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CHILD RIGHTS: RACIAL JUSTICE AND EXTREME SENTENCING OF CHILDREN IN THE UNITED STATES

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Before the formal end of apartheid in South African, a youth justice delegation from Johannesburg and Cape Town visited the world's first juvenile court in Chicago. We, at the Children and Family Justice Center at Northwestern University School of Law had the privilege of escorting them to court hearings, in the bustling Juvenile Court building on Chicago's Southwest side. After two hours of watching children and their families appear before judges in a bewildering display of handcuffed and chained young people, overflowing carts of case files by next to harassed lawyers, and judges who referred to children as "minors" rather than by their name --- one of our visitors leaned over to whisper to me: "Where is the *white* juvenile court?"

Indeed, in a city with some 35% of the population being African American (or Black), virtually every youth brought before the Juvenile Court judges was Black. One might think that --- as in apartheid South Africa where there were three different categories of children and of courts (white, colored, and Black) ---- here in segregated Chicago, white children had never violated the law. In fact, young people who broke the law (whether for assault, possession or sale of drugs, larceny or theft, destruction of property, assault, battery, or resisting arrest) were sent into two separate systems of justice: one informal system that recognized their youthfulness, the likelihood that they would not re-offend again, and offer ways in which they and their families could accept responsibility and take

steps to repair the harm --- without criminalizing them, and without a permanent record; and one formal legal system that was functioning to stigmatize, punish, and cage young people of color: to assume their guilt, to hold them in detention pre-trial, to routinely accept false police testimony, to label them as gang members, and to overcharge them.

For white children in Chicago, there was, and continues to be, an unofficial, separate system of justice, although it is not formal or legally authorized. White children who are in trouble with the law might have their parents pay the victim family to repair the harm. They might send the "delinquent" youth to a mental health facility, a special education school, a private school, or a military school, or send them to live with a relative in another state – all options that would allow the youngsters grow out of their common adolescent characteristics of being unable to anticipate future consequences and their tendency to succumb to peer pressure. There will be ways to not have a permanent or public record of their misdeeds.

Today, in the U.S. -- in stark violation of international human rights standards, the Convention on the Rights of the Child (which only the U.S. has failed to ratify), and of proper Constitutional standards -- we continue to have two systems of justice, as documented by the W. Haywood Burns Institute for Justice, Fairness and Equity.

While the overall rate of incarceration of all U.S.

youth has decreased by 55% since 1997, the rate of incarceration for youth of color continues to rise! LatinX youth are between 1 ½ to 2 times more likely to be committed to out-of-home placements as white youth. The disparity between Native American youth and White youth has risen in every offense category between 1997 and 2013.[i]

In California, for example, racial and ethnic disparities were dramatic in the cases of "direct file", where prosecutors could, on their sole initiative, decide to charge youthas young as fourteen as adults n adult criminal courts – subject to adult sentences -- , rather than in juvenile courts. In 2015, Latinx youth were 3.4 times more likely to be direct filed than white youth and Black youth were direct filed at 10.8 times the rate of white youth. 3 The report by the W. Haywood Burns Institute, the Center on Juvenile and Criminal Justice (CJCJ), and the National Center for Youth Law (NCYL) documents the rise in direct file arrests, despite the *decline* of serious felony arrests of youth in 2014-2015. The direct file law in California was subsequently repealed.

Black youth in my home state of Illinois fare no better. Despite a deliberate and effective campaign by the Juvenile Justice Initiative to reduce youth pre-trial detention, which reduced juvenile detention admissions in 2016 to 10,042 (down 15% from 2012 and down 54% from

1998, "racial and ethnic disparities are quite pronounced."4 Statewide, the African American population is 14.7% and the Latinx population is 16.9%, a total of 31.6%. Yet Black and Latinx youth made up 71% of all detention admissions in the state in 2015. 5

Nationwide, youth of color are more likely to be arrested, prosecuted, sentenced and incarcerated than their white peers for similar behavior. Black youth are more than four times as likely as white youth to be incarcerated. 6

In brief, while African American and other youth of color benefit from our efforts to reduce youth incarceration and detention, these reforms have not impacted the racial and ethnic over-representation or disparities.

The U.S. has a distinct and shameful history of racial slavery and it's aftermath. But it appears that these racial and ethnic disparities in youth justice also characterize juvenile justice in other countries of the world, both in the global South and across Europe and North America.

Second, reform efforts in the U.S. have concentrated on abolishing the most extreme sentences given to youth: the juvenile death penalty and juvenile life without possibility of parole.

With no foundation funding, but with great collective talent and energy, the youth justice network mobilized, recruited attorneys, told the stories of the – then 69 -- people on death row who were sentenced to die for crimes committed as children (under the age of 18). We educated the public, recruited a broad coalition of medical, educational, child welfare

and youth justice organizations, litigated juvenile death eligible cases, and changed the law to abolish the juvenile death penalty in an additional six states.

