Journal of Criminal Law and Criminology

Volume 111 | Issue 2 Article 5

Spring 2021

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0091-4169/21/11102-0571
THE JOURNAL OF CRIMINAL LAW & CRIMINOLOGY Vol. 111, No. 2

Printed in U.S.A.

REGIONAL INTERNATIONAL JUVENILE INCARCERATION MODELS AS A BLUEPRINT FOR REHABILITATIVE REFORM OF JUVENILE CRIMINAL JUSTICE SYSTEMS IN THE UNITED STATES

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Adolescence marks a unique and transformative time in a person's physical, emotional, and intellectual development and requires special considerations in the realm of criminal justice. This Comment explores how rehabilitative models of criminal justice are better suited than punitive models to recognize and accommodate the intricacies and special factors inherent in juvenile delinquency and uses examples from regional international bodies to illustrate how the United States can adopt measures that align with modern-day neurology and psychiatry. First, this Comment explores the unique characteristics of juvenile offenders as adolescent, semi-autonomous individuals who are more likely to be incompetent to stand trial than adult offenders. Second, this Comment demonstrates how rehabilitative theories of punishment, rather than retributive theories, better align with the unique characteristics of adolescence. Third, this Comment shows how the European Court of Human Rights and the Inter-American Court of Human Rights have embraced rehabilitative juvenile justice programs and how member states have integrated those ideals to varying degrees and in imaginative ways. This Comment also explores how the United States remains uniquely committed to a more punitive retributive regime that rose

J.D., Northwestern Pritzker School of Law, 2021. Thank you to everyone who helped edit, review, and produce this Comment. Professor Stephen P. Sawyer introduced me to the regional international human rights courts and provided thoughtful feedback in the early stages of this Comment. Members of the Journal of Criminal Law and Criminology were instrumental in editing and finalizing this Comment. I am particularly grateful for the work of Miranda Roberts, Emily Grant, Teresa Manring, Isabel Mattson, and Corinna Goodman.

to prominence in the 1980s and fails to deter juvenile delinquency or reduce recidivism. Finally, this Comment proposes five moderate steps that states can adopt, without abandoning goals to reduce recidivism or deter crime, to reflect evolving international norms and to better embody the traditional rehabilitative goals of juvenile justice.

INTRODUCTION

In 1989, the United Nations adopted the Convention on the Rights of the Child (CRC) and it has been adopted with "global support" by almost every country in the world.[1] Article 37(b) of the CRC establishes broad guidelines for the incarceration and detention of juvenile offenders and provides that the "arrest, detention or imprisonment of a child . . . shall be used only as a measure of last resort and for the shortest appropriate period of time."[2] This has led to the reformation of juvenile justice systems throughout the world, including in Europe and Latin America,[3] as countries have modeled their systems to comply with the CRC. It has also led the European Court of Human Rights (ECHR), the Inter-American Commission on Human Rights (IACHR), and the Inter-American Court of Human Rights (IACtHR) to develop jurisprudence that reflects the rehabilitative goals of juvenile justice and the semi-autonomous nature of adolescents.[4] However, although it played a major role in drafting the CRC, the United States has yet to sign the Convention and has not taken steps to ensure that its juvenile justice system complies with the values enumerated in the CRC.[5] Without pressure to adhere to the standards set forth in the CRC, states within the United States have continued to administer primarily retributive juvenile criminal justice systems that do not embody established international norms.

This Comment argues that the United States has failed to realize the rehabilitative goals of juvenile justice and to take into account the fluid nature and degree of adolescents' autonomy and culpability. Accordingly, the

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[1] Cynthia Price Cohen, *The Role of the United States in the Drafting of the Convention on the Rights of the Child*, 20 EMORY INT'L L. REV. 185, 185 (2006). After South Sudan and Somalia ratified the CRC in 2015, the United States remains the only country in the United Nations not to ratify the Convention. Sarah Mehta, *There's Only One Country That Hasn't Ratified the Convention on Children's Rights: US*, ACLU (Nov. 20, 2015, 1:30 PM), https://www.aclu.org/blog/human-rights/treaty-ratification/theres-only-one-country-hasnt-ratified-convention-childrens [https://perma.cc/Z7N6-RZD7]; *see also* G.A. Res. 44/25, Convention on the Rights of the Child (Nov. 20, 1989).

[2] G.A. Res. 44/25, *supra* note 1, at ¶ 37(b).

[3] Mary Beloff, *Los Adolescentes y el Sistema Penal. Elementos Para Una Discusión Necesaria en la Argentina Actual*, 6 REVISTA JURIDICA DE LA UNIVERSIDAD DE PALERMO 97 (2005) (discussing the history and evolution of juvenile justice systems in Latin America broadly and in Argentina specifically).

[4] *See generally* COMM'N MINISTERS COUNCIL OF EUR., GUIDELINES OF THE COMMITTEE OF MINISTERS OF THE COUNCIL OF EUROPE ON CHILD-FRIENDLY JUSTICE (2010) [hereinafter GUIDELINES] (providing concrete recommendations for member states of the Council of Europe to reform their juvenile justice systems); INTER-AM. COMM'N ON HUM. RTS., JUVENILE JUSTICE AND HUMAN RIGHTS IN THE AMERICAS 9 (observing that Article 19 of the American Convention guarantees juveniles the opportunity for rehabilitation).

[5] Cohen, *supra* note 1, at 185–86.

United States should adopt aspects of juvenile justice systems developed in other countries that better embody the rehabilitative ideal. Part I of this Comment provides background on juvenile offenders in the criminal justice system. Specifically, Part I.A reviews the unique characteristics of juvenile offenders and explains how adolescents lack full competency to be judged by a criminal proceeding. Subsequently, in Part I.B, this Comment illustrates how a punitive juvenile justice system that is justified by retributive or deterrence theories of punishment is fundamentally inconsistent with the broad consensus in our scientific community that juvenile offenders have diminished agency and competency. Instead, juvenile criminal justice systems should be focused on rehabilitative systems that reflect adolescents' psychical, emotional, and neurological development. In Part II.A, this Comment broadly reviews juvenile justice systems found in Europe, Latin America, and the United States and argues that the United States' juvenile justice systems fail to embody the rehabilitative ideal of juvenile justice. However, regional international courts and their member states provide myriad examples of how to create more rehabilitative juvenile justice systems, and Part II.B of this Comment outlines aspects of several different systems that would fundamentally improve the United States' juvenile criminal systems without sacrificing legitimate public safety interests.

I. BACKGROUND

Childhood and adolescence are marked by diminished competency and limited agency. These features make juvenile justice systems poorly suited for traditional theories of punishment like retribution or deterrence. Instead, they reinforce the traditional rehabilitative justification of juvenile justice systems. This Part provides background on juvenile offenders in the criminal justice system. Part II.A explores why children and teenagers have limited agency and competency. It also briefly discusses the prevalence of mental illness among juvenile offenders and its implications for agency and competency. Part II.B discusses the impact these characteristics have for traditional theories of punishment and concludes that juvenile justice systems should strive to embody the rehabilitative ideal.

A. UNIQUE CHARACTERISTICS OF JUVENILE AGENCY AND COMPETENCY

Juvenile justice models internationally and in the United States broadly treat criminal justice as a binary system; offenders are either adult or juvenile actors. However, children are fundamentally different from teenagers, who are fundamentally different from adults. A binary system fails to take into account that the maturity of some child offenders should completely absolve

them of blame, while for many adolescents, their maturity should be a significant mitigating factor. These differences in maturity have substantial implications for whether or not juveniles should be subject to criminal sanctions.

1. Dependency and Childhood

Children are different from both adolescents and adults and lack the autonomy to ever justly be subject to criminal justice systems. Children lack the minimum capacity for blameworthiness and punishment.[6] This was recognized at common law[7] and has been codified into statutes domestically and internationally as the criminal age of responsibility.[8] Children's ability to make decisions, to process information, and to consider the consequences of alternative choices is significantly different from both adults and adolescents.[9]

The transition between childhood and adolescence is marked by improved "intellectual, emotional, behavioral, and interpersonal functioning."[10] A gradual increase in logical reasoning abilities begins at around age eleven and continues through the age of sixteen.[11] This increase in logical reasoning abilities includes the fundamental ability to "comprehend information relevant to a decision and . . . the ability to use this information logically to make a choice."[12] Simultaneously, focus on one's peer group increases between the ages of ten and fourteen.[13] As opposed to adolescents, who struggle to create their own independence, children do not consider autonomy a goal and "look to their parents to make decisions for them."[14] The low rate of childhood offenses reflects children's inability to make independent decisions.[15] Criminal offenses committed by children under the age of twelve are almost nonexistent.[16] Children, who have not begun transitioning into adults and who are not autonomous individuals,

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[6] *See* FRANKLIN E. ZIMRING, AMERICAN JUVENILE JUSTICE 52 (2005) (reviewing the principles and policy implications of separate juvenile justice systems that are responsive to the unique implications of youth crime).

[7] ELIZABETH S. SCOTT & LAURENCE STEINBERG, RETHINKING JUVENILE JUSTICE 130 (2008).

[8] *See infra* notes 110, 112, 116, 157–159, 172–173.

[9] SCOTT & STEINBERG, *supra* note 7, at 130.

[10] *Id.* at 33.

[11] *Id.* at 34.

[12] *Id.* at 36.

[13] *Id.* at 34.

[14] *Id.* at 31.

[15] *See* ZIMRING, *supra* note 6, at 93.

[16] *See* ZIMRING, *supra* note 6, at 93.

should not be subject to a criminal justice system that implicitly assumes some degree of autonomy.

