

# **CHILDREN IN CONFLICT WITH THE LAW: JUVENILE JUSTICE & THE U.S. FAILURE TO COMPLY WITH OBLIGATIONS UNDER THE CONVENTION FOR THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION<sup>1</sup>**

## **I. INTRODUCTION**

1. The United States' Periodic Report to the Committee significantly understates the extent of racial discrimination in the criminal justice system overall, and fails to discuss anywhere in its 300 page report the practice of widespread and well-documented racial and ethnic discrimination in its juvenile justice system, despite well-known racial disparities in the number of youth targeted, adjudicated, sentenced and incarcerated. The Report's passing mention of juvenile facilities in the context of CRIPA enforcement simply highlights this failure.

2. The juvenile justice system in the U.S. provides a stark example of racial discrimination, with racially discriminatory effects evident in every State in the country but one. The juvenile justice system serves as a feeder into the adult criminal justice system, and has reached deeply into the public education system to criminalize youth for minor and typical adolescent behaviors, particularly in poor urban school districts with large numbers of students of color.

3. Systemic discrimination in the juvenile justice system is a grave and decisive violation, because justice for the child is an entry point for subsequent involvement in the adult criminal justice system, and results in substantial negative and pervasive lifetime consequences including: exclusion from education, jobs, college scholarships, and public housing, bars to enrollment in the military, voting disenfranchisement, incarceration in dangerous conditions, and increased

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<sup>1</sup> This Shadow Report on Discrimination in Juvenile Justice was prepared by a Working Group that included: Addie Rolnick of Sonosky, Chambers, Sachse, Endreson & Perry, LLP; Alison Parker of Human Rights Watch; Angela Arboleda of National Council of La Raza; Bernardine Dohrn, Director of Children and Family Justice Center, Northwestern University School of Law; Cindy Soohoo, Director of Bringing Human Rights Home Project, Human Rights Institute, Columbia Law School; Dalia Hashad of Amnesty International, USA; Deborah LaBelle, ACLU Michigan; Eric Tars of National Law Center on Homelessness and Poverty and Coalition for Human Rights at Home; Francisco Villaruel of the Institute for Children, Youth, and Families and Julian Samora Research Institute of Michigan State University; Jasmine Tyler of National Affairs of the Drug Policy Alliance; Jason Zeidenberg of the Justice Policy Institute; Jenni Gainsborough of Penal Reform International; Jill Beeler of the Office of the Ohio Public Defender; Katayoon Majd of the National Juvenile Defender Center; Liz Sullivan and Tiffany Gardner of the National Economic and Social Rights Initiative; Luis Rodriguez, author and activist, LTia Chucha, Los Angeles; Margaret Huang of the U.S. Racial Discrimination Program of Global Rights; Marsha Weissman of Center for Community Alternatives; Michael Harris of The W. Haywood Burns Institute; Michelle Leighton, Director, Human Rights Programs of University of San Francisco; Randolph Stone of the Edwin F. Mandel Legal Aid Clinic of University of Chicago School of Law; Ryan King of The Sentencing Project; Tonya McClary, National Criminal Justice Representative of American Friends Service Committee; Tshaka Barrows of The W. Haywood Burns Institute; and the outstanding and timely legal research of law students Dominique Doan-My Thuy Nong and Viniyanka Prasad, University of Chicago Law School; Erin White and her students at the University of Oregon Law School; and Charla Strong, Christopher Vaughn and Kieran Wiberg, at Northwestern University School of Law.

risk of violence.<sup>2</sup> Although juvenile records are sealed for many purposes, youth adjudicated delinquent are often subject to sentencing enhancements upon conviction of a subsequent crime, as well as trial as adults for future offenses.

4. The Convention on the Elimination of all forms of Racial Discrimination (CERD) recognizes that racial and ethnic discrimination is a barrier to the full realization of human rights, and obliges states to nullify any law or practice *which has the effect* or the purpose of creating or perpetuating racial discrimination.

5. The continuing failure of the United States federal government to take concrete action to rectify the many instances of racial discrimination that exist within the juvenile justice system is a clear failure to meet its obligations under article 5 section (a) of the Convention to guarantee people of all races “the right to equal treatment before the tribunals and all other organs administering justice.” The Committee has elaborated on those obligations in General Comment XXXI, especially paragraphs. 25 and 41.

## **II. INITIAL POINT OF CONTACT FOR CHILDREN IN CONFLICT WITH THE LAW**

1. Every stage of the juvenile justice system is marked by substantial racial disparities, even when data is controlled for severity of the charge and prior delinquency record. Moreover, the school system has become a significant entry point into the juvenile justice system through disciplinary policies that mandate school suspension, expulsion, and arrest for an increasing array of minor student behaviors and rule infractions. Following the passage of the Gun-Free Schools Act in 1994, the receipt of federal funding was predicated on school districts’ creation of “zero tolerance” policies resulting in mandatory expulsions for certain offenses. These policies were initially directed at the possession of a weapon but have since been used to expel, suspend, and arrest students for a variety of behaviors, the majority of which involved no violence whatsoever.<sup>3</sup>

2. Over 3 million students were suspended or expelled from elementary and secondary schools in the U.S. in the year 2000.<sup>4</sup> U.S. Department of Education Office of Civil Rights data shows that while youth of color (Black, Latino/a, Asian American, and Native American youth) comprised 38 % of the U.S. student population, they represented 52 % of students suspended or expelled from school. The greatest disparities were found among Black students, who made up 17 % of the U.S. student population but 34 % of students subjected to out-of-school suspensions

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<sup>2</sup> Angela McGowan, et al, “Effects on Violence of Laws and Policies Facilitating the Transfer of Juveniles from the Juvenile Justice System to the Adult Justice System”, *Am.J.Prev.Med.* 2007; 32(4S).

<sup>3</sup> National Economic and Social Rights Initiative, *Deprived of Dignity: Degrading Treatment and Abusive Discipline in New York City and Los Angeles Public Schools*, March 2007.

<sup>4</sup> National Center for Education Statistics Digest of Education Statistics 2006. September 17, 2007. Online at [http://nces.ed.gov/programs/digest/d06/tables/dt06\\_149.asp](http://nces.ed.gov/programs/digest/d06/tables/dt06_149.asp) and [http://nces.ed.gov/programs/digest/d06/tables/dt06\\_148.asp](http://nces.ed.gov/programs/digest/d06/tables/dt06_148.asp)

and 30 % of students subjected to expulsions.<sup>5</sup>

3. School suspensions are linked to dropping out of school, which is in turn associated with incarceration. The National Center for Educational Statistics found that 31 % of students who had been suspended three or more times before the spring of their second year of high school dropped out of school, compared to 6 % of students who had never been suspended.<sup>6</sup> Students who drop out of school are 3.5 times more likely than high school graduates to be incarcerated in their lifetime<sup>7</sup> – in fact, sixty-eight (68) percent of state prisoners dropped out of high school.<sup>8</sup> This phenomenon has come to be known as the “school to prison pipeline” in the U.S., reflecting recognition of the direct and dire consequences of increased surveillance and harsher punishments for minor disciplinary infractions in the public school system. Because youth of color are disproportionately suspended and expelled from public schools, the consequences of dropping out and the attendant increased likelihood of subsequent incarceration are not race neutral. Fifty-six (56) percent of black youth in the juvenile justice system report a prior school suspension.<sup>9</sup> One study estimated that, while 1 in 10 young (age 22-30) white high school dropouts have been incarcerated by their early thirties, this figure increases to 52 % for African American males.<sup>10</sup>

4. The juvenile and criminal justice systems also intervene directly in the school setting. According to the U.S. Department of Education, between 1999 and 2003, the number of schools reporting the regular presence of armed safety and police officers increased by 30%. While national data is not available, information from individual cities shows an increasing number of arrests of children while in school, again largely for minor misbehavior. For example, in 2003 in Chicago, Illinois, 8,539 students were arrested in public schools, disproportionately youth of color.<sup>11</sup> Almost 10% of those arrested were children age 12 or younger. Black students made up 77% of the arrests, but only 50% of the school population. Less than half of the students arrested in Chicago schools are referred to juvenile or criminal court and only some 17% of the cases are continued through trial, yet students are excluded from their schools. In New York City, more than 4,600 police officers work in public schools every day, representing a larger police presence than exists in most cities in the U.S.<sup>12</sup> While New York City has refused to disclose the number of arrests made in schools, a recent study by the New York Civil Liberties Union (“NYCLU”) shows that increased law enforcement and school security measures are concentrated in schools

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<sup>5</sup> Office of Civil Rights 2000. Fall 1998 elementary and secondary school civil rights compliance report: National and state projections. Washington, DC: U.S. Department of Education

<sup>6</sup> Livingston, 2006, Table 27-2.

<sup>7</sup> Martin and Halperin, 2006.

<sup>8</sup> Harlow, Caroline Wolf. 2003. *Education and correctional populations*. Washington, DC: Bureau of Justice Statistics.

<sup>9</sup> Snyder, Howard N., and Sickmund, Melissa. 2006. *Juvenile Offenders and Victims, 2006 National Report*. Washington, DC: U.S. Department of Justice, Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention

<sup>10</sup> Westem, Petit, and Guetzkow, 2002.

<sup>11</sup> Advancement Project. Judith A. Browne, 2005. *Education on Lockdown: The Schoolhouse to jailhouse Track*. Washington, DC., Online at <http://www.advancementproject.org/reports/FINALEOLrep.pdf> .

<sup>12</sup> Mukherjee, Elora 2007. *Criminalizing the classroom: The over-policing of New York City schools*. New York: New York Civil Liberties Union.

whose student body is disproportionately made up of students of color: 82 % of children attending schools with metal detectors were Black and Latino/a, surpassing their 93% representation in the citywide school population.<sup>13</sup> The racial disparity in school arrests is not limited to large urban centers: in 2003, according to the Des Moines Register, Black students who make up 15% of the Des Moines, Iowa high school student population represented 33% of the 556 arrests made in that city's high schools.

5. Many arrests made in schools are for non-criminal activity, and are carried out without regard for the age of the student or the context for the child's misbehavior. For example, in St. Petersburg, Florida in 2005, a five-year-old African American girl was arrested by police for throwing a tantrum and hitting an assistant principal. One month earlier in New York City a sixteen year-old girl was arrested for shouting an obscenity in the hallway. When the school principal attempted to stop the police from detaining the girl, the principal and a school aide were also arrested. This underscores that girls, as well as boys, suffer from the consequences of racial discrimination in school discipline. In Palm Beach County, Florida in 2003, where Black students are 64% of those arrested in school but only 29% of the student population, 26% of arrests were for fights or threats where there were no injuries or weapons, and 22% were for miscellaneous, and highly discretionary, offenses such as "disruptive behavior".<sup>14</sup>

6. Beyond arrests in school, overall arrest rates of youth of color are disproportionate to their representation in the general population. For instance, African American youth are 16 % of the overall population, but represent 28 % of children arrested in the U.S.<sup>15</sup>

7. Racial disparities in school suspensions, expulsions, and school and community arrests are compounded throughout the juvenile justice system itself, resulting in a cumulative impact. These disparities are particularly acute for African American youth, as indicated by Figure 1.