In particular, and against the advice of some lawyers, we raised the issue of racial disproportion in the arrest, charging, convicting, and sentencing of children charged with the most serious crimes.

Five years after we began, in *Roper v. Simmons* (2005), the U.S. Supreme Court abolished the juvenile death penalty.

Despite this bleak picture, youth advocates in the U.S. have continued to forge civil advocacy campaigns, to change state legislation, and to litigate to greatly restrict the use of sentences of life without possibility of parole for offenses committed under the age of eighteen – although not yet to fully abolish that sentence. In three U.S. Supreme Court cases, *Graham v Florida* (2010)*, Miller v. Alabama* (2012)*,* and *Montgomery v. Louisiana* (2016), the Court held youth life without parole sentences are unconstitutional in non-homicide cases, eliminated mandatory life without parole, narrowed the use of the sentence of juvenile life without parole ("JLWOP"), affirmed that these rulings were retroactive, and thus required resentencing hearings that take into account youth-mitigating factors for most juvenile life sentences.[ii]

The number of states that have banned life without parole for children has quadrupled in just five years. Twenty-six states still have juvenile life without possibility of parole sentences and are using these

laws in defiance of *Miller v. Alabama* and *Montgomery v. Louisiana.* Twenty states and the District of Columbia have banned JLWOP. Four states have no one serving the sentence. Hundreds of people, who were told as children that they would die in prison with no recourse, have been released, and thousands have received new sentences short of life without parole, giving them a realistic hope of liberty and a second chance.

Utilizing four strategies: public education, litigation, legislation, and outreach (coalition-building), the Campaign for the Fair Sentencing of Youth 7 and numerous statewide organizations have helped to instigate dramatic momentum for abolition of life without parole sentences for children.

Those who have been released from prison have themselves formed a powerful and persuasive force for abolition. These men (and a several women) are the dramatic and eloquent example of why such sentences should be unconstitutional and banned. An organization of those released from prison, ICAN (Incarcerated Children's Advocacy Network) 8 has been at the forefront of changing hearts and minds: in state legislatures, in schools and workplaces, and within the youth justice community.

Together, the Campaign, ICAN, and state coalitions bring together defense attorneys and family members to strategize, develop targeted resources (such as guidelines, parole rules, bench cards for judges, and model briefs). They educate key decision-makers.

These entities help implement new laws following abolition, and recruit members of the private bar to represent individuals who were sentenced as children and remain behind bars.

And we have learned that stories change hearts, minds and policies. Thus we center the expertise of people directly impacted by extreme sentencing for youth: mothers, parents, and siblings of the incarcerated, victim families who are devoted to redemption as a part of justice, clergy, teachers and and the formerly incarcerated youth themselves --- now no longer young – who share their stories of personal pain, growth, dignity, and restorative justice that humanizes people once deemed monstrous "super-predators."

Broad coalitions composed of legal entities, youth and youth-caring organizations have been mobilized to support sustained campaigns to rid the U.S. of youth policies and practices that violate the Convention on the Rights of the Child, international law, and human rights standards, and to insist on the capacity of young people to grow into their own humanity.

FOOTNOTES

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[1]**"New BI Report Highlights Troubling Trends in Youth of Color Incarceration", posted May 19, 2016 by Julia Beatty, at:** **https://www.burnsinstitute.org/blog/new-bi-report-highlights-troubling-trends-in-youth-of-color-incarceration/**

2 "Age-Appropriate Sentencing", Children and Family Justice Center, Bluhm Legal Clinic, Northwestern Pritzker School of Law, May 17, 2018

3. "Report Update: Direct File Rates Arbitrarily Rising for Youth of Color", posted October 18, 2016 by Julia Roma, at: **https://www.burnsinstitute.org/blog/report-update-direct-file-rates-arbitrarily-rising-for-youth-of-color/**

4. Illinois Juvenile Justice Commission, *Illinois Juvenile Detention Data Report on CY2015 Detention, 2016.*

5. Juvenile Justice Initiative, *Detention of Juveniles in Illinois,* May 4, 2028, p. 16.

6. *Ibid*.

7. Campaign for the Fair Sentencing of Youth, at:
https://www.fairsentencingofyouth.org/

8. Incarcerated Children's Advocacy Network, ICAN, at https://www.nochildisbornbad.com/incarcerated-childrens-advocacy-network

ABSTRACT

Virtually alone in the world, the United States continues to racially and ethnically discriminate against African American youth, Latinx youth, and indigenous youth in the state juvenile justice systems and the adult criminal justice systems.

In addition, the U.S. continues to charge, convict and incarcerate youth under the age of eighteen years of age with the prohibited sentence of life without parole.

Robust campaigns are mobilized to abolish these practices that violate both the Convention on the Rights of the Child, and the Convention on the Elimination of all forms of Racial Discrimination.