

“COMPARATIVE ANALYSIS OF JUVENILE JUSTICE BETWEEN THE
UNITED STATES AND SPANISH-SPEAKING COUNTRIES”

*Stephen T. Day**

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* J.D. Candidate, Georgetown University Law Center; Staff Development Editor, *Georgetown Journal of Poverty Law and Policy*, Vol. 30. I thank Professor Eduardo Ferrer for his tutelage and the Georgetown Law Juvenile Justice Clinic for the opportunity to engage in the work that inspired this Note.

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ABSTRACT

This paper highlights the relative lack of due process protections afforded to children in conflict with the law in the United States (U.S.) and identifies statutory safeguards adopted by Argentina, Colombia, Mexico, and Spain to promote the fair treatment of juvenile offenders and to protect them as children. The U.S. must reform its juvenile justice system and embrace a rights-based approach to better protect the rights of children. While the U.S. is party to the International Covenant on Civil and Political Rights (ICCPR) and constitutionally recognizes some protections for juvenile offenders, it fails the latter by defining such a group too broadly through no minimum age of criminal responsibility, exposing juvenile offenders to life without parole, and failing to confine youth separately from adults. While there are many opportunities for improvement of the juvenile justice system, these reforms target significant weaknesses by reducing the stigmatization of children under the age of fourteen charged with gang or criminal activity; by aligning juvenile sentencing with modern international conceptions of the limits of such sentencing; and by preventing their abuse in adult facilities.

I. INTRODUCTION

This paper highlights the relative lack of due process protections afforded to children in conflict with the law in the United States and identifies statutory safeguards adopted by other countries to promote the fair treatment of juvenile offenders and to protect them as children. I argue the United States is an outlier because it relies on *parens patriae* as the legal foundation of its juvenile justice framework rather than international concepts of the individual rights of the child, as expressed by the United Nations Convention on the Rights of the Child (UN CRC) and other international law. Comparing juvenile court jurisdiction in the United States to Argentina, Colombia, Mexico, and Spain, reveals the doctrines and traditions underpinning differences in juvenile justice policy. Juvenile court jurisdiction is not a theoretical concept devoid of practical significance, but it is a dangerous opportunity for the state to use care as a pretext for control. In some of its worst forms the state can use juvenile justice to exploit the socioeconomic vulnerability of children by confining indigent minors caught begging, institutionalizing minors suffering from mental disabilities, and detaining minors for status offenses – conduct such as smoking, cursing, or truancy that is not defined as a crime for adults.¹ Juvenile justice can indirectly prejudice the poor or those from nontraditional households at sentencing by considering whether the child has two heterosexual parents present to care for them and excluding caretakers, like partners or relatives, through archaic definitions of family.² The selected countries

¹ See INTER-AM. COMM’N ON H.R., JUVENILE JUSTICE AND HUMAN RIGHTS IN THE AMERICAS 20 (2011).

² See *id.* at 34.

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employ various forms of government and adhere to different bodies of international law, resulting in diverse statutory frameworks for juvenile justice.

Globally, juvenile justice generally consists of separate criminal courts and detention facilities to serve minors accused of conduct defined as a crime by adult criminal law. A juvenile justice system must balance the need to avoid punishing minors beneath the minimum age of criminal responsibility while providing all children access to the courts to protect their rights. Similarly, the system must respect individual autonomy and the voice of the child while recognizing the inherent vulnerability of children and their natural state of quasi-liberty in the custody of their parents.³ Minors deserve the same procedural safeguards enjoyed by adults to maintain the integrity of the adversarial process while avoiding unnecessary trauma associated with confronting opposing parties or describing past events. Countries differ in how they process and sentence children of different ages, the number of sentencing options available, and the procedural safeguards applicable to the accused. These differences are a product of multilateral international agreements, like the UN CRC, regional international agreements, like the American Convention on Human Rights (the “American Convention”), and the European Convention on Human Rights (“ECHR”), the chosen form of government, and cultural traditions. Despite their differences, nearly all countries define a minimum age of criminal responsibility by law and scale the severity of sentencing options to reflect increasing culpability as children near maturity. Although incarceration remains the predominant intervention used, juvenile justice models employ non-custodial measures; including probation, warnings, rules of conduct, supervision, individualized diversion programs, restorative justice penalties, like community service, and other socio-educational programs.⁴

Part I of this paper examines the sources of international and domestic law relevant to juvenile justice in Argentina, Colombia, Mexico, Spain, and the United States. Part II discusses the following agreements of international law affecting juvenile justice in the selected countries: the UN CRC, the American Convention, and the ECHR. Part III outlines the juvenile justice system of each selected country by identifying applicable national and local statutes and judicial decisions. Part IV illustrates the differences among the countries’ respective minimum age of criminal responsibility, sentencing limitations for minors, and ability to maintain separate facilities for incarcerated youth and adults as required. Part V concludes this paper by suggesting the following reforms the United States should adopt to embrace a child rights-based approach to juvenile justice: establish a minimum age of criminal responsibility, stop the imposition of sentences of life without parole for minors, and enforce the separation of incarcerated youth from adults.

³ See Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence*, 58(12) AM. PSYCH. 1009, 1015 (2003) (describing the myopia of adolescent decision-making and other deficiencies contributing to incapacity to be held criminally responsible).

⁴ INTER-AM. COMM’N ON H.R., *supra* note 1, at 82-83.

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II. INTERNATIONAL JUVENILE JUSTICE LAW BY AGREEMENT

Domestic juvenile justice law is generally a product of the minimum standards and requirements dictated by international law and the frameworks derived from common or civil law traditions. International juvenile justice law is framed by the UN CRC and supplemented by regional agreements like the American Convention and the ECHR. These international agreements contain guiding principles, like the child’s best interests, that signatory countries are expected to enforce through their legislative, executive, and judicial branches of government. International law in juvenile justice broadly seeks to protect a child’s right to information, representation, and participation in judicial and non-judicial proceedings to ensure each child has a place and voice at all stages of adjudication to determine the best interests of the child.⁵

A. The United Nations Convention on the Rights of the Child

The foundational source of international law in juvenile justice is the United Nations Convention on the Rights of the Child of 1989. The United Nations (UN) replaced the 1924 Geneva Declaration of the Rights of the Child with the Universal Declaration of Human Rights (UDHR) at the founding of the UN in 1948, but the recognition of widespread failure to extend children the rights commensurate with the UDHR prompted the UN CRC.⁶ All members of the United Nations, except the United States, have ratified the UN CRC and committed to implementing its principles through domestic law and practice.⁷ Compliance with the agreement is enforced by the Committee on the Rights of the Child (the “Committee”), a body of eighteen independent experts that reviews reports submitted by members every five years, publishes evaluations of member compliance with UN CRC standards and suggests opportunities for improvement.⁸ Over 30 years later, the UN CRC remains the foundational document of international child rights law and requires countries to produce periodic and detailed evaluations of their juvenile justice systems.⁹

The UN CRC contains substantive principles and standards to provide minimum protections for the rights of children centered around the requirement to protect and consider the best interests of the child in all actions affecting them.¹⁰ Where the state’s determination of the best interest of the child conflicts with the

⁵ EUR. CONSULT. ASS., *Guidelines of the Committee of Ministers of the Council of Europe on Child-Friendly Justice*, 42 (2010).

⁶ Brian K. Gran, *An International Framework of Children’s Rights*, 13 ANN. REV. LAW SOC. SCI. 79, 86 (2017).

⁷ *Id.*

⁸ U.N. Comm. on the Rights of the Child, Introduction to the Committee, <https://www.ohchr.org/en/treaty-bodies/crc/introduction-committee> (last visited Apr. 28, 2023).

