

The Fight for Our Soul

A Legislative Blueprint for Changing the Way the Criminal Justice System Treats Children



Even though it co-sponsored the provision to treat children separately according to their age and status, the United States maintained a reservation to “treat juveniles as adults” in exceptional circumstances. As concluded by the Human Rights Committee in its observations on the United States’ compliance with this treaty [International Covenant on Civil and Political Rights], the United States does not limit its treatment of children as adults to exceptional circumstances. The Commission observes that the ambiguity of this reservation has been converted into an expansive gap in juvenile justice systems across the U.S., resulting in **the violation of children’s human rights on federal, state, and local levels.**

Inter-American Commission on Human Rights, 2018



*Dedicated to the hundreds of thousands of children
who have suffered human rights violations in the U.S. justice system.*



*For Sara, Cyntoia, Alexis, and Chrystul:
We See You, We Hear You, We Love You, & We Are So Sorry.*



*For Kelly, Christopher, and Laura:
You Are Our Why.*



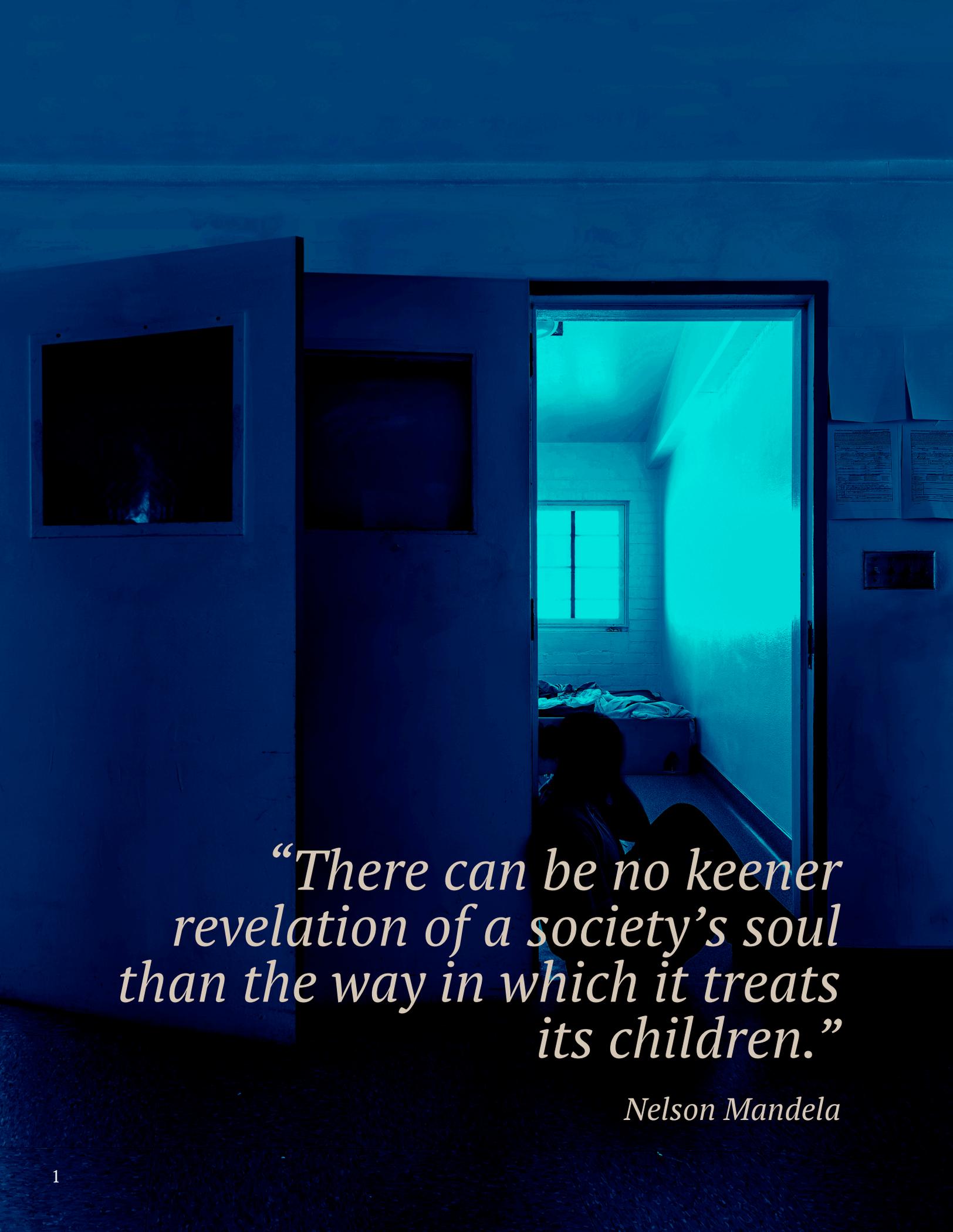
*For Raymond, Kevin, Antron, Yusef, Korey, Alfred, Ransom, and Andrew:
Never Again.*



*For George and the other 365 children who have been executed in the United States:
God Forgive Us.*



*Thank You to the Weissberg Foundation, the Coalition for Public Safety,
and the anonymous Angel Investor who all made this publication possible.*



*“There can be no keener
revelation of a society’s soul
than the way in which it treats
its children.”*

Nelson Mandela

A HUMAN RIGHTS CRISIS



Human Rights for Kids was founded in 2017 by a coalition of Republican and Democratic state legislators and child rights advocates from around the country to promote and protect the human rights of children. Today, eleven current or former legislators (6 Republicans, 5 Democrats), from eight states, serve on our Board of Directors where they help inform and champion our human rights work on behalf of children.