2. Adolescent Offenders as Limited Legal Actors

In contrast, adolescence is a period of semi-autonomy that bridges the dependency of childhood and the independence of adulthood.[17] It is marked by "puberty, the transition from elementary to secondary school, and the emergence of increasingly sophisticated reasoning abilities."[18]

Despite adolescents' increased autonomy, modern-day science on juveniles' physical and psychological development makes clear that adolescent offenders should also not be considered full legal actors.[19] Adolescent offenders lack the ability to be fully responsible for their actions because their behavior is "more likely to be shaped by developmental forces that are constitutive of adolescence" than by "subjectively defined preferences and values," as found in adults.[20] Areas of the brain that implicate "long-term planning, the regulation of emotion, and impulse control" are still developing in adolescents.[21] Specifically, large-scale changes to the frontal lobe and prefrontal cortex, areas of the brain that are critical to advanced thinking, occur during an individual's teenage years.[22] As a result, "adolescents, as compared with adults, are more susceptible to influence, less future oriented, less risk averse, and less able to manage their impulses and behavior."[23] Since "these differences likely have a neurobiological basis,"[24] juvenile offenders have "greater prospects for reform,"[25] "are not as morally reprehensible,"[26] and are therefore "less deserving of the most severe punishments" than adults.[27]

Adolescent offenders are also subject to psychological factors that reduce their culpability. Adolescence is marked by "psychosocial maturation

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[17] *See id.* at 42.

[18] SCOTT & STEINBERG, *supra* note 7, at 34.

[19] *See* Sally Terry Green, *Realistic Opportunity for Release Equals Rehabilitation: How the States Must Provide Meaningful Opportunity for Release*, 16 BERKELEY J. CRIM. L. 1, 12, 27, 39–40 (2011).

[20] Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCH. 1009, 1015 (2003).

[21] *Id.* at 1013.

[22] SCOTT & STEINBERG, *supra* note 7, at 44.

[23] Steinberg & Scott, *supra* note 20, at 1013.

[24] *Id.*

[25] Miller v. Alabama, 567 U.S. 460, 471 (2012).

[26] Thompson v. Oklahoma, 487 U.S. 815, 835 (1988).

[27] Graham v. Florida, 560 U.S. 48, 68 (2010).

and the maturation of the brain's executive functions."[28] As a result, adolescent offenders are subject to factors that reduce their culpability that are nonexistent in adult offenders. First, adolescents are much more susceptible to peer pressure than adult offenders.[29] Susceptibility to peer pressure increases between the ages of eleven and fourteen and peaks around the ages of fourteen and fifteen.[30] Second, adolescents are also less future-oriented than adults.[31] Adolescents discount the future more heavily, and this leads adolescents to be less risk-averse.[32] Finally, teenagers, as opposed to adults, are more impulsive and less able to control their behavior and choices.[33] They have a greater tendency to moodiness and to seek sensation-arousing situations.[34] Collectively, these factors make juvenile delinquency less about moral blameworthiness or culpability and more about inherent psychological factors outside of an individual's control.

Decisions of the regional international courts and the United States Supreme Court have supported these scientific findings and recognized that a juvenile offender, owing to his or her developmental immaturity, should be viewed as less culpable than a comparable adult offender.[35] The United States Supreme Court has consistently recognized that children under the age of eighteen are still developing and are therefore less culpable than adults.[36]

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[28] SCOTT & STEINBERG, *supra* note 7, at 34.

[29] *Id.* at 38.

[30] *Id.* at 34, 38.

[31] Laurence Steinberg, Sandra Graham, Lia O'Brien, Jennifer Woolard, Elizabeth Cauffman & Marie Banich, *Age Differences in Future Orientation and Delay Discounting*, 80 CHILD DEV. 28, 28 (2009) ("Younger adolescents consistently demonstrate a weaker orientation to the future than do individuals aged 16 and older, as reflected in their greater willingness to accept a smaller reward delivered sooner than a larger one that is delayed, and in their characterizations of themselves as less concerned about the future and less likely to anticipate the consequences of their decisions.").

[32] *Id.*

[33] SCOTT & STEINBERG, *supra* note 7, at 43.

[34] *Id.*

[35] *See infra* note 36; Thompson v. Oklahoma, 487 U.S. 815, 835 (1988) ("[T]he Court has already endorsed the proposition that less culpability should attach to a crime committed by a juvenile than to a comparable crime committed by an adult. The basis for this conclusion is too obvious to require extended explanation. Inexperience, less education, and less intelligence make the teenager less able to evaluate the consequences of his or her conduct while at the same time he or she is much more apt to be motivated by mere emotion or peer pressure than is an adult. The reasons why juveniles are not trusted with the privileges and responsibilities of an adult also explain why their irresponsible conduct is not as morally reprehensible as that of an adult.").

[36] *See* Miller v. Alabama, 567 U.S. 460, 489 (2012); J.D.B. v. North Carolina, 564 U.S. 261, 272 (2011); Graham v. Florida, 560 U.S. 48, 68 (2010); Roper v. Simmons, 543 U.S. 551, 569–70 (2005).

Outside the context of criminal justice, the Supreme Court has noted that "a child lacks [the] maturity, experience, and capacity for judgment required for making life's difficult decisions."[37] More recently, in *Miller v. Alabama*, the Court struck down the sentencing of juvenile offenders to life without parole absent a review of mitigating factors.[38] Justice Kagan observed that youth status is marked as a time of "immaturity, irresponsibility, 'impetuousness, and recklessness.'"[39] Similarly, in an advisory opinion, the IACHR stated that the principle that juvenile offenders require special measures "originates from the specific situation of children, taking into account their weakness, immaturity or inexperience."[40] Finally, the ECHR has held that the sentencing of juveniles "must be done with due regard for their presumed immaturity."[41] Because adolescents have limited competency and agency, juvenile justice systems should account for their youth status and recognize the physical and psychological factors that influence their actions.

3. Juvenile Justice and Mental Illness

Regardless of their age, juvenile offenders are very likely to suffer from mental illness and, therefore, be incompetent to stand trial.[42] In the United States, "nearly 60% of male juvenile detainees and more than two-thirds of female detainees meet diagnostic criteria for one or more psychiatric disorders."[43] Furthermore, "[e]ducational researchers have found that upwards of 40 percent of incarcerated youth have a learning disability, and they will face significant challenges returning to school after they leave detention."[44] When we compare the mental illness prevalence rates of youths in the juvenile justice system to youths in the general population, the results are similarly skewed. Youths in the juvenile justice system are four times more likely to have a conduct disorder, roughly ten times more likely to have a substance abuse issue, and three to four times more likely to have an

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[37] Parham v. J. R., 442 U.S. 584, 602 (1979).

[38] *Miller*, 567 U.S. at 489.

[39] *Id.* at 476 (quoting Johnson v. Texas, 509 U.S. 350, 368 (1993)).

[40] Juridical Condition and Human Rights of the Child, Advisory Opinion OC-17/02, Inter-Am. Ct. H.R. (ser. A) No. 17, ¶ 60 (Aug. 28, 2002).

[41] Khamtokhu v. Russia, Apps. Nos. 60367/08, 961/11, ¶ 80 (Jan. 24, 2017), http://hudoc.echr.coe.int/eng?i=001-170663.

[42] Michael L. Perlin, *Yonder Stands Your Orphan with His Gun: The International Human Rights and Therapeutic Jurisprudence Implications of Juvenile Punishment Schemes*, 46 TEX. TECH. L. REV. 301, 307 (2013).

[43] *Id.* at 308.

[44] BARRY HOLMAN & JASON ZIEDENBERG, THE DANGERS OF DETENTION: THE IMPACT OF INCARCERATING YOUTH IN DETENTION AND OTHER SECURE FACILITIES 2 (2006).

affective disorder like clinical depression.[45] And while young people may be more likely to have a behavioral health problem before being incarcerated, those behavioral health problems "simply get worse in detention, not better."[46]

The close correlation between mental illness and juvenile offenses goes to the heart of whether or not adolescent offenders are competent to stand trial—and the United States Supreme Court has differed from the ECHR on this matter. Under federal law, an incompetent defendant does not understand the "nature and consequences of the proceedings against him" or cannot "properly assist in his defense."[47] Therefore, if the majority of minors who commit crimes do so as a result of a mental illness, then they may not be competent to be judged for that crime.[48] The Supreme Court has long held that insanity is a complete defense to criminal liability and that the Fifth Amendment requires an inquiry into a defendant's insanity when it is in doubt.[49] However, the Court has never required that the insanity defense be considered in juvenile justice systems, and some states do not even offer an insanity defense to juvenile offenders.[50]

The ECHR, on the other hand, has taken a different approach. When the ECHR considered Germany's diminished responsibility statute in a 2018 case,[51] it held that the defendant, a nineteen-year-old with severe sexual

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[45] Thomas Grisso, *Juvenile Offenders and Mental Illness*, 6 PSYCHIATRY PSYCH. & L. 143, 147 (1999).

[46] HOLMAN & ZIEDENBERG, *supra* note 44, at 8 ("Why is the prevalence of mental illness among detained youth so high? First, detention has become a new 'dumping ground' for young people with mental health issues . . . . At the same time, new laws were enacted that reduced judicial discretion to decide if youth would be detained, decreasing the system's ability to screen out and divert youth with disorders."); *id.* ("[T]he kind of environment generated in the nation's detention centers, and the conditions of that confinement, conspire to create an unhealthy environment. Researchers have found that at least a third of detention centers are overcrowded, breeding an environment of violence and chaos for young people. Far from receiving effective treatment, young people with behavioral health problems simply get worse in detention, not better.").

[47] 18 U.S.C. § 4241(a).

[48] *See* Perlin, *supra* note 42, at 315 (detailing the connection between mental illness, competency, and the insanity defense in the United States).