⁹ U.N. Comm. on the Rights of the Child, Reporting Guidelines, <https://www.ohchr.org/en/treaty-bodies/crc/reporting-guidelines> (last visited Apr. 28, 2023).

¹⁰ U.N. Convention on the Rights of the Child art. 3, Nov. 20, 1989, 1577 U.N.T.S. 3, [hereinafter UN CRC].

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opinion of a child or their advocate or guardian, the UN CRC recognizes the “competence” of the state’s judiciary to make a final decision ¹¹

The UN CRC contains specific provisions applicable to minors in conflict with the law. While the UN CRC does not suggest a minimum age of criminal responsibility, it requires countries to legally define one “that is not too low.”¹² The Committee has suggested a minimum age of criminal responsibility below the age of 12 would not be internationally acceptable.¹³ It recently noted the most common minimum age of criminal responsibility internationally is 14 and “commended” states that have set minimums of 15 or 16 years of age.¹⁴ Minimum procedural safeguards within the UN CRC include prompt notice of charges;¹⁵ the right to assistance of legal representation;¹⁶ the opportunity to be heard in any judicial and administrative proceeding affecting the child, whether directly or through a representative, at the child’s choice;¹⁷ separate detention facilities from adults once convicted in the juvenile justice system;¹⁸ the right to appeal any decision that the minor violated the law;¹⁹ the opportunity to examine witnesses;²⁰ and the right of the child to initiate a challenge in court to their deprivation of liberty (e.g., *habeas corpus*).²¹ Additionally, the UN CRC expressly prohibits states from sentencing minors to capital punishment or life imprisonment without the possibility of parole.²² There is no right to a trial by jury within the UN CRC, only adjudication by “a competent, independent, and impartial authority or judicial body in a fair hearing according to law.”²³

B. The American Convention on Human Rights

Argentina, Colombia, and Mexico are among the 25 countries that comprise the Organization of American States (OAS) and that ratified the American Convention on Human Rights (the “American Convention”) in 1948, the primary source of international law relevant to juvenile justice in Latin America.²⁴ The American Convention was followed by the creation of the Inter-American Commission on Human Rights (IACHR or CIDH) in 1959 to enforce member

¹¹ EUR. CONSULT. ASS., *supra* note 5, at 18.

¹² U.N. Convention on the Rights of the Child, *supra* note 12 at art. 40(3)(a).

¹³ U.N. Comm. on the Rights of the Child, *General Comment No. 10 (2007) Children’s Rights in Juvenile Justice*, CRC/C/GC/10, ¶¶ 32, 33 (April 25, 2007).

¹⁴ U.N. Comm. on the Rights of the Child, *General Comment No. 24 (2019) Children’s Rights in the Child Justice System*, CRC/C/GC/24, ¶¶ 21, 22 (Nov. 11, 2019).

¹⁵ U.N. Convention on the Rights of the Child, *supra* note 12, at art. 40(2)(b)(ii).

¹⁶ U.N. Convention on the Rights of the Child, *supra* note 12 at art. 40.

¹⁷ U.N. Convention on the Rights of the Child, *supra* note 12 at art. 12.

¹⁸ U.N. Convention on the Rights of the Child, *supra* note 12 at art. 37(c).

¹⁹ U.N. Convention on the Rights of the Child, *supra* note 12 at art. 40(2)(b)(v).

²⁰ U.N. Convention on the Rights of the Child, *supra* note 12 at art. 40(2)(b)(iv).

²¹ EUR. CONSULT. ASS., *supra* note 5, at 74.

²² U.N. Convention on the Rights of the Child, *supra* note 12 at art. 37.

²³ U.N. Convention on the Rights of the Child, *supra* note 12 at art. 40.

²⁴ Inter-Am. Comm’n H.R., *What is the IACHR?*, ORG. OF AM. STATES, <https://www.oas.org/en/IACHR/jsForm/?File=/en/iachr/mandate/what.asp> (last visited Apr. 28, 2023).

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compliance with human rights standards within the American Convention and to investigate complaints of human rights abuses.²⁵

Interpreting the American Convention, the American Declaration, and the UN CRC, the IACHR has stated the minimum age of criminal responsibility “must be interpreted in light of present-day conditions,” thus while it appeared internationally acceptable to set a minimum age of 12, reform should follow the path of states who have raised their minimums in recent years.²⁶ Establishing the upper limit of juvenile justice jurisdiction, child protections apply to all people under the age of 18.²⁷ The IACHR has interpreted the best interest of the child’s obligation to consider the full development and enjoyment of the child’s rights when establishing and applying policy affecting their life.²⁸ Child rights include the same rights as all other persons and the special rights that follow from their status as minors.²⁹ The substantive law within the American Convention requires members to develop a specialized juvenile justice system to process minors only for conduct defined as a crime by adult criminal law (to the exclusion of status offenses or other pretexts for control).³⁰ Conformity to traditional models of punishment should be resisted in favor of restorative justice goals of reparation, rehabilitation, and social reintegration of youth.³¹ In practice, this means pursuing solutions like mediation, restitution, or referral to social services before imprisonment.³²

When minors do come in conflict with the law, the juvenile justice system must provide them the same procedural safeguards received by adults that protect the integrity of the adversarial process, as well as supplemental protection given the limited capacity of juvenile offenders as minors.³³ Minimum procedural safeguards include the right to a competent and impartial judge,³⁴ the right to legal representation once charged,³⁵ the right to be presumed innocent,³⁶ the opportunity to present a rebuttal,³⁷ the right of the child to voice their opinion in any proceeding,³⁸ and the right to appeal.³⁹ These protections are guaranteed in all

²⁵ *Id.*

²⁶ INTER-AM. COMM’N H.R., *supra* note 1, at 13.

²⁷ INTER-AM. COMM’N H.R., *supra* note 1, at 11.

²⁸ See Juridical Conditions and Human Rights of the Child, Advisory Opinion OC-17/02, Inter-Am. Ct. H.R. (ser. A) No. 17, ¶¶ 53, 137 (Aug. 28, 2002).

²⁹ INTER-AM. COMM’N H.R., *supra* note 1, at 17.

³⁰ See INTER-AM. COMM’N H.R., *supra* note 1, at x. See also American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123, art. 5(5), [hereinafter “American Convention”].

³¹ INTER-AM. COMM’N H.R., *supra* note 1, at 8.

³² INTER-AM. COMM’N H.R., *supra* note 1, at 9.

³³ INTER-AM. COMM’N H.R., *supra* note 1, at 43.

³⁴ American Convention on Human Rights, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 at art. 40.

³⁵ *Id.* at art. 8.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.* at art. 12.

³⁹ *Id.* at art. 8.

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criminal proceedings and all other proceedings under the state’s supervision, particularly where deprivation of liberty is a possible outcome.⁴⁰

C. The European Convention on Human Rights

The European Convention on Human Rights (ECHR) is the regional source of international law that sets minimum standards and requirements for the juvenile justice system as members of the European Union and is enforced by the Council of Europe (COE).⁴¹ The ECHR is founded on child-friendly justice, “drafted to protect children and youth from secondary victimization by the justice system, notably by fostering a holistic approach to the child, based on concerted multidisciplinary working methods.”⁴² Without imposing strict demands on the structures of juvenile justice systems, the ECHR incorporates the UN CRC principles of separate criminal substantive law, procedures, and facilities⁴³ for juvenile offenders.⁴⁴ The COE does not suggest a minimum age of criminal responsibility, instead requiring that the age not be too low and be defined by law (as of 2010, members had adopted minimum ages of criminal responsibility ranging from 8 to 18).⁴⁵ Traditional punitive approaches are to be resisted as a measure of last resort in favor of socio-educational interventions in the best interest of the child.⁴⁶ Because the right to be heard is one of the four guiding principles of the UN CRC,⁴⁷ the ECHR gives substantial consideration to the voice of the child when possible, even assigning it greater weight than the voice of the parent in at least one instance.⁴⁸ The ECHR provides any deprivation of liberty should be a measure of last resort and for the shortest time possible,⁴⁹ alternatives to court proceedings should guarantee an equivalent level of legal safeguards,⁵⁰ minors should be offered free legal aid,⁵¹ and if minors are punished for status offenses, then adjudication

⁴⁰ See *Ivcher-Bronstein v. Peru*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 74, ¶¶ 102-04 (Feb. 6, 2001); See also *Baena Ricardo et al. v. Panama*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 72 ¶¶ 124-26 (Feb. 2, 2001).

