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TEN IS TOO YOUNG: SOUTH DAKOTA’S NEED FOR A LEGISLATIVE AMENDMENT RAISING THE MINIMUM AGE OF CRIMINAL RESPONSIBILITY TO FOURTEEN

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South Dakota, like many other states, allows young children to be introduced to the criminal justice system at a very young age. Although South Dakota originally focused on managing children’s misbehavior, the law has evolved in a way that punishes kids for being kids. Despite recent reforms to handle juvenile delinquency in a more gentle, rehabilitative manner, the South Dakota Legislature has failed to raise the minimum age of criminal responsibility above ten years. This comment examines international norms in juvenile law, the developmental and social consequences of exposing young children to the legal system, and a more appropriate, effective alternative to managing delinquency in young children. This comment concludes that South Dakota should raise the minimum age of criminal responsibility to fourteen years.

I. INTRODUCTION

On May 13, 2021, J.H., a ten year old boy who suffered from mental health issues, was arrested at his elementary school.¹ Prior to the arrest, another student had bullied J.H. while in class.² After that class, J.H. went to the school office where he refused to eat lunch because he was so angry and distraught.³ The principal demanded that J.H. eat, which caused J.H. to become more frustrated.⁴ He threw a ball of yarn, hand sanitizer, and a tissue box.⁵ The principal threatened to call J.H.’s mother if he did not change his behavior.⁶ Further agitated by the threat to call his mother, J.H. struck the principal.⁷ J.H. then walked out of the

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1. Complaint at 5, 12, *Hutchinson-Harper v. Jefferson Parish Sch. Bd.*, No. 2:22-cv-01271 (E.D. La. May 9, 2022) (The complaint was titled “Complaint for Injunctive Relief, Declaratory Relief, & Damages & Jury Demand”) [hereinafter Complaint]. Although this incident occurred in Louisiana, this situation is permitted under current South Dakota law. See SDCL § 26-8C-2 (2016) (defining “delinquent child” as “any child ten years of age or older.”); SDCL § 22-3-1 (2017) (setting the minimum age of criminal responsibility for juveniles at ten).

2. Complaint, *supra* note 1, at 7.

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.* at 8.

7. *Id.*

school, picked up a trashcan, and threw it at a window.⁸ School administrators called 9-1-1.⁹

When officers arrived at the school, J.H. was walking away from the school with tears streaming down his face.¹⁰ At that time, he did not pose a threat to others and was not in the process of committing any crime.¹¹ An officer “grabbed J.H. by the arm and pulled J.H.’s arm behind his back.”¹² When J.H. pulled his arm away, the officer grabbed the ninety-three pound boy, put him in a chokehold, and pulled him to the ground.¹³ The officer then dragged the child on the ground while he was in a chokehold.¹⁴ J.H. was handcuffed and taken to the principal’s office to be interrogated.¹⁵

The officers interrogated J.H. for an hour and a half while he sat on the floor with his hands cuffed behind his back.¹⁶ J.H.’s mother, who had arrived at the school, told the officers that her son was only ten years old.¹⁷ One officer replied, “He’s at least 10.1 years old.”¹⁸ J.H. was placed in a cop car and taken to the Juvenile Assessment Center.¹⁹ At the detention center, J.H.’s legs were handcuffed, and he was booked and processed.²⁰ J.H. was charged with two counts of battery of a police officer, one count of battery of a schoolteacher, one count of resisting arrest, and one count of simple criminal damage of less than \$1,000.²¹ He was placed in a cell for approximately four hours, was not allowed food or water, and was not allowed to see his parents.²² J.H. was eventually released from the juvenile detention center to his parents.²³

While what happened to J.H. seems extreme, this situation repeatedly happens to youth across the United States.²⁴ Young children regularly end up in the juvenile justice system when they should not.²⁵ In fact, situations like this are acceptable under current South Dakota law, which allows children as young as ten

8. *Id.*

9. *Id.* at 9.

10. *Id.* at 10.

11. *Id.* at 10-11.

12. *Id.* at 11.

13. *Id.* at 6, 11-12.

14. *Id.* at 12.

15. *Id.*

16. *Id.* at 13.

17. *Id.* at 14.

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.* at 15.

22. *Id.*

23. *Id.*

24. *See, e.g.,* M. Sickmund et al., *Easy Access to Juvenile Court Statistics: 1985-2020*, NAT’L CTR. FOR JUV. JUST. (2022), <https://perma.cc/43SW-P3WR> (breaking down United States juvenile court records by age from 2005 to 2020).

25. *See, e.g., id.* (showing that 16.9% of juvenile referrals are children under fourteen); *see also* Youth Corr. Leaders for Just., *Statement on Minimum Age of Jurisdiction*, YOUTH CORR. LEADERS FOR JUST. (2021), <https://perma.cc/2HP6-G4EQ> (listing ten reasons why young children should not be subjected to the juvenile justice system) [hereinafter YCLJ Statement].

to be held criminally responsible.²⁶ Young children are also arrested in South Dakota for similar offenses.²⁷ This needs to change.²⁸

In Part II, this comment describes the evolution of juvenile court in the United States.²⁹ Part III details the history of South Dakota's juvenile legislation.³⁰ Part IV outlines a proposal for an amendment to current South Dakota legislation and offers rationale for the proposal.³¹ Ultimately, this comment concludes that South Dakota should raise its minimum age of criminal responsibility for juvenile offenders to fourteen years of age.³²

II. THE EVOLUTION OF JUVENILE COURT

Between the early 1800s and the establishment of juvenile courts, children did not enjoy the legal or social status that they hold today.³³ Due to the high infant mortality rate and the inability to provide economically for new children, youth were sometimes viewed as a burden on the family.³⁴ "Infancy," as it was referred to in legal dialogue, was treated as a significant legal disability.³⁵ When children engaged in misbehavior, authorities applied traditional remedies of criminal law.³⁶