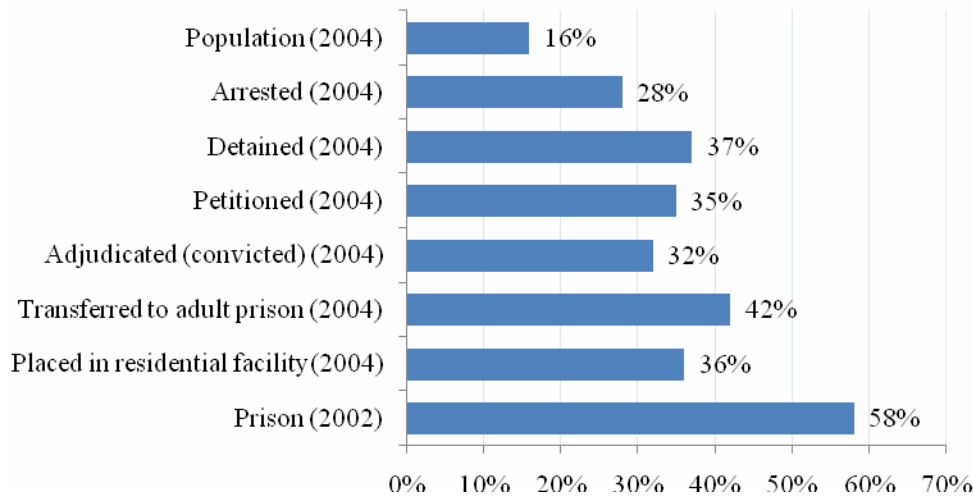
<sup>13</sup> Mukherjee, Elora 2007. Criminalizing the classroom: The over-policing of New York City schools. New York Civil Liberties Union.

<sup>14</sup> Advancement Project. Judith A. Browne, 2005. *Education on Lockdown: The Schoolhouse to jailhouse Track*. Washington, DC. Online at <http://www.advancementproject.org/reports/FINALEOLrep.pdf>.

<sup>15</sup> **Arrest:** National Council on Crime and Delinquency 2007. *And Justice For Some*. Washington, DC; **Population:** Puzanchera, C., Finnegan, T. and Kang, W. 2006. Easy Access to Juvenile Populations. Online at: [www.ojjdp.ncjrs.gov/ojstatbb/ezapop/](http://www.ojjdp.ncjrs.gov/ojstatbb/ezapop/)

The now notorious case of the arrest of six African American students in Jena, Louisiana, on charges of attempted murder and conspiracy, illustrates in dramatic form what has become common practice across the U.S.: arresting Black students and bringing escalated charges for school misbehavior, failing to charge white students for similar behavior, and trying and sentencing the students of color in adult criminal court. In 2006, an African American student asked the principal at a Jena school assembly if he could sit under an oak tree outside the school, known as a "white tree" because only white students gathered there. He was told he could, and he and several friends went to the tree. The next day, someone hung two nooses from the tree, recalling the over a century long history of lynching and torture of African Americans subsequent to emancipation. School officials identified three white students as the perpetrators and the principal recommended school expulsion. He was overruled by a school superintendent who imposed only suspensions. Racialized fights among students in the school increased as a result, and, in December 2006, a white student was hit and briefly knocked unconscious by a Black student. Justin Barker, the white student, was hospitalized, treated for cuts and bruises, and released within hours. Police then arrested six Black students, ages 14-18, and the prosecutor charged them with attempted murder and conspiracy; those charged in adult criminal court were subject to sentences of up to seventy-five years in prison. In June, an all white jury convicted Mychal Bell, who was 16 years old at the time of the assault. He served ten months in prison as the case gathered national attention. In the face of mass demonstrations and opposition, Bell's charges have been overturned; he has been remanded to juvenile court for retrial, and released on bail but subsequently detained again. All Black students continue to await trial. In a bizarre act of denial of the significance of the entire incident, the city of Jena cut down the oak tree

**African American youth are disproportionately represented through every stage in the juvenile justice process.**



**Figure 1.** Sources: **Population:** Puzzanchera, C., Finnegan, T. and Kang, W. 2006. Easy Access to Juvenile Populations. Online at: [www.ojjdp.ncjrs.gov/ojstatbb/ezapop/](http://www.ojjdp.ncjrs.gov/ojstatbb/ezapop/); **Detained, Petitioned, Adjudicated, Transferred, Placed:** Stahl, A., Finnegan, T., and Kang, W. 2007. "Easy Access to Juvenile Court Statistics: 1985-2004." Online at: <http://ojjdp.ncjrs.gov/ojstatbb/ezajcs/>; **Arrest, Prison:** National Council on Crime and Delinquency 2007. *And justice for some*. Washington, DC: National Council on Crime and Delinquency.

8. Despite wholly inadequate data about other youth of color (Latino/as, Asian Americans, Native Americans) in the juvenile justice system, when youth of color are added to the dire discrimination against African American youth, the disparities become even more stark. For example, the incarceration rate for African American young males in 2003 was 1,278 per 100,000, the rate for Latino male youth was 774 per 100,000 compared to the rate for white youth of 305 per 100,000.<sup>16</sup>

<sup>16</sup> Sampson & Lauritsen, 1997.

Native Americans are too often an easily overlooked population of youth of color in the U.S., in part because they make up a very small percentage of the total population (less than 1%), and in part because a large proportion of the Native American population is concentrated in reservations located around the country. These reservations operate independently in significant ways. In addition, in some areas, Native American youth in urban areas may not be identified as Native American in the juvenile or criminal justice system. Although 1% of the U.S. youth population in 2003, identified Native youth made up a full 2% of the cases referred to juvenile courts. This is the single greatest increase among any racial group in the U.S. Similarly, in 2003, Native American youth had a higher percentage of petitioned cases waived to adult criminal court, at 1.2% of all Native American cases formally processed, than any other racial group in the U.S. When the numbers are disaggregated by offense categories, Native American youth have the highest percentage of cases in every category except drug crimes. Also in 2003, Native American youth had the highest percentage of adjudicated cases that resulted in a placement out of the home (33%), which is the most serious sentence a juvenile court judge can impose, and they had the lowest percentage of adjudicated cases that resulted in probation (56%). In some states, the disparities are even worse. In 2002, Native American youth in North Dakota were incarcerated in adult correctional centers at a rate of 16.7 for every 100,000 youth. By contrast, no other group experienced enough youth admitted to adult corrections to register at over 0 per 100,000. This data indicates an alarming level of racial discrimination against Native American youth in the juvenile justice system.

Statistics drawn from:

***And Justice for Some: Differential Treatment of Minority Youth in the Justice System,*** published by the National Council on Crime and Delinquency (NCCD), January 2007 [http://www.nccd-crc.org/nccd/pubs/2007jan\\_justice\\_for\\_some.pdf](http://www.nccd-crc.org/nccd/pubs/2007jan_justice_for_some.pdf)

### III DISCRIMINATORY DETENTION OF CHILDREN

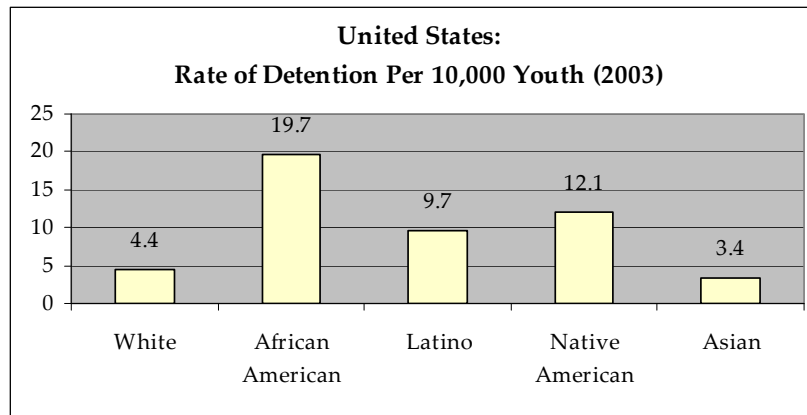
1. From 1985 to 1995, the number of youth held in secure detention in the U.S. increased by 72%. Over the same ten year period, the racial proportions of these youth were reversed. In 1985, 56.6% of children in public detention centers were white and 43.4% were children of color. By 1995, the proportion of children of color in public detention facilities was 56.4%, while that of white youth declined to 43.6%.<sup>17</sup> Similarly the rate of incarceration of girls grew 65% from 1988 through 1997. The rate of incarceration for African-American girls grew 123% compared to 41% for white girls.<sup>18</sup>

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<sup>17</sup> Census of Public and Private Juvenile Detention, Correctional and Shelter Facilities, 1985-1995, in *Beyond Detention: System Transformation through Juvenile Detention Reform*, Bart Lubow, Pathways to Juvenile Detention Reform, No. 14, Juvenile Detention Alternatives Initiative, a project of the Annie E. Casey Foundation, 2007, at <http://www.aecf.org>

<sup>18</sup> Bernardine Dohrn, All Ellas: Girls Locked Up, *Feminist Studies* 30 no. 2 (Summer 2004), 309.

# A Comparison of Rates of Detention



Source: Sickmund, Melissa, Sladky, T.J., and Kang, Wei. (2005) "Census of Juveniles in Residential Placement Databook."

