).

Kansas, a 10-year-old can be transferred for any criminal offense;<sup>102</sup> in Vermont, a 10-year-old can be transferred for certain offenses against the person and property offenses;<sup>103</sup> in Indiana, a 10-year-old can be transferred for murder.<sup>104</sup> Fifteen states and the District of Columbia have no age limit for judicial waiver with respect to certain offenses.<sup>105</sup>

Judicial waivers also are not necessarily limited to the most egregious cases; in many states waiver is permitted for minor or non-violent offenses. A drug or property offense was the most serious charge in approximately 40% of judicial waivers in 2007.<sup>106</sup> Twenty-one states and the District of Columbia permit children to be transferred to adult criminal court for any criminal offense, depending on their age.<sup>107</sup> In Wyoming, a 13-year-old can be transferred to adult criminal court on a misdemeanor charge.<sup>108</sup>

*b. Statutory Exclusion Laws*

In 47 states and the District of Columbia, cases against some juveniles never come before a juvenile court judge because they are filed directly in adult criminal court.<sup>109</sup> In 31 of these states, direct filing in adult court is achieved by statutory exclusion laws—laws that exclude some children from juvenile court jurisdiction by setting age, offense, and prior record criteria that, if met, automatically remove the juvenile from the jurisdiction of the juvenile court.

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<sup>102</sup> Kan. Stat. Ann. § 38-2302(i) (West 2011), Kan. Stat. Ann. § 38-2347 (West 2012).

<sup>103</sup> Vt. Stat. Ann. tit. 33, § 5204 (West 2012).

<sup>104</sup> Ind. Code Ann. § 31-30-3-1-4 (West 2008).

<sup>105</sup> These states are Alaska, Arizona, Delaware, Hawaii, Idaho, Maine, Maryland, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Washington, West Virginia, and the District of Columbia. See Appendix.

<sup>106</sup> See Griffin, *supra* note 5, at 10.

<sup>107</sup> Alabama, Alaska, California, Delaware, Florida, Georgia, Idaho, Illinois, Iowa, Kansas, Maryland, Mississippi, Nevada, New Jersey, North Dakota, Rhode Island, South Carolina, Tennessee, Washington, Wisconsin, Wyoming, and the District of Columbia. See Appendix.

<sup>108</sup> Wyo. Stat. Ann. § 14-6-203 (West 2013).

<sup>109</sup> See Appendix.

In some states, including Florida, Nevada, and Pennsylvania, a child of any age may be considered an adult for jurisdictional purposes for some offenses.<sup>110</sup>

Even in states that set a minimum age for statutory exclusions, the age limit is often low. In Wisconsin, a 10-year-old child who commits certain offenses is statutorily excluded from the juvenile justice system.<sup>111</sup> In Georgia, Mississippi, and New York, cases involving thirteen-year-old children charged with certain offenses are automatically filed in the criminal court system.<sup>112</sup> In Michigan, a 14-year old child accused of certain crimes must be charged in adult criminal court unless the prosecuting attorney affirmatively files a petition seeking permission to proceed in juvenile court.<sup>113</sup>

In addition to setting offense-based criteria for juvenile court jurisdiction, some states set an across-the-board age limit on juvenile court jurisdiction that is below 18. In 2007, the upper age limit for juvenile jurisdiction in New York and North Carolina was 15—this means that any child of 16 or 17 charged with a criminal offense in these states has no option of proceeding in juvenile court.<sup>114</sup> In Michigan, New Hampshire, South Carolina, and Wisconsin, the maximum age-limit for the juvenile justice system is 16.<sup>115</sup>

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<sup>110</sup> Fla. Stat. Ann. § 985.557 (West 2011); Nev. Rev. Stat. § 62B.330 (West 2009); 42 Pa. Cons. Stat. Ann. § 6355 (West 1995); *see also* Appendix.

<sup>111</sup> Wis. Stat. Ann. § 938.183 (West 2008).

<sup>112</sup> Ga. Code Ann. § 15-11-560 (West 2014); Miss. Code Ann. § 43-21-151 (West 2011); N.Y. U.C.C. Law § 30.00 (McKinney 2007).

<sup>113</sup> Mich. Comp. Laws § 712A.2 (West 2002); Mich. Comp. Laws § 600.606 (West 1997).

<sup>114</sup> N.Y. U.C.C. Law § 30.00 (McKinney 2007); N.C. Gen. Stat. Ann. § 7B-1604 (West 1999); *see also* Appendix.

<sup>115</sup> Mich. Comp. Laws § 712A.2 (West 2002); N.H. Rev. Stat. Ann. § 169-B:2 (2013); S.C. Code Ann. § 63-19-20 (2008); Wis. Stat. Ann. § 938.12 (West 2006); *see also* Appendix.



c. *Mandatory Waiver*

Mandatory waiver laws exist in 15 jurisdictions.<sup>116</sup> These laws are similar in effect to the jurisdictional exclusions discussed above, except that the accused child begins in juvenile court merely as a formality and then is automatically transferred to adult court if certain age and offense criteria are met.<sup>117</sup>

States across the United States have adopted low age thresholds for mandatory waivers, even for non-violent offenses. North Carolina mandates the transfer of 13-year-old children to adult court for certain felonies.<sup>118</sup> Seven states—Connecticut, Kentucky, North Dakota, Ohio, South Carolina, Virginia, and West Virginia—mandate the transfer of 14-year-old children to adult court for at least some offenses.<sup>119</sup> In North Dakota and South Carolina, transfer is mandatory for 14-year-olds for certain drug offenses,<sup>120</sup> and Indiana and Delaware impose no age limit on mandatory transfers for certain felonies.<sup>121</sup>

d. *Prosecutorial Discretion*

Sixteen states and the District of Columbia grant juvenile and adult criminal courts concurrent jurisdiction over certain offenses, and then vest prosecutors with broad discretion to choose where to file a particular case.<sup>122</sup> The prosecutor's decision typically may be exercised without court oversight, and there generally is no hearing or record that would provide a juvenile an opportunity to challenge the decision or even learn the basis on which it

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<sup>116</sup> These states are Connecticut, Delaware, Georgia, Illinois, Indiana, Kentucky, Louisiana, New Jersey, North Carolina, North Dakota, Ohio, Rhode Island, South Carolina, Virginia, and West Virginia. *See* Appendix.

<sup>117</sup> Griffin, *supra* note 5, at 4; Redding, *supra* note 79, at 2.

<sup>118</sup> N.C. Gen. Stat. Ann. § 7B-2200 (West 1999).

<sup>119</sup> *See* Appendix.

<sup>120</sup> N.D. Cent. Code § 27-20-34 (2011); S. C. Code. Ann. § 63-19-1210 (2008).

<sup>121</sup> Del. Code tit. 10, § 1010 (West 2012); Ind. Code Ann. § 31-30-3-6 (West 1997).

<sup>122</sup> *See* Appendix.

was made.<sup>123</sup> Indeed, as the DOJ OJJDP acknowledges, “it is possible that prosecutorial discretion laws in some places operate like statutory exclusions, sweeping whole categories into criminal court with little or no individualized consideration.”<sup>124</sup>

Like other transfer mechanisms, prosecutorial discretion laws often are not limited to the oldest children or the most serious offenses. For example, prosecutors in Michigan and seven other states have discretion to charge 14-year-old children in adult court for certain offenses.<sup>125</sup> In Wyoming, a prosecutor may choose to prosecute any child over age 13 in adult criminal court for almost any misdemeanor.<sup>126</sup> In Montana, a prosecutor may charge a 12-year-old in criminal court for certain personal offenses.<sup>127</sup> In Nebraska, there is no age limit for choosing to file certain felony charges directly in criminal court, and a juvenile may be prosecuted in criminal court for any crime starting at age 16.<sup>128</sup>

*e. Reverse Waiver*

Twenty-six states currently provide reverse waiver mechanisms that allow a child to be charged in the adult criminal system for certain offenses, and then place the burden on the child to prove to a judge in the adult criminal system that he or she belongs in juvenile court.<sup>129</sup> In other words, the child is, in the eyes of the court, an adult until proven otherwise. Criminal court judges considering petitions for reverse waiver typically must consider a variety of factors, including the seriousness of the alleged offense and whether the “protection of society requires

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<sup>123</sup> Griffin, *supra* note 5, at 2, 5.

<sup>124</sup> Griffin, *supra* note 5, at 5.

<sup>125</sup> Mich. Comp. Laws § 712A.2 (West 2002); *see also* Appendix (Arizona, Arkansas, California, Florida, Massachusetts, Oklahoma, and Virginia).

<sup>126</sup> Wyo. Stat. § 14-6-203 (West 2013).

<sup>127</sup> Mont. Code Ann. § 41-5-206 (2011).

<sup>128</sup> Neb. Rev. Stat. Ann. § 43-247 (West 2013).

<sup>129</sup> *See* Appendix.

prosecution” in adult criminal court, the manner in which the alleged offense was carried out, whether the offense was against a person or property, and the culpability of the juvenile in committing the alleged offense, among other factors.<sup>130</sup> The best interests of the child are typically not among the factors considered.

*f. Presumptive Waiver*

Fifteen states categorize certain offenses as presumptively within the jurisdiction of the adult criminal court, and then shift the burden to the juvenile to prove to a juvenile court judge that he or she should not be transferred.<sup>131</sup> Although some states limit this burden shifting framework to children of certain age groups, other states do not. Rhode Island, for example, imposes no age limit at all—children carry the burden to remain in juvenile court for all criminal offenses, even misdemeanors.<sup>132</sup> In Maine, presumptive waiver has no age limit with respect to murder and certain personal offenses.<sup>133</sup> In California, Kansas, New Jersey, and North Dakota, a 14-year-old has the burden for certain drug offenses.<sup>134</sup>

*g. Once An Adult, Always An Adult*

The repercussions of a transfer decision extend beyond the particular case. In 35 states, the prosecution of a child as an adult transforms not only the instant case but also the child’s status, forever marking him or her an adult in the eyes of the law.<sup>135</sup> Such “once an adult, always an adult” laws generally provide that if a child has been transferred to adult court for one

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<sup>130</sup> See, e.g., Ark. Code Ann. § 9-27-318 (West 2003); Colo. Rev. Stat. Ann. § 19-2-517 (West 2012). Colorado’s reverse waiver statute additionally requires the court to consider the “interest of the community in the imposition of a punishment commensurate with the gravity of the offense” and the “impact of the offense on the victim.”

<sup>131</sup> See Griffin, *supra* note 5, at 4.

<sup>132</sup> R.I. Gen. Laws Ann. § 14-1-7.3 (West 2007).

<sup>133</sup> Me. Rev. Stat. Ann. tit. 15, § 3101 (2013).

<sup>134</sup> Cal. Welf. & Inst. Code § 707 (West 2012); Kansas Stat. Ann. § 38-2347 (West 2012); N.D. Cent. Code § 27-20-34 (2011).

<sup>135</sup> See Appendix.

offense, he or she must be prosecuted as an adult for any future offenses.<sup>136</sup> In other words, the first transfer deprives the child of any right to be treated as a juvenile in the future, regardless of the child's age or offense.

## 2. Regressive Trend

The transfer mechanisms discussed above are not vestiges of the past—they are the result of a recent and regressive agenda promoting the adultification of juvenile justice in the United States. Before the 1970s, only eight states had any kind of automatic transfer law, and only two states, Florida and Georgia, had prosecutorial discretion laws.<sup>137</sup> By the mid-1980s, 20 states had automatic transfer laws and 7 had prosecutorial discretion laws.<sup>138</sup> By the end of the 1990s, 38 states had automatic transfer laws and 15 had prosecutorial discretion laws, including Michigan.<sup>139</sup> Today, 48 states and the District of Columbia have automatic transfer laws and 17 states have prosecutorial discretion laws. In other words, over four decades, automatic transfer laws multiplied more than six-fold, from 8 to 49, and prosecutorial discretion laws more than doubled, from 7 to 17. Moreover, actual use of these alternative transfer mechanisms has been increasing, at the expense of judicial oversight of the transfer process.<sup>140</sup> The use of judicial waivers has fallen since the mid-1990s,<sup>141</sup> while the use of alternative transfer mechanisms has dramatically increased: in 1998, direct filing and statutory exclusions accounted for nearly 75% of all transfers.<sup>142</sup>

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<sup>136</sup> Griffin, *supra* note 5, at 7.

<sup>137</sup> Griffin, *supra* note 5, at 8-9.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* at 9.

<sup>141</sup> *Id.* at 10.

<sup>142</sup> *Id.* at 12.

The patchwork of laws produced by the proliferation of alternative transfer laws in all 50 states means not only that more children end up facing adult criminal charges and sentences, but also that a juvenile's chances of facing such charges, and of facing them without judicial oversight, depend on where the child happens to live. For example, from 2003 to 2008, Florida transferred youths at twice the rate of Arizona, eight times the rate of California, and five times the average rate in 12 other states.<sup>143</sup> Approximately 98% of the children prosecuted as adults in Florida during fiscal year 2012-13 were transferred to adult court via the state's direct file statute, meaning that prosecutors made virtually all transfer decisions, with no juvenile court oversight.<sup>144</sup>

Transfer mechanisms are also applied inconsistently to children of different races, with juveniles of color disproportionately transferred to adult criminal court.<sup>145</sup> Empirical studies of racial disparities in transfer cases are "sparse,"<sup>146</sup> but the few studies that do exist show that racial disparities in transfer cases reflect racial disparities in the juvenile system as a whole.<sup>147</sup> For example, one study by the U.S. Bureau of Justice Statistics, the U.S. Government body that collects, analyzes and publishes data relating to crime and the operation of the justice system, found that 62% of transfers in 40 large jurisdictions were of African-American juveniles.<sup>148</sup> A 1996 study found that transferred juveniles were more likely than adult felons to

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<sup>143</sup> *Id.* at 18.