[49] *See, e.g.*, Pate v. Robinson, 383 U.S. 375, 386 (1966) ("Having determined that Robinson's constitutional rights were abridged by his failure to receive an adequate hearing on his competence to stand trial, we direct that the writ of habeas corpus must issue and Robinson be discharged, unless the State gives him a new trial within a reasonable time.").

[50] Perlin, *supra* note 42, at 313.

[51] Strafgesetzbuch [StGB] [Penal Code], § 21, https://germanlawarchive.iuscomp.org/?p=752#21 [https://perma.cc/HDP5-3E4K] (Ger.) ("If the capacity of the perpetrator to appreciate the wrongfulness of the act or to act in accordance with such appreciation is

sadism who murdered a woman and was at a high risk of recidivism, could be continuously detained only for preventative, not punitive, reasons.[52] The ECHR implicitly recognized what Germany had already codified: mental illness, while not always an exculpatory factor, may often be a mitigating factor.

Children lack the autonomy or competency to be considered legal actors, and teenagers, while beginning to develop autonomy and competency, are limited legal actors. As Part I.B outlines, this has implications for the rationale behind juvenile justice systems and traditional theories of punishment.

B. TRADITIONAL GOALS OF JUVENILE JUSTICE AND THEORIES OF PUNISHMENT

The unique characteristics of adolescent offenders have significant implications for the rationale behind juvenile justice systems. The traditional theories of retributivism and deterrence generally fail to take into account the unique position of adolescent offenders. For this reason, the rehabilitative model serves as the primary goal of domestic and international juvenile justice systems. This Section will consider how traditional theories of retributivism, deterrence, and rehabilitation each align with the juveniles' diminished competency and agency.

1. Retributivism and Youth Offenders

The retributive rationale for criminal justice is based on the Kantian idea of moral desert: we punish in order to preserve the dignity of the offender and to balance the moral scales.[53] The rationale for retributive justice is dependent on a person's free will and is fundamentally based on the idea of the full, rational actor.[54] Put another way, "[p]unishment that gives an

substantially diminished upon commission of the act due to one of the reasons indicated in section 20, then the punishment may be mitigated pursuant to Section 49 subsection (1).").

[52] Ilnseher v. Germany, Apps. Nos. 10211/12, 27505/14, ¶¶ 127–128 (Dec. 4, 2018), http://hudoc.echr.coe.int/eng?i=001-187540.

[53] *See generally* IMMANUEL KANT, GROUNDWORK OF THE METAPHYSIC OF MORALS (Mary Gregor ed. trans., 1997) (providing the philosophical foundation for retributive criminal justice systems).

[54] *Id.* at 37–38 ("If, then, there is to be a supreme practical principle and, with respect to the human will, a categorical imperative, it must be one such that, from the representation of what is necessarily an end for everyone because it is an *end in itself*, it constitutes an *objective* principle of the will and thus can serve as a universal practical law. The ground of this principle is: *rational nature exists as an end in itself* . . . . The practical imperative will therefore be the following: *So act that you use humanity, whether in your own person or in the person of any other, always at the same time as an end, never merely as a means.").*

offender what he or she deserves for a past crime is a valuable end in itself and needs no further justification."[55] However, any retributive model of criminal punishment must adjudicate desert in accordance with justice, and it precludes the punishment of individuals who are "not responsible for their offense."[56]

Retributive rationales have broadly been rejected as the basis for juvenile justice models. This is because a retributive basis for juvenile justice would "focus on backward-looking attributions of blame" for the action, rather than on the actor, which would make it "dangerously tempting [to abolish] the juvenile court."[57] Instead, the existence of a separate juvenile justice system "recogniz[es] the diminished blameworthiness of juveniles" and undermines the retributive justification for punishment.[58] The Supreme Court recognized this diminished blameworthiness in *Roper v. Simmons*, holding that as a result of "the lesser culpability of the juvenile offender," the death penalty was impermissible.[59] Similarly, the ECHR, in *V. v. United Kingdom*, affirmed the language, adopted by the United Nations, that any retributive goals of juvenile justice be outweighed by the rehabilitative interests in "safeguarding the well-being and future of the young person."[60]

2. Societal Deterrence and Recidivism

The deterrence considerations normally at play in criminal justice systems also do not apply well in juvenile systems. Incarcerating some adolescents will generally not impact the decision-making of other teenagers or have any impact on the overall offense rate.[61] As the Supreme Court has

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[55] Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453, 454 (1997).

[56] *Id.* at 477.

[57] Christopher Slobogin & Mark R. Fondacaro, *Juvenile Justice: The Fourth Option*, 95 IOWA L. REV. 1, 34 (2009). A retributive rationale for juvenile justice would make it easy to abolish the entire system because in a retributive model, there is no reason to distinguish between adult and juvenile actors. In other words, when the focus of criminal justice is punishing past actions as an independently valuable end, the focus is on the action, not the actor. *See id.* ("Treatment of juvenile offenders is not necessarily ignored, but it is not necessary to, and in a sense is a distraction from, assigning culpability and assuring accountability for one's offenses.").

[58] *Id.* at 35.

[59] Roper v. Simmons, 543 U.S. 551, 571 (2005).

[60] V. v. United Kingdom, 1999-IX Eur. Ct. H.R. 111, 135. The dissenting opinion went even further and found the sentence in the instant case impermissible because the "principal reason for bringing these proceedings against children of eleven years of age was retribution [and] vengeance is not a form of justice and in particular vengeance against children in a civilised society should be completely excluded." *Id.* at 172.

[61] *See infra* note 64.

recognized, this is because of three major differences between children and adults: (1) juveniles tend to engage in reckless behavior due to their general lack of maturity, which is still developing; (2) minors are more susceptible to the influence of peer pressure; and (3) minors' character traits are in the process of development and are more likely to change over time than those of adults.[62] As a result, adolescents will not accurately assess the risks of their chosen course of action. However, incarceration is not designed to address any of the three major reasons why a teenager might commit a crime. It is no surprise, then, that "decades of research show incarceration to be the least effective, most expensive option in treating delinquency."[63]

Similarly, reducing recidivism in the general population cannot be addressed by incarceration in juvenile justice systems. This is primarily because, for the majority of crimes, adolescents are not likely to reoffend.[64] Instead, their tendency to commit most crimes peaks around the age of sixteen and then dramatically decreases from the age of seventeen onward, independent of whether or not they are incarcerated for their crimes.[65] These relatively common "phase-specific" offenses are concentrated in adolescents' teenage years and include offenses like arson (ages thirteen and fourteen), motor vehicle theft (age sixteen), larceny (age seventeen), and burglary (age eighteen).[66] Incarceration adds nothing to the natural development of an adolescent's brain, which already makes recidivism unlikely.

The exceptions to this "age-crime relationship" are particularly violent crimes, like rape, homicide, and assault.[67] The peak age for committing these more violent offenses is later, and the drop-off in offense rates is much more gradual.[68] The peak age for homicide is nineteen, for rape it is twenty, and for aggravated assault it is twenty-one.[69] Youth offense rates of these violent crimes are also much lower than phase-specific offenses.[70] "While the ratio of homicide arrests at age fifteen to age twenty-three is .4, the ratio of auto

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[62] *Roper*, 543 U.S. at 569–70; *see also infra* Part II.A.

[63] David J. Utter & Megan Hougard, *Juvenile Justice Project of Louisiana: Redefining the Role of the Advocate*, 50 LA. B.J. 99, 99 (2002).

[64] SCOTT & STEINBERG, *supra* note 7, at 52–53.

[65] *See id.*

[66] ZIMRING, *supra* note 6, at 92.

[67] *Id.* at 91, 93.

[68] *Id.* at 91.

[69] *Id.* at 92.

[70] *Id.*

theft arrests at age fifteen to age twenty-three is 3.67."[71] The ephemeral nature of phase-specific offenses, like property-related violations, suggests that they are symptomatic of the conditions of adolescence rather than indicative of a permanent adult characteristic.[72] Recidivism concerns that could be addressed by incarceration in an adult criminal justice system do not exist for most adolescent offenses. Any deterrence rationale for a juvenile incarceration model would only apply to the small, limited group of violent offenses like rape and murder that could be indicative of a more permanent condition.

3. Rehabilitation, Education, Treatment, and Diversion

In contrast to the traditional retribution and deterrence theories of punishment, rehabilitation has traditionally been considered the foundation of juvenile justice in the United States and abroad.[73] This is because the "uniqueness of immaturity as a mitigating condition argues for . . . a separate justice system, in which rehabilitation is a central aim."[74] Social reformers during the late 1800s believed "that juveniles, unlike adults, were not responsible for their behavior."[75] As a result, reformers designed juvenile courts as social welfare agencies that were distinct from adult criminal courts, which focused on punishment.[76] These courts embraced the rehabilitative model, which focuses on "the notions that children[] are dependent upon adults; are developing emotionally, morally, and cognitively and, therefore, are psychologically impressionable and behaviorally malleable; and have different, less competent, levels of understanding and collateral mental functioning than adults."[77]

Today, the rehabilitative goals of juvenile justice systems have been reaffirmed by the United States Supreme Court, the Council of Europe, and the ECHR. The Supreme Court has long recognized the value of

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[71] *Id.* at 94. In other words, there are .4 homicides committed by a fifteen-year-old for every homicide committed by a twenty-three-year-old. And there are 3.67 auto thefts committed by a fifteen-year-old for every auto theft committed by a twenty-three-year-old.

[72] *See id.*

[73] *See generally A Madman's Vacation*, SERIAL (Nov. 2018), https://serialpodcast.org/season-three/8/a-madmans-vacation [https://perma.cc/2YBM-GA8R] (discussing the rationale for juvenile justice systems overall).

[74] Steinberg & Scott, *supra* note 20, at 1016.