⁴¹ EUR. CONSULT. ASS., *Child-Friendly Justice*, <https://www.coe.int/en/web/children/child-friendly-justice#%7B%2212440309%22%3A%5B%5D%7D> (last visited Apr. 28, 2023); EUR. CONSULT. ASS., *The European Court of Human Rights*, <https://www.coe.int/en/web/tbilisi/europeancourtsofhumanrights> (last visited Apr. 28, 2023).

⁴² EUR. CONSULT. ASS., *supra* note 5, at 8.

⁴³ See *Bouamar v. Belgium*, App. No. 9106/80, ¶¶ 52-53 (Feb. 29, 1988), <https://hudoc.echr.coe.int/eng?i=001-57445> (finding a violation of Art. 5.1.d where a juvenile offender was incarcerated 9 times in an adult prison).

⁴⁴ EUR. CONSULT. ASS., *supra* note 5, at 85; see also UN CRC at art. 40.3.

⁴⁵ EUR. CONSULT. ASS., *supra* note 5, at 25, 69.

⁴⁶ *Id.* at 53.

⁴⁷ *Id.* at 79.

⁴⁸ *Hokkanen v. Finland*, App. No. 19823/92, ¶ 61 (Sep. 23, 1994), <https://hudoc.echr.coe.int/eng?i=001-57911> (denying a father’s custody claim to his daughter who had been living with her grandparents for years as against the best interests of the child because the child did not want to live with the father).

⁴⁹ EUR. CONSULT. ASS., *supra* note 5, at 24.

⁵⁰ *Id.* at 25.

⁵¹ See *id.* at 27. See also *Salduz v. Turkey*, App. No. 36391/02, ¶ 55 (Nov. 27, 2008), <https://hudoc.echr.coe.int/eng?i=001-89893> (finding a violation of Art. 6, paragraph 1, of the ECHR when a 17-year-old suspect was detained for 5 days before obtaining access to legal

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should be subject to normal procedural safeguards.⁵² Deprivation of liberty is available in limited circumstances “to avoid the risk of tampering with evidence, influencing witnesses, or when there is a risk of collusion or flight”⁵³ However “no other children’s right shall be restricted except the right to liberty, as a consequence of the deprivation of liberty.”⁵⁴

III. JUVENILE JUSTICE BY COUNTRY

A. *Argentina*

The juvenile justice system of Argentina has jurisdiction over minors ages 16 to 18 in conflict with the law under Decree-Law 22,278 of 2005.⁵⁵ This law overhauled the juvenile justice system to become compliant with the UN CRC, which the country ratified in 1990.⁵⁶ Although the law was passed by the last military dictatorship, not by the current democratic government, it remains federal law applicable throughout the country.⁵⁷ This reform represented a paradigm shift from the targeting of juveniles in conditions of poverty or nontraditional household structures to the perception of children as entitled to the same protections regardless of socioeconomic status.⁵⁸ This new system embraces a more reparative approach to juvenile justice than the prior model of intervention in “irregular” juveniles, founded on the “doctrine of irregular situations,” derived from Argentina’s first juvenile justice regulation of 1919. The prior model distinguished between “regular” children in stable family environments and “irregular” children in situations in which families were deemed incapable of providing for children, exposing themselves and society to negative externalities justifying state intervention.⁵⁹ After hearing from a parent or guardian, judges had the authority to order necessary government intervention, if they believed the juvenile had been abandoned, needed assistance, had behavioral problems, or was in material or moral danger.⁶⁰ In practice, this was used to justify the arrest of children caught begging or who otherwise appeared to be neglected or abandoned.⁶¹ Attitudes towards juvenile offenders changed in the 1980s amidst growing dissatisfaction with the

representation; “access to a lawyer should be provided, as a rule, from the first interrogation of a suspect by the police”).

⁵² EUR. CONSULT. ASS., *supra* note 5, at 57.

⁵³ EUR. CONSULT. ASS., *supra* note 5, at 67.

⁵⁴ *Id.*

⁵⁵ Law No. 13298, “Ley Nacional de Protección Integral de los Derechos de las Niñas, Niños y Adolescentes,” Jan. 14, 2005, [25090] B.O. (Arg.) <https://normas.gba.gob.ar/ar-b/ley/2005/13298/3569>.

⁵⁶ *Id.*

⁵⁷ *Mendoza et al. v. Argentina*, Preliminary Objections, Merits and Reparations, Inter-Am. Ct. H.R. (ser. C) No. 260, ¶74 (May 14, 2013).

⁵⁸ Valentina Viego & Pamela Manciovillano, *Childhood Rights in Argentina*, 22 INTER. J. OF CHILDREN’S RIGHTS 269-70 (2014).

⁵⁹ *Id.* at 270.

⁶⁰ National Council for Children and the Family, Initial Reports of States Parties Due in 1994: Argentina, U.N. Doc. CRC/C/8/Add.17, 1 (Dec. 22, 1994).

⁶¹ Viego & Manciovillano, *supra* note 57, at 270.

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dictatorial state, advocacy for social justice, and respect for human rights.⁶² After Argentina ratified the CRC in 1990, advocates increasingly criticized the doctrine of irregular situations as a pretext for discrimination and abuse, laying the groundwork for the 2005 Child Rights Law.⁶³ This reform reoriented intervention to promote the best interests of the child, moving away from categorical conclusions (e.g., children working or in the streets are presumptively delinquent) towards solutions centered on education and rehabilitation.⁶⁴

The minimum age of criminal responsibility is 16, and minors ages 16 to 18 are subject to the same maximum sentences as adults under the Argentine Penal Code, including life imprisonment.⁶⁵ Although the criminal courts have a stated minimum age of 16, the IACHR has observed that minors under the age of 16 have been confined for their own “protection,” based on a judicial finding “that the minor has been abandoned, is indigent, is in material or moral danger, or has behavioral problems...in a reasoned judgment and after a hearing with the parents or guardian.”⁶⁶ Judges have unilateral discretion to sentence juvenile offenders to full adult sentences, lesser sentences reflecting the diminished capacity of minors, or to no sentence at all.⁶⁷ UNICEF has criticized this broad discretion vested in judges to impose sentences on subjective grounds as having resulted in arbitrary sentencing, where juveniles responsible for the same misconduct receive vastly different sentences.⁶⁸ The IACHR has attacked the law’s bright-line age between juvenile and adult sentencing, arguing the failure to distinguish between adults and children in sentencing is incompatible with the principle of proportionality of the sentence and the lesser culpability of children in light of the best interests of the child.⁶⁹ The IACHR found Argentina in violation of Art. 37 of the UN CRC through Decree-Law 22,278, holding sentences of life imprisonment for minors made it impossible to serve the rehabilitative and reintegration goals of juvenile justice.⁷⁰ Moreover, such sentences do not entail “the deprivation of liberty for the shortest time possible...and they do not permit periodic review of the need for the deprivation of liberty.”⁷¹ Instead, they contravene Art. 5(6) of the American Convention, “the deprivation of liberty shall have as an essential aim the reform and social reintegration of the prisoners.”⁷²

B. *Colombia*

The juvenile justice system in Colombia is the Sistema de Responsabilidad Penal para Adolescentes (SRPA), created in 2006 by Ley 1098, the Code of

⁶² *Id.* at 271.