<sup>144</sup> Human Rights Watch, Report on Florida's Prosecution of Children as Adults Pursuant to its Direct File Statute (forthcoming Apr.2014) ("HRW forthcoming Report").

<sup>145</sup> Rubin, *supra* note 42, at 13.

<sup>146</sup> M. A. Bortner, et al., *Race and Transfer: Empirical Research and Social Context*, in THE CHANGING BORDERS OF JUVENILE JUSTICE: TRANSFER OF ADOLESCENTS TO THE CRIMINAL COURT, 277, 282 (2000).

<sup>147</sup> Amanda Burgess-Proctor, et al., Campaign for Youth Justice, *Youth Transferred to Adult Court: Racial Disparities*, 9 (2007).

<sup>148</sup> Gerard Rainville & Steven Smith, U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Survey of 40 Countries, 1998: Juvenile Felony Defendants in Criminal Courts*, 2 (2003).

be African American (55% versus 45%).<sup>149</sup> The OJJDP reports that from 1985 to 1995, African-American juveniles were more likely than white juveniles to be transferred to adult court for all types of offenses and all age categories, and especially more likely when charged with drug offenses.<sup>150</sup> Although the frequent failure to separate race from ethnicity makes it more difficult to discern differential rates of transfer for Latino juveniles from the data, studies nevertheless show that Latino juveniles are similarly transferred more often than their white juvenile counterparts.<sup>151</sup>

New statistics from Human Rights Watch reveal that in Florida, where prosecutors wield great discretion over transfer decisions, black children are more frequently transferred to adult court than white children.<sup>152</sup> Although black boys make up 27.2 percent of all children received by the juveniles justice system—that is, those children arrested and initially processed by the Department of Juvenile Justice—they account for 51.4 percent of children sent to adult court.<sup>153</sup> White boys, on the other hand, make up 28 percent of children arrested and account for only 24.4 percent of youth tried in adult court.<sup>154</sup>

While the severity of crimes committed by black boys may explain some of this disparity—6% of white youth arrests are for violent felonies versus 10% of black youth arrests—an examination of transfer rates of black and white youth accused of similar non-homicide

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<sup>149</sup> *State Court Sentencing of Convicted Felons*, *supra* note 19, at 9.

<sup>150</sup> Griffin, *supra* note 5, at 12. *See also* HRW forthcoming Report, *supra* note 144. Human Rights Watch's analysis of data provided by the Florida Department of Juvenile Justice showed that, while black and white youth are transferred to adult court at similar rates for homicide and property crimes, black boys arrested for violent felonies (other than homicide) and drug felonies are more likely to be prosecuted in adult court than children of any other race or gender.

<sup>151</sup> Griffin, *supra* note 5, at 10.

<sup>152</sup> HRW forthcoming Report, *supra* note 144.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

violent offenses reveals this explanation to be incomplete.<sup>155</sup> Statewide, Florida courts transfer black youth arrested for violent felonies at higher rates than white youth arrested for violent felonies.<sup>156</sup> Black youths are also transferred with greater frequency than white youths for drug felony offenses.<sup>157</sup> Whatever ultimately causes the disparity, black boys are more likely to be transferred to the adult criminal system and, as a result, more likely to be tried, sentenced, and imprisoned as adults, perhaps for life.

### 3. States Fail To Collect Relevant Data

The true scope of the adultification of juvenile justice in the United States may in fact be much greater than what is reflected in the available data, because states and the federal government have largely failed to collect and publish data about children in the adult criminal justice system. By not providing this data, the states prevent the public from fully evaluating their practices and their compliance with international laws and norms.

Much of the available data concerning children in the adult criminal justice system involves children who are judicially waived into the adult system. While this data reveals a troubling number of children who are transferred to the adult system—in 2007, there were at least 8,500 documented cases in which children had been judicially waived to adult criminal courts—it also tells an incomplete story. The statistics do not include children transferred by the other alternative transfer mechanisms discussed above.<sup>158</sup> Fourteen states report no information whatsoever about transfers.<sup>159</sup> Only 2 of the 29 states with statutory exclusion laws in 2011

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<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> Griffin, *supra* note 5, at 2; D. M. Bishop & C. E. Frazier, *Consequences of Transfer*, in *THE CHANGING BORDERS OF JUVENILE JUSTICE: TRANSFER OF ADOLESCENTS TO THE CRIMINAL COURT*, 227, 229 (2000).

<sup>159</sup> Griffin, *supra* note 5, at 14.

publicly reported the number of children who were tried as adults because of this jurisdictional limitation.<sup>160</sup> Of the states with prosecutorial discretion laws in 2011, only one publicly reported the total number of juvenile cases that prosecutors chose to bring in adult criminal courts.<sup>161</sup> Thirteen states publicly report the total number of children who are transferred from juvenile court to adult criminal court, including statutory exclusions and prosecutorial discretion, but not all of these states report offense profiles, demographic characteristics, or other relevant details regarding processing and sentencing.<sup>162</sup>

Exacerbating the problem is the fact that there is no national database to coordinate and compile information gathered from the few state tracking programs that do exist.<sup>163</sup> Without a centralized and systematic reporting system about juveniles in the adult criminal system, data remains piecemeal and burdensome—if not impossible—to collect and analyze.<sup>164</sup>

As a final matter, once a juvenile enters the adult criminal system, few sources provide information regarding his or her fate. No federal agency systematically monitors the living conditions experienced by juvenile prisoners held in adult prisons, despite the existence of national agencies with specialized expertise like the federal OJJDP.<sup>165</sup>

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<sup>160</sup> *Id.* at 15.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> *Id.* at 12.

<sup>164</sup> *Id.* at 14. Although 14 states report data on judicially waived cases to the National Juvenile Court Data Archive, the Nation Center for Juvenile Justice's publication of national judicial waiver estimates does not provide state-specific information and thus does not help citizens assess the performance of individual jurisdictions

<sup>165</sup> *Growing Up Locked Down*, *supra* note 6, at 9.



## B. Pretrial Detention

The dangers of incarcerating children alongside adults<sup>166</sup> plague children before they enter prisons, and even before they are convicted of any crime. Juveniles who are prosecuted as adults generally may be, and often are, detained with adults while they await trial, despite the well-recognized dangers of doing so.<sup>167</sup> Juveniles are far less safe in adult jails than they would be in juvenile facilities, and even a short detention with adults can have devastating and long-lasting effects on children's physical and mental health, their engagement with the criminal process, and their future development.

In 2005, for example, the DOJ estimated that 21% of the victims of inmate-on-inmate violence in jails were children under the age of 18.<sup>168</sup> More than a quarter of these children were injured and two-thirds were victimized repeatedly.<sup>169</sup> Of those children physically or sexually victimized by other inmates, more than three-quarters report experiencing force or the threat of force, and nearly 40% were pressured by their assailant to engage in a sexual act.<sup>170</sup> As is the case with children housed in adult prisons, children detained with adults in adult jails are at great risk of not only violence, both physical and sexual, but also depression and suicide.<sup>171</sup>

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<sup>166</sup> See *supra* Part II.B.

<sup>167</sup> Griffin, *supra* note 5, at 22.

<sup>168</sup> *Jailing Juveniles*, *supra* note 45, at 4 (citing Allen Beck, et al., U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Sexual Violence Reported by Correctional Authorities, 2006* (2007) and Allen Beck, et al., U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Sexual Violence Reported by Correctional Authorities, 2005* (2006)).

<sup>169</sup> *Sexual Victimization in Prisons and Jails*, *supra* note 50, at 23.

<sup>170</sup> *Id.*

<sup>171</sup> “Studies show that youth held in adult facilities are eight times more likely to commit suicide, five times more likely to report being a victim of rape, twice as likely to report being beaten by staff and 50 percent more likely to be attacked with a weapon.” Rubin, *supra* note 42, at 12-13 (quoting *A Blueprint for Juvenile Justice Reform*, *supra* note 42, at ¶ 9). See *supra* Part II.B.3.

Almost all states permit pretrial detention of juveniles in adult facilities. As of 2011, 48 states allowed juveniles charged with adult offenses to be jailed in adult facilities while they awaited trial.<sup>172</sup> Fourteen states went further, actually requiring that juveniles prosecuted in adult criminal court be held in adult jails in at least some circumstances.<sup>173</sup> Only 15 states imposed a minimum age limit or required a court order for the pretrial detention of children in adult jails, and even those age limits are low—in some cases as young as 13 years.<sup>174</sup> In practice, children who are tried as adults are overwhelmingly likely to be detained in adult facilities before trial. One study found that 67.8% of juvenile defendants who were detained pretrial were held in an adult jails—with 58.3% of these children spending at least one month in an adult jail and 18.2% spending at least six months—although they had not yet been convicted of any crime.<sup>175</sup>

In many states, children detained in adult facilities need not be separated from adults. In 2007, only 18 states required such separation.<sup>176</sup> Michigan allows children under the age of 17 to be jailed with adults, subject only to the prior approval of the sheriff.<sup>177</sup> Once approval is given, such children are held physically separate from adult prisoners, but the law does not require them to be separated from adult prisoners by sight or sound.<sup>178</sup>

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<sup>172</sup> *Id.*

<sup>173</sup> *Id.* These states are Alabama, Alaska, Connecticut, Delaware (if over 16), Florida (for felony charges), Hawaii, Louisiana, Maryland, New Hampshire, and Oklahoma.

<sup>174</sup> *Jailing Juveniles, supra* note 45, at 26-37; Griffin, *supra* note 5, at 22.

<sup>175</sup> *Jailing Juveniles, supra* note 45, at 17-18; Jolanta Juskiewicz, *To Punish a Few: Too Many Youth Caught in the Net of Adult Prosecution*, 29, 34 (2007), available at [http://www.campaignforyouthjustice.org/documents/to\\_punish\\_a\\_few\\_final.pdf](http://www.campaignforyouthjustice.org/documents/to_punish_a_few_final.pdf).

<sup>176</sup> *Id.*; *Jailing Juveniles, supra* note 45, at 26-37.

<sup>177</sup> *Jailing Juveniles, supra* note 45, at 30.

<sup>178</sup> Mich. Comp. Laws Ann. § 764.27a(3) (West 2006). Both the Inter-American Court of Human Rights, *Juvenile Reeducation Institute* (interpreting Art.5(5) of the Convention on the Rights of the Child), and federal legislation in the United States, Juvenile Justice and Delinquency Prevention Act, require that children detained in adult facilities be separated from adults not only physically but visually and aurally as well.

### C. Trial

When a juvenile is transferred to the adult criminal system, the judges and lawyers who take control of the case rarely specialize in youth cases and generally do not consider whether a child defendant's age renders him or her incompetent to stand trial or to participate effectively in his or her defense. In the adult context, a competent defendant is one who has a basic understanding of the roles of his or her own and opposing attorneys; comprehends the functions of the judge and jury; is able to consult with his or her attorney in a meaningful way; and can weigh the consequences of the decisions he or she has to make, such as whether or not to accept a plea.<sup>179</sup> Children are much less likely than adults to have the ability to understand the purpose and nature of the trial process or to effectively apply such information to their own situations.<sup>180</sup> Lack of concentration, undeveloped memories, and general inexperience also combine to impair the ability of juveniles to provide their attorneys with relevant information regarding their alleged crimes, and to recognize which information is relevant in the first place.<sup>181</sup> As the U.S. Supreme Court recognized in *Graham v. Florida*, "the features that distinguish juveniles from adults also put them at a significant disadvantage in criminal proceedings."<sup>182</sup>

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<sup>179</sup> See, e.g., *Dusky v. United States*, 362 U.S. 402 (1960).

<sup>180</sup> See, Susan LaVelle Ficke, et al., *The Performance of Incarcerated Juveniles on the MacArthur Competence Assessment Tool-Criminal Adjudication (MacCAT-CA)*, 34 J. Am. Acad. Psychiatry Law 360, 361 (2006) (recognizing "consistent finding that age is related to [competency to stand trial] judgments and abilities." (internal quotation marks omitted)); see also Laurence Steinberg, *Adolescent Development and Juvenile Justice*, 5 Ann. Rev. Clinical Psychol. 459, 475 (2009); *When I Die*, supra note 20, at 5.

<sup>181</sup> Elizabeth Scott & Thomas Grisso, *Developmental Incompetence, Due Process and Juvenile Justice Policy*, Pub. L. & Legal Theory Working Paper Series 1, 29 (2004); see Thomas Grisso et al., *Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants*, 27 L. & Hum. Behav. 333, 343 (2003).

<sup>182</sup> *Graham v. Florida*, 130 S. Ct. 2011, 2032 (2011).

