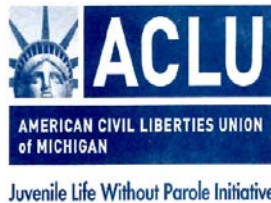


The City University of New York

CUNY SCHOOL OF LAW



**Criminalization of Minority Youth:
Youth Criminally Tried and Incarcerated as Adults**

**Shadow Report to the
U.N. Committee on the Elimination of All Forms of
Racial Discrimination**

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I. Issue Summary

1. One of the most devastating effects of racial discrimination in the United States is the criminalization of minority youth. Punitive zero-tolerance education policies, increased police presence in schools and minority neighborhoods, and laws that allow youth to be criminally tried as adults have resulted in a “school to prison pipeline” which expels, arrests, criminally tries and incarcerates youth at alarming rates.

2. In violation of the U.S.’s human rights obligations, state criminal laws permit, and in some cases require, that youth, defined as individuals under 18, be subjected to adult criminal prosecution and penalties. Each year approximately 200,000 youth are prosecuted as adults in criminal court,¹ and on any given day, thousands are incarcerated in adult jails and prisons.² By far, the vast majority of the youth who are criminalized and incarcerated in adult facilities are racial and ethnic minorities. Indeed, while there are troubling racial disparities throughout the U.S. prison system, the disparities are the most extreme among the youngest prisoners. Once in the adult criminal justice system, minority youth are significantly more likely to receive the most severe adult criminal sentences and face staggeringly high rates of solitary confinement.

3. Background and Statistics. Racial discrimination begins when youth are pushed out of schools, continues with the first encounter that minority youth have with law enforcement and pervades decisions about who will be arrested, prosecuted and tried as adults, what crimes they will be charged with, and the sentences that will be imposed. Black students are 3.5 times and Latino students are approximately 1.5 times³ more likely to be expelled than white students. Many schools directly refer youth involved in school-based infractions to law enforcement. Nationwide, more than 70 percent of the students involved in school-related arrests or referred to law enforcement are black or Latino.⁴

4. Black youth are more than twice as likely to be arrested as white youth.⁵ After arrest, they stand a much greater chance of being tried as adults. A 2007 study found that African-Americans constituted 83% of youth cases filed in adult courts.⁶ Youth of color also are much more likely to receive the most extreme sentences. In Michigan, 73.4% of the individuals serving life without parole sentences for offenses committed as youth are people of color.⁷

5. The youth that end up imprisoned in adult facilities are overwhelmingly minorities. In 2002, nearly three out of four youth admitted to adult state prison were youth of color.⁸ Prison data from individual states confirm the racial disparities. For instance:

- In Florida, of the 144 youth currently held in adult prisons, 78% (112) are black, 20% (29) are white and 2% (3) are Hispanic.⁹
- In Michigan, of the reported 81 youth held in adult prisons on Nov. 19, 2013, 74% (60) were black, 23.5% (19) were white, and 2.5% (2) were Native American.¹⁰
- In New York, of the 136 youth held in adult prisons on December 31, 2012, 65% (89) were black, 24% (32) were Hispanic, and 9% (12) were white.¹¹
- In South Carolina, of the 39 youth held in adult prisons on June 30, 2013, 69.2% were black, 28.5% were white, and 2.5% were other races.¹²

6. Latino youth are likely to be under-reported because federal arrest data only requires reporting on race and not ethnicity. Many states lack a standard procedure for collecting race and ethnicity. As a result, many youth who are Latino may be characterized as white.

