

TOO YOUNG FOR THE SYSTEM: WHAT THE UNITED STATES CAN LEARN FROM INTERNATIONAL LAW ON THE MINIMUM AGE OF CRIMINAL RESPONSIBILITY

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INTRODUCTION

It was a Friday morning in May when Indiana spring was finally in full force and schools were weeks away from letting out for summer vacation.¹ After nine in the morning, ambulances raced the streets in response to a report of an active shooter at a local middle school. It spread quickly that there were two people shot within the building, but what was even more shocking to the community was that a thirteen-year-old student pulled the trigger.² It was a time when several Indiana residents traversed deep into the rabbit hole on how the juvenile justice system operates and handles children who commit crimes that shake communities in the way that this one did.

The student was charged in the juvenile court.³ This meant that the student was too young—under fourteen—to be charged as an adult for attempted murder under Indiana law.⁴ The courtroom felt the pressure as the student was ordered to a maximum-security juvenile detention facility until the age of eighteen.⁵ Many individuals who were impacted by this incident, especially those without knowledge of the law, had different opinions on what the punishment should be for any person who commits attempted murder and whether that person should be provided with the maximum sentence afforded by law. What often seemed to be missing from consideration among these debates was the age of the person in question and the limitations that should come with that. What would the response have been if the student was younger than thirteen or if this incident happened in a different state within the United States? The issue of age goes beyond just serious crimes such as this one, as statistics show that most crimes committed by younger individuals are considered to be delinquent acts that can only be carried out by juveniles.⁶ These questions plague juvenile rights advocates and lawyers all over the world on how children are handled when crime comes into play.

The idea of the juvenile justice system is that it operates under the knowledge that “youth are fundamentally different from adults, both in terms of level of responsibility and potential for rehabilitation,”⁷ but some countries around the

1. Vic Ryckaert et al., *Noblesville School Shooter Sent to Juvenile Jail: 'You Took This Community's Sense of Safety'*, INDYSTAR (Nov. 14, 2018, 10:06 AM), <https://www.indystar.com/story/news/local/hamilton-county/education/2018/11/14/noblesville-west-middle-school-shooter-indiana-shooting-sentenced/1994561002/> [<https://perma.cc/N94E-AFJL>].

2. *Id.*

3. Lauren Chapman, *Noblesville Shooting Suspect Will Not Be Tried As an Adult*, WFYI (June 6, 2018), <https://www.wfyi.org/news/articles/noblesville-shooting-suspect-will-not-be-tried-as-an-adult> [<https://perma.cc/5XU3-M3UV>].

4. *Id.*

5. Ryckaert et al., *supra* note 1.

6. United Nations, *United Nations Fact Sheet on Youth*, DEP'T OF ECON. & SOC. AFFS. 1, <https://www.un.org/esa/socdev/unyin/documents/wyr11/FactSheetonYouthandJuvenileJustice.pdf> [<https://perma.cc/46DM-PVE5>].

7. *Juvenile Justice*, YOUTH.GOV, <https://youth.gov/youth-topics/juvenile-justice>

world are criminalizing children as young as seven years old with a retributive model.⁸ Juvenile justice has been a topic of controversial discussion for quite some time now as people begin to question what age is reasonable for a child to be held accountable for a crime—delinquent or not.

The purpose of this Note is to address the need for the United States to follow the international standards for the minimum age of criminal responsibility (“MACR”) and advocate for state legislatures to raise their minimum ages to reflect no criminal responsibility below the age of twelve, taking into consideration the emotional, mental, and intellectual development of children and adolescents. Part I of this Note will address the history of the juvenile justice system and the reform efforts sought throughout many decades by advocates, both in the United States and internationally. Part II will discuss the minimum age of criminal responsibility in practice, the international standards set forward through the four United Nations (U.N.) international conventions addressing youth, and the benefits that would come from the United States following what is set out in the Convention on the Rights of the Child (CRC). In the absence of the United States joining its fellow U.N. Member States in the ratification of the CRC, Part II will also provide model legislation which states can consider when raising its MACR. Part III will break down the reasons why the current minimum ages of criminal responsibility in the United States are concerning and why many factors of a juvenile’s life should be provided with more weight when assessing the MACR. Part IV analyzes the importance of each state raising its MACR and the positive impact it would have on the juvenile justice system in the United States. It will also provide recommendations on how the states can address any challenges that would result from adopting a higher MACR and how these solutions focus on the best interests of children. Lastly, Part V emphasizes the need for change in the United States juvenile justice system and calls for the States to follow international models on addressing youth crime.

I. DEVELOPMENT OF THE JUVENILE JUSTICE SYSTEM

A. *The Juvenile Court at Its Inception*

Age did not always play a part in the justice system. Until the late nineteenth century, juveniles were punished under the criminal courts in the same way as adults, regardless of the crime and offense.⁹ Children were bound by the laws that would criminalize them as if they were adults, yet they had no voice or place to

[<https://perma.cc/H52R-YTBU>].

8. PENAL REFORM INT’L, JUSTICE FOR CHILDREN BRIEFING NO. 4: THE MINIMUM AGE OF CRIMINAL RESPONSIBILITY 1 (Feb. 2013), https://cdn.penalreform.org/wp-content/uploads/2013/05/justice-for-children-briefing-4-v6-web_0.pdf [<https://perma.cc/QBY9-UBUH>].

9. STA Law Firm, *United Arab Emirates: International Perspective on Juvenile Justice*, MONDAQ (Mar. 29, 2019), <https://www.stalawfirm.com/en/blogs/view/international-perspective-on-juvenile-justice.html> [<https://perma.cc/BG2S-USE7>].

challenge these laws.¹⁰ However, as the legal system continued to develop, it became clear that a line needed to be drawn between juvenile and adult offenses.¹¹

The world's first juvenile court was in Chicago, Illinois, which opened in July of 1899.¹² The purpose of the court was to make the separation between criminal court and rehabilitation. In doing so, it focused on providing therapeutic services and diverting children away from the system.¹³ It prioritized rehabilitation as it was believed that children had a "greater capacity for change" than their fully developed adult counterparts.¹⁴ It operated under the idea that a child is incapable of reform if the simple response to children who commit crimes is punishment.¹⁵

According to the United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules"), a juvenile is a "child or young person who, under the respective legal systems, may be dealt with for an offense in a manner which is different from an adult."¹⁶ The United States Code defines it more objectively—a child who has yet to hit their eighteenth birthday.¹⁷

The decisions of the juvenile court were made by judges and probation officers during this time.¹⁸ These two players of the criminal justice system decided when to file delinquent petitions, what offenses required detention, and even which juveniles were waived to the adult criminal justice system for prosecution.¹⁹ Furthermore, the concept of *parens patriae* started to play a part in the juvenile court.²⁰ This concept signified that the court—as an agent of the state—had the "ultimate responsibility for junior citizens," and the juvenile court would act less as a criminal court and more as a statutory court that acts in the

10. David S. Tanenhaus, *First Things First: Juvenile Justice Reform in Historical Context*, 46 TEX. TECH L. REV. 281, 282 (2013).

11. See STA Law Firm, *supra* note 9 ("Until recently, the law relating to the commission of crimes by the juveniles was under a dilemma, and now with the evolution of jurisprudence, the legal system is more explicit concerning juvenile delinquency.").

12. Tanenhaus, *supra* note 10, at 282.

13. *Id.*

14. *Youth in the Justice System: An Overview*, JUV. L. CTR. (Mar. 22, 2018), <https://jlc.org/youth-justice-system-overview> [<https://perma.cc/9ZT9-F5XH>].

15. Tanenhaus, *supra* note 10, at 282.

16. G.A. Res. 40/33, annex, United Nations Standard Minimum Rules for the Administration of Juvenile Justice at 207 (Nov. 29, 1985) (quoting General Principle 2.2(a)) [hereinafter *The Beijing Rules*].

17. 18 U.S.C.A. § 5031 (1994).