## 1. Juveniles Have Diminished Reasoning Ability

Research shows that many juveniles are not developmentally and intellectually mature enough to participate effectively in their trials.<sup>183</sup> One frequently cited study has shown that nearly 20% of 14- to 15-year-old juveniles are, because of their age, as cognitively deficient as mentally ill adult criminal defendants who, because of those deficiencies, would not be legally competent to stand trial.<sup>184</sup> The younger the child, the less likely he or she is to be competent: nearly one-third of children aged 11-13 and nearly one-fifth of children aged 14-15 have been shown to be significantly impaired in their abilities to reason and understand.<sup>185</sup>

One important problem is that children tend to favor immediate gains, such as an end to persistent questioning, over long-term goals.<sup>186</sup> For example, juveniles considering whether to waive their *Miranda* rights tend to focus on the immediate gain of getting to go home and avoiding a night in jail rather than the long-term goal of preserving, preparing for, and eventually presenting their strongest available defenses.<sup>187</sup> Moreover, children, particularly those under 15, are much more likely to endorse decisions that comply with what an authority seems to want,<sup>188</sup> and less likely to recognize the risks of legal decisions and long-term consequences.<sup>189</sup> Despite evidence that children lack critical abilities to participate effectively in

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<sup>183</sup> See Thomas Grisso et al., *Juveniles' Competence to Stand Trial*, 27 L. & Hum. Behav. 340 (2003).

<sup>184</sup> *Id.* at 356.

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*; Thomas Grisso, *Juveniles' Waiver of Rights: Legal and Psychological Competence*, 3 Perspectives in Law & Psychol., 151 (1981).

<sup>188</sup> *Id.* at 352, 357.

<sup>189</sup> *Id.*; MacArthur Foundation Research Network on Adolescent Development and Juvenile Justice, *Issue Brief 1: Adolescent Legal Competence in Court*, [http://www.adjj.org/downloads/9805issue\\_brief\\_1.pdf](http://www.adjj.org/downloads/9805issue_brief_1.pdf) (last visited Jan. 2, 2014).

the criminal process, special legal protections generally are not provided when children are transferred to the adult criminal system.

Recognizing the developmental and intellectual immaturity of children, some states have begun enacting juvenile competency laws ostensibly to assess the ability of children to participate effectively in their trials. However, such laws currently exist in only 17 states, and in any event they generally are limited to juvenile justice systems and so do not apply to children who have been transferred to adult criminal courts.<sup>190</sup> As a result, in most states juveniles may be required to stand trial in an adult criminal court without any special consideration given to their ability to participate effectively in the trial process.<sup>191</sup> Moreover, while some juvenile competency laws allow for the consideration of a particular child's age and developmental immaturity, most instead apply the less stringent competency standard the U.S. Supreme Court developed for adults: whether a defendant has "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and has "a rational as well as factual understanding of proceedings against him."<sup>192</sup> The application of a competency standard

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<sup>190</sup> National Conference of State Legislatures, *Juvenile Justice: States with Juvenile Competency Laws* (2013), <http://www.ncsl.org/research/civil-and-criminal-justice/states-with-juvenile-competency-laws.aspx> ("Juvenile Justice: States with Juvenile Competency Laws"); Kimberly Larson and Thomas Grisso, *Developing Statutes for Competence to Stand Trial in Juvenile Delinquency Proceedings: A Guide for Lawmakers*, 2 (Worcester, MA: National Youth Screening & Assessment Project, 2011), [http://www.njjn.org/uploads/digital-library/Developing\\_Statutes\\_for\\_Competence\\_to\\_Stand\\_Trial\\_in\\_Juvenile\\_Delinquency\\_Proceedings\\_A\\_Guide\\_for\\_Lawmakers-MfC-3\\_1.30.12\\_1.pdf](http://www.njjn.org/uploads/digital-library/Developing_Statutes_for_Competence_to_Stand_Trial_in_Juvenile_Delinquency_Proceedings_A_Guide_for_Lawmakers-MfC-3_1.30.12_1.pdf) (last visited January 2, 2014) ("*Developing Statutes for Competence to Stand Trial*") ("When states' laws allow [transfer of] younger adolescents, criminal courts are increasingly faced with the need to determine youths' competence to stand trial in criminal court before proceeding to trial. This has raised a number of issues associated with the criminal code's deficiencies in providing developmentally sensitive evaluation procedures or remedies for incompetence. Therefore, in many states, criminal statutes are in need of revision to manage these circumstances."). See, e.g., Ariz. Rev. Stat. Ann. § 8-291.01 (1996); Cal. Welf. & Inst. Code §709 (West 2012); La. Children's Code Ann. Art. 832 (2005); 52 Minn. Stat. Ann. 20.01 (2005).

<sup>191</sup> *Juvenile Justice: States with Juvenile Competency Laws*, *supra* note 190.

<sup>192</sup> *Dusky v. United States*, 362 U.S. 402 (1960); *Developing Statutes for Competence to Stand Trial*, *supra* note 190, at. See, e.g., Ariz. Rev. Stat. Ann. § 8-291.01 (1996); Cal. Welf. & Inst. Code §709 (West 2012); 52 Minn. Stat. Ann. 20.01 (2005); *Delinquency Proceedings: A Guide for Lawmakers*, *supra* note 190.

designed for adults by its own terms fails to account for the special needs and incapacities of children.

## **2. Juveniles Have Difficulty Understanding Their Legal Rights**

Studies have shown that fundamental legal rights are particularly difficult for juveniles to grasp. In one study, fewer than half of juveniles understood the *Miranda* warnings they received, compared with nearly three-quarters of adults.<sup>193</sup> A 2007 study similarly found low levels of juvenile comprehension: *Miranda* rights were not understood by 78% of defendants aged 11-13, 63% of defendants aged 14-15, and approximately 33% of defendants aged 16-17.<sup>194</sup>

Moreover, even when children understand their legal rights, they are less likely to exercise those rights out of fear of punishment. One study found that while two-thirds of adults understood that they could assert the right to remain silent without negative repercussions, the same percentage of juveniles believed that exercising their rights would provoke punishment.<sup>195</sup> Between not understanding their rights to begin with and often fearing reprisal for exercising those rights, juveniles are more likely to waive their rights. A 2005 study examining juveniles ages 11 to 17 detained in a juvenile facility found that 86% waived their right to remain silent.<sup>196</sup>

## **3. Juveniles Often Misunderstand The Role Of Their Own Counsel**

Juveniles often misunderstand the role of their counsel, and these misunderstandings can cause juveniles to undermine their defense by withholding relevant

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<sup>193</sup> Thomas Grisso, *The Competence of Adolescents as Trial Defendants*, 3 Psychol. Pub. Pol'y & Law 3, 12 (1997).

<sup>194</sup> Jodi Viljoen et al., *Adjudicative Competence and Comprehension of Miranda Rights in Adolescent Defendants: A Comparison of Legal Standards*, 25 Behav. Sci. & L. 1, 9 (2007).

<sup>195</sup> See *Juveniles' Waiver of Rights: Legal and Psychological Competence*, *supra* note 187, at 124.

<sup>196</sup> Jodi Viljoen et al., *Legal Decisions of Preadolescent and Adolescent Defendants: Predictors of Confessions, Pleas, Communication with Attorneys, and Appeals*, 29 L. & Hum. Behav. 253, 255, 261 (2005).

information.<sup>197</sup> One study of adolescents aged 12 to 18 showed that 26% believed that their lawyers could disclose to the judge any information the adolescents shared with them, and 30% believed the same with respect to their parents.<sup>198</sup> Another study found that 28% of juveniles believed that confidentiality did not apply if their lawyer knew they were guilty.<sup>199</sup> Juveniles were especially likely to believe this when represented by public defenders.<sup>200</sup>

Although the U.S. Supreme Court has recognized that juveniles are “less likely than adults to work effectively with their lawyers to aid in their defense,”<sup>201</sup> juveniles in the adult criminal system generally do not receive many of the basic protections they would otherwise receive in a juvenile justice system: children in the adult system do not typically receive legal counsel from professionals trained in the special needs of juveniles, nor do they receive specially-trained judges or probation officers, or special judicial procedures. In Michigan, a child prosecuted in juvenile court could be evaluated by psychologists with juvenile training or experience, would be detained in juvenile institutions, would have limitations placed on public access to court files, could receive appointed counsel even if he or she were not indigent, and would receive a fact-finding hearing rather than a criminal trial.<sup>202</sup> A child prosecuted in adult criminal court receives none of these protections.

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<sup>197</sup> Melinda Schmidt et al., *Effectiveness of Participation as a Defendant: The Attorney-Juvenile Client Relationship*, 21 *Behav. Sci. & L.* 175, 177 (2003).

<sup>198</sup> Michel Peterson-Badali et al., *Young People’s Experience of the Canadian Youth Justice System: Interacting with Police and Legal Counsel*, 17 *Behav. Sci. & L.* 455, 461 (1999).

<sup>199</sup> Thomas Grisso, *Juveniles’ Capacities to Waive Miranda Rights: An Empirical Analysis*, 68 *Cal. L. Rev.* 1134, 1158 (1980).

<sup>200</sup> Donna Bishop & Hillary Farber, *Joining the Legal Significance of Adolescent Developmental Capacities with the Legal Rights Provided by In re Gault*, 60 *Rutgers L. Rev.* 125, 164-65 (2007).

<sup>201</sup> *Graham*, 130 S. Ct. at 2032.

<sup>202</sup> See, e.g., *Cal. Welf. & Inst. Code* §709 (West 2012) (Judges will conduct hearings “in an informal nonadversary atmosphere” and “with a view to the expeditious and effective ascertainment of the jurisdictional facts,” focusing on “the present condition[,] . . . future welfare[,] . . . [and] best interests of the child.”); MCL Sec. 712A.1 (“proceedings under this chapter are not criminal proceedings”). See also Paul Robinson, *Punishing Dangerousness: Cloaking Preventive Detention as Criminal Justice*, 114 *Harv. L. Rev.* 1429, 1434-35 (2001) (“[A]

#### 4. Petitioner Kevin Boyd's Case

Petitioner Kevin Boyd's case illustrates the vulnerability of children in the adult criminal court system, both leading up to and during trial. After arresting him, police officers interrogated Kevin on several occasions.<sup>203</sup> They initially obtained Kevin's mother's consent to interrogate her son,<sup>204</sup> although neither she nor any responsible adult consented to the more than five hours of interrogation—lasting from 8:30 p.m. to 1:40 a.m.—that produced Kevin's murder confession.<sup>205</sup> Furthermore, neither Kevin's mother nor his counsel accompanied him during the interrogation, more than three and one half hours of which were not taped.<sup>206</sup> Kevin later recanted his confession, and his lawyer tried to have the confession excluded from the trial, arguing that Kevin's interrogators subjected him to psychological intimidation and coercion, and that they failed to inform him fully of his rights to an attorney and to remain silent.<sup>207</sup> Kevin's interrogators were also aware that Kevin was represented by counsel, Kevin's lawyer argued, yet they neither gave Kevin an opportunity to contact his lawyer nor ensured that his lawyer received notification of his detention.<sup>208</sup>

The adult court considering Kevin's case nevertheless admitted his confession into evidence. After a jury heard this confession and convicted Kevin of first-degree murder and conspiracy to commit murder, Kevin was sentenced as an adult, receiving life in prison. The

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young offender impaired in a similar way by immaturity has no defense or mitigation, because adult courts traditionally have not recognized an immaturity excuse. Courts have had no need to make such an excuse available in the past for the obvious reason that juvenile courts dealt with the cases involving youthful offenders. The recent trend toward trying youths in adult courts has created the need for such an excuse defense, but none has been developed, perhaps because the defense would interfere with the goal of gaining control over dangerous offenders without regard to their blamelessness.”).

<sup>203</sup> Final Observations Regarding the Merits of the Case, *supra* note 7, at 20.

<sup>204</sup> Final Observations Regarding the Merits of the Case, *supra* note 7, at 21.

<sup>205</sup> *Id.*

<sup>206</sup> Final Observations Regarding the Merits of the Case, *supra* note 7, at 20-21.

<sup>207</sup> Final Observations Regarding the Merits of the Case, *supra* note 7, at 21.

<sup>208</sup> *Id.*



conviction meant that the Michigan parole board had no jurisdiction to consider Kevin for parole. The adultification of the U.S. juvenile justice system paved the way for Kevin, a child, to face state machinery designed to prosecute, convict and sentence adults.

### III

## THE UNITED STATES VIOLATES CHILDREN'S RIGHT TO SPECIAL PROTECTION

The right of children to special protection is firmly established in the Inter-American human rights system, including Article VII of the Declaration on the Rights and Duties of Man (the "American Declaration") as well as other sources of international law that inform its interpretation. The trend of treating children as adults in the criminal justice system violates this right by failing to protect and promote the best interests of hundreds of thousands of children under the age of 18 every year.