**Figure 2.**

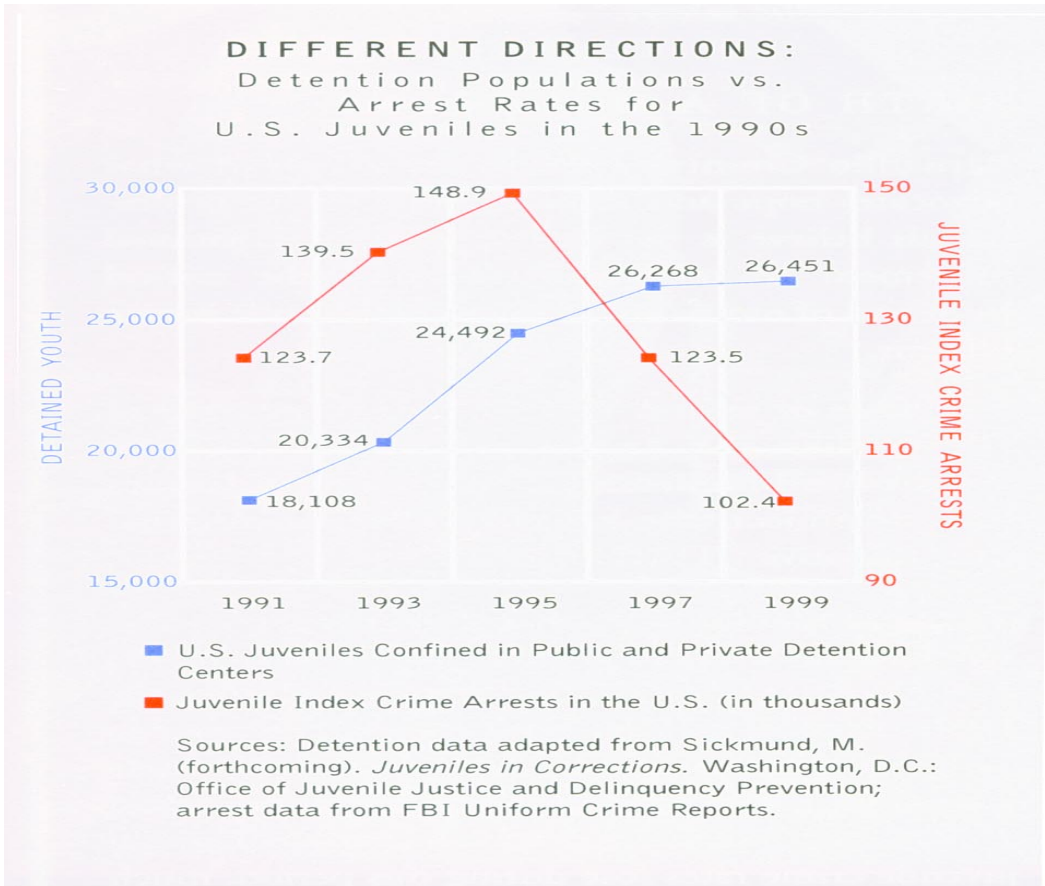
2. Nationwide, youth of color were overrepresented in the detained juvenile population at 3.1 times the rate of white youth, among commitments to public facilities at 2.9 times the rate of white youth, and among private commitments at 2.0 times the rate of White youth.<sup>19</sup> Youth are often unnecessarily or inappropriately detained at great expense, with long-lasting negative consequences for both public safety and youth development.

3. This increase in the use of secure detention for children awaiting trial, and the increase in the detention of children of color, has resulted in severely overcrowded detention facilities. The number of juvenile detention centers with populations over capacity rose by 642% in this decade, from 24 to 178 institutions. Sixty-two percent of African American and Latino youth who were detained were held in overcrowded facilities.<sup>20</sup>

<sup>19</sup> *And Justice for Some: Differential Treatment of Minority Youth in the Justice System*, published by the National Council on Crime and Delinquency (NCCD), January 2007 [http://www.nccd-crc.org/nccd/pubs/2007jan\\_justice\\_for\\_some.pdf](http://www.nccd-crc.org/nccd/pubs/2007jan_justice_for_some.pdf)

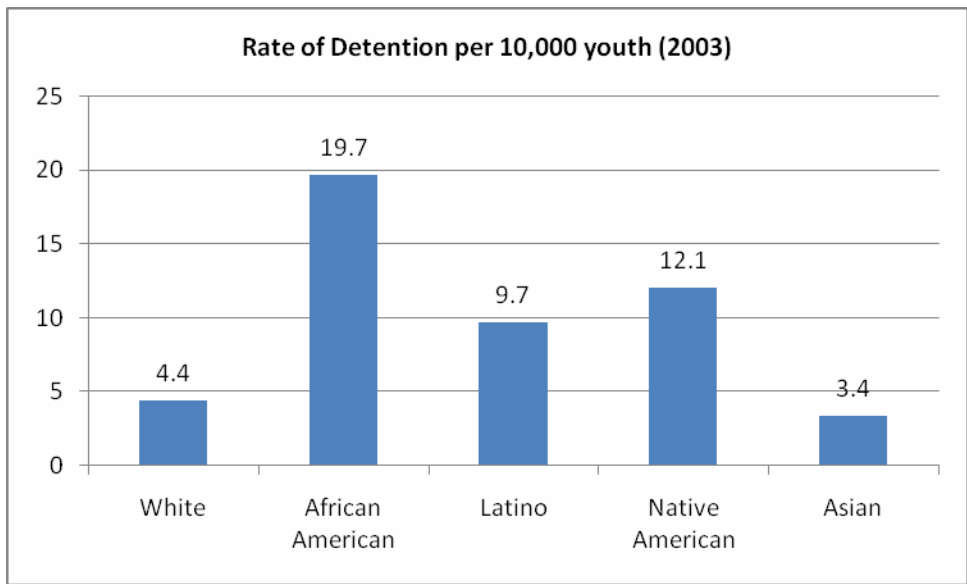
<sup>20</sup> Ibid.





## Detention Increased Despite Decreases in Juvenile Crime

Figure 3





#### **Figure 4.**

Source: Sickmund, Melissa, Sladky, T.J., and Kang, Wei. (2005) "Census of Juveniles in Residential Placement Databook."

4. In 1992, the Juvenile Detention Alternatives Initiative (JDAI) was launched to reduce the detention of children, improve child outcomes, and preserve public safety, by testing new ways to establish smarter, fairer, more effective and efficient juvenile justice systems. These sites have achieved measurable results using strategies such as better screening tools, more reliance on data, collaboration between systems and communities, and effective alternatives to incarceration.

Many of these results are well documented. For example, while implementing JDAI, sites achieved the following:

- In Cook County, Illinois, the average juvenile detention population dropped by 37 percent and youth arrests decreased by more than half;
- Multnomah County, Oregon, has decreased its juvenile detention population by two-thirds and decreased juvenile arrests by almost half; and
- Bernalillo County, New Mexico, greatly reduced its average daily population in secure detention between 1999 and 2003, while seeing a 26 percent drop in juvenile crime.

JDAI promotes changes to policies, practices, and programs to:

- reduce reliance on secure confinement;
- improve public safety;
- reduce racial disparities and bias;
- save taxpayer dollars; and
- stimulate overall juvenile justice reforms.

Since its inception in 1992, JDAI has repeatedly demonstrated that jurisdictions can safely reduce reliance on secure detention for children without increasing re-arrests or failure-to-appear rates, despite the continued existence of law enforcement policies such as juvenile curfews and increasing presence of law enforcement in schools that drove up juvenile detention rates nationally.<sup>21</sup> There are now approximately 80 JDAI sites in 21 states and the District of Columbia.

5. Notwithstanding these promising initiatives, under existing U.S. juvenile justice policies detention continues to be the first resort of juvenile justice systems, rather than the last resort, with dramatic and disproportionate impacts on youth of color.

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<sup>21</sup> M. Wordes, *et al*, *Juvenile Detention Alternatives Initiative Evaluation Report*, Oakland, CA, National Council on Crime & Delinquency, 2000.

#### IV. JUVENILE JUSTICE COURT PROCESSING

1. From the inception of the modern juvenile justice system, the court processes and procedures of the juvenile justice system have been tainted by the United States' racial discrimination and inequality.<sup>22</sup> This effect can still be seen in the way that juvenile cases are handled in court today. As previously discussed, there is disproportionate contact between children of color and the juvenile justice system. Therefore, court processes that rob children of their due process rights have a disparate impact on children of color in the United States. Some court practices may go beyond disparate impact and become examples of intentional as well as systemic racial discrimination, such as prosecutorial charging and transfer decisions and judicial transfer decisions which deny youth of color their right to equal treatment before the courts. The lack of action by the U.S. government to counter the discriminatory effect of policies and practices or to mitigate the harm done to youth of color represent a violation of both Article 2 and Article 5 (a) of the Convention.

2. Because the United States has both a disproportionate number of people of color living in poverty, and a disproportionate percentage of children of color involved with the juvenile justice system, it stands to reason that the client population of many juvenile indigent defenders is disproportionately African American, Latino, Asian American and Native American. Therefore, state systems that under-resource and under-value the provision of specialized juvenile indigent defense services have a disparate impact on children of color in the United States.

3. Juvenile indigent defense systems are many and varied across the country with no legally enforceable ethical standards and model rules of conduct. Although each state has its own unique challenges in providing quality counsel to youth, there are several common problems across the states.<sup>23</sup> Throughout the United States, children's access to qualified counsel is impeded by:

- Delayed appointment of attorneys assigned to represent children<sup>24</sup>
- High rates of waiver of counsel, such waiver often being encouraged by court systems<sup>25</sup>

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<sup>22</sup> See James E. Starrs, *A Sense of Irony in Southern Juvenile Courts*, 1 Harv. CR-CL L. Rev. 129 (1966) (recounting the use of juvenile delinquency charges to punish children for engaging in civil rights demonstrations and prevent their further involvement in such activities).

<sup>23</sup> See ABA JUVENILE JUSTICE CENTER ET AL., *A CALL FOR JUSTICE: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS* (1995), available at <http://www.njdc.info/pdf/cfjfull.pdf> [hereinafter *A CALL FOR JUSTICE*]

<sup>24</sup> Children and Family Justice Center and National Juvenile Defender Center, *ILLINOIS: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS* (2007); ABA JUVENILE JUSTICE CENTER ET AL., *MONTANA: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS* 29 (2003), available at <http://www.njdc.info/pdf/mtreport.pdf>

<sup>25</sup> ABA JUVENILE JUSTICE CENTER ET AL., *JUSTICE CUT SHORT: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS IN OHIO* 25 (2003), available at [http://www.njdc.info/pdf/Ohio\\_Assessment.pdf](http://www.njdc.info/pdf/Ohio_Assessment.pdf) [hereinafter *OHIO ASSESSMENT*] (up to 80% waiver rate). See also ABA JUVENILE JUSTICE CENTER ET AL., *VIRGINIA: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS* 23 (2002), available at <http://www.njdc.info/pdf/Virginia%20Assessment.pdf> [hereinafter *VIRGINIA ASSESSMENT*] (about 50% waive right to counsel); National Juvenile Defender Center, *FLORIDA: AN ASSESSMENT OF ACCESS TO*

- Defenders with staggeringly high caseloads that prevent zealous representation of each client;<sup>26</sup>
- Inadequate resources allocated to defender offices and private conflict counsel, including lack of investigators, motions, experts, and training in adolescent development, preventing zealous advocacy;<sup>27</sup>
- A lack of training and supervision of juvenile defense attorneys, resulting in under-qualified lawyers for children;<sup>28</sup> and
- A court room culture that discourages juvenile defenders from advocating strongly for child clients, by viewing delinquency courts as “kiddie courts” where adversarial practices are out of place and defense attorneys are roadblocks to be overcome.<sup>29</sup>

4. The consequences are dire when a child receives ineffective assistance of counsel, or no counsel at all. Low-income children of color who are adjudicated face a much greater likelihood of out-of-home placement. Once disposition is complete, juvenile adjudications have serious collateral consequences, like: expulsion from school, limited job prospects, deportation, disqualification and eviction from public housing, and ineligibility to serve in the military. For children to suffer these consequences without the protection afforded by competent counsel is an affront to due process that harshly affects children of color.

5. The prosecutor’s function is also important because of the multitude of discretionary decisions prosecutors make that result in racially disparate impacts on youth cases. Prosecutors must decide whether to drop or file charges; the severity and nature of charges to file; whether to offer plea deals, and the nature of those deals; what discovery to turn over; and if a child is adjudicated, what sentences to recommend. These crucial decisions are made with little to no oversight or accountability.<sup>30</sup> Non-transparent prosecutorial discretion contributes to the disparities in outcomes for children of different racial backgrounds and ethnicities..