Under the original United States criminal justice system, which was imported to the colonies from England, it was presumed that children under seven did not possess the ability to form criminal intent.³⁷ Therefore, children of this age were not handled by the system.³⁸ It was presumed that children ages seven to fourteen were incompetent to form criminal intent, but a prosecutor could overcome the presumption by showing that the child knew right from wrong.³⁹ It was presumed that children over fourteen years of age possessed the capacity to form requisite

26. See SDCL § 26-8C-2 (2016) (setting the minimum age of criminal responsibility for juveniles at ten).

27. See C. Puzzanchera et al., *Easy Access to the Census of Juveniles in Residential Placement*, NAT'L CTR. FOR JUV. JUST. (2023), <https://perma.cc/77US-K9ME> (laying out South Dakota's juvenile arrests in 2021 by type of offense).

28. See generally YCLJ Statement, *supra* note 25 (calling upon the states to raise the minimum age of juvenile jurisdiction to fourteen).

29. See discussion *infra* Part II (analyzing the evolution of juvenile court in the United States).

30. See discussion *infra* Part III (the legislative history regarding juveniles in South Dakota).

31. See discussion *infra* Part IV (proposing an amendment to current South Dakota legislation).

32. See discussion *infra* Part V (concluding that South Dakota should raise its minimum age of criminal responsibility for juvenile offenders to fourteen).

33. JOHN C. WATKINS, JR., *THE JUVENILE JUSTICE CENTURY* 3 (1998).

34. CLIFF ROBERSON, *JUVENILE JUSTICE: THEORY AND PRACTICE* 22 (2010).

35. WATKINS, *supra* note 33, at 3.

36. *Id.* at 3-4.

37. ROBERSON, *supra* note 34, at 26; see also Susan Magarey, *The Invention of Juvenile Delinquency in Early Nineteenth-Century England*, 34 *LABOUR HIST.* 11, 18-19 (1978) (describing England's three stages of minority for punishment purposes).

38. ROBERSON, *supra* note 34, at 26.

39. *Id.*; see also Magarey, *supra* note 37, at 18-19 (describing England's three stages of minority for punishment purposes). "The burden of proof of understanding was greater for children under ten and a half than for those between ten and a half and fourteen." *Id.*

criminal intent.⁴⁰ At this time, the criminal justice system did not have special courts for children.⁴¹ Instead, children were subjected to the same procedures, punishments, and facilities as adult criminals.⁴²

In 1819, the Society for the Prevention of Pauperism released a report highlighting the problems of confining children and adults together.⁴³ This report, examining confinement in Bellevue Prison, initiated reform efforts to establish separate institutions for juveniles in New York.⁴⁴ In 1825, the City of New York opened the first House of Refuge for juvenile offenders in the United States.⁴⁵ Many cities established their own houses of refuge by 1854.⁴⁶

The first houses of refuge were designed to combat poverty and neglectful families, which were viewed as “breeding grounds for crime.”⁴⁷ The houses were intended to provide delinquent youth with a home where they could be educated, reformed, and disciplined.⁴⁸ As the Supreme Court of Pennsylvania explained, “The House of Refuge is not a prison, but a school. Where reformation, and not punishment, is the end, it may indeed be used as a prison for juvenile convicts who would else be committed to a common gaol [sic]”⁴⁹

However, these houses of refuge were built and used as prisons for children.⁵⁰ Children were subject to schedules similar to those in adult confinement facilities and expected to be silent at all times.⁵¹ They received punishments ranging from only being served bread and water to whippings.⁵² Children were confined for an indeterminate length of time.⁵³ Additionally, with the depression of 1857, the houses of refuge quickly became overcrowded.⁵⁴

These issues with the houses of refuge sparked a reformatory movement in the late 1800s.⁵⁵ In addition to the issues related to the conditions of confinement, houses of refuge had generally failed to decrease delinquency rates.⁵⁶ Due to this,

40. ROBERSON, *supra* note 34, at 26; *see also* Magarey, *supra* note 37, at 19 (explaining that children above the age of fourteen were liable to the same extent as adults).

41. ROBERSON, *supra* note 34, at 27.

42. *See id.*

43. *See* SOC’Y FOR THE PREVENTION OF PAUPERISM, SECOND ANNUAL REPORT, 31-36 (1820).

44. ROBERSON, *supra* note 34, at 28.

45. Alexander W. Pisciotta, *Treatment on Trial: The Rhetoric and Reality of the New York House of Refuge*, 29 AM. J. LEGAL HIST. 151, 153 (1985).

46. ROBERSON, *supra* note 34, at 28.

47. *Id.*

48. *Id.*; *see also* Pisciotta, *supra* note 45, at 154 (stating that “[t]he purpose of the institution was to instill the values of the middle and upper middle classes into the inmates: order, discipline, punctuality, and submission to authority”).

49. *Ex parte* Crouse, 4 Whart. 9, 11 (Pa. 1839).

50. ROBERSON, *supra* note 34, at 30.

51. *Id.*

52. *Id.*; *see also* Pisciotta, *supra* note 45, at 157-58 (describing the punishments imposed on children who violated the rules).