#### A. All Children In The Inter-American Human Rights System Are Entitled To Special Protection

Since its inception, the Inter-American human rights system has made the protection of the human rights of children under the age of 18 a priority.<sup>209</sup> The right of every child to special protection is rooted in Article VII of the American Declaration, the founding human rights instrument of the Organization of American States (the "OAS"). A variety of more

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<sup>209</sup> Early special reports issued by the Commission referred "to the arbitrary detention of children, the death of children by private militia in the service of the Government, and children who remain with their parents deprived of liberty in adequate conditions." *The Rights of the Child in the Inter-American Human Rights System*, Inter-Am. Comm'n H.R., OEA/Ser.L/V/II.133, doc. 34 ¶ 64 (2008) (citing Report on the Procedures of the Inter-American Commission on Human Rights in the Dominican Republic, Inter-Am. Comm'n H.R., OEA/Ser.L/V/II.13, doc. 14 rev. ch. IV (1965); Report on the Human Rights Situation in Haiti, Inter-Am. Comm'n H.R., OEA/Ser.L/V/II.21 doc. 6 rev. ch. II (1969); Report on the Status of Human Rights in Chile, Inter-Am. Comm'n H.R., OEA/Ser.L/V/II.34, doc. 21, ch. V (1974); Report on the Situation of Political Prisoners and Their Families in Cuba, Inter-Am. Comm'n H.R., OEA/Ser.L/V/II.7, doc. 4, ch. IV (1963); and *The Second Inter-American Commission on Human Rights Report on the Situation of Political Prisoners and their Families in Cuba*, Inter-Am. Comm'n H.R., OEA/Ser.L/V/II.23, doc. 6, ch. II (1970).

recent international human rights instruments and developments in the *corpus juris gentium* of international human rights law—all of which shape the interpretation and scope of the American Declaration—also recognize and inform the scope of this right. Together, this *corpus juris* articulates the internationally-accepted practices relating to children, the standard against which the U.S. practice of sentencing children to life without parole must be measured.

## 1. The American Declaration And The Right Of Special Protection

The express obligation to protect the human rights of children was first recognized by American countries in the American Declaration.<sup>210</sup> As a signatory to the Charter of the Organization of American States (the “OAS Charter”), the United States is bound by the American Declaration, which is recognized by the OAS General Assembly as a binding source of international legal obligation for OAS member States.<sup>211</sup> The Commission’s statute empowers it to supervise OAS member States’ compliance with the human rights obligations contained in the OAS Charter and the American Declaration.<sup>212</sup>

Article VII of the American Declaration guarantees “[a]ll children . . . the right to special protection, care and aid.”<sup>213</sup> This means that children “must not only be accorded the

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<sup>210</sup> Bogota Conference of American States, Mar. 30-May 2, 1948, *American Declaration on the Rights and Duties of Man*, art. VII, 9th Conference (May 2, 1948). This document was adopted in 1948 by the American states at the Ninth International Conference of American States, a group that included the United States.

<sup>211</sup> See, e.g., OAS G.A. Res. 314, OAS Doc. VII-0/77 (June 22, 1977) (charging the Inter-American Commission with the preparation of a study to “set forth their obligation to carry out the commitments assumed in the American Declaration of the Rights and Duties of Man). This principle has been affirmed by both the Inter-American Court of Human Rights and the Inter-American Commission on Human Rights, see Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights, Advisory Opinion OC-10/89, Inter-Am Ct. H.R. (ser. A) No. 10, ¶¶ 43, 45 (July 14, 1989)(“Interpretation Article 64”); see also Hector Geronimo Lopez Aurelli, Case 9850, Inter-Am. Comm’n H.R., Report No. 74/90, OEA/Ser. L/V/IL.79, rev.1, doc. 12, ¶ 6 (Feb. 22, 1991) (Argentina) (quoting Interpretation Article 64 ¶ 45); Mary and Carrie Dann v. United States, Case 11.140, Inter-Am. Comm’n H.R., Report No. 75/02, doc. 5 rev. 1 ¶ 163 (2002).

<sup>212</sup> OAS G.A. Res. 447, OAS Doc. IX-0/79 (October 31, 1979).

<sup>213</sup> American Declaration, *supra* note 210, art.VII.

same guarantees that every adult enjoys, but special measures of protection as well.”<sup>214</sup> It also means that “each case will be examined on an individual basis, as every child’s needs are different, and that proper weight will be given to the child’s own opinion in accordance with his or her respective age and maturity.”<sup>215</sup> There must be “duly qualified institutions, with appropriate staff, adequate facilities, suitable means and proven experience in this type of task.”<sup>216</sup> Further, “all persons intervening in the proceedings” must have “sufficient training on what the best interests of the child involve, and therefore on effective protection of his or her rights.”<sup>217</sup> In Advisory Opinion 17 rendered in 2002, the Inter-American Court set a baseline by which the right to special protection is to be measured: the “regulating principle” regarding children’s rights is the promotion of the “best interests of the child.”<sup>218</sup> Because the Commission’s decision in this case affects the life, liberty, physical and moral integrity,

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<sup>214</sup> *Derechos*, *supra* note 3, ¶ 14.

<sup>215</sup> *Derechos*, *supra* note 3, ¶ 27 (citing Case of Neulinger and Shuruk v. Switzerland, Application No. 4161/07, Eur. Ct. H.R. 138 (July 6, 2010); *see also* IACHR Advisory Opinion OC-17/2002, *supra* note 3, ¶ 101 (recognizing that “the degree of participation of a child in the proceedings must be reasonably adjusted, so as to attain effective protection of his or her best interests, which are the ultimate objective of International Human rights Law in this regard”).

<sup>216</sup> IACHR Advisory Opinion OC-17/2002, *supra* note 3, at ¶ 78.

<sup>217</sup> IACHR Advisory Opinion OC-17/2002, *supra* note 3, at ¶ 79.

<sup>218</sup> *See* Juridical Status and Human Rights of the Child, Advisory Opinion OC-17/2002, Inter-Am. Ct. H.R., (ser. A) No. 17, ¶¶ 53-60, 78, 137(2) (August 28, 2002) (“Juridical Status OC-17/2002”); *see also* *Derechos*, *supra* note 3, ¶ 24 (The justice system “must always bear in mind the best interests of the child.”); I.A. Comm. on H.R. Rights of the Child in the IAHR System ¶ 147 (citing Gómez Paquiyauri Brothers v. Peru, Inter-Am. Ct. H.R. (ser. C) No. 110, ¶ 166 (July 8, 2004) (“Gómez”)); Case of the Girls Yean and Bosico v. Dominican Republic, Judgment of November 23, 2006, Inter-Am Ct. H.R., ¶ 134 (2006) (“Case of Girls Yean and Bosico”); Declaration of the Rights of the Child, G.A. Res. 1386, U.N. GAOR, 14th Sess., Supp. No. 16, principle 2, U.N. Doc. A/4354 (1959) (“[T]he child shall enjoy special protection, and shall be given opportunities and facilities, by law and by other means, to enable him to develop physically, mentally, morally, spiritually, and socially in a healthy and normal manner and in conditions of freedom and dignity. In the enactment of laws for this purpose, the best interests of the child shall be the paramount consideration.”); CRC, Art. 3 (“In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”).

development, education, health, and other rights of minors, it must “be made in light of what is most advantageous for the child.”<sup>219</sup>

A child’s right to special protection is also informed by several other guarantees in the American Declaration applicable to children, including:

- **Article I**, which guarantees every person “the right to life, liberty and the security of his person,”<sup>220</sup> recognized by the Commission to include a right to humane treatment;<sup>221</sup>
- **Article II**, which guarantees that “[a]ll persons are equal before the law”;
- **Article XII**, which guarantees every person “the right to an education that will prepare him to attain a decent life, raise his standard of living, and to be a useful member of society”;
- **Articles XVIII, XXIV, XXV, and XXVI**, which guarantee each person a right to due process, including the rights to humane treatment while in custody and freedom from “cruel, infamous or unusual punishment.”<sup>222</sup>

Moreover, the broad guarantees in the American Declaration are not static. They must be understood “in the context of the broader international and Inter-American human rights systems, in the light of developments in the field of international human rights law since it was first composed.”<sup>223</sup> In interpreting the American Declaration, the Commission must therefore consider other international law rules, as well as “developments in the *corpus juris gentium* of

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<sup>219</sup> Inter-American Commission on Human Rights, *The Rights of the Child in the Inter-American Human Rights System* ¶70 (2nd ed. 2008).

<sup>220</sup> American Declaration, *supra* note 213, art. I.

<sup>221</sup> See Report on Terrorism and Human Rights, Inter-Am. Comm’n H.R., OEA/Ser.L/V/II.116, doc. 5 rev. 1, ¶ 155 (2002).

<sup>222</sup> *Id.* at arts. XVIII, XXIV, XXV, XXVI.

<sup>223</sup> Michael Domingues v. United States, Case 12.285, Inter-Am. Ct. H.R., Report No. 62/02, OEA/Ser.L/V/II.117, doc. 1 rev. 1, ¶ 44 (2002) (“Domingues”) (drawing support from Interpretation Article 64, *supra* note 214); see also The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, Advisory Opinion OC-16/99, Inter-Am. Ct. H.R. (ser. A) No. 16, ¶ 113 (October 1, 1999) (citing the U.N. Conference on the Law of Treaties, *Vienna Convention on the Law of Treaties*, art. 31 (May 22, 1969)) (“the interpretation of a treaty must take into account not only the agreements and instruments related to the treaty [...] but also the system of which it is part . . . ”); Case of the “Street Children” (Villagrán Morales et al.) v. Guatemala, Inter-Am. Ct. H.R. (ser. C) No. 63, ¶ 192 (Nov. 19, 1999) (“Street Children”).

international human rights law over time and in present-day conditions.”<sup>224</sup> The relevant *corpus juris* encompasses various sources of law, including “the provisions of other international and regional human rights instruments and customary international law.”<sup>225</sup> Of particular relevance in interpreting the scope of the protection of children’s human rights in the Inter-American system are the American Convention on Human Rights (the “American Convention”); the United Nations Convention on the Rights of the Child (the “CRC”); the International Covenant on Civil and Political Rights (the “ICCPR”); the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the “Beijing Rules”); and the United Nations rules for the Protection of Juveniles Deprived of their Liberty (the “Havana Rules”).<sup>226</sup>

## 2. The American Convention On Human Rights

The Commission has long looked to the American Convention to determine the scope of human rights, even when considering the obligations of OAS member States that have not ratified the Convention, because the Convention provides greater substance to the human rights recognized in the American Declaration.<sup>227</sup> Of particular importance is Article 19 of the American Convention, which codifies the right of every child “to the measures of protection

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<sup>224</sup> *Domingues*, *supra* note 226, ¶ 44; *Derechos*, *supra* note 3, ¶ 15-17.

<sup>225</sup> *Id.* ¶ 45; *see also* *Minors in Detention*, Case 11.491, Inter-Am. Ct. H.R., Report No. 41/99, ¶ 72 (Mar. 10, 1999) (“*Minors in Detention*”).

<sup>226</sup> *See Derechos*, *supra* note 3, ¶¶ 18-19 (recognizing that the “juridical framework for the protection of children’s human rights” includes, *inter alia*, the American Declaration, the American Convention, the CRC, the Beijing Rules, and the Havana Rules).

<sup>227</sup> *See Report on the Situation of Human Rights of Asylum Seekers Within the Canadian Refugee Determination System*, Inter-Am. Comm’n H.R., OEA/Ser.L/V/II.106, doc. 40 rev. ¶ 38 (2000); *see also Derechos*, *supra* note 3, ¶ 20 (“The IACHR emphasizes that those member States that have not yet ratified the American Convention are just as bound by the *corpus juris* on children’s rights, because Article VII of the American Declaration provides that all children have a right to special protection, care and aid.”). The United States has signed the treaty but has yet to ratify it.

required by his condition as a minor on the part of his family, society and the state.”<sup>228</sup> Like Article VII of the American Declaration, this provision prohibits penal practices that do not give special consideration to a child’s unique status and specific circumstances.<sup>229</sup>

The American Convention specifically requires that while subject to criminal proceedings, minors “shall be separated from adults and brought before specialized tribunals, as speedily as possible, so that they may be treated in accordance with their status as minors.”<sup>230</sup> It also requires, with particular significance in the context of juvenile offenders, that “[p]unishment consisting of deprivation of liberty shall have as an essential aim the reform and social rehabilitation of prisoners.”<sup>231</sup>

### 3. The Convention On The Rights Of The Child

The CRC is the most comprehensive and expansive international convention addressing the rights of the child, building on nearly a century of human rights protection for children.<sup>232</sup> The Inter-American Court has held that “[b]oth the American Convention and the Convention on the Rights of the Child form part of a very comprehensive international *corpus juris* for the protection of the child that should help this Court establish the content and scope of the general provision established in Article 19 of the American Convention.”<sup>233</sup>

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<sup>228</sup> Organization of American States, American Convention on Human Rights art.19, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 (1969) (“American Convention”) (emphasis added).

<sup>229</sup> *Id.* at art. 19.

<sup>230</sup> *Id.* at art. 5(5).

<sup>231</sup> *Id.* at art. 5(6).

<sup>232</sup> The United States is a signatory but not a party to the CRC, and thus the CRC does not bind the United States. However, as discussed *supra* at pp. 40-41, the CRC informs the scope of the United States’ obligations under the American Declaration. In addition, the CRC, which has been ratified by every nation except the United States and Somalia, reflects an established international consensus on the rights of children, and its prohibition on JLWOP has become a customary international law norm.

<sup>233</sup> Street Children, *supra* note 226, ¶ 194. See Juridical Status OC-17/2002, *supra* note 218, ¶ 37.