For example, prosecutors choose to bring African American and Latino youth into court for formal processing more often than white youth [see the Jena 6 case above]. According to the

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COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS 27-28 (2006), available at [http://www.njdc.info/pdf/Florida% 20Assessment.pdf](http://www.njdc.info/pdf/Florida%20Assessment.pdf) [hereinafter FLORIDA ASSESSMENT] (up to 75% waive right to counsel in some jurisdictions).

<sup>26</sup> VIRGINIA ASSESSMENT, at 20-21; ABA JUVENILE JUSTICE CENTER ET AL., WASHINGTON: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN JUVENILE OFFENDER MATTERS 40-42 (2003), available at <http://www.njdc.info/pdf/wareport.pdf>; NATIONAL JUVENILE DEFENDER CENTER ET AL., INDIANA: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS 40-41 (2006), available at <http://www.njdc.info/pdf/Indiana%20Assessment.pdf> ; FLORIDA ASSESSMENT, at 55.

<sup>27</sup> VIRGINIA ASSESSMENT, at 26; OHIO ASSESSMENT, at 35

<sup>28</sup> GEORGIA ASSESSMENT, at 2, 26-27; VIRGINIA ASSESSMENT, at 28-30; ABA JUVENILE JUSTICE CENTER ET AL., MAINE: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS 26 (2003), available at <http://www.njdc.info/pdf/mereport.pdf> [hereinafter MAINE ASSESSMENT] (no training is required or available)

<sup>29</sup> A CALL FOR JUSTICE, at 9, 51; TEXAS ASSESSMENT, at 21; GEORGIA ASSESSMENT, at 2; MAINE ASSESSMENT, at 27 (defenders friendly with court personnel); MARYLAND ASSESSMENT, at 4 (defenders who zealously advocate for clients are seen as interfering); INDIANA ASSESSMENT, at 40

<sup>30</sup> See Angela Y. Davis, *Arbitrary Justice: The Power of the American Prosecutor* (2007)

2006 National Report on Juvenile Offenders, 66.1% of African American juveniles and 59.5% of other children of color who were arrested for person offenses were petitioned for formal processing, while only 56.7% of white juveniles were petitioned to court.<sup>31</sup> For drug offenses, 78.2% of African American juveniles and 56.1% of other children of color were petitioned for formal processing, while only 55.8% of white youth were petitioned.<sup>32</sup>

6. In the case of young women of color, this bias may be compounded.<sup>33</sup> Prosecutorial discretion also results in a disparity in the treatment of male and female juveniles. Prosecutors choose to pursue technical violations more often when committed by females than when committed by males. For example, 20% of all females who violate their probation, parole or court orders are held in residential placements, while only 12% of males with similar violations are held.<sup>34</sup>

Because of the numerous other decision makers and decision points in a juvenile case, it is unclear how much of this apparent bias is attributable to prosecutorial discretion, alone. The very opacity of prosecutors' decision making renders those decisions difficult to analyze in this way. However, transparency regarding the prosecutorial function would surely reduce the overrepresentation of children of color in the juvenile justice system.

7. Confidentiality protections limiting access to juvenile records – previously a defining characteristic of juvenile court -- are eroding. All states allow some access to juvenile records to courts, prosecutors, and schools. Children are increasingly subject to surveillance, fingerprinting and DNA testing, and their data is stored in state repositories. A prior juvenile record may be considered in sentencing in the adult system, increasing the likelihood of a custodial sentence.<sup>35</sup> Because a disproportionate number of children in the juvenile justice system are children of color, this erosion of protections is particularly harmful to them.

8. There are three main transfer mechanisms by which children are sent to adult court: judicial waiver, wherein a judge makes the decision to transfer a child after a hearing; statutory exclusion, which occurs when the legislation removes certain offenses and offenders of a certain age from the jurisdiction of the juvenile court; and prosecutorial discretion or direct file. As discussed above, many children of color lack effective legal representation. Qualified counsel is essential to ensuring that judges are able to make appropriate decisions in transfer hearings, and not decisions that are predicated on biases, inappropriate evidence, and prosecutorial presentation, and a lack of argument on behalf of the accused youth. Statutory waiver often uses factors that have a racially disparate impact and because they do not offer individualized decisions; inappropriate children are brought into both the juvenile and the adult justice systems.

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<sup>31</sup> Juvenile Offenders and Victims, p. 179

<sup>32</sup> Juvenile Offenders and Victims, p. 183

<sup>33</sup> Laurie Schaffner, *Girls in Juvenile Justice*, University of California Press, 2006.

<sup>34</sup> Juveniles in Corrections, p. 14

<sup>35</sup> Sampson, Robert J. and Janet L. Lauritsen, 1997. Racial and ethnic disparities in crime and criminal justice in the United States, *Ethnicity, Crime, and Immigration: Comparative and Cross-National Perspectives, Volume 21 of Crime and Justice*, ed. Michael Tonry. Chicago: University of Chicago Press; Pope & Feyerherm, 1990.

Prosecutorial discretion gives sole determination, with no showing, hearing, due process or equal protection rationale, to the prosecutor.

9. Transfer disproportionately affects youth of color.<sup>36</sup> Some 50,000 children are transferred to adult criminal court each year; in addition 200,000 children are sent to adult court because their state laws set the upper age of juvenile court jurisdiction at 16 or 17, rather than 18 years of age.<sup>37</sup> These numbers violate the US ratification of the International Covenant on Civil and Political Rights, even with its reservation.<sup>38</sup> Studies have shown that in California, as many as 70 percent of the children transferred to the adult criminal system are Black or Latino. Children of color in Illinois represent 9 out of 10 of the transfer cases.<sup>39</sup> Nationally, research has shown that in 2002, 73% of the 4100 new admissions to adult prisons of children under age 18 were children of color.<sup>40</sup> Racial disparities are often most pronounced when children are transferred based on drug or gun charges. For example, in 2003, white youth were 69% of the petitioned drug cases in the country, and 58% of the transferred drug cases. Black youth, on the other hand, were only 29% of the petitioned drug cases, but made up 41% of the transferred drug cases.

10. Transfer to adult courts and systems have negative consequences for all youth, and the consequences are often compounded for youth of color. For example, youth who are sent to adult court are more likely to recidivate than youth who remain in the juvenile system, more likely to reoffend sooner, and to reoffend with greater severity.<sup>41</sup> Further, in some states, adult felony convictions result in the loss of voting rights. Adult convictions also reduce a youth's future employment opportunities and earnings potential, as well as impact their chances at higher education, public housing, and military recruitment.

## V. SENTENCING OF CHILDREN

1. Youth of color in the U.S. are sentenced to and incarcerated in juvenile detention

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<sup>36</sup> MIKE MALES & DAN MACALLAIR, BUILDING BLOCKS FOR YOUTH, THE COLOR OF JUSTICE: AN ANALYSIS OF JUVENILE ADULT COURT TRANSFERS IN CALIFORNIA (2000), *available at* <http://www.buildingblocksforyouth.org/colorofjustice/coj.html>; JASON ZIEDENBERG, BUILDING BLOCKS FOR YOUTH, THE RACIAL IMPACT OF ILLINOIS' PRACTICE OF TRANSFERRING YOUNG DRUG OFFENDERS TO ADULT COURT (2001), *available at* <http://www.buildingblocksforyouth.org/illinois/illinois.html>.

<sup>37</sup> Campaign for Youth Justice, "The Consequences Aren't Minor: The Impact of Trying Youth as Adults and Strategies for Reform, March 2007 at 8-9; Woolard, J.L., Odgers, C., Lanza-Kaduce, L., & Daglis, H. , "Juveniles within Adult Correctional Settings: Legal Pathways and Developmental Considerations, *International Journal of Forensic Mental Health*, 4(1), 1-18 (2005).

<sup>38</sup> International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, UN Doc. A/6316 (Dec. 16, 1966), Art. 10(2) (b).; International Covenant on Civil and Political Rights, New York, 16 December 1966. Declarations and Reservations: United States Reservation (5), at [http://www.ohchr.org/english/countries/ratification/4\\_1.htm](http://www.ohchr.org/english/countries/ratification/4_1.htm)

<sup>39</sup> Campaign for Youth Justice, Executive Summary: The Consequences Aren't Minor at 2 (2007)

<sup>40</sup> National Council on Crime and Delinquency, *And Justice for Some* at 34 (2007)

<sup>41</sup> Bishop, Donna M., Frazier, Charles E., Lane, Jodi, and Lanza-Kaduce, Lonn. (January 2002). Juvenile Transfer to Criminal Court Study: Final Report. pg. 15.

facilities and adult prisons in far greater numbers than white youth and far above their demographic representation. Of all children of color, African-Americans are particularly disadvantaged in the sentencing process, and disproportionately receive the harshest sentence possible: to die in prison.

2. Juvenile Justice Systemic Discrimination. African American and Latino/a youth regularly receive more severe sentences than white youth across all types of crime categories adjudicated in juvenile courts. Given that probation is the least severe sentence and out-of-home or “residential” placement the most severe, in 2003, 63% of white youth received probation compared to 58% of youth of color. For drug offenses, 67% of white youth received probation compared to 58% of youth of color. These percentages were reversed for out-of-home (residential) placement: 38% of Native Americans, 37% of Asian Pacific Islander youth, and 28% of African-American youth were placed out of the home, compared to 25% of white youth.<sup>42</sup> Youth of color are also held in custody and prosecuted “as adults” in criminal courts more often than white youth and given adult sentences.<sup>43</sup> African American youth are nine times more likely to be brought into custody than white youth, even though they make up just 16% of the total youth population (compared to 78% white youth).<sup>44</sup>

3. Vast Discriminatory Variation among States. On a state-by-state basis, the racial disparities in sentencing within the juvenile justice systems are startling. Though African Americans comprise 16% of the youth population in the U.S., they make up 38% of those confined in state correctional facilities. The latest “relative rate index” data (a standardized index that compares rates of racial and ethnic groups compared to whites)<sup>45</sup>, reflects overrepresentation of youth of color in detention in juvenile detention for every state in the country but one. For example, in South Dakota, the relative rate index for African Americans compared to whites in detention is 47 to 1; in North Dakota it is 21 to 1; Wisconsin 18 to 1; New Jersey 15 to 1; Wyoming 12 to 1; Nebraska 11 to 1 and New Hampshire 10 to 1.<sup>46</sup>

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37 National Council on Crime and Delinquency, “And Justice for Some,” pp. 21-22 (Jan. 2007) (hereinafter “NCCD 2007”).