53. ROBERSON, *supra* note 34, at 30.

54. *Id.*

55. *See id.*

56. WATKINS, *supra* note 33, at 8.

advocates began promoting a different approach to juvenile delinquency.⁵⁷ This new approach created reformatories for delinquent children.⁵⁸ Reformatories were justified by the doctrine of *parens patriae*, which refers to the power of the state to intervene and act as the parent of any child who needs protection.⁵⁹

The first United States reformatory was established in 1848 in Massachusetts.⁶⁰ The goal of the reformatory was to offset experiences of poor family life, poverty, and corruption with proper training in residential environments.⁶¹ This goal was to be accomplished through military drill and continual supervision.⁶² The belief was that these children would be reformed if they were protected from laziness, idleness, and the corrupt influence of adult prisoners.⁶³

These theoretical ideas soon developed into a system of prisons that the reformatories were intended to replace.⁶⁴ The reformatories were overcrowded and ineffective in decreasing juvenile delinquency.⁶⁵ Further, this new system permitted the commitment of children to these reformatories without judicial procedures or proceedings.⁶⁶

In 1870, an Illinois Supreme Court decision documenting the reality of the pre-juvenile court system, which marginalized the legal rights of children, had a monumental impact on juvenile reform.⁶⁷ By 1880, many states had passed laws providing for separate juvenile trials.⁶⁸ Illinois established the first juvenile court in 1899.⁶⁹ That court, located in Cook County, Illinois, was designed as a family court to manage juvenile issues.⁷⁰ Other states followed in establishing independent courts for juveniles.⁷¹ By 1920, forty-five of the forty-eight states

57. *Id.*

58. *Id.* at 8-9.

59. *Id.* at 9; ROBERSON, *supra* note 34, at 23.

60. WATKINS, *supra* note 33, at 8.

61. ROBERSON, *supra* note 34, at 30-31.

62. *Id.* at 31.

63. *Id.*; see also Graham Parker, *The Juvenile Court Movement*, 26 U. TORONTO L. J. 140, 149 (1976) (explaining that the institutions were established “for juvenile delinquents who, instead of the corruption of prison, would be decontaminated by industry and education”).

64. ROBERSON, *supra* note 34, at 31.

65. *Id.*; see also Yale Levin, *The Treatment of Juvenile Delinquency in England During the Early Nineteenth Century*, 31 J. CRIM. L. & CRIMINOLOGY 38, 45 (1940) (explaining that juvenile crime did not diminish to the extent reformers had hoped for).

66. ROBERSON, *supra* note 34, at 31.

67. *People ex rel. O’Connell v. Turner*, 55 Ill. 280, 287 (Ind. Sup. Ct. 1870) (“Why should minors be imprisoned for misfortune? Destitution of proper parental care, ignorance, idleness and vice, are misfortunes, not crimes.”); WATKINS, *supra* note 33, at 25.

68. ROBERSON, *supra* note 34, at 31.

69. *Id.* at 31.

70. *Id.* When a complaint was received, juvenile court officials could investigate the child’s home and family to understand the circumstances underlying his or her delinquency. DAVID B. WOLCOTT, *COPS AND KIDS* 19 (2005).

71. ROBERSON, *supra* note 34, at 31.

had established juvenile courts, and there were more than 600 juvenile courts in the United States by 1932.⁷² All states had established juvenile courts by 1945.⁷³

The first juvenile courts followed the *parens patriae* doctrine, in which the courts were acting in place of the parents and were to look out for the best interests of the children.⁷⁴ The belief was that these juveniles were not criminals, but rather, were children in need of protection, care, and rehabilitation.⁷⁵ Initially, these new courts only intervened in cases of dependency, neglect, and criminal activity.⁷⁶ Over time, their jurisdiction extended to curfew violations, status offenses, and family issues.⁷⁷

From 1899 to 1967, the emphasis on rehabilitating juveniles resulted in the infringement of their legal rights.⁷⁸ The common belief at the time was that children had a right to custody and nothing more.⁷⁹ Juvenile courts were an informal setting in which children were discouraged from attorney representation and typical courtroom procedures were not followed.⁸⁰ The United States Supreme Court, assuming that the juvenile court system was effective, followed a hands-off policy towards these new court systems during this time.⁸¹

In 1966, the United States Supreme Court finally intervened into the juvenile court system and acknowledged that it was not working.⁸² This decision converted the informal proceedings of juvenile courts into formalized hearings with procedure and representation.⁸³ States began revising their juvenile laws to decriminalize certain offenses and to create categories of certain status offenders.⁸⁴ Many states were moving away from the institutionalization of juveniles toward effective and humane alternatives.⁸⁵ Congress also responded in 1974 by passing the Juvenile Justice and Delinquency Prevention Act

72. *Id.*

73. *Id.* at 32.

74. *Id.*; see also Sanford J. Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN. L. REV. 1187, 1193 (1970) (explaining the nineteenth-century reformer's definition of *parens patriae*). An early judge of the Cook County Juvenile Court "argued that the main principle of the court was 'that the child who has begun to go wrong, who is incorrigible, who has broken a law or an ordinance, is to be taken in hand by the state, not as an enemy but as a protector, as the ultimate guardian.'" WOLCOTT, *supra* note 70, at 19.

75. ROBERSON, *supra* note 34, at 32.

76. *Id.*

77. *Id.*

78. *Id.*

79. *In re Gault*, 387 U.S. 1, 17 (1967) ("The right of the state, as *parens patriae*, to deny to the child procedural rights available to his elders was elaborated by the assertion that a child, unlike an adult, has a right 'not to liberty but to custody.'").

80. ROBERSON, *supra* note 34, at 32.

81. *Id.* at 34.

82. *Kent v. United States*, 383 U.S. 541, 555-56 (1966) ("There is evidence, in fact, that there may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children.").

