

**Youth in the Adult Court in the United States: Reduced Numbers, Persistent
Racial Disparities**

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ABSTRACT

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While the United States is almost alone in not ratifying the U.N. Convention on the Rights of the Child (CRC), significant progress has been made on reducing the number of children prosecuted as adults, thereby bringing the U.S. closer to compliance with the CRC. However, the reduction in numbers of children tried as adults has not be accompanied by a reduction in racial disparities; children of color remain disproportionately affected by the practice of transferring children to the adult criminal justice system. Consciously and intentionally addressing this form of racial discrimination will be necessary for progress in respecting the rights of children in the United States to continue.

Youth in the Adult Court in the United States: Reduced Numbers, Persistent Racial Disparities

Despite being almost alone in not ratifying the U.N. Convention on the Rights of the Child (CRC), the United States has, through other mechanisms to which it is a State Party, been directly informed of its obligation to end the practice of transferring children under 18 to the adult criminal justice system.

In April 2014, the U.N. Human Rights Committee, in its concluding observations of the United States under the International Covenant on Civil and Political Rights (ICCPR), noted¹:

“The State party should ... ensure that juveniles are separated from adults during pretrial detention and after sentencing, and that juveniles are not transferred to adult courts. It should encourage states that automatically exclude 16 and 17 year olds from juvenile court jurisdictions to change their laws.”

In August 2014, the U.N. Committee on the Elimination of Racial Discrimination (CERD), similarly observed²:

¹ U.N. HUMAN RIGHTS COMMITTEE (HRC), *Concluding observations on the fourth periodic report of the United States of America*, 23.04.2014, CCPR/C/USA/CO/4, para. 23.

² U.N. COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION (CERD), *Concluding observations on the combined seventh to ninth periodic reports of the United States of America*, 29.04.2014, CERD/C/USA/CO/7-9, para. 21.

“The Committee calls upon the State party to ... ensure that juveniles are not transferred to adult courts and are separated from adults during pretrial detention and after sentencing.”

United States President Bill Clinton signed the CRC in 1995. This was about the time the political climate in the U.S. began to mutate. An extreme view of sovereignty, the emergence of conspiracy theories regarding the potential role of the United Nations, and strong partisan polarization have made it impossible to achieve the two-thirds majority (67 votes) necessary for the United States Senate to ratify human rights treaties. The CRC, the Convention on the Elimination of Discrimination Against Women (CEDAW)³, and the Convention on the Rights of Persons with Disabilities (CRPD)⁴, all remain unratified, although the United States has ratified two Optional Protocols to the CRC, having to do with child soldiers and child trafficking.

In the face of this political climate advocates and policy makers outside of Washington, D.C., have moved forward with policy changes at the state and local level that have had the cumulative effect of bringing the United States more into compliance with the CRC. Advocates usually do not argue that their proposed policy changes will help bring the U.S. into CRC compliance – such an argument in the current climate would likely have negative consequences – and many advocates do not necessarily think in terms of international human rights when promoting youth justice reforms.

³ Signed by President Jimmy Carter in 1980.

⁴ Signed by President Barack Obama in 2009.

They are focused on what is in the best interests of children. Fortunately, this is the same spirit that drove the creation of the CRC, so youth justice reformers are successfully bringing the U.S. toward compliance with the treaty, whether they explicitly say so or not.

In Article 1, the CRC defines children as all those who are under 18 years of age, with a caveat: “*unless, under the law applicable to the child, majority is attained earlier.*” Article 40 requires that: “*State Parties shall seek to promote ... the establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law ...*”

So, while the CRC does not specifically define 18 as the age of adult criminal responsibility, the U.N. Committee on the Rights of the Child, which monitors implementation of the CRC, has said that the age should be relatively high, and should be the same everywhere, to ensure that children are free from discrimination (as outlined in Article 2 of the CRC) and enjoy the right of equal access to justice.

In its 1996 report on Yemen, for example, the Committee wrote that⁵: “*... the age of criminal responsibility should not be set at too low an age and it should be ensured that below such an age, children are presumed not to have the capacity to infringe the penal law ...*”

⁵ U.N. COMMITTEE ON THE RIGHTS OF THE CHILD (CRC), *Concluding observations of the Committee on the Rights of the Child: Yemen*, 13.02.1996, CRC/C/15/Add.47, para. 14. At the time, children between 15 and 18 in Yemen could be held criminally responsible, but not to the same extent as adults 18 and older; see UN COMMITTEE ON THE RIGHTS OF THE CHILD (CRC), *Consideration of reports submitted by States Parties under Article 44 of the Convention: Yemen*, 23.07.1998, CRC/C/70/Add.1, para. 6.