43 National Council on Crime and Delinquency, “And Justice for Some,” supra note 1.

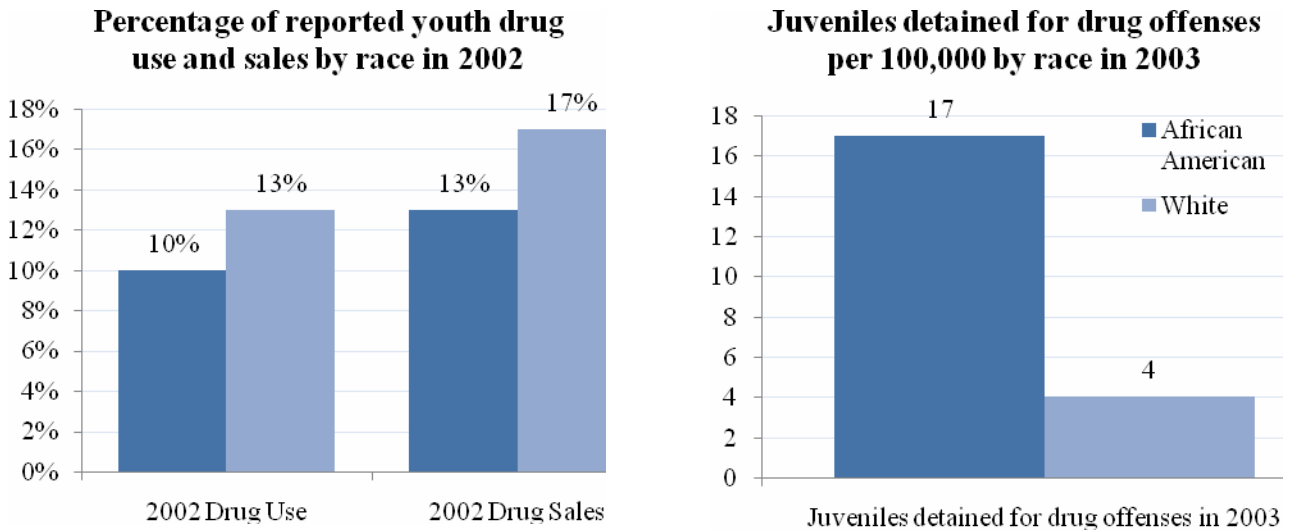
44 Howard Snyder and Melissa Sickmund, *Juvenile Offenders and Victims: 2006 National Report*, at 2.

45 The custody rate in the index is the number of juvenile offenders in detention in 2003 per 100,000 juveniles aged 10 and over to age 18 generally.

46 *Id.* at 24 (citing *Census of Juveniles in Residential Placement 1997, 1999, 2001, and 2003*. OJJDP (2005); Online analysis package OJJDP (2006)).

4. Discrimination in Juvenile Drug Sentencing. Although African American and white youth use and sell drugs at similar rates, African Americans are committed for drug offenses at five times the rate of whites.

**Figure 6:** Reported Juvenile Drug Use and Drug Sales by Race; Juveniles Detained for Drug Offenses by Race



Sources: SAHMSA, 2005 Note: This is data for 12-to 17- year olds; Sickmund, Melissa, Sladky, T.J., and Kang, Wei. (2005) "Census of Juveniles in Residential Placement Data book."

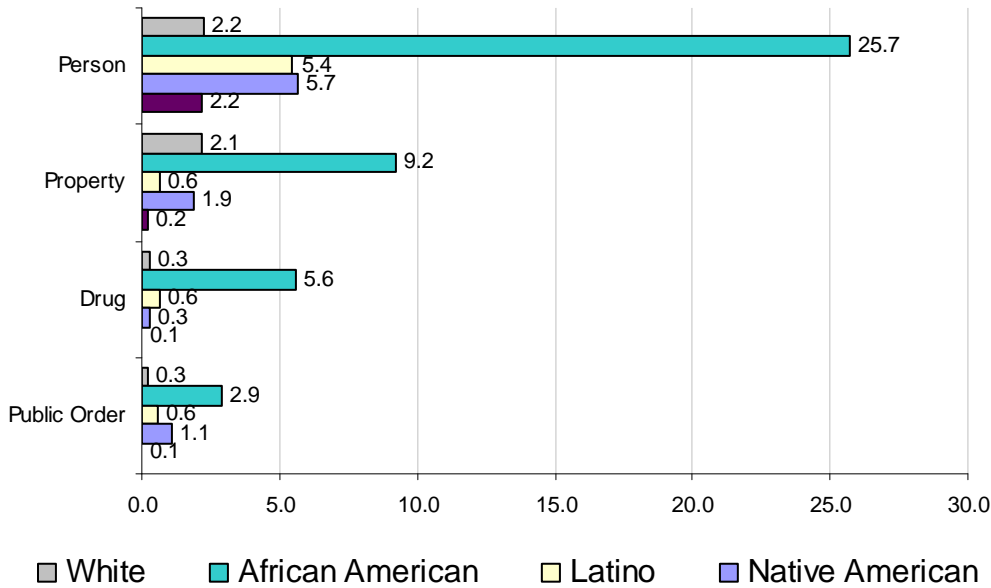
5. Youth incarcerated in adult prisons. As a result of racial disparities in transfer decisions discussed above, children of color are also much more likely than white youth to be incarcerated in adult prison. As Figure 8 below shows, 26 out of every 100,000 African American youth are serving time in adult prison while for white youth the rate is only 2.2 per 100,000. On a state-by-state basis, these disparities are magnified as shown in Figure 2, below. The U.S. government is aware of this disparity, as are most Americans. A recent survey indicated that 60% of Americans believe that non-white youth are *more likely* to be prosecuted in adult court.<sup>47</sup> This is clearly not “equal treatment before the tribunals” as required by Article 5(a) of the treaty.

**Figure 7:** Youth in Adult Prison by Race and Ethnicity: Rates of New Commitments to Prison by Offense

<sup>47</sup> See B. Krisberg and S. Marchionna, “Attitudes of Voters toward Youth Crime and the Justice System,” on a national survey commissioned by NDDC (Feb. 2007, [http://www.nccd-crc.org/nccd/pubs/zogby\\_feb07.pdf](http://www.nccd-crc.org/nccd/pubs/zogby_feb07.pdf)).



**Custody Rate (per 100,000)**



Produced by the National Council on Crime and Delinquency, “And Justice for Some” (2007). Rates are based on numbers per 100,000 youth of that race in the population.

Moreover, in open violation of U.S. legal standards and international law, children of color are disproportionately incarcerated in adult prisons, despite undisputed research documenting that children held in adult facilities are subject to greater incidence of physical violence and rape, commit or attempt to commit suicide at greater rates, and suffer lifelong consequences.<sup>48</sup> As indicated below, the rates of African American youth in adult prisons is more than 44 per 100,000, while that of white youth is 5 per 100,000.

**Figure 8:** Rates of Youth in Adult Prison by Race and Ethnicity, by State

<sup>48</sup> Campaign for Youth Justice, Executive Summary: *The Consequences Aren't Minor* (2007).

**Youth in Adult Prison: Rates of New Prison Commitments by State and Race/Ethnicity, 2002 (per 100,000 youth)**

	White	African American	Latino	Native American	Asian and Pacific Islander	Total
United States	5	44.1	7.4	9.2	2.5	11.8
Alabama	8.5	41.5	0	0	0	18.9
Alaska	15.5	73	0	20	0	17.5
Arizona	0	0	0	0	0	0
Arkansas	11.4	59.9	0	0	0	20.8
California	1.5	19.3	7.1	3.3	1.9	5.4
California Youth Authority	0.4	6.4	2.1	0	1.5	1.7
Colorado	3.6	46.1	17.6	21.3	7.9	9.1
Connecticut	0	0	0	0	0	0
Delaware	0	0	0	0	0	0
District of Columbia	0	0	0	0	0	0
Florida	8	67.6	8.6	0	0	20.9
Georgia	7.6	32.5	10.8	37.2	0	16.7
Hawaii	0	0	0	0	1.2	0.8
Idaho	0	0	0	0	0	0
Illinois	7.6	74.7	15.5	0	0	21.4
Indiana	0	0	0	0	0	0
Iowa	13	81	0	0	0	14.5
Kansas	0	0	0	0	0	0
Kentucky	0	2.3	0	0	0	0.2
Louisiana	5.6	33.2	0	0	0	16.4
Maine	0.7	0	0	0	0	0.7
Maryland	3.6	53.7	0	0	0	20.1
Massachusetts	0	0	0	0	0	0
Michigan	6.7	46.8	5.8	0	4.2	13.8
Minnesota	1.6	20.4	9	28.9	7.2	3.7
Mississippi	18.1	59.6	19.4	0	0	36.5
Missouri	14.5	40.3	11	0	0	18
Montana	0	0	0	0	0	0
Nebraska	5.2	49.7	12.9	75.5	0	9.2
Nevada	6.4	8.5	22.7	0	0	10.6
New Hampshire	2.1	0	28	0	0	2.7
New Jersey	0.5	14.5	5.3	0	0	3.5
New Mexico	0	0	0	0	0	0
New York	2.2	41.2	13.4	0	0	11.7
North Carolina	16.5	100.5	33.1	36	12.1	40.7
North Dakota	0	0	0	16.7	0	1.4
Ohio	4.9	42.1	3	0	0	10.7
Oklahoma	4	14.5	6.7	8.3	0	5.7
Oregon	16.3	142.6	11.3	26.8	14	19.2
Pennsylvania	1	19.6	8.9	0	3.7	3.9
Rhode Island	0	0	0	0	0	0
South Carolina	30	100.7	33	0	0	56.4
South Dakota	2.6	96.5	0	7.5	0	4.3
Tennessee	2.7	17.3	0	0	0	5.8
Texas	4.2	29.3	0	0	0	9.7
Utah	3.4	0	0	0	0	2.9
Vermont	0	0	0	0	0	0
Virginia	1.3	25.6	6.7	0	0	7.5
Washington	5.8	60.7	15	0	10.8	9.8
West Virginia	0	0	0	0	0	0
Wisconsin	8.1	154.6	50.8	109.6	16.4	24.4
Wyoming	0	0	0	0	0	0

Note: Rates are calculated per 100,000 youth age 10 to 17 years of age in the general population. This table reflects the racial/ethnic proportions of youth in adult prisons when race/ethnicity is known. Racial categories (e.g. White youth) do not include

Source: National Corrections Reporting Program, 2002. Bureau of Justice Statistics. Easy Access to Juvenile Populations [Online analysis package] OJJDP (2006).

Produced by the National Council on Crime and Delinquency, "And Justice for Some" (2007).

6. Juvenile Sentences of Life Without Possibility of Parole. Not only are youth of color disproportionately sentenced to adult prisons, they also disproportionately receive the toughest

adult sentences. For example, the most severe sentence a child can receive is life without the possibility of parole (“JLWOP”).<sup>49</sup> While the juvenile death penalty has been struck down in the U.S., the JLWOP sentence condemns children to die in prison. Stark racial disparities in the imposition of the JLWOP sentence are evident nationwide: under age 17, African American youth are 19% of the population but 65% of youth serving JLWOP sentences. In California, African American youth are 20 times more likely than white youth to receive the LWOP sentence, even though they make up only 8% of the youth population.<sup>50</sup> Latino youth are 5 times more likely receive an LWOP sentence than white youth.<sup>51</sup>

7. Other State examples include:

**Alabama:** Youth of Color are:

36% of the youth population;<sup>52</sup>

73% of youth serving LWOP sentences (49% are African American);<sup>53</sup> and

100% of youth serving LWOP for non-homicide offenses.<sup>54</sup>

**Michigan:** Youth of Color are:<sup>55</sup>

27% of the population;<sup>56</sup> and

71% of youth serving LWOP sentences.