⁶³ *Id.*

⁶⁴ *Id.* at 272.

⁶⁵ INTER-AM. COMM’N H.R., *supra* note 1, at 94.

⁶⁶ *Id.* at 15.

⁶⁷ Argentina Law No. 13298, Jan. 14, 2005, [25090] B.O.

⁶⁸ *Mendoza et al.*, Inter-Am. Ct. H.R. (ser. C) No. 260 at ¶76 (Arg.).

⁶⁹ INTER-AM. COMM’N H.R., *supra* note 1, at 12.

⁷⁰ *Id.* at 93.

⁷¹ *Mendoza et al.*, Inter-Am. Ct. H.R. (ser. C) No. 260 at ¶163.

⁷² *Id.* at ¶165.

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Childhood and Adolescence, to continue to incorporate the UN CRC by establishing special procedures for minors in conflict with the law.⁷³ Nearly 10 years later, the Colombian legislature reaffirmed its faith in the SRPA by reinforcing its authority and updating its organizational structure for long-term sustainability.⁷⁴ Colombia’s juvenile justice system is based on a comprehensive, rather than punitive, justice model implemented through protective, pedagogical, and restorative interventions and sanctions intended to restore rights and reintegrate juvenile offenders into society.⁷⁵ This restorative justice model resists punishment in favor of a collective resolution engaging all parties, for example, restitution, compensation, rehabilitation, satisfaction, and the guarantee of non-repetition.⁷⁶ The model was officially introduced in 2004 by Ley 906, which authorized pre-indictment mediation between the youth and victims as an alternative to traditional criminal prosecution.⁷⁷ In 2021, the Colombian legislature reaffirmed the right of the parent or guardian to educate the child but for the first time expressly prohibited physical punishment or other violence against children.⁷⁸

The minimum age of criminal responsibility in Colombia is 14.⁷⁹ When minors are accused of a crime, the SRPA may impose a reprimand, community service, probation, or confinement.⁸⁰ In practice, prosecutors are criticized for overreliance on confinement, only rarely ordering other interventions.⁸¹ Colombia does not allow the imposition of a life sentence; the maximum sentence is eight years.⁸² SRPA jurisdiction extends to victims and family members of the youth, in reflection of the belief that juvenile misconduct is a product of multiple factors.⁸³

Colombia’s juvenile justice system is somewhat unique in its coexistence with dissident paramilitary groups, like the Fuerzas Armadas Revolucionarias de Colombia-Ejército del Pueblo (FARC-EP), that have recruited children for armed conflict.⁸⁴ Although the Colombian government enacted a national action plan in 2019 to prevent the recruitment and use of children in armed conflict, the UN Secretary-General expressed continued concern in 2021 about the persisting recruitment of children.⁸⁵ The IACHR has also expressed concern about Colombia’s

⁷³ L. 1098, Nov. 8, 2006, 46.446, DIARIO OFICIAL [D.O.] (Colom.), http://www.secretariassenado.gov.co/senado/basedoc/ley_1098_2006.html.

⁷⁴ D. 1885, Sep. 21, 2015, 49.642, DIARIO OFICIAL [D.O.] (Colom.), https://www.funcionpublica.gov.co/eva/gestornormativo/norma_pdf.php?i=65324.

⁷⁵ Juliana Villanueva Congote, *Mental Health in the Attention Models for Juvenile Offenders. The Cases of Colombia, Argentina, United States and Canada*, 59(4) UNIVERSITAS MEDICA 3 (2018).

⁷⁶ *Id.* at 4.

⁷⁷ L. 904 at art. 521, Sep. 1, 2005, 45.658, DIARIO OFICIAL [D.O.] (Colom.), https://www.oas.org/dil/esp/codigo_de_procedimiento_penal_colombia.pdf.

⁷⁸ Colombia Ley 2089 (2021).

⁷⁹ INTER-AM. COMM’N H.R., *supra* note 1, at 13.

⁸⁰ Congote, *supra* note 73, at 4.

⁸¹ CAMPIE ET AL., COLOMBIA YOUTH VIOLENCE ASSESSMENT: DRIVERS AND OPPORTUNITIES FOR CHANGE 37 (2020).

⁸² INTER-AM. COMM’N H.R., *supra* note 1, at 95.

⁸³ Congote, *supra* note 74, at 4.

⁸⁴ U.N. Secretary-General, *Children and Armed Conflict*, ¶ 37, U.N. Doc. A/75/873-S/2021/437 (May 6, 2021).

⁸⁵ *Id.* at ¶¶ 44–46.

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treatment of children recruited by paramilitary groups and gangs, criticizing law enforcement’s practice of publishing photographs of arrested children in the media, violating their right to privacy and right to presumed innocence.⁸⁶ Colombia’s juvenile justice system is challenged to address minors participating in armed conflict without stigmatizing children in conflict with the law, especially those involved in gangs.⁸⁷

C. Mexico

Juvenile justice in Mexico involves the state-specific implementation of a general framework promulgated by the federal legislature in 2005. Reparative justice principles guide this framework,⁸⁸ obliging youth to compensate victims for their harm by either repairing physical damage, returning assets, or repaying through garnished wages.⁸⁹ When someone under the age of 18 is caught committing a crime, the local state prosecutor has the discretion to release the minor, order an educational intervention, or formally charge and confine the minor for up to 36 hours before a neutral judge must review the charges.⁹⁰ Although the minimum age of criminal responsibility is 12,⁹¹ Mexico’s Constitution provides that at both the federal and state levels, custodial sentences are reserved for minors over the age of 14 convicted of serious offenses.⁹² Time limits on sentences (both custodial and otherwise) are defined by age group: one year for minors 12 to 14 years old, three years for minors 14 to 16 years old, and five years for minors 16 to 18 years old.⁹³ Courts have the authority to order preventive detention, but only for youth older than 14 who are charged with crimes that carry possible prison sentences.⁹⁴

Mexico ratified the CRC on September 21, 1990.⁹⁵ Still, its juvenile justice system was disjointed as individual states used administrative hearings to deprive minors of their freedom with wide discretion, often with a tendency to target children of the poor for confinement.⁹⁶ Minors were not represented by counsel and judicial supervision was nonexistent; rather, directors of detention centers retained

⁸⁶ See U.N. Comm. on the Rights of the Child, Consideration of the Reports Submitted by States Parties under Art. 44 of the Convention, Concluding Observations: Colombia, ¶¶ 92–93, U.N. Doc. CRC/C/COL/CO/3 (June 8, 2006).

⁸⁷ INTER-AM. COMM’N H.R., *supra* note 2, at 41.

⁸⁸ Ley Nacional del Sistema Integral de Justicia Penal de Adolescentes [LNSIIPA] art. 21, Diario Oficial de la Federación [DOF] 16-06-2016 (Mex.) (restorative justice promotes social harmony by repairing the damage and understanding the origin, cause, and consequences of the conflict).

⁸⁹ LNSIIPA art. 60 (Mex.).

⁹⁰ *Id.* at art. 129.

⁹¹ INTER-AM. COMM’N H.R., *supra* note 1, at 13.

⁹² *Id.* at 89.

⁹³ LNSIIPA art. 109 (Mex.).

⁹⁴ *Id.* at art. 122.

⁹⁵ U.N. Comm. on the Rights of the Child, Mexico State Party Report 6-7, ¶ 1, U.N. Doc. CRC/MEX/6-7 (Dec. 18, 2020).

⁹⁶ Beth Caldwell, *Punishment v. Restoration: A Comparative Analysis of Juvenile Delinquency Law in the United States and Mexico*, 20 CARDOZO J. INT’L & COMP. L. 105, 111 (2011).