18. Tanenhaus *supra* note 10, at 284.

19. *Id.*

20. Philip Reichel & Jay Albanese, *Comparing and Delivering Juvenile Justice Across the World*, in WOMEN AND CHILDREN AS VICTIMS AND OFFENDERS: BACKGROUND, PREVENTION, REINTEGRATION 783, 785 (Evelyn Shea et al., eds., 2016), https://www.researchgate.net/publication/304189558_Comparing_and_Delivering_Juvenile_Justice_Across_the_World [<https://perma.cc/JN4V-XT66>].

best interests of the child.²¹

In October of 1905, the Supreme Court of Pennsylvania entertained the idea of different punishments for individuals who commit the same offense in accordance with their age in *Commonwealth v. Fisher*.²² This was a leading case on the constitutionality of juvenile courts,²³ looking to move away from looking at punishment, and more toward the “salvation of children.”²⁴ Even though this was the goal, the Court opposed the notion that the juvenile court deprived children of any due process that is usually guaranteed to an adult charged in criminal court.²⁵

Fast forward to 1967, the Supreme Court of the United States heard *In re Gault*.²⁶ After *Fisher* decided that juvenile court laws were constitutional under due process,²⁷ the Supreme Court’s majority opinion in *In re Gault* disagreed and found that the rules at the time did not necessarily mean that children were receiving the compassionate treatment that they needed, despite the separate system.²⁸ It stressed that due process of law is the “primary and indispensable foundation of individual freedom” and should be afforded to juveniles just the same.²⁹ This was a monumental decision in the history of the juvenile justice system, as it held that a juvenile has the right to notice of charges, right to confrontation and cross-examination of witnesses, and the privilege against self-incrimination.³⁰

As time progressed, the juvenile justice system evolved at the international level by recognizing children’s rights and the need for a completely separate system. This approach was favored by most early reformers,³¹ as it aimed away from long prison sentences and focused on maintaining due process for children. However, there were still many things that the juvenile system was failing to address, such as the minimum age in which juveniles can enter this separate system.

21. *Id.*

22. *See generally* *Commonwealth v. Fisher*, 62 A. 198 (Pa. 1905) (determining whether *Fisher* was denied his state and federal constitutional rights to due process, such as effective counsel, fair jury instructions, etc).

23. *Tanenhaus supra* note 10, at 283.

24. *Fisher*, 62 A. at 199.

25. *Tanenhaus supra* note 10, at 283.

26. *In re Gault*, 387 U.S. 1 (1967).

27. *See generally Fisher*, 62 A. at 200-01 (finding that none of the juvenile’s arguments against constitutionality could have been sustained and that the enactment was an “exercise by the state of its supreme power over the welfare of its children.”).

28. *Gault*, 387 U.S. at 18.

29. *Id.* at 20.

30. *Id.* at 10, 33, 47, and 55.

31. *See generally* *Tanenhaus supra* note 10, at 283 (“[w]ithin a generation, ‘the American juvenile court ideal—that children’s cases should be diverted from the criminal justice system and handled in a separate system that emphasized rehabilitation over punishment—had quickly spread,’ nationally and internationally.”).

B. Juvenile Justice System Today

Children and adolescents are different from their adult counterparts. This is recognized by many lawmakers today and there are many research studies to back it up. Not only has more data been collected on the best ways to rehabilitate youth, but also to demonstrate the need for “developmentally appropriate” juvenile justice policies.³² Researchers who specialize in adolescent behavioral psychology have found three noteworthy differences between adults and youth through their studies: “[1] adolescents are less able to self-regulate in emotionally charged situations than adults; [2] they have a heightened sensitivity to peer pressure and immediate incentives; and [3] they are less able to consider the long-term consequences of their actions.”³³ Other studies have found that characteristics of juvenile offenders include impulse control difficulties and Attention Deficit Hyperactivity Disorder (ADHD), and that many currently live or have previously lived in homes with domestic violence, child maltreatment, and substance abuse.³⁴

The juvenile justice system today still follows the idea that rehabilitation should be the main priority and continues to distinguish itself from the criminal justice system.³⁵ This system significantly handles delinquency, which is defined as criminal acts committed by an individual who was under the age of eighteen at the time.³⁶ Juvenile laws in some areas, notably the United States and Germany, allow children to stay “under the supervision of the juvenile court” until their twenty-first birthday.³⁷ While under this supervision, they are entitled to educational and therapeutic programming.³⁸ Juveniles usually get the benefit of attending private court hearings that are closed to the public, allowing them to avoid the unfortunate stigma that comes along with being involved in the criminal justice system.³⁹ However, these private hearings cannot always be guaranteed, which can later create roadblocks to “obtaining employment, serving in the military, or enrolling in higher education programs.”⁴⁰

Juveniles are highly represented in recent statistics on crime, as both

32. BENJAMIN CHAMBERS & ANNIE BALCK, JOHN D. & CATHERINE T. MACARTHUR FOUND., *BECAUSE KIDS ARE DIFFERENT: FIVE OPPORTUNITIES FOR REFORMING THE JUVENILE JUSTICE SYSTEM, MODELS FOR CHANGE 5* (2014).

33. *Id.*

34. William Halikias, *Understanding the Adolescent Offender: The Contributions of Psychology to Juvenile Justice*, 24-DEC VT. B.J. & L. DIG. 22, 23 (1998).

35. *Youth in the Justice System: An Overview*, *supra* note 14.

36. *Id.*

37. *Id.*; see also Maurice Chammah, *How Germany Treats Juveniles: Inside the German Prison System, Day Four*, THE MARSHALL PROJECT (June 19, 2015, 7:15 AM), <https://www.themarshallproject.org/2015/06/19/how-germany-treats-juveniles> [<https://perma.cc/FC9B-B6JQ>].

38. *Id.*

39. *Id.*

40. *Id.*

perpetrators and victims.⁴¹ Significant research has been done on adolescent development and the outside pressures that contribute to this increase in juvenile crime, which has led to changes in the international response to youth in the system. Incarceration and detention are both still very prominent internationally, even for juvenile crimes that are relatively minor.⁴² Juvenile arrest rates have gone up and down over the last twenty years, and arrests amongst males have stayed consistently greater than females according to the National Center for Juvenile Justice.⁴³ In the numbers from 2019, the highest number of arrests were related to property crime, drug abuse, simple assault, and larceny-theft.⁴⁴

Despite the significant changes seen within the juvenile justice system since its inception, some countries still take extreme punitive measures against youth who commit crimes. The United Nations International Children's Emergency Fund ("UNICEF") has estimated that "more than one million children are behind bars around the world"—some being in "decrepit, abusive, and demeaning conditions."⁴⁵ Since 2010, juvenile offenders are still being sentenced to death in countries like Egypt, Iran, Maldives, Pakistan, Saudi Arabia, Sri Lanka, Sudan, and Yemen.⁴⁶ Additionally, in the United States some children are subject to prosecution in adult criminal courts depending on the seriousness of their offenses.⁴⁷

Many juvenile justice advocates started to look at the increase of juvenile punishment from a scientific lens to assess adolescent decision-making and youthful culpability. The MacArthur Foundation Research Network on Adolescent Development & Juvenile Justice has conducted studies on the competence to stand trial, psychopathy, and culpability to provide some insight into why the treatment of juveniles around the world needs improvement.⁴⁸

Even with the large goals the juvenile justice system is attempting to achieve with rehabilitation, juvenile courts are often provided with little resources.⁴⁹ Further, many people in the public disagree with the system's therapeutic approach, pushing for more punitive measures to establish accountability for

41. *United Nations Fact Sheet on Youth*, *supra* note 6, at 1.

42. *Id.*

43. *Nat'l Ctr. for Juv. Just., Juvenile Arrest Rates by Offense, Sex, and Race*, OFF. OF JUV. JUST. & DELINQ. PREVENTION (Nov. 16, 2020), <https://www.ojjdp.gov/ojstatbb/crime/jar.asp> [<https://perma.cc/5VQ6-EXYQ>].

44. *Id.*

45. Michael Bochenek, *Children Behind Bars: The Global Overuse of Detention of Children*, in *WORLD REPORT 2016: EVENTS OF 2015*, 41 (Bristol University Press, Policy Press 2016).

46. *Id.*

47. *Id.* at 42.

48. *See generally* *Research Network on Adolescent Development & Juvenile Justice*, MACARTHUR FOUND., <https://www.macfound.org/networks/research-network-on-adolescent-development-juvenil> [<https://perma.cc/7PQV-GGHG>] (specifically looking at the goals set out by the Foundation for their studies and results).

