

## HUMAN RIGHTS WATCH

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July 3, 2008

The Honorable Patrick J. Leahy  
Chairman, Committee on the Judiciary  
United States Senate  
433 Russell Senate Office Building  
Washington, DC 20510-4502

The Honorable Arlen Specter  
Ranking Member, Committee on the Judiciary  
United States Senate  
711 Hart Senate Office Building  
Washington, DC 20510-3802

## Re: Human Rights Watch Supports S. 3155, the Juvenile Justice and Delinquency Prevention Reauthorization Act of 2008

Dear Chairman Leahy and Senator Specter:

Human Rights Watch is pleased to offer strong support for S. 3155, the Juvenile Justice and Delinquency Prevention Reauthorization Act of 2008 (JJDP). In supporting this legislation, we encourage the Senate Judiciary Committee to continue to work on strengthening the JJDP core protections for children and youth as this critical legislation moves through the Committee. In particular, we hope the Committee will amend the legislation to gradually eliminate all statutory authority for the incarceration of status offenders.

Human Rights Watch has issued 17 reports on juvenile justice since 1995.<sup>1</sup> Based on our research, we urge the Committee to strengthen and pass S. 3155, which updates and improves many of the federal core requirements that protect youth in this country. In so doing, S. 3155 also comports with basic principles of juvenile and criminal justice, scientific research on violence and crime reduction, and US treaty obligations under international law.

### 1. S. 3155 Strengthens the Disproportionate Minority Contact (DMC) Core Requirement.

Research reveals that youth of color are over-represented and subject to more punitive sanctions at all levels of the juvenile justice

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<sup>1</sup> For a list of reports, please see [http://www.hrw.org/children/juvenile\\_justice.htm](http://www.hrw.org/children/juvenile_justice.htm).

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system.<sup>2</sup> S. 3155 provides clear direction to states and localities, instructing them to plan and implement data-driven approaches to ensure fairness and reduce racial and ethnic disparities, to set measurable objectives for DMC reduction, and to publicly report on progress.<sup>3</sup>

By taking clear steps to reduce structural ethnic and racial discrimination in the justice system, S. 3155 brings the US closer to compliance with its obligations under the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), a treaty ratified by the United States in 1994.<sup>4</sup> ICERD requires states parties “to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race ... to equality before the law,” including “the right to equal treatment before the tribunals and all other organs administering justice.”<sup>5</sup>

Criminal justice practices that have a racially disparate impact do not violate the US Constitution as long as they are not the result of discriminatory intent. By contrast, ICERD imposes no discriminatory intent requirement, and prohibits government policies that have racially discriminatory effects:

In this Convention, the 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 exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.<sup>6</sup>

Under ICERD, governments may not engage in malign neglect; that is, they may not ignore the need to secure equal treatment of all racial and ethnic groups, but rather, must act affirmatively to prevent or end policies with unjustified discriminatory effects.

In March 2008 the UN Committee on the Elimination of Racial Discrimination expressed concern about racial discrimination in the US criminal justice system. “The Committee reiterates its concern with regard to the persistent racial disparities in the criminal justice system of [the United States], including the disproportionate

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2 National Council on Crime and Delinquency, “And Justice for Some: Differential Treatment of Youth of Color in the Justice System,” January 2007, [http://www.nccd-crc.org/nccd/pubs/2007jan\\_justice\\_for\\_some.pdf](http://www.nccd-crc.org/nccd/pubs/2007jan_justice_for_some.pdf) (accessed July 2, 2008).

3 S. 3155 § 205 (amending 42 USC § 5633 (a)).

4 International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), adopted December 21, 1965, G.A. Res. 2106 (XX), annex, 20 U.N. GAOR Supp. (No. 14) at 47, UN Doc. A/6014 (1966), 660 U.N.T.S. 195, entered into force January 4, 1969.

5 ICERD, Article 5(a).

6 ICERD, Article 1(1).

number of persons belonging to racial, ethnic and national minorities in the prison population.” The Committee called on the United States to “implement[] ... national strategies or plans of action aimed at the elimination of structural racial discrimination.”<sup>7</sup>

S. 3155 advances US compliance with its obligations under ICERD.

## 2. S. 3155 Encourages States to Keep Youth in Juvenile Facilities.

Under current law, states risk losing federal funding if they house youth convicted in adult court in age-appropriate juvenile facilities.<sup>8</sup> Under S. 3155, states may place youth convicted in adult courts in juvenile facilities until they reach the age of extended juvenile jurisdiction, without jeopardizing federal funding.<sup>9</sup>

This provision of S. 3155 updates the law to comport with scientific research, which reveals that holding youth in adult facilities increases violence and harms youth. A recent study published by the US Centers for Disease Control and Prevention (CDC) found that children who are held in adult prisons commit more crimes, and more serious crimes, when they are released, than children with similar histories who are kept in juvenile facilities.<sup>10</sup> The CDC’s recent report, *Jailing Juveniles*, reveals that children in adult prisons are at increased risk of abuse, sexual assault, suicide, and death.<sup>11</sup>

By encouraging states to keep youth out of adult jails and prisons where they are at risk of abuse, S. 3155 is consistent with US treaty obligations under international law. The United States has ratified the two principal international treaties that protect the human rights of detainees: the International Covenant on Civil and Political Rights (ICCPR), ratified by the US in 1992, and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, ratified in 1994. The United

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7 Committee on the Elimination of Racial Discrimination, “Concluding Observations of the Committee on the Elimination of Racial Discrimination: United States of America,” Seventy-second session, Geneva, 18 February – 7 March 2008, Recommendation 20, <http://www2.ohchr.org/english/bodies/cerd/docs/co/CERD-C-USA-CO-6.pdf> (accessed July 2, 2008).