**Mississippi:** African American youth are:

45% of the population;<sup>57</sup> and

75% of youth serving LWOP sentences (compared to 20% of white youth).<sup>58</sup>

8. The United States does not systematically collect and evaluate national data disaggregated by race and gender for juvenile offenders serving the life without parole sentence in violation of its obligations. Yet the data that exists suggests serious racial discrimination in the imposition of this harsh punishment. Though this information is public and the discrimination widely known, the U.S. government has failed to ensure that states take measures to redress the discriminatory practices, as it is required to do under articles 2 and 5 of the Convention.

**Figure 9: Ratio of Rates of African American and White Youth Sentenced to Life Without Possibility of Parole, by States**

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<sup>49</sup> *The Rest of Their Lives: Life Without Parole for Child Offenders*, Human Rights Watch and Amnesty International, 2005 at <http://www.hrw.org/reports/2005/us100518.htm>

<sup>50</sup> See, *Juvenile Offenders and Victims: 2006 National Report*, at 3 (population statistics), supra note 5 and Human Rights Watch, "Child Offenders Sentenced to Life without Parole in California," (working title) (forthcoming October / November 2007, data as of April 2007).

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

<sup>52</sup> *Juvenile Offenders and Victims: 2006 National Report*, at 3, supra note 5.

<sup>53</sup> Equal Justice Initiative, "Cruel and Unusual: Sentencing Children to Die in Prison" (forthcoming 2007).

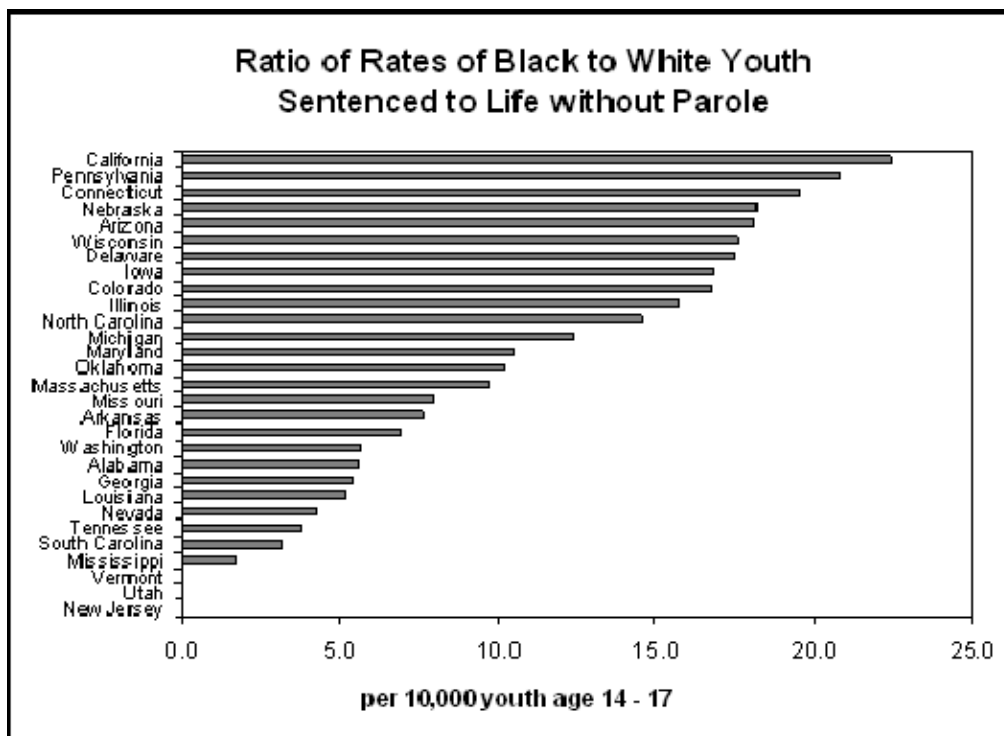
<sup>54</sup> *Id.*

<sup>55</sup> Deborah LaBelle, Esq., Michigan, findings from local investigation (2007).

<sup>56</sup> Note 7, supra, for 0-17 years of age.

<sup>57</sup> *Id.*

<sup>58</sup> Mississippi Department of Corrections, data released via Freedom of Information Act request and updated with the Office of Capital Defense Counsel in Mississippi, H. Thomas, NAACP, 2007.



Source: Data provided by thirty-eight state correctional departments and additional other sources for the states of Alabama and Virginia. Population data were obtained from the U.S. Census Bureau, State Population Data Sets, available online at: [http://www.census.gov/popest/states/asrh/files/SC-EST2003-race6-AL\\_MO.csv](http://www.census.gov/popest/states/asrh/files/SC-EST2003-race6-AL_MO.csv) and [http://www.census.gov/popest/states/asrh/files/SC-EST2003-race6-MT\\_WY.csv](http://www.census.gov/popest/states/asrh/files/SC-EST2003-race6-MT_WY.csv), accessed on March 4, 2005. Calculations are based on Census 2000 data. *The Rest of Their Lives: Life Without Parole for Child Offenders*, Human Rights Watch and Amnesty International, 2005 at <http://www.hrw.org/reports/2005/us100518.htm>,

9. Sentencing children to die in prison not only violates the Convention, but also breaches other U.S. treaty obligations. In 2006, the U.N. Human Rights Committee found the U.S. to be in violation of its treaty obligations by trying children as adults and imposing JLWOP sentences. The Committee further stated that the U.S. “should ensure that no child offender is sentenced to life imprisonment without parole, and should adopt all appropriate measures to review the situation of persons already serving such sentences.”<sup>59</sup>

10. Similarly, the Committee Against Torture also expressed concern “at the large number of children sentenced to life imprisonment in the State party (art. 16). The State party should address the question of sentences of life imprisonment of children, as these could constitute cruel, inhuman or degrading treatment or punishment.”<sup>60</sup>

<sup>59</sup> See C. De la Vega and M. Leighton, *Special Report on Human Rights Violations in Sentencing Children to Die in Prison*, submitted to U.N. Human Rights Council (2007), USF School of Law and Human Rights Advocates (citing HRC Report on the U.S., CCPR/C/USA/CO/3/Rev.1, para 34).

<sup>60</sup> *Id.* (citing Committee Against Torture review of U.S. report, CAT/C/USA/CO/2, para 34).

11. While institutions in the U.S. have documented racial disparities in sentencing of juveniles over the past decade, the U.S. government has done little to address the most serious discriminatory practices leading to this disparity. Despite reauthorization passage of the 2002 Juvenile Justice and Delinquency Act, the government does not ensure that racial disparity is comprehensively collected, monitored and analyzed, nor does it ensure that effective action is taken by states to address the offending problems in their jurisdictions as required by the Convention. Moreover, data on racial disparities in the imposition of the draconian sentence of life without parole on juveniles is neither collected nor made public by the federal government or the states in any systematic manner, nor is it being addressed. Without such a systematic effort, the U.S. cannot effectively ensure the eradication of discrimination as required by article 2 of the Convention.

## **VI. DISCRIMINATORY HARM DUE TO THE INCARCERATION OF CHILDREN IN CORRECTIONAL FACILITIES (training schools, reform schools, juvenile correctional facilities, youth prisons, residential facilities)**

1. The fact of Racial Discrimination in the incarceration of children who have been adjudicated in juvenile or criminal court is undisputed. The incarceration rate for African American young males in 2003 was 1,278 per 100,000, the rate for Latino male youth was 774 per 100,000 compared to the rate for white youth of 305 per 100,000.<sup>61</sup>

2. In a 1995 study, NCCD found that African American and Latino youth had higher incarceration rates in state public facilities than White youth when controlling for current offense and prior admissions.

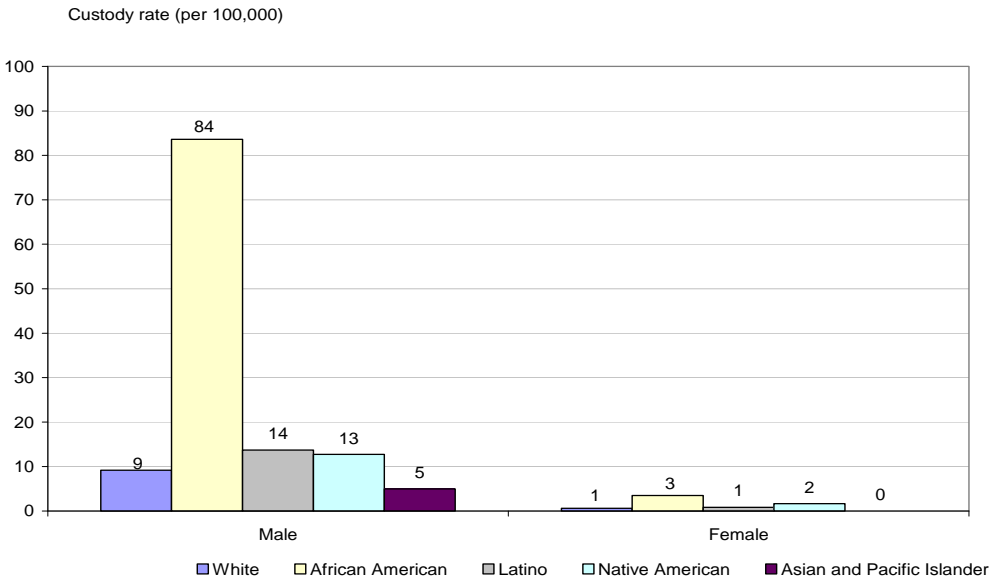
- When White youth and African American youth were charged with the same offenses, African American youth with no prior admissions were six times more likely to be incarcerated in public facilities than White youth with the same background.
- Latino youth were three times more likely than White youth to be incarcerated.
- Admission rates to public facilities were seven times greater among African American youth with one or two prior admissions than among White youth in 1993. The admission rate for Latino youth was twice the rate of White youth.
- African American youth were confined on average for 61 days longer than White youth, and Latino youth were confined 112 days longer than White youth.<sup>62</sup>

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<sup>61</sup> *And Justice for Some: Differential Treatment of Minority Youth in the Justice System,* published by the National Council on Crime and Delinquency (NCCD), January 2007, available at [http://www.nccd-crc.org/nccd/pubs/2007jan\\_justice\\_for\\_some.pdf](http://www.nccd-crc.org/nccd/pubs/2007jan_justice_for_some.pdf)

<sup>62</sup> *And Justice for Some: Differential Treatment of Minority Youth in the Justice System,* published by the National Council on Crime and Delinquency (NCCD), January 2007, available at [http://www.nccd-crc.org/nccd/pubs/2007jan\\_justice\\_for\\_some.pdf](http://www.nccd-crc.org/nccd/pubs/2007jan_justice_for_some.pdf)

**Figure 11: Juvenile Confinement (post-conviction) by Race and Ethnicity**



Produced by the National Council on Crime and Delinquency, “And Justice for Some” (2007). Rates are based on calculated based on numbers per 100,000 youth of that race in the population.