49. Halikias, *supra* note 34, at 22.

those who commit criminal acts.⁵⁰

II. A LOOK AT THE MINIMUM AGE OF CRIMINAL RESPONSIBILITY IN PRACTICE

A. *The MACR is More Than Just a Number*

The minimum age of criminal responsibility (“MACR”) refers to the “youngest age in which an individual can be processed formally in the justice system.”⁵¹ It signifies that a child under this minimum age “lacks the capacity to commit a crime.”⁵² Broadly speaking, this means that the child is unable to be prosecuted under the law for the crimes committed, as he or she has yet to attain the “emotional, mental and intellectual maturity” to understand the consequences of his or her actions.⁵³ These ages range significantly from as low as seven up to eighteen years of age internationally, with the median age across all countries being twelve.⁵⁴

It is not an easy task to determine what this number should be. Although from the outside looking in, or from the point of creation of the first juvenile court in the nineteenth century, it looks just like any other number that would assist in decision making, but the determination requires more than that.⁵⁵ The MACR should be an age that assesses an “individual’s mental wellness, cognitive ability, and developmental maturity.”⁵⁶ These three factors can bring into consideration a child’s competency for right and wrong, childhood experiences, past justice system involvement, and more.⁵⁷

International instruments highly encourage countries and states around the world to set a MACR as high as they possibly can, focusing on juveniles as children rather than criminals.⁵⁸ The countries that abide by the standards set out in most of the international covenants dealing with the juvenile system have obligations to focus on rehabilitation and reintegration into society.⁵⁹ Although the international standards provide hope to many juvenile justice lawyers and advocates, the countries that do not look to that guidance, such as the United States, create a scary world in which a child can be considered a criminal as

50. *Id.*

51. Kelly Orts, *An Overview of Recent National and International Research on the Minimum Age of Criminal Responsibility*, EBPSOCIETY (Jan. 19, 2020), <https://www.ebpsociety.org/blog/education/402-an-overview-of-recent-national-and-international-research-on-the-minimum-age-of-criminal-responsibility> [https://perma.cc/NZ22-VT3Z].

52. PENAL REFORM INT’L, *supra* note 8.

53. *Id.*

54. *Id.*

55. Orts, *supra* note 51.

56. *Id.*

57. *Id.*

58. PENAL REFORM INT’L, *supra* note 8.

59. *Id.*

young as eight.⁶⁰

The United States Supreme Court has recognized the significant differences between a juvenile and an adult through monumental decisions, and the need to have the juvenile justice system reflect that. In *Roper v. Simmons* decided in 2005, the Court rejected the imposition of the death penalty on juvenile offenders under eighteen, stating that it violated the Eighth Amendment protection against cruel and unusual punishment.⁶¹ Years later in 2012, the Court decided in *Miller v. Alabama* that mandatory life without parole for a juvenile should be restricted.⁶²

The United States has established through these cases that because juveniles have a “lack of maturity and underdeveloped sense of responsibility,” they are more susceptible to peer pressures and outside influences, and are not as well-formed as adults.⁶³ Nevertheless, the United States is the only U.N. Member State that has yet to ratify the U.N. Convention on the Rights of the Child (CRC), which is one of the most influential international covenants for juvenile rights.⁶⁴

B. Requirements Under International Law

Many significant questions of law go into determining the MACR—At what age can a child be given a criminal record? Is this age determinative of the type and level of offense? Do capacity-based tests come into play with the MACR? When can prosecution become a part of that determination?⁶⁵ Many international organizations attempt to answer these questions, notably the United Nations.

The United Nations is an “organization comprised of nearly all the countries in the world.”⁶⁶ Its mission is

to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and to establish conditions under which justice

60. *Raising the Minimum Age for Prosecuting Children*, NATIONAL JUVENILE JUSTICE NETWORK, <https://www.njjn.org/our-work/raising-the-minimum-age-for-prosecuting-children> [https://perma.cc/RYL8-8TNW].

61. *See Roper v. Simmons*, 543 U.S. 551 (2005).

62. *See Miller v. Alabama*, 567 U.S. 460 (2012).

63. *Simmons*, 543 U.S. at 569 (quoting *Johnson v. Texas*, 509 U.S. 350, 367 (1993)).

64. CN.147.1993., Convention on the Rights of the Child, Proposal of Amendments, Costa Rica, United Nations (Mar. 11, 1993), <http://treaties.un.org/doc/Publication/CN/1993/CN.147.1993-Eng.pdf>, [https://perma.cc/Y6HW-R2U4]; CN.322.1995., Convention on the Rights of the Child, Proposal of Amendments, Costa Rica, United Nations (Nov. 7, 1995), <http://treaties.un.org/doc/Publication/CN/1995/CN.322.1995-Eng.pdf> [https://perma.cc/KU5A-NKZB] (showing that the United States does not have a ratification date listed within the status list).

65. CHILD RTS. INT’L NETWORK, CRIN BRIEFING ON THE REVIEW OF GENERAL COMMENT NO. 10 OF THE COMM. ON THE RTS. OF THE CHILD 2 (2018), https://www.ohchr.org/Documents/HRBodies/CRC/GC10/CRIN_Briefing.pdf [https://perma.cc/8P9K-6YVF] [hereinafter *CRIN Briefing*].

66. Reichel & Albanese, *supra* note 20, at 793.

and respect for the obligations arising from treaties and other sources of international law can be maintained, and to promote social progress and better standards of life in larger freedom.⁶⁷

This mission brings into question juvenile justice efforts, leading the U.N. to develop rules, standards, and conventions for the Member Nations to follow.⁶⁸

These “conventions” are more than just guidelines or recommendations: they are requirements that the ratifying nations must follow as a U.N. Member State.⁶⁹ Juvenile justice efforts has been a topic of discussion within the United Nations since 1985, and there has been four major efforts that set standards for approaching delinquency.⁷⁰

1. United Nations Standard Minimum Rules for the Administration of Juvenile Justice (“The Beijing Rules”)

In 1985, the Beijing Rules arose as the first international legal instrument to look specifically at the MACR while considering the emotional, mental, and intellectual development of children.⁷¹ The Beijing Rules take a modern approach, suggesting that any child should be assessed by whether they can “live up to the moral and psychological components of criminal responsibility.”⁷² They encourage the Member Nations to look more toward “fair and humane treatment of juveniles,” and focus on rehabilitation rather than punishment.⁷³

The Beijing Rules focused their recommended standards by dividing it into integral parts of the juvenile justice process, focusing on the general principles, investigation and prosecution, adjudication and disposition, institutional treatment, and research.⁷⁴ Part 1, general principles, generally describes important definitions and recommendations, including the age of criminal responsibility.⁷⁵ Rule 4.1 of Part 1, which discusses the age of criminal responsibility, is brief, possibly because it was the first international instrument to discuss the MACR, but provides its guidance as the “age shall not be fixed at too low an age level, bearing in mind the facts of emotional, mental and intellectual maturity.”⁷⁶ This does not put much of a limit on the Member States that look toward the Rules as guidance. It further explains within its commentary that there is a “close relationship” between the responsibility for a criminal act and other

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.* at 793-95.

71. G.A. Res. 40/33, *supra* note 16, at 3, ¶ 4; *see also* Reichel & Albanese, *supra* note 20, at 794.

72. G.A. Res. 40/33, *supra* note 16, at 3, ¶ 4.

73. Reichel & Albanese, *supra* note 20, at 794.

74. *See generally* G.A. Res. 40/33, *supra* note 16 (pointing out the general layout and sections of the Beijing Rules).

75. *Id.* at 1.

76. *Id.* at 3.

responsibilities a person has, and without a low age limit, these responsibilities would be “meaningless.”⁷⁷

2. *United Nations Convention on the Rights of the Child*

Four years after the creation of the Beijing Rules in 1989, the United Nations Convention on the Rights of the Child (CRC) set out to recognize the additional unique safeguards and legal protections that children needed.⁷⁸ It is seen as a unique human rights treaty that shifts from looking at the child as a “passive object based on her needs” to looking at the child as an “active subject and bearer of her own rights.”⁷⁹ Intending to improve the lives of children, the CRC highly encourages states to establish a minimum age “below which children shall be presumed not to have the capacity” to commit a crime.⁸⁰ In addition to that minimum age, states are guided to approach those children who commit criminal acts with services, such as counseling, education and vocational training programs, and other alternatives to detention.⁸¹ The CRC does not explicitly state a minimum age in which states should follow, leaving states with the discretion to make that decision in light of the requirements laid out within the convention. Since the CRC was produced, forty countries have either “established or increased their MACR” to abide by the requirements set forth within it with positive results.⁸²

However, the Committee on the Rights of the Child (“the Committee”) in General Comment No. 10 specifically focused on juvenile justice and provided states parties with more specific guidance on how to improve their approaches to determining a MACR.⁸³ The Committee recommended that state parties “increase the existing low MACR to an internationally acceptable level,” and unlike the CRC, provided a specific age recommendation of twelve years as the absolute minimum.⁸⁴

This General Comment by the Committee ended up being heavily misinterpreted and controversial. Rather than seeing it as an absolute minimum, it was misused to propose that twelve is “an acceptable international level.”⁸⁵ By misinterpreting this as an internationally acceptable age, some of the U.N.