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discretion to determine when to release juvenile offenders from confinement.⁹⁷ In 2005, Mexico revised Art. 18 of its Constitution to establish a comprehensive framework of juvenile justice for minors between 12 and 18 years old who had committed a crime punishable under adult criminal law.⁹⁸ Mexico’s 32 states and the Federal District were each responsible for enacting their juvenile justice statutes in compliance with national minimum standards of due process.⁹⁹ Based on the principles contained therein, in 2014, Mexico enacted the Ley General de los Derechos de Niñas, Niños, y Adolescentes (LGDNNA) to recognize the rights of children and reinforce their protection.¹⁰⁰ In 2016, that legislation was followed by the Ley Nacional del Sistema Integral de Justicia Penal de Adolescentes (LNSIIPA), which updated the juvenile justice system to comply with the LGDNNA and emphasize precautionary measures in the best interests of the child.¹⁰¹ The LNSIIPA directed states and the Federal District to ensure deprivation of liberty was only used as an extreme measure and for the shortest time possible;¹⁰² provide all indicted minors with counsel;¹⁰³ provide parents or guardians the opportunity to engage in proceedings (unless the judge finds such presence against the interests of the child);¹⁰⁴ reserve solitary confinement for exigent circumstances in cases of rioting or other widespread violence and limit the use to the shortest time possible (24 hours maximum);¹⁰⁵ provide for judicial review of preventive detention at least monthly;¹⁰⁶ and limit removal of minors from their families to cases where prior intervention was unsuccessful and the family environment is unstable.¹⁰⁷

Like paramilitary groups in Colombia, drug traffickers in Mexico present a persistent danger to children by abducting them for use in armed conflict or organized crime or by prompting their later arrest by the police. The press estimates that since 2006, at least 3,000 minors have been arrested for crimes related to drug trafficking, although UNICEF continues to complain about the lack of government statistics on minors in conflict with the law in Mexico.¹⁰⁸ UNICEF and IACHR also criticize Mexico for fostering the stigmatization of children in conflict with the law, citing routine violations of the presumption of innocence by the publication of details of minors accused of crimes in the media.¹⁰⁹

⁹⁷ Mary Jordan, *Mexico’s Children Suffer in “Little Jails,”* WASHINGTON POST (Nov. 4, 2002), <https://www.washingtonpost.com/archive/politics/2002/11/04/mexicos-children-suffer-in-little-jails/ebf9fbd5-c392-46e2-9418-82db3f40fcd6/> (finding juvenile detention centers in Mexico employed corporal punishment and solitary confinement and failed to discipline center staff).

⁹⁸ Martha Frías Armenta & Livier Gómez Martínez, *Juvenile Justice in Mexico*, 3 LAWS 580, 582 (2014).

⁹⁹ Caldwell, *supra* note 95, at 111–12.

¹⁰⁰ U.N. Comm. on the Rights of the Child, Mexico State Party Report, *supra* note 94, ¶ 1.

¹⁰¹ *Id.* ¶¶ 12, 230.

¹⁰² LNSIIPA art. 31 (Mex.).

¹⁰³ *Id.* at art. 41.

¹⁰⁴ *Id.* at art. 42.

¹⁰⁵ *Id.* at art. 54.

¹⁰⁶ *Id.* at art. 121.

¹⁰⁷ *Id.* at art. 260.

¹⁰⁸ INTER-AM. COMM’N H.R., *supra* note 1, at 40-41.

¹⁰⁹ *Id.* at 46.

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D. *Spain*

Spain established its first independent juvenile courts by passing the Juvenile Criminal Act of 2000 (JCA).¹¹⁰ The JCA consolidated juvenile justice throughout Spain into a single federal system with jurisdiction based on the conduct and age of the accused.¹¹¹ Spain’s effort to reconcile the realities of criminal prosecution with the best interests of the child in juvenile proceedings is reflected in the JCA. The JCA achieved this reconciliation by placing juvenile justice under the umbrella of the adult criminal courts on the belief that “an intervention by the legal institutions is only educational and meaningful for juveniles when they have been declared guilty and have accepted and understood their responsibility.”¹¹²

Minors between the ages of 14 and 18 in conflict with the law are subject to specialized criminal procedures and confined in separate facilities from adults.¹¹³ Juvenile courts have jurisdiction over children accused of conduct defined as a crime by applicable adult criminal law.¹¹⁴ The JCA defines the minimum age of criminal responsibility as 14; minors who commit crimes before turning 14 are automatically referred to welfare services for non-punitive interventions once their age is verified.¹¹⁵ The JCA imposes greater criminal responsibility as minors near maturity: youth ages 14 and 15 may be sentenced to a maximum of 5 years, and those ages 16 and 17 may be sentenced up to 8 years.¹¹⁶ Younger children cannot be sentenced to any remedial measure, carceral or otherwise, for longer than two years, and older youth may be sentenced to a maximum of five years, creating a progressive transition from legal minority to adult responsibility.¹¹⁷

E. *United States*

In the United States, juvenile justice is state-specific within boundaries set by the Constitution, as interpreted by the Supreme Court. Although the United States is unique in that it is not a party to the UN CRC, it has ratified the International Covenant on Civil and Political Rights (ICCPR), which requires youth to be separated from adults and to receive age-appropriate treatment with an emphasis on rehabilitation.¹¹⁸ An important caveat to that ratification – the U.S. reserved the right to, in exceptional circumstances, transfer youth to the adult

¹¹⁰ Ley Orgánica Reguladora de la Responsabilidad Penal de los Menores (B.O.E. 2000, 641) (Spain). <https://www.boe.es/eli/es/lo/2000/01/12/5/con>. [hereinafter *Ley Orgánica*].

¹¹¹ Esther Fernández-Molina, *Spain: Juvenile Offenders, Laws, and Rights*, in INTER. HANDBOOK OF JUVENILE JUSTICE 421, 422-23 (2017).

¹¹² *Id.* at 423-24.

¹¹³ Ley Orgánica, B.O.E. 2000, 641.

¹¹⁴ Fernández-Molina, *supra* note 108, at 422-23.

¹¹⁵ *Id.* (although there is advocacy for lowering the age of legal minority to 12, juvenile court jurisdiction remains limited to juveniles ages 14 to 18 due to persistent lobbying by the protective services).

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ NAT’L COLLABORATION FOR YOUTH & NAT’L JUV. JUST. NETWORK, HUMAN RIGHTS AS A CATALYST FOR JUVENILE JUSTICE REFORM, Policy Brief No. 3, (2006) at 2.

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system.¹¹⁹ The use of international law has generally been limited to the policy realm or by guiding the Supreme Court in finding certain punishments sufficiently cruel and unusual to be constitutionally impermissible to apply to minors.¹²⁰

Minors in conflict with the law are formally accused of “delinquency,” conduct committed by a minor that would be a crime if committed by an adult, upon referral to a juvenile court by law enforcement, social services, schools, parents, probation officers, or victims.¹²¹ Juvenile courts also have jurisdiction over youth who commit status offenses, acts that are illegal only because the person committing them is a juvenile.¹²² The five major status offenses are running away, truancy, curfew violations, ungovernability (beyond the control of one’s parents), and underage alcohol violations.¹²³ Although the majority of status offenses are handled outside the formal justice system through schools or social service agencies, adjudication of status offenses may result in probation or detention.¹²⁴

There is no national minimum age of criminal responsibility in the United States; individual states may set their respective minimums. Some states have enacted minimums as low as 7, most are between 10 and 18, and some states have no minimum at all.¹²⁵ The closest analog to a national minimum was set by the Violent Crime Control and Law Enforcement Act of 1994, which allows children as young as 13 to be tried as adults in federal courts when charged with certain felonies like murder and bank robbery.¹²⁶ States also differ in their mechanism for transferring cases between juvenile and adult courts. More than half of states allow children ages 12 and above to be transferred to adult court through one of the following mechanisms: automatically in the prosecution of certain serious crimes, at the judge’s discretion, at the prosecutor’s discretion, or automatically because the child was previously tried as an adult.¹²⁷

The legal authority for the special treatment of juveniles in criminal proceedings in the United States emerged in *Ex Parte Crouse*, a decision by the Pennsylvania Supreme Court in 1839. That decision authorized judges and local bureaucrats to admit juveniles into reformatories based on a determination that it was in the child’s best interest for the state to provide services traditionally provided

¹¹⁹ *Id.* at 4.

