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“I’LL TRY ANYTHING ONCE”: USING THE CONCEPTUAL FRAMEWORK OF CHILDREN’S HUMAN RIGHTS NORMS IN THE UNITED STATES

Bernardine Dohrn*

International human rights law provides norms, concepts, and standards of immediate and practical value to attorneys for court-involved children in the United States. The conceptual framework of the comprehensive rights of the child is broadly congruent with, or closely related to, the strongest aspects of U.S. constitutional law and practice. The expansive language of children’s human rights offers an historic opportunity: new tools and a more comprehensive context in which to change how we think about young people in conflict with the law, children in state custody, and children in related legal settings. The challenge is to use these fresh substantive concepts as terms of reference in our work and our thinking, as a prelude and incentive to integrating the “instructive” nature of children’s international law with the interpretation of our own laws and constitutional traditions. The adoption of the discourse itself can encourage and influence future implementation of enforceable domestic and international law that expands the rights and well-being of children.

INTRODUCTION

One of the great philosophers of the twentieth century, Mae West, once said: “I’ll try anything once, twice if I like it, three times to make sure.”¹ It is time to give human rights concepts and standards for court-involved children in the United States a try.

International human rights law, particularly children’s rights involving youngsters in conflict with the law and children in state “protective” custody, offers fresh norms and a powerful conceptual framework for advocates representing children. Despite legal and ideological resistance to full U.S. participation in the Convention on the Rights of the Child² (“CRC”) and related human rights

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1. PAULA MUNIER, ON BEING BLONDE: WIT AND WISDOM FROM THE WORLD’S MOST INFAMOUS BLONDES 16 (2004).

2. *Convention on the Rights of the Child*, adopted Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC], available at <http://www.unhchr.ch/html/menu3/b/k2crc.htm>. Note also U.S. ratification in 2002 of two optional protocols to the CRC: Optional Protocols to the Convention on the Rights of the Child on Involvement of Children in Armed Conflict and on the Sale of Children, Child Prostitution and Child Pornography. *Opened for signature* July 25,

treaties,³ we have new tools available in the form of expansive language and a more spacious framework to change how we think about young people in conflict with the law, children in state custody, and children in related legal settings. The challenge is to use these substantive concepts as terms of reference in our work and our thinking, as preludes and incentives to integrating the “instructive”⁴ nature of international law and the laws of other nations with interpretations of our own laws and constitutional traditions.

Although the United States is the only remaining country actively opposing adoption of the CRC and one of only two nations that have failed to ratify the CRC,⁵ the United States was a major and active participant throughout the ten-year drafting process.⁶ In part as a consequence of the engaged role of the United States in drafting, U.S. norms regarding the rights and protections of children inform the CRC, the world’s most comprehensive legal document on the rights and well-being of children.⁷

This Article explores the historic opportunity of the human rights’ “[f]ield of [e]manicipatory [p]ossibility:”⁸ the radical notion presented by bringing home a union of human rights and children’s rights. Much like the strategy of “removal” to federal courts was to the civil rights movement,⁹ children’s human rights offers child advocates a new window, a door,¹⁰ an escape from the increas-

2000, S. TREATY DOC. NO. 106-37 (2000) [hereinafter *Optional Protocols*]; see also G.A. Res. 54/263, U.N. Doc. A/RES/54/263 (May 25, 2000).

3. See, e.g., Convention on Protection of Children and Cooperation in Respect of Inter-country Adoption, *adopted* May 29, 1993, 1870 U.N.T.S. 181; Convention on the Elimination of All Forms of Discrimination Against Women, *adopted* Dec. 18, 1979, 1249 U.N.T.S. 13; International Covenant on Economic, Social and Cultural Rights, *adopted* Dec. 16, 1966, 993 U.N.T.S. 3.

4. *Roper v. Simmons*, 543 U.S. 551, 575 (2005).

5. Jonathan Todres, *Analyzing the Opposition to U.S. Ratification of the U.N. Convention on the Rights of the Child*, in *THE U.N. CONVENTION ON THE RIGHTS OF THE CHILD: AN ANALYSIS OF TREATY PROVISIONS AND IMPLICATIONS OF U.S. RATIFICATION* 19 (Jonathan Todres et al. eds., 2006).

6. CYNTHIA PRICE COHEN & SUSAN H. BITENSKY, *ANSWERS TO 30 QUESTIONS 1* (Child Rights Int’l Res. Inst. 1996); see also Cynthia Price Cohen, *Role of the United States in Drafting the Convention on the Rights of the Child: Creating a New World for Children*, *LOY. POVERTY L.J.* 9, 25–26 (1998).

7. Jonathan Todres et al., *Overview of THE U.N. CONVENTION ON THE RIGHTS OF THE CHILD: AN ANALYSIS OF TREATY PROVISIONS AND IMPLICATIONS OF U.S. RATIFICATION* 3, 6–7 (Jonathan Todres et al. eds., 2006).

8. David Kennedy, *The International Human Rights Movement: Part of the Problem?*, 15 *HARV. HUM. RTS. J.* 101, 108 (2002).

9. United States Court of Appeals for the Eleventh Circuit, *History of the Court of Appeals*, <http://www.ca11.uscourts.gov/about/appealshistory.php> (last visited Sept. 16, 2007).

10. EMILY DICKINSON, *THE COLLECTED POEMS OF EMILY DICKINSON* 136 (2003) (“Not knowing when the dawn will come / I open every door . . .”).

ingly constricted legal analyses of children's rights to full constitutional protection and participation.¹¹ Yet these human rights standards and frameworks draw upon and extend familiar constitutional principles. They are family, not foreigners or "outsiders." This Article will explore, as examples, a range of children's rights that could immediately become part of our discourse, practice, and education, a pathway to changing hearts and minds. We can and should use these legal and linguistic concepts immediately and consistently before judges, probation officers, caseworkers, correctional authorities, police, and professionals, as well as with adolescent clients themselves.

Setting aside the legal complexity of whether and how international law is applicable in U.S. courts,¹² this Article emphasizes the importance of the conceptual child rights language itself, and the multi-dimensionality and dynamism of human rights as an emerging field of rapid development.¹³ Even in the United States, the Supreme Court has confirmed the significant influence of international law and the CRC in the interpretation of our own Constitution and traditions.¹⁴

The CRC as one of the first international human rights treaties adopted and ratified post-Cold War, is the first to integrate civil and political rights with economic, social and cultural rights.¹⁵ This status creates significant opportunities because children's rights—to survival, development, education, and health care, for instance—cannot be framed or fulfilled without the family and nation-state to promote those rights, including basic economic rights.¹⁶ The satisfaction of fundamental economic rights, even for children, is subject to the modifying standards of "progressive

11. See, e.g., FRANKLIN E. ZIMRING, AMERICAN JUVENILE JUSTICE 141–44 (2005).

12. These barriers and hurdles include: U.S. reservations to treaty ratification stating that treaties are not "self-executing" and thus require parallel domestic legislation; the U.S. practice of substantive reservations, understandings, and declarations ("RUDs"); and a dominant legal culture (despite recent Supreme Court language and references) of disdain for the law of other nations and international law. LOUIS HENKIN ET AL., HUMAN RIGHTS 778–88 (1999).

13. See generally Bernardine Dohrn, *Something's Happening Here: Children and Human Rights Jurisprudence in Two International Courts*, 6 NEV. L.J. 749 (2006).

14. See *Roper v. Simmons*, 543 U.S. 551, 578 (2005) ("The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions."); see also Barbara Woodhouse, *The Changing Status of the Child*, in THE U.N. CONVENTION ON THE RIGHTS OF THE CHILD: AN ANALYSIS OF TREATY PROVISIONS AND IMPLICATIONS OF U.S. RATIFICATION 51, 60 (Jonathan Todres et al. eds., 2006).

15. UNICEF, Convention on the Rights of the Child, <http://www.unicef.org/crc/index.html> (last visited Sept. 16, 2007).

16. Nigel Cantwell, *Children's Rights in Relation to Their Family*, in THE UN CHILDREN'S RIGHTS CONVENTION: THEORY MEETS PRACTICE 389, 393 (A. Alen et al. eds., 2007).

realisation.”¹⁷ Nonetheless, the opportunities to utilize these rights to improve the well-being of children are potentially dramatic. Additionally, the integration of children’s economic and cultural rights with civil and political rights reinforces and resonates with the so-called “indivisibility” of human rights—the ways in which the rights regime is an integrated structure whose core is the dignity of every human person.¹⁸ Paradoxically, while children’s rights are indivisible, integrated, and reinforcing, they can be simultaneously contested and conflicting.¹⁹

As an illustration of the reasons to adopt the human rights framework here in the United States, consider the example of adopting the use of “children” as a description of all of our clients under the age of eighteen,²⁰ following the rest of the world in adopting the CRC terminology.²¹ No one refers to their own adolescent children as “juveniles” or as “minors.” Focus groups at the time of the Juvenile Court centennial in 1999 confirmed the obvious connotations: people associate the word “juvenile” with “delinquent,” or “gangster,” or violent criminal, rather than with their own teenage children who inhabit that mysterious territory between childhood and adulthood.²² As the poet Gwendolyn Brooks wrote of wayward youth: “We real cool. We / Left school. We / Lurk late. We / Strike straight. We / Sing sin. We / Thin gin.

17. *Republic of S. Afr. v. Grootboom*, 2001 (1) SA 46 (CC) at 57 (S. Afr.) (discussing “progressive realization” which means that with an economic right, states are obligated to have a plan to move forward the realization of that right, but not necessarily to implement it immediately. It springs from a recognition that states must determine economic priorities themselves); see also CASS R. SUNSTEIN, *THE SECOND BILL OF RIGHTS* 220–23 (2004).

18. Ton Liefwaard, *The Right to be Treated With Humanity: Implications of Article 37(c) CRC for Children in Detention*, in *THE UN CHILDREN’S RIGHTS CONVENTION: THEORY MEETS PRACTICE* 565, 574 (A. Alen et al. eds., 2007); SHARON DETRICK, *A COMMENTARY ON THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD* 22 (1999).

19. For example, the rights of mothers (parents) and children may be in contention or contradiction in areas such as inter-country adoption, corporal punishment, child marriage, female genital cutting, child protection and child custody. See, e.g., Peter Rosenblum, *Teaching Human Rights: Ambivalent Activism, Multiple Discourses, and Lingering Dilemmas*, 15 HARV. HUM. RTS. J. 301, 306–09 (2002) (noting the potential for ambiguity and conflict in applying human rights norms).