In a 1994 Committee discussion about Mexico, one member noted⁶: *“It appeared that the minimum legal age for criminal responsibility was generally 18 years but lower in some parts of Mexico. It was difficult to see how children could be treated equally if their status in that respect depended on their place of residence.”*

In many U.S. states, children as young as 14 or even 12 can be prosecuted as adults; some states, for certain crimes, set no lower age limit at all. In terms of equal treatment, the United States also falls well short of CRC requirements; while federal law and most states have established 18 as the age of adult court jurisdiction, five states⁷ have yet to change their laws requiring all 17 year olds to be prosecuted as adults, and some method of transferring children to the adult court exists in every state. Children face a confusing array of different laws in each of the 50 states and other territories, and even within states, they are often subjected to differing treatment depending on the whims of local elected prosecutors and judges, many of whom may harbor unconscious or conscious racial biases.

It is a plain fact that access to justice in the United States varies according to geography, but even more starkly according to race and ethnicity. The failure to establish a uniform age below which children may not be prosecuted as adults, and the existence of multiple mechanisms by which children may be transferred to the adult

⁶ U.N. COMMITTEE ON THE RIGHTS OF THE CHILD (CRC), *Fifth Session: Summary Record of the 106th Meeting*, 14.01.1994, CRC/C/SR.106, para. 37.

⁷ Legislation passed in the state of Missouri to “Raise the Age” to 18 is currently awaiting the Governor’s signature to become law.

system (some of which are dangerously arbitrary), enables these racial disparities to flourish.

There is no reason the United States cannot come into compliance with the CRC prior to ratifying the treaty. But to do so, the United States must establish a uniform age of adult court jurisdiction, and eliminate the various mechanisms of transfer, so that all children will enjoy equal access to justice.

Indeed, the United States has been making slow, but steady progress in this area. At the turn of the century there were perhaps 250,000 children⁸ under 18 prosecuted in the adult system each year. In recent years that number has dropped significantly, as over 100,000 fewer children⁹ are now prosecuted as adults solely because of their age.

By far the largest number of children charged as adults in the United States have been those charged automatically, because of their age. At the turn of the century there are 11 states in which all 17-year-olds were charged as adults, and three states where all 17 and 16-year-olds were automatically transferred to the adult criminal justice system. Since then, five of those states have raised the age of adult court jurisdiction to 18, while four others have passed laws to do so.¹⁰ It is anticipated that, once these new

⁸ COALITION FOR JUVENILE JUSTICE, *Childhood on Trial: The Failure of Trying & Sentencing Youth in Adult Criminal Court*, Coalition for Juvenile Justice, Washington, D.C., 2005, p. 8.

⁹ JUSTICE POLICY INSTITUTE, *Raising the Age: Shifting to a Safer and More Effective Juvenile Justice System*, The Justice Policy Institute, Washington, D.C., 2017, p. 6.

¹⁰ States that have changed their laws over the last decade so that 16 and 17-year-olds are no longer automatically charged as adults: Connecticut, North Carolina (not yet implemented), and New York (to be implemented for 16-year-olds October 1, 2018); states that have changed laws over the last decade so that 17-year-olds are no longer automatically charged as adults: Illinois, Massachusetts, Mississippi, New Hampshire, Louisiana (not yet implemented), and South Carolina (not yet implemented); states that still have laws mandating that all 17-year-olds be charged as adults: Georgia, Michigan, Missouri (legislation currently waiting for Governor's signature to become law), Texas, and Wisconsin.

laws are implemented, the number of children automatically charged as adults will drop by more than 50%.¹¹

In addition to these “Raise the Age” states, there have been other important reforms that have (or will once implemented) reduce the transfer of youth to the adult system. Most significantly, in terms of numbers affected, the state of California ended the practice of allowing prosecutors to unilaterally decide, without judicial review, whether to charge a child as an adult. Californians voted in a 2016 referendum to bring this practice to an end by a 2-1 margin.

Many other states have adopted reforms that are intended to limit the transfer of children to the adult system. These reforms have included: reducing the number of crimes for which transfer is available, giving judges more discretion to keep children in the juvenile system, giving children opportunities to challenge their transfer, and raising the lower age at which children can be charged as adults.