A centerpiece of the CRC is Article 3, which establishes that in all actions concerning children, the “best interests of the child shall be a primary consideration.”<sup>234</sup> The Committee on the Rights of the Child, the body that oversees State parties’ compliance with the CRC, has explained that “[c]hildren differ from adults in their physical and psychological development, and their emotional and educational needs,” and thus children are held to a lesser standard of culpability and require a “separate juvenile justice system” and “different treatment” than adults.<sup>235</sup>

The CRC establishes that a child in conflict with the law must have a voice in establishing his or her own best interests during the adjudication process. “A child capable of forming her own views has the right to express those views, personally or through a representative, and to have those views given due weight in judicial and administrative proceedings that affect her.”<sup>236</sup> Of course, a child’s ability to adequately present his or her views in a judicial proceeding depends on the child’s access to representation that is tailored to the special needs of children. Accordingly, every child deprived of liberty has the right to prompt access to legal representation as well as “other appropriate assistance.”<sup>237</sup>

With respect to sentencing and incarceration, the CRC requires that children be treated in a manner that promotes “the child’s sense of dignity and worth” and “takes into account the child’s age and the desirability of promoting the child’s reintegration and the child’s

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<sup>234</sup> Convention on the Rights of the Child art. 3, G.A. Res. 44/25, U.N. Doc. A/RES/44/25 (Nov. 20, 1989) (“CRC”).

<sup>235</sup> Committee on the Rights of the Child, General Comment No. 10, *Children’s rights in juvenile justice*, ¶ 10 (Apr. 25, 2007) (“Committee on the Rights of the Child Comment No. 10”).

<sup>236</sup> CRC, *supra* note 234, art. 12.

<sup>237</sup> CRC, *supra* note 234, art. 37(d).

assuming a constructive role in society.”<sup>238</sup> Any punishment must be proportional to the circumstances of both the offender and the offence,<sup>239</sup> and detention should be used only as a last resort or in exceptional circumstances, and for the shortest time possible.<sup>240</sup> Children must be “separated from adults unless it is considered in the child’s best interest not to do so.”<sup>241</sup> A child is entitled to “periodic review” of his or her detention.<sup>242</sup>

Critically, Article 37(a) of the CRC expressly prohibits JLWOP sentences for children under the age of 18: “Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age.”<sup>243</sup> The Committee on the Rights of the Child has reiterated that: “No child who was under the age of 18 at the time he or she committed an offence should be sentenced to life without the possibility of release or parole.”<sup>244</sup>

#### **4. The International Covenant On Civil And Political Rights**

The international community adopted the ICCPR<sup>245</sup> in order to give legally binding effect to the Universal Declaration of Human Rights.<sup>246</sup> The Commission regularly turns

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<sup>238</sup> Article 40(1); *see also* Comm’n on the Rights of the Child, *General Comment No. 10* ¶ 77, CRC/C/GC/10 (April 25, 2007) (“Comm’n on the Rights of the Child”) (recognizing that child’s “eventual release and reintegration into society should be the goal of any juvenile sentence. This means *inter alia* that the child sentenced to this imprisonment should receive education, treatment, and care aiming at his/her release, reintegration and ability to assume a constructive role in society.”).

<sup>239</sup> CRC, *supra* note 234, art. 40(4).

<sup>240</sup> CRC, *supra* note 234, art. 37(b).

<sup>241</sup> CRC, *supra* note 234, art. 37(c).

<sup>242</sup> CRC, *supra* note 234, art. 25.

<sup>243</sup> CRC, *supra* note 234, art. 37(a).

<sup>244</sup> Comm’n on the Rights of the Child, *supra* note 238, ¶ 77.

<sup>245</sup> International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 21 U.N. GOAR Supp. No. 16, U.N. Doc. A/6316 (1966) (“ICCPR”). The United States signed the ICCPR and ratified it in 1992. International Covenant on Civil and Political Rights, 138 Cong. Rec. S4781-01, S4783 (1992).

<sup>246</sup> Universal Declaration of Human Rights, G.A. Res. 217A (III), at 71, 3 U.N. GAOR, 3d Sess., 1st plen. mtg., Supp. (No. 13), UN Doc. A/810 (Dec. 12, 1948); *see also* Henry J. Steiner & Phillip Alston, INTERNATIONAL



to the ICCPR, which has been broadly ratified by 166 nation-states, including the United States,<sup>247</sup> because its provisions are a part of the *corpus juris* that informs States' obligations under the American Declaration.<sup>248</sup> Today, the ICCPR is universally accepted as the definitive statement of obligations undertaken by States to protect individuals' civil and political rights.<sup>249</sup> The ICCPR applies to children no less than adults.

ICCPR Article 7 prohibits "cruel, inhuman or degrading treatment or punishment."<sup>250</sup> Article 10(1) goes further, requiring states to treat all persons deprived of their liberty "with humanity and with respect for the inherent dignity of the human persons."<sup>251</sup> The Human Rights Committee, the oversight body responsible for monitoring the implementation of the ICCPR, has recognized that Article 10(1) imposes "a positive obligation towards persons who are particularly vulnerable because of their status as persons deprived of liberty, and complements for them the ban on torture or other cruel, inhuman or degrading treatment or punishment contained in Article 7 of the Covenant."<sup>252</sup> Children are a "particularly vulnerable" population when cast into the adult criminal system, and therefore Article 10(1) imposes a "positive obligation" on States to protect their inherent dignity.

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HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS 136, 2d ed. (2000) (ICCPR designed to give effect to the Universal Declaration).

<sup>247</sup> The United States signed the ICCPR and ratified it in 1992.

<sup>248</sup> See, e.g., Grand Chief Michael Mitchell v. Canada, Case 12.435, Inter-Am. Comm'n H.R., Report No.61/08, ¶ 78 (2008); Domingues, *supra* note 226, ¶ 58-62; Edwards v. Bahamas, Cases 12.067, 12.068 & 12.086, Inter-Am Ct. H.R., Report No. 48/01, OEA/Ser.L/V/II.111 doc.2 rev. ¶ 131 (2001).

<sup>249</sup> See generally Bruno Simma and Philip Alston, *The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles*, 12 Aust. Y.B. Int. L. 82 (1992).

<sup>250</sup> ICCPR, *supra* note 250, art. 7.

<sup>251</sup> ICCPR, *supra* note 250, art. 10(1).

<sup>252</sup> The Human Rights Committee issues "General Comments" that serve as interpretations of the ICCPR. Colette Connor, *Recent Development: The United States' Second and Third Periodic Report to the United Nations Human Rights Committee*, 49 Harv. Int'l L.J. 509, 511 (2008). The General Comments are applicable to all States Parties, and signal the Committee's interpretation of the ICCPR. U.N. Human Rights Comm., *CCPR General Comment No. 21: Article 10* ¶ 5 (1992).

Article 24(1) of the ICCPR further requires that every child has “the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.”<sup>253</sup> This requirement mirrors the “special protection” requirement that is the cornerstone of children’s rights within the Inter-American system, and a juvenile justice regime that does not permit consideration of the special status of the minor is directly at odds with this provision. Similarly, a system that does not treat children according to their special status violates ICCPR Articles 10(3) and 14(4), which require that procedures for juveniles “shall be designed to take account of children’s age” and that children must be “accorded treatment appropriate to their age and legal status.”<sup>254</sup> Although the United States has reserved its right to treat juveniles as adults in the criminal justice system, it has done so only in “exceptional circumstances.”<sup>255</sup> The Human Rights Committee, in a 2006 review of U.S. practices, indicated that JLWOP sentences violate Article 24(1).<sup>256</sup>

With respect to detention, ICCPR Articles 10(3) and 14(4) require states to separate incarcerated juveniles from adults and to guarantee the right of children to rehabilitation.<sup>257</sup> The Human Rights Committee has explained that under the ICCPR, “convicted juvenile offenders shall be subject to a penitentiary system that involves segregation from adults and is appropriate to their age and legal status, the aim being to foster reformation and social

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<sup>253</sup> *Id.* at art. 24.1.

<sup>254</sup> ICCPR, *supra* note 250, arts. 10(3) and 14(4).

<sup>255</sup> *Id.*, Reservation (5).

<sup>256</sup> Human Rights Comm., Concluding Observations of the Human Rights Committee on the Second and Third U.S. Reports to the Committee, ¶ 34, U.N. Doc. CCPR/C/SR.2395, (July 27, 2006) (noting that “sentencing children to a life sentence without parole is of itself not in compliance with article 24(1) of the Covenant.”).

<sup>257</sup> U.N. Human Rights Commission, *CCPR General Comment No. 17: Article 24* ¶¶ 2, 7 (April 1989); *see generally* Connie de la Vega & Michelle Leighton, *Sentencing Our Children to Die in Prison: Global Law and Practice*, 42 U.S.F. L. Rev. 983 (2008) (“*Sentencing Our Children to Die in Prison*”) (arguing that juveniles sentenced to life without parole are not given the opportunity to rehabilitate); *see also* Equal Justice Initiative, *Cruel and Unusual: Sentencing 13- and 14-year old Children to Die In Prison* (2007), available at <http://www.eji.org/eji/files/20071017cruelandunusual.pdf> (“*Cruel and Unusual*”); *The Rest of Their Lives*, *supra* note 21, at 95.

rehabilitation.”<sup>258</sup> Furthermore, the Committee has expressed concern over the disproportionate application of JLWOP against juveniles of color.<sup>259</sup>

## 5. The Beijing Rules

The United Nations promulgated Standard Minimum Rules for the Administration of Juvenile Justice, known as the Beijing Rules, to “establish minimum standards accepted by the United Nations for the protection of juveniles deprived of their liberty.”<sup>260</sup> The Beijing Rules preceded the CRC by five years, and indeed helped shape the Convention.<sup>261</sup> Broadly speaking, the Beijing Rules seek to divert juveniles away from the adult criminal system, to ensure that, at a minimum, juveniles are treated differently from adults, and to implement the principle of proportionality in sentencing.<sup>262</sup>

The Beijing Rules specifically insist that countries establish juvenile-specific legal regimes designed to put juveniles at ease and to promote their participation and expression in the judicial process.<sup>263</sup> A court should give individualized attention to juveniles, taking into

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<sup>258</sup> *ICCPR General Comment No. 17: Article 24*, *supra* note 257, at ¶ 2.

<sup>259</sup> *See* Comm. on the Elimination of Racial Discrimination, Concluding observations of the Committee on the Elimination of Racial Discrimination: United States of America, ¶ 21, 72nd Sess., Feb. 18-Mar. 7, 2008, U.N. Doc. CERD/C/USA/CO/6 (May 8, 2008) (recommending that the United States “discontinue the use of life sentence without parole against persons under the age of eighteen at the time the offence was committed, and review the situation of persons already serving such sentences,” and noting the “disproportionate imposition of life imprisonment without parole on young offenders – including children – belonging to racial, ethnic and national minorities”).

<sup>260</sup> Beijing Rules ¶ 3.

<sup>261</sup> *See* Andrea Geiger, *Internat’l Law – Juvenile Justice in Pakistan*, 23 *Suffolk Transnat’l L. Rev.* 713, 718 (2000) (“Ultimately, the Convention on the Child incorporated the principles undergirding the Beijing Rules.”); *see also* Cynthia Price Cohen, *The Developing Jurisprudence of the Rights of the Child*, 6 *St. Thomas L. Rev.* 1, 87 (1993) (“Cohen”).

<sup>262</sup> *Id.*

<sup>263</sup> Beijing Rules 2.3 (“Efforts shall be made to establish, in each national jurisdiction, a set of laws, rules and provisions specifically applicable to juvenile offenders and institutions and bodies entrusted with the functions of the administration of juvenile justice...”); Beijing Rules 14.2.

consideration the circumstances and gravity of the offense as well as the particular needs of the juvenile, and craft its disposition in proportion to those considerations.<sup>264</sup>

The Beijing Rules also provide guidelines for both the pretrial detention of juveniles and their incarceration after trial. Pretrial detention is designated a “measure of last resort” to be used only “for the shortest possible period of time,” and generally “shall be replaced by alternative measures, such as close supervision, intensive care or placement with a family or in an educational setting or home.”<sup>265</sup> Penal incarceration, like pretrial detention, also is to be used sparingly, and any restrictions on the personal liberty of a juvenile “shall be limited to the possible minimum,” and shall not be imposed “unless there is no other appropriate response.”<sup>266</sup>

If incarceration cannot be avoided, juveniles should spend the shortest necessary period behind bars.<sup>267</sup> In recognition of the negative influences and physical dangers associated with adult offenders, juveniles should never be housed with adults.<sup>268</sup> Moreover, States should implement affirmative measures to promote the care and development of incarcerated youth. The Beijing Rules are expansive in this respect: “Juveniles shall receive care, protection and all necessary assistance—social, educational, vocational, psychological, medical and physical—that they may require because of their age, sex, and personality and in the interest of their wholesome development.”<sup>269</sup>

To ensure that each member State is in a position to maintain and reform a juvenile justice system that meets minimum international standards, the Beijing Rules charge

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<sup>264</sup> Beijing Rules 5.1, 17.1(a).

<sup>265</sup> Beijing Rules 13.1-13.2.

<sup>266</sup> Beijing Rules 17.1(b), (c), 19.1.

<sup>267</sup> Beijing Rules 19.1.

<sup>268</sup> Beijing Rules 13.4, 26.3, Commentary to Rule 26.