20. To call an adolescent client a child would require, of course, a conversation and understanding with the child client, as part of the attorney/client relationship.

21. All but two nations of the world, Somalia and the United States, have ratified the CRC. *Roper v. Simmons*, 543 U.S. 551, 576 (2005). Of course, countries in certain regions of the world, such as Latin America, use both the words “child” and “adolescent” to describe children who are older teenagers. See, e.g., American Convention on Human Rights, art. 13, ¶ 4, adopted Nov. 22, 1969, 1144 U.N.T.S. 143 (describing the need for “protection of childhood and adolescence”).

22. Chicago Bar Association & Children’s Court Centennial Committee, *A Noble Social Experiment: The First 100 Years of the Cook County Juvenile Court 1899–1999* (1999) (unpublished focus group results, on file with author).

We / Jazz June. We / Die soon."²³ Those who work on juvenile issues are aware that the "general public" may at times consider abused and neglected children to be innocent victims—as contrasted with children who are alleged to have committed delinquent offenses.²⁴ It is simultaneously true that the public views all children in juvenile court as similar, overlapping, and "damaged," in the sense of being hopelessly harmed.²⁵ Language mirrors these perceptions. "[W]hen someone under the age of eighteen is in conflict with the law he or she is a *juvenile* offender, yet when someone under eighteen is in need of state protection, reference is made to *child* welfare."²⁶

These negative perceptions of "juveniles" are due, in large part, to white supremacist structures and racist stereotypes which make children of color wildly overrepresented in both domains of juvenile justice and child protection.²⁷ The often dismal consequences associated with poverty further contribute to fear and hostility directed toward children in conflict with the law.²⁸ All the more reason to reject the use of "juvenile" and "minor," and to insist on the language of children, kids, girls, boys, and youngsters—words that carry with them the promise, potential, and imaginative possibility of childhood, as well as its suffering and turbulence.

I. CONSTITUTIONAL MOMENT

Two years ago, the U.S. Supreme Court abolished the practice of executing juvenile offenders, holding that the juvenile death penalty violated the Eighth Amendment prohibition against "cruel and unusual punishments" because children are categorically less

23. GWENDOLYN BROOKS, *We Real Cool*, in BLACKS 331, 331 (4th prtg. 1989).

24. Barry C. Feld, *Abolish the Juvenile Court: Youthfulness, Criminal Responsibility, and Sentencing Policy*, 88 J. CRIM. L. & CRIMINOLOGY 68, 71–72 (1997).

25. Barry C. Feld, *The Juvenile Court: Changes and Challenges*, FOCUS ON L. STUD. (A.B.A., Chicago, Ill.) Fall 2000, at 1, 1–2.

26. GERALDINE VAN BUEREN, *THE INTERNATIONAL LAW ON THE RIGHTS OF THE CHILD* 199 (1995).

27. James Bell, *Shadowboxing with the Apocalypse: Race and Juvenile Justice*, YOUTH LAW NEWS, Sept.–Oct. 1998, at 19; NAT'L COUNCIL ON CRIME & DELINQ., AND JUSTICE FOR SOME: DIFFERENTIAL TREATMENT OF YOUTH OF COLOR IN THE JUSTICE SYSTEM 4 (2007), http://www.nccd-crc.org/nccd/pubs/2007jan_justice_for_some.pdf; Jason Zidenberg, *Drugs and Disparity: The Racial Impact of Illinois' Practice of Transferring Young Drug Offenders to Adult Court*, <http://www.buildingblocksforyouth.org/illinois/illinois.html> (last visited Sept. 16, 2007); MIKE MALES & DAN MACALLAIR, *THE COLOR OF JUSTICE: AN ANALYSIS OF JUVENILE ADULT COURT TRANSFERS IN CALIFORNIA* 5–11 (2000), <http://www.buildingblocksforyouth.org/colorofjustice/coj.pdf>;

28. Liefwaard, *supra* note 18, at 565.

culpable than adults.²⁹ At its core, *Roper* reaffirmed the foundational principle of the juvenile court, elaborated over a century ago with the establishment of the world's first juvenile court in Chicago.³⁰ Children are different than adults, and their misdeeds—even grave crimes—must be addressed in a distinct system of justice that takes into account their age, their lesser culpability, and their greater ability to recover.³¹ The *Roper* decision relied on the differences between children and adults, supported by research on adolescent development,³² and arrived at by the peculiarities of evolving standards of decency unique to Eighth Amendment jurisprudence.³³

Surprisingly, the Court devoted several pages to a discussion of the standards of international human rights law.³⁴ In expansive language, the 5-4 majority of the U.S. Supreme Court noted: “[T]he opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions.”³⁵ While this renewed recognition of international law and human rights treaties is welcome and deserves further exploration,³⁶ the focus of this Article is on the strategic opportunities for children’s rights created by the expanding terrain of children’s international human rights, bolstered by the reasoning and logic of *Roper*.

29. *Roper v. Simmons*, 543 U.S. 551, 578 (2005).

30. David S. Tanenhaus, *The Evolution of Juvenile Courts in the Early Twentieth Century, Beyond the Myth of Immaculate Construction*, in A CENTURY OF JUVENILE JUSTICE 42, 42–43 (Margaret K. Rosenheim et al. eds., 2002) (discussing the establishment of Chicago’s juvenile court); see also DAVID S. TANENHAUS, JUVENILE JUSTICE IN THE MAKING 4 (2004).

31. See *Roper*, 543 U.S. at 569–71 (explaining three general differences).

32. *Id.* at 569–70.

33. ADAM ORTIZ, AM. BAR ASS’N, CRUEL AND UNUSUAL PUNISHMENT: THE JUVENILE DEATH PENALTY I (2004), <http://www.abanet.org/crimjust/juvjus/EvolvingStandards.pdf>.

34. *Roper*, 543 U.S. at 575–78.

35. *Id.* at 578.

36. The *Roper* Court drew attention to Article 37 of the CRC, “which every country in the world has ratified save for the United States and Somalia,” even remarking that none have taken exception to Article 37. *Id.* at 576. The Court wrote further: “It does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by *other nations and peoples* simply underscores the centrality of those same rights within our own heritage of freedom.” *Id.* at 578 (emphasis added).

II. IMMEDIATE NORMS AND SUBSTANTIVE FRAMING CONCEPTS

This Article selects eight³⁷ core norms and one framing theory from the dense tapestry of the CRC to illustrate the value of children's human rights to the discourse and narrative of children in conflict with the law here in the United States. These norms and substantive framing concepts are:

- children deprived of their liberty;
- arrest, detention or imprisonment only as a last resort and for the shortest appropriate period of time;
- separation from adults when deprived of liberty;
- non-separation of parents and children;
- non-discrimination and equal treatment under the law;
- right to be heard/to express views;
- right to effective participation/competency; and
- right to reintegration.

The Article concludes with a discussion of the overarching right to be "treated with humanity and respect for the inherent dignity of the human person."³⁸

Because core human rights norms and substantive concepts are powerful tools in the zealous advocacy for our clients, and because they strengthen the content of constitutional and legal standards for children in conflict with the law, we should use them now, regardless of whether or not they are established as literal legal norms or binding international law. This language humanizes our child clients. How we think and talk about our child clients and the rights they possess influences how others respond. Large portions of the world are engaged in a slow but dynamic dialogue about the promotion of children's rights and the protection of children.³⁹ A freshly invented form of common law and best practices is emerging.⁴⁰ We in the United States could become part of that

37. This selection omits other significant norms of children's rights, such as the right to have legal assistance, the right to habeas corpus, and the prohibition against torture or cruel, inhuman, or degrading treatment or punishment. Similarly, the basic objective of the best interest of the child is beyond the scope of this Article.

38. CRC, *supra* note 2, art. 37(c).

39. See, e.g., Off. of the U.N. High Comm'r for Hum. Rts., State Reports to the Committee on the Rights of the Child and Concluding Observations, <http://www.ohchr.org/english/bodies/crc/sessions.htm> (last visited Sept. 16, 2007).

40. Cantwell, *supra* note 16, at 396 (discussing the proposed United Nations Guidelines for the Protection and Alternative Care of Children without Parental Care); Liefwaard, *supra* note 18, at 580.

conversation and benefit from its vitality and development, even short of ratifying treaties and implementing legislation. The adoption of the discourse itself can encourage and influence future implementation of enforceable domestic and international law that expands the rights and well-being of children.

This proposal is concrete and immediate. The author intends this Article to provoke conversation beyond the eight examples explored here, and to spark debate as to whether and where children's rights lawyers and advocates can instantly adopt human rights norms as substantive framing concepts in our work.

A. *Children Deprived of their Liberty (Article 37)*⁴¹

At least one million children worldwide are currently detained, imprisoned, incarcerated, jailed or held in secure or closed facilities.⁴² The reasons underlying the practice of removing children from their families and communities, locking them up with one another only to return them to society with a heavier burden include deeply-rooted and complex issues, clearly linked to poverty, discrimination, and fear.⁴³

"Children Deprived of their Liberty" is a human rights formulation totally different from "detained minor" or "incarcerated juvenile"⁴⁴ or "sentenced delinquent." It is even unlike the awkward formulation of CRC's Article 40: "every child alleged as, accused of, or recognized as having infringed the penal law."⁴⁵ First, "children deprived of their liberty" assumes that children, as persons, have a right to liberty and that they have been deprived of that condition—a deprivation requiring some protection, process, and assurances. This is the very opposite of Justice Rehnquist's infamous and oft repeated dicta in *Schall v. Martin* that children "are

41. CRC, *supra* note 2, art. 37.

42. DEF. FOR CHILD. INT'L, KIDS BEHIND BARS: A STUDY ON CHILDREN IN CONFLICT WITH THE LAW 9 (Stan Meuwese ed., 2003) [hereinafter KIDS BEHIND BARS], <http://www.kidsbehindbars.org/english/docs/RapportKBBtotaal.pdf>.