83. ROBERSON, *supra* note 34, at 35.

84. *Id.*

85. *Id.*

(“JJDP”),⁸⁶ The Office of Juvenile Justice and Delinquency Prevention (“OJJDP”) was created under the act to discourage institutionalization and promote community-based alternatives.⁸⁷

In the 1980s, a nationwide push for a “tough on crime” approach to criminal justice prompted states to revise their juvenile codes.⁸⁸ The amended codes often stated that public safety was a primary purpose of juvenile courts.⁸⁹ States also toughened their juvenile delinquency codes to deemphasize rehabilitation and focus on retribution, incapacitation, and punishment.⁹⁰

In 1995, John DiIulio, then a professor at Princeton University, began issuing predictions about an upcoming wave of “superpredators.”⁹¹ He predicted that there would be three times as many juveniles in custody in the upcoming years and that there would be approximately 270,000 more youth predators on the streets by 2010.⁹² These predictions triggered a panic which led almost every state to pass legislation that dramatically changed the way juveniles were treated for purposes of sentencing and punishment between 1992 and 1999.⁹³ Although the superpredator theory was later debunked and DiIulio himself admitted that his predictions were wrong, they were taken seriously for several years.⁹⁴ By the time the public accepted that these predictions were a myth, the damage had already been done.⁹⁵

In the mid-2000s, nonprofit agencies and advocates funded scientific research that advanced reforms based on developmental science regarding a child’s lessened culpability.⁹⁶ This new developmental approach to juvenile

86. *Id.* The JJDP is based on a consensus that children and families involved with the justice system should be guarded by federal standards for custody and care, while upholding the interests of the prevention of victimization and community safety. The Act provides for a nationwide juvenile justice advisory and planning system, federal funding for improvements in juvenile justice programs and practices, and the operation of the ODDJP. *History of the JJDP*, COAL. FOR JUV. JUST., <https://perma.cc/3VDJ-DYRR> (last visited Nov. 10, 2023).

87. ROBERSON, *supra* note 34, at 35. The OJJDP is a component of the Office of Justice Programs in the United States Department of Justice that works to prevent youth delinquency and protect children. The Office helps states, localities, and tribes develop equitable and effective juvenile justice systems that make communities safer and empower children to lead productive lives. *About OJJDP*, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, <https://perma.cc/3D7Q-23AE> (last visited Nov. 10, 2023).

88. ROBERSON, *supra* note 34, at 37.

89. *Id.*

90. Jeffrey Fagan, *The Contradictions of Juvenile Crime and Punishment*, 139 DAEDALUS 43, 48 (2010).

91. *The Superpredator Myth 25 Years Later*, EQUAL JUST. INITIATIVE (April 7, 2014), <https://perma.cc/6RGS-V57L> [hereinafter *The Superpredator Myth*].

92. *Id.*

93. *Id.* In South Dakota specifically, a law was passed in 1997 that allows for delinquent children sixteen years old or older who have been charged with a felony to be tried as an adult. SDCL § 26-11-3.1 (2016) (“In such a transfer hearing, there is a rebuttable presumption that it is in the best interest of the public than any child, sixteen years of age or older, who is charged with a Class A, Class B, Class C, Class 1, or Class 2 felony, shall be tried as an adult.”).

94. *The Superpredator Myth*, *supra* note 91; JAMES C. HOWELL, PREVENTING AND REDUCING JUVENILE DELINQUENCY: A COMPREHENSIVE FRAMEWORK 7 (2009).

95. See HOWELL, *supra* note 94, at 7.

96. Esther K. Hong, *A Reexamination of the Parens Patriae Power*, 88 TENN. L. REV. 277, 293-94 (2021). Through its Models for Change initiative award, the MacArthur Foundation awarded grants “that

justice led to several United States Supreme Court cases in which the Court took into account the developmental differences in children for constitutional purposes.⁹⁷

III. THE EVOLUTION OF SOUTH DAKOTA'S JUVENILE LAW

In 1862, before South Dakota became a state, the General Laws and Memorials and Resolutions of the Territory of Dakota set the minimum age of criminal responsibility at ten years old.⁹⁸ In 1877, still twelve years before South Dakota officially became a state, this law was amended to lower the minimum age of criminal responsibility to seven years old.⁹⁹ However, children between the ages of seven and fourteen were not capable of being charged with a crime unless it was proven that, at the time of the act or neglect charged, they knew it was wrong.¹⁰⁰

Additionally, in 1908—while juvenile courts were being established throughout the United States—South Dakota, in a separate statute, defined “delinquent child” as any child under the age of eighteen who violated a law of the state.¹⁰¹ The definition specified certain activities that, if engaged in by a child, would cause them to be found delinquent.¹⁰² For instance, a child “who [did] not regularly attend school and [was] not otherwise engaged in any regular occupation or employment but loiter[ed] and idle[d] away its time” was viewed as

supported reform based on the ‘growing body of behavioral and neuroscience research on youth development.’” *Id.* at 294. “The MacArthur Foundation Research Network on Adolescent Development and Juvenile Justice conducted research primarily on teenagers’ competence and culpability, some of which were expressly relied on by the Supreme Court . . .” *Id.*

97. Hong, *supra* note 96, at 291-92; *see, e.g.*, *Roper v. Simmons*, 543 U.S. 551, 569-70 (2005) (describing three general differences between juveniles and adults); *Graham v. Florida*, 560 U.S. 48, 68-69 (2010) (stating that developments in brain science continue to show fundamental differences between juveniles and adults); *J.D.B. v. North Carolina*, 564 U.S. 261, 272-73 (2011) (regarding the fundamental differences between juveniles and adults as commonsense conclusions); *Miller v. Alabama*, 567 U.S. 460, 471 (2012) (explaining that the developmental era decisions have rested on common sense, science, and social science). Interestingly, none of the landmark Supreme Court decisions applying the new developmental approach refer to the *parens patriae* power. Hong, *supra* note 96, at 296. However, even without the *parens patriae* doctrine, juvenile jurisprudence appeared to be orientating toward the treatment of children, rather than punishment. ROBERSON, *supra* note 34, at 39.

98. *See* GENERAL LAWS AND MEMORIALS AND RESOLUTIONS OF THE TERRITORY OF DAKOTA, PASSED AT THE FIRST SESSION OF THE LEGISLATIVE ASSEMBLY 157 (1862) (corresponds to SDCL § 22-3-1 (2017)) (“An infant under the age of ten years shall not be found guilty of any crime or misdemeanor.”).