¹²⁰ See *Thompson v. Oklahoma*, 487 U.S. 815 (1988) (holding the death penalty for youth under 16 unconstitutional based on “evolving standards of decency” reflected in treaties like the ICCPR); *Roper v. Simmons*, 543 U.S. 551, 577 (2005) (citing the CRC as a reflection of international consensus that the death penalty is too cruel and unusual to be imposed on minors); see also *Graham v. Florida*, 560 U.S. 48, 81 (2010) (citing Art. 37(a) of the CRC as a reflection of international consensus prohibiting imposition of life imprisonment without possibility of release for minors under the age of 18).

¹²¹ Sarah Hockenberry & Charles Puzanchera, *Juvenile Court Statistics 2019*, NAT’L CTR. FOR JUV. JUST. at 5 (Jun. 2021).

¹²² *Id.* at 63.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ INTER-AM. COMM’N H.R., *supra* note 1, at 13.

¹²⁶ Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796.

¹²⁷ INTER-AM. COMM’N H.R., *supra* note 1, at 24.

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by parents where the latter proved incapable of doing so.¹²⁸ *Ex Parte Crouse* cemented *parens patriae* as the legal doctrine justifying the American judiciary’s resolution of the tension in the early nineteenth century between enduring notions of traditional male authority over the family and modern concerns for the interests of children and mothers.¹²⁹ Denying the *habeas corpus* petition of a father because of the mother’s inability to parent placed *parens patriae* and the state’s claim to intervene on behalf of the child above the traditional role of the father as the dominant force within the family. Social reformers followed this calling to troubled youth by constructing institutions dedicated to rehabilitation in a separate facility from adult offenders.¹³⁰ The natural sequitur was a separate institution dedicated to an “informal, nonadversarial, and flexible approach;” Chicago opened the world’s first juvenile court in 1899 and most states followed within the next twenty-five years.¹³¹ The U.S. pioneered a specialized approach to youth within the criminal justice system that reached its peak in the 1970s with the implementation of community programs, diversion, and de-institutionalization but receded significantly with tough-on-crime laws in the 1980s to traditional incarceration-centric punishment.¹³²

IV. DISCUSSION

A. *The Minimum Age of Criminal Responsibility and Maturity*

The fundamental boundaries of any juvenile justice system are the upper and lower limits of its age jurisdiction, as defined by the minimum age of criminal responsibility and the age of majority. While countries have individual minimum ages of criminal responsibility, there is international consensus that 18 is the age of majority.¹³³ Thus, this discussion is limited to the different minimum ages of criminal responsibility adopted by the selected countries and how they are shaped by international law and domestic traditions. Historically, English common law recognized “infants” as people incapable of committing a crime because they were too young to fully understand their actions.¹³⁴ Blackstone and his contemporaries considered 7 to be legal minority, the earliest age to be found guilty of a crime, and 14 as the age of adult criminal responsibility.¹³⁵ Between the ages of 7 and 14, children were presumed incapable of committing a crime but could nevertheless be convicted if evidence indicated the child understood the difference between right and wrong.¹³⁶

¹²⁸ *Ex Parte Crouse*, 4 Whart. 9 (Pa. 1793).

¹²⁹ *Id.*

¹³⁰ ABA DIV. FOR PUB. EDUC., *DIALOGUE ON YOUTH AND JUSTICE* 5 (2007).

¹³¹ *Id.*

¹³² INTER-AM. COMM’N H.R., *CHILDREN AND ADOLESCENTS IN THE UNITED STATES’ ADULT CRIMINAL JUSTICE SYSTEM* 25-26 (2018).

¹³³ *Mendoza et al. v. Argentina*, *Preliminary Objections, Merits, and Reparations* (2013) at ¶67.

¹³⁴ ABA DIV. FOR PUB. EDUC., *supra* note 129, at 4.

¹³⁵ *Id.*

¹³⁶ *Id.*

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The minimum ages of criminal responsibility for the selected countries are: Argentina (16), Colombia (14), Mexico (12), and Spain (14). The United States has no federal minimum age of prosecution; states have set minimums ranging from 7-13 years old, to the extent that they have even set a minimum.¹³⁷ In practice, Argentina has imperfectly adhered to its stated minimum age of criminal responsibility – the IACHR “observes that some children and adolescents under 16 years of age are deprived of their liberty for the sake of their ‘protection’ based on the fact that [Argentine law states] that ‘if the studies show that the minor has been abandoned, is indigent, is in material or moral danger, or has behavioral problems, the judge shall decide the matter once and for all, in a reasoned judgment and after a hearing with the parents or guardian.’”¹³⁸

Contemporary international law is divided – while the UN CRC does not suggest a minimum age of criminal responsibility, it requires countries to clearly define one by law “that is not too low”¹³⁹ The Committee has suggested a minimum age of criminal responsibility below the age of 12 would not be internationally acceptable.¹⁴⁰ It recently noted the most common minimum age of criminal responsibility internationally is 14 and “commended” states that have set minimums of 15 or 16 years of age.¹⁴¹ Interpreting the American Convention, the American Declaration, and the UN CRC, the IACHR has stated the minimum age of criminal responsibility “must be interpreted in light of present-day conditions,” thus while it appeared internationally acceptable to set a minimum age of 12, reform should follow the path of states who have raised their minimums in recent years.¹⁴² The COE asserts the ECHR does not suggest a minimum age of criminal responsibility, instead requiring that it not be too low and be defined by law (as of 2010, members of the European Union had adopted minimum ages of criminal responsibility ranging from 8 to 18).¹⁴³

B. Detention and Sentencing Limits on Juvenile Offenders

Juvenile justice systems in the selected countries have followed the global trend away from corporal punishment towards reliance on deprivation of liberty and reparative interventions. This shift has challenged the traditional boundaries of acceptable forms of punishment of children in conflict with the law and manifested in universal condemnation of the physical torture of children, but countries remain in disagreement on the limits of confinement. Specifically, countries disagree on

¹³⁷ NAT’L JUV. JUST. NETWORK, *Raising the Minimum Age for Prosecuting Children*, <https://www.njjn.org/our-work/raising-the-minimum-age-for-prosecuting-children> (last visited Apr. 28, 2023).

¹³⁸ INTER-AM. COMM’N H.R., *supra* note 1, at 15.

¹³⁹ U.N. Convention on the Rights of the Child, *supra* note 13 at art. 40(3)(a).

¹⁴⁰ U.N. Comm. on the Rights of the Child, General Comment No. 10, Children’s Rights in Juvenile Justice, U.N. Doc. CRC/C/GC/10, ¶¶ 32-33 (Apr. 25, 2007).

¹⁴¹ U.N. Comm. on the Rights of the Child, *General Comment No. 24 (2019) Children’s Rights in the Child Justice System*, CRC/C/GC/24, ¶¶ 21, 22 (Nov. 11, 2019).

¹⁴² INTER-AM. COMM’N H.R., *supra* note 1, at 13.

¹⁴³ EUR. CONSULT. ASS., *supra* note 5, at 25, 69.