[75] Ira M. Schwartz, Neil Alan Weiner & Guy Enosh, *Nine Lives and Then Some: Why the Juvenile Court Does Not Roll over and Die*, 33 WAKE FOREST L. REV. 533, 535 (1998).

[76] *See id.*

[77] *Id.*

rehabilitative justice for juvenile offenders.[78] In *Graham v. Florida*,[79] the Court struck down life without parole sentences for children convicted of nonhomicide offenses because life without parole "forswears altogether the rehabilitative ideal" and "[w]hat the State must do . . . is give defendants like Graham some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation."[80] Similarly, the ECHR has stated that member states have an obligation to facilitate the rehabilitation and reintegration of juvenile delinquents.[81] It has also noted that the abolition of life imprisonment in member states is rooted in a desire to "facilitate the rehabilitation of juvenile delinquents."[82] The Council of Europe has also reiterated rehabilitative goals when children are deprived of liberty. In the Guidelines on Child-Friendly Justice, the Committee of Ministers stated that the incarceration of children should be focused on "reintegration into society."[83] The Guidelines also state that juveniles should have "regular and meaningful contact with parents;" "receive appropriate education, vocational guidance and training, medical care;" and have access to "programmes that prepare children in advance for their return to their communities."[84] The rehabilitative ideals of juvenile justice have been repeatedly affirmed by the Supreme Court, the Council of Europe, and the ECHR.

II. ANALYSIS

Countries around the world have developed juvenile justice systems with unique characteristics in an attempt to embody the rehabilitative ideal of juvenile justice. This Part will review some of these systems. Part II.A will review rehabilitative aspects of juvenile justice systems that have been established by the ECHR, the IACtHR, and member states in the Council of Europe and the Organization of American States in the wake of the CRC. Specific focus will be placed on the role of incarceration of juvenile offenders. Part II.A will also broadly review juvenile justice systems in the United States and show that instead of embodying a rehabilitative idea of juvenile justice that is aligned with modern-day psychiatry and neurology,

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[78] *See, e.g.*, Kent v. United States, 383 U.S. 541, 554 (1966) ("The objectives [of Juvenile Courts] are to provide measures of guidance and rehabilitation for the child and protection for society, not to fix criminal responsibility, guilt and punishment.").

[79] 560 U.S. 48 (2015).

[80] *Id.* at 74–75; *see also* Green, *supra* note 19, at 11.

[81] Khamtokhu v. Russia, Apps. Nos. 60367/08, 961/11, ¶ 80 (Jan. 24, 2017), http://hudoc.echr.coe.int/eng?i=001-170663 [https://perma.cc/3NRT-EVAH].

[82] Maslov v. Austria, 2008-III Eur. Ct. H.R. 301, 331.

[83] GUIDELINES, *supra* note 4, at 24.

[84] *Id.*

they reflect retributive principles from the 1980s. Finally, Part II.B will propose that the United States shed its current juvenile criminal justice systems in favor of systems that draw on various international models and minimize the incarceration of adolescents by (1) raising the age of criminal responsibility; (2) creating a tiered system for teenagers with varying degrees of competency; (3) significantly restricting incarceration options; (4) investing in alternative options that divert youth offenders from the juvenile justice system; and (5) reimagining juvenile detention centers as rehabilitative resources that provide rigorous educational and psychological services.

A. JUVENILE INCARCERATION MODELS INTERNATIONALLY AND IN THE UNITED STATES

1. The Council of Europe and its Member States

The Council of Europe is Europe's "oldest political body" and focuses on protecting democracy and human rights within member states.[85] It was founded in the wake of World War II in 1949 and today consists of forty-seven members states.[86] The Council of Europe executes the judgments of the ECHR and ensures that members states comply with the European Convention on Human Rights.[87] This sub-section explores how the Council of Europe and various member states, including the United Kingdom, various Scandinavian countries, and Turkey, have structured their juvenile justice systems.

a. The Council of Europe and the ECHR

In 2010, the Council of Europe adopted the Guidelines on Child-Friendly Justice.[88] The Guidelines focus on "the best interests of children" and dictate that "member states should make . . . concerted efforts to establish multidisciplinary approaches" to juvenile justice.[89] The Guidelines also echo the CRC and establish that juvenile incarceration should only be used as a last resort.[90] Furthermore, they emphasize "the importance of family ties and promoting the reintegration into society" and dictate that

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[85] *What Is The Council of Europe?,* BBC NEWS (Feb. 5, 2015), https://www.bbc.com/news/world-europe-17741526 [https://perma.cc/U83K-UE48].

[86] *Id.*

[87] *Id.*; *see also* THE COURT IN BRIEF, EUROPEAN CT. OF HUM. RTS., https://www.echr.coe.int/Documents/Court_in_brief_ENG.pdf [https://perma.cc/JRU8-QUFU].

[88] GUIDELINES, *supra* note 4, at 7.

[89] *Id.* at 18.

[90] *Id*. at 24.

children should be able to "maintain regular and meaningful contact with parents"; "receive appropriate education, vocational guidance and training, medical care, and . . . access to leisure, including physical education and sport."[91] The Guidelines also demand that the age of responsibility be reasonable and that alternatives to incarceration, such as mediation and diversion, be encouraged.[92] In many ways, the Guidelines provide details for what the ECHR has already decided and simply "serve as a practical guide for [member] states to implement international standards."[93]

In several cases, the ECHR has emphasized that adolescents' immutable limited agency and competency must be considered for countries to embody rehabilitative ideals of juvenile justice. As one example, in 1999, the ECHR invalidated the United Kingdom's criminal adjudication of an eleven-year-old child.[94] The Court held that it was "essential that a child charged with an offence [be] dealt with in a manner which takes full account of his age, level of maturity and intellectual and emotional capacities."[95] Similarly, in 2006, after Turkish authorities detained a sixteen-year-old for four months while his case was pending, the ECHR held that, since the authorities did not consider the unique status of the offender as a minor, the detention was unlawful.[96]

The ECHR also considers an offender's age outside the context of incarceration. In *Maslov v. Austria*, the ECHR overturned an expulsion order of a sixteen-year-old adolescent who had committed a variety of criminal offenses and held that "the decisive feature of the present case is the young age at which the applicant committed the offences."[97] The ECHR reached this conclusion because it determined that the non-violent property-related acts committed by the minor could still be "regarded as acts of juvenile delinquency" rather than violent crimes that might justify an expulsion order.[98] Finally, where the ECHR considered whether a ten-year-old received a fair hearing, the court focused on the applicant's immaturity and the "considerable psychiatric evidence" that suggested that the applicant "found

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[91] *Id.*

[92] *Id.* at 25. However, the Guidelines refrain from setting a minimum age and do not establish a definition for "reasonable." *See generally id.*

[93] Ton Liefaard, *Child-Friendly Justice: Protection and Participation of Children in the Justice System*, 88 TEMP. L REV. 905, 907 (2016).

[94] T. v. United Kingdom, App No. 24724/94, ¶ 84 (Dec. 16, 1999), http://hudoc.echr.coe.int/eng?i=001-58593.

[95] *Id.*

[96] Selçuk v. Turkey, App. No. 21768/02, ¶¶ 34–37 (Jan. 10, 2006), http://hudoc.echr.coe.int/eng?i=001-71944.

[97] Maslov v. Austria, 2008-III Eur. Ct. H.R. 301, 304.

[98] *Id.* at 327.

it very difficult and distressing to think or talk about the events in question, making it impossible to ascertain many aspects."[99] The ECHR has consistently emphasized the adolescence of juvenile offenders, the relationship between immaturity and limited intellectual and emotional capacities, and the rehabilitative ideals of juvenile justice.

However, despite this rhetoric, the ECHR has refrained from taking substantive steps to curtail the punitive juvenile justice systems of some of its member states. For instance, in *V. v. United Kingdom*, a ten-year-old boy convicted of murder claimed that, under Article 3 of the European Convention on Human Rights, the United Kingdom was precluded from enforcing a criminal age of responsibility for a ten-year-old without ensuring that procedures and sentences be modified to reflect the age of the child.[100] The ECHR rejected the argument, holding that "there is [not] at this stage any clear common standard amongst the member States of the Council of Europe as to the minimum age of criminal responsibility."[101] Therefore, "the attribution of criminal responsibility to the applicant does not in itself give rise to a breach of Article 3 of the Convention."[102] The ECHR's abdication of its responsibility to protect adolescent offenders has allowed punitive juvenile justice systems to remain in the United Kingdom.[103]

The ECHR has been more active, though not steadfast, in regulating the length of juvenile prison sentences. In *T. v. United Kingdom*, the ECHR held that "a policy which ignores at any stage the child's development and

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[99] V. v. United Kingdom, 1999-IX Eur. Ct. H.R. 111, 148. V. and T. were co-defendants convicted of murder in the United Kingdom in 1999. *See supra* note 94.

[100] *Id.* ¶ 86. Article 3 of the European Convention on Human Rights, the prohibition of torture, dictates that "[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment." Convention for the Protection of Human Rights and Fundamental Freedoms, art. 3, Nov. 4, 1950, 312 E.T.S. 5, https://www.echr.coe.int/Documents/Convention_ENG.pdf [https://perma.cc/3T29-5LSU].

[101] *V.*, 1999-IX Eur. Ct. H.R. at 144.

[102] *Id.* The ECHR noted that Cyprus, Ireland, Liechtenstein, and Switzerland all set the criminal age of responsibility at seven, while Spain, Belgium, and Luxembourg all set the criminal age of responsibility at eighteen. *Id.* at 137.