7. Racial disparities among youth incarcerated as adults are greater than in the general prison population. In Michigan, people of color represent 56% of the adult prison population but 76.5% of the youth prison population.¹³ The federal government does not provide a racial breakdown of the 1,300 youth under 18 who are currently in adult prisons, but the national data available shows that racial disparities are the most extreme among the youngest prisoners. Overall, the imprisonment rate of black males is 6 times that of white males, but among 18-19 year olds, black males are more than 9 times as likely to be in prison than white males the same age.¹⁴

8. Youth sent to adult jails and prisons are subjected to multiple additional human rights violations. They are at high risk of physical and sexual assault.¹⁵ They are deprived of age-appropriate programming, education, and medical and mental health care. Because prisons are not set up to meet the needs of youth, youth in prison are disproportionately punished through disciplinary actions and solitary confinement.¹⁶ Minority youth face the highest rates of solitary confinement. In Michigan, youth of color constitute 78% of youth placed in isolation or solitary confinement.¹⁷ Once released from prison, youth face a much higher re-arrest rate than youth processed in the juvenile justice system¹⁸ and their convictions often impede access to employment, housing, and education.

9. Legal Framework. Because of federalism, states determine the laws governing the limits of juvenile court jurisdiction and the conditions under which youth who normally would be under juvenile court jurisdiction can be moved to adult criminal court. Many states allow prosecutors to determine whether youth will be tried as adults. In Florida, 98% of youth transfers are decided by prosecutors without judicial review,¹⁹ and black boys are more than twice as likely to be transferred to adult court than white boys.²⁰ In Michigan, Black or African-American youth were more than 3 times more likely to be waived or designated to be tried in adult courts.²¹

10. Even in states where all youth of a certain age are treated as adults, disparities in rates of arrest and imposition of sentences still result in severe disparities between the minority and white youth who are tried and imprisoned as adults. In New York, all 16 and 17 year olds are tried as adults. Only 32% of the state's total population is black or Latino,²² but in 2010, more than 70% of youth who were arrested were black or Latino.²³ Once arrested, black youth in New York are nearly twice as likely to be incarcerated in an adult jail or prison than white youth.²⁴ As a result, blacks and Hispanics account for over 90% of the youth in adult prisons in New York.²⁵

II. Concluding Observations

11. In 2008, the Committee expressed concern about discrimination within the U.S. criminal justice system, including harsh adult sentencing practices that discriminate against minority youth.²⁶ The Committee described the “stark racial disparities in the administration and functioning of the criminal justice system,” including the disproportionate number of minorities

in the prison population, and emphasized that imposing the adult criminal sentence of life without parole on youth was “incompatible with article 5(a).” CERD CO (2008) ¶¶ 20, 21.

III. U.S. Government Report

12. The U.S. fails to address the issue of youth who are tried as adults. Federal efforts to enforce non-discrimination laws and the Juvenile Justice Delinquency Protection Act (JJDP) described in the U.S. report (U.S. Report, ¶¶ 19, 73) address youth in the juvenile justice system and do not apply to youth who are tried and incarcerated in the adult criminal justice system. The Prison Rape Elimination Act (PREA) does include national standards requiring that youth in adult prisons be separated from adults. However, PREA does not address the underlying problem of trying youth as adults, imposing adult sentences and incarcerating them in adult facilities. Further, the standards are only binding on federal facilities (Report, ¶ 28), and youth incarcerated in adult jails and prisons are in state or local facilities. To date only two states have indicated they are in compliance with PREA,²⁷ 46 states and territories have filed assurances that they will work toward compliance and use 5% of federal funds they receive for criminal justice purposes from the Department of Justice.²⁸ Eight states and territories have opted out of complying with PREA standards.²⁹ The U.S. has issued interpretive guidance indicating that the states that have submitted assurances may not be required to undertake the facility audits required by the standards during the first three year audit cycle.³⁰

IV. Legal Framework

13. The laws and policies described violate CERD Articles 1(a), (c) & (d), 5(a), (b), (e)(iv) and (v) and 6.

V. The CERD Committee General Recommendations

14. The Committee’s General Recommendations³¹ make clear that States must ensure that measures taken to fight crime do not have a racially discriminatory effect. GR 34, ¶ 38. The recommendations emphasize that minority children are particularly vulnerable to multiple forms of discrimination because of their race and age and are entitled to special protection from the State. GR 31, Preamble, GR 34, ¶¶ 25, 26,

15. The Committee has recognized that discrimination against racial minorities can occur during all phases of interaction with the criminal justice system, including questioning and arrest, pretrial detention, trial, sentencing and treatment in prison. GR 31, ¶¶ 20, 26, 28, 34, 38; *See* GR 34, ¶ 39 (emphasizing that States should take measures to prevent discrimination by law enforcement against people of African descent, especially in connection with arrest and detention). The Committee also has recognized that disparate rates of arrest, incarceration and severity of sentences are indicators of racial discrimination. GR 31, ¶ 1(d)-(f).