All in all, during the past decade legislatures in 36 states have passed at least 70 pieces of reform legislation.¹²

In addition to the issue of transfer, states have begun to address the question of jailing or imprisoning children with adults, a practice recognized almost universally as

¹¹ J.M. THOMAS, *Raising the Bar: State Trends in Keeping Youth Out of Adult Courts (2015-2017)*, Campaign for Youth Justice, Washington, D.C., 2017, p. 10.

¹² *Ibid.*, p. 6.

harmful.¹³ This aligns with the CRC requirement that “... *every child deprived of liberty shall be separated from adults unless it is considered in the child’s best interest not to do so ...*”

Many states have traditionally sent children charged as adults to be jailed with adults while they await trial. And children who are convicted and sentenced as adults have usually been incarcerated in adult prisons. This practice creates a situation in which these children have routinely endured traumatizing physical and sexual assaults and abuse.

A 2003 law passed unanimously by the United States Congress and signed by President George W. Bush, called the Prison Rape Elimination Act, led to the establishment – nine years later under the Obama administration – of the “Youthful Inmate Standard”.¹⁴

The “Youthful Inmate Standard” defines a “youthful inmate”¹⁵ as “*any person under the age of 18 who is under adult court supervision and incarcerated or detained in a prison or jail,*” and requires that they be housed separately from adult inmates, and that there either be “*sight and sound separation*” between adults and youth outside of housing, or direct staff supervision.

¹³ For example, children incarcerated with adults are roughly five times more likely to commit suicide; see: CAMPAIGN FOR YOUTH JUSTICE, *Let’s Get Children Out of Adult Courts, Jails, and Prisons*, Campaign for Youth Justice, Washington, D.C., 12.02.2018.

¹⁴ U.S. CODE OF FEDERAL REGULATIONS, 28 C.F.R. pt. 115.14 (2012).

¹⁵ U.S. CODE OF FEDERAL REGULATIONS, 28 C.F.R. pt. 115.5 (2012).

States that fail to comply with these requirements lose funding from the United States federal government. Several states have cited these requirements to push for reforms that remove youth under 18 from adult jails and prisons, or at least establish mechanisms to keep them “*sight and sound*” separated.

As a result of these efforts, and a significant drop in juvenile crime rates, the number of youth incarcerated with adults has declined. From the year 2000 to 2014, the one day count of children in adult jails dropped from over 7,600 to about 4,200.¹⁶ From 2009 to 2015, the number of children in adult prisons dropped from 2,779 to 993.¹⁷

Parallel with the rising awareness of the damage done to youth who are jailed with adults has been an increased understanding of the harm caused by juvenile solitary confinement. In 2016, the Obama administration attempted to lead by example, banning the use of “restrictive housing” on the few juveniles held in federal prisons.¹⁸

The United States has been criticized by the U.N. Committee Against Torture for its excessive use of solitary confinement, and in 2014 was urged to¹⁹: “[p]rohibit the use of *solitary confinement for juveniles...*” It is well known that the use of solitary confinement on children causes lasting or even permanent psychological trauma and can exacerbate

¹⁶ CAMPAIGN FOR YOUTH JUSTICE, *Case Examples: Jurisdictions That Have Removed Youth Under the Age of 18 from Adult Jails*, Campaign for Youth Justice, Washington, D.C., 2017, p. 2.

¹⁷ THOMAS, *Raising the Bar*, p. 24.

¹⁸ U.S. DEPARTMENT OF JUSTICE, *Report and Recommendations Concerning the Use of Restrictive Housing: Final Report*, U.S. Department of Justice, Washington, D.C., 2016.

¹⁹ U.N. COMMITTEE AGAINST TORTURE, *Concluding observations on the combined third to fifth periodic reports of the United States of America*, 19.12.2014, CAT/C/USA/CO/3-5, para. 20. The United States is a State Party to the U.N. Convention Against Torture.

mental illness. Over half of the suicides committed by incarcerated youth in the U.S. occur in solitary confinement.²⁰

Many states in recent years have begun to pursue legislation to restrict or end the practice of placing children in solitary confinement, but the practice continues to an unknown extent. Information is frustratingly scarce. Definitive data on the harm caused by solitary confinement is not matched by data on how much, or where, it is being used, and reform faces resistance from prison staff who see solitary confinement as a useful tool for punishing or, perversely, protecting young inmates.