77. *Id.*

78. *See generally* G.A. Res. 44/25, Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 (explaining how the CRC set out to make sure children were getting the additional legal protections and rights they needed.).

79. Maria Grahn-Farley et al., *International Child Rights At Home & Abroad: A Symposium on the UN Convention on the Rights of the Child*, 30 CAP. U. L. REV. 657, 659 (2002).

80. G.A. Res. 44/25, *supra* note 78, at 12.

81. *Id.*

82. Orts, *supra* note 51.

83. Comm. on the Rts. of the Child (CRC), *General Comment No. 10 (2007): Children's Rights in Juvenile Justice*, U.N. Doc. CRC/C/GC/10, at 7 (Apr. 25, 2007).

84. *Id.* at 11.

85. CRIN BRIEFING, *supra* note 65.

Member States with MACR's already above twelve found that as an opportunity to lower their age, which would, in turn, allow criminalization for more children in that country.⁸⁶ Although this is not what the Committee intended by its suggestion, countries like Denmark, Panama, and Georgia subsequently lowered their MACR, and twelve other Member States drafted proposals to lower it.⁸⁷ The real intent of these international standards, shown specifically by this comment regarding the MACR within General Comment No. 10, is to give Member States an absolute minimum age to follow while still encouraging those states to aim for the highest possible option to ensure each is meeting the best interests of the children.⁸⁸

The Child Rights International Network (CRIN) entered a briefing that addressed this issue in July of 2018, that recognized the questions and elements that go into setting a national age and came up with its own recommendation to provide clarification.⁸⁹ It recommended that “the Committee clarify the meaning of the term and avoid recommending a specific age,” but encourage states to progressively raise the minimum age of criminal responsibility *towards* 18; however, the damage from the General Comment was done and twelve became the “respectable norm.”⁹⁰ CRIN still holds that conventions are “living instruments,” whereas General Comments should not be set in stone, so countries should be sticking to the language within the CRC.⁹¹

a. Ratification of the CRC

The CRC is a binding instrument that requires all U.N. Member States who have ratified the document to abide by its recommendations and standards and has gone on to become the “most universally approved treaty in the world.”⁹² However, the one and only Member State that has yet to ratify the CRC is the United States— due to concerns that these standards will interfere with “parents’ ability to raise and discipline their children.”⁹³ There is no clear explanation of what this means exactly, although an article in *The Washington Post* claims that those against the United States ratification of this convention believe that American children and families are “better served by constitutional democracy than international law.”⁹⁴ By suggesting it would interfere with parents’ ability

86. *Juvenile Justice: Stop Making Children Criminals*, CHILD RTS. INT’L NETWORK, <https://archive.crin.org/en/library/publications/juvenile-justice-stop-making-children-criminals.html>, [<https://perma.cc/B2RA-RWML>].

87. *Id.*

88. *Id.*

89. *See generally* CRIN BRIEFING, *supra* note 65 (looking at the overall layout of what this briefing set out to accomplish).

90. *Juvenile Justice: Stop Making Children Criminals*, *supra* note 86, at 2.

91. *Id.* at 3.

92. Reichel & Albanese, *supra* note 20, at 795.

93. *Id.*

94. Karen Attiah, *Why Won't the U.S. Ratify the U.N.'s Child Rights Treaty?*, WASH. POST

to raise and discipline, it seems the fear is that a child's "right to be heard" would get the government involved in any decision that a parent makes in which the child does not agree.⁹⁵

While keeping these concerns in mind, these standards set out in the CRC are not putting the rights of a child above the rights of parents: rather, they are aiming to give children a more equal playing field. Not only does the United States disadvantage the children in the justice system by refusing to ratify the CRC, but it also hurts the country in terms of the high child poverty rates and no-granted paid maternity leave.⁹⁶ The CRC provides legal standards beyond just criminal justice, as it covers education, poverty, women's rights, and more, pertaining to children specifically.⁹⁷ Although it is the most widely ratified human rights treaty in history, the CRC is only the second of four United Nations international documents that provide rules and procedures to shine a light on the gaps within the juvenile justice system.

3. The Rules for Protection of Juveniles Deprived of Their Liberty ("The Havana Rules")

The Rules for Protection of Juvenile Deprived of Their Liberty ("The Havana Rules") was adopted in 1990, one year after the CRC, providing standards for how to approach individuals under the age of 18 when confined by any court-ordered institution.⁹⁸ The goal at its inception was to make sure no child would be deprived of liberty, and by doing so, pushed for more training of juvenile justice personnel and required juvenile facilities to be inspected frequently.⁹⁹

The Havana Rules recommend detention of juveniles to be a decision of last resort: In the case that a juvenile is deprived of their liberty through some form of incarceration, this document lays out the standards in which the Member States need to follow during any confinement of a minor.¹⁰⁰ Some of the suggestions involve ensuring their constitutional rights—such as the right to be presumed innocent while detained under arrest or awaiting trial, and the right to legal counsel and free legal aid if requested.¹⁰¹ It goes on to provide guidance on more rights that every juvenile should have while detained, such as the right to

(Nov. 21, 2014), <https://www.washingtonpost.com/blogs/post-partisan/wp/2014/11/21/why-wont-the-u-s-ratify-the-u-n-s-child-rights-treaty/> [<https://perma.cc/PN3K-Y4Q9>].

95. *Id.*

96. *Id.*

97. *Id.*

98. Reichel & Albanese, *supra* note 20, at 794.

99. *Id.*

100. *See generally* G.A. Res. 45/113, United Nations Rules for the Protection of Juveniles Deprived of Their Liberty (Apr. 2, 1991) [hereinafter *The Havana Rules*]. The Havana Rules document sets out to provide standards for juvenile confinement, which are specified later within the paragraph. *Id.*

101. *Id.* at 2, Part III.

adequate medical care, education, daily free exercise, and religion.¹⁰² This international document is very helpful in ensuring the protection of a juvenile post-arrest and during the event of detention.

4. *The United Nations Guidelines for the Prevention of Juvenile Delinquency*
(“*The Riyadh Guidelines*”)

The Guidelines for the Prevention of Juvenile Delinquency (“The Riyadh Guidelines”) were also adopted in 1990 and focused on prevention using a proactive approach that involved “the roles of the family, the school, the community, the media, social policy, legislation, and juvenile justice administration.”¹⁰³ These rules encourage countries to look at these community-based interventions rather than resorting to legal ramifications, to prevent children from entering the system in the first place.¹⁰⁴

The Riyadh Guidelines recognize the impact that outside influences have on a child’s development and growth. It sees prevention as addressing the many different players that make up a child’s day-to-day activities and seeing childhood as a key player in “harmonious development.”¹⁰⁵ These are not only ways to prevent juvenile delinquency, but also ways to help a child who is already in the system by making sure they are provided with proper services and care within their home, school, and community to stop “criminogenic attitudes.”¹⁰⁶

The Riyadh Guidelines are broken up into areas that are important to keep children out of the justice system. It starts with family—emphasizing the need of every society to place a high priority on the well-being of a family and to establish policies that are “conducive to the bringing up of children in stable and settled family environments.”¹⁰⁷ The guidelines recommend measures and programs to provide families with ways to learn about parental roles, what aspects go into childcare and development, how to create positive parent-child relationships, and to encourage parents to be involved in community-based activities.¹⁰⁸

The next area it discusses is education. The Riyadh Guidelines focus on what education systems should aim special attention to in order to help prevent children from getting involved in crime.¹⁰⁹ The recommendations provided for education are extensive; ranging from teaching basic values and respecting the child’s “own cultural identity and patterns,” to extending unique care and

102. *Id.* at 5-6.

103. Reichel & Albanese, *supra* note 20, at 795.

104. *Id.*

105. G.A. Res. 45/112, United Nations Guidelines for the Prevention of Juvenile Delinquency (Dec. 14, 1990) [hereinafter *The Riyadh Guidelines*].

106. *Id.*

107. *Id.* at 202.

108. *Id.*

109. *Id.* at 202-03.

attention to those young individuals who are seen to be at “social risk.”¹¹⁰ Through all of these suggestions, it is clear that the message illustrated is that educational systems should not only be focusing on academics but also that the programs available and the values being taught are aimed at leading children to reach their fullest potential in and out of the classroom.