43. The Secretary-General, *Report of the Independent Expert for the United Nations Study on Violence Against Children*, ¶ 61, delivered to the General Assembly, U.N. Doc. A/61/299 (Aug. 29, 2006) (prepared by Paulo Sérgio Pinheiro); PAULO SÉRGIO PINHEIRO, *Violence Against Children in Care and Justice Institutions*, in WORLD REPORT ON VIOLENCE AGAINST CHILDREN 171, 171–229 (2006), http://www.violencestudy.org/IMG/pdf/5._World_Report_on_Violence_against_Children.pdf

44. Colleen R. McLaughlin et al., *Factors Associated with Parenting Among Incarcerated Juvenile Offenders*, 34 ADOLESCENCE 665, 669 (1999); see, e.g., Lacie Morrison, *Juvenile Arsonist Arrested*, MIN. WELLS INDEX, July 27, 2007, http://www.mineralwellsindex.com/homepage/local_story_208100423.html?keyword=leadpicturestory.

45. CRC, *supra* note 2, art. 40.

always in some form of custody."⁴⁶ His majority opinion upheld a New York State preventive detention law, which permitted children to be confined in a detention center without a probable cause hearing for up to three days.⁴⁷

The concept in U.S. law that children have no right to liberty because they are normally subject to the control and discipline of their parents gives children the worst of both worlds: they have fewer rights than adults because they are presumably familiar with conditions of no control over their circumstances, while at the same time adults are permitted to incarcerate children "for their own good"⁴⁸ or safety. In *Schall*, plaintiffs presented evidence that the vast majority of juveniles held in pretrial detention without a hearing were released either unconditionally or on parole near the time of their first court hearing.⁴⁹ Yet *Schall* justifies pre-trial incarceration as a measure to keep children from re-offending, and to protect them from the dangers of their peers and their environment.⁵⁰ Parental custody is thus extended and analogized to abysmal situations of confinement in jails, prisons, juvenile detention centers, orphanages, mental health facilities, sexual offender programs, and drug treatment institutions. Justice Marshall's dissent in *Schall* noted that pretrial detention is used for punitive purposes where the "net impact on the juveniles who come within its purview is overwhelmingly detrimental."⁵¹ Twenty years later, we have substantial evidence documenting that damage, and the harm to hundreds of thousands of more children who have suffered incarceration.⁵²

Second, the human rights concept of "children deprived of their liberty," articulated in Article 37(b) of the CRC and interpreted by the Committee on the Child in its General Comment #10, means

46. *Schall v. Martin*, 467 U.S. 253, 265 (1984).

47. "[N]ot more than three days after the conclusion of the initial appearance or four days after the filing of the petition, whichever is sooner." *Id.* at 269-70. "[O]ne 3-day extension possible for good cause shown." *Id.* at 277.

48. *See, e.g.*, Juvenile Court Act of 1987, 705 ILL. COMP. STAT. 405/5-501 (2006) (providing that pretrial detention may be "for the protection of the minor").

49. *Schall*, 467 U.S. at 286-87 (Marshall, J., dissenting).

50. *Id.* at 264-66.

51. *Id.* at 308 (Marshall, J., dissenting).

52. CAMPAIGN FOR YOUTH JUSTICE, THE CONSEQUENCES AREN'T MINOR: THE IMPACT OF TRYING YOUTH AS ADULTS AND STRATEGIES FOR REFORM 8-9 (Liz Ryan & Jason Ziedenberg eds., 2007), http://www.campaignforyouthjustice.org/Downloads/NEWS/National_Report_consequences.pdf; ROCHELLE STANFIELD, ANNIE E. CASEY FOUNDATION, PATHWAYS TO JUVENILE DETENTION REFORM: THE JDAI STORY 6-7 (1999), <http://www.aecf.org/upload/PublicationFiles/jdai%20story.pdf>; Jennifer L. Woolard et al., *Juveniles Within Adult Correctional Settings: Legal Pathways and Developmental Considerations*, 4 INT'L J. FORENSIC MENTAL HEALTH 1, 1-18 (2005), <http://www.iafmhs.org/files/Woolardspr05.pdf>.

that the “[u]se of pretrial detention as a punishment violates the presumption of innocence.”⁵³ General Comment #10 provides that the elements required to deprive a child of liberty, as well as the confinement, the duration, and regular reviews, be subject to clear legal limits and strict conditions.⁵⁴ Allowing children to languish in detention is a grave violation because of the clear link between violence against children and their institutionalization.⁵⁵

In a recent European Court of Human Rights (“ECHR”) case, *Selçuk v. Turkey*, a sixteen year old arrested for robbery of a computer from an elementary school was ordered by the court to be detained with adults.⁵⁶ The child’s attorney challenged the order, repeatedly citing both the European Convention on Human Rights and Fundamental Freedoms Article 5(3) (trial within a reasonable time or release pending trial), and, surprisingly, CRC Article 37(b) (deprivation of liberty as a last resort, and for the shortest appropriate period of time).⁵⁷ The ECHR unanimously held that the failure to take into account the age of the child, who was confined in continued pre-trial detention with adults, was a violation of the European Convention on Human Rights and Fundamental Freedoms.⁵⁸

Third, this “deprivation of liberty” framework for children applies not just to “training schools,” juvenile correctional facilities, or prisons, but to all forms of child confinement, however benign the name and stated purpose. This includes any other form of placement in a public or private custodial setting from which the child is not permitted to leave at will by order of any judicial, administrative or other public authority.⁵⁹ The range encompasses group homes, residential treatment, training schools, orphanages, mental health institutions, drug treatment facilities, centers for the confinement of unaccompanied immigrant children in deporta-

53. Comm. on the Rts. of the Child, *General Comment No. 10: Children’s Rights in Juvenile Justice*, ¶ 80, U.N. Doc. CRC/C/GC/10 (Feb. 2, 2007), available at <http://www.ohchr.org/english/bodies/crc/docs/CRC.C.GC.10.pdf>.

54. *Id.* ¶¶ 79–84.

55. PINHEIRO, *supra* note 43, at 190.

56. *Selçuk v. Turkey*, App. No. 21768/02, ¶ 5 (Eur. Ct. H.R. Jan. 10, 2006).

57. *Id.* ¶¶ 13, 16, 26–37.

58. *Id.* ¶ 37 (holding that there has been a violation of Article 5 § 3 of the Convention).

59. DETRICK, *supra* note 18, at 629 (citing Comm. on the Rts. of the Child, *General Guidelines Regarding the Form and Contents of Periodic Reports to be Submitted by States Parties Under Article 44, Paragraph 1 (b), of the Convention*, U.N. Doc. CRC/C/58, at 40 n.1 (1996)); VAN BUEREN, *supra* note 26, at 206.

tion proceedings, and institutions for sexual offenders.⁶⁰ This broader definition of deprivation of liberty is resonant given the history of "caging kids"⁶¹ under different labels, based on different rationales over the past century.⁶² The recent growth of private closed facilities for children further expands the importance of an inclusive framework.⁶³

Thus, international law seeks to limit the deprivation of children's liberty in two ways: first, to divert children away from the formal systems of juvenile or criminal law with alternative sanctions;⁶⁴ second, to restrict arrest, detention and incarceration.⁶⁵

*B. Arrest, Detention or Imprisonment Only as a Last Resort
and for the Shortest Appropriate Period of Time
(Article 37(b))⁶⁶*

This core statement on the uses of criminal justice remedies regarding children (people under the age of eighteen years) is worthy of rigorous analysis and regular use. It includes not only two forms of deprivation of liberty (detention and imprisonment), but it also includes the little explored limits on the *arrest* of children by police and law enforcement officials.⁶⁷

Arrest of children only as a last resort creates a barrier at the core point of entry into the system of justice for children, the police, and carries significant consequences. In fact, arrest as a "last resort" was once a practical cornerstone of most policing practices toward children in conflict with the law. Until the current wave of harsh laws and policies across the United States began in 1986, approximately two-thirds of police contacts with children resulted in a warning.⁶⁸ If the arrest itself must be a last resort in police-youth

60. Paul Lerman, *Twentieth-Century Developments in America's Institutional Systems for Youth in Trouble*, in A CENTURY OF JUVENILE JUSTICE 74, 74 (Margaret K. Rosenheim et al. eds., 2002).

61. A phrase used by Bart Lubow, director of the Annie E. Casey Juvenile Detention Alternatives Initiative.

62. Lerman, *supra* note 60, at 78–81.

63. *Id.*

64. U.N. Doc. CRC/C/GC/10, *supra* note 53, ¶¶ 22–29; VAN BUEREN, *supra* note 26, at 211.

65. VAN BUEREN, *supra* note 26, at 211.

66. Article 37(b) of the CRC provides that: "The arrest, detention or imprisonment of a child shall be . . . used only as a measure of last resort and for the shortest appropriate period of time." CRC, *supra* note 2, art. 37(b).

67. *Id.*

68. HOWARD N. SNYDER & MELISSA SICKMUND, NAT'L CENTER FOR JUV. JUST., JUVENILE OFFENDERS AND VICTIMS: 2006 NATIONAL REPORT 96 (2006), <http://www.ojjdp.ncjrs.gov/ojstatbb/nr2006/downloads/NR2006.pdf>; Anne L. Stahl, *Juvenile Court Processing of*

encounters, a range of non-judicial alternative remedies or interventions must be available, as provided by Article 40(3)(b) of the CRC.⁶⁹ Those alternatives might include a warning, contact with parents and family conferencing, restorative justice, compensation, or community service. But all interventions without judicial proceedings must include the protections of due process (or “human rights and legal safeguards,” in the terms of international law and the CRC). Diversion measures must not become either a justification for bringing more children into the system of policing and criminal justice (known as “widening the net”) or serve as a pretext for doing away with vital legal safeguards in the name of informal help or treatment for the child. General Comment #10 specifies, for example, that in cases of diversions from court proceedings there must be convincing evidence that the child committed the offense, that the child freely and voluntarily acknowledges responsibility without intimidation or pressure, and that the acknowledgement not be used against the child in any subsequent legal proceeding.⁷⁰

A century of research documents the negative consequences of detention and incarceration on both the right to life, survival, and development of the child⁷¹ and the right to reintegration into society.⁷² The high level of violence that accompanies most institutionalization of children⁷³ is a major reason for setting high barriers and conditions for the decision to deprive a child of his/her liberty. In addition, the stigma of arrest, detention and incarceration creates formidable obstacles to the goal of reintegration.⁷⁴

Each year, revelations of snake pit conditions for incarcerated children are splashed across headlines and result in momentary scandals. Recall, for example: Georgia’s juvenile correctional

Delinquency Cases, 1986–1995, Office of Juvenile Justice and Delinquency Prevention Fact Sheet (U.S. Department of Justice), Apr. 1999, at 1.