3. By the time a youth is sentenced to a correctional facility, the racial disparities that pervade the juvenile justice system have often reached their peak. Prisons are widely seen as suitable places for youth of color, and all too often they are sent there for technical violations, such as minor violations of parole. Youth prisons are often constructed to look similar to adult prisons, featuring razor wire, severely restricted movement, use of solitary confinement, and dangerous disciplinary restraints. These facilities by design offer no opportunity for rehabilitative programming, nor do they foster a humane environment that focuses on the goal of rehabilitation and reintegration. Rather these facilities expose youngsters to the most inhumane violent abusive and deadly environments in our society.

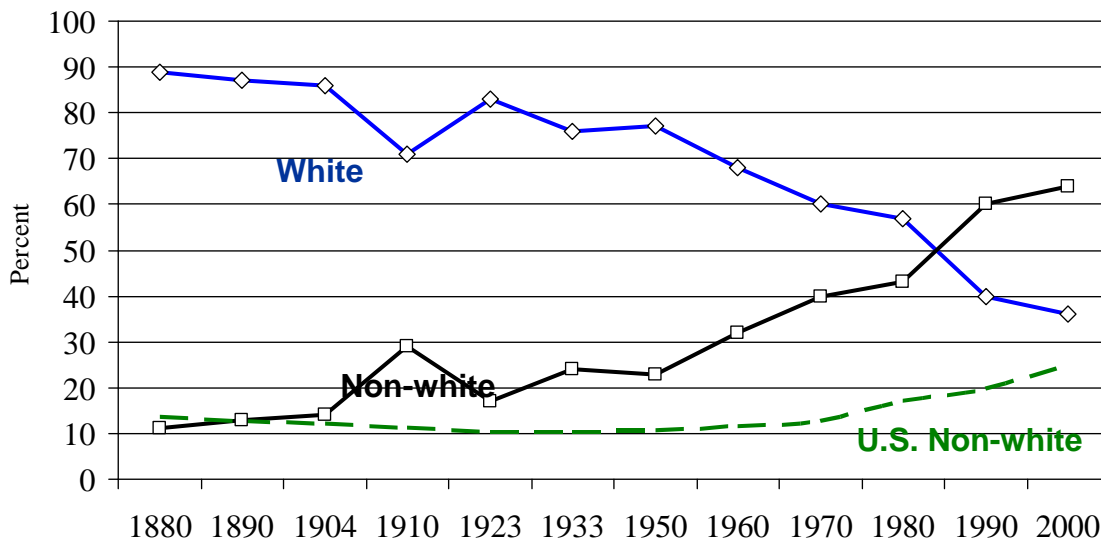
4. Youth prisons in the U.S., which are disproportionately populated by youth of color, are characterized by chronic violence and abuse, both among the youth and between the staff and the youth<sup>63</sup>, as described below. Accountability and grievance mechanisms are faulty or non-existent, and youth, their families and the staff must consider the very real possibility of retaliation when deciding whether to report an incident. The systemic neglect which characterizes the juvenile correction system often gives rise to utter misery and life threatening depression for the youth sentenced to such facilities, as well as a loss of humanity on the part of staff who become accustomed to violence and abuse, whether through direct participation or

<sup>63</sup> Margaret Rosenheim, Franklin Zimring, David Tanenhaus, Bernardine Dohrn, eds., *A Century of Juvenile Justice*, University of Chicago Press, 2002; See also, See the Texas Youth Commission sex abuse scandal, cover-up and collapse, noting high level administrators’ indictments for sexual assault, a subsequent finding that 65 TYC employees had felony records, and the release of 226 children whose sentences had been improperly “extended.” Dallas Morning News and Texas Observer reports, 2007.

observation.

**Figure 12**

### Racial Characteristics of Male Youth in Public Juvenile Correctional Institutions, 1880 to 2000



Sources: Cahalan, M. W. (1986). *Historical Corrections Statistics in the United States*. Rockville, MD: Westat, Inc.; US Census.

5. For instance, the state of Texas is home to one of the worst youth incarceration systems in the country, the Texas Youth Commission (TYC). Overwhelmingly, the children confined in Texas are youth of color. On March 16<sup>th</sup> 2007 US Congresswoman Sheila Jackson Lee wrote a letter to then Attorney General Roberto Gonzalez requesting he “take immediate action to open a federal investigation into the allegations of sexual and physical abuse at TYC facilities.” She goes on to say that “Texas state officials have opened at least 27 investigations into a variety of complaints including inmate-on-inmate assaults, rampant sexual and physical abuse by both inmates and staff allegedly covered up by agency employees, dilapidated facilities, extremely high staff turnover rates, lack of uniform standards, and fear that staff may experience retaliation if they raise significant concerns.<sup>64</sup>” Congresswoman Lee outlined the various ways in which human rights are violated within these facilities; the data only reinforces her point. This table produced by the Dallas Morning News outlines the total number of incidents reported vs. the number of incidents that have been confirmed from Jan. 2000 through March 15<sup>th</sup> 2007<sup>65</sup>:

<sup>64</sup> Letter to Attorney General Alberto Gonzalez United States Department of Justice from Congress of the United States House of Representatives Sheila Jackson Lee 18<sup>th</sup> District, Texas. March 16, 2007

<sup>65</sup> Dallas Morning News Website - <http://www.dallasnews.com/sharedcontent/dws/graphics/0407/tyc/>



Assaults:	3,850 - 449 confirmed
Unnecessary force:	2,610 - 937 confirmed
Youth harm self/others:	2,610 - 946 confirmed
Inadequate supervision:	1,772 – 716 confirmed
Excessive force:	1,692 – 181 confirmed
Inappropriate relations or physical contact with inmate:	939 – 344 confirmed
Inappropriate staff sexual conduct:	938 – 99 confirmed
Other:	1,884 – 782 confirmed

6. The state of Louisiana is home to another example of the horrors that exist within the youth prisons of the US. A report titled “Just Shut It Down: Bringing Down a Prison While Building a Movement” written by Families and Friends of Louisiana’s Incarcerated Children (FFLIC), a grassroots organizations focused on shutting down the Tallulah Correctional Center for Youth, outlines the very personal way these abuses occur and discusses the damage done to the families involved. What follows is an excerpt from that report describing a killing that occurred not at Tallulah but at another youth prison within the state of Louisiana.

*” On May 1, 2003, 17-year-old Emmanuel Narcisse was killed at the hands of a youth prison guard at the Bridge-City Correctional Center for Youth. One deadly blow to the head knocked Emmanuel onto the ground and unconscious. Within minutes, Emmanuel was dead. Emmanuel’s death dramatized in a profound and tragic way the ultimate consequence of Louisiana’s violent and misguided juvenile justice system. FFLIC immediately reached out to Emmanuel’s mother and family, providing support and encouragement, as well as helping them to express their outrage in speaking about the pain of losing a child.”<sup>66</sup>*

FFLIC’s campaign to shut down the Tallulah facility was a success; however the facility where Emmanuel was killed is still open.

7. The families of the youth in these prisons often suffer and must take on the huge burden of caring for a loved one who is locked in cage at such a young age. Issues of proximity challenge the family’s in-terms of visitation and communication. Low income families can not afford the cost of calls or the cost of transportation to youth prisons that are often located far from their homes. Once these family members arrive they may or may not get the chance to meet with their son or daughter. They are often searched and spoken to as though they had committed a crime.

8. Books Not Bars, a grassroots organization focused on shutting down the California youth prison system formerly known as CYA, produced a report outlining the problems as well as three potential solutions. The report begins by describing the plight of a family trying to find out what happened to their child.

*“At 9pm on Mother’s Day this year, Hilda received a phone call from a doctor stationed at the youth prison where her son has been incarcerated for the last two years. Her heart almost stopped as the doctor said that her son had attempted suicide that morning. He*

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<sup>66</sup> Families and Friends of Louisiana’s Incarcerated Children “Just Shut It Down: Bringing Down a Prison While Building a Movement”

*was alive, but he was in critical condition. He tried to hang himself and was now on a respirator. Frantic, Hilda immediately tried to see her son. Youth prison staff on the phone transferred Hilda back and forth from person to person, giving her little information and no help getting in to see her son. Hilda kept calling everyone she could think of that may be able to help her get a visit. After four days of stonewalling, Hilda finally found Books Not Bars, a nonprofit juvenile justice advocacy organization. Books Not Bars staff was able to contact senior management and get Hilda permission to see her son.”<sup>67</sup>*

These experiences illustrates the way in which discriminatory youth facilities work to inflict pain on the youth and their families as well as the general disregard for the lives of young people on the inside. Eighty-six percent of youth held in California’s youth prisons hold youth ranging in age from 12 – 25 years with approximately 86 percent of those youth are youth of color, mostly Latino and African American.

## **VI. THE NEED FOR ALTERNATIVE SENTENCING AND SANCTIONING OPTIONS FOR CHILDREN IN CONFLICT WITH THE LAW**

### **1. “Best Practices” to Ameliorate Racial Disparities**

There are practices, both systematic and programmatic, that could be adopted by the United States to ameliorate racial disparities in the U.S. juvenile justice system, and specifically efforts to reduce the inappropriate reliance on detention. We briefly summarize four examples of successful efforts to reduce juvenile racial discrimination and disparities: The Annie E. Casey Foundation’s Juvenile Detention Alternative Initiative (JDAI); the work of the W. Haywood Burns Institute; the efforts of the Center for Young Women’s Development; and the Center for Community Alternatives’ Youth Advocacy Project.

**a.** In 1992, the **Juvenile Detention Alternatives Initiative (JDAI)**<sup>68</sup> was launched to reduce the detention of children, improve child outcomes, and preserve public safety, by testing new ways to establish smarter, fairer, more effective and efficient juvenile justice systems. These sites have achieved measurable results using strategies such as better screening tools, more reliance on data, collaboration between systems and communities, and effective alternatives to incarceration.

Many of these results are well documented. For example, while implementing JDAI, sites achieved the following:

- In Cook County, Illinois, the average detention population dropped by 37 percent and youth arrests decreased by more than half;

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<sup>67</sup> Books Not Bars – Three Solutions to CA’s Youth Prison Crisis: Fewer Youth Inside, More Family Access, and Build Regional Alternative Programs

<sup>68</sup> JDAI is a project of the Annie E. Casey Foundation, at <http://www.aecf.org/Home/MajorInitiatives/JuvenileDetentionAlternativesInitiative.aspx>

- Multnomah County, Oregon, has decreased its detention population by two-thirds and decreased arrests by almost half; and
- Bernalillo County, New Mexico, greatly reduced its average daily population in secure detention between 1999 and 2003, while seeing a 26 percent drop in juvenile crime.