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whether and how preventive detention and sentences of life without parole may be imposed on minors. These issues are important because of their potential for abuse: the IACHR has documented persisting problems within the Americas, including improper use of solitary confinement,¹⁴⁴ excessive reliance on preventive detention, and failure to otherwise protect children while in confinement.¹⁴⁵

In the United States, the doctrine of *parens patriae* frames preventive detention as protecting children from the consequences to themselves of their continued criminal activity (e.g., physical injury when a victim resists or police make an arrest), thus it is not considered punishment but positive intervention in the best interests of the child.¹⁴⁶ The ECHR frames preventive detention completely differently, admitting its potential for use only in certain necessary cases, “for example, to avoid the risk of tampering with evidence, influencing witnesses, or when there is a risk of collusion or flight.”¹⁴⁷ The IACHR recognizes preventive detention as a practical necessity to ensure the minor is present for the duration of the juvenile justice process but expressly rejects the notion that the labeling of precautionary detention makes it any less depriving of liberty than traditional incarceration.¹⁴⁸

Sentencing minors to life without parole violates Art. 37 of the UN CRC, which prohibits the imposition of such sentences on minors because it contravenes the juvenile justice objectives of rehabilitation and reintegration into society. As the IACHR has held, these goals are impossible to accomplish by contemplating no possibility of future release into the community.¹⁴⁹ Colombia does not allow the imposition of a life sentence; the maximum sentence is 8 years.¹⁵⁰ Mexico also prohibits life sentences; the maximum sentence is 5 years, and only for youth older than 16.¹⁵¹ Spain prohibits life sentences and imposes greater criminal responsibility as children near maturity: youth ages 14 and 15 may be sentenced to a maximum of 5 years, and youth ages 16 and 17 may be sentenced up to 8 years.¹⁵²

Nevertheless, the United States and Argentina continue this practice. In the U.S., the federal government and 42 states have statutes allowing children to be charged as adults and sentenced to life without parole.¹⁵³ At least 2,500 people are

¹⁴⁴ See INTER-AM. COMM’N H.R., *supra* note 1, at 144 (reprimanding Colombian “reflection rooms” as “small, dark and damp rooms with no bathroom; girls and boys alike have to sleep on the floor...it is obvious...that these are solitary confinement cells used for disciplinary reasons”); see also INTER-AM. COMM’N H.R., *supra* note 129, at 95 (reprimanding the U.S. for subjecting minors to solitary confinement in adult facilities).

¹⁴⁵ INTER-AM. COMM’N H.R., *supra* note 1, at 66.

¹⁴⁶ *Id.*

¹⁴⁷ EUR. CONSULT. ASS., *supra* note 5, at 67.

¹⁴⁸ See INTER-AM. COMM’N H.R., JUVENILE JUSTICE AND HUMAN RIGHTS IN THE AMERICAS 73 (2011).

¹⁴⁹ *Id.* at 93.

¹⁵⁰ *Id.* at 95.

¹⁵¹ LNSIIPA art. 109 (Mex.).

¹⁵² Fernández-Molina, *supra* note 110, at 422-23.

¹⁵³ Wallace J. Mlyniec, *The Implications of Articles 37 and 40 of the Convention on the Rights of the Child for U.S. Juvenile Justice and U.S. Ratification of the Convention*, 89(5) Child Welfare 103, 113 (2010).

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serving life sentences in the U.S. for crimes committed when they were minors.¹⁵⁴ Argentina’s Decree-Law 22,278 exposes juvenile offenders, ages 16 to 18, to the maximum sentences allowed under the Argentine Penal Code, including life imprisonment.¹⁵⁵

C. Maintenance of Separate Facilities for Youth and Adults

The requirement to maintain separate facilities for incarcerated youth and their adult counterparts arises from the inherent vulnerability of minors and the state’s duty to protect people who have been deprived of liberty. That duty includes obligations to protect children from abuse and to provide them with necessities like food and medical care.

The countries discussed in this article have an imperfect record of compliance with their obligations to protect minors confined by the state. For example, the IACHR has reprimanded Argentina for violating Art. 5(2) of the American Convention for failing to provide incarcerated children access to routine medical care.¹⁵⁶ Confinement conditions for incarcerated youth are a widespread issue in the Americas. In 2009, the IACHR requested Brazil take action to protect the life and physical integrity of minors in confinement, citing state agents and other adolescents beating and torturing incarcerated youth.¹⁵⁷

In the United States, the federal Juvenile Justice and Delinquency Prevention Act (JJDP A) requires that youth in the juvenile justice system reside in different facilities from adults or be sight-and-sound separated from adults.¹⁵⁸ Such protections did not apply to minors charged as adults until the JJDP A was amended in 2018, when Congress ordered all youth held for pretrial detention in adult jails to be transferred to juvenile detention centers by December 21, 2021, unless a court found that keeping a minor in an adult jail was “in the interest of justice.”¹⁵⁹ Although the 2018 amendment closes an important gap in the JJDP A, evidence suggests that the original provisions of the JJDP A are ineffective even where they apply— nearly 3,000 minors are held daily in adult prisons and over 6,000 are

¹⁵⁴ See INTER-AM. COMM’N H.R., *supra* note 1, at 94.

¹⁵⁵ *Id.*

¹⁵⁶ *Mendoza et al. v. Argentina*, *supra* note 55, at ¶195 (reprimanding Argentina after a child went blind because of treatable illness preventable by basic medical care).

¹⁵⁷ See *Adolescents Deprived of Liberty in the Socio-Educational Internment Facility (UNIS), Brazil*, Precautionary Measures, Inter-Am. Ct. H.R. (Nov. 25, 2009).

¹⁵⁸ CAMPAIGN FOR YOUTH JUST., KEY FACTS: YOUTH IN THE JUSTICE SYSTEM 4–5 (2018) at 4–5.

¹⁵⁹ Campaign of the Nat’l Juv. Justice & Delinquency Prevention Coalition, *Juvenile Justice and Delinquency Prevention (JJDP A) Fact Sheet Series*, (Feb. 2019), ,

http://www.act4jj.org/sites/default/files/resource-files/Jail%20Removal%20and%20Sight%20and%20Sound%20Separation%20Fact%20Sheet_0.pdf. (To determine whether detention in an adult facility is “in the interest of justice,” courts weigh seven factors: 1) the person’s age, 2) their physical and mental maturity, 3) their present mental state, 4) the nature and circumstances of the charges, 5) the youth’s history of delinquency, 6) the relative ability of available adult and juvenile facilities to both meet the needs of the individual but to protect the public and other youth in their custody, and 7) “any other relevant factor”).

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confined in adult jails.¹⁶⁰ The IACHR has criticized the JJDPa and its loophole for minors charged as adults, finding it fails to nationally require the separation of youth from adults in adult facilities as is the international consensus.¹⁶¹ Further, the IACHR has reprimanded the U.S. for failing to adequately protect children while in pretrial detention, citing intermingling of youth with adults in violation of Art. 10 of the ICCPR, which requires any youth accused of committing a crime to be held separate from adults.¹⁶² While the Department of Justice Civil Rights Division investigates the conditions of juvenile correctional facilities,¹⁶³ serious problems persist and such coverage fails to protect minors in adult facilities. For example, minors in adult jails are five times more likely to commit suicide than their counterparts in juvenile facilities and are at the highest risk of sexual abuse in the prison system.¹⁶⁴ Facilities often resort to placing youth in solitary confinement to effectively separate them from adults, exacerbating the mental health issues of children in conflict with the law.¹⁶⁵

V. SOLUTIONS FOR THE UNITED STATES

The United States must reform its juvenile justice system to better protect the rights of children in conflict with the law. While there are many opportunities for improvement, the following solutions target significant weaknesses in the juvenile justice system. These solutions reduce the stigmatization of children under 14, align youth sentencing with modern international principles regarding the limits of such sentencing, and better protect youth by preventing their abuse in adult facilities.