We are in the midst of a *human rights crisis* based on our treatment of children in the U.S. criminal justice system. From the point of entry and arrest to sentencing and incarceration, U.S. policies are not in line with child brain and behavioral development science, as well as universally accepted human rights norms.

In the late 1980's states began passing laws making it easier to transfer children into the adult criminal justice system, exposing them to harsh mandatory minimum sentences. By 2000, a child as young as 10 could be tried as an adult for certain offenses. By 2010, an estimated 139,000 children were being housed in adult prisons across the U.S. An estimated 76,000 children are prosecuted in the U.S. adult criminal justice system every year where they face harsh punishment that is neither trauma-informed nor age-appropriate.

From a neurophysiological perspective, the pre-frontal cortex of children's brains is not yet fully developed. This area is responsible for "executive functions" including the ability to differentiate among conflicting thoughts, determine good and bad and the future consequences of current activities, predict outcomes, and engage in social "control" (the ability to suppress urges that, if not suppressed, could lead to socially unacceptable outcomes).¹

This underdeveloped status and proclivity for irrational decision-making is why we do not allow children to vote, enter into contracts, work in certain industries, get married, join the military, or use alcohol or tobacco products. The one area where we don't recognize the developmental difference between the adult and child brain is in

our criminal justice system, where we have been too quick to discard child-status and throw children to the mercy of a system that was never designed with them in mind.

Even more egregious is the fact that the vast majority of children in our criminal justice system are contending with early childhood trauma and unmitigated Adverse Childhood Experiences (ACEs). Approximately 90% of children in the system have experienced at least 2 ACEs, while 27% of boys and 45% of girls have experienced at least five. Tragically, our system rarely recognizes or understands the connection between a child's criminal act and his or her previous exposure to trauma.

These policy failures disproportionately impact children of color who make up roughly 83% of children prosecuted in the adult system. Human rights observers routinely admonish the U.S. for its criminal justice policies that violate children's human rights.

The Fight for Our Soul introduces policymakers to these issues, providing a legislative blueprint to begin reforming criminal justice policies to protect the human rights of children who come into conflict with the law. Through it, we can collectively build a better future for vulnerable, system-involved children by focusing on treatment, rehabilitation and reintegration into society. There is no such a thing as a disposable child. Please join us in making certain our laws reflect this unassailable principle.

With hope and love,

A handwritten signature in black ink, appearing to read 'James Dold'.

James Dold
Chief Executive Officer
Human Rights for Kids

¹ *The Prefrontal Cortex*, Neuroscience, (January 4, 2017) <https://www.thescienceofpsychotherapy.com/prefrontal-cortex>

A HUMAN RIGHTS FRAMEWORK

The U.N. Convention on the Rights of the Child (CRC) lays forth the following human rights protections for children who come into conflict with the law:

Article 37.

- Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offenses committed by persons below eighteen years of age.
- Every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family.
- Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance.

Article 39.

- States shall take measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts.

Article 40.

- Every child having infringed the penal law shall have the right to be treated in a manner which *takes into account the child's age* and the desirability of *promoting the child's reintegration* and the child's assuming a constructive role in society.
- Every child accused of having infringed the penal law has at least the following guarantees: (1) Not to be *compelled* to give testimony or to *confess* guilt; and (2) To be informed promptly and directly of the charges against him or her, and, if appropriate, through his or her parents or legal guardians, and to have legal or other appropriate assistance in the preparation and presentation of his or her defense.
- States shall seek to promote the establishment of laws that establish a *minimum age* below which children shall be presumed not to have the capacity to infringe the penal law.

A HUMAN RIGHTS FAILURE

Despite the important contributions to the CRC by President Ronald Reagan and President George H.W. Bush, and the signing of the treaty by President Bill Clinton in 1995, the United States remains the only country that has not ratified the treaty which has resulted in our failure to protect the human rights of children in the justice system.

In 2018, the Inter-American Commission on Human Rights released a scathing report on *Children in the United States' Adult Criminal Justice System* where it included, among others, the following recommendations:

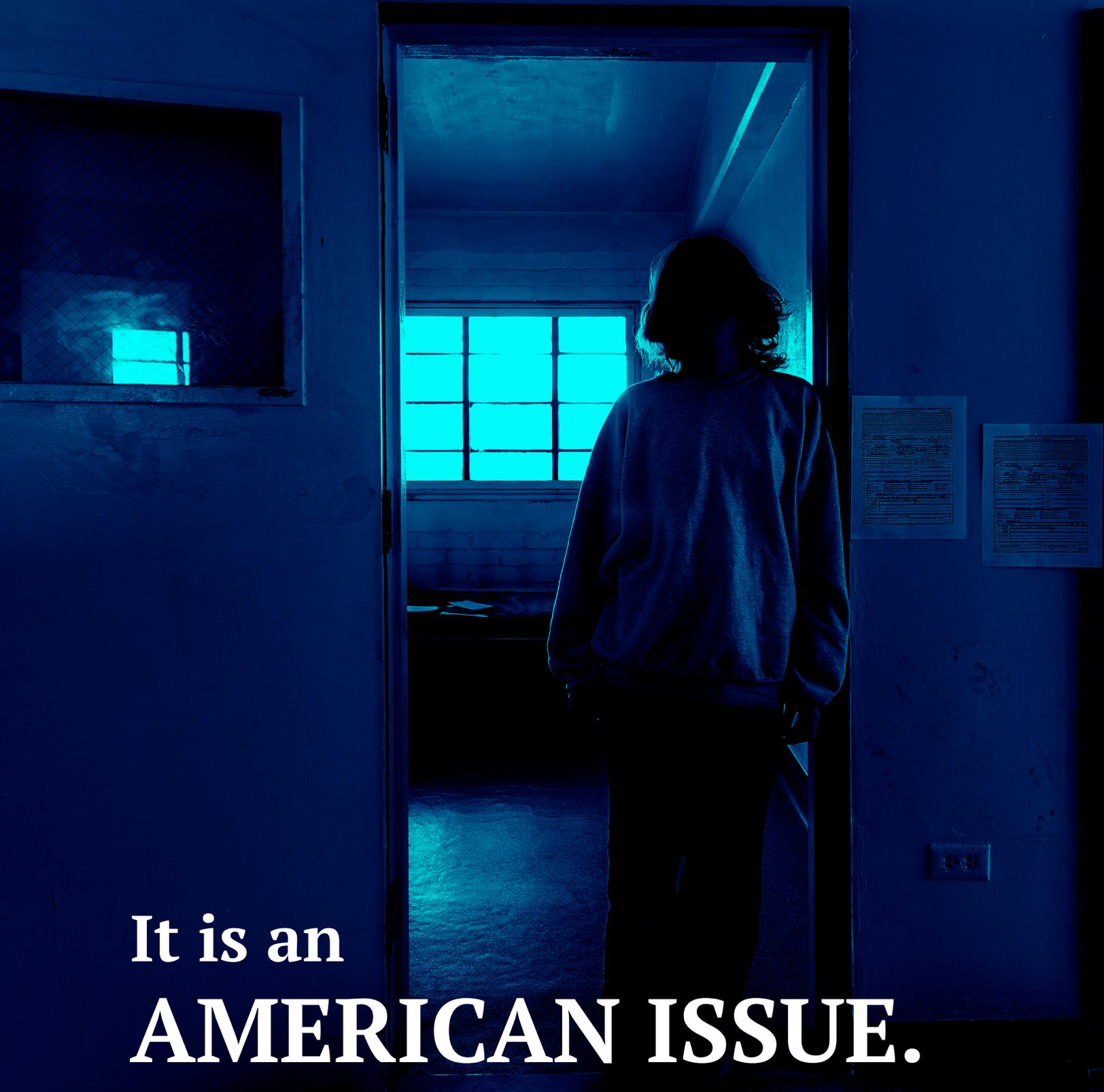
- (1) Practices counter to children's due process rights, such as pressure on youth to plead guilty, must be expressly prohibited;
- (2) The U.S. must ensure that no child is subjected to the adult criminal justice system or sentenced by the same guidelines that would apply to adults, regardless of the offense committed;
- (3) Sentencing of children should take into account "the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society;"
- (4) The U.S. should prohibit and abolish the sentence of life imprisonment without parole for juveniles;
- (5) No child shall be incarcerated in adult facilities; and
- (6) Any treatment that amounts to torture and other cruel, inhuman, or degrading treatment, such as solitary confinement, should be strictly prohibited.²

The Commission also noted that in 21 states there is no minimum age for the transfer of children to adult court, and in 26 states children 10 - 14 years of age are eligible to be transferred into the adult criminal justice system.

The Model Child Justice Reform Act (MCJRA) reflects needed policy reforms that are consistent with universally accepted human rights norms. It seeks to establish a legal floor by which children who come into conflict with the law will be treated in the U.S. In 2020, HRFK will begin rating states annually on whether they have enacted human rights protections consistent with the provisions in the MCJRA.

² *Children in the United States' Adult Criminal Justice System*, (March 2018) <http://www.oas.org/en/iachr/reports/pdfs/Children-USA.pdf>

Protecting the human rights of children in the U.S. Justice system is not a RED or BLUE issue.



It is an
AMERICAN ISSUE.

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**Assemblyman John Hambrick
(R-NV)**

“These are not partisan issues. We’re talking about kids. Whether you are a Republican or a Democrat, a conservative or a liberal, this is about the soul of America and who we want to be as a country.”



**Representative John Mizuno
(D-HI)**

“If we are to be a moral society, we must be willing to consider forgiveness for children who make mistakes and who harm others, because at the end of the day its about people not politics and our children represent our nation's most precious resource - our future.”

MODEL CHILD JUSTICE REFORM ACT

I. CUSTODIAL INTERROGATIONS OF DETAINED CHILDREN

Section 1. Consultation with Legal Counsel for Children Under 18

(a) Prior to a custodial interrogation, and before the waiver of any Miranda rights, a child under 18 years of age shall:

- (1) consult with legal counsel in person, by telephone, or by video conference; and
- (2) have contact with a parent or legal guardian in person, by telephone, or by video conference.

(b) After the consultation with legal counsel and contact with a parent or legal guardian, the child may waive his or her rights and be subject to a custodial interrogation.

(c) The court shall treat, except as allowed under subsection (d), any statements of a child 17 years of age or younger made during or after a custodial interrogation that does not comply with subsection (a) as inadmissible.

(d) This section does not apply to the admissibility of statements of a child 17 years of age or younger if both of the following criteria are met:

- (1) The officer who questioned the youth reasonably believed the information he or she sought was necessary to protect life or property from an imminent threat; and
- (2) The officer's questions were limited to those questions that were reasonably necessary to obtain that information.