8 See 42 USC § 5603 (26).

9 See S. 3155 § 103 (amending 42 USC § 5603 (26)).

10 Centers for Disease Control and Prevention, “Effects on Violence of Laws and Policies Facilitating the Transfer of Youth from the Juvenile to the Adult Justice System: A Report on Recommendations of the Task Force on Community Preventive Services,” vol. 56, no. RR-9, November 30, 2007, <http://www.cdc.gov/mmwr/pdf/rr/rr5609.pdf> (accessed July 2, 2008).

11 Campaign for Youth Justice, “Jailing Juveniles: The Dangers of Incarcerating Youth in Adult Jails in America,” November 2007, [Jailing\\_Juveniles\\_Report\\_2007-11-15.pdf](http://www.campaignforjustice.org/jailing_juveniles_report_2007-11-15.pdf) (accessed July 2, 2008); See also Human Rights Watch, *No Escape: Male Rape in US Prisons* (New York: Human Rights Watch, 2001), <http://www.hrw.org/reports/2001/prison/report.html>, p.64: “young or youthful-looking inmates are at particular risk of rape.”

States has also signed the Convention on the Rights of the Child (CRC), obligating itself to refrain from acts that would defeat the treaty's object and purpose.<sup>12</sup>

International law requires separation of detained juveniles from adults, and the provision of treatment and rehabilitation appropriate to a youth's age and stage of development.<sup>13</sup> In this connection, S. 3155 advances US compliance with its treaty obligations under international law.

### 3. S. 3155 Improves the Jail Removal and Sight and Sound Separation Core Requirements.

Despite the research showing that youth confined in adult facilities face increased recidivism and high risks of assault and suicide,<sup>14</sup> certain state laws require some youth under the age of 18 to be automatically tried as adults with no access to the

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12 International Covenant on Civil and Political Rights (ICCPR), adopted December 16, 1966, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force March 23, 1976; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture), adopted December 10, 1984, G.A. res. 39/46, annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984), entered into force June 26, 1987; Convention on the Rights of the Child (CRC), adopted November 20, 1989, G.A. Res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), entered into force September 2, 1990. The signatory's obligation not to defeat the object and purpose of a treaty is a recognized principle of customary international law, articulated by the International Court of Justice in a 1951 case and codified in the Vienna Convention on the Law of Treaties. Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, 1951 I.C.J. 15; Vienna Convention on the Law of Treaties, Article 18(a), 1155 U.N.T.S. 331 (concluded May 23, 1969; entered into force January 27, 1980).

13 ICCPR, Articles 10, 14(4). The United States ratified the ICCPR with several reservations that purport to limit its obligations under this treaty. For example, the United States has stated that it considers itself bound by the ICCPR only to the extent that the Fifth, Eighth, and Fourteenth Amendments to the US Constitution prohibit cruel and unusual treatment or punishment. Additionally, in ratifying the ICCPR, the United States stated that it reserves the right, in exceptional circumstances, to treat juveniles as adults for the purposes of sentencing, pretrial detention, and incarceration. Finally, the United States declared the provisions of the treaty to be non-self-executing, meaning that individuals cannot rely upon the treaty provisions to bring suit in US courts unless Congress enacts enabling legislation. Nevertheless, the laws of the US and its states as well as their implementation must be consistent with the ICCPR. This mandate follows directly from Article VI, section 2 of the US Constitution, which states that "all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the land." As a matter of international law, reservations to treaties may not contradict the object and purpose of the treaty at issue. Vienna Convention on the Law of Treaties, adopted May 22, 1969, 1155 U.N.T.S. 331, entered into force January 27, 1980, signed by the US on April 24, 1970, Article 19(3). Instructive in this regard are the comments of the UN Human Rights Committee, responsible for interpreting and monitoring compliance with the ICCPR, which has stated that reservations or interpretive declarations should not "seek to remove an autonomous meaning to Covenant obligations, by pronouncing them to be identical, or to be accepted only in so far as they are identical, with existing provisions of domestic law." UN Human Rights Committee, General Comment 24, Reservations to the ICCPR, UN Doc. CCPR/c/21/Rev. 1/Add. 6 (1994), para. 19.