69. Article 40(3)(b) of the CRC provides that: “Whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected.” CRC, *supra* note 2, art. 40(3)(b).

70. U.N. Doc. CRC/C/GC/10, *supra* note 53, ¶ 27, pt. 3.

71. See, e.g., Kristina H. Chung, *Kids Behind Bars: The Legality of Incarcerating Juveniles in Adult Jails*, 66 IND. L.J. 999, 1006–08 (1991); Barry C. Feld, *The Transformation of the Juvenile Court*, 75 MINN. L. REV. 691, 715–17 (1991); Dorothy O. Lewis et al., *A Clinical Follow-Up of Delinquent Males: Ignored Vulnerabilities, Unmet Needs, and the Perpetuation of Violence*, 33 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 518, 518–28 (1994).

72. See *infra* notes 101, 106, 109 and accompanying text.

73. PINHEIRO, *supra* note 43, at 175.

74. VAN BUEREN, *supra* note 26, at 217–18.

system,⁷⁵ Jena⁷⁶ and Tullulah,⁷⁷ private juvenile correctional facilities in Louisiana, Baltimore juvenile detention,⁷⁸ the Cook County Juvenile Temporary Detention Center in Chicago,⁷⁹ California Youth Authority,⁸⁰ and the Texas Youth Commission system.⁸¹

"Last resort" and for the "shortest appropriate period of time" are also the standards or norms for *any* incarceration of children (both pre-trial detention and post-adjudication).⁸² The last resort and shortest appropriate period of time requirements of the CRC are based on the 1985 UN Standard Minimum Rules for the Administration of Juvenile Justice⁸³ and the 1990 UN Rules for the Protection of Juveniles Deprived of their Liberty,⁸⁴ both non-binding resolutions. The CRC treaty standards include any other deprivation of liberty for children in different systems of "care" or custody—including mental health institutions, drug treatment facilities, group homes and orphanages, or sexual offender facilities, as described above. This suggests that alternatives to detention and incarceration must be available and used (alternatives such as evening report centers, home confinement, and probation conditions).⁸⁵

The challenge of *Roper* is to integrate international human rights law and the practice of other nations with our own constitution and traditions. These concepts of "last resort" and "shortest

75. HUMAN RIGHTS WATCH, *Children's Rights: Juvenile Justice*, in WORLD REPORT 1999 (1999), <http://www.hrw.org/worldreport99/children/child3.html> (last visited Sept. 16, 2007).

76. Fox Butterfield, *Privately Run Juvenile Prison in Louisiana is Attacked for Abuse of 6 Inmates*, N.Y. TIMES, Mar. 16, 2000, at A14.

77. Fox Butterfield, *Profits at a Juvenile Prison Come with a Chilling Cost*, N.Y. TIMES, July 15, 1998, at A1.

78. See generally HUMAN RIGHTS WATCH, NO MINOR MATTER: CHILDREN IN MARYLAND'S JAILS (1999), <http://www.hrw.org/reports/1999/maryland/>.

79. PATRICIA CONNELL & MALCOLM C. YOUNG, JOHN HOWARD ASS'N OF ILL., AN ASSOCIATION REPORT: VOLUNTEER VISIT TO THE COOK COUNTY JUVENILE TEMPORARY DETENTION CENTER 20–21 (2006), http://www.john-howard.org/images/FINAL_REPORT_CCJTDC_WITH_TOCCOVER-GRAPHIC_8-23-06.pdf.

80. Mark Martin, *Youth Authority: 'Factory for Prisons'*, S.F. CHRON., Feb. 3, 2004, at A1; Dean E. Murphy, *California Settles Lawsuit on Juvenile Prisons*, N.Y. TIMES, Nov. 17, 2004, at A18; Denny Walsh, *Family Sues over Teen's Prison Death*, SACRAMENTO BEE, Nov. 29, 2006, at B1.

81. Gregg Jones et al., *TYC Facilities Ruled by Fear*, DALLAS MORNING NEWS, Mar. 18, 2007, at 1A; Doug J. Swanson, *TYC Sex Allegations Exceed 750*, DALLAS MORNING NEWS, Mar. 7, 2007, at 1A.

82. VAN BUEREN, *supra* note 26, at 214; see also CRC, *supra* note 2, art. 37(b).

83. United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules), G.A. Res. 40/33, R. 13, 17, 19, U.N. Doc. A/RES/40/33 (Nov. 29, 1985); DETRICK, *supra* note 18, at 630.

84. United Nations Rules for the Protection of Juveniles Deprived of Their Liberty, G.A. Res. 45/113, R. 1, 2, 17, U.N. Doc. A/RES/45/113 (Dec. 14, 1990); DETRICK, *supra* note 18, at 630.

85. U.N. Doc. CRC/C/GC/10, *supra* note 53, ¶ 28(a).

appropriate period of time”⁸⁶ may be brought to life as a revival, expansion, and renewed interpretation of the “least restrictive environment” standard under U.S. law,⁸⁷ of the Constitutional requirement of proportionality,⁸⁸ and of the standard of the “lesser culpability of the juvenile offender.”⁸⁹ “Last resort” and “shortest appropriate period of time” are terms children’s lawyers and advocates could be using throughout the process: from the first probable cause hearing, to hearings on revocation of probation, and through dispositional/sentencing proceedings. The overlay of these terms with familiar U.S. legal standards can breathe new substantive life into U.S. legal concepts.

*C. Separation from Adults when Deprived of Liberty (Article 37(c))*⁹⁰

Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, *every child deprived of liberty shall be separated from adults* unless it is considered in the child’s best interest not to do so⁹¹

This right, for children deprived of liberty, is the right to have their age, their youthfulness, serve as a barrier to being confined with adults.⁹² It means that there is an affirmative responsibility to take into account the *needs* of an individual that age and to limit deprivation to the possible minimum.⁹³ It embraces the concepts of special protection and special accommodations and includes all domains of deprivation of liberty: child protection, mental health, drug treatment, sexual offenders, detention, and corrections.

In addition to the CRC provision and the UN Rules above, the International Covenant on Civil and Political Rights (“ICCPR”), ratified by the United States, provides in Article 10 that both children accused of a crime and children convicted of a crime be

86. Note that the standard in the United Nations Rules for the Protection of Juveniles Deprived of Their Liberty is “shortest possible duration.” G.A. Res. 45/113, *supra* note 84, R. 17. Similarly Rule 13(1) of the Beijing Rules provides: “Detention pending trial shall be used only as a measure of last resort and for the shortest possible period of time.” G.A. Res. 40/33, *supra* note 83, R. 13(1).

87. See, e.g., 20 U.S.C. § 1412(A)(5) (2000).

88. U.S. CONST. amend. VIII.

89. *Roper v. Simmons*, 543 U.S. 551, 571 (2005).

90. CRC, *supra* note 2, art. 37(c).

91. *Id.* (emphasis added).

92. DETRICK, *supra* note 18, at 679.

93. Liefwaard, *supra* note 18, at 569.

separated from adults.⁹⁴ As significantly, in terms of current practice here in the United States, the ICCPR provides: "*Juvenile offenders shall be segregated from adults* and be accorded treatment appropriate to their age and legal status."⁹⁵

The concept of "separation from adults" and "segregation from adults" is stronger than, but similar to, the U.S. federal mandate of "sight and sound" separation of children from adults in jails and their speedy removal whenever they are placed in an adult jail.⁹⁶ This mandate of the Juvenile Justice and Delinquency Prevention Act does not—but clearly should—include adult prisons and correctional facilities.⁹⁷ Despite this longstanding mandate for separation in jails, there are 7000 youngsters held in adult jails on a given day in the United States, and forty states permit or mandate that children charged as adults be detained in adult jails.⁹⁸ This 208% increase since 1990 is principally due to the fiction of declaring that children who are tried as adults are no longer children, even though they are overwhelmingly tried for non-violent offenses, ranging from bicycle theft to stealing gym clothes.⁹⁹

The meaning of "separated from adults" has been elaborated by the Committee on the Rights of the Child in their recent General Comment #10. In it, the Committee notes bluntly: "Every child deprived of liberty shall be separated from adults. A child deprived of his/her liberty shall not be placed in an adult prison or other facility for adults."¹⁰⁰ Co-mingling with adults or being in an adult facility jeopardizes children's safety, well-being, prospects for avoiding recidivism, and ability to reintegrate into society.¹⁰¹ Further, the Committee urges separate facilities for children deprived of their

94. International Covenant on Civil and Political Rights, G.A. Res. 2200 (XXI), art. 10(2)(b), U.N. Doc. A/6316 (Dec. 16, 1966) [hereinafter ICCPR] ("*Accused juvenile persons shall be separated from adults* and brought as speedily as possible for adjudication.") (emphasis added); see also The Secretary-General, *Reservations, Declarations, Notifications and Objections Relating to the International Covenant on Civil and Political Rights and the Optional Protocols Thereto*, at 40, U.N. Doc. CCPR/C/2/Rev.4 (Aug. 24, 1994).

95. ICCPR, *supra* note 94, art. 10(3) (emphasis added).

96. The Juvenile Justice and Delinquency Prevention Act requires "sight and sound separation" between adults and non-transferred juveniles. 42 U.S.C. §§ 5633(a)(a)(11)–(12).

97. 42 U.S.C. §§ 5601–5785 (2000); Juvenile Justice and Delinquency Prevention Act of 1974, Pub. L. No. 93–415, § 223(a)(13), 88 Stat. 1109, 1121 (1974) (providing mandates as a condition of federal financial aid including one requiring the separation of children from adults in jails).

98. CAMPAIGN FOR YOUTH JUSTICE, *supra* note 52, at 7.

99. *Id.* at 6.