16. The Committee has emphasized that at each phase of the criminal justice system the State must take special precautions to protect children given their special vulnerability, GR 31, ¶¶ 25, 26(c), GR 34, ¶ 26, and “pay the greatest attention possible” to ensure that children “benefit from the special regime to which they are entitled in relation to the execution of sentences,” GR 31, ¶

41. Given the vulnerability of children of African descent, States should adopt measures to promote their equality, education and health and prevent the transmission of poverty. GR 34, ¶¶ 25, 50.

VI. Other UN Body Recommendations

17. In its 2014 Concluding Observations, the U.N. Human Rights Committee (HRC)³² expressed concern about racial disparities at different stages in the criminal justice system (racial profiling by law enforcement, sentencing disparities and overrepresentation of racial and ethnic minorities in prisons and jails) and the U.S.'s violation of the right of children in conflict with the law to special protection and in particular to specialized juvenile proceedings, sentencing and treatment in detention. HRC COs (2014), ¶¶ 6,7, 20, 23.

18. The HRC stated that the U.S. must ensure “that juveniles are not transferred to adult courts” and encourage “states that automatically exclude 16 and 17 year olds from juvenile court jurisdictions to change their laws.” HRC COs (2014), ¶ 23. It also stated that the U.S. should “ensure that juveniles are separated from adults during pretrial detention and after sentencing,” “prohibit and abolish the sentence of life imprisonment without parole for juveniles,” and abolish the use of solitary confinement for anyone under 18. HRC COs (2014), ¶¶ 20 and 23.

19. In its 2006 Conclusions and Recommendations, the U.N. Committee Against Torture³³ criticized the U.S. practice of incarcerating youth in adult jails and prisons and stressed that the U.S. “should ensure that detained children are kept in facilities separate from those of adults in conformity with international standards.” CAT COs (2006), ¶ 34.

V. Recommended Questions

- What is the federal government doing to encourage states to reform laws that allow, or require that youth be criminally tried as adults, and to end the disproportionate impact that these laws have on minority youth?
- What effort is the federal government undertaking to improve and standardize data collection regarding the relative rate of contact of Latino youth with the justice system?
- What is the federal government doing to limit school referrals to law enforcement or otherwise keep school discipline issues in house?

VI. Suggested Recommendations

- Adopt measures to ensure that minority youth and all youth in conflict with the law are not subjected to adult criminal procedures that fail to take into account their age and cognitive development and the desirability of promoting rehabilitation.
- Create meaningful incentives and penalties to ensure that states comply with PREA and enforce PREA's audit requirements.
- Amend the JJDPA to require states to report measures they have taken to decrease disproportionate minority youth contact at each stage of contact with the system.

- Improve data collection at the federal, state and local levels to accurately reflect racial and ethnic disparities and provide disaggregated data by both race and ethnicity at all stages of contact with the system and disaggregated data for youth under 18 in prisons and jails.
- Address the School to Prison Pipeline by requiring states to adopt the federal standards in the school discipline guidance package to limit referrals and/or interaction with law enforcement.
- Direct funding and technical assistance to districts to comply with the school discipline guidance package to limit the use of suspensions, expulsions and law enforcement referrals, provide training in proven practices--such as restorative justice--and invest in school counselors, social workers and other support staff instead of law enforcement personnel.