The next two sections, Community and Mass Media, are briefer; however, they still provide more assistance to the Member States on prevention methods.¹¹¹ It recommends community-based services that are available to manage the needs and problems of children and “offer appropriate counseling and guidance to young persons and their families.”¹¹² This can be achieved through shelter locations for those who are unsafe at home, youth organizations that encourage children and adolescents to get involved in helping their communities, and recreational facilities of interest to children in the area.¹¹³ Further, mass media should portray a positive view of young individuals to society and how they can contribute to that society, recognizing the significant influence media has on today’s children.¹¹⁴

C. The Effect of International Conventions

Spending time focusing on what these international instruments contain and the guidance they provide signifies the beneficial role these documents play in the juvenile justice system. It can be preached that countries need to stop making children criminals, but the weight of that statement is lost without having any approach on how to do so. All Member States of the CRC pledged “directly to children themselves all around the world: for every child, every right, and our collective action today to reach this goal,”¹¹⁵ and many of the Member States that have ratified and continue to follow the requirements set out by the U.N., have the top juvenile justice systems in the world.

In 2016, CRIN conducted a global report on access to justice for children.¹¹⁶ Within this report, CRIN provided a global ranking that assessed and ranked 197 countries on their approaches to child rights. Belgium ranked the highest with a score of 81.6 percent, with Portugal, Spain, Finland, and the Netherlands finishing out the top five with scores of 77.2 percent, 77.0 percent, 76.4 percent,

110. *Id.*

111. *Id.* at 203.

112. *Id.*

113. *Id.*

114. *Id.*

115. *Global Action on the 30th Anniversary of the Convention on the Rights of the Child*, UNICEF, <https://www.unicef.org/child-rights-convention/global-action> [https://perma.cc/M4SR-RNT3].

116. *Access to Justice for Children: Global Ranking*, CHILD RTS. INT’L NETWORK, <https://archive.crin.org/en/access-justice-children-global-ranking.html> [https://perma.cc/PUY6-FKLZ].

and 76.1 percent, respectively.¹¹⁷ All five of these countries follow the requirements of the CRC by ratification,¹¹⁸ and more specifically geared toward the specific recommendation within this Note, all have a MACR at or over the age of twelve years old, with Finland as high as fifteen years old.¹¹⁹

The report was prepared by CRIN and follows the structure of national reports, looking at each country's "status of the CRC, the legal status of the child, legal mechanisms for challenging rights violations and practical considerations related to bringing a court case."¹²⁰ Further, the scores listed above were created based on a number of criteria developed by the staff at CRIN to "reflect international standards related to access to justice for children."¹²¹ It is broken down into four parts each containing its own set of points: I. Legal Status of the Convention on the Rights of the Child, II. Legal Status of the Child, III. Challenging Children's Rights Violations, and IV. Practical Considerations.¹²²

Belgium ratified the CRC in December of 1991, and by doing so, it formed part of Belgium's domestic law.¹²³ It takes precedence over statutory law and the Constitution if it is "determined that a specific provision is 'self-executing.'"¹²⁴ Areas within the report that Belgium stands out on are allowing children to be heard in divorce cases in its family courts and the provision of free youth attorneys.¹²⁵ With the country's MACR, children can be held responsible for crime from the age of twelve.¹²⁶ However, any child who has not hit the required discernment is "incompetent" to initiate or participate in legal proceedings.¹²⁷

117. *Id.*

118. *Global Action on the 30th Anniversary of the Convention on the Rights of the Child*, *supra* note 115.

119. *Minimum Ages of Criminal Responsibility in Europe*, CHILD RTS. INT'L NETWORK, <https://archive.crin.org/en/home/ages/europe.html> [<https://perma.cc/CEL6-BTTW>].

120. *Access to Justice for Children: Data and Methodology*, CHILD RTS. INT'L NETWORK, <https://archive.crin.org/en/home/law/access-justice/access-justice-children-data-and-methodology.html> [<https://perma.cc/UKJ8-JLE8>].

121. *Id.*

122. *Access to Justice for Children: Country Reports*, CHILD RTS. INT'L NETWORK, <https://archive.crin.org/en/home/law/access-justice/access-justice-children-country-reports.html> [<https://perma.cc/MS2K-PM7N>].

123. White & Case LLP, *Belgium: Access to Justice for Children*, CHILD RTS. INT'L NETWORK 1 (Apr. 2015), https://archive.crin.org/sites/default/files/belgium_access_to_justice.pdf [<https://perma.cc/TY3S-VLCX>].

124. *Id.*

125. Robyn Boyle, *Belgium Tops List of World's Best Juvenile Justice Systems*, BULLETIN (Feb. 16, 2016), [https://www.thebulletin.be/belgium-tops-list-worlds-best-juvenile-justice-systems#:~:text=Children%20in%20Belgium%20have%20more,Rights%20International%20Network%20\(CRIN\)](https://www.thebulletin.be/belgium-tops-list-worlds-best-juvenile-justice-systems#:~:text=Children%20in%20Belgium%20have%20more,Rights%20International%20Network%20(CRIN)) [<https://perma.cc/2TRN-94UM>].

126. *Minimum Ages of Criminal Responsibility in Europe*, *supra* note 119.

127. White & Case, *supra* note 123, at 1.

D. The United States Minimum Age of Criminal Responsibility

The United States was ranked number fifty-two in the global report assessing access to justice for children done by CRIN in 2016.¹²⁸ When it comes specifically to the MACR in the United States, it ranges from age eight to age thirteen.¹²⁹ As of January 2022, one state has its MACR at thirteen years old, five states at twelve years old, one state at eleven years old, fifteen states at ten years old, and two states at eight years old.¹³⁰ There were significant changes in the MACR over the year of 2021, with many states raising its MACR.¹³¹ In addition, twenty-eight states do not have a specified minimum age.¹³² In these states without a specified MACR, a child could technically be held criminally responsible at any age, although most states will do a capacity-related test.¹³³

A capacity-related test, or a forensic evaluation, for a juvenile offender applies science to a legal issue.¹³⁴ Juveniles get a forensic evaluation if there are concerns regarding their abilities to understand *Miranda* rights, their trial competences, their dangers to society, or their levels of maturity or development.¹³⁵ However, due to the lack of resources within the juvenile courts, it can be hard to achieve adequate forensic evaluations of a juvenile and many states differ in the way they conduct these tests, leading to more conflict.¹³⁶ These evaluations provide useful information to prosecutors, but if they are not accurate or contain “misinformation,” they are a “waste of resources” that results in financial costs to society.¹³⁷

1. Higher End of the United States MACR

New Hampshire has the highest MACR in the United States as of early 2022.¹³⁸ No “delinquent” under the statute can be subject to prosecution under the age of thirteen—with the exception of serious violent offenses that are defined as such under the New Hampshire criminal code.¹³⁹ Five states have a MACR of

128. See *infra* Part II of this Note; see also *Access to Justice for Children: Global Ranking*, *supra* note 116.

129. *Jurisdictional Boundaries*, JUV. JUST. GEOGRAPHY, POL’Y, PRAC. & STAT., <http://www.jjgps.org/jurisdictional-boundaries> [<https://perma.cc/2M98-BRNF>].

130. *Raising the Minimum Age for Prosecuting Children*, *supra* note 60.

131. Alyson Clements, *Connecticut and New York Raise Minimum Age of Prosecution*, NATIONAL JUVENILE JUSTICE NETWORK (June 26, 2021) <https://www.njjn.org/article/connecticut-and-new-york-raise-minimum-age-of-prosecution> [<https://perma.cc/8337-F39J>].

132. *Raising the Minimum Age for Prosecuting Children*, *supra* note 60.

133. *Minimum Ages of Criminal Responsibility in the Americas*, CHILD RTS. INT’L NETWORK, <https://archive.crin.org/en/home/ages/Americas.html> [<https://perma.cc/XKR8-M6C8>].

134. Halikias, *supra* note 34, at 22.

135. *Id.*

136. *Id.* at 23.