100. U.N. Doc. CRC/C/GC/10, *supra* note 53, ¶ 85.

101. *Id.*

liberty to include “distinct, child-centered staff, personnel, policies, and practices.”¹⁰²

The standard of separation is bolstered by international human rights court decisions in individual cases, such as the case of *Minors in Detention v. Honduras*, decided by the Inter-American Commission of Human Rights in 1999.¹⁰³ In that case, the Commission concluded that the conditions of confinement for children incarcerated with adult prisoners in an adult penal institution violated the American Convention on Human Rights, Honduran law, and the CRC.¹⁰⁴ The case involved children held, sometimes with eighty adult prisoners in a cell; unsurprisingly, rape, physical assault, and abuse of the children were well documented.¹⁰⁵ The Commission held that incarcerating children “in adult penal institutions, thus placing their physical, mental and moral health in serious peril” violated the American Convention on Human Rights¹⁰⁶ and took notice of Article 37 of the CRC as part of its analysis.¹⁰⁷

Evidence of harm to U.S. children confined with adults in adult correctional facilities in Florida and California is well documented and undisputed.¹⁰⁸ Each day, more than 2000 youth are confined in adult prisons.¹⁰⁹ Children in adult penal institutions, even those in a “separate” wing or building, nonetheless have adult prison guards and are subject to extraordinarily high risk of sexual assault, beatings, and suicide.¹¹⁰ Furthermore, after release, children confined in adult facilities re-offend sooner, commit more serious offenses, and face more charges than children with similar offense convictions who serve their time in juvenile correctional facilities.¹¹¹

More children are incarcerated with adults because more children are being tried in adult criminal courts. By the early 1990s,

102. *Id.*

103. *Minors in Detention v. Honduras*, Case 11.491, Inter-Am. C.H.R., Report No. 41/99, OEA/Ser.L/V/II.102, doc. 6 rev., at 575 (1999).

104. *Id.* ¶¶ 69, 73–75, 146.

105. *Id.* ¶¶ 1, 3, 7, 68, 130–132.

106. *Id.* ¶ 98.

107. *Id.* ¶¶ 2, 73, 115, 139, 148.

108. Lawrence Winner et al., *The Transfer of Juveniles to Criminal Court: Reexamining Recidivism over the Long Term*, 43 CRIME & DELINQ. 548, 557–59 (1997); see also CAMPAIGN FOR YOUTH JUSTICE, FACT SHEET: COLLATERAL CONSEQUENCES 1–4 (n.d.), <http://www.campaign4youthjustice.org/Downloads/KeyResearch/FactSheetCollateralConsequences.doc>.

109. See PAIGE M. HARRISON & ALLEN J. BECK, U.S. DEP’T OF JUST., PRISON AND JAIL INMATES AT MIDYEAR 2005 1 (2006), <http://www.ojp.usdoj.gov/bjs/pub/pdf/pjim05.pdf>.

110. 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: A Systematic Review*, 32 AM. J. PREVENTIVE MED. (Supp. 1), Apr. 2007, at S7, S17.

111. Jeffrey Fagan, *The Comparative Advantage of Juvenile Versus Criminal Court Sanctions on Recidivism Among Adolescent Felony Offenders*, 18 LAW & POL’Y 77, 98–101 (1996).

most states had passed legislation to facilitate trying children through mandatory legislative transfer¹¹² (statutory exclusion), lowering the age of criminal jurisdiction, and/or allowing prosecutors to try children as adults at their sole discretion.¹¹³ When one accounts for the number of states whose adult criminal jurisdiction begins at sixteen or seventeen years of age (rather than at eighteen), as well as those transferred or waived to adult criminal courts, approximately 200,000 youngsters each year (20–25% of all children in conflict with the law) are tried in adult criminal courts.¹¹⁴ It is now well-documented that transferring youngsters to the adult justice system—holding constant for offense, histories, and age—generally increases their rates of violence.¹¹⁵ Overall, transferred juveniles were 33.7% more likely to be rearrested for a violent or other crime.¹¹⁶

It is worth noting that when the United States ratified the ICCPR,¹¹⁷ it took a reservation to Article 10(3),¹¹⁸ stating that: "the United States reserves the right, *in exceptional circumstances*, to treat juveniles as adults . . ." ¹¹⁹ Whether one counts all 200,000 children under the age of eighteen tried in adult courts each year, or only the children transferred or waived (excluding those in states where the juvenile court jurisdiction ends at sixteen or seventeen),¹²⁰ the number of children in the United States treated as adults is far beyond "exceptional circumstances." This patent violation of treaty responsibilities makes it more incumbent on children's attorneys

112. Legislative or mandatory transfer is where state statute provides that children who are a certain age and who are charged with certain offenses must be transferred to adult criminal court. Robert O. Dawson, *Judicial Waiver in Theory and Practice*, in *THE CHANGING BORDERS OF JUVENILE JUSTICE* 45, 64–66 (Jeffrey Fagan & Franklin E. Zimring eds., 2000).

113. PATRICK GRIFFIN, NAT'L CTR. FOR JUV. JUST., TRYING AND SENTENCING JUVENILES AS ADULTS: AN ANALYSIS OF STATE TRANSFER AND BLENDED SENTENCING LAWS 2–3 (2003), <http://ncjj.servehttp.com/NCJJWebsite/pdf/transferbulletin.pdf>; David S. Tanenhaus, *The Evolution of Transfer Out of the Juvenile Court*, in *THE CHANGING BORDERS OF JUVENILE JUSTICE* 13, 20 (Jeffrey Fagan & Franklin E. Zimring eds., 2000).

114. CAMPAIGN FOR YOUTH JUSTICE, *supra* note 52, at 6. See generally Donna M. Bishop, *Juvenile Offenders in the Adult Criminal Justice System*, in 27 *CRIME AND JUSTICE: A REVIEW OF RESEARCH* 81 (Michael Tonry ed., 2000).

115. McGowan, *supra* note 110, at S20.

116. Michael Tonry, *Treating Juveniles as Adult Criminals: An Iatrogenic Violence Prevention Strategy if Ever There Was One*, 32 *AM. J. PREVENTIVE MED. (SUPP. 1)* S3, S3–S4 (2007).

117. ICCPR, *supra* note 94.

118. "Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status." *Id.* art. 10(2)(b). Note that the United States also took a reservation to the provision prohibiting the juvenile death penalty. *Id.* art. 6(5).

119. U.N. Doc. CCPR/C/2/Rev.4, *supra* note 94, at 40 (emphasis added).

120. HOWARD N. SNYDER & MELISSA SICKMUND, U.S. DEP'T OF JUST., JUVENILE OFFENDERS AND VICTIMS: 1999 NATIONAL REPORT 86, 106 (Off. Juv. Just. & Delinq. Prevention 1999), available at <http://www.ncjrs.org/html/ojjdp/nationalreport99/toc.html> (last visited Sept. 19, 2007).

to insist on separation of children from adults when detained or confined, and to treat juveniles as children, not adults.

*D. Non-Separation of Parents and Children (Article 9)*¹²¹

Article 9 of the CRC is a strong affirmation of the importance of parents to children. This flips the script on the core U.S. approach to abused and neglected children, which linguistically, substantively, and procedurally severs children from their nest within a family and from their relationship with their parents. “States Parties shall ensure that a child shall not be separated from his or her parents against their will, except”¹²² The starting point here is the child’s right *not* to be separated, and the state obligation is that the child not be separated from her parents against their will. The exception is the need to balance the right of the child to protection from maltreatment,¹²³ which is difficult to weigh in practice. State Parties have an affirmative obligation to take positive measures to prevent the separation of a child from her parents “against their will.”¹²⁴ Leading commentators suggest that the drafting history of the CRC and Article 9 indicates that “against their will” refers equally to the parents and the child.¹²⁵ Yet it is important to note that, despite widespread misperceptions, the CRC does not provide for a child’s right to a family.¹²⁶

As an example of the CRC’s affirmation of the importance of parents to children, the U.N. Committee on the Child makes concrete recommendations to prevent the abandonment of children by their parents, separations frequently a result of economic crises.¹²⁷ Thus, the Committee recommends that states provide for family support allowances for parents in countries as distinct as Norway and Kyrgyzstan.¹²⁸ The growing presence of child-headed

121. CRC, *supra* note 2, art. 2.

122. *Id.*

123. *Id.* arts. 19, 20.

124. JAAP DOEK, A COMMENTARY ON THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD, ARTICLE 8 AND ARTICLE 9, at 21 (2006).

125. THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD: A GUIDE TO THE “TRAVAUX PRÉPARATOIRES” 168 (Sharon Detrick ed., 1992) [hereinafter GUIDE TO THE TRAVAUX PRÉPARATOIRES].

126. Cantwell, *supra* note 16, at 392.

127. *Id.* at 393.

128. Comm. on the Rts. of the Child, *Consideration of Reports Submitted by States Parties Under Article 44 of the Convention: Concluding Observations: Kyrgyzstan*, ¶ 40(a), U.N. Doc. CRC/C/15/Add.244 (Nov. 3, 2005); Comm. on the Rts. of the Child, *Consideration of Reports Submitted by States Parties Under Article 44 of the Convention: Concluding Observations: Norway*, ¶ 24, U.N. Doc. CRC/C/15/Add.263 (Sept. 21, 2005).

households in countries ravished by HIV-AIDS is another economically-impacted form of abandonment of children by their parents.¹²⁹

Non-separation of children from their parents may have an impact on children of incarcerated parents (requiring creation of alternatives to institutionalization of parents and/or opportunities for the child to maintain direct contact with an imprisoned parent). Furthermore, the standard of non-separation includes children who are forcibly separated from parents when parents residing illegally in this country are deported.¹³⁰

The importance of non-separation is reinforced by the subsequent two paragraphs of the CRC:

- all interested parties (including children) shall be given an opportunity to *participate* in the proceedings and make their views known;¹³¹
- the child who is separated from one or both parents has a right to maintain personal relations and direct contact with both parents on a regular basis, unless it is contrary to the child's best interests.¹³²

The child's right to maintain relationships and direct contact with parents is brought home to me most vividly each June when I teach children's rights at a law school in the Netherlands.¹³³ There, my students are alarmed, even horrified, by the U.S. practice of "termination of parental rights" as part of the child protection system. Over the years, Dutch students repeatedly insist that the right to know their parents is a right belonging to the child, regardless of whether that child has been abused or neglected, or whether the child can safely return to live with their parent[s].

Article 9 is largely concerned with the exceptions that make separation of a child from her parents feasible or necessary: best

129. Cantwell, *supra* note 16, at 397.

130. Note the 2007 Department of Homeland Security raids on food processing plants in Massachusetts, resulting in the deportation of parents, whose citizen children immediately became the responsibility of the Department of Social Services. Monica Rhor, *Immigration Raids Split Families* (Mar. 11, 2007), http://www.boston.com/news/local/massachusetts/articles/2007/03/11/ap_impact_immigration_raids_split_families/. In response to the raids, Massachusetts Department of Social Services Commissioner Harry Spence said "ICE's [Immigration and Customs Enforcement] rhetoric has been completely different from the truth." Yvonne Abraham, *DSS Chief Raps Immigration Agency over Detainees*, BOSTON GLOBE, Mar. 13, 2007, at 3B.