<sup>269</sup> Beijing Rules 26.2. *See also* Rule 13.5.

States with the responsibility of devising a built-in evaluative mechanism “to collect and analyze relevant data and information for appropriate assessment and future improvement” of the juvenile justice regime in place.<sup>270</sup> Thus, under the Beijing Rules, the failure to collect data in order to facilitate compliance with international standards itself becomes a violation of the applicable standards.

## 6. The Havana Rules

The United Nations Rules for the Protection of Juveniles Deprived of their Liberty, or Havana Rules, provide additional “minimum standards” for the protection of juveniles deprived of their liberty.<sup>271</sup> Recognizing that “juveniles deprived of their liberty are highly vulnerable to abuse, victimization and the violation of their rights,” and “[c]oncerned that many systems do not differentiate between adults and juveniles,”<sup>272</sup> the Havana Rules seek to foster juvenile justice systems that “uphold the rights and safety and promote the physical and mental well-being of [incarcerated] juveniles.”<sup>273</sup>

Like the Beijing Rules, the Havana Rules reaffirm that “[d]eprivation of the liberty of a juvenile should be a disposition of last resort and for the minimum necessary period and should be limited to exceptional cases.”<sup>274</sup> They unequivocally condemn JLWOP sentences, specifically providing that juvenile sentences must not preclude the possibility of release.<sup>275</sup> The

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<sup>270</sup> Beijing Rules 30.3.

<sup>271</sup> Havana Rules 3; Cohen, *supra* note 264, at 90.

<sup>272</sup> United Nations: General Assembly Resolution on U.N. Rules for the Protection of Juveniles Deprived of Their Liberty, 30 I.L.M. 1390, 1394 (1991).

<sup>273</sup> Havana Rules 1.

<sup>274</sup> Havana Rules 2 (invoking the Beijing Rules).

<sup>275</sup> Havana Rules 2 (“The length of the sanction should be determined by the judicial authority, without precluding the possibility of his or her early release.”)

Havana Rules also reaffirm that juveniles in custody must be held separate from adults,<sup>276</sup> and further provide that untried detainee juveniles should be held separate from convicted juveniles.<sup>277</sup> The Havana Rules specifically prohibit solitary confinement of juveniles.<sup>278</sup>

While incarcerated, juveniles “have the right to facilities and services that meet all the requirements of health and human dignity.”<sup>279</sup> The Havana Rules assume the purpose of a juvenile sentence is rehabilitation and release, and thus the daily activities of juveniles in detention should be meaningful,<sup>280</sup> and the very architecture of a detention facility “should be in keeping with the rehabilitative aim of residential treatment.”<sup>281</sup> All juveniles should benefit from arrangements designed to assist them in returning to society, family life, education or employment after release,” and “[p]rocedures, including early release, and special courses should be devised to this end.”<sup>282</sup> Moreover, correctional staff must “be qualified and include a sufficient number of specialists such as educators, vocational instructors, counselors, social workers, psychiatrists and psychologists” to help juveniles along their way to rehabilitation and reintegration.<sup>283</sup>

## **7. The Inter-American System Protects All Children Under The Age Of 18**

The Inter-American system of human rights recognizes that all children under 18 years of age are entitled to special protection. Summarizing “international norms” and its own jurisprudence, the Inter-American Court recognized in Advisory Opinion 17 that the term “child”

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<sup>276</sup> Havana Rules 29.

<sup>277</sup> Havana Rules 17.

<sup>278</sup> Havana Rules 67.

<sup>279</sup> Havana Rules 31.

<sup>280</sup> Havana Rules 12, 38-48.

<sup>281</sup> Havana Rules 32.

<sup>282</sup> Havana rules 38, 39, 42, 79.

<sup>283</sup> Havana Rules 81.

refers to “any person who has not yet turned 18 years of age.”<sup>284</sup> In *Bulacio v. Argentina* (2003), the Inter-American Court affirmed and repeated this definition, and found the case before it “especially grave” because the victim was 17 years old, and thus entitled to special protection, when the State violated his rights.<sup>285</sup>

The Inter-American Commission has similarly recognized that “[i]nternational law has clearly established the age of adulthood at 18” and that “under international law, only those over 18 years of age can be held criminally responsible as adults.”<sup>286</sup> In *Michael Domingues v. United States* (2002), the Commission interpreted the American Declaration in light of the *jus cogens* norm against applying the death penalty to those who were under 18 when they committed the crime, and took into account “developments in the *corpus juris gentium* of international human rights law over time and in present-day conditions.”<sup>287</sup> The Commission found that any earlier uncertainty regarding the age of majority under international law had been resolved, and that the United States had violated Article I of the American Declaration in executing Michael Domingues, because he had been under the age of 18 at the time of offense.

In the United States, the U.S. Supreme Court has in some cases upheld special protections for children under the age of 18. In *Roper v. Simmons*, Court held unconstitutional the imposition of capital punishment with respect to offenders who were under the age of 18 when they committed their crimes.<sup>288</sup> In *Graham v. Florida*, Court also used the age of 18 to limit JLWOP sentences, holding such sentences unconstitutional in cases where children had

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<sup>284</sup> See Juridical Status OC-17/2002, *supra* note 218, ¶ 42; see also *id.* ¶ 101 (recognizing that “the group defined as children includes all persons under 18”).

<sup>285</sup> *Bulacio v. Argentina*, Merits, Reparations and Costs, Inter-Am Ct H.R., Series C No. 100 (September 18, 2003) (“*Bulacio*”).

<sup>286</sup> *Derechos*, *supra* note 3, ¶ 38-39.

<sup>287</sup> *Id.* ¶ 44.

<sup>288</sup> 543 U.S. 551 (2005).

committed crimes other than homicide.<sup>289</sup> In *Miller v. Alabama*, the Court took one step further, holding that mandatory JLWOP sentences for homicide offenses are unconstitutional when applied to children under the age of 18.<sup>290</sup> However, the Court left open the possibility of children convicted of homicide being sentenced to life without parole in certain circumstances.<sup>291</sup>

## 8. Inter-American Jurisprudence Prohibits Juvenile Life Without Parole Sentences

Beyond the general recognition of children's right to special protection, the Inter-American Court has explicitly held that life sentences for juveniles violate human rights standards because they do not comply with the core principles of juvenile sentencing: that deprivation of liberty should be a last resort, for the shortest time possible, with definitive terms, and subject to periodic review.<sup>292</sup> In *Mendoza et al. v. Argentina*, the Inter-American Court held that life sentences imposed on children, which allowed for the possibility of parole only after 20 years in prison, violated international human rights law.<sup>293</sup> Specifically, the Inter-American Court, basing its judgment in Articles 19, 7(3), 5, 8, and 25 of the American Convention, held that Argentina failed in its duty to provide special measures of protection for children by allowing children to be sentenced to life in prison with review available only after serving twenty years.<sup>294</sup>

Of particular importance to the Inter-American Court's holding was Article 19 and the principle of the child's best interest. The court held sentences of life without parole, by

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<sup>289</sup> 560 U.S. 48 (2011).

<sup>290</sup> 132 S. Ct. 2455 (2012).

<sup>291</sup> *Id.* at 2469 (“Although we do not foreclose a sentencer’s ability to make that judgment in homicide cases, we require it to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.”).

<sup>292</sup> *Mendoza et al. v. Argentina*, Preliminary Objections, Merits, Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 260 (May 14, 2013) (“Mendoza”).

<sup>293</sup> *Id.* ¶¶ 183, 227.

<sup>294</sup> *Id.*



their very nature, do not comply with the penological purpose of social rehabilitation and reintegration of children.<sup>295</sup> Indeed, life sentences imposed on children represent precisely the opposite, as they imply the “maximum exclusion of these children from society.”<sup>296</sup> Such sentences do not take into account the specific circumstances of each child, and are purely retributive and cancel all expectations of rehabilitation.<sup>297</sup> The disproportionate character of life sentences imposed on children, the Court held in turn, had provoked a high psychological impact on the victims and constituted cruel, inhuman and degrading treatment, in violation of Articles 5, 19 and 1(1) of the American Convention.<sup>298</sup>

#### **B. The United States’ Practice of Sentencing Children To Life Imprisonment Without Parole Violates Children’s Right To Special Protection**

The United States fails to provide special protection to hundreds of thousands of children every year in clear violation of Article VII of the American Declaration, as well as other established international law. Most egregiously, the United States fails to afford children special protection by: (1) sentencing children as harshly as adults, and sometimes more harshly, including sentencing them to JLWOP sentences, and (2) failing to provide adequate educational, health, and rehabilitative opportunities to children incarcerated in adult facilities. The trend in U.S. practice of treating children as adults has produced additional systemic failures to afford special protection to children by: (3) transferring children into the adult criminal system without due consideration of their best interests, (4) detaining children with adults before they are even convicted of a crime, and (5) trying children in the adult criminal system without providing specialized procedures tailored to their special needs.

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<sup>295</sup> *Id.* ¶¶ 314-18.

<sup>296</sup> *Id.* ¶ 166.

<sup>297</sup> *Id.*

<sup>298</sup> *Id.* ¶¶ 183, 310-12.

## 1. Adult Sentencing Denies Special Protection

### a. JLWOP Sentences

In *Mendoza et al. v. Argentina*, the Inter-American Court held that life without parole sentences imposed on children violate the duty to provide special measures of protection to children. The Court made clear that “life imprisonment . . . for children [is] incompatible with Article 7(3) of the American Convention, because [it is] not [an] exceptional punishment[], [it] do[es] not entail the deprivation of liberty for the shortest possible time or for a period specified at the time of sentencing, and [it] do[es] not permit periodic review of the need for the deprivation of liberty of the children.”<sup>299</sup> Moreover, the Inter-American Court noted that JLWOP sentences fly in the face of 5(6) of the American Convention, which mandates that “the deprivation of liberty shall have as an essential aim the reform and social reintegration of the prisoners.”<sup>300</sup> Finally, the Court found such sentences to have produced psychological harm on the children serving them, and as a result they constituted cruel, inhuman and degrading treatment, in violation of Articles 5, 19 and 1(1) of the American Convention.<sup>301</sup>

That children in the United States can still receive JLWOP violates international law and the Inter-American human rights system. The Inter-American human rights system categorically disapproves of JLWOP sentences. Article 37 of the Convention on the Rights of the Child expressly prohibits “life imprisonment without possibility of release . . . imposed for

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<sup>299</sup> *Id.* ¶ 163. See also, CRC, *supra* note 234, art. 37(b); Committee on the Rights of the Child Comment No. 10, *supra* note 240, ¶ 71 (citing CRC, *supra* note 234, art. 40 (1)) (“[T]he reaction to an offence should always be in proportion not only to the circumstances and the gravity of the offence, but also to the age, lesser culpability, circumstances and needs of the child.”); see also *Juvenile Reeducation Institute*, *supra* note 3, ¶ 231; see also Beijing Rules Articles 5(1), 13(2); Bulacio, *supra* note 288, ¶ 134-35; *Derechos*, *supra* note 3, ¶ 350.

<sup>300</sup> *Mendoza*, *supra* note 295, ¶ 165. See also Article 5(6) of the American Convention (“Punishments consisting of deprivation of liberty shall have as an essential aim the reform and social readaptation of the prisoners.”).

<sup>301</sup> *Mendoza*, *supra* note 295.

offences committed by persons below eighteen years of age.”<sup>302</sup> Article 25 of the CRC further provides for the periodic review of the conditions of the child’s detention.<sup>303</sup> Interpreting Articles 25 and 37 of the CRC, the Committee on the Rights of the Child has emphasized that “the possibility of release should be realistic and regularly considered.”<sup>304</sup> Rule 28.1 of the Beijing Rules mandates that parole “shall be used . . . to the greatest possible extent, and shall be granted at the earliest possible time.”<sup>305</sup>

No other country in the world still allows JLWOP sentences.<sup>306</sup> Furthermore, JLWOP sentences are incompatible with a child’s right to special protection, because they ensure that he or she will have no chance at rehabilitation, no chance to review his or her sentence, and will never become a constructive or productive member of society.<sup>307</sup> Such sentences are incompatible with the principle of proportionality of the sentence and the lesser culpability of children because they draw little to no distinction between adults and children—indeed, JLWOP sentences are actually harsher on children than adults, because children serving JLWOP often face a longer term of incarceration.<sup>308</sup>

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<sup>302</sup> CRC, *supra* note 234, art. 37.

<sup>303</sup> CRC, *supra* note 234, art. 25.

<sup>304</sup> *Derechos*, *supra* note 3, ¶¶ 362, 373. Committee on the Rights of the Child Comment No. 10, *supra* note 240, ¶ 77. See also Havana Rules, Rule 79.

<sup>305</sup> Beijing Rule 28.1.

<sup>306</sup> Final Observations Regarding the Merits of the Case, *supra* note 7, at 42-43.

<sup>307</sup> Juvenile life without parole sentences disclaim any interest in promoting the child’s rehabilitation and reintegration into society. *Sentencing Our Children to Die in Prison*, *supra* note 261 (arguing that juveniles sentenced to life without parole are not given the opportunity to rehabilitate); see also *Cruel and Unusual*, *supra* note 261; *The Rest of Their Lives*, *supra* note 21.

<sup>308</sup> See *Derechos*, *supra* note 3, ¶ 42 (citing Committee on the Rights of the Child Comment No. 10, *supra* note 240, ¶ 10).