99. *See* THE REVISED CODES OF THE TERRITORY OF DAKOTA, Penal Code, ch. 2, § 16 (Geo. H. Hand, ed., 1877) (corresponds to SDCL § 22-3-1) (“All persons are capable of committing crime, except those belonging to the following classes: 1. Children under the age of seven years.”).

100. *See id.* (“All persons are capable of committing crime, except those belonging to the following classes: . . . 2. Children of the age of seven years, but under the age of fourteen years, in the absence of proof that at the time of committing the act or neglect charged against them, they knew its wrongfulness.”).

101. Act of Mar. 5, 1909, S.D. Sess. Laws ch. 298 § 1, 483 (corresponds to SDCL § 26-8C-2 (2016)). The law in South Dakota at this time was inconsistent, as it set the minimum age of criminal responsibility at seven, but found any child under the age of eighteen who committed certain acts as a “delinquent child.” *Compare* THE REVISED CODES OF THE TERRITORY OF DAKOTA, Penal Code, ch. 2, § 16 (setting the minimum age of criminal responsibility at seven), *with* THE COMPILED LAWS 1909 STATE OF SOUTH DAKOTA, Political Code, ch. 298, §1 (Hipple Prtg. Co. 1910) (finding any child under the age of eighteen who violated a law or ordinance as a “delinquent child”).

102. *Id.* At this time, the South Dakota Legislature considered “delinquency” to be behavior that went against the moral values of society. *Id.*

delinquent.¹⁰³ A delinquent child was also one “who frequent[ed] or patronize[d], with one of the opposite sex, any restaurant or other place where liquors [could] be purchased at night after the hour of nine o’clock.”¹⁰⁴ Further, a child “who wander[ed] about the streets in the night time without being on any lawful business or lawful occupation” was found to be delinquent.¹⁰⁵ Additionally, a delinquent child was one “who [wrote] or use[d] vile, obscene, vulgar, profane or indecent language.”¹⁰⁶

In 1961, a clause was added to the delinquency statute to address the operation of motor vehicles, but the general definition remained unchanged.¹⁰⁷ This law was eventually repealed, amended, and re-enacted in 1968.¹⁰⁸ The re-enacted law defined “delinquent child” as any child ten years old or older who violated a federal law, state law, or municipal ordinance, except traffic laws and ordinances.¹⁰⁹ That same year, the South Dakota legislature amended the statute setting the minimum age of criminal responsibility.¹¹⁰ The amendment raised the age back to ten years old.¹¹¹

Since 1968, these laws have remained almost completely unchanged.¹¹² In fact, the 1968 amendment to the statute setting the minimum age of criminal responsibility has not changed at all.¹¹³ However, South Dakota now defines “delinquent child” as:

[A]ny child ten years of age or older who, regardless of where the violation occurred, has violated any federal, state, or local law or regulation for which there is a penalty of a criminal nature for an adult, except state or municipal hunting, fishing, boating, park, or traffic laws that are classified as misdemeanors, or petty offenses or any violation of § 35-9-2 or 32-23-21.¹¹⁴

103. *Id.* at 837-37a.

104. *Id.*

105. *Id.*

106. *Id.*

107. Act of Mar. 3, 1961, S.D. Sess. Laws ch. 214 § 2, 233-34 (corresponds to SDCL § 26-8C-2 (2016)).

108. Act of Feb. 10, 1968, S.D. Sess. Laws ch. 164 § 1, 220-21 (codified at SDCL § 26-8C-2).

109. *Id.* at 221.

110. Act of Feb. 10, 1968, S.D. Sess. Laws ch. 28 § 1, 42 (codified at SDCL § 22-3-1 (2017)).

111. *Id.*

112. *See* Act of Mar. 29, 1976, S.D. Sess. Laws ch. 159 § 43-5; Act of May 9, 1983, S.D. Sess. Laws ch. 174 § 3; Act of Mar. 14, 1985, S.D. Sess. Laws ch. 192 § 10; Act of Mar. 22, 2005, S.D. Sess. Laws ch. 120 § 370; SDCL § 26-8C-2 (2016) (demonstrating that the law setting the minimum age of criminal responsibility has not changed since 1968); *see also* Act of Mar. 16, 1973, S.D. Sess. Laws ch. 169 § 1; Act of Feb. 15, 1974, S.D. Sess. Laws ch. 153 § 45; Act of Mar. 29, 1976, S.D. Sess. Laws ch. 158 § 43-5; Act of Mar. 13, 1981, S.D. Sess. Laws ch. 201; Act of Mar. 19, 1991, S.D. Sess. Laws ch. 217 § 152B; Act of May 1, 1994, S.D. Sess. Laws ch. 219 § 1; Act of Mar. 11, 1996, S.D. Sess. Laws ch. 179 § 2; Act of Mar. 14, 2000, S.D. Sess. Laws ch. 124 § 1; Act of May 1, 2003, S.D. Sess. Laws ch. 149 § 7; Act of Feb. 25, 2004, S.D. Sess. Laws ch. 218 § 3; SDCL § 26-8C-2 (demonstrating that the law defining “delinquency” has only slightly changed since 1968).