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¹ Patrick Griffin, Sean Addie, Benjamin Adams, and Kathy Firestone, *Trying Juveniles as Adults: An Analysis of State Transfer Laws and Reporting*, U.S. DEP'T OF JUSTICE, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION NATIONAL REPORT SERIES, BULLETIN, 20-1 (Sept. 2011). This figure combines the estimated number of youth transferred from juvenile to adult criminal court and the estimated number of youth prosecuted as adults in states that exclude 16 and 17 year olds from juvenile court jurisdiction. The conservative estimate of youth who are tried as adults in states that try all 16 and 17 year olds as adults is 175,000. *Id.* at 21. There were 14,000 reported transfers of youth into the adult system in 2007, but most states do not track or report the data. *Id.* at 20.

² The combined single day count for youth in adult jails and prisons in 2012 was over 6,800. This figure combines counts of children in adult prisons on December 31, 2012 and children in adult jails on June 30, 2012. *See e.g.*, Todd D. Minton, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, JAIL INMATES AT MIDYEAR 2012 – STATISTICAL TABLES, 5 tbl. 2 (2013) available at: <http://www.bjs.gov/content/pub/pdf/jim12st.pdf>; E. Ann Carson, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2012: TRENDS IN ADMISSIONS AND RELEASES, 1991-2012, 26 (2013) available at: <http://www.bjs.gov/content/pub/pdf/p12tar9112.pdf>.

³ Advancement Project, *Test, Punish, and Push Out: How “Zero Tolerance” and High-Stakes Testing Funnel Youth into the School-to- Prison Pipeline* (Washington, DC: Advancement Project, 2010).

⁴ http://www.abajournal.com/news/article/gestapo_tactics_must_end_say_school_discipline_panelists/

⁵ In 2011, the arrest rate for black youth was 8380.5 per 100,000 blacks 10-17. The arrest rate for white youth was 3786.7 per 100,000 whites aged 10-17. National Center for Juvenile Justice (February 25, 2014). *Juvenile Arrest Rates by Offense, Sex, and Race*. Available: http://www.ojjdp.gov/ojstatbb/crime/excel/JAR_2011.xls. *See* Sentencing Project, *Disproportionate Minority Contact in the Juvenile Justice System*, p. 2.

⁶ Neelum Aruya and Ian Augarten, *Critical Condition: African American Youth in the Justice System* (Campaign for Youth Justice 2008), p. 26.

⁷ Out of 364 individuals serving juvenile life without parole sentences as of June 17, 2014, 256 are black, 8 are Hispanic, 2 are Asian, 1 is Native American and 97 are white. MDOC data as of June 17, 2014 analyzed by ACLU Michigan/JLWOP Initiative.

⁸ National Council on Crime and Delinquency, *And Justice for Some: Differential Treatment of Youth of Color in the Justice System* (January 2007), p. 34.

^{vii} Florida Department of Corrections, *Inmate Population Search*, (inmates ages 0-17, last accessed November 1, 2013) available at: <http://www.dc.state.fl.us/ActiveInmates/>. The Florida state prison system appears to classify inmates of Hispanic origin as “white.” As a result, the statistics may under represent Hispanic youth and over-represent white youth.

¹⁰ MDOC data as of November 19, 2013 analyzed by ACLU Michigan/JLWOP.

¹¹ NYS Department of Corrections and Community Supervision (DOCCS), Data Prepared by DOCCS, Report: *Current Age By Ethnic Status; Under custody December 31, 2012*.

¹² South Carolina Department of Corrections, Age Distribution of SCDC Total Inmate Populations as of June 30, 2013, available at http://www.doc.sc.gov/pubweb/research/InmatePopulationStats/ASOF_AgeDistrib_063013.pdf.

¹³ In 2012, there were 19,026 Whites and 24,236 Non-Whites in Michigan prisons. Michigan Department of Corrections, Statistical Report 2012, p. C-72 and C-74, available at http://www.michigan.gov/documents/corrections/2013-08-12_-_MDOC_2012_Statistical_Report_-_Vers_1_0_430723_7.pdf.

¹⁴ Bureau of Justice Statistics, *Prisoners in 2012: Trends in Admissions and Releases, 1991-2012* (Dec. 2013), p. 25, available at <http://www.bjs.gov/index.cfm?ty=pbdetail&iid=4842>.