NOTE: Article 40 of the U.N. Convention on the Rights of the Child (CRC) states that children have the right “not to be compelled to give testimony or to confess guilt” and to “have legal assistance in preparation and presentation of his or her defense.” General Comment 24 of the CRC notes that, “the term “compelled” should be interpreted broadly and not be limited to physical force. The risk of false confession is increased by the child’s age and development, lack of understanding, and fear of unknown consequences, including a suggested possibility of imprisonment, as well as by the length and circumstances of the questioning. The age of the child, the child’s development, the length of the interrogation, the child’s lack of understanding, the fear of unknown consequences or of a suggested possibility of imprisonment may lead him/her to a confession that is not true.” The risk of false confessions with child suspects is so great that it has led the American Psychological Association to recommend that “particularly vulnerable suspect populations, including youth, be provided special and professional protection during interrogations such as being accompanied and advised by an attorney or professional advocate.” See American Psychological Association, *Resolution on interrogations of criminal suspects*, (2014), retrieved from <http://www.apa.org/about/policy/interrogations.aspx>. In addition to the increased risk of false confessions, children without legal counsel are not able to properly understand or invoke their constitutional and human rights. Therefore, states are encouraged to enact policies ensuring that a child suspect consults with legal counsel prior to waiving his or her rights under *Miranda v. Arizona* (1966).

Section 2. Electronic Recording of Custodial Interrogations of Children

- (a) Any law enforcement officer conducting a custodial interrogation in an investigation of a child shall make an electronic recording of the interrogation in its entirety.
- (b) The State shall not destroy or alter any electronic recording of a custodial interrogation of a child adjudicated delinquent or convicted of any offense related to the interrogation until one year after the completion of all State and federal appeals of the conviction, including the exhaustion of any appeal of any motion for appropriate relief or habeas corpus proceedings.
- (c) Upon motion by the child in a criminal or delinquency proceeding, the court may order that a copy of an electronic recording of a custodial interrogation of the child be preserved for any period beyond the expiration of all appeals, post-conviction relief proceedings, and habeas corpus proceedings.

NOTE: This subsection should be adopted in conjunction with subsection 1 in order to afford greater due process protections to children during custodial interrogations. Electronic recordings will help to ensure the integrity of law enforcement investigations, preserve critical evidence as criminal proceedings move forward, and provide a material record for the appellate process.

II. MINIMUM AGE FOR ADJUDICATION IN JUVENILE COURT

Section 1. Juvenile Court Jurisdiction

- (a) The juvenile court shall have jurisdiction of any child who has committed an act which would constitute a misdemeanor or felony offense or other violation of law in this state and who was at least **[twelve]** years of age or older at the time the act was committed. All cases involving children less than **[twelve]** years of age shall be referred to family court or the proper child welfare agency for treatment and services in accordance with **[cite state's child in need of supervision statute]**.
- (b) The juvenile court shall retain jurisdiction of any child subject to subsection (a) until he or she reaches **[eighteen]** years of age unless the court waives jurisdiction pursuant to **[cite state's transfer law]**.

NOTE: While Article 40 subsection (3)(a) of the CRC is silent on what a minimum age for juvenile delinquency should be, General Comment 24 encourages states to increase the minimum age to 14. In the U.S. twenty-eight states do not set a minimum age which is in violation of Article 40. Sixteen states have a minimum age of at least 10 which is what we view as minimally necessary for compliance with human rights standards. *See A.C.A. § 9-27-303(15)*. However, we encourage states to adopt greater protection such as those found in the Commonwealth of Massachusetts which sets the minimum age for juvenile delinquency at 12 and is more consistent with current international human rights norms. *See Mass. Gen. Laws Ann. ch. 119, § 52*.* Pursuant to the CRC and General Comment 24, the juvenile justice system shall apply to children who are “above the minimum age of criminal responsibility but *below the age of 18* years at the time of the commission of the offense.” Therefore, states must ensure that juvenile court jurisdiction extends to all children under 18 years of age.

* For more information on raising or establishing a minimum age of juvenile court jurisdiction and reducing the number of children who come into the system at an early age, please visit the [National Juvenile Justice Network](#).

III. MINIMUM AGE FOR TRANSFER TO ADULT CRIMINAL COURT

Section 1. Prohibition on Adult Transfer for Children Under 14

The state shall not file a motion in juvenile court to transfer a case to adult criminal court or file charges in adult criminal court where the case involves a child who was less than **[fourteen]** years of age at the time of the offense. The juvenile court shall have exclusive jurisdiction over cases involving children less than **[fourteen]** years of age.

NOTE: International human rights law is very clear that the policy goal when children come into conflict with the law must be focused on reintegrating the child back into society. Further, in the fall of 2018 the Inter-American Commission on Human Rights (IACHR) made the following recommendation to the United States: “ensure that no child is subjected to the adult criminal justice system or sentenced by the same guidelines that would apply to adults, regardless of the offense committed.” We therefore encourage states to eliminate or limit the application of juvenile transfer laws as much as possible. Fourteen was specified in Section 1 as it represents the “minimum age of criminal responsibility” that was most recently recommended in General Comment 24 to the CRC. While this age was meant to be a guideline for the treatment of children in the juvenile justice system, it represents a more widely accepted minimum age where children are held accountable for their actions. Therefore, to be more in compliance with human rights standards, states should at a minimum prohibit the transfer of children under 14 years of age into the adult system and consider enacting, as California has done, a prohibition on transferring children under 16 years of age. See Cal. Welf. & Inst. Code § 707.