131. CRC, *supra* note 2, art. 9.

132. *Id.*

133. For five years, I have had the privilege of teaching as visiting professor at Vrije University, Amsterdam. This year, I taught at the University of Leiden Law Faculty (June, 2007).

interests of the child, applicable law and procedure, competent authorities, subject to judicial review, abuse and neglect, and divorce and custody.¹³⁴ No one suggests, of course, that the right of non-separation is without exceptions.¹³⁵ The jurisprudence developed in the European Court of Human Rights over five decades,¹³⁶ however, for nations which have also ratified the Convention on the Rights of the Child, suggests some significant guidelines for the principle of non-separation articulated in Article 9:

- separation of a child from her parents is necessary in the best interests of the child *if* there are no other measures available to provide the child with necessary protection;¹³⁷
- separation of a child from her parents should be a temporary measure, for the shortest time possible, and subject to regular review;¹³⁸
- separation should be carried out in a way that reunification with the parent is not necessarily impeded;¹³⁹
- yet, it may be that separation from parents is final.¹⁴⁰

An analysis of the jurisprudence of “best interests of the child” in international law is beyond the scope of this Article. Nonetheless, the presumption is that contact between the separated child and her parent[s] is in her best interests.¹⁴¹ Contact can be denied only if it is contrary to the child’s best interests; the burden is on the state.¹⁴²

Article 9 additionally provides that when the separation of a child from her parents is the result of state action—such as in the case of child protective removal, incarceration of a parent, or detention of a child—essential information on the whereabouts of the child or the parent[s] shall be provided. This right to information on the whereabouts of the separated child and family is explicit, but rather weak.¹⁴³ Moreover, this right of the separated

134. Cantwell, *supra* note 16, at 394.

135. *Id.*

136. European Court of Human Rights Home Page, <http://www.echr.coe.int/echr/> (last visited Sept. 16, 2007).

137. DOEK, *supra* note 124, at 25.

138. *Id.*

139. *Id.* at 26.

140. *Id.*

141. *Id.*

142. *Id.*

143. CRC, *supra* note 2, art. 12; African Charter on the Rights and Welfare of the Child, art. 19, *entered into force* Nov. 29, 1999, OAU Doc. CAB/LEG/24.9/49 (1990); African Charter on Human and Peoples’ Rights, art. 19, *adopted* June 27, 1981, 1520 U.N.T.S. 217.

child to family information stands in contrast to state practices in the United States, where the child is not the bearer of the rights and may have no knowledge of the whereabouts of, or be able to establish contact with, other siblings in state custody.¹⁴⁴

As discussed below,¹⁴⁵ the views of the child on the matter of non-separation from her parents must enjoy free expression, be taken into account, and receive due weight in accordance with the age and maturity of the child.¹⁴⁶

Finally, it is noteworthy that the CRC promotes an approach to the complex interrelationship of the right of non-separation from parents and the right of the child to protection from abuse that firmly supports the primary role of parents and the family in nurturing, protecting, and educating the child.¹⁴⁷ Furthermore, it sets forth the state's role in supporting parents and family, unless and until they are unwilling or unable to fulfill that role.¹⁴⁸ The CRC promotes policies, such as family preservation and family-based alternative care, to limit but not prohibit the child's separation from her parents.¹⁴⁹

*E. Non-Discrimination: Equal Treatment Under the
Law for Children (Article 2)*¹⁵⁰

Children's lawyers often neglect to use the language of non-discrimination even though children's involvement in legal proceedings are fraught with unequal, discriminatory consequences at every stage. The inclusive language of Article 2 of the CRC is broad: "without discrimination of any kind, irrespective of the child's [or parents'] race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status."¹⁵¹ While this brief discussion of the opportunities this norm provides will focus on uncontested racial

144. OFFICE OF CHILDREN & FAMILY SERVS., OFFICE OF THE N.Y. STATE COMPTROLLER, SIBLING PLACEMENT IN FOSTER CARE 4-5 (2006), <http://www.osc.state.ny.us/audits/allaudits/093006/05s70.pdf>; Youth Leadership Advisory Team, Youth Leadership Advisory Team Position Paper: Siblings in Foster Care and Adoption, <http://www.ylat.org/leadership/policy/siblingposition.htm> (last visited Sept. 19, 2007).

145. See *infra* Part II.F

146. CRC, *supra* note 2, art. 12.

147. Cantwell, *supra* note 16, at 399.

148. *Id.*

149. CRC, *supra* note 2.

150. CRC, *supra* note 2, art. 2.

151. *Id.*; Daniel L. Skoler, *Anti-Discrimination Guarantees Under the U.N. Convention on the Rights of the Child—Issues and Impact for U.S. Ratification*, in THE U.N. CONVENTION ON THE RIGHTS OF THE CHILD: AN ANALYSIS OF TREATY PROVISIONS AND IMPLICATIONS OF U.S. RATIFICATION 99, 100 (Jonathan Todres et al. eds., 2006).

discrimination and white supremacy in the law and practice, there is work to be done uncovering the child's right to be free of discrimination of any kind: gender-based discrimination for girls in juvenile justice;¹⁵² the special harm to indigenous children's rights;¹⁵³ sexual orientation;¹⁵⁴ disabled children;¹⁵⁵ undocumented immigrant children;¹⁵⁶ homeless youth; Arab and Muslim youth; and those children subject to religious or political discrimination.

Disproportional racial composition in the child welfare and juvenile justice systems in the United States is no secret.¹⁵⁷ In large cities, white children are virtually absent from the juvenile court systems.¹⁵⁸ Instead, children of color, particularly African American, Latino, and Native American children, comprise a vast majority of youngsters brought into the system and an even greater proportion of those transferred to adult criminal court.¹⁵⁹ The deeper one goes into the juvenile and criminal justice system, the greater the racial disproportion. For example, a recent study found that African Americans represented:

- 16% of youth;
- 28% of juvenile arrests;
- 30% of referrals to juvenile court;
- 37% of detained youth;
- 30% of adjudicated youngsters;
- 35% of youth judicially waived to adult criminal court;
- 38% of youth in residential placement (confinement);
- and
- 58% of youth admitted to state adult prison.¹⁶⁰

Disabled children are also overrepresented, and the data on Latino and Native American youth remains partial or non-existent.¹⁶¹

152. Woodhouse, *supra* note 14, at 61. See generally Bernardine Dohrn, *All Ellas: Girls Locked Up*, 30 FEMINIST STUD. 302 (2004); GIRL TROUBLE: GIRLS TELL THEIR TRUTH ABOUT THE JUVENILE JUSTICE SYSTEM (New Day Films 2004).

153. CRC, *supra* note 2, art. 30.

154. See generally Barbara Fedders, *Coming Out for Kids: Recognizing, Respecting, and Representing LGBTQ Youth*, 6 NEV. L.J. 774 (2006).

155. CRC, *supra* note 2, art. 23.

156. *Id.* art. 22.

157. See *supra* note 27.

158. *Id.*

159. CAMPAIGN FOR YOUTH JUSTICE, *supra* note 52, at 11–12; Ziedenberg, *supra* note 27.

160. NAT'L COUNCIL ON CRIME & DELINQUENCY, *supra* note 27, at 37.

161. FRANCISCO A. VILLARRUEL ET AL., ¿DÓNDE ESTÁ LA JUSTICIA?: A CALL TO ACTION ON BEHALF OF LATINO AND LATINA YOUTH IN THE U.S. JUSTICE SYSTEM 38–45 (2002); Bldg. Blocks for Youth, *Native Youth in the Juvenile Justice System*, <http://www.buildingblocksforyouth.org/issues/nativeyouth/> (last visited Sept. 19, 2007).

Further, as noted by the Committee on the Child in its General Comment #10, Article 2 requires that children in conflict with the law be treated equally.¹⁶² In contrast to current U.S. constitutional law and statutes on discrimination, the CRC takes *de facto* discrimination and disparities seriously, to be remedied by appropriate redress, solutions, and compensation.

One example of the CRC's discrimination protection is the Committee's recommendation that status offenses, such as truancy, runaways, and vagrancy, be abolished because they are per se discriminatory given that they are not offenses when committed by adults.¹⁶³ Equal treatment under the law for children and adults requires the elimination of status offenses and their consequences: stigma, victimization, and criminalization of young people.

Every child under the age of eighteen years should enjoy the same rights, including a separate juvenile justice system based on the best interest of the child, rather than an adult criminal court. The Inter-American Commission of Human Rights, for example, requires that the state bring minors before "specialized tribunals" or jurisdictions, "which shall be the only court competent to prosecute minors."¹⁶⁴

Discrimination exists when children under eighteen years of age are treated as adults. Those systems that limit juvenile jurisdiction to those children under sixteen or seventeen, or have statutory exceptions that exclude sixteen and seventeen year olds who are charged with certain offenses, are discriminating against those children.¹⁶⁵ Full, non-discriminatory implementation of juvenile justice rules should apply to all persons under eighteen years of age.

The core CRC human rights standard of non-discrimination is a broader, more inclusive legal concept than the U.S. constitutional mandate of equal protection, as described above.¹⁶⁶ The International Convention on the Elimination of all Forms of Racial Discrimination ("CERD"), which the United States ratified in 1994, provides a further expansive definition of discrimination:

[T]he term racial discrimination shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the *purpose or effect* of nullifying or impairing the recognition, enjoyment or

162. U.N. Doc. CRC/C/GC/10, *supra* note 53, ¶ 6.

163. *Id.* ¶ 8.

164. *Minors in Detention v. Honduras*, Case 11.491, Inter-Am. C.H.R., Report No. 41/99, OEA/Ser.L/V/II.102, doc. 6 rev., at 575, ¶ 99 (1999).

165. *Id.* ¶¶ 17, 21.