137. *Id.*

138. N.H. REV. STAT. ANN. § 169-B:2 (2021).

139. *Id.*

twelve specified by statute: California, Massachusetts, Utah, New York, and Delaware.¹⁴⁰ Under California statute, any minor who is between twelve and seventeen years of age is within the jurisdiction of the juvenile court.¹⁴¹ However, the California statute includes offenses that would lead to exceptions if the minor is under the age of twelve, such as murder, rape by force, sodomy by force, oral copulation by force, or sexual penetration by force.¹⁴² Under these offenses, there is no minimum age limit for prosecution in this State.¹⁴³

In Massachusetts, a “delinquent child” is one between the ages of twelve and eighteen who commits any offense against a law of the Commonwealth.¹⁴⁴ Like California, Massachusetts sets a few requirements—the offense “shall not include a civil infraction, a violation of any municipal ordinance or town by-law or a first offense of a misdemeanor for which the punishment is a fine, imprisonment in a jail or house of correction for not more than 6 months or both such fine and imprisonment.”¹⁴⁵ These two states were the first American jurisdictions meeting the international standards encouraged by the United Nations Conventions,¹⁴⁶ until the others later followed their lead in 2021.¹⁴⁷

The State legislature in Massachusetts recently raised its MACR from seven to twelve in 2018.¹⁴⁸ The Massachusetts Governor Charlie Baker signed into law an extensive “criminal justice overhaul bill,” which included this change in the MACR, intending to “prevent involvement in the criminal justice system.”¹⁴⁹ Lawmakers created the provision because they believed there is an “indisputable link” between the age at which a child enters the system and the likelihood of recidivism during the rest of his or her life.¹⁵⁰ Due to this provision excluding children under the age of twelve to be arrested or prosecuted, lawmakers in the State are still working on the best ways to handle young individuals that do commit criminal acts.¹⁵¹

140. *Raising the Minimum Age for Prosecuting Children*, *supra* note 60.

141. CAL. WELF. & INST. CODE § 602 (West 2019).

142. *Id.*

143. *Minimum Age for Delinquency Adjudication: Multi-Jurisdiction Survey*, NAT'L JUV. DEF. CTR., <https://njdc.info/practice-policy-resources/state-profiles/multi-jurisdiction-data/minimum-age-for-delinquency-adjudication-multi-jurisdiction-survey/> [https://perma.cc/XBJ5-RWMQ] (last updated Jan. 22, 2020).

144. MASS. GEN. LAWS ANN. ch. 119, § 52 (West 2018).

145. *Id.*

146. Orts, *supra* note 51.

147. *Raising the Minimum Age for Prosecuting Children*, *supra* note 60.

148. *Id.*

149. Brianna Hill, *Legislative Update: Massachusetts Raises Minimum Age of Criminal Responsibility*, 39 CHILD. LEGAL RTS. J. 168 (2019).

150. *Id.*

151. *Id.* at 170.

2. Lower End of the United States MACR

Two states in the United States have a MACR of eight years old. North Carolina is one of these states.¹⁵² Any child in this state who is at least eight years of age and commits a crime can be considered as a delinquent juvenile.¹⁵³ Washington is the other state with a MACR of eight, given that the court finds the child has the capacity to understand the act he or she committed.¹⁵⁴ Fifteen other states have its MACR set at ten, which is currently the most common MACR within the United States.¹⁵⁵ For example, in Connecticut, a child for the purposes of delinquency matters is defined as one between the ages of ten and eighteen years old.¹⁵⁶

All these states have lawmakers and advocates who have pushed initiatives to raise their minimum age and the advocacy seems to finally be making waves. Reformers in Connecticut, like the Executive Director of the Connecticut Juvenile Justice Alliance, Abby Anderson, are working to raise the MACR to twelve, calling on the legislature to enhance education offered to children in the state's custody and push money toward more mental health support.¹⁵⁷ Although it has not yet been raised to twelve, the MACR went from seven up to ten in mid-2021 due to the efforts of reformers in the state.¹⁵⁸ North Carolina Representative Marcia Morey passed a bill in 2019 that would raise the MACR to ten years old because she recognizes that children are “too young to understand what a court is or the proceedings are in the court system.”¹⁵⁹ Morey wants the state to provide services without putting them in the system, “which is a stigma that can stay with kids for the rest of their lives.”¹⁶⁰ At the time of Morey's bill, the North Carolina MACR was as low as six.¹⁶¹ It moved up to eight when Governor Roy Cooper signed a juvenile justice bill on August 30, 2021.¹⁶²

152. N.C. GEN. STAT. ANN. § 7B-1501(7) (West 2021).

153. *Id.*

154. WASH. REV. CODE ANN. § 9A.04.050 (West 2011).

155. *Raising the Minimum Age for Prosecuting Children*, *supra* note 60.

156. CONN. GEN. STAT. ANN. § 46b-120(1)(A)(i) (2021).

157. Kelan Lyons, *Juvenile Justice Advocates: Let's 'Raise the Age' Again*, CT MIRROR (Feb. 10, 2020), <https://ctmirror.org/2020/02/10/juvenile-justice-advocates-lets-raise-the-age-again/> [<https://perma.cc/5CPX-32LJ>].

158. Clements, *supra* note 131.

159. Sarah Willets, *Six-Year-Olds Can Be Prosecuted in North Carolina Courts. A New Bill Seeks to Change That*, INDY WEEK (Mar. 15, 2019, 4:51 PM), <https://indyweek.com/news/northcarolina/kids-six-can-be-prosecuted-in-nc-courts/> [<https://perma.cc/68FF-M3Q8>].

160. *Id.*

161. *Id.*

162. Imprint Staff Reports, *North Carolina Raises the Floor for Prosecution to 8 Years Old*, THE IMPRINT (Sept. 15, 2021, 11:32 AM) <https://imprintnews.org/justice/juvenile-justice-2/north-carolina-raises-the-floor-for-prosecution-to-8-years-old/> [<https://perma.cc/C262-XF9G>].

3. *The States with No Specified MACR*

Twenty-eight states in the United States have no MACR,¹⁶³ which gives state prosecutors the discretion to charge younger, more vulnerable children as a juvenile regardless of their age. The National District Attorneys Association says that juvenile delinquency prosecutors approach their jobs by “balanc[ing] community safety, offender accountability to victims and communities, and competency development in offenders.”¹⁶⁴ Despite prosecutors across the United States developing programs to pivot youth away from crime and use their discretion positively,¹⁶⁵ it is still extremely problematic to have inconsistency across states with what age a child can be brought into the justice system.

III. CONCERNS WITH LOW MACRS

A. *Problematic Inconsistency*

After the breakdown of what the United States looks like in terms of the MACR, the issue of inconsistency should be clear. With significant differences regarding the MACR, the system is not treating youth fairly and equally. It is easy to consider a hypothetical scenario where a child of age nine commits a delinquency crime in the state of North Carolina—a state with a MACR of eight. There is a possibility that this child could be put into the juvenile justice system according to the North Carolina statute; however, if another nine-year-old in California commits the same crime, the punishment or approach would be different as the child has not hit the specified MACR in that state. Again, this hypothetical is not to say that a prosecutor or juvenile court judge in North Carolina would take more punitive measures like this, but the issue here is that it is a possibility, or even a reality, that the children in the country are being treated and handled differently depending on the state in which they live. Given the recent raises of the MACR in many states, there is no doubt that this change is possible and realistic.

B. *Brain Development in Adolescents*

The prefrontal cortex region of the brain is heavily correlated with “reasoning and executive functioning.”¹⁶⁶ In more basic terminology, it is involved with an individual’s ability to make thoughtful and knowing decisions and often is “developmentally immature” until one’s mid-twenties.¹⁶⁷ The emotional reactivity

163. *Raising the Minimum Age for Prosecuting Children*, *supra* note 60.

164. *Juvenile Justice*, NAT’L DIST. ATT’YS ASS’N, <https://ndaa.org/programs/juvenile-justice/> [<https://perma.cc/9XW5-T3DN>].

165. *Id.*

166. Jason Chein, *INSIGHT: Adolescent Brain Immaturity Makes Pending Execution Inappropriate*, BLOOMBERG LAW (Sept. 17, 2020, 4:00 AM), <https://www.bloomberglaw.com/document/XBBCKGKK000000?udvexpired=true> [<https://perma.cc/6AX5-RSJ7>].

167. *Id.*

and lack of maturity that comes with being a child or adolescent, and the biological explanations to why some children get involved in crime, further emphasize why many states need to make a change or set a specified MACR in the first place.

Not only do most forms of risky behavior peak during adolescence, but multiple studies have also shown that teenagers are the most likely to make rash decisions “when they are in stressful and emotionally evocative situations.”¹⁶⁸ If a brain is developmentally immature until at least the age of twenty, to charge a juvenile with full criminal responsibility is a blatant disregard of the endless neuroimaging studies that have made these results clear.

This is where looking toward the international standards, specifically the Riyadh Guidelines, that show how to best handle juveniles who enter the system at a young age and have serious pressures from outside influences, such as an abusive home life. The United States Supreme Court has determined in previous decisions where it acknowledges juvenile differences, in cases previously mentioned within the first part of this Note, that a “juvenile’s character is not as ‘well-formed’ as an adult’s, his traits are ‘less fixed,’ and his actions are less likely to be ‘evidence of irretrievabl[e] deprav[ity].”¹⁶⁹ It is clear from these decisions that the country does abide by many requirements set out within the CRC, despite not having ratified it, and should be open to understanding the concerns with the current status of the MACR.