[103] International criminal courts have also refrained from exercising jurisdiction over children, in effect regulating juvenile prosecution to nation states and making the ECHR's abdication of responsibility even more egregious. The Rome Statute of the International Criminal Court (ICC) excludes persons under the age of eighteen from the ICC's jurisdiction. Rome Statute of the International Criminal Court art. 26, July 17, 1998, 2187 U.N.T.S. 38544. Similarly, the International Criminal Tribunals for Rwanda and former Yugoslavia have refrained from setting a minimum age of criminal responsibility, though they have also refrained from indicting anyone under the age of eighteen. Matthew Happold, *The Age of Criminal Responsibility in International Criminal Law, in* INTERNATIONAL CRIMINAL ACCOUNTABILITY AND THE RIGHTS OF CHILDREN 69, 76 (Karin Arts & Vesselin Popovski eds., 2006).

progress while in custody as a factor relevant to his eventual release date is an unlawful policy."[104] Similarly, in *Hussain v. The United Kingdom*, the ECHR held that without the use of a tariff[105] to reevaluate his prison sentence, the applicant, because he was a sixteen-year-old boy, would be impermissibly detained.[106]

The ECHR has also developed loose standards for the detention of minors with mental health issues. As a preliminary matter, before children can be detained, "a medical assessment should be made of the child's state of health to determine whether or not he or she can be placed in a juvenile detention centre."[107] This principle was illustrated in a case where the ECHR found that Russia had violated the rights of a twelve-year-old boy with ADHD and neurosis who was hospitalized immediately after being released from a temporary detention center because he was "not given the necessary treatment for his condition at the temporary detention centre."[108] However, in the same way it has neglected to set a clear minimum age of criminal responsibility for its member states, the ECHR has failed to describe, beyond a prohibition on juvenile life sentences without parole, a maximum detention length for juvenile offenders.

b. The United Kingdom

The ECHR's deferential treatment of member states has allowed some countries wide latitude to maintain primarily retributive, rather than rehabilitative, juvenile justice systems. For instance, the United Kingdom, despite criticism from the Council of Europe's Commissioner for Human Rights,[109] has lower ages of criminal responsibility[110] and more incarcerated

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[104] Marina Ann Magnuson, *Taking Lives: How the United States Has Violated the International Covenant of Civil and Political Rights by Sentencing Juveniles to Life Without Parole*, 14 U.C. DAVIS J. JUV. L. & POL'Y 163, 174 n.48 (2010).

[105] A tariff in the British system serves a similar function as parole in American systems. *Id.* at 174 n.50.

[106] Hussain v. United Kingdom, 1996-I Eur. Ct. H.R. 252, 269.

[107] Blokhin v. Russia, App. No. 47152/06, ¶ 138 (Mar. 23, 2016), http://hudoc.echr.coe.int/eng?i=001-161822.

[108] *Id.* ¶¶ 146, 149.

[109] Thomas Hammarberg, *A Juvenile Justice Approach Built on Human Rights Principles*, 8 YOUTH JUST. 193, 195 (2008) ("In the United Kingdom, over three thousand minors are kept in detention at any one time which means that about five thousand youngsters are given that experience during one year. This is hardly consistent with the norm of detention as a 'last resort'.").

[110] Barry Goldson & John Muncie, *Rethinking Youth Justice: Comparative Analysis, International Human Rights and Research Evidence*, 6 YOUTH JUST. 91, 95 (2006) ("12 in Canada, the Netherlands and Turkey; 13 in France; 14 in Germany, Italy, Japan, New Zealand

youth offenders than most other European Countries.[111] The age of criminal responsibility is eight in Scotland and ten in England, Wales, and Northern Ireland.[112] However, in Wales and England, the prosecutor has the burden of proving that juvenile offenders between the ages of ten and fourteen knew their actions were wrong.[113] These harsher punishments reflect the importance placed on deterrence and retribution in the juvenile justice system in the U.K.[114] Admittedly, the United Kingdom has also adopted rehabilitative concepts into its incarceration model. Section 53(1) of the Children and Young Persons Act of 1933 requires that "[u]ntil the age of eighteen a child or young person detained . . . will be held at a children's home or other institution providing facilities appropriate to his age."[115] Nonetheless, the British model's retributive and punitive elements are often under reproach from the ECHR as out of line with international norms of juvenile justice.

c. Scandinavia

The antithesis of the British model has been adopted uniformly by the four Scandinavian countries: Denmark, Norway, Sweden, and Finland. In all four countries, the age of criminal responsibility is fifteen years.[116] Additionally, while none of these countries have a separate juvenile court system, youth offenders between the ages of fifteen and seventeen are supported by both the criminal justice and child welfare systems.[117] Significantly, all four countries restrict the charges that can be brought against youth offenders.[118]

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and Spain; 15 in Denmark, Finland, Norway and Sweden; and 18 in Belgium and Luxembourg.").

[111] *Id.* at 92 ("[T]he defining hallmark of contemporary youth justice in England and Wales is a 'new punitiveness', characterized by rates of child imprisonment significantly exceeding those found in most other industrialized democratic countries in the world.") (citations omitted).

[112] *Id.* at 95.

[113] V. v. United Kingdom, 1999-IX Eur. Ct. H.R. 111, 128.

[114] Goldson & Muncie, *supra* note 110, at 99 ("Youth justice policies are increasingly located within a wider ideological context whereby social, economic and political problems are redefined as issues to be *managed* rather than *resolved*."); *see also V.*, 1999-IX Eur. Ct. H.R. at 125 (noting that in the sentencing of two ten-year-old boys for murder, the trial judge "subsequently recommended that a period of eight years be served by the boys to satisfy the requirements of retribution and deterrence").

[115] *V.*, 1999-IX Eur. Ct. H.R. at 130.

[116] Tapio Lappi-Seppälä, *Penal Policy in Scandinavia*, 36 CRIME & JUST. 217, 225 (2007).

[117] *Id.* at 226. For instance, Sweden uses social welfare authorities, rather than criminal justice officials, to administer court-ordered institutional treatment. *Id.*

[118] *See id.*

Furthermore, in the majority of cases, all four countries use alternatives to incarceration to resolve youth offenses. Probation and fines are the most common sanctions for youth offenders.[119] In Norway, mediation is frequently used as an independent criminal sanction to resolve offenses.[120] Denmark uses "youth contract" programs and "youth sanction" programs.[121] "Youth contract" programs obligate youths to participate in certain activities, which if they complete, lead to the dropping of the charges and in some cases, a suspended sentence. "Youth sanction" programs are "two-year programs imposed by courts but implemented by [] social welfare authorities."[122]

As a result, juvenile offenders are incarcerated far less frequently in these countries. Finland, for example, only allows non-suspended prison terms for youth offenders in extraordinary circumstances.[123] Countrywide, this has led to "about 100 (2 per 100,000) prisoners between the ages of eighteen and twenty and fewer than ten (0.2 per 100,000) in the fifteen to seventeen age group."[124] Similarly, in Sweden, "[p]rison is seldom used for the age group fifteen to seventeen (five cases in 2003), and it is relatively rare in the age group eighteen to twenty (767 in 2003)."[125] At the heart of all four of these systems are principles of rehabilitative justice that aim to reduce recidivism and address the underlying issues without reverting to societal condemnation.

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[119] *Id.*

[120] *Id.* Norway was the first Scandinavian country to begin using mediation in 1981. *Id.*

[121] *Id.*

[122] *Id.*; ANETTE STORGAARD, INT'L JUV. JUST. OBSERVATORY, ALTERNATIVES TO CUSTODY FOR YOUNG OFFENDERS: NATIONAL REPORT ON JUV. JUSTICE TRENDS DENMARK, 4–5 (2011). Often times, a contract requires an offender to complete a training program or finish school. If the offender does not complete the program, then charges remain, and in some cases, a suspended sentence could be imposed. In rare cases, a suspended sentence could include a fine or other penalty. Britta Kysvgaard, *Youth Crime and Youth Justice: Comparative and Cross-National Perspectives*, 31 CRIME & JUST. 349, 371 (2004). More severe sanctions might include community service, with an hours requirement between thirty and three hundred. A contract is signed by both the offender and their parents in exchange for a suspended criminal sentence, which would be imposed if the terms of the contract are not met. STORGAARD, *supra*, at 4–5. In contrast, youth sanction programs require juvenile offenders to serve time first in a closed juvenile institution and then in an open residential institution. *Id.* at 6–7. However, both centers are administered by welfare, rather than penal, institutions. *Id.*

[123] Lappi-Seppälä, *supra* note 116, at 236. Non-suspended prison terms are generally reserved for "homicides, aggravated robberies and aggravated drug offences." TAPIO LAPPI-SEPPÄLÄ, INT'L JUV. JUST. OBSERVATORY, ALTERNATIVES TO CUSTODY FOR YOUNG OFFENDERS: NATIONAL REPORT ON JUVENILE JUSTICE TRENDS FINLAND 8 (2011).

[124] Lappi-Seppälä, *supra* note 116, at 236.

[125] *Id.* at 249.

d. Turkey and "Open Prisons"

Finally, Turkey, which reformed its juvenile criminal justice system over the last twenty years, provides a model for reformation of juvenile penal institutions in the twenty-first century.[126] Turkey's transition towards a more rehabilitative juvenile justice system began with the passage of Turkey's Juvenile Protection Law in 2005, which aimed to "regulate the procedures and principles with regard to protecting juveniles who are in need of protection or who are *pushed* to crime, and ensuring their rights and well-being."[127] In using the phrase "*pushed* to crime," Turkey makes it clear that it fundamentally views juvenile offenders as victims, rather than perpetrators.