166. DETRICK, *supra* note 18, at 67; Skoler, *supra* note 151, at 100.

exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.¹⁶⁷

CERD, taken together with the norms of the CRC, adds two key elements to non-discrimination rights: a broad obligation of the state to ensure rights, and the recognition of disparate impact as well as intentional discrimination. It is difficult not to notice that there are two systems of justice for children in the United States: one largely white and private, for children of resourced parents, and one for children of color and children of poor parents, that is public. Observers should take notice of the recent report of the United States to the Committee on the Elimination of Racial Discrimination that never mentions juvenile justice or the rates of incarceration of children of color,¹⁶⁸ and the shadow report domestic children's rights lawyers and activists are preparing to submit to the Committee.¹⁶⁹

*F. Right to be Heard/ to Express Views (Article 12)*¹⁷⁰

Perhaps one of the most surprising rights the CRC recognizes is the right of children to be heard, to express their views freely in all matters affecting them, and reciprocally, to have their views receive due weight in accordance with their age and maturity.¹⁷¹ The substance of Article 12 has been developing rapidly in the past five years in ways that are changing the practices of those working for children's rights.¹⁷² CRC Article 12 acknowledges that children are legal, whole persons, with a capacity for independent thought and existence which is, in part, independent of their family, culture, and society. This provision challenges centuries of practice relegat-

167. International Convention on the Elimination of All Forms of Racial Discrimination, adopted Dec. 21, 1965, 660 U.N.T.S. 195 (emphasis added) (internal quotations omitted), available at <http://www.ohchr.org/english/law/cerd.htm>; see also 140 CONG. REC. 14326 (1994) (U.S. declarations and reservations).

168. See generally U.S. DEP'T OF STATE, PERIODIC REPORT OF THE UNITED STATES OF AMERICA TO THE U.N. COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION CONCERNING THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION (2007), <http://www.state.gov/documents/organization/83517.pdf>.

169. See generally CERD Shadow Reporting, <http://groups.yahoo.com/group/cerdshadow/> (last visited Sept. 19, 2007).

170. CRC, *supra* note 2, art. 12.

171. *Id.*

172. Caroline Vandresse, *Participation in the Juvenile Justice System*, in PARTICIPATION RIGHTS OF CHILDREN 87, 89 (2006).

ing children to the status of property or inferior human persons.¹⁷³ It also presumes that the participation of children in legal and administrative proceedings will improve the outcomes for children in the particular, and strengthen implementation of children's rights overall.

The right to be heard and to express views is closely linked to the rights to freedom of expression (Article 13) and to the more limited but critical right to effective participation for children tried in adult criminal courts (discussed below).¹⁷⁴ Ironically, these civil liberty rights were put forth and pressed forward by the United States during the Cold War era drafting of the CRC.¹⁷⁵

For children's lawyers, the right to be heard and express views may be immediately relevant in two important regards. First, children's attorneys must acknowledge that their child clients *have* views and that the lawyer's task is to solicit these views by providing all information in understandable forms to their clients prior to determining the course of the litigation. Indeed, the child's attorney may well be the vehicle through which the child's views are expressed and heard. Second, the child's right to be heard and express views may help clarify the ongoing confusion and conflict over the proper role of the child's attorney: should the attorney advocate for the expressed views of the child client or represent their opinion of the child's best interest to the court or administrative decision-maker instead of the child's opinion?¹⁷⁶ It may be that Article 12 tilts the debate toward representing the express views of the child, wherever possible. At the very least, it may encourage child lawyers to advocate for the child's views and to ask the court to appoint a guardian ad litem to represent their best interests only where necessary.

The right to be heard and to express views is mandated by Article 12 in any judicial and administrative proceeding affecting the child.¹⁷⁷ This is a specific obligation of state parties and for all legal

173. MARY ANN MASON, FROM FATHER'S PROPERTY TO CHILDREN'S RIGHTS: THE HISTORY OF CHILD CUSTODY IN THE UNITED STATES 1-49 (1994); Woodhouse, *supra* note 14, at 51-56.

174. See *infra* Part II.G.

175. Martha Matthews, *Freedom of Expression*, in THE U.N. CONVENTION ON THE RIGHTS OF THE CHILD: AN ANALYSIS OF TREATY PROVISIONS AND IMPLICATIONS OF U.S. RATIFICATION 143, 143 (Jonathan Todres et al. eds., 2006).

176. Bruce A. Green & Bernardine Dohrn, Forward, *Children and the Ethical Practice of Law*, 64 FORDHAM L. REV. 1281, 1281-84, 1294-98 (1996). See generally Martin Guggenheim, *A Paradigm for Determining the Role of Counsel for Children*, 64 FORDHAM L. REV. 1399 (1996); Special Issue, *Proceedings of the UNLV Conference on Representing Children in Families: Children's Advocacy and Justice Ten Years After Fordham*, 6 NEV. L.J. 592 (2006).

177. Vandresse, *supra* note 172, at 91.

proceedings involving the child.¹⁷⁸ It is therefore fundamental for a fair trial.

G. Right to "Effective Participation"/Competency (ECHR Case Law)

Children tried in adult proceedings must be able to effectively participate in their trials. In Europe, the requirement of effective participation now mandates that the trial court take full account of the defendants' ages, levels of maturity, and intellectual and emotional capacities, and the court must take steps to promote children's ability to understand and participate in the proceedings.¹⁷⁹ This standard is related to U.S. legal concepts of fitness and competency,¹⁸⁰ but expands the domain. The MacArthur Foundation Research Network on Adolescent Development, for example, concludes that "[t]he court should take into account the level of competence of young defendants to fully participate in criminal proceedings to better assess their capacity for emotional and psychological maturity, because youth, particularly those under age 15, were more likely to be incompetent to stand trial due to their developmental immaturity."¹⁸¹

Effective participation presupposes that the accused has a broad understanding of the trial process and what is at stake for him, including the significance of any penalty that may be imposed. It does not require that a child understand all legal terminology or nuances, but it does require a fundamental understanding by the child defendant of what is said in court, an ability to follow what is said by prosecution witnesses, the wherewithal to explain to his lawyers the child defendant's own version of events, and the ability to make his own lawyers aware of facts which should be put forward in the child's defense. Effective participation is indeed a higher standard than that currently in place for children tried in adult criminal courts in the United States.¹⁸²

178. *Id.*

179. See the European Court of Human Rights' ("ECHR") decisions in the adult criminal trial of two ten year old boys for the infamous child abduction and murder of two year old James Burger, *V v. United Kingdom*, 1999-IX Eur. Ct. H.R. 111, and in the trial of an eleven year old for attempted robbery of an eighty-seven year old woman, *S.C. v. United Kingdom*, 2004-IV Eur. Ct. H.R. 281.

180. CAMPAIGN FOR YOUTH JUSTICE, *supra* note 52, at 14.

181. *Id.* (citing MacArthur Foundation Research Network on Adolescent Development and Juvenile Justice (Sept. 2006)).

182. *V v. United Kingdom*, 1999-IX Eur. Ct. H.R. 111; *see S.C. v. United Kingdom*, 2004-IV Eur. Ct. H.R. 281 (holding that S.C. was unable to fully comprehend or participate in the trial due to his age and impaired intellectual ability).

England and the ECHR require additional informal procedures to facilitate the effective participation of child defendants in adult criminal courts and to mitigate trauma, but these procedures are not in themselves sufficient to address the concerns.¹⁸³ Such measures include adapting adult procedures by having judges wear less formal judicial attire, taking more frequent breaks during trial, and assigning a social worker to sit with child defendants.¹⁸⁴ When a child is unable to fully comprehend or participate in the trial process and cannot adequately give instructions to his attorney, these child-friendly measures are deemed insufficient.¹⁸⁵

With the emerging standard of effective participation for children tried as adults in Europe, might U.S. juvenile courts also require a similar standard? The consequences of a juvenile court conviction are today more severe than they were twenty years ago,¹⁸⁶ before state laws and homeland security practices authorized greater use of juvenile court records. Blended sentencing and extended juvenile jurisdiction statutes increase potential juvenile court sentences far beyond the age of twenty-one.¹⁸⁷ With juvenile court adjudications increasingly resulting in adult-like consequences, it is essential that the child clients be able to effectively participate by being able to work with their defense attorneys.¹⁸⁸

In the United States, we must breathe life into child participation in trials by expanding our understandings of both child competency and of due process for children in adult criminal court. We must consider whether the standard of effective participation applies also to adjudications with serious consequences in juvenile courts. One way to utilize the substance of "effective participation" is to contrast it with the three major developmental differences between children and adults, cited by the Supreme Court in *Roper v. Simmons*: adolescents lack maturity and have an underdeveloped sense of responsibility; they are more vulnerable to negative influences and peer pressure; and the character of a juvenile is not as formed as that of an adult.¹⁸⁹

183. *S.C. v. United Kingdom*, 2004-IV Eur. Ct. H.R. 281.

184. *Id.*

185. *Id.*

186. See generally ZIMRING, *supra* note 11.

187. Marcy Podkopacz & Barry C. Feld, *The Back-Door to Prison: Waiver Reform, "Blended Sentencing," and the Law of Unintended Consequences*, 91 J. CRIM. L. & CRIMINOLOGY 997, 1009-23 (2001).

188. CATHRYN CRAWFORD ET AL, ILLINOIS: AN ASSESSMENT OF ACCESS TO COUNSEL & QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS 4 (2007); PATRICIA PURITZ & CATHRYN CRAWFORD, NAT'L JUVENILE DEFENDER CTR., FLORIDA: AN ASSESSMENT OF ACCESS TO COUNSEL & QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS 27-62 (2006), <http://www.njdc.info/pdf/Florida%20Assessment.pdf>.

189. *Roper v. Simmons*, 543 U.S. 551, 569-70 (2005).

This human rights standard of effective participation narrows the ability to try extremely young, incapacitated, or emotionally or intellectually-challenged children in adult criminal court. Further, the ECHR cases and General Comment #10 provide a practical roadmap for an expanded recognition of what is required for effective participation in a trial: basic understanding of the proceedings and the significance of any penalty, as well as the ability to follow what is said and to provide one's own version of events and facts that should be put forward in the defense. The challenge is to integrate effective participation with due process and competency without demeaning the child client.