Focusing on the weight of this data highlights the importance of a developmentally appropriate approach to juveniles. The MacArthur Foundation on Juvenile Justice, an organization that seeks to demonstrate the developmental differences between adolescents and adults, found that using punishment methods as a deterrent to juvenile crime is “contrary to the science of adolescent development.”¹⁷⁰ They found that the most effective responses are those that push to meet needs of children and influence their development by focusing on their differences and bringing outside influences into play with treatment.¹⁷¹ Further, juveniles are often less capable than adults of understanding legal proceedings and the long-term consequences of crime.¹⁷² To think that children at the ages in which some states have set its MACR are developmentally mature enough to understand the legal ramifications of involvement in crime is unfair.

C. Outside Influences in a Juvenile’s Life

It is not only important to understand the developmental differences between juveniles and adults, but it is also crucial to take into account the home life and outside influences of a juvenile offender. Any young child, arguably until the age of eighteen, is spending a significant part of their day learning from the people

168. *Id.*

169. *Id.*

170. CHAMBERS & BALCK, *supra* note 32, at 6.

171. *Id.*

172. *Id.* at 8.

within their “circle,” and the criminal actions observed by the older individuals may be seen as normal behaviors to an underdeveloped individual.

A child’s family life is one of the most influential factors in their development. Early human development, “from the brain’s evolving circuitry to the child’s capacity for empathy,” is significantly impacted by the environment and experiences that they experience during the prenatal years and throughout early childhood.¹⁷³ Experts in child development and neuroscience have found that the child’s brain is “biologically primed to learn from experience, so that early environments powerfully affect the architecture of the developing brain.”¹⁷⁴

These influences have been found to have a serious correlation between delinquency and crime.¹⁷⁵ Children who are neglected by their caregivers, grow up in homes with conflict, experience child abuse or domestic violence, or are often unsupervised, are “at greatest risk of becoming delinquents.”¹⁷⁶ In a publication by the Office of Juvenile Justice and Delinquency Prevention in the United States Department of Justice, it found that experiences in early childhood have a lifelong effect on behavior, but that many individuals “maintain considerable capacity for change and that the consequences of early childhood experiences are continually modified by events during adolescence of adulthood.”¹⁷⁷

If experts in juvenile delinquency find that outside influences, such as the family, play a significant role in crime, this is a reason to focus on therapeutic measures and services to provide the child with help rather than punishment or punitive measures. This data is helpful to give states more alternatives to entering a child in the juvenile justice system at such a young age—such as providing services to the family, assistance for the parents, or a new home environment for the child if necessary. The situations that children experience within their childhood are often out of their control and are sometimes a serious cry for help. However, many do not receive this help before getting involved in the criminal justice system themselves, such as mental health treatment.

D. Mental Health Concerns

Mental illness is common in the criminal justice system, and it is no different for juveniles. There is a link between mental health struggles and youthful offending, so it is important to recognize that children who are having difficulties with mental instability and illness are more at risk for later delinquency.¹⁷⁸ An

173. ROBERT D. PUTNAM, *OUR KIDS: THE AMERICAN DREAM IN CRISIS* 109 (2015).

174. *Id.* at 110.

175. See generally Kevin N. Wright & Karen E. Wright, *Family Life and Delinquency and Crime: A Policymakers’ Guide to the Literature*, U.S. DEP’T OF JUST., OFF. OF JUV. JUST. & DELINQ. PREVENTION (Jan. 15, 1993).

176. *Id.* at i.

177. *Id.* at 4-5.

178. Lee Underwood & Aryssa Washington, *Mental Illness and Juvenile Offenders*, 13 INT’L J. ENVTL. RES. PUB. HEALTH 228, 229-30 (2016).

article focusing on mental illness and juvenile offenders published within the International Journal of Environmental Research and Public Health found that the prevalence rate of juveniles with mental disorders is consistently higher than the general population of adolescents.¹⁷⁹ It suggests the need for many different levels of mental health care treatments, such as cognitive-behavioral interventions, functional family therapy, or crisis intervention teams, to name a few.¹⁸⁰

Mental illness in children can take many different forms, from one end of the spectrum to the other. Taking outside influences into consideration, scientists have developed the Adverse Childhood Experiences Scale (ACE), which breaks down events in a child's life that can have serious effects on mental health.¹⁸¹ These events range from physical and sexual abuse to neglect, and the amount of those events experienced leads to a higher "ACE score" for the child.¹⁸² There have been many studies determining the accuracy of the ACE Scale, and Nobel Prize-winning economist James Heckman found that it "correlate[s] with poor adult health, high medical care costs, increased depression and suicide rates, alcoholism, drug use, poor job performance and social function, disability, and impaired performance of subsequent generations."¹⁸³ It has also been found that many offenders who are involved in crime experienced several of the events mentioned within the ACE scale and have a much higher rate of traumatic events during their early childhood,¹⁸⁴ so this is only more of a reason to consider these things when assessing the children that are entering the system at such a young age.

Recognizing the high prevalence of youthful offenders that are experiencing mental illness, it is even more important to direct these children toward serious treatment from the outset. Some states in the United States do consider mental illness as a realistic factor and take those necessary steps once the child is put into the system; however, due to the data provided through the International Journal of Environmental Research and Public Health, even if the "punishment" involves some kind of mental health treatment, any involvement whatsoever in the system can do more harm than good for later recidivism.¹⁸⁵ Regardless of how unfortunate, being involved in the justice system often creates an unavoidable stigma. Mental illness or instability can often be a factor in why any child under the age of twelve is offending, and rather than punishment or introducing them into the system, the focus should be on care alone.

179. *Id.* at 229.

180. *Id.* at 331-34 (specifically described within paragraphs 3, 3.1, 3.3, 3.8).

181. PUTNAM, *supra* note 173, at 112-113.

182. *Id.* at 113.

183. *Id.*

184. James Reavis, et al., *Adverse Childhood Experiences and Adult Criminality: How Long Must We Live Before We Possess Our Own Lives?*, 17 PERMANENTE J. 44, 47 (2013).

185. Underwood & Washington, *supra* note 178, at 1.

IV. RECOMMENDATION

A. Implementing a Minimum Age of Criminal Responsibility of Twelve

The United States should follow the international standards established by the MACR and set the average MACR for the states to be no less than twelve years old. To have an international median minimum age of criminal responsibility at age twelve, it is concerning why the United States is taking its own path regarding the MACR, despite the numerous studies that show this is not the best way to achieve the goals of a juvenile justice system focusing on the best interests of children. Raising the MACR does not mean that society is ignoring youth who commit crimes and “giving in” to those who offend.¹⁸⁶ It is simply a quest to separate “responsibility” from criminalization. International law conventions explain how a higher MACR does not mean a country goes easy on crime, rather it means that it is recognizing the alternatives to introducing children to the criminal system.

By recommending a MACR of twelve, it is in the form of an absolute minimum. As General Comment No. 10 by the Committee explained after it had to clarify its suggestion,¹⁸⁷ it is not to limit the capability of any state to go above the age of twelve—rather, that is highly encouraged. It is also not to imply that the development level of a twelve-year-old is significantly different than those who are ten or eleven, for example; however, the CRC provides noteworthy guidance and suggestions on how to best care for the rights of those children,¹⁸⁸ and pushes to aim for the highest age possible going toward eighteen. When the United States has a significant number of jurisdictions in the country with MACRs under the age of twelve, notably two that are as low as eight which is four years younger than the age recommended by the CRC and consistent with the lowest MACRs reported in the world¹⁸⁹—it is important to recognize the age of twelve as an absolute minimum as a modest steppingstone to close this gap before aiming beyond what is realistic for real change at this time.

As it has been presumed that the United States Senate is quite unlikely to ratify the CRC, as the country originally signed it over twenty-five years ago in February of 1995,¹⁹⁰ state legislatures should consider looking toward the international guidelines explained in Part II of this Note to make changes at the state government level. State legislatures in six states made this change in recent years, demonstrating to all other states within the country that if this change will not be had at the federal level to require the United States as a country to abide by these international recommendations, it can still be done at the state level. As exhibited above with Connecticut and North Carolina,¹⁹¹ this will not be a change

186. *Juvenile Justice: Stop Making Children Criminals*, *supra* note 86, at 6-7.

187. *See infra* Part II of this Note.

188. *See infra* Part II of this Note.