However, Turkey retained punitive characteristics in its juvenile justice system. Even though it was raised to twelve, Turkey still maintains a low age of criminal responsibility.[128] Similarly to those in the United Kingdom, adolescent offenders between the ages of twelve and fifteen are evaluated by a forensic specialist who determines whether the child understood that what they were doing was wrong.[129] Turkey also often detains juveniles during pretrial proceedings.[130]

Nevertheless, Turkey manages to maintain a low recidivism rate because it detains relatively few children, and the children who are detained are kept in "open prisons," which "allows for juveniles to experience more successful rehabilitation than they might otherwise receive in closed facilities."[131] Turkey's "open prisons" more closely resemble boarding schools than traditional detention centers and are used primarily for serious offenders.[132] They emphasize education, practical work experience, physical fitness, and community service.[133] The "open prisons" do not have fences or barriers, and detainees attend school, training sessions, or have jobs in the local community.[134] Residents may spend the weekend or an afternoon

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[126] Brenda McKinney & Lauren Salins, *A Decade of Progress: Promising Models for Children in the Turkish Juvenile Justice System*, 12 UCLA J. ISLAMIC & NEAR E. L. 13, 13 (2013).

[127] Juvenile Protection Law, Law No.: 5395 Official Gazette, 15 July 2005, No. 25876, enacted: 3 July 2005 (Turk.). (emphasis added).

[128] McKinney & Salins, *supra* note 126, at 18.

[129] *Id.* at 20.

[130] *Id*. at 22; *see also* Selçuk v. Turkey, App. No. 21768/02, ¶¶ 5–18 (Jan. 10, 2006), http://hudoc.echr.coe.int/eng?i=001-71944 (where the ECHR considered the validity of the four-month pretrial detention of the sixteen-year-old applicant).

[131] McKinney & Salins, *supra* note 126, at 27–28.

[132] *Id.* at 25–26.

[133] *Id.* at 26–27.

[134] *Id.*

visiting family.[135] Because the living conditions in these prisons are often better than living conditions at home, residents rarely attempt to leave or escape.[136] These prisons prepare children for life after detention, and recidivism rates are thus lower among previously incarcerated teenagers in Turkey than in other countries.[137] Turkey's open-air prisons emphasize rehabilitative programs, and teenagers are able to grow into productive members of society that no longer pose a threat to public safety.

2. The Organization of American States and Latin America

Like the Council of Europe, the Organization of American States (OAS) is a regional international body that focuses on promoting democracy and protecting human rights.[138] Within the OAS, the Inter-American Commission on Human Rights (IACHR) is responsible for promoting and protecting human rights.[139] And like the ECHR, the Inter-American Court of Human Rights (IACtHR) is an autonomous judicial body that enforces the human rights conventions adopted by OAS member states.[140] This sub-section will review how the IACHR and IACtHR have articulated and enforced principles of juvenile justice. It will also review the system developed by Oaxaca, Mexico, one of the OAS members states.

a. The IACHR and the IACtHR

Since the passage of the CRC, many Latin American countries have reformed their juvenile justice systems.[141] The IACHR has consistently recognized that the primary goal of the juvenile justice system is rehabilitation.[142] With regard to the minimum age of criminal responsibility, the IACHR provides more guidance than its European counterpart.[143] While the IACHR has refrained from setting a specific age of criminal responsibility and acknowledges that there is no clear international standard, it also says

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[135] *Id.* at 26.

[136] *Id.* at 26 n.103.

[137] *Id.* at 28.

[138] *About the OAS: Who We Are*, ORG. AM. STATES (last visited July 26, 2020), http://www.oas.org/en/about/who_we_are.asp [https://perma.cc/84QW-SSLB].

[139] *Inter-American Commission on Human Rights*, ORG. AM. STATES (last visited July 26, 2020), http://www.oas.org/en/about/commission_human_rights.asp [https://perma.cc/GA3R-W7F2].

[140] *What is the I/A Court H.R.?*, INTER-AM. CT. HUM. RTS. (last visited July 26, 2020), http://www.corteidh.or.cr/que_es_la_corte.cfm?lang=en [https://perma.cc/RF7T-CUQS].

[141] Beloff, *supra* note 3, at 98–100.

[142] INTER-AM. COMM'N ON HUM. RTS, *supra* note 4, at ix.

[143] *See supra* note 92.

that any criminal age of responsibility below twelve is unacceptable.[144] Additionally, it notes that "the Committee on the Rights of the Child has recommended that States set the minimum at between 14 and 16 years."[145] In contrast to the British and Turkish systems, the IACHR specifically condemns the use of a tiered model that recognizes multiple criminal ages of responsibility, coupled with a determination of maturity, as "confusing."[146] Among member states, Argentina has the highest age of responsibility at sixteen, while Grenada and Trinidad and Tobago have the lowest age of responsibility among member states at seven.[147]

The IACtHR has also disavowed punitive rationales for juvenile punishment and embraced rehabilitative principles. In an advisory opinion requested by the IACHR, the IACtHR supported the principle that "children requir[e] measures to protect their rights [and] must not be subject to punitive treatment. On the contrary, they require prompt and careful intervention on the part of well-equipped and well-staffed institutions in order to resolve their problems or mitigate their consequences."[148] Even more notably, in *Juvenile Reeducation Institute v. Paraguay*, the IACtHR found Paraguay in violation of several conventions due to their treatment of juvenile prisoners.[149] The country's "Panchito López" Center, which housed juvenile prisoners, was constantly suffering from "overpopulation, overcrowding, lack of sanitation, inadequate infrastructure, and a prison guard staff that was both too small and poorly trained."[150] Additionally, Paraguay failed to keep juvenile offenders under the age of eighteen separated from adult prisoners when a series of fires required officials to send juvenile prisoners to adult prisons all over the country.[151] The IACtHR found the State of Paraguay in violation of Articles 4(1), 5(1), 5(2), 5(6), and 19 of the American Convention on Human Rights when it determined that Paraguay failed to provide "decent living

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144 INTER-AM. COMM'N ON HUM. RTS., *supra* note 4, at 13.

145 *Id.*

146 INTER-AM. COMM'N ON HUM. RTS., *supra* note 4, at 14–15. The IACHR also noted that a tiered system "leaves much to the discretion of the court or judge and may result in discriminatory practices." *Id.*

147 *Id*. at 13–14.

148 *Id.* at 20 (citing Juridical Condition and Human Rights of the Child, Advisory Opinion OC-17/02, Inter-Am. Ct. H.R. (ser. A) No. 17 (Aug. 28, 2002)).

149 Juv. Reeducation Inst. v. Paraguay, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 112, ¶ 4 (Sept. 2, 2004).

150 *Id.*

151 *Id.* ¶ 5.

conditions, rehabilitative programs, and care to children in State custody."[152] Finally, the IACtHR, while recognizing that in practice many member states fall woefully short, reaffirmed the CRC's language that incarceration "must be used only as a last resort and only by way of exception, and for as short a time as possible."[153] Thus, the IACHR and IACtHR have consistently promoted rehabilitative principles of juvenile justice.

b. Mexico and Oaxaca

Upon ratification of the CRC, the Mexican government amended its constitution and directed its states to develop juvenile justice systems in accordance with the principles outlined in the CRC.[154] In anticipation of the amendment, Oaxaca, a state to the southwest of Mexico City, developed a system that served as a model for the rest of the country.[155] Oaxaca, due to cultural norms[156] and the financial and geographic constraints of the region, emphasized rehabilitative principles in Oaxaca's Penal Code for Adolescents, which was passed in 2007.[157]

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[152] Ava Rubin, *Juvenile Reeducation Institute v. Paraguay*, 38 LOY. L.A. INT'L & COMPAR. L. REV. 1446, 1455–56 (2016); *see also Juvenile Reeducation Inst.*, Inter-Am. Ct. H.R. (ser. C) No. 112, ¶¶ 176, 340. Article 4(1) of the American Convention on Human Rights states, "[e]very person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life." American Convention on Human Rights art. 4(1), Nov. 22, 1969, S. Treaty Doc. No. 95-21, 1144 U.N.T.S. 123. Article 5(1) is "[e]very person has the right to have his physical, mental, and moral integrity respected"; 5(2) states, "[n]o one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person"; and 5(6) states "[p]unishments consisting of deprivation of liberty shall have as an essential aim the reform and social readaptation of the prisoners." *Id.* art. 5. Article 19 states, "[e]very minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the state." *Id.* art. 19.

[153] *Juvenile Reeducation Inst.*, Inter-Am. Ct. H.R. (ser. C) No. 112, ¶ 231; INTER-AM. COMM'N ON HUM. RTS., *supra* note 4, at 22.

[154] Beth Caldwell, *Punishment v. Restoration: A Comparative Analysis of Juvenile Delinquency Law in the United States and Mexico*, 20 CARDOZO J. INT'L & COMPAR. L. 105, 109 (2011) ("In 2005, Article 18 of the Mexican Constitution was modified to require each state to design and implement a juvenile delinquency system that operates separately from the adult criminal justice system.").

[155] *Id*. at 112 ("Oaxaca has received national attention for the extent to which mediation and restorative justice processes are utilized to address juvenile crime. Because of this innovative approach, Oaxaca's Penal Code for Adolescents has been referred to as a model for other states.").

[156] *Id.* at 115 ("The prevalence of indigenous people and cultures in Oaxaca contributes to a world-view that prioritizes dialogue and community responses to problems that are similar in many ways to restorative justice conferences.").

[157] *Id.* at 115, 112 n.35.