*b. Adult Sentences*

Juvenile life without parole sentences represent the United States' most flagrant violation of its obligation to provide children with special protection. Beyond JLWOP, however, several other U.S. sentencing practices violate children's right to special protection.

First, that children can be and in fact are sentenced more harshly than adults in the adult criminal system starkly shows that they do not receive special treatment in sentencing. The Inter-American Commission itself has already recognized and criticized this fact, finding that in the United States, children prosecuted with adults for the same crime can receive tougher sentences than their adult co-defendants.<sup>309</sup>

Second, that children in the adult criminal system can be and in fact are sentenced more harshly than children in the juvenile justice system similarly shows that the children in the adult system are being denied special protections.

Third, that African American children can be and are sentenced more harshly than white children for similar offenses further demonstrates that some children are being denied special protections granted to others.<sup>310</sup>

## **2. Incarceration In Adult Facilities Denies Special Protection**

As discussed above, detention of children in adult facilities violates international law because children are far less safe in adult jails than they would be in juvenile facilities, and even a short detention with adults can have devastating and long-lasting effects on children's physical and mental health, their engagement with the criminal process, and their future development. Furthermore, states in the United States violate children's right to special

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<sup>309</sup> *Derechos*, *supra* note 3, ¶ 356. *See, e.g., Derechos*, *supra* note 3, ¶¶ 29, 34, 366. Cf. *Domingues*, *supra* note 226, ¶ 80. Committee on the Rights of the Child Comment No. 10, *supra* note 240, ¶ 10.

<sup>310</sup> *Submission to the CERD*, *supra* note 31, at 19-24.

protection by incarcerating children in adult facilities that provide fewer educational, health, and vocational opportunities than are available in juvenile facilities. These violations are a direct consequence of the use of JLWOP sentences, along with other harsh sentences that fail to account for the unique status of children, in the United States.

First, the Inter-American human rights system requires that children in detention must be held separate and apart from adults.<sup>311</sup> In *Minors in Detention*, the Commission found that the housing of children and adults in the same prison facility violated the children’s right to humane treatment under Article 5(5) of the American Convention, considered in combination with Article 19.<sup>312</sup> In doing so, it recognized that the obligations of “special protection” under the Convention “cannot be interpreted solely as requiring the creation of juvenile courts” but extend, in this instance, to ensuring that the conditions in which juvenile offenders are held in captivity similarly reflect an underlying consideration of their juvenile status.<sup>313</sup> Moreover, even states like Michigan that require physical separation between children and adults do not go far enough, as they fail to require the necessary “sight and sound” separation. In *Juvenile Reeducation Institute*, the Inter-American Court considered the case of children who were transferred to adult prisons “either as a form of punishment or because of overcrowding,” and found that the transfers violated Article 5(5) of the Convention on the Rights of the Child because the adult prisons did not provide sight-and-sound separation and therefore “exposed the children to conditions highly prejudicial to their development”, as well as leaving them vulnerable to sexual and physical violence at the hands of predatory adults.<sup>314</sup>

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<sup>311</sup> American Convention Art. 5(5). CRC, *supra* note 234, arts 10, 37(c). *Juvenile Reeducation Institute*, *supra* note 3, ¶ 169. Committee on the Rights of the Child Comment No. 10, *supra* note 2435, ¶ 10. Havana Rules 29.

<sup>312</sup> *Minors in Detention*, *supra* note 225, ¶ 125.

<sup>313</sup> *Id.*

<sup>314</sup> *Juvenile Reeducation Institute*, *supra* note 3, ¶ 175.

Second, states that detain children alongside adults affirmatively subject them to a heightened risk of grave harm, both physical and psychological. The Inter-American Commission has made clear that it “is indispensable that children be separated from adults”<sup>315</sup> because holding children with adults “expose[s] the children to conditions highly prejudicial to their development and ma[kes] them vulnerable to others who, as adults, could prey on them.”<sup>316</sup> The Inter-American Commission has also specifically recognized that “[t]he impact of institutionalization goes beyond the experience by children of violence,” and that the long-term effects of institutionalization “can include severe developmental delays, disability, irreversible psychological damage, and increased rates of suicide and recidivism.”<sup>317</sup> It has also recognized that “[t]he use of deprivation of liberty has very negative consequences for the child’s harmonious development and seriously hampers his/her reintegration in society.”<sup>318</sup> Exposing children to such risk by transferring them to the adult criminal system and detaining them with other adults—often for many months before trial even begins—is inconsistent with children’s right to special protection, as well as numerous other international law rules that require States to promote children’s future development and social rehabilitation, including their physical, mental, spiritual, moral, psychological, and social development.<sup>319</sup> Moreover, the Inter-American Commission has unequivocally “urged the [United] States to absolutely prohibit the placement of

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<sup>315</sup> *Bulacio*, *supra* note 285, ¶ 136.

<sup>316</sup> *Juvenile Reeducation Institute*, *supra* note 3, ¶ 175.

<sup>317</sup> *Derechos*, *supra* note 3, ¶ 535 (quoting Report of the Independent Expert for the United Nations Study on Violence against Children, A/61/299, August 29, 2006, ¶ 54).

<sup>318</sup> *Derechos*, *supra* note 3, ¶ 345 (quoting Committee on the Rights of the Child, General Comment No. 10, *Children’s rights in juvenile justice*, CRC/C/GC/10, 25 April 2007, ¶ 11).

<sup>319</sup> I.A. Comm. On H.R. Rights of the Child in the IAHR System ¶¶ 129, 131, 157; *see also Juvenile Reeducation Institute*, *supra* note 3, ¶ 12; Inter-Am. Comm’n on Human Rights, *IACHR Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas*, document approved by the Commission at its 131st regular session, Principle X (March 3 to 14, 2008); Havana Rules 51 and 54; Case of Girls Yean and Bosico, *supra* note 218.

children in solitary confinement,” noting that “international law prohibits the use of solitary confinement on children, as by definition it constitutes cruel, inhuman, or degrading treatment.”<sup>320</sup>

Third, the length of JLWOP sentences violates the right to special protection. Article 37(b) of the CRC provides that the arrest, detention, or imprisonment of a child shall be used only “for the shortest appropriate period of time.”<sup>321</sup> As the Inter-American Court held in *Mendoza*, JLWOP sentences fail to take into account the specific circumstances of each child and are disproportionate to the important purposes of rehabilitation and reintegration.<sup>322</sup> It is well established in the Inter-American human rights system that incarceration of children should be used only as a last resort, only for the shortest appropriate period of time, and should be proportional to the crime alleged<sup>323</sup>—requirements that clearly are not met in the case of JLWOP sentences.

Fourth, states in the United States violate the right to special protection by holding children in an adult facility because juvenile detention has “as an essential aim the reform and social rehabilitation of prisoners,” and this goal cannot be satisfied in a system in which adult and child offenders are held together.<sup>324</sup> Detention of children in the same facilities as adults

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<sup>320</sup> Press Release, Annex to the Press Release Issued at the Close of the 147<sup>th</sup> Session (Apr. 5, 2013).

<sup>321</sup> *Juvenile Reeducation Institute*, *supra* note 3, ¶ 231; see also Beijing Rules Article 13(2).

<sup>322</sup> *Mendoza*, *supra* note 292, ¶ 175.

<sup>323</sup> See, e.g., CRC, *supra* note 234, art. 37(b); Committee on the Rights of the Child, General Comment No. 10, *Children’s rights in juvenile justice*, CRC/C/GC/10, 25 ¶ 71 (2007) (citing Article 40 (1) of CRC) (“[T]he reaction to an offence should always be in proportion not only to the circumstances and the gravity of the offence, but also to the age, lesser culpability, circumstances and needs of the child.”); see also *Juvenile Reeducation Institute*, *supra* note 3, ¶ 231; see also Beijing Rules Articles 5(1), 13(2); *Bulacio*, *supra* note 285, ¶ 134-35; *Derechos*, *supra* note 3, ¶ 350.

<sup>324</sup> *Id.* ¶ 126.

leads to more, not less, exposure to criminal behavior, and accordingly leads to higher recidivism rates.<sup>325</sup>

The Beijing Rules emphasize that the objective of institutionalizing children is to “provide care, protection, education and vocational skills, with a view to assisting them to assume socially constructive and productive roles in society.”<sup>326</sup> To this end, States must provide institutionalized children with educational, vocational, psychological and medical care and assistance.<sup>327</sup> Similarly, the Havana Rules recognize that the fundamental rehabilitative objective underlying the detention of children requires that the very architecture of facilities used to house juvenile inmates be conducive to the special care owed to children,<sup>328</sup> including facilitating the socialization, education and rehabilitation that is the goal of juvenile incarceration.<sup>329</sup> For its part, the CRC recognizes that states must give due regard to children’s needs for privacy, sensory stimuli, opportunities to associate with peers and to participate in sports, exercise, arts, and other leisure time activities.<sup>330</sup> In *Bulacio*, the Inter-American Commission recognized that those responsible for detaining juveniles must have juvenile-specific training.<sup>331</sup>

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<sup>325</sup> *Youth in the Adult Criminal Justice System*, supra note 12, at 9; Roman, J., The Urban Institute, *Assessing the Economic Consequences of Juvenile Versus Adult Justice* (2005); Donna Bishop, Charles Frazier, Lon Lanza-Kaduce and Lawrence Winner, *The Transfer of Juveniles to Criminal Court: Does It Make a Difference?*, 42 *Crime & Delinq.* 2 (1996); David Myers, *The Recidivism of Violent Youths in Juvenile and Adult Court* (2003); Marcy Podkopacz & Barry C. Feld, *Judicial Waiver Policy and Practice: Persistence, Seriousness, and Race*, Law Unequal (1995).

<sup>326</sup> Beijing Rule 26.1.

<sup>327</sup> Beijing Rule 26.3.

<sup>328</sup> *Derechos*, supra note 3, ¶ 520 (citing the Havana Rules).

<sup>329</sup> *Derechos*, supra note 3, ¶ 522 (citing IACHR Principles and Best Practices).

<sup>330</sup> *Derechos*, supra note 3, ¶ 521 (citing the CRC’s General Comment).

<sup>331</sup> *Bulacio*, supra note 285, ¶ 136.



Yet, as detailed above, few adults facilities in the United States provide juvenile-specific training.<sup>332</sup> Adult incarceration facilities in the United States also provide fewer opportunities for education, recreation, or vocational training to children than juvenile facilities.<sup>333</sup> Where they do, class space is limited and youths serving JLWOP often find themselves at the back of the line, as rehabilitative resources are directed toward those with a chance at future reintegration and away from prisoners without spouses, GED, or significant job experience—markers that disfavor prisoners who were incarcerated as children.<sup>334</sup> The deprivation of these opportunities directly impedes social reintegration after incarceration, and therefore violates the child’s rights to education, recreation, and rehabilitation.<sup>335</sup> Undoubtedly, this deficiency also contributes to a sense of hopelessness in the face of a lifetime in prison, without any possibility of reprieve.

### 3. Transfer Mechanisms Deny Special Protection

In *Juvenile Justice and Human Rights in the Americas*, the Inter-American Commission stated that the denial of the “protections afforded by the juvenile justice system” was one of its “main concerns.”<sup>336</sup> The Inter-American Commission was particularly “disturbed” and “troubled” by States in which juveniles could be transferred from juvenile courts “to ordinary courts, where they receive adult sentences and are forced to serve their sentences in adult prisons.”<sup>337</sup> These same concerns were expressed in *Minors in Detention*, where the Inter-

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<sup>332</sup> See *supra* Part II.B.4.

<sup>333</sup> See *id.*

<sup>334</sup> See *id.*

<sup>335</sup> *The Juvenile Reeducation Institute*, *supra* note 3 ¶ 161. In the same sense, I/A Court H.R., IACHR Advisory Opinion OC-17/2002, *supra* note 3, ¶¶ 80-81, 84 and 86-88; *Street Children*, *supra* note 223, ¶; and Beijing Rules, Rule 13.5. I/A Court H.R., *Juridical Condition*, *supra* note 3, ¶ 84. Havana Rules, Rules 34, 35, 36, 37, 38, 39, 42, 43, 45, 46, 47 and 48. See *European Rules for Juvenile Offenders Subject to Sanctions or Measures*, ¶ 28. See U.N. Human Rights Council (UNHRC), *The right to education of persons in detention: Report of the Special Rapporteur on the Right to Education, Vernor Muñoz*, A/HRC/11/8, (Apr. 2, 2009).

American Commission specifically found that Honduras's practice of subjecting children to trial as adults and incarceration in adult prisons violated their right to "special protection" under Articles 5 and 19 of the American Convention.<sup>338</sup> According to the Commission, these children were entitled to be prosecuted according to procedures specialized to the particular needs of minors, and detained in facilities apart from adults.<sup>339</sup>

Although a juvenile justice system exists in all 50 states in the United States to provide at least some measure of special protection to children, transfer laws allow states in the United States to withhold these protections from hundreds of thousands of children based solely on their age or the offense of which they are accused, most often without any consideration of the child's individual circumstances or best interests, and to try them as adults in the adult criminal courts. These laws violate the right to special protection in several respects.