The aspect of juvenile transfer to the adult system that has been most resistant to change has been that of racial disparities. Racial disparities have persisted, and in some cases, gotten worse, even as reforms have reduced overall numbers of youth charged as adults, or incarcerated with adults.

These racial disparities persist at arrest, and at charge or transfer to the adult system. In 2015, about 14% of youth in the United States were African-American, but 34% of youth arrested were African-American. In 2014, over half (52.5%) of all youth transferred to the adult system by a judge were African-American.²¹ Youth of color account for 88% of youth incarcerated in adult jails and prisons.²²

²⁰ L.M. HAYES, *Juvenile Suicide in Confinement: A National Survey*, U.S. Department of Justice, Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention, Washington, D.C., 2009, p. viii.

²¹ CAMPAIGN FOR YOUTH JUSTICE, *Let's Get Children Out of Adult Courts, Jails, and Prisons*.

²² N. ARYA, *Getting to Zero: A 50-State Study of Strategies to Remove Youth from Adult Jails* [Forthcoming], p. 22.

In states where prosecutors decide whom to charge as an adult, racial disparities are extremely apparent. In Florida, where prosecutors directly charge children as adults more than in any other state, 68% of the children transferred to the adult system are African-American, despite their comprising only 17% of the state's youth population.²³ Before the law was changed in 2016, the decisions of California prosecutors to "directly file" children with adult charges was characterized by increasing racial disparities²⁴:

"For every White youth directly filed in 2003, there were 2.4 Latino youth and 4.5 Black youth. In 2014, 3.3 Latino youth and 11.3 Black youth were directly filed for every White youth."

For youth not charged as adults, racial disparities in "commitments" (juvenile detention) have not only not improved, but have in fact gotten worse. While the total number of commitments between 2003 and 2013 dropped in the United States by almost 50%, African-American youth are now more than four times more likely to be committed to juvenile detention than their white counterparts.²⁵

Why are racial disparities so persistent when other aspects of reform are making substantial progress?

²³ C. HUFFAKER, "In many states, black juveniles end up in adult court in high numbers." *Miami Herald*, 22.06.2017. Web: <http://www.miamiherald.com/news/nation-world/national/article157648774.html> [last accessed 21.05.2018]

²⁴ L. RIDOLFI, M. WASHBURN, F. GUZMAN, *The Prosecution of Youth as Adults: A County-Level Analysis of Prosecutorial Direct-File in California and Its Disparate Impact on Youth of Color*, W. Haywood Burns Institute, Oakland, CA, 2016, p. 12.

²⁵ THE SENTENCING PROJECT, *Racial Disparities in Youth Commitments and Arrests*, The Sentencing Project, Washington, D.C., 2016, p. 5.

The disparities continue to thrive because racial bias and racism have not been adequately addressed; racism persists in the United States and in many ways has gotten worse, or at least more open, over the last decade.

The problem begins with policing, both in the implicit (and sometimes explicit) racial biases that are rampant in U.S. police departments, and the racially biased notions of where policing should be focused. Arrests are higher because of where police are – in the schools and communities of people of color.

The problem continues in the courtroom, where the biases of many prosecutors (a 2015 survey found that 95% of elected prosecutors are white, and 83% are men²⁶), appear to inform their charging decisions.

Progress in the United States toward reducing the number of children transferred to the adult criminal justice system is of course welcome, but the failure to adequately address the racial bias and racial disparities inherent in the current system means that this progress will always be limited.

The openness of racism on some fronts, including in law enforcement, has accelerated since the elections of 2016. As states continue to attempt to reform and reduce transfer, addressing racial bias and its consequences has become more difficult, and more important, than ever.

²⁶ REFLECTIVE DEMOCRACY CAMPAIGN, *Justice for All*?*, 2015. Web: <http://wholeads.us/justice/> [last accessed 21.05.2018]

The United States will not ratify the CRC in the near future. That does not mean it cannot move towards compliance; indeed it has, at least in terms of reducing the numbers of children prosecuted as adults. But in the absence of national leadership, it is essential for every municipal, county, and state government seeking to reduce the adult prosecution of youth to collect data, monitor practices, and prioritize reducing racial disparities. Identifying and addressing discrimination and its resulting racial and ethnic disparities is critical to making additional progress.

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