Section 2. Mandatory Child Status Hearing Before Proceeding in Adult Criminal Court

(a) Before a juvenile court waives jurisdiction of a child or an adult criminal court permits adult criminal proceedings of a child who was **[fourteen]** years of age or older at the time of the offense, the court shall hold a full investigation and child status hearing where the court finds that:

- (1) There is no evidence the child is committable to an institution for individuals with intellectual disabilities or the mentally ill;
- (2) The child is not treatable in any available institution or facility within the State designed for the care and treatment of children; or
- (3) The safety of the community requires that the child be subject to state custody for a period extending beyond the child’s eighteenth birthday.

(b) The court may waive jurisdiction or permit proceedings in adult criminal court involving a child described in subsection (a) to move forward if, after a full investigation and hearing, the court finds that:

- (1) The child is alleged to have committed an act that would constitute a felony if committed by an adult and either:
 - (A) The act resulted in serious bodily injury or death to a victim; or
 - (B) The act would constitute a [class A felony] if committed by an adult; and
- (2) The child cannot be successfully treated and rehabilitated before his or her eighteenth birthday and the safety of the community requires the child to be transferred to adult criminal court.

(c) The factors to be considered in deciding whether criminal proceedings against a child should proceed under subsection (a) or (b) include:

- (1) The seriousness of the alleged offense;
- (2) Whether and to what extent an adult was involved in the offense;
- (3) The age and maturity of the child as determined by consideration of the child's home, environmental situation, history of trauma and adverse childhood experiences, emotional attitude, and pattern of living;
- (4) The record and previous history of the minor, including previous contacts with the family court, law enforcement agencies, courts in other jurisdictions, or prior commitments to juvenile institutions;
- (5) The prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the minor (if the minor is found to have committed the alleged offense) by the use of procedures, services, and facilities in the juvenile court system;
- (6) Whether the best interests of the child are better served in the juvenile court system relative to the adult system; and
- (7) All other relevant factors.

NOTE: This section should be read in conjunction with subsection 1 which prohibits the transfer of any child under fourteen years of age regardless of the offense he or she committed. This is a floor for compliance with human rights standards, however, and states are encouraged to increase this minimum age. *See Cal. Welf. & Inst. Code § 707.* The use of automatic or mandatory transfer laws without due consideration of the child status of an offender between 14 and 17 years of age violates the CRC and international human rights law regarding the treatment of children in conflict with the law. In every criminal proceeding, child status and the “*best interest of the child*” standard must be a paramount consideration for courts with jurisdiction over child offenders. To comply with human rights standards courts must hold a child status hearing in juvenile court prior to the transfer of a child to adult criminal court, or if a child is subject to direct file in adult criminal court, the court must hold a child status hearing to determine whether waiving the child back into juvenile court is in the best interest of the child, and the public welfare, under all of the circumstances. States are encouraged to follow the example of states like Kansas, where direct file is prohibited and child status hearings are held prior to the transfer of children fourteen years of age or older into adult criminal court. *See K.S.A. §38-2347.*

IV. SENTENCING CHILDREN IN ADULT CRIMINAL COURT

Section 1. Child Status Consideration & Judicial Discretion at Sentencing

(a) If a child is convicted as an adult for an offense that the child committed when he or she was less than 18 years of age, in addition to any other factors that the court is required to consider before imposing a sentence, the court shall consider:

- (1) the child’s exposure to adverse childhood experiences, early childhood trauma, and involvement in the child welfare system; and
- (2) the differences between child and adult offenders, including, without limitation, the diminished culpability of children as compared to that of adults and the typical characteristics of youth.

(b) Notwithstanding any other provision of law, after considering the factors set forth in subsection (a), the court may, in its discretion, reduce any mandatory minimum or maximum

period of incarceration, or both, that the child is required to serve if the court determines that such a reduction is warranted given the child’s age, mitigating circumstances, and the child’s prospects for rehabilitation.

(c) Prior to the imposition of any sentence on a child who was less than 18 years of age at the time of the offense, the court may, after consideration of the factors in subsection (a), depart from any mandatory sentencing enhancement that the court would otherwise be required to impose.

(d) This section shall be construed as prioritizing the successful treatment, rehabilitation, and eventual reintegration of children who commit serious offenses and are prosecuted in the adult criminal justice system over incapacitation or retribution.

NOTE: As mentioned previously, the 2018 IACHR report recommended that “*no child be sentenced by the same guidelines that would apply to adults, regardless of the offense committed.*” To comply with human right standards, states need to require judges in adult criminal court to consider how children differ from adults and authorize them to depart from mandatory minimum sentences or sentencing guidelines that would otherwise apply to adult offenders. Some jurisdictions have set parameters around how much discretion courts have to deviate from minimum sentences. For example, Virginia allows judges to impose a sentence below the mandatory minimum required by statute, as well as suspend any portion of an otherwise applicable sentence. *See Va. Code. Ann. § 16.1-272; See also, D.C. Official Code § 24-903.* State courts have also begun to scale back mandatory sentences for children. In *State v. Lyle*, 854 N.W.2d 378 (Iowa 2014), the Iowa Supreme Court held that “all mandatory minimum sentences of imprisonment for youthful offenders are unconstitutional under the cruel and unusual punishment clause,” and required judges to consider child status prior to sentencing. States should follow the movement away from mandatory sentencing practices and empower judges to create more fair and age-appropriate sentences for children in adult court.

