Understanding Human Rights Instruments and a Human Rights Framework

The legal relevance of human rights instruments with respect to U.S. policy and governance should be understood based on (1) U.S. ratification of international human rights instruments\(^1\), and (2) the experience and recommendations of human rights scholars, NGOs, international legal experts, and international oversight bodies working to realize human rights practice in the U.S.

(1) Human Rights Instruments Ratified by the U.S.

The U.S. has signed every major international human rights instrument, and historically played a leading role in the development of the U.N. Charter, the Universal Declaration of Human Rights [UDHR], and the International Criminal Court [ICC]. Yet the U.S. has so far only ratified the Convention Against Torture [CAT], the International Convention on the Elimination of All Forms of Racial Discrimination [ICERD], and the International Covenant on Civil and Political Rights [ICCPR].

When state parties ratify a human rights instrument, they agree to:

a) “Respect” the instrument. The state party agrees not to manifestly violate the agreements, rights, rules, or standards articulated in the treaty.

b) “Protect” the rights of those falling under the authority of that state. The state party agrees to guard the articulated rights from internal or external threats.

c) “Fulfill” the obligations of the instrument through creating an “enabling environment” through which rights can be reasonably enjoyed and standards can be reasonably met. For example, in agreeing to provide for the “right to education” by signing the International Covenant on Economic, Social and Cultural Rights [ICESR], (ICESCR), a state perhaps agrees to provide the schools and infrastructure that would make such a right meaningful in practice.

However, in ratifying the CAT, ICCPR, and ICERD, the U.S. included a reservation\(^2\) noting that the instruments are “not self executing,” or that their legal relevance is to be decided on a case-by-case basis in U.S. judicial and legislative processes. In sum, this means that the U.S. agrees in principle with every major human rights instrument as a state signatory, and though it ratified three central instruments, the U.S. has so far failed to fully ratify any of them to the extent that they automatically become the “supreme Law of the land” (U.S. Constitution). The U.S. stands alone when it comes to this grand historical contradiction—what human rights scholars call

\(^1\) Human rights instruments refer to the documents defining human rights through international law. These documents include both declarations (non-binding, such as the UDHR) and ratified treaties (such as the two Covenants). Binding human rights instruments have the same legal weight as other international treaties in accordance with the 1969 Vienna Convention on the Law of Treaties.

\(^2\) “Reservations” refer to the exceptions (the “fine print”) that may accompany and qualify state ratification.
American exceptionalism." This does not mean that international human rights law does not apply in the U.S.—rather its role is a contested terrain across contexts.

(2) Relevance of Human Rights In Lieu of Ratification

Despite this lack of automatic substantive legal obligations, human rights law and certainly a human rights discourse are far from irrelevant when it comes to U.S. policy. Human rights provide a powerful framework for local government agencies and authorities to evaluate existing laws and policies as well as develop programs to advance and strengthen human rights in local communities. Many strategies to realize human rights practice in the U.S. are based on the ratification and recognition of human rights instruments as the standard for policy and practice at local levels of governance. To demonstrate the strategies and reasoning for doing so, see the 2012 study and report by Columbia Law School’s Human Rights Institute, Bringing Human Rights Home:

[The following] recommendations apply to all state and local officials because authority to implement human rights belongs to all local decision-makers, including governors, mayors, state legislators, city council members, law enforcement, city, county and town executives, and boards of supervisors. Indeed, fulfilling the promise of human rights will ultimately require multiple strategies and collaboration among all levels of government.

- Making Aspirational Commitments to, and Raising Awareness of, Human Rights (NOTE: this would include efforts toward “human rights education”)
- Reframing Local Concerns as Human Rights Issues
- Fostering Participatory Governance
- Reporting on Local Compliance with Human Rights Treaties; and
- Conducting Human Rights Based Audits and Impact Assessments

A human rights framework is especially useful in that it:

- Places a focus on proactively identifying and addressing problems.
- Empowers and elevates public service.
- Fosters partnerships and promotes inclusivity.
- Enhances responsiveness and accountability.
- Emphasizes addressing systemic causes of discrimination.
- Provides opportunities to demonstrate leadership locally and globally (often in solidarity networks) (pg. 6).