113. SDCL § 22-3-1.

114. SDCL § 26-8C-2. In February of 2024, South Dakota passed an amendment to SDCL § 26-8C-2, which rearranged the wording of the statute and added that a “delinquent child” is also one who violates SDCL § 34-46-2(2). H.B. 1087, 99th Leg. Sess. (S.D. 2024). South Dakota Codified Law section 35-9-2 addresses the purchase, possession, or consumption of alcoholic beverages by persons under twenty-

South Dakota law emphasizes that this statute “shall be liberally construed in favor of the child, the child’s parents, and the state for the purposes of . . . affording guidance, control, and rehabilitation of . . . any delinquent child.”¹¹⁵ Further, it clarifies that proceedings in juvenile court “shall be in the best interests of the child.”¹¹⁶

In addition to these legislative amendments, South Dakota has made some reformatory changes to the law in the past several years.¹¹⁷ In 2014, South Dakota’s juvenile system had the second-highest juvenile commitment rate in the country.¹¹⁸ In response, South Dakota created the Juvenile Justice Reinvestment Initiative Work Group to examine the state’s juvenile justice data, practices, and policies.¹¹⁹ The work group recommended expanding community-based interventions and diversion programs while saving residential placements for youth who posed a serious risk to public safety.¹²⁰

Based on these findings and recommendations, South Dakota passed the Juvenile Justice Public Safety Improvement Act (“JJPSIA”), which was signed into law in March of 2015.¹²¹ The JJPSIA was designed to improve outcomes for youth in the juvenile system, effectively hold juveniles accountable, and reduce costs by investing in evidence-based, community-based practices while saving out-of-home placements for youth who pose a serious public safety risk.¹²²

In 2015, South Dakota began a second phase of reforms that involved the implementation of new policies and measuring performance.¹²³ The adopted reforms provide for improved outcomes by investment in rehabilitative programs that can meet a child’s individual needs.¹²⁴ The Department of Social Services, the Unified Judicial System, and the Department of Corrections are required to work together to identify treatment options based on the needs of youth involved in the justice system.¹²⁵ Additionally, the law stresses the importance of utilizing

one. SDCL § 35-9-2 (2013). South Dakota Codified Law section 32-23-21 addresses driving after alcohol or drug consumption by persons under the age of twenty-one. SDCL § 32-23-21 (2011 & Supp. 2019). South Dakota Codified Law subdivision 34-46-2(2) addresses the possession and use of tobacco products by persons under the age of twenty-one. SDCL § 34-46-2(2) (2011 & Supp. 2020).

115. SDCL § 26-7A-6 (2016).

116. SDCL § 26-7A-5.

117. CRIME AND JUST. INST., IMPLEMENTING COMPREHENSIVE JUVENILE JUSTICE IMPROVEMENT IN SOUTH DAKOTA 1 (2019) [hereinafter CRIME AND JUSTICE INSTITUTE]. These reforms have been met with opposition from education officials. Stu Whitney, *Back to School or Off to Jail: Legislators Seek Update to South Dakota Juvenile Justice Assessment System*, SOUTH DAKOTA NEWS WATCH (Jan. 24, 2023) <https://perma.cc/J6K6-6B4L>. This opposition has resulted in an amendment to South Dakota law that places juvenile offenders into the custody of the Department of Corrections after three infractions within a twelve month period. *Id.*; see SDCL § 26-8C-7 (2016).

118. CRIME AND JUSTICE INSTITUTE, *supra* note 117, at 1.

119. *Id.*

120. *Id.*

121. *Id.*

122. JUVENILE JUSTICE PUBLIC SAFETY IMPROVEMENT ACT 2017 ANNUAL REPORT 2 (2017) [hereinafter JJPSIA 2017 ANNUAL REPORT].

123. Wendy Hess & Emily Verhine, *South Dakota’s Data-Driven, Evidence-Based Juvenile Justice Reform*, 62 S.D. L. REV. 579, 597 (2017).

124. *Id.* at 600.

125. *Id.*

mental health assessments, risk assessment tools, and substance abuse assessments to match youth to community programs.¹²⁶

IV. PROPOSAL FOR A LEGISLATIVE AMENDMENT RAISING THE MINIMUM AGE OF CRIMINAL RESPONSIBILITY TO FOURTEEN

Jurisdictions around the world differ in how they manage juvenile delinquency.¹²⁷ In particular, jurisdictions vary in the minimum age at which a child is subject to the juvenile justice system.¹²⁸ Although this variance exists, a growing number of legal, governmental, and professional groups seek to raise the minimum age of responsibility, especially throughout the United States.¹²⁹ This comment proposes an amendment to current South Dakota legislation establishing ten years as the minimum age of criminal responsibility.¹³⁰ Specifically, the proposal calls on the South Dakota Legislature to raise the minimum age of criminal responsibility to fourteen years old.¹³¹

Section IV.A explains that the United States is an outlier in the practice of exposing such young children to the legal system.¹³² Section IV.B applies recent

126. *Id.*

127. See NAT'L JUV. JUST. NETWORK, BRIEF: CHARTING U.S. MINIMUM AGES OF JURISDICTION, DETENTION, AND COMMITMENT (Melissa Coretz Goemann 2023) (charting the minimum ages of criminal responsibility in the United States) [hereinafter NJJN BRIEF]; Jantien Leenknecht et al., *Age Limits in Youth Justice: A Comparative and Conceptual Analysis*, 1 ERASMUS L. REV. 13, 14-20 (2020) (comparing minimum age limits across six countries); NAT'L JUV. JUST. NETWORK, NJJN POLICY PLATFORM: RAISE THE MINIMUM AGE FOR TRYING CHILDREN IN JUVENILE COURT 3 (2020) (charting the minimum ages of criminal responsibility around the world) [hereinafter NJJN POLICY PLATFORM].

128. See NJJN BRIEF, *supra* note 127 (charting the minimum ages of criminal responsibility in the United States); Leenknecht et al., *supra* note 127, at 14-20 (comparing minimum age limits across six countries); NJJN POLICY PLATFORM, *supra* note 127, at 3 (charting the minimum ages of criminal responsibility around the world).