¹⁵ 77 Fed. Register 119 (June 20, 2012), p. 37128 (noting that state prison inmates under 18 were more than 8 times more likely to have a substantiated incident of sexual abuse than the average inmate) available at <http://www.gpo.gov/fdsys/pkg/FR-2012-06-20/pdf/2012-12427.pdf>

¹⁶ American Civil Liberties Union & Human Rights Watch, *Growing Up Locked Down: Youth In Solitary Confinement in Jails and Prisons Across the United States*, 63-65, 68 (October 2012). Solitary confinement has devastating psychological effects on youth, including an increased risk of suicide. *Id.* at 23-24.

¹⁷ Out of 200 youth in segregation from 2010-2013, 155 were youth of color and 2 were of unknown race. MDOC data as of July 26, 2013 analyzed by ACLU Michigan/JLWOP Initiative.

¹⁸ Richard E. Redding, *Juvenile Transfer Laws: An Effective Deterrent to Delinquency?*, U.S. Dep't of Justice, Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention, OJJDP Juvenile Justice Bulletin, June 2010, at 6, available at <https://www.ncjrs.gov/pdffiles1/ojjdp/220595.pdf>.

¹⁹ HRW, *Branded for Life*, p.4. Available at: <http://www.hrw.org/node/124345/section/5>

²⁰ Black boys make up 27.2 percent of children received by the juvenile justice system, but account for 51.4 percent of transfers to the adult system. White boys make up 28 percent of children received by the juvenile justice system, but account for only 24.4 percent of transfers. *Id.*

²¹ Weemhoff & Staley, p. 11 (“In 2012, 59 percent of youth who were waived or designated as adults were Black or African American, even though Black youth only make up 18 percent of the youth population statewide.”)

²² U.S. Census Bureau (2010), Profile of General Population and Housing Characteristics of New York, retrieved from: http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=DEC_10_DP_DPDP1.

²³ *Criminal Justice Case Processing of 16-17 Year Olds, Prepared by New York Division of Criminal Justice Services, Office of Justice Research and Performance, January 4, 2013*, p. 3 and Table 6a, available at: <http://www.cardozo.yu.edu/sites/default/files/Criminal%20Justice%20Case%20Processing%20of%2016-17%20Year%20Olds.pdf>.

²⁴ Of the black youth arrested, 14.8% received incarceration sentences, whereas only 8.2% of white youth arrested received incarceration sentences. *Criminal Justice Case Processing of 16-17 Year Olds*, p. 3.

²⁵ See note xi.

²⁶ Committee on the Elimination of Racial Discrimination, *Concluding Observations: United States of America*, U.N. Doc. CERD/C/USA/CO/6 (8 May 2008).

²⁷ See, Department of Justice List for PREA State Certifications (May 28, 2014) found at <http://www.wcl.american.edu/endsilence/documents/PREASStateList.pdf>.

²⁸ *Id.*

²⁹ *Id.*

³⁰ See, Department of Justice Issued Frequently Asked Questions on Governor Certification Question 5 May 16, 2014. (Question: May a governor submit an Assurance even if the state will not be conducting any PREA audits? Answer: During the initial three year audit cycle, which ends on August 19, 2016, a governor may submit an Assurance without conducting any PREA audits. If necessary, additional guidance will be provided on whether the Department of Justice will continue to accept Assurances in the absence of PREA audits beyond the initial three year audit cycle.) found at <http://www.prearesourcecenter.org/faq#n2233>.

³¹ See Committee on the Elimination of Racial Discrimination (CERD), *General Recommendation No. 34 adopted by the Committee: Racial discrimination against people of African descent*, ¶ 38, U.N. Doc. CERD/C/GC/34 (3 Oct. 2011); Committee on the Elimination of Racial Discrimination (CERD), *General Recommendation XXXI on the Prevention of Racial Discrimination in the Administration and Functioning of the Criminal Justice System*.

³² Human Rights Committee, *Concluding Observations: United States of America*, U.N. Doc. CCPR/C/USA/CO/4 (2014)

³³ Committee Against Torture, *Concluding Observations: United States of America*, U.N. Doc. CAT/C/USA/CO/2 (2006).