Instead of setting a single age of criminal responsibility that would determine when a child could be detained, Oaxaca created a tiered approach. The Oaxacan Penal Code excludes any children younger than twelve from the juvenile criminal justice system.[158] From twelve until fourteen, children may be held criminally accountable, but detention is prohibited.[159] Finally, from ages fourteen until eighteen, children may be incarcerated if convicted of a limited list of crimes.[160] However, fourteen to sixteen-year-olds may only be incarcerated for a maximum of four years, and seventeen to eighteen-year-olds may only be incarcerated for a maximum of seven to ten years.[161] These tiers were designed to track with a youth's "capacity to understand the wrongfulness of their actions and to engage in higher order reasoning."[162] As of January 2010, Oaxaca only had thirty-five youth offenders incarcerated.[163]

3. The United States

Illinois pioneered rehabilitative juvenile justice when it set up the first juvenile justice system in 1899.[164] Within twenty-five years, all but two states had adopted similar systems.[165] However, during the 1980s, the United States moved from a rehabilitative approach to juvenile justice to a system focused on retributive justice.[166] This followed a national trend towards more punitive criminal justice models and marked the most substantial growth in youth imprisonment in the history of American crime policy.[167] Between 1971 and 1995, the incarceration rate of juveniles increased by over forty percent.[168] Today, the United States' juvenile incarceration rate remains "five times higher than South Africa . . . seven times greater than England and Wales,

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158 *Id.* at 122.

159 *Id*.

160 *Id.* at 133–34 ("Youth ages fourteen to sixteen may only be detained for committing one of the following offenses: rape, battery, causing injury, homicide, robbery involving physical violence, kidnapping, and human trafficking of children.").

161 *Id.* at 122–23 n.95.

162 *Id.* at 122.

163 *Id.* at 133 n.161.

164 Brad Taylor, *Return to Rehabilitation: Illinois' Evolving Juvenile Sentencing Practices in Light of* Miller v. Alabama, 43 S. ILL. U. L.J. 403, 404 (2019).

165 AM. BAR ASS'N, DIV. PUBLIC EDUC., DIALOGUE ON YOUTH AND JUSTICE 5, americanbar.org/content/dam/aba/administrative/public_education/resources/DYJfull.pdf.

166 Taylor, *supra* note 164, at 404.

167 *Id.*; ZIMRING, *supra* note 6, at 45.

168 ZIMRING, *supra* note 6, at 46.

thirteen times greater than Australia, eighteen times greater than France, and over three thousand times greater than Japan."[169]

The United States' high juvenile incarceration rate is not the only thing that makes it stand out in the criminal justice context. It was not until 2005 that the United States Supreme Court ruled that the death penalty for juvenile offenders violated the Eighth Amendment.[170] Furthermore, despite the limits imposed by the Supreme Court in *Miller v. Alabama,*[171] juvenile life without parole remains legal in the United States to this day.[172] Among the states, only nineteen have minimum ages of criminal responsibility.[173] The lowest minimum age is seven in Oklahoma, and both Nevada and Washington consider eight the minimum age of criminal responsibility.[174] And as of 2007, forty-six states had waiver laws that allowed states to prosecute minors as adults, either through categorical exclusions for certain offenses or through prosecutorial discretion.[175]

Additionally, while juvenile offenders are often separated from adult offenders, this is frequently at the discretion of judges, and juvenile detention

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[169] Jacqueline L. Bullard & Kimberly E. Dvorchak, *Juvenile Appeals: A Promising Legal Strategy to Reduce Youth Incarceration*, 8 J. MARSHALL L.J. 403, 406–07 (2015). These high incarceration rates show the continuing influence that retributive ideologies have on American juvenile justice systems, even when compared to other relatively retributive models like the United Kingdom and France. *Id.*

[170] Roper v. Simmons, 543 U.S. 551, 578 (2005). This is remarkable because at the time, "the United States [was] the only country in the world that continue[d] to give official sanction to the juvenile death penalty." *Id.* at 575.

[171] 576 U.S. 460 (2012).

[172] Taylor, *supra* note 164, at 403–04. *Miller* held that juvenile life without parole may only be applied in cases where there is a finding of "irreparable corruption." *Miller*, 576 U.S. at 479–80.

[173] Linda A. Szymanski, *Do States Set a Minimum Age, Below Which a Juvenile Cannot be Tried in Criminal Court?,* 16 NCJJ SNAPSHOT (2011) ("Alabama, California, Colorado, Georgia, Hawaii, Idaho, Illinois, Louisiana, Maine, Minnesota, Nevada, New Hampshire, New Jersey, New York, Oklahoma, Oregon, Texas, Utah, and Washington.")

[174] *Id.*

[175] JASON ZIEDENBERG, U.S. DEP'T JUST., NAT'L INST. CORR., YOU'RE AN ADULT NOW: YOUTH IN ADULT CRIMINAL JUSTICE SYSTEMS 3 (2011). Juvenile waiver laws, which allow juvenile offenders to be tried as adults for certain crimes, rose to prominence within the 1980s retributive justice movement because they were thought to deter juvenile offenses and reduce recidivism. Richard E. Redding, *Juvenile Transfer Laws: An Effective Deterrent to Delinquency?*, JUV. JUST. BULL. (Off. of Juv. Just. & Delinquency Prevention, Wash. D.C.), June 2010, at 1. However, "[s]everal studies have found higher recidivism rates for juveniles convicted in criminal court than for similar offenders adjudicated in juvenile courts" and "[t]he bulk of the evidence suggests that transfer laws, at least as currently implemented and publicized, have little or no general deterrent effect in preventing serious juvenile crime." *Id.* at 1, 3.

facilities mirror adult facilities.[176] Since 2000, twenty-two states and the District of Columbia have all documented instances of maltreatment of juvenile prisoners, including "systemic violence, [physical and sexual] abuse, and excessive use of isolation or restraints."[177] Even in model juvenile detention systems, such as Ohio's, access to rehabilitation resources are limited, and gangs may control the rehabilitative resources.[178] Finally, although children might be initially charged with abbreviated sentences, they will often also be charged with a suspended adult sentence if they misbehave in prison.[179] Despite recent decisions by the Supreme Court, the United States' juvenile justice systems remain uniquely punitive and fail to embody rehabilitative ideals.

B. THE PROPER JUVENILE INCARCERATION MODEL FOR THE UNITED STATES

In light of the unique issues of competency that plague juvenile criminal justice and the rehabilitative rationale that it recognizes as the core of the juvenile justice system, the United States' punitive systems provide inadequate protections for youth when compared to the systems adopted by many member states in the Council of Europe and the Organization of American States. In order to move their juvenile justice systems into the twenty-first century so that they better reflect rehabilitative ideals and the modern-day scientific consensus regarding children and adolescents, states should reform their juvenile justice systems by (1) establishing a statutory minimum criminal age of responsibility no lower than twelve that precludes children without some degree of autonomy from entering the juvenile justice system; (2) installing a tiered sentencing structure that reflects the growth of autonomy and culpability experienced by adolescents throughout their teenage years to guide the discretion of individual judges; (3) restricting the number of crimes for which incarceration is a sentencing option to those violent crimes that are not phase-specific violations unique to the adolescent experience; (4) creating additional diversionary programs that emphasize community service, education, and physical and mental fitness without

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[176] ZIEDENBERG, *supra* note 175 at 4 ("There are also various legal mechanisms a judge or prosecutor can choose to transfer a youth charged with a particular crime to the adult system."); *see also* ANNIE E. CASEY FOUND., NO PLACE FOR KIDS: THE CASE FOR REDUCING JUVENILE INCARCERATION 5–9 (2011).

[177] ANNIE E. CASEY FOUND., *supra* note 176, at 5.

[178] *See generally* SERIAL, *supra* note 73 (describing the conditions at juvenile prisons in Cuyahoga County, Ohio).

[179] *Id.*

requiring incarceration; and (5) restricting the incarceration of juvenile offenders to special reform prisons that emphasize rehabilitative ideals.

1. A Responsible Minimum Age of Criminal Responsibility

A minimum age of criminal responsibility of twelve reflects the modern scientific consensus that until their preteen years, children do not strive to be autonomous and are dependent on their parents.[180] It reflects the data that children twelve and younger commit significantly fewer crimes than adolescents.[181] It also reflects the age when teenagers *begin* to become independent, rationally thinking members of society, and it lines up with other significant transitions that occur during childhood: the development of an outside social group that exerts peer pressure, puberty, and the transition from elementary to secondary schooling.[182]

A minimum criminal age of responsibility of twelve also allows states to realize the rehabilitative ideals of the juvenile justice system by keeping children too young to have any degree of culpability from entering the system.[183] It recognizes the transitory nature of childhood and prevents the criminal justice system from having jurisdiction over people without agency.[184] It also reflects the growing international consensus that any criminal age of responsibility below twelve is too low. The IACHR, for instance has explicitly recognized that any criminal age of responsibility below twelve is too low.[185] And although the ECHR has notably abdicated its responsibility to set a minimum age for its member states, even that court has recognized that age is a crucial element of a juvenile's competency to stand trial.[186] Additionally, the majority of member states in the Council of Europe have set the criminal age of responsibility at or above the age of twelve.[187] In many instances, member states, such as the Scandinavian

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[180] *See infra* Part II.A.

[181] *Id.*

[182] *Id.*

[183] *Id.*

[184] *Id.*

[185] INTER-AM. COMM'N ON HUM. RTS., *supra* note 4, at 13.

[186] *See supra* notes 92, 95.

[187] *See Minimum Ages of Criminal Responsibility in Europe*, CHILD RTS. INT'L NETWORK (last visited Mar. 7, 2021), https://archive.crin.org/en/home/ages/europe.html [https://perma.cc/8HWR-322G]. Among the forty-seven member states of the Council of Europe, only four states do not have minimum ages of criminal responsibility at or above the age of twelve. *Id.* France does not have a minimum age of responsibility, but only allows criminal sentences to be imposed on children at least thirteen years old. Code Pénal [C. Pén.] [Penal Code] art. 122-8 (Fr.). Ireland has a minimum age of responsibility of ten for the crimes of murder,

countries, have actually set the age of criminal responsibility even higher in order to better reflect their interpretation of the rehabilitative rationale for juvenile justice.[188] In order to better reflect the international norms governing the treatment of children and to better protect children from the jurisdiction of the criminal justice system, states should set a minimum criminal age of responsibility of at least twelve years old.