129. See AM. ACAD. OF PEDIATRICS ET AL., HEALTH GROUP STATEMENT OF SUPPORT FOR INSTITUTING A MINIMUM AGE OF JURISDICTION FOR JUVENILE JUSTICE INVOLVEMENT (2021) (endorsing action, on behalf of professional child and adolescent health organizations, to institute a minimum age of at least twelve years for juvenile court jurisdiction) [hereinafter HEALTH GROUP STATEMENT OF SUPPORT]; NAT'L GOVERNORS ASSOC., AGE BOUNDARIES IN JUVENILE JUSTICE SYSTEMS 1 (2021) (stating that there is growing movement to raise the age to better meet the developmental needs of youth); April Frazier-Camara, *Report to the House of Delegates*, 2021 A.B.A. CRIM. JUST. SEC., SEC. CIV. RTS. & SOC. JUST., COMM'N. ON YOUTH AT RISK 505 (urging all legislative bodies to enact laws raising the minimum age of criminal responsibility to age fourteen); YCLJ Statement, *supra* note 25 (calling upon the states to raise the minimum age of juvenile jurisdiction to fourteen); NJJN POLICY PLATFORM, *supra* note 127, at 3 (calling on the states to ensure children are protected by a reasonable minimum age of prosecution).

130. See SDCL § 26-8C-2 (2016) (establishing a minimum age of ten in South Dakota).

131. It should be noted that the minimum age proposed is based on international norms and recommendations from various child-focused organizations. See *infra* Section IV.A (describing the international norms on the minimum age of criminal responsibility); HEALTH GROUP STATEMENT OF SUPPORT, *supra* note 129 (endorsing action, on behalf of professional child and adolescent health organizations, to institute a minimum age of at least twelve years for juvenile court jurisdiction); Frazier-Camara, *supra* note 129 (urging all legislative bodies to enact laws raising the minimum age of criminal responsibility to age fourteen); NJJN POLICY PLATFORM, *supra* note 127, at 3 (calling on the states to ensure children are protected by a reasonable minimum age of prosecution). However, this proposal is not intended to suggest that all children above the age of fourteen should be eligible for the full array of criminal interventions such as commitment to juvenile detention or waiver into adult court.

132. See discussion *infra* Section IV.A (laying out international practices regarding minimum age of criminal responsibility).

research advancements in child cognitive development and neuroscience to minimum age of criminal responsibility legislation.¹³³ Section IV.C discusses the social consequences of exposing such young children to the legal system.¹³⁴ Section IV.D offers a more appropriate and manageable approach to juvenile delinquency in young children.¹³⁵

A. THE UNITED STATES IS AN OUTLIER

The United States is an outlier in the practice of exposing young children to the criminal legal system.¹³⁶ In 2019, the United Nations Convention on the Rights of the Child issued its “General comment No. 24 . . . on children’s rights in the child justice system.”¹³⁷ In this comment, it stated that “the most common minimum age of criminal responsibility internationally is fourteen.”¹³⁸ It also encouraged nations to increase their minimum age to at least fourteen years.¹³⁹

However, there is currently no federal standard on a minimum age of juvenile court jurisdiction in the United States.¹⁴⁰ Thus, the states vary in their minimum age requirements, with twenty-four states having no set minimum age, no state having a minimum age older than thirteen years, and only eight states having a minimum age older than ten years.¹⁴¹

Most other countries have a higher minimum age of criminal responsibility than the United States.¹⁴² While other countries differ slightly in the way they manage juvenile delinquency, most follow the international standards calling for “developmentally appropriate treatment of youth below the age of [eighteen].”¹⁴³ For example, in Austria, children under fourteen are subject only to child welfare

133. See discussion *infra* Section IV.B (discussing the developmental and neurological consequences of exposing young children to the legal system).

134. See discussion *infra* Section IV.C (explaining the social consequences of exposing young children to the legal system).

135. See discussion *infra* Section IV.D (laying out a more appropriate way to manage juvenile delinquency in young children).

136. NJJN POLICY PLATFORM, *supra* note 127, at 3.

137. Comm. on the Rts. of the Child, Gen. Comment No. 24 on Child’s Rts. in the Child Just. Sys., U.N. Doc. CRC/C/GC/24 (2019) [hereinafter United Nations Comment].

138. *Id.* at 6.

139. *Id.* This recommendation was based on documented evidence in child development and neuroscience. *Id.*

140. NJJN POLICY PLATFORM, *supra* note 127, at 3-4.

141. See NJJN BRIEF, *supra* note 127. The twenty-four states that have no minimum age of criminal responsibility include Alabama, Alaska, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kentucky, Maine, Michigan, Missouri, Montana, New Jersey, New Mexico, Ohio, Oklahoma, Oregon, Rhode Island, South Carolina, Tennessee, Virginia, West Virginia, and Wyoming. *Id.* The only state that sets the minimum age of criminal responsibility at seven is Florida. *Id.* The only state that sets the minimum age of criminal responsibility at eight is Washington. *Id.* The sixteen states that set the minimum age of criminal responsibility at ten are Arizona, Arkansas, Colorado, Connecticut, Kansas, Louisiana, Minnesota, Mississippi, Nevada, North Carolina, North Dakota, Pennsylvania, South Dakota, Texas, Vermont, and Wisconsin. *Id.* The only state that sets the minimum age of criminal responsibility at eleven is Nebraska. *Id.* The five states that set the minimum age of criminal responsibility at twelve are California, Delaware, Massachusetts, New York, and Utah. *Id.* The two states that set the minimum age of criminal responsibility at thirteen are Maryland and New Hampshire. *Id.*

142. NJJN POLICY PLATFORM, *supra* note 127, at 6.

143. See *id.*

laws.¹⁴⁴ In China, children can only be held criminally responsible at age fourteen for serious offenses.¹⁴⁵ The age of full criminal responsibility is sixteen.¹⁴⁶ In Argentina, the minimum age of criminal responsibility is sixteen.¹⁴⁷ However, the juvenile court only has jurisdiction over sixteen and seventeen year olds who have committed an offense punishable by at least two years in prison.¹⁴⁸