A. *Set a Minimum Age of Criminal Responsibility of at least 14*

States should set a minimum age of criminal responsibility of at least 14 to avoid the harm associated with early court intervention while protecting the due process rights of children in conflict with the law. As of January 2022, 26 states did not have a minimum age of prosecution; those that did adopt minimums of 7-13 years old.¹⁶⁶ Youth under 15, especially those under 12, often lack the cognitive maturity to understand legal proceedings and are likely to be found incompetent to stand trial.¹⁶⁷ Funding may need to be reallocated to ensure children under 14

¹⁶⁰ INTER-AM. COMM’N H.R., *supra* note 131, at 91.

¹⁶¹ *Id.* at 94.

¹⁶² *Id.* at 114–15.

¹⁶³ U.S. Dep’t of Just., *Justice Department Announces Investigation into Conditions at Five Juvenile Facilities in Texas* (Oct. 13, 2021), <https://www.justice.gov/opa/pr/justice-department-announces-investigation-conditions-five-juvenile-facilities-texas>.

¹⁶⁴ CAMPAIGN FOR YOUTH JUST., *supra* note 157, at 6.

¹⁶⁵ *Id.* at 5.

¹⁶⁶ NAT’L JUV. JUST. NETWORK, *supra* note 136.

¹⁶⁷ Thomas Grisso. *Evaluating Juveniles' Adjudicative Competence: A Guide for Clinical Practice*. PRO. RES. PRESS (2005). Eraka Bath & Joan Gerring, *National Trends in Juvenile Competency to Stand Trial*, 53(3) J. OF THE AM. ACAD. OF CHILD AND ADOLESCENT PSYCHIATRY. 265-8, 268 (2014).

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receive social services, but engaging with children under 14 using the juvenile justice system labels them as criminals and exposes them to harm. Early contact with the juvenile justice system has a negative impact on future behaviors that increases the earlier court intervention begins.¹⁶⁸ Stigmatization of children in conflict with the law is a pervasive issue in the Americas, especially for those recruited into gangs or other organized crime.¹⁶⁹ The IACHR suggests such stigma can be holistically prevented by relegating incarceration to a means of last resort in favor of education, health, and protection interventions designed to reinforce the positive rights of the child and provide them stability.¹⁷⁰ By adopting an age of minimum responsibility of at least 14, states can take a step towards the prevention of such harm and stigma and reorient government engagement with youth under 14 towards protection; not control.

B. Restrict Life Without Parole to People Older than 18

The United States should restrict the imposition of sentences of life without parole to people above the age of 18 in recognition that it contravenes the objective of reintegrating the juvenile offender into society. The United States expressly violates Art. 37 of the UN CRC, which prohibits sentencing minors to life imprisonment without parole, because the federal government and 42 states have statutes allowing children to be charged as adults and sentenced to life without parole¹⁷¹ (at least 2,500 people are serving life sentences in the United States for crimes committed when they were minors).¹⁷² The ACLU of Michigan has urged the IACHR to reprimand the continued use of sentences of life imprisonment without parole, citing the UN CRC, ICCPR, and other human rights treaties in the ACLU’s effort to find relief for 32 people from the State of Michigan who were sentenced to life sentences for offenses they committed as children.¹⁷³ This follows a request by the United Nations Human Rights Committee (UNHRC) in July 2006 asking the U.S. to ensure no further juveniles were sentenced to life without parole.¹⁷⁴ That same year, the UN Committee Against Torture (CAT) expressed concern about life sentences for minors and the holding of juveniles in adult prisons.¹⁷⁵ Although rehabilitation and “successful” reintegration of youth into the community are stated goals of the U.S. juvenile justice system,¹⁷⁶ sentences of life without parole directly contravene these objectives by contemplating no possibility of future release into the community.

¹⁶⁸ Barnert et al., *Setting a Minimum Age for Juvenile Justice Jurisdiction in California*, 13(1) INT. J. PRISON HEALTH (2017).

¹⁶⁹ INTER-AM. COMM’N H.R., *supra* note 1, at 41.

¹⁷⁰ *Id.*

¹⁷¹ Mlyniec, *supra* note 153, at 113.

¹⁷² *See* INTER-AM. COMM’N H.R., *supra* note 1, at 94.

¹⁷³ *See* Hill et al. v. U.S., Inter-Am. Ct. H.R. (ser. C) No. 12.866 (filed Feb. 21, 2006).

¹⁷⁴ NAT’L JUV. JUST. NETWORK, *supra* note 115, at 4.

¹⁷⁵ *Id.*

¹⁷⁶ Youth.gov, *Juvenile Justice*, <https://youth.gov/youth-topics/juvenile-justice> (last visited Apr. 28, 2023).

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C. Enforce the Requirement to Maintain Separate Facilities for Youth and Adults

The United States should enforce the requirement to separate juvenile offenders from adults. Although the federal Juvenile Justice and Delinquency Prevention Act (JJDP A) requires that youth in the juvenile justice system reside in different facilities from adults or be sight-and-sound separated from adults, such protections do not apply to minors charged as adults whose detention in an adult facility is “in the interest of justice” or to minors convicted as adults.¹⁷⁷ Minors in adult jails are five times more likely to commit suicide than their counterparts in juvenile facilities and are at the highest risk of sexual abuse of any group in the prison system.¹⁷⁸ Facilities often resort to placing juvenile offenders in solitary confinement to effectively separate them from adults, exacerbating the mental health issues of juvenile offenders.¹⁷⁹ No further legislation is needed to remedy this problem – the Department of Justice (“DOJ”) Civil Rights Division should follow its current investigation into the conditions of juvenile correctional facilities in Texas¹⁸⁰ with similar inquiries in other states. The Ware Youth Center in Louisiana is a prime target for DOJ intervention and illustrates the shortcomings of state oversight – two Louisiana agencies control Ware’s funding and licensing and routinely inspect and audit the facility, yet neither has issued fines or revoked contracts or licenses despite a record of documented abuses.¹⁸¹ These investigations leverage DOJ authority under the Civil Rights of Institutionalized Persons Act (“CRIPA”)¹⁸² to review conditions and practices in juvenile justice institutions and sue states or local governments to bring their institutions into compliance with the JJDP A.¹⁸³

VI. CONCLUSION

The United States must reform its juvenile justice system to embrace a rights-based approach to better protect the rights of children in conflict with the law. While the United States is a party to the ICCPR and constitutionally recognizes some protections for youth, it fails juvenile offenders by defining such a group too broadly through no national minimum age of criminal responsibility, exposing juvenile offenders to life without parole, and failing to separate incarcerated youth from adults. While there are many opportunities for improvement of the juvenile

¹⁷⁷ CAMPAIGN FOR YOUTH JUST., *supra* note 158, at 4-5.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ U.S. Dep’t of Just., *supra* note 162.

¹⁸¹ Megan Shutzer & Rachel Lauren Mueller, ‘Dying Inside’: Chaos and Cruelty in Louisiana Juvenile Detention, N.Y. TIMES (Oct. 30, 2022), <https://www.nytimes.com/interactive/2022/10/29/us/juvenile-detention-abuses-louisiana.html>.

¹⁸² 42 U.S.C. § 1997a.

¹⁸³ U.S. Dep’t of Just., *Rights of Juveniles*, <https://www.justice.gov/crt/rights-juveniles> (last visited Apr. 28, 2023) (for example, the DOJ “obtained a comprehensive agreement that addresses suicide prevention, how youth are disciplined, keeping youth safe from physical and sexual abuse and staff accountability” in Louisiana).

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justice system, these reforms target significant weaknesses by reducing the stigmatization of children under 14, aligning juvenile sentencing with modern international principles regarding the limits of such sentencing, and better protecting juvenile offenders by preventing their abuse in adult facilities.