14 Campaign for Youth Justice, "Jailing Juveniles;" Human Rights Watch, *No Minor Matter: Children in Maryland's Jails* (New York: Human Rights Watch, 1999), <http://www.hrw.org/reports/1999/maryland>.

juvenile system. These youth do not come under the protections of the Juvenile Justice and Delinquency Prevention Act in its current form.<sup>15</sup> In many adult facilities, youth are placed in solitary confinement for weeks or months at a time in order to maintain their separation from adults and ensure their safety. Such isolation can create or exacerbate mental health conditions, and may in some cases lead to suicide.<sup>16</sup>

Articles 10 and 14 of the ICCPR require that detained juveniles be separated from adults and receive treatment appropriate to their age. Article 37 of the CRC requires every child deprived of his or her liberty to be separated from adults, with the exception of unusual cases in which it is not in the child's best interest to maintain such separation.<sup>17</sup>

S. 3155 extends the jail removal and sight and sound core requirements to keep youth awaiting trial in criminal court out of adult facilities under certain circumstances.<sup>18</sup> This provision of S. 3155 also facilitates US compliance with its international treaty obligations.

While Human Rights Watch urges Congress to remove youth from adult facilities altogether, we are pleased that S. 3155 takes a significant and positive step in this direction.

#### **4. S. 3155 Strengthens the Deinstitutionalization of Status Offenders (DSO) Core Requirement.**

Under current law, non-delinquent status offenders, including children who are truant, children who run away, or children who violate curfew, alcohol or tobacco laws, may be held in secure detention facilities under the Valid Court Order exception, which allows judges to issue detention orders.<sup>19</sup> The practice persists despite significant evidence that detaining status offenders is harmful to youth development, as well as less effective and more expensive than positive family, community and school-based alternatives, all of which are more effective at preventing crime and reducing recidivism.

Many youth who engage in these non-criminal behaviors suffer poor family functioning or dynamics or school problems, including domestic violence, academic problems, substance abuse, lack of parental involvement in education, chronic health problems, or physical and/or sexual abuse. Youth with special behavioral

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<sup>15</sup> See 42 USC § 5633 (a)(13).

<sup>16</sup> Human Rights Watch, *Ill Equipped: U.S. Prisons and Offenders with Mental Illness*, (New York: Human Rights Watch, 2003), Chapter 12, <http://www.hrw.org/reports/2003/usa1003/>.

<sup>17</sup> ICCPR, Articles 10(2)(b), (3) and 14(4); CRC, Article 37.

<sup>18</sup> See S. 3155 § 205 (amending 42 USC § 5633 (a)(13)).

<sup>19</sup> See 42 USC § 5633 (a) (23).

health or physical health needs should not be placed in secure corrections facilities, where they are vulnerable to victimization and at risk of developing delinquent behaviors. Such youth are more appropriately served in secure behavioral health, substance abuse or other treatment facilities that are better equipped to meet their special needs and ensure their safety and well-being.

S. 3155 improves current law by requiring judicial findings prior to an order of confinement for a status offense, and establishing a seven-day maximum sentence of secure detention for such an offense.<sup>20</sup> While we applaud this improvement, Human Rights Watch strongly encourages this Committee to strengthen this core protection further by passing an amendment to gradually eliminate the VCO exception altogether and protect status offenders from incarceration.

Human Rights Watch has consistently maintained that in light of US incarceration rates that are climbing ever higher, with racial minorities greatly overrepresented in prisons and jails, the US desperately needs to adopt alternative criminal justice policies.<sup>21</sup> We are thus especially pleased that in addition to strengthening the four core JJDPA protections for youth, S. 3155 makes additional juvenile justice advances by improving conditions of confinement in juvenile facilities, promoting alternatives to detention, improving mental health and substance abuse assessment and services, supporting effective assistance of counsel, and improving case management and transitional care for youth upon re-entry.<sup>22</sup>

For the foregoing reasons, Human Rights Watch urges the Senate Judiciary Committee to improve the quality of juvenile justice in this country by passing S. 3155 and additional amendments to strengthen the core JJDPA protections for youth.

Thank you for your consideration, and please feel free to contact me if I can provide any further information.

Sincerely,



Carol Chodroff  
Advocacy Director, US Program

cc: Senate Judiciary Committee Members  
Senator Edward M. Kennedy

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<sup>20</sup> See S. 3155 § 205.

<sup>21</sup> "United States: Prison Numbers Hit New High," Human Rights Watch news release, June 6, 2008, <http://www.hrw.org/english/docs/2008/06/06/usdom19035.htm>; "Criminal Sentencing and Re-Entry Policy," Human Rights Watch thematic page, [http://www.hrw.org/doc/?t=usa\\_sentencing](http://www.hrw.org/doc/?t=usa_sentencing).

<sup>22</sup> S. 3155 § 205.

Senator Joseph R. Biden, Jr.  
Senator Herb Kohl  
Senator Dianne Feinstein  
Senator Russell D. Feingold  
Senator Charles E. Schumer  
Senator Richard J. Durbin  
Senator Benjamin L. Cardin  
Senator Sheldon Whitehouse  
Senator Orrin G. Hatch  
Senator Charles E. Grassley  
Senator Jon Kyl  
Senator Jeff Sessions  
Senator Lindsey Graham  
Senator John Cornyn  
Senator Sam Brownback  
Senator Tom Coburn