Although the United States has a lower minimum age of criminal responsibility than the international norm, there has been recent movement in some states to raise the age.¹⁴⁹ In New Jersey, for example, a bill was introduced in February of 2023 to raise the minimum age of criminal responsibility to twelve years.¹⁵⁰ The judiciary committee unanimously agreed to advance the bill to the senate after increasing the minimum age to fourteen, rather than twelve.¹⁵¹ Additionally, a Colorado bill attempting to raise the minimum age of criminal responsibility to thirteen was introduced in March of 2022.¹⁵² The South Dakota Legislature, however, has yet to show any movement towards raising the age.¹⁵³

B. THE DEVELOPMENTAL AND PSYCHOLOGICAL CONSEQUENCES OF EXPOSING YOUNG CHILDREN TO THE LEGAL SYSTEM

Modern understanding of child cognitive development and neuroscience has changed how juveniles are treated under the law.¹⁵⁴ In a series of landmark United States Supreme Court decisions from 2005 to 2012, the Court held that no child under the age of eighteen may be sentenced to capital punishment,¹⁵⁵ sentenced to life without parole for a non-homicide offense,¹⁵⁶ or mandatorily sentenced to

144. Leenknecht et al., *supra* note 127, at 18.

145. Anqi Shen, *The Age of Criminal Responsibility and Juvenile Justice in Mainland China: A Case Study*, 67 N. IR. LEGAL Q. 357, 357 (2016).

146. *Id.*

147. Leenknecht et al., *supra* note 127, at 18.

148. *Id.*

149. See, e.g., Dana DiFilippo, *Lawmakers Propose 14 as Minimum Age for Juvenile Delinquency*, NEW JERSEY MONITOR (June 12, 2023), <https://perma.cc/B9LK-AZAZ> (explaining that lawmakers in New Jersey proposed a bill in February of 2023 to raise the minimum age of criminal responsibility to twelve years); Loretta Wimbley, *New Colorado Bill Aims to Increase Age Limit that Juveniles can be Prosecuted Under*, CPR NEWS (Mar. 31, 2023), <https://perma.cc/C6FF-U7T8> (explaining that lawmakers in Colorado proposed a bill in March of 2022 to raise the minimum age of criminal responsibility to thirteen years).

150. DiFilippo, *supra* note 149.

151. *Id.* If it passes, New Jersey will be the first state to follow the United Nations Convention's recommendation. Compare *id.* (explaining that the judiciary committee in New Jersey agreed to advance a bill attempting to raise the minimum age of criminal responsibility to fourteen to the Senate), with United Nations Comment, *supra* note 137 (encouraging nations to increase their minimum age of criminal responsibility to at least fourteen years).

152. Wimbley, *supra* note 149.

153. See SDCL § 26-8C-2 (2016).

154. See Caitlin Cavanagh, *Healthy Adolescent Development and the Juvenile Justice System: Challenges and Solutions*, 16 CHILD DEV. PERSPECT. 141, 142 (2022).

155. *Roper v. Simmons*, 543 U.S. 551, 578 (2005) (“The Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed.”).

156. *Graham v. Florida*, 560 U.S. 48, 82 (2010) (“The Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide.”).

life without parole.¹⁵⁷ The reasoning in these decisions was, in large part, based on contemporary research on child development.¹⁵⁸ Recognizing these scientific advancements, the United States Supreme Court has explained that there are three general differences between juveniles and adults.¹⁵⁹

First, the Supreme Court has stated that juveniles have “a lack of maturity and an undeveloped sense of responsibility” which results “in impetuous and ill-considered actions and decisions.”¹⁶⁰ According to the Court, this means that their “irresponsible conduct is not as morally reprehensible as that of an adult.”¹⁶¹ Research in child development continues to show that children are more likely to engage in impulsive and risky behaviors than adults.¹⁶²

Ongoing developments in this area of research show that children have a hyper-sensitivity to emotional contexts, which makes them “susceptible to emotionally driven decisions, impulsive behavior, and poor judgment.”¹⁶³ This hypersensitivity can “interfere with self-control.”¹⁶⁴ Due to the ongoing development of the prefrontal cortex, children are also less able to make future-oriented decisions.¹⁶⁵ They are more focused on short-term rewards and gains rather than long-term consequences.¹⁶⁶

Due to these developmental differences, children often engage in behaviors that overlap with criminal offenses.¹⁶⁷ However, this increase in risk-taking behavior is developmentally normal and can even be useful in certain contexts.¹⁶⁸ In fact, the United States Supreme Court has held that, due to developmental differences, this conduct is not as blameworthy for children as it would be for adults.¹⁶⁹ Still, South Dakota responds to this type of behavior through the legal

157. *Miller v. Alabama*, 567 U.S. 460, 489 (2012) (“*Graham, Roper*, and our individualized sentencing decisions make clear that a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles.”). The Court reasoned that a mandatory life without the possibility of parole sentence for a juvenile “precludes consideration of his chronological age and its hallmark features – among them, immaturity, impetuosity, and failure to appreciate risks and consequences.” *Id.* at 477. Additionally, the Court explained that this sentence prevents the consideration of the family and home environment, the circumstances of the homicide offense, the juvenile’s inability to deal with police officers or prosecutors, the juvenile’s inability to assist his or her own attorneys, and the possibility of rehabilitation. *Id.* at 477-78.

158. *See Roper*, 543 U.S. at 569-70 (relying on research in child development to describe three general differences between juveniles and adults); *Graham*, 560 U.S. at 68 (explaining that developments in brain science and psychology continue to show fundamental differences between juveniles and adults); *Miller*, 567 U.S. at 472 n.5 (“The evidence presented to us in these cases indicates that the science and social science supporting *Roper’s* and *