189. *Id.*

190. Convention on the Rights of the Child, Sept. 2, 1990, 1577 U.N.T.S. 3.

191. *See infra* Part II of this Note.

that happens overnight simply because the idea is pushed or a bill is introduced, as there are many pushbacks on the possible negatives to this raise. Nevertheless, these conversations need to be had and actions need to be taken.

B. Pushback on Raising the Minimum Age

Many lawyers within the United States, specifically prosecutors and judges, fear that if the country implements these standards, they will have no way of dealing with the juveniles who commit serious violent crimes under the MACR or to deter future crime within their communities. Provisions for violent offenses within the statute are ways in which states can go about this fear, as both California and Massachusetts have included,¹⁹² but there are other ways in which a state can adopt a higher MACR while continuing to keep its streets safe. Regardless of the level of offense, a state should do everything possible to make criminalization as minimal as possible.

The United States currently leads the world in the percentage of children locked up in juvenile detention, with over 60,000 youth in facilities according to data by the Annie E. Casey Foundation in 2011.¹⁹³ According to international law set out by the U.N., if the United States had ratified the CRC, detention could only be a measure of last resort and for the “shortest appropriate period of time.”¹⁹⁴ Although detention rates in the United States fell dramatically from 1996 to 2011, there is still the question of how many of those 60,000 individuals are under the age of twelve, or at an age in which they are developmentally incapable of understanding the consequences of their actions.

CRIN, as well as the CRC, explains that the only justification of using detention for children is if “they pose an assessed serious risk to others’ safety and other ways of minimising this risk are considered inadequate.”¹⁹⁵ This justification can be used, and arguments could be made that some of the youth being detained today may be considered a risk to society; however, children under the age of twelve make up a very small percentage of the crime in the United States.¹⁹⁶ Current research findings from 2020 show that in the six largest states, “justice-involved youth under 12 made up 1-3% of their juvenile justice population.”¹⁹⁷ Furthermore, this rate is continuing to go down in all states across the country, and the juveniles that do find themselves involved in the system are for status offenses and misdemeanors.¹⁹⁸ This data eliminates the concern for public safety to an extent, as the violent offenses being committed by juveniles under the age of this recommended MACR are becoming rarer.

If a juvenile under the age of twelve has committed an offense—one

192. *See infra* Part II of this Note.

193. Bochenek, *supra* note 45.

194. *Id.*

195. *Juvenile Justice: Stop Making Children Criminals*, *supra* note 86, at 4.

196. Orts, *supra* note 51.

197. *Id.*

198. *Id.*

classified as violent or not—there is a serious need to develop a method of rehabilitation that focuses on all the circumstances in that child's life. Within General Comment No. 10 by the Committee, it stressed the importance of focusing less on detention or imprisonment and more on counseling, guidance and supervision, educational and training programs, and other alternatives that are aimed at the child's well-being.¹⁹⁹ If this approach is implemented, it would lower some of the concern about how to address children under the chosen MACR who commit crimes by pinpointing the serious issues likely going on in their lives.

Providing referrals to social services and working on finding the root of the problem through therapy and supervision can assist prosecutors in maintaining order and doing their jobs, while still recognizing the significant differences between a child and an adult.²⁰⁰ Further, approaching children under the MACR who commit a crime with targeted and appropriate interventions is more effective for future recidivism than depriving them of their own liberty through an institution.²⁰¹

There is no assumption that acquiring these services and programs for children is easy, as it requires funding. The juvenile court is lacking resources and there are often hoops to jump through for community programs or facilities to accept juvenile offenders who have committed a crime.²⁰² This is a known concern, but there are some effective ways to work around this. Many juvenile probation departments have unique programs available to address a child's needs or the departments can work with other programs throughout their state.²⁰³ Parents can also take action to acquire services for their child after encouragement from those within the juvenile court and help get the child involved in in-patient care if the parents have the ability and resources to do so, or work with the Department of Child Services to find other free resources in the community.²⁰⁴

C. What the United States Can Learn from Other Countries

As the median MACR internationally is twelve years old, many countries in the world that have ratified the CRC have adopted successful approaches to dealing with juvenile crime despite the age restriction. Not only can the states use the U.N. international conventions as guidance to make this change, but some countries have also exceeded those recommendations and set an example for other juvenile systems.

In the Access to Justice Report conducted by CRIN,²⁰⁵ Germany ranked after

199. *General Comment No. 10 (2007): Children's Rights in Juvenile Justice*, *supra* note 83, at 8.

200. PENAL REFORM INT'L, *supra* note 8.

201. *Id.*

202. Kelly L. Burris, *The Juvenile Justice System: How Community Programs Play a Role*, 66 TEX. B.J. 160, 162 (2003).

203. *Id.*

204. *Id.*

205. *See infra* Part II of this Note.

the United States, coming in 66th place.²⁰⁶ However, this report consists of more than just addressing juvenile crime, and when it comes to juveniles, Germany is excelling. Germany has a MACR of fourteen years old, and no individual can be charged as an adult until after the age of twenty-one.²⁰⁷ Children under that age who do commit a crime are “sent into care or to special schools, where the emphasis is on therapy rather than punishment.”²⁰⁸ For those over fourteen, the country’s juvenile “prisons” are meant to “mirror the outside world,” to help them learn to have successful and happy lives without crime when they leave.²⁰⁹ According to a state report, in Germany only about thirty percent of its juveniles return to prison within three years, whereas in the state of New Jersey in the United States, it was eighty-five percent.²¹⁰ The director-general of prisons and probation in Mecklenburg-Western Pomerania in Germany, Joerg Jesse, believes that the United States often uses punitive measures when it comes to crime and has a “strange belief” that it is leading to real change.²¹¹

Scotland has created a phased approach for dealing with youth crime.²¹² Lawmakers have set a precedent that children aged between eight and twelve may have the legal capacity to commit a crime but cannot be prosecuted.²¹³ The “hearings system” in Scotland exists to address the specific needs of children by addressing who they are on a big picture scale and uses it as a way to intervene early in their lives to ensure children stay in their communities.²¹⁴

In Italy, children under the age of fourteen cannot be punished criminally. With that being said, the way the country approaches youth crime under its set MACR is by creating institutions for protection and education, and in the chance that a juvenile is a danger to society, they could be placed into a reformatory.²¹⁵ Parents would have a civil responsibility to their children under fourteen and may have to pay damages to any victims of the crime.²¹⁶

206. *Access to Justice for Children: Global Ranking*, *supra* note 116 (specifically noting the ranking).

207. *Minimum Ages of Criminal Responsibility in Europe*, *supra* note 119 (looking at Germany’s MACR); *see also* Sarah Gonzalez, *Kids in Prison: Germany Has a Different Approach, Better Results*, WNYC NEWS (Oct. 10, 2016), <https://www.wnyc.org/story/being-kid-adult-prison-here-vs-other-countries/> [<https://perma.cc/NS9U-E7UZ>].

208. *What’s Gone Wrong? How Other Countries Deal with Young Criminals*, INDEPENDENT (Oct. 22, 2011), <https://www.independent.co.uk/life-style/what-s-gone-wrong-how-other-countries-deal-with-young-criminals-1475897.html> [<https://perma.cc/5YDP-AVCW>].

209. Gonzalez, *supra* note 207.

210. *Id.*

211. *Id.*

212. PENAL REFORM INT’L, *supra* note 8.

213. *Id.*

214. *Id.*

215. *What’s Gone Wrong? How Other Countries Deal with Young Criminals*, *supra* note 208.

216. *Id.*

V. CONCLUSION

Having a separate justice system for children recognizes the importance of focusing on the best interests of the child and it has dramatically changed the way the world approaches juveniles. The benefits that have come from this separate system by creating a safer space for children are immense. Nevertheless, there is still more work to do. The United States failing to establish an absolute minimum standard of twelve for the MACR and follow the United Nations' guidelines is going against what the juvenile justice system set out to accomplish.

Focusing on best interests and rehabilitation still allows children to be held responsible for their actions.²¹⁷ It simply adds that the system is ensuring that children are being recognized as unique from their adult counterparts. The recommendation set out in this Note is that this is a necessary step for the United States to take to continue improving their juvenile justice systems. The United States excels in many aspects of its juvenile justice system, and lawmakers in the country do want to continue to improve by conducting more studies and introducing new bills. Now, the MACR needs to be at the forefront.

Having the discretion to criminalize children at the young ages of eight and ten, and even more discretion in the states with no specified MACR, the idea is being accepted that children have the mental capacity to be criminalized at ages where most kids should still be playing with toys. Raising the MACR to an absolute minimum of twelve is the step needed to show that the states in this country truly recognize that children are just too young for the system as it stands.

217. PENAL REFORM INT'L, *supra* note 8.