2. A Tiered Approach

It is also clear that once a person turns twelve, they are not immediately fully autonomous individuals. Instead, adolescents go through a period of semi-autonomy, beginning in their preteen years and continuing until adulthood.[189] The competency of an individual will always be an individualized investigation. As a result, a blanket approach for all teenagers with regard to competency would be too rigid. However, a tiered approach to the sentence lengths for juveniles would provide more relevant sentencing parameters for judges evaluating juvenile competency.

Oaxaca, Mexico, provides a clear example for states seeking to create a tiered sentencing structure for adolescent offenders. Oaxaca has a minimum criminal age of responsibility at twelve, but three separate sentencing tiers for twelve to fourteen-year-olds, fourteen to sixteen-year-olds, and sixteen to eighteen-year-olds.[190] Oaxacan authorities restrict incarceration options to adolescents fourteen or older and have an abbreviated sentencing structure

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manslaughter, rape, and aggravated sexual assault, but otherwise recognizes a minimum age of criminal responsibility of twelve. Criminal Justice Act 2006 (Act No. 26/2006) § 129 (Ir.), http://www.irishstatutebook.ie/eli/2006/act/26/section/129/enacted/en/html#sec129 [https://perma.cc/4H6L-YSB2]; *Children and the Criminal Justice System*, CITIZEN INFO. BD., https://www.citizensinformation.ie/en/justice/children_and_young_offenders/children_and_the_criminal_justice_system_in_ireland.html [https://perma.cc/W8NM-7ZW7] (last visited Feb. 17, 2021). Switzerland and the majority of the United Kingdom (England, Wales, and Northern Ireland) all have a minimum age of criminal responsibility of ten. Schweizerisches Strafgesetzbuch [StGB], Code Pénal Suisse [CP], Codice Penale Svizzero [CP], June 20, 2003, SR 311.1 art. 3(1) (Switz.); Children and Young Persons Act 1933, 23 & 24 Geo. 5 ch. 12 § 50 (Gr. Brit.), http://www.legislation.gov.uk/ukpga/Geo5/23-24/12 [https://perma.cc/6AAQ-2K7L]; Criminal Justice (Children) (Northern Ireland) Order 1998, SI 1998/1504 (N.I. 9) art. 3, https://www.legislation.gov.uk/nisi/1998/1504/article/3 [https://perma.cc/K89Z-GQPM]. Scotland allows criminal liability for children as young as eight but does not allow criminal prosecution of children until the age of twelve. Criminal Procedure (Scotland) Act 1995 (ASP 13) §§ 41, 41A(1)–(2), http://www.legislation.gov.uk/ukpga/1995/46/contents [https://perma.cc/ZGF8-JM9U].

188 *See supra* note 116.

189 *See generally* Lappi-Seppälä, *supra* note 116 (examining Scandinavia's low incarceration rates and the reasons behind their lenient penal policy).

190 Caldwell, *supra* note 154, at 122.

for fourteen to sixteen-year-old adolescents.[191] This allows Oaxaca to emphasize community-based rehabilitation programs and minimize the incarcerated juvenile population. It also more closely reflects the transition adolescents go through in their teenage years, as they develop greater competency to stand trial and be held accountable for their actions. Oaxaca's formal tiered system also mirrors the practical effects of Finland and Sweden's juvenile justice systems, as both countries have significantly fewer offenders incarcerated between the ages of fifteen and seventeen than seventeen to twenty.[192] Both models are consistent with the ECHR's edict that it is "essential that a child charged with an offence [be] dealt with in a manner which takes full account of his age, level of maturity and intellectual and emotional capacities."[193] States should adopt a tiered approach to juvenile sentencing based on both the offender's age and offense that reflects adolescents' semi-autonomy and limited competency.

3. Minimizing Incarceration

In addition to raising the criminal age of responsibility and creating a tiered approach to sentencing, states should limit the crimes that make adolescent offenders eligible for incarceration. Although the primary goal of juvenile justice systems is rehabilitation, there is admittedly a secondary deterrence rationale that justifies the incarceration of juvenile offenders in limited circumstances. However, these circumstances are restricted to those violent crimes where recidivism is more likely: crimes such as murder, rape, and aggravated assault.[194] Other crimes, like property-related crimes, fall under a category of "phase-specific" offenses that adolescents are likely to grow out of and never repeat.[195]

In a related context, this dichotomy has already been recognized by the Supreme Court, which has held that life without parole sentences can only be applied to individuals where rehabilitation is not possible and recidivism is very likely.[196] Similarly, where a teenager was expelled from Austria for minor offenses, the ECHR overturned the expulsion because the acts committed by the minor could still be "regarded as acts of juvenile

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[191] *Id.* at 133–34.

[192] *See id.* at 122; Lappi-Seppälä, *supra* note 116, at 236.

[193] T. v. United Kingdom, App No. 24724/94, ¶ 84 (Dec. 16, 1999), http://hudoc.echr.coe.int/eng?i=001-58593.

[194] *See* Caldwell, *supra* note 154, at 133–34.

[195] ZIMRING, *supra* note 6, at 91–93.

[196] *See* Graham v. Florida, 560 U.S. 48, 75 (2015) ("What the State must do, however, is give defendants like Graham some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.").

delinquency."[197] This approach is also used by Finland, which reserves incarceration remedies only for the most "extraordinary" cases.[198] Finally, again, Oaxaca, Mexico, is a model of restraint when it comes to incarcerating juveniles. The Oaxacan Penal Code provides incarceration as an option only in cases where the adolescent has committed rape, battery causing injury, homicide, robbery involving physical violence, kidnapping, or human trafficking of children.[199] By limiting the crimes adolescents could be incarcerated for, states could enhance the rehabilitative aspects of their juvenile justice systems without jeopardizing public safety or increasing recidivism.

4. Diversion

For adolescent offenders who fall into the juvenile justice system but who are not incarcerated, state juvenile justice systems should offer robust rehabilitative programs. In an advisory opinion, the IACHR has held that "children requir[e] . . . prompt and careful intervention on the part of well-equipped and well-staffed institutions in order to resolve their problems or mitigate their consequences."[200] This principle has found its way into Scandinavian models for juvenile justice as well, where probation and fines are the primary forms of intervention.[201] Similarly, Denmark prescribes activities for youth offenders as part of their child welfare system.[202] Programs modeled after these examples could also be augmented by proven programs like clinical family intervention and therapeutic foster care.[203] By investing in robust programs outside of detention centers, states could provide rehabilitative services for adolescents who do not need to be incarcerated.

5. Reimagined Juvenile Detention Centers

Finally, states should reimagine the juvenile detention centers they do retain. Juvenile prisons should not be miniature adult prisons, but rather rehabilitative centers that emphasize education, community service, developing professional skills, and mental and physical health. Here, Turkey provides an aspirational model for the United States. In Turkey, the open-air

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[197] Maslov v. Austria, 2008-III Eur. Ct. H.R. 301, 327.

[198] Lappi-Seppälä, *supra* note 116, at 236.

[199] Caldwell, *supra* note 153, at 122 n.95.

[200] INTER-AM. COMM'N ON HUM. RTS, *supra* note 4, at 20.

[201] *See* Lappi-Seppälä, *supra* note 116, at 248.

[202] *Id*. at 226.

[203] PETER W. GREENWOOD, CHANGING LIVES: DELINQUENCY PREVENTION AS CRIME-CONTROL POLICY 71 (2006).

prisons resemble boarding schools and provide rehabilitative models for detainees within and outside the prison.[204] There are robust educational opportunities, and adolescents often have apprenticeships in the local community.[205] Turkey's open-air prisons also provide psychological services to detainees and emphasize healthy living and physical fitness.[206] Nightly curfews and restrictions on adolescents' ability to go home still keep checks on potentially dangerous offenders while simultaneously recognizing the rehabilitative goals of the juvenile justice system.[207] By embracing an open-detention center ideal for juvenile centers in the United States, states could reduce the negative impacts that detention centers currently have on adolescents.

III. CONCLUSION

Juvenile offenders, as a product of their age, lack the agency and competency to be held fully accountable for criminal actions. These biological facts about adolescents reinforce the traditional rehabilitative goals of juvenile justice and challenge the retributive models adopted by some countries. The ECHR has recognized the rights of juveniles to have their age taken into account, and though it has refrained from dictating a criminal age of responsibility, it has consistently emphasized the rehabilitative goals of juvenile justice.[208] Across the pond, the IACHR has taken it a step further by setting a minimum criminal age of responsibility at twelve and emphasizing rehabilitative prison conditions for juveniles.[209] Though the home of the original juvenile justice system, the United States has lagged behind both the Council of Europe and the Organization of American States. The United States has failed to realize the lofty rehabilitative goals of juvenile justice and to take into account the fluid nature and degree of adolescents' autonomy and culpability. To correct these failures, American states should (1) comply with the IACHR's mandate and raise their criminal age of responsibility to at least twelve; (2) create a tiered sentencing model for adolescent offenders that resembles Oaxaca's, Sweden's, and Finland's; (3) reduce the number of offenses that make adolescents eligible for incarceration; (4) increase rehabilitative alternatives to incarceration; and (5) reform juvenile detention centers to give adolescents

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[204] McKinney & Salins, *supra* note 126, at 125–26.

[205] *Id*. at 126–27.

[206] *Id*.

[207] *Id.* at 26.

[208] *See generally* GUIDELINES, *supra* note 4 (providing concrete recommendations for member states of the Council of Europe to reform their juvenile justice systems).

[209] INTER-AM. COMM'N ON HUM. RTS, *supra* note 4, at 13.

the ability to invest in their community, mental and physical fitness, education, and professional skills.