Section 2. Protect Child Sex Crime Victims Prosecuted in Adult Criminal Court

(a) Notwithstanding any other law to the contrary, if a child is convicted as an adult for an offense that the child committed when he or she was less than 18 years of age, and the court subsequently finds by clear and convincing evidence that the person against whom the child is convicted of committing the offense against, trafficked the child in violation of subsection **[insert criminal code section]**, sexually abused the child in violation of subsection **[insert criminal code section]**, or sexually assaulted the child in violation of subsection **[insert criminal code section]** within one year prior to the commission of the offense, the court may, in its discretion:

- (1) Depart from any mandatory minimum sentence, maximum sentence, or sentencing enhancement;
- (2) Suspend any portion of an otherwise applicable sentence; or
- (3) Transfer the child back to the jurisdiction of the juvenile or family court for proper adjudication.

(b) This section shall be construed as prioritizing the successful treatment and rehabilitation of child sex crime victims who commit acts of violence against their abusers. It is the legislatures preference that these children be viewed as victims and provided treatment and services in the juvenile or family court system.

NOTE: Article 39 of the CRC requires states to take measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or

punishment; or armed conflicts. This includes when child victims commit acts of violence against their abusers that otherwise may not be covered by traditional self-defense laws. There are strong policy reasons for extending the protections of this section to victims of other forms of abuse beyond sex crimes. In all cases where a child victim engages in violence against their abuser, it is preferable for courts to have as much flexibility as possible in creating a trauma-informed and age-appropriate response.

Section 3. Eliminating the Felony-Murder Rule for Children

(a) A participant who was under the age of 18 at the time of the perpetration or attempted perpetration of a crime listed in [cite state felony murder statute] in which a death occurs is liable for murder only if one of the following is proven:

(1) The minor child was the actual killer; or

(2) The minor child was not the actual killer, but, with the intent to kill, aided, abetted, counseled, commanded, induced, solicited, requested, or assisted the actual killer in the commission of the unlawful killing of another human being.

(b) A minor who is not liable for murder under subsection (a) shall be sentenced in accordance with the crime he or she committed or attempted to commit.

NOTE: The application of the felony-murder rule to children runs counter to the IACHR recommendation to not “*sentence children by the same guidelines that apply to adults,*” as well as to child brain and behavioral development science. It is a well-documented fact that children are more impetuous, prone to irrational decision-making, and often lack the ability to foresee the unintended consequences of their actions. Therefore, states should move to eliminate the application of the felony-murder rule to children in order to create more age-appropriate sentences. This change in the law should also be applied retroactively. *See Cal. Pen. Code § 189(e).*

Section 4. Prohibit Death and Life Without the Possibility of Parole for Child Offenders

A sentence of death or life imprisonment without the possibility of release or parole shall not be imposed on any person who at the time of the commission of the crime was less than 18 years of age. As to such a person, the maximum punishment that may be imposed is life imprisonment with the possibility of release or parole.

NOTE: Article 37 of the CRC categorically prohibits the use of such sentences on child offenders. Further, the U.S. Supreme Court in *Roper v. Simmons* (2005) ruled that the death penalty violates the 8th Amendment’s prohibition on cruel and unusual punishment and later extended this prohibition to life without parole sentences for almost all children. *See Graham v. Florida* (2010), *Miller v. Alabama* (2015), and *Montgomery v. Louisiana* (2016). *

* *For more information on the use of life without parole and other extreme sentences on children, please visit the [Campaign for the Fair Sentencing of Youth](#).*

V. CHILD OFFENDER SAFETY VALVE

Section 1. Child Sentencing Review

(a) Unless subject to earlier parole eligibility, a prisoner who was a child at the time of the offense or multiple offenses and was tried and sentenced as an adult, is eligible for parole no later than his or her [fifteenth year] of incarceration. The Parole Board shall ensure that the hearing to consider parole under this subsection provides a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.

(b) During a parole hearing involving a prisoner who was convicted and sentenced as a child, the Parole Board shall take into consideration the diminished culpability of children as compared to that of adults, the hallmark features of youth, and any subsequent growth and increased maturity of the prisoner during incarceration. The board shall also consider the following:

- (1) A review of educational and court documents;
- (2) Participation in available rehabilitative and educational programs while in prison;
- (3) Age at the time of the offense;
- (4) Immaturity at the time of the offense;
- (5) Home and community environment at the time of the offense;
- (6) Efforts made toward rehabilitation;
- (7) Evidence of remorse; and
- (8) Any other factors or circumstances the board considers relevant.

NOTE: Articles 37 and 40 of the CRC are concerned with the rehabilitation and social reintegration of children who come into conflict with the law. The imposition of lengthy prison terms, including mandatory prison terms of 15 years or more, without a reasonable opportunity for release, violate the human rights of children under the CRC. Therefore, states should enact “safety valve” or “second look” laws to ensure children have an opportunity for sentencing review after no more than 15 years in prison. Such policies, like those enacted by West Virginia, properly balance the states desire to protect public safety with the need to treat children who come into conflict with the law, including those who commit serious offenses, differently than adult offenders. *See W.VA. §62-12-13b.*

VI. CONDITIONS OF CONFINEMENT FOR CHILDREN

Section 1. Prohibition on Solitary Confinement for Children

(a) The use of solitary or room confinement on children for discipline, punishment, retaliation, or any reason other than as a temporary response to a child’s behavior that poses a serious and immediate risk of physical harm to any individual, including the child, is prohibited.