Additionally, organizations representing civil society in the U.S. have been increasingly engaged at the international level, linking local social problems to broad (problematic) trends in U.S. domestic and foreign policy. In the 2014 review of the U.S. record under the Convention Against Torture in Geneva, representatives from U.S. civil

---

5 For a detailed discussion of these hearings and links to the CAT review documents, see the following from the US Human Rights Network: http://www.ushrnetwork.org/events/cat-review-us.
society joined the international community and CAT committee in exposing and pressuring the U.S. government with regard to human rights violations at Guantánamo Bay, torture in U.S. prisons and juvenile facilities, and the troubling pattern of police violence against unarmed people of color. Such international attention and criticism of these concerning trends increase the relevance of human rights in U.S. policy discourse, and provide tools to incorporate human rights in practice.

Legal Framework: Relevant Instruments, Articles, and Standards

From a preliminary assessment of county and community concerns and testimony from community members, the following instruments and articles are relevant to this report, and should form the national and international legal framework for policy discussion on the use of oleoresin capsicum (OC) spray in Santa Clara County Juvenile Hall. The inappropriate or excessive use of OC spray as a behavior management practice risks violations of youths’ human, civil, and constitutional rights to be free from excessive force, as well as their rights not to be incarcerated in conditions posing a substantial risk of serious harm. In California, juvenile commitment is grounded in rehabilitation and treatment, not punishment.

It is important to note first that, “currently, there are no national standards in federal rule or law regulating conditions of confinement in facilities in the juvenile justice system, and there is little or no federal monitoring or oversight to hold these facilities accountable for how they care for and supervise youth.” As a result, we must rely on what can be determined from U.S. case law, social scientific data/research, and international instruments and standards.

U.S. Constitution

- Due Process Clause of the 14th Amendment

Because the fundamental purpose of juvenile confinement is rehabilitation, rather than punishment, conditions of confinement in juvenile facilities are evaluated under the Due Process Clause of the 14th Amendment. Juveniles’ constitutionally protected liberty interests are violated where the conditions of confinement “amount to punishment” or reveal a substantial departure from accepted professional judgment in the juvenile correctional field.

U.S. courts have found that the use of chemical agents in juvenile facilities is unconstitutional to inflict punishment, enforce an order, or maintain control; it is

---

only justified “in situations where an imminent and serious threat of harm persists after less drastic methods have been tried and failed.”

In addition to finding the use of pepper spray highly problematic and “counterproductive,” a federal court in *Alexander v. Boyd* (876 F. Supp. 133, 1995) found that its “indiscriminate use” violated the constitutional rights of juvenile detainees under the Due Process clause while “teaching the victims to inflict pain as a method of controlling others and makes the juveniles more volatile, more aggressive, and less likely to respond properly to authority figures.” These findings are particularly interesting in that suffering the effects of pepper spray (as an undeserving target or innocent bystander) was characterized by the court as a form of coercive punishment, as well as posing risks of long-term medical complications.

The majority of states have prohibited the use of chemical restraints in their juvenile detention systems, suggesting that use of OC spray departs not only from best practices in juvenile justice, but from the mainstream of accepted professional practice around the country.

*Institute of Judicial Administration [IJA]/American Bar Association [ABA] Standards for Juvenile Justice*

- “7.8 Limitations on restraints and weapons.
  
  A. Mechanical restraints.
  Given the small size of programs, it should not be necessary to use mechanical restraints within the facility. The program director may authorize the use of mechanical restraints during transportation only.

  B. Chemical restraints.
  In extreme situations, chemical restraints may be used under strict controls. The department should develop regulations governing their use.

  C. Weapons.
  Under no circumstances should personnel take any weapons into the facility.
  
  Commentary

  The standard holds that mechanical and chemical restraints should not be used within facilities. The rational for this position is: 1. Given the small size of the

---


11 See pages 145-6 of the IJA-ABA Juvenile Justice Standards Relating to Corrections Administration, found in full at: [http://www.americanbar.org/groups/criminal_justice/pages/juvenilejusticestandards.html](http://www.americanbar.org/groups/criminal_justice/pages/juvenilejusticestandards.html).

Report Authors: Drs. William Armaline and Edith Kinney, J.D.
SJSU Human Rights Working Group
program these methods are not necessary; and 2. There has been a consistent history of abuse of these methods in juvenile corrections settings...In extreme situations a facility may use chemicals as a restraint. The department should develop regulations governing use...such regulations should contain stringent controls on access, and provide that chemical restraints may be used only to prevent serious injury to persons or property.”