*H. Right to Reintegration (Article 40(1))*¹⁹⁰

The desirability of promoting “the child’s reintegration and the child’s assuming a constructive role in society” frames Article 40, which addresses the treatment of “every child alleged as, accused of, or recognized as having infringed the penal law.”¹⁹¹ Thus, a major goal of juvenile justice is to promote the child’s recovery and social reintegration.¹⁹² Reintegration is a recognizable element of the juvenile justice system in the United States, known as “re-entry.”¹⁹³ But re-entry does not contain the fully-connected connotations of reintegration, which contemplates children taking their full place within the family, the community, and society.¹⁹⁴ Reintegration suggests that children who have been deprived of their liberty are now back in school and able to live at home, obtain work, and be full participating citizens. It requires that reintegration be a goal from the moment of the child’s first contact with the legal system.¹⁹⁵ Detention and incarceration themselves exacerbate the difficulties of reintegration into society and hamper the child’s right to development.¹⁹⁶

As the Committee on the Rights of the Child notes, reintegration requires that “no action may be taken that can hamper the child’s

190. CRC, *supra* note 2, art. 40.

191. *Id.*

192. See VAN BUEREN, *supra* note 26, at 216; See generally Liefgaard, *supra* note 18.

193. NEELUM ARYNA ET AL., YOUTH LAW CTR., KEYSTONES FOR REFORM: PROMISING JUVENILE JUSTICE POLICIES AND PRACTICES IN PENNSYLVANIA 21–27 (2005), <http://www.jlc.org/mfc/keystonesforreform.pdf>; NANCY G. LA VIGNE ET AL., URBAN INST., A PORTRAIT OF PRISONER REENTRY IN ILLINOIS 1 (2003), http://www.urban.org/UploadedPDF/410662_ILPortraitReentry.pdf; Office of Justice Programs, U.S. Dep’t of Justice, State Activities & Resources for Criminal Reentry: Pennsylvania, <http://www.reentry.gov/sar/pa.html> (last visited Sept. 20, 2007).

194. *Id.*

195. U.N. Doc. CRC/C/GC/10, *supra* note 53, ¶ 4, pt. 3.

196. *Id.*

full participation in his/her community, such as stigmatization, social isolation, or negative publicity"¹⁹⁷ This standard raises the question of confidentiality, largely lost in the United States but presumed by the Committee on the Child as part of the right of the child to have his privacy fully respected at all stages of the proceedings.¹⁹⁸ The goal is to prevent the harm of publicity and stigma associated with delinquency and crime, and to promote the child's rehabilitation and recovery. Since the high profile cases of the Central Park jogger,¹⁹⁹ and school shootings,²⁰⁰ the media has largely abandoned all semblance of protecting the identity of juveniles.²⁰¹ In addition, law enforcement computer data bases, notice provisions (to schools, employers, neighborhoods),²⁰² and post-9/11 criminal record background checks have combined to destroy traditional notions of juvenile delinquency privacy and confidentiality.²⁰³ These new conditions of notoriety and access to juvenile justice information undoubtedly make the goal of reintegration even more challenging.

Certain categories of child offending contribute to further obstacles to social reintegration. For example, escalated charging by prosecutors can broaden the identification of offenses as "violent crimes." The great influx of new delinquency cases coming from school-based arrests includes a significant number of cases of battery or simple assault, or aggravated battery and aggravated assault, where there is no harm or injury resulting from the underlying incident.²⁰⁴ The underlying event may involve simple touching or

197. *Id.* ¶ 29.

198. CRC, *supra* note 2, arts. 16, 40(2)(b)(vii).

199. Craig Wolff, *Youths Rape and Beat Central Park Jogger*, N.Y. TIMES, Apr. 21, 1989, at B1.

200. See generally ELIZABETH DONOHUE ET AL., CTR. ON JUVENILE & CRIMINAL JUSTICE, SCHOOL HOUSE HYPE: THE SCHOOL SHOOTINGS, AND THE REAL RISKS KIDS FACE IN AMERICA (1998), <http://www.cjcg.org/pubs/shooting/shootings.html>; KIM BROOKS ET AL., JUSTICE POLICY INST., SCHOOL HOUSE HYPE: TWO YEARS LATER (2000), http://www.justicepolicy.org/images/upload/00-04_REP_SchoolHouseHype2_JJ.pdf.

201. Constance K. Davis, *How Iowa Editors are Using Law Expanding Access to Names of Juveniles*, J. NEWSPAPER RES., Fall 2000, at 38, 38-49; Grade the News, *Should the News Media Reveal the Name of a Juvenile Murder Suspect Before the Police Have Charged Him?* (Oct. 31, 2005), <http://www.gradethenews.org/feat/makethecall/juvenile.htm>.

202. Franklin E. Zimring, *An American Tragedy: Legal Responses to Adolescent Sexual Offending: Executive Summary*, http://njjn.org/media/resources/public/resource_169.pdf (last visited Sept. 20, 2007).

203. Office of Juvenile Justice & Delinquency Prevention, U.S. Dep't of State, *Confidentiality of Juvenile Court Records and Proceedings*, <http://ojjdp.ncjrs.org/jjbulletin/9811/confidential.html> (last visited Sept. 20, 2007).

204. ELIZABETH SULLIVAN, NAT'L ECON. & SOC. RIGHTS INITIATIVE, *DEPRIVED OF DIGNITY: DEGRADING TREATMENT AND ABUSIVE DISCIPLINE IN NEW YORK CITY & LOS ANGELES PUBLIC SCHOOLS 7* (Catherine Albisa et al. eds., 2007), http://www.nesri.org/programs/Deprived_of_Dignity_07.pdf; JUDITH A. BROWNE, *ADVANCEMENT PROJECT, DERAILED: THE*

bumping or pushing someone in school, and if the other person is a teacher or other adult, the charge can be “aggravated”—school charges often include “weapons” that may be only the child’s hand or foot.²⁰⁵ Yet a youngster may have a permanent felony record and be designated a violent offender for such minor misbehavior.²⁰⁶ Furthermore, the child might be suspended or expelled from school, even when the underlying school arrest is dismissed at the police station, rejected by the prosecutor, or the child is acquitted at trial. Enrolling or being readmitted to school is no longer likely.²⁰⁷ This again creates barriers to reintegration.

Promoting the reintegration of every child alleged as, accused of infringing, or recognized as having infringed the penal law requires taking into account the child’s age at every stage of the proceedings and anticipating a constructive role in society for the child. Reintegration is a more comprehensive and inclusive goal than that of re-entry from detention or correctional institutions. According to the CRC, it is a major objective of the juvenile justice system, requiring changes from prevention and arrest as a last resort, to every stage of legal or administrative proceedings involving children.²⁰⁸ Reintegration challenges our practices and our thinking.

CONCLUSION: TREATMENT WITH DIGNITY (ARTICLE 40)²⁰⁹

To a large degree, all of the above eight human rights standards for children can be summarized as the right of every child in conflict with the law to be treated with “humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age”²¹⁰ and “to be treated in a manner consistent with the promotion of the child’s sense of dignity and worth.”²¹¹ Perhaps the notion of dignity is the essence of all human rights. When it comes to children, however, the promotion of the sense of dignity from the child’s perspective includes broader notions of equality, education, and identity.

SCHOOLHOUSE TO JAILHOUSE TRACK 14 (2003), <http://www.advancementproject.org/reports/Derailerepccor.pdf>.

205. See generally SULLIVAN, *supra* note 204.

206. *Id.*

207. *Id.*

208. VAN BUEREN, *supra* note 26, at 216–18.

209. CRC, *supra* note 2, art. 40.

210. *Id.* art. 37(c).

211. *Id.* art. 40(1).

At the least, treatment with dignity prohibits a range of common practices imposed on children in conflict with the law: shackling in court and while being transported to court proceedings; solitary confinement or isolation measures; blatant racial discrimination; punishments that include denial of communication or contact with family members; the denial of education or health care; the use of pepper spray, tasers, and coercive restraints; or any other discipline or form of punishment that may compromise the physical or mental health or well-being of the child.²¹² It forbids violent practices denied on paper but all too frequent in practice: beatings, humiliation, racial, gender, and sexual orientation discrimination, rape and sexual assault,²¹³ and corporal punishment. It prohibits the two systems of justice that characterize juvenile courts: one public for children and families of color and the poor, and one private for white and resourced children and families.

Children are aware that the police stations, lock-ups, courtrooms, detention centers, probation calendars, and correctional populations do not reflect the general population demographics.²¹⁴ They have a heightened sense of injustice, even while those working in these systems appear to be in denial.

Dignity and the right to be treated with humanity in the CRC create a positive obligation to establish minimum conditions for children who are detained or incarcerated.²¹⁵ It requires recognition that children are rights holders with substantive and procedural rights.²¹⁶

Dignity goes to the core of racial discrimination in juvenile justice. It highlights the humiliating treatment of girls in detention, in court proceedings, and in confinement. It challenges the violence that characterizes much of the world of children behind bars.²¹⁷ It anticipates that children will rejoin society and become productive citizens. The core task of illuminating the humanity of our youngsters involves their dignity and worth. This principle is central to

212. U.N. Doc. CRC/C/GC/10, *supra* note 53, ¶ 28(c).

213. See the Texas Youth Commission ("TYC") sex abuse scandal, cover-up, and collapse, noting high-level administrators' indictments for sexual assault, a subsequent finding that sixty-five TYC employees had felony records, and the release of 226 children whose sentences had been improperly "extended." Emily Ramshaw, *TYC Freeing 226 Held Past Original Terms: Longer Sentences Threatened if Inmates Spoke Out on Abuse*, DALLAS MORNING NEWS, May 19, 2007, at 6A; Christy Hoppe, *65 TYC Employees Found to Have Felony Records*, DALLAS MORNING NEWS, Apr. 13, 2007, at 7A; Doug J. Swanson, *Officials Indicted in Abuse at TYC: 2 Ex-Administrators Accused of Sex Acts with Teenage Inmates*, DALLAS MORNING NEWS, Apr. 11, 2007, at 1A.

214. *Supra* note 27.

215. Liefwaard, *supra* note 18, at 574.

216. *Id.* at 584.

217. See generally KIDS BEHIND BARS, *supra* note 217.

international human rights law and is enshrined in Article 1 of the Universal Declaration of Human Rights: that all human beings are born free and equal in dignity and inherent rights.²¹⁸

This Article is an attempt to seduce child advocates to use the broader, substantive standards and framework of children's human rights in our work, our speech, and our thinking. International children's law is not a panacea. Like all law, it is standard-setting more than enforcement. Nonetheless, it is a tool, a palate, a template.

Children's human rights concepts are sometimes congruent, sometimes overlapping, and sometimes an expansion of U.S. constitutional rights, statutory legislation, and common law. The *Roper* invitation and challenge is to integrate the law of other nations and peoples with U.S. traditions. Try it, three times to make sure.

218. Universal Declaration of Human Rights, G.A. Res 217A, art. 1, U.N. Doc. A/810 (Dec. 10, 1948).