(b) Before a staff member of a facility places a child in solitary or room confinement, the staff member shall attempt to use less restrictive techniques, including:

- (1) talking with the child in an attempt to de-escalate the situation; and
- (2) permitting a qualified mental health professional to talk to the child.

(c) If, after attempting to use less restrictive techniques as required under subsection (b), a staff member of a facility decides to place a child in temporary room confinement, the staff member shall:

- (1) explain to the child the reasons for the room confinement; and
- (2) inform the child that release from room confinement will occur immediately when the

child regains self-control or not later than after the expiration of the time period described in subsection (d).

(d) If a child is placed in temporary room confinement because the child poses a serious and immediate risk of physical harm to himself or herself, or to others, the child shall be released:

(1) immediately when the child has sufficiently gained control so as to no longer engage in behavior that threatens serious and immediate risk of physical harm to himself or herself, or to others; or

(2) if a child does not sufficiently gain control as described in subsection (d) (1), not later than 3 hours after being placed in room confinement, in the case of a child who poses a serious and immediate risk of physical harm to others; or 30 minutes after being placed in room confinement, in the case of a child who poses a serious and immediate risk of physical harm only to himself or herself.

(e) If, after the applicable maximum period of confinement has expired, a child continues to pose a serious and immediate risk of physical harm the child shall be transferred to another juvenile facility or internal location where services can be provided to the child without relying on room confinement.

(f) During a period of room confinement staff shall periodically check on the child at least once every 15 minutes.

NOTE: According to the Committee on the Rights of the Child, the Committee against Torture, and the Special Rapporteur on Torture, the use of solitary confinement on children, of any duration, constitutes cruel, inhumane, or degrading treatment or punishment, or even torture. Human rights observers have urged the U.S. to adopt policies that regulate the limited use of isolation or segregation of youth. Such policies cannot be solely limited to children in juvenile facilities, as children transferred into the adult criminal justice system are routinely placed in solitary confinement under the guise of “protection.” Thus, states should enact policies consistent with both this section and section 2, which prohibit incarcerating children in adult correctional facilities. When isolation is used for the safety of others or the child, it should be used only as long as necessary for the child to regain control. The recently enacted First Step Act provides helpful guidance but is limited in application to juvenile facilities. Such policies will be sufficient to comply with human rights standards so long as states also prohibit children from being incarcerated in adult facilities. *See 18 U.S.C. §5043.*

Section 2. Prohibition on Children Being Incarcerated in Adult Correctional Facilities

No child under eighteen (18) years of age shall be detained, placed, or incarcerated in any jail, prison, or other place of detention where adults are detained, placed, or incarcerated. This section applies to all children in the custody of the Department of Corrections, including children who are subject to the jurisdiction of adult criminal court.

NOTE: Under international human rights law, no child may be incarcerated in adult correctional facilities. Accordingly, the IACHR has urged the U.S. to adopt laws which prohibit any child under the age of 18 from serving “pre-trial confinement or custodial sentences under the adult correctional system or any form of adult facility.”

VII. POST-RELEASE SOCIAL REINTEGRATION

Section 1. Discharge from Parole or State Supervision

The Parole Board may discharge a person from parole if the person:

- (1) Was released on parole for having committed an offense as a minor; and
- (2) Has served five (5) years on parole without a violation.

NOTE: Lengthy post-release supervision, including lifetime parole, can make life and full social reintegration difficult on formerly incarcerated children who have demonstrated their maturity, rehabilitation, and fitness to re-enter society. Therefore, states are encouraged to enact policies that limit post-release supervision or give the supervising authority (parole board or judge) the ability to discharge the person from supervision at a reasonable point after release. States are encouraged to look toward recently enacted legislation in Arkansas for guidance. *See A.C.A. § 16-93-622.*

Section 2. Restoration of Voting Rights

A person who was a child at the time of the commission of an offense shall have his or her constitutional right to vote and other rights to civic participation restored after he or she has been released from prison.

-OR-

A person who has been discharged from parole under [**cite section that allows parole discharge**] shall have his or her constitutional right to vote and other civic participation restored.

NOTE: In order for a child to be fully reintegrated into society and to assume their maximum constructive role, he or she must have the same rights and privileges enjoyed by their fellow citizens. States are encouraged to restore the right to vote to formerly incarcerated children who have reached the minimum age for voting upon his or her release from custody. If a state's Constitution allows for voting rights restoration only upon completion of a person's term of post-release supervision, like Arkansas for example, states must create a mechanism to allow formerly incarcerated children to be discharged from supervision and have their civic rights restored. *See Section 1 above & A.C.A. § 16-93-622.*

CONCLUDING THOUGHTS

It is our hope that this publication will provide a pragmatic state and federal legislative blueprint for what criminal justice reform should look like when it comes to the treatment of children who come into conflict with the law. Child offenders have universally recognized human rights that are regularly being violated in the U.S. justice system. As one of the world's foremost human rights leaders, it is imperative that the U.S. protect and uphold the human rights of our most vulnerable citizens – our children.

Our model law is the initial phase of that process. However, it is important to recognize the limitations of our proposals. Perhaps, most glaring is the allowance for the transfer and prosecution of older children in the adult criminal justice system when such treatment has been condemned as a violation of human rights norms. The unfortunate reality is that all U.S. states and the federal government engage in this practice. Some U.S. jurisdictions, e.g., Pennsylvania, don't even set a universal minimum age, resulting in horrific human rights violations where children as young as 10 and 11 have been criminally charged in adult court. Our model law is concerned with remedying the most egregious application of this practice, laying the foundation for the second iteration of criminal justice reform focused on children.