JDAI promotes changes to policies, practices, and programs to:

- reduce reliance on secure confinement;
- improve public safety;
- reduce racial disparities and bias;
- save taxpayers' dollars; and
- stimulate overall juvenile justice reforms.

Since its inception in 1992, JDAI has repeatedly demonstrated that jurisdictions can safely reduce reliance on secure detention. An evaluation of these JDAI project sites confirms that reducing reliance on secure detention can be accomplished without increasing re-arrests or failure-to-appear rates, despite law enforcement policies that drove up juvenile detention nationally.<sup>69</sup> There are now approximately 80 JDAI sites in 21 states and the District of Columbia. However, detention continues to be the first resort of juvenile justice systems, rather than the last resort.

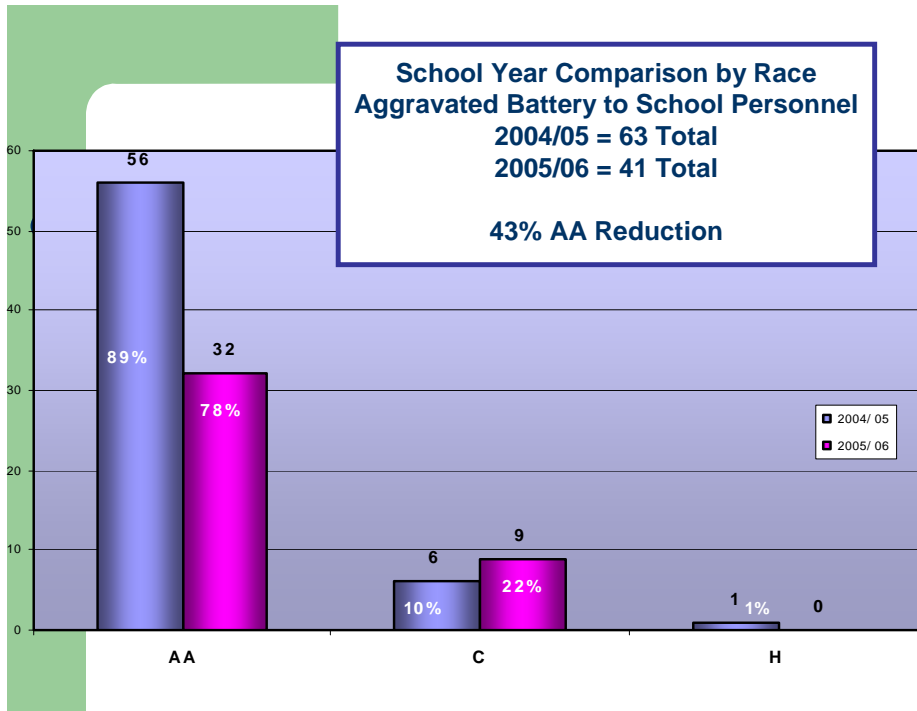
b. **The W. Haywood Burns Institute** provides technical assistance and training to reduce the over representation of youth of color in the juvenile justice system. The Burns approach is similar to that of JDAI insofar as it involves convening a group of key stakeholders and using data, focusing however these strategies on the specific issue of disproportionate minority confinement. The Burns Institute process also works to engage stakeholders from communities of color - the parents and community organizations that are central in the lives of children in the juvenile justice system. The Burns Institute provides training and support so that these often unrecognized stakeholders can fully participate in the efforts to reduce the racial disparities. Community members are trained in using data to analyze the juvenile justice system, and supported in their efforts to participate with the traditional stakeholders - prosecutors, public defenders, police, probation, political leaders, and service providers - in a process that focuses specifically and intentionally on reducing racial disparities in the juvenile justice system.

The work of the Burns Institute (BI) has also yielded impressive results. In Peoria, IL, the BI reduced the percentage of African American youth sent to detention from local schools 43% over a twelve month period by getting the local schools to change their practices so they stopped sending students to detention for school fights and minor altercations with teachers and staff.

**Figure 13** Peoria IL

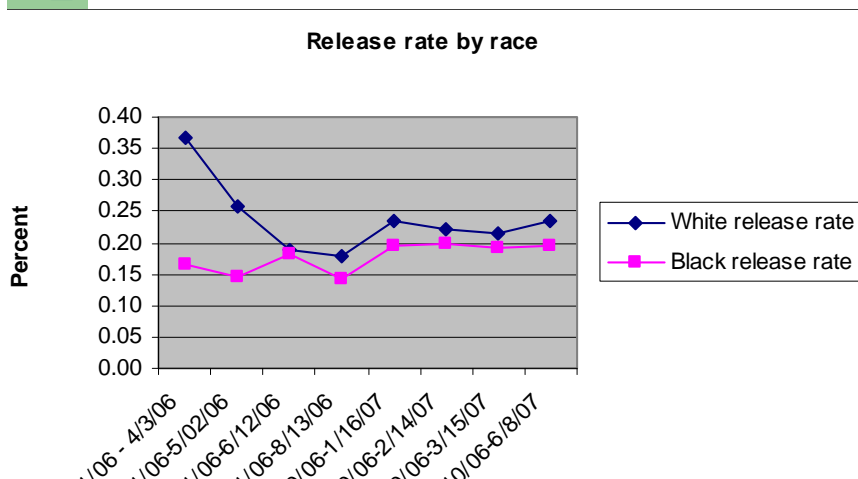
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69 M. Wordes, *et al*, *Juvenile Detention Alternatives Initiative Evaluation Report*, Oakland, CA, National Council on Crime & Delinquency, 2000.



Moreover, BI reduced the racial disparity at a key decision making point in Louisville, KY. After Louisville began a new practice of allowing youth with outstanding warrants to be considered for immediate release after consulting with the on duty Judge, it became clear that White youth were being released at a higher rate than similarly situated African American youth. Over time the release rates were brought to virtual parity thus eliminating the previous disparity.

## Louisville, KY



## Figure 14

c. **Center for Young Women’s Development (CYWD)** encourages young women to move beyond survival and become leaders and advocates for incarcerated and formerly incarcerated young women. Although young women and girls represent almost 30% of the total juvenile arrests, they have access to a fraction of the prevention and alternative to incarceration programs available to boys. Nationwide, they receive only 2% of services. Because of the lack of alternative programs, jobs, and housing, young women and girls find themselves locked up or on probation longer for lesser crimes than their male counterparts. CYWD’s programs offer young women a way out of repeated incarceration and the street economy and into self-sufficiency, wholeness, and advocacy. They understand that a huge component of this work is self-care and healing which mean many different things to the young women. For some, it may be eating right, for others it may mean finding reliable childcare so that they can fully participate in our programs. Each of their programs promotes wellness and healthier living.<sup>70</sup>

d. **The Center for Community Alternatives (CCA)** reflects how individual program efforts reduce the use of detention and impact the disparity detention of youth of color in New York State. CCA used data to identify characteristics of youth detained - their charges and socio-demographic characteristics. Through careful targeting of youth who would otherwise be in detention, the youth served by CCA mirror the population in detention: youth of color charged with robbery. In New York City, 98 percent of children in CCA alternative programs are youth of color. CCA partners with public defenders and the courts, providing individual case advocacy and case planning to encourage courts to place youth in CCA’s ATD program. The program then provides community support and supervision, leadership development, educational support and referrals to other services. CCA staff report to the courts on youth compliance.

The success of this program is demonstrated by data that show that less than 20 percent of program youth are rearrested compared to a 60 percent re-arrest rate for youth released from the State’s juvenile facilities.<sup>71</sup>

e. **The Missouri Division of Youth Services.** For the small number of juveniles who have to be detained, the state of Missouri serves as a national model for juvenile rehabilitation. Characteristics of the model include small groups, treatment, and aftercare. Correspondingly, Missouri has a significantly lower recidivism rate among juveniles than other states that measure the recidivism rate similarly.<sup>72</sup> For the fiscal year of 2006, the recidivism rate for Missouri youth

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<sup>70</sup> Adapted from <http://www.cywd.org/programs.html>

<sup>71</sup> Bruce Frederick and Roy, Dina, 2003. Recidivism Among Youth Released From The Youth Leadership Academy To The City Challenge Intensive Aftercare Program, (Albany, N.Y.: NYS Division of Criminal Justice Services, 2003).

<sup>72</sup> Mendel, Dick. 2003. “Small is Beautiful: The Missouri Division of Youth Services.” Advocasey: Juvenile Justice at a Crossroads. Baltimore, MD: Annie E. Casey Foundation.

<http://www.aecf.org/upload/PublicationFiles/juvenile%20justice%20at%20crossroads.pdf>

was 8.7%. The rate has ranged between 6% and 9% from 2002 through 2006.<sup>73</sup>

## **2. Recommendations for Expansion of “Best Practice” Approaches**

The above examples would have more widespread impact if supported by law reform, policy changes and funding. To comport with the Convention provisions, the U.S. should provide leadership and support to state and local efforts by:

- Adopting legislation that explicitly establishes and operationalizes standards for the least restrictive alternative for juveniles, arrest, detention and incarceration as a last resort and for the shortest appropriate period of time.
- Providing support for indigent juvenile defenders including training on unique developmental needs of children, trial practice skills, and attorney, investigative and social work resources to improve representation of children in the juvenile justice system.
- Providing training for judges, probation officers, and prosecutors on the developmental needs of children, alternatives to detention and incarceration, and public data, solutions and monitoring of the problem of racial discrimination and disparity in the juvenile justice system.
- Ensuring vigorous enforcement of the Juvenile Justice and Delinquency Act to require states to not only document racial disparity in the juvenile justice system, but to address, demonstrate and document a reduction in such disparity.
- Initiate a moratorium on construction of detention and correctional facilities for youth, and devote the equivalent resources to community-based support for youth and their families in the community.
- Use of objective screening instruments to reduce racial discrimination in detention and incarceration decisions for children.
- Devote legislative, financial and educational resources to alternatives to juvenile detention and incarceration and increases in community involvement in alternatives.

## **CONCLUSION**

While the U.S. State Department’s official report to the Committee failed to make any mention whatsoever of the juvenile justice system, racial discrimination characterizes the juvenile justice system and remains a deep and pervasive crisis at every level. Youth of color, particularly African American youngsters are more likely to come into contact with the system, and once they are in they are more likely to face the harshest consequences. Only a serious commitment by the U.S. government to recognize and address this problem, to take both the purpose and effect of racial discrimination and disparities as grave violations of the promise of justice, and to develop effective solutions can bring the U.S. government into compliance with its Convention obligations. Local and national non-governmental organizations across the U.S. have begun the work of developing alternatives to the current system’s harsh and discriminatory policies and practice. These efforts need to be encouraged, funded, and supplemented by

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<sup>73</sup> Missouri Department of Social Services, Division of Youth Services, *Annual Report Fiscal Year 2006* available at <http://www.dss.mo.gov/re/pdf/dys/dysfy06.pdf>

national and state commitments. Only by promptly rectifying the glaring practices of racial and ethnic discrimination in the juvenile justice system can the U.S. assure that all of its youngest citizens receive “equal treatment before the tribunals.”