First, all transfer laws violate the right to special protection because they affirmatively deny children protections that would be available in the juvenile court system, such as specially-trained counsel and juvenile court judges, specialized juvenile court procedures, and specialized juvenile detention facilities.<sup>340</sup> Withholding existing protections from children based solely on their age or offense is punitive and is clearly inconsistent with the rehabilitative ideal represented in numerous international instruments, including Article 19 of the American Convention.<sup>341</sup>

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<sup>336</sup> *Derechos*, *supra* note 3, ¶ 8; *see also id.* ¶¶ 86-88.

<sup>337</sup> *Derechos*, *supra* note 3, ¶ 8.

<sup>338</sup> *Minors in Detention*, *supra* note 225, ¶ 70 (1999).

<sup>339</sup> *Id.* ¶ 70, 99, 125.

<sup>340</sup> I.A. Comm. On H.R. Rights of the Child in the IAHR System ¶ 65.

<sup>341</sup> *See also Derechos*, *supra* note 3, ¶ 30.

Second, all transfer laws violate the right to special protection because they ensure that children will be treated no differently than adult defendants. Not only are children denied the existing special protections of the juvenile justice system, but they are also subject to the exact same criminal procedures and detention facilities as adults. Such laws clearly violate children's right to receive specialized treatment and not be subject to the exact same procedures as adults.<sup>342</sup>

Third, all transfer laws violate the right to special protection to the extent they are not applied only as a last resort and in exceptional circumstances. The Inter-American Commission has recognized that the "juvenile justice system—especially the deprivation of liberty of children— must be used only as a last resort and only by way of exception, and for as short a time as possible."<sup>343</sup> Similarly, Article 37(b) of the CRC and Article 24(1) of the ICCPR, as well as the Beijing Rules and the Havana Rules, mandate that children be deprived of their liberty only as a last resort or in exceptional circumstances. *A fortiori*, the adult criminal justice system may be used, if at all, only in even more exacting circumstances. However, in many states in the United States, transfer laws apply automatically even to the youngest children and for non-violent or minor offenses. Such laws by definition subject children to adult prosecution and sentencing in circumstances that are neither exceptional nor a last resort.<sup>344</sup>

Fourth, several types of transfer laws—statutory exclusion, mandatory waiver, and prosecutorial discretion laws—eliminate judicial oversight of the transfer process and thus eliminate a child's chance to be heard regarding his or her individual circumstances and best

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<sup>342</sup> See, e.g., *Derechos*, *supra* note 3, ¶¶ 29, 34, 366. Cf. IACHR, Report No. 62/02, Case 12.285, Merits. *Michael Domingues* (United States), October 22, 2002, ¶ 80. Committee on the Rights of the Child Comment No. 10, *supra* note 235, ¶ 10.

<sup>343</sup> *Derechos*, *supra* note 3, ¶ 80.

<sup>344</sup> Because these transfer laws are not reserved for exceptional circumstances, the United States' reservation to the ICCPR to treat juveniles as adults in "exceptional circumstances" is not implicated.

interests. These laws are contrary to the standards set forth in the Declaration of the Rights of the Child, and decisions of the Inter-American Commission and Court decisions.<sup>345</sup> Moreover, even judicial waiver laws violate a child's right to special protection to the extent the juvenile court's primary consideration is not the child's best interests.<sup>346</sup>

Fifth, “once an adult, always an adult” laws defeat the right of children to special protection by bootstrapping one legal deprivation to another. That a child has been previously processed through the adult system—likely without judicial oversight or adequate consideration of the child's best interests—should have no bearing on whether it is in the child's best interest to be transferred to adult criminal court in a later case.<sup>347</sup>

Sixth, presumptive waiver and reverse transfer laws place an impermissible burden on children to prove their entitlement to proceed in the juvenile system. It is the states—not children—that have an affirmative obligation to promote a child's exercise of his or her right to special protection.<sup>348</sup>

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<sup>345</sup> Declaration of the Rights of the Child, principle 2 and Art. 3; I.A. Comm. On H.R. Rights of the Child in the IAHR System ¶ 147 (citing *Gomez*, *supra* note 218, ¶ 163); Case of Girls Yean and Bosico, *supra* note 218, ¶ 134.

<sup>346</sup> See Juridical Status OC-17/2002, *supra* note 218, ¶¶ 53-60, 78, 137(2); see also *Derechos*, *supra* note 3, ¶ 24 (the justice system “must always bear in mind the best interests of the child”); Declaration of the Rights of the Child, principle 2 (“[T]he child shall enjoy special protection, and shall be given opportunities and facilities, by law and by other means, to enable him to develop physically, mentally, morally, spiritually, and socially in a healthy and normal manner and in conditions of freedom and dignity. In the enactment of laws for this purpose, the best interests of the child shall be the paramount consideration.”); Declaration of the Rights of the Child, Art. 3 (“In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”). CRC Art. 3.

<sup>347</sup> Committee on the Rights of the Child Comment No. 10, *supra* note 235, ¶ 27; *Derechos*, *supra* note 3, ¶¶ 86, 220; Beijing Rules Rule 22.1.

<sup>348</sup> The Human Rights Committee issues “General Comments” that serve as interpretations of the ICCPR. *Recent Development: The United States' Second and Third Periodic Report to the United Nations Human Rights Committee*, 49 HARV. INT'L L.J. 509, 511 (2008). The General Comments are applicable to all States Parties, and signal the Committee's interpretation of the ICCPR. U.N. Human Rights Comm., *CCPR General Comment No. 21: Article 10* ¶ 5 (April 1992).

#### 4. Pretrial Detention In Adult Facilities Denies Special Protection

States also violate established international law by detaining children in adult facilities before they even have been convicted of a crime. The trauma and violence to which U.S. states expose children by detaining them with adults is unacceptable at any juncture, but particularly so where the detention occurs before trial and before the child has been proven guilty of any crime.

First, laws in the United States that automatically require children to be held with adults for certain offenses cannot be said to use pretrial detention as a last resort based on an individualized consideration of each case. The Inter-American Commission has recognized also that preventive detention of children must be limited to cases where “the child poses an immediate and real threat to others.”<sup>349</sup> In *Lopez-Alvarez v. Honduras*, the Inter-American Commission further recognized that the American Convention requires pretrial detention to be justified in each case, giving due consideration to the individual and her specific circumstances, and that “in no case shall the application of said precautionary measure be determined by the crime with which the individual is being charged.”<sup>350</sup> Moreover, in *Juvenile Reeducation Institute*, the Inter-American Commission found that, “[w]hen preventive detention is ordered for children, the rule must be applied with even greater rigor.”<sup>351</sup> It is especially important in the case of children that pretrial detention be the exception, and that alternative measures—supervision, permanent custody, foster care, removal to a home or educational institution, care,

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<sup>349</sup> *Derechos*, *supra* note 3, ¶ 276; *see also* Article 8(2) of the American Convention (requiring States not to restrict the liberty of the accused “beyond the limits strictly necessary” to prevent flight or interference with any ongoing investigation; “preventive detention is, therefore, a precautionary rather than a punitive measure”); ICCPR Art. 9(3) (recognizing that pretrial detention should be used only in exceptional circumstances as the practice).

<sup>350</sup> *Lopez-Alvarez*, Merits, Reparations and Costs, Inter-Am Ct H.R., Series C No. 100 ¶ 81 (February 1, 2006) (“*Lopez-Alvarez*”).

<sup>351</sup> *Juvenile Reeducation Institute*, *supra* note 3, ¶ 230.

guidance and supervision orders, counseling, probation, or education and vocational training programs—be the rule.<sup>352</sup> Laws in the United States that automatically require children to be detained with adults before trial violate these standards because they restrict the children’s liberty without individualized consideration, and do so based solely on the crimes they allegedly committed.

Second, states in the United States violate the right to special protection to the extent they detain children before trial longer than necessary. Article 37(b) of the CRC provides that the arrest, detention, or imprisonment of a child shall be used only “for the shortest appropriate period of time.”<sup>353</sup> Nearly 20% of children detained before trial in adult jails in the United States spend at least *six months* in detention, which strongly suggests that states are not ensuring that children are detained in adult facilities for only the shortest appropriate period of time.

## **5. Adult Criminal Procedures Deny Special Protection**

Due to their undeveloped cognitive abilities, poor impulse control, and general immaturity, children are less equipped to confront the emotional, psychological, and intellectual complexities of trial. As a result, providing children with special protections is perhaps nowhere more important than in adversarial proceedings, especially where simple errors or rash decisions can result in a child spending his life behind bars. The special protections designed to insulate children from the machinery of the State—such as the right to an attorney and the right to remain silent—begin with arrest, detention, and the period leading up to trial. For example, the government authority detaining the child has the duty of notifying the child’s relative (or in the

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<sup>352</sup> *Id.*

<sup>353</sup> *See also id.* ¶ 231; see also Beijing Rules Article 13(2).

alternative of notifying the child's representative) of the arrest such that the child may benefit from timely assistance of counsel.<sup>354</sup> The child also has a right to be notified, at the time of imprisonment, of the right to establish contact with a relative or an attorney.<sup>355</sup> Whether or not the detained child requests to communicate with his relatives or representatives, the State agents responsible for his detention must immediately notify these persons of his situation.<sup>356</sup> In addition, at trial, the child has the right to have witnesses called and examined, the right not to testify against or be forced to incriminate oneself, the right to a judge who specializes in juvenile justice, and the right to an appointed attorney.<sup>357</sup> While these rights also apply to adults, children require special protection due to their difficulty in understanding and properly exercising such rights. By charging children as adults and subjecting them to ordinary criminal procedures, states in the United States violate the right to special protection in several ways.

First, by not providing children in the criminal system with counsel specialized in juvenile defense, U.S. states ensure that children are likely to be prejudiced by their diminished ability to reason and work with counsel. The failure to provide special counsel violates, among other provisions, Article 40 of the Convention on the Rights of the Child and Article 8, paragraphs (d) and (e), of the American Convention.<sup>358</sup>

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<sup>354</sup> *Bulacio, supra* note 285, ¶ 130.

<sup>355</sup> *Id.*

<sup>356</sup> *Bulacio, supra* note 285, ¶ 136.

<sup>357</sup> *Derechos, supra* note 3, ¶¶ 181, 172 (“Article 8, paragraphs (d) and (e) of the American Convention establish certain minimum guarantees for the right of defense, such as the inalienable right to be assisted by counsel provided by the State, if the accused does not defend himself personally or engage his own counsel within the time period established by law, and the right to examine witnesses present in the court and to summon witnesses, experts or other persons who can shed light on the facts”); *Derechos, supra* note 3, ¶ 162; CRC Art. 40; *Lopez-Alvarez, supra* note 350, ¶ 152.

<sup>358</sup> Inter-American Commission Human Rights of the Child in the IAHR System ¶ 65. American Convention Art. 8(d) and (e). *Derechos, supra* note 3, ¶ 172. The Committee on the Rights of the Child has specifically stated that a juvenile justice system “requires the establishment of . . . specialized defenders or other representatives who provide legal or other appropriate assistance to the child.” Committee on the Rights of the Child Comment No. 10, *supra* note 240, ¶ 92.

Second, by not providing judicial officers specialized in juvenile cases, U.S. states ensure that the judicial system is unlikely to help children understand and exercise their legal rights, including their rights to remain silent and to not incriminate themselves. The Inter-American Commission has made clear that the special protection required by Article VII of the American Declaration requires that a special judge should hear cases involving children.<sup>359</sup>

Third, by not providing specialized procedures, from initial arrest through trial, U.S. states similarly ensure that the judicial system is unlikely to compensate for children's diminished ability to reason and to understand and exercise their legal rights.<sup>360</sup>

Fourth, by not conducting competency evaluations that individually assess each child's best interests and ability to participate effectively in the adult criminal process, U.S. states ensure that the deprivations identified above cannot be identified and remedied in individual cases.<sup>361</sup>

## V

### CONCLUSION

The United States' practice of sentencing children to life without parole violates its obligations under the American Declaration to provide children with special measures of protection, including specifically their right to suffer incarceration only as a last resort and for the shortest duration, their right to a sentence that is proportionate, their right to rehabilitation, and their right to be free from discrimination. The United States stands alone among nations in

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<sup>359</sup> *Derechos*, supra note 3, ¶ 65 (citing Report on the Human Rights Situation in Nicaragua, Inter-Am. Comm'n H.R., OEA/Ser.L/V/II.45 doc. 18, ch. IV, rev. 1 (1978)). See also Committee on the Rights of the Child Comment No. 10, supra note 240, ¶ 93 ("States parties [should] establish juvenile courts. . . . Where that is not immediately feasible for practical reasons, the States parties should ensure the appointment of specialized judges or magistrates for dealing with cases of juvenile justice.").

<sup>360</sup> IACHR Advisory Opinion OC-17/2002, supra note 3, ¶ 102.

<sup>361</sup> Report of the Independent Expert for the United Nations Study on Violence Against Children, A/61/299, ¶ 112 (Aug. 29, 2006); *Derechos*, supra note 3, ¶ 276.


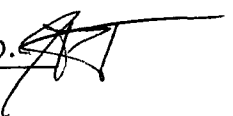


its routine and systematic application of JMWOP sentences. Accordingly, *amicus* respectfully requests that the Commission find the United States in violation of its obligations under international law in this regard, and declare its practice of JMWOP unlawful.

Dated: New York, New York  
March 19, 2014

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