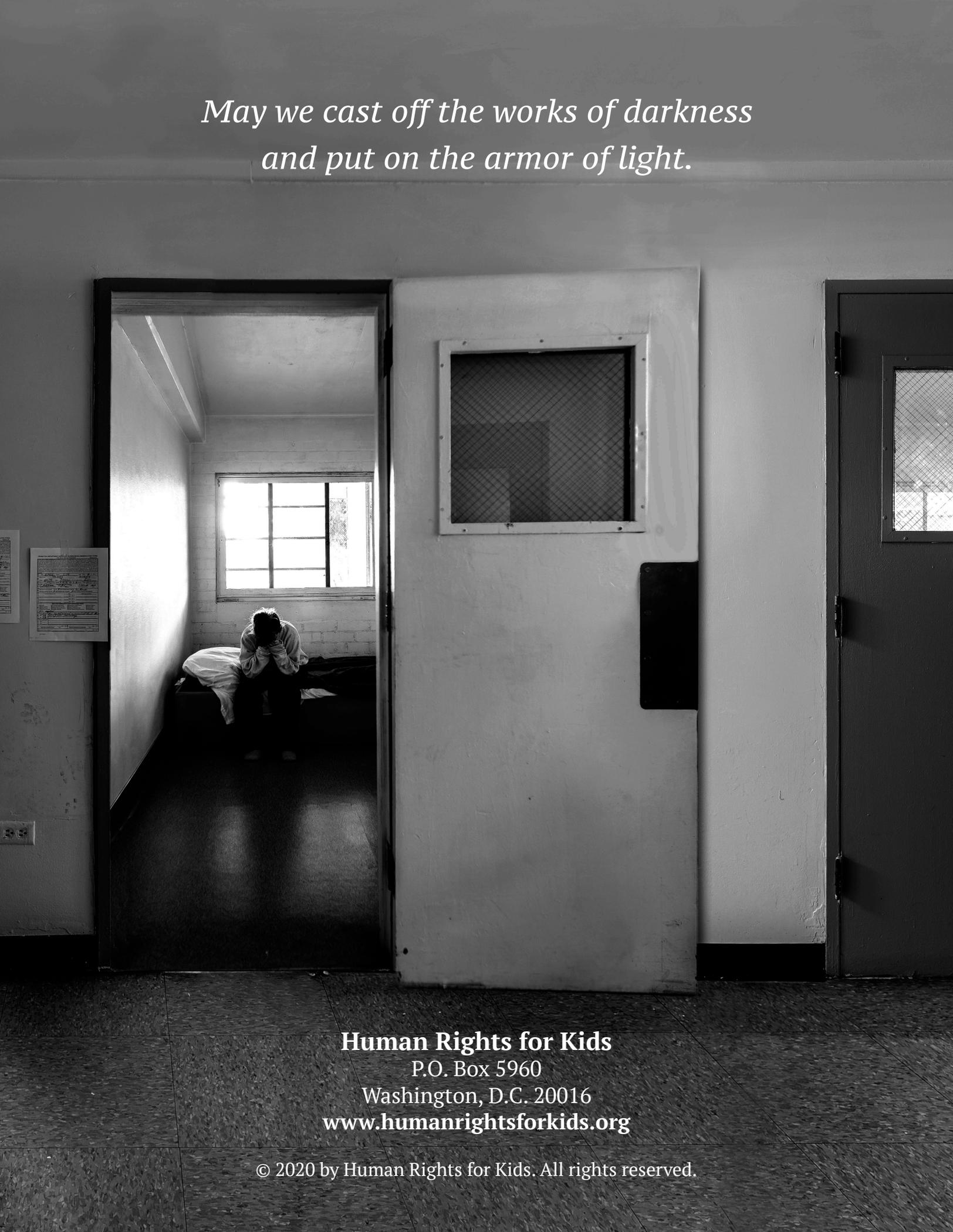
It should also be noted that our model law does not comprehensively address all of the recommendations or human rights concerns outlined by the Inter-American Commission on Human Rights or other international human rights reports, covenants, or treaties. For example, diversion, treatment and alternative resolution programs were not addressed in an effort to focus on what we deemed to be the most pressing human rights issues facing children in the U.S. justice system. It is our intention for subsequent editions of the Model Child Justice Reform Act (MCJRA) to build on the foundation outlined in this publication and to give full breath to the overarching principles of the CRC: (1) serving the best interests of the child in all circumstances, and (2) resorting to arrest, detention, and imprisonment of children only as a means of last resort and only for the shortest appropriate period of time. The MCJRA is thus best viewed as a first step in creating a trauma-informed and human rights centered justice system for children.

Another limitation is the legislative focus of this publication. Policymakers should remain vigilant in ensuring the effective implementation of these reforms once they become law. Future reports of HRFK will be focused on holding states accountable for the enactment and implementation of the reforms outlined in this publication.

Beginning in the summer of 2020, HRFK will be using this blueprint as the basis for a national state ratings system that will rate states on how well or how poorly they are protecting the human rights of children in the justice system.

For additional information or technical assistance with reforming the way the criminal justice system treats children in your state, please visit us at www.humanrightsforkids.org or contact us at info@humanrightsforkids.org.

*May we cast off the works of darkness
and put on the armor of light.*



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