U.N. Standard Minimum Rules for the Treatment of Prisoners\(^{12}\)

- “33. Instruments of restraint\(^{13}\), such as handcuffs, chains, irons and straitjackets, shall never be applied as a punishment. Furthermore, chains or irons shall not be used as restraints. Other instruments of restraint shall not be used except in the following circumstances:
  
  (a) As a precaution against escape during a transfer, provided that they shall be removed when the prisoner appears before a judicial or administrative authority;
  
  (b) On medical grounds by direction of the medical officer;
  
  (c) By order of the director, if other methods of control fail, in order to prevent a prisoner from injuring himself or others or from damaging property; in such instances the director shall at once consult the medical officer and report to the higher administrative authority.”

The International Covenant on Civil and Political Rights [ICCPR]

- Article 7, articulating the protection against torture. This is a non-derogable right, meaning that it cannot be violated under any circumstance. Further, Article 10 guarantees the right to “humane treatment” when deprived of liberty.
- Articles 2 and 26, guaranteeing freedoms from discrimination and the right to equal protection under the law.
- Article 14, guaranteeing due process and the presumption of innocence.

The International Convention on the Elimination of all forms of Racial Discrimination [ICERD]

- In contrast to Constitutional law in the U.S., “conscious racial animus” is not required to find any particular state policy in violation of the treaty as a form of “racial discrimination.” Instead, all that is required is evidence of the policy’s systematically racially disparate effects, regardless of explicit racial discourse or clear personal (“racist”) intent. This is important to consider in any examination


\(^{13}\) OC spray is often legally interpreted and discussed as a form of “chemical restraint.
SCC Human Relations Commission - Justice Review Committee

of carceral policies (adult or juvenile) in the U.S., due to its systematic targeting of people of color—African Americans and “Latino/a” immigrant populations in particular.

The Convention on the Rights of the Child [CRC]

The following are adapted from the Committee on the Rights of the Child, General Comment No. 10, “Children’s rights in juvenile justice” (44th Session, 2007). The Committee on the Rights of the Child articulates the specific implications of the CRC for the criminal justice system in the U.S. as determined by the Committee on the Rights of the Child. As an important legal point here, though the U.S. has not ratified the CRC, we have signed off on significant portions of the CRC Optional Protocol, meaning that the U.S. volunteers to participate in periodic review according to the treaty. To be clear, “Articles” below refer to articles of the CRC.

- Article 2, Non-discrimination

“6. States parties have to take all necessary measures to ensure that all children in conflict with the law are treated equally…

7. Many children in conflict with the law are also victims of discrimination, e.g. when they try to get access to education or to the labour market. It is necessary that measures are taken to prevent such discrimination, inter alia, as by providing former child offenders with appropriate support and assistance in their efforts to reintegrate in society, and to conduct public campaigns emphasizing their right to assume a constructive role in society (art. 40 (1)).

8. It is quite common that criminal codes contain provisions criminalizing behavioural problems of children, such as vagrancy, truancy, runaways and other acts, which often are the result of psychological or socio-economic problems. It is particularly a matter of concern that girls and street children are often victims of this criminalization. These acts, also known as Status Offences, are not considered to be such if committed by adults. The Committee recommends that the States parties abolish the provisions on status offences in order to establish equal treatment under the law for children and adults. In this regard, the Committee also refers to article 56 of the Riyadh Guidelines which reads: “In order to prevent further stigmatization, victimization and criminalization of young persons, legislation should be enacted to ensure that any conduct not considered an offence or not penalized if committed by an adult is not considered an offence and not penalized if committed by a young person.”

9. In addition, behaviour such as vagrancy, roaming the streets or runaways should be dealt with through the implementation of child protective measures,

---


Report Authors: Drs. William Armaline and Edith Kinney, J.D.
SJSU Human Rights Working Group
including effective support for parents and/or other caregivers and measures which address the root causes of this behaviour.”

- **Article 3, Best Interests of the Child**

  “10. In all decisions taken within the context of the administration of juvenile justice, the best interests of the child should be a primary consideration. Children differ from adults in their physical and psychological development, and their emotional and educational needs. Such differences constitute the basis for the lesser culpability of children in conflict with the law. These and other differences are the reasons for a separate juvenile justice system and require a different treatment for children. The protection of the best interests of the child means, for instance, that the traditional objectives of criminal justice, such as repression/retribution, must give way to rehabilitation and restorative justice objectives in dealing with child offenders. This can be done in concert with attention to effective public safety.”

- **Article 6, The Right to Life, Survival and Development**

  “11. … this basic right should result in a policy of responding to juvenile delinquency in ways that support the child’s development. The death penalty and a life sentence without parole are explicitly prohibited under article 37 (a) of CRC (see paragraphs 75-77 below). The use of deprivation of liberty has very negative consequences for the child’s harmonious development and seriously hampers his/her reintegration in society. In this regard, article 37 (b) explicitly provides that deprivation of liberty, including arrest, detention and imprisonment, should be used only as a measure of last resort and for the shortest appropriate period of time, so that the child’s right to development is fully respected and ensured.”

- **Article 40(1), Dignity**

  “13. CRC provides a set of fundamental principles for the treatment to be accorded to children in conflict with the law:

  - Respect for the dignity of the child requires that all forms of violence in the treatment of children in conflict with the law must be prohibited and prevented. Reports received by the Committee show that violence occurs in all phases of the juvenile justice process, from the first contact with the police, during pretrial detention and during the stay in treatment and other facilities for children sentenced to deprivation of liberty. The committee urges the States parties to take effective measures to prevent such violence and to make sure that the perpetrators are brought to justice and to give effective follow-up to the recommendations made in the report on the United Nations Study on Violence Against Children presented to the General Assembly in October 2006 (A/61/299).
Article 37(c), Treatment and Conditions

“89. The Committee wishes to emphasize that, inter alia, the following principles and rules need to be observed in all cases of deprivation liberty:

- Children should be provided with a physical environment and accommodations which are in keeping with the rehabilitative aims of residential placement, and due regard must be given to their needs for privacy, sensory stimuli, opportunities to associate with their peers, and to participate in sports, physical exercise, in arts, and leisure time activities…

- Restraint or force can be used only when the child poses an imminent threat of injury to him or herself or others, and only when all other means of control have been exhausted. The use of restraint or force, including physical, mechanical and medical restraints, should be under close and direct control of a medical and/or psychological professional. It must never be used as a means of punishment. Staff of the facility should receive training on the applicable standards and members of the staff who use restraint or force in violation of the rules and standards should be punished appropriately;

- Any disciplinary measure must be consistent with upholding the inherent dignity of the juvenile and the fundamental objectives of institutional care; disciplinary measures in violation of article 37 of CRC must be strictly forbidden, including corporal punishment, placement in a dark cell, closed or solitary confinement, or any other punishment that may compromise the physical or mental health or well-being of the child concerned…”

*Convention Against Torture [CAT]*

It is first important to note that the CAT has a lower bar for the definition of torture than the Constitutional standards under the 8th Amendment. We have already discussed the implications of Constitutional protections against torture for juvenile detainees in the U.S. above, so we will not reproduce the same arguments according to the CAT here. That said, the following is taken from the 2014 Concluding Observations from the periodic review of the U.S. that concluded in November 2014. The Committee Against Torture recommended the following with regard to juvenile justice in the U.S.:

- “Juvenile Justice

23. The Committee remains concerned at the notable gaps in the protection of juveniles in the State party’s criminal justice system. In particular, the Committee expresses once again its concern at the conditions of detention for juveniles,
including their placement in adult jails and prisons, and in solitary confinement (art. 11 and 16).

The State party should take the necessary measures to ensure the proper functioning of the juvenile system in compliance with international standards. In particular, the State party should:


(b) Ensure that juvenile detainees and prisoners under 18 are held separately from adults, in line with the provisions of The Beijing Rules (rules 13.4 and 26.3), and the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (General Assembly resolution 45/113 of 14 December 1990, rules 17, 28 and 29);

(c) Prohibit any use of solitary confinement against juveniles (see, para. 20);

(d) Resort more to alternatives to incarceration, taking into account the provisions of the United Nations Standard Minimum Rules for Non-custodial 12 Measures (the Tokyo Rules, General Assembly resolution 45/110, of 14 December 1990) and the Bangkok Rules.”

Analysis: Use of Oleoresin Capsicum (OC) or “Pepper Spray” in California Juvenile Detention Facilities

Contextual Note:

Approximately 1.5 million youth are arrested per year annually (nationally), 95% for non-violent offenses. Juvenile crime rates and rates of arrest continue to drop (as is the case with most adult crimes over the same period)\(^{16}\). Today, 30% fewer youth (across race) are getting caught up in the juvenile justice/delinquency system than in 2002, yet the racial disparities have grown somewhat. African American youth are 4.6


times as likely to be incarcerated as white youth.\textsuperscript{17} Patterns of racial disparity across our adult and juvenile systems\textsuperscript{18} suggest that populations of color will almost automatically experience the conditions of confinement (including the use of OC spray) disproportionally. Put simply—we systematically incarcerate people of color (youth and adults) at a much higher rate than others. This means that they are systematically more likely to experience any potentially problematic conditions of confinement (compared to more privileged populations who may be moved to diversion or escape criminal penalty entirely).

We find the following empirical findings relevant to the human rights framework put forth here on the use of OC spray in California juvenile detention facilities, including but not limited to the Santa Clara County Juvenile Hall:

- In agreement with the Santa Clara County Juvenile Justice Commission [SCC JJC], it is concerning that two separate pilot programs on the use of OC for confined room removals and the “self defense” of staff in Juvenile Hall were initiated as the result of collective bargaining talks over the Local 1587 Santa Clara County Probation Peace Officers’ Union contract, rather than the result of evidence-based practice or rigorous public debate and policy research. Domestic and international standards suggest that such policies should be vetted through the appropriate public channels. Further, research suggests that where juvenile justice facilities have chosen to employ the use of OC spray, decisions were made as a misplaced “carry over” from the adult system or as a result of “pressure from staff, unions and politics.”\textsuperscript{19}

- It seems that use of OC spray in state juvenile facilities is prohibited in the wide majority of states and rarely used in other jurisdictions. A 2011 survey by the Council of Juvenile Correctional Administrators [CJCA] found that “only 12% of the [juvenile justice] agencies authorize staff to carry chemical sprays in secure facilities.”\textsuperscript{20} Further, “California is one of only 15 states that allow the use of OC spray in juvenile facilities… Of the seven Bay Area Counties, only Alameda, Contra Costa and Santa Clara Counties have authorized the use of OC spray in juvenile correctional facilities.”\textsuperscript{21} Finally, jurisdictions like Los Angeles County, the Texas Youth Commission, and California Department of Corrections and

\textsuperscript{20} Page 1. See here for full report: \url{http://cjca.net/attachments/article/172/CJCA_Issue_Brief_OC_Spray.pdf}.
Rehabilitation’s Division of Juvenile Justice “have all been forced to reduce OC usage following legal pressure from civil rights groups and youth advocates.”22

- It is troubling that one of the central claims in support of the OC pilot program seems to be factually incorrect. The 2014 SCC JJC report demonstrates (page 4) that there has been no significant rise in violent incidents (including those against staff) since 2011. Similarly, claims that OC spray is needed to ensure the safety of detainees seem to be unsupported—the injury rate as the result of violent incidents in the units (8 and 9) where OC is proposed is only 4%. Finally, research on the use of OC spray in San Diego’s juvenile detention facilities found these common staff rationales were unfounded. A 2014 Youth Law Center complaint to the U.S. Department of Justice noted, “Not only does the use of OC spray frequently fail to end fights between detainees, it also does not replace other physical intervention by staff, as staff often go ‘hands-on’ even after deploying OC spray.”23

- In a complaint filed by the Youth Law Center with the DOJ in July, 2014, authors “listed numerous examples of OC spray being used on youth at risk of suicide or self-harm, on youth who had failed to follow instruction or for verbal defiance, and on medically-contraindicated youth.”24 This should not surprise us, given the troubling frequency of mental illness among juvenile detainees in the U.S. According to national OJJDP data, “70% of youth in the juvenile justice system may have a diagnosable mental health disorder, and 60% may also meet the criteria for a substance use disorder, and 27% may experience disorders so severe that their ability to function is significantly impaired.” Further, “44% of youth in custody say they were under the influence of alcohol or drugs during the commission of their offense.”25 The use of OC spray and chemicals as tools for behavioral control not only risks violating the lives of youth in juvenile detention; it also poses risks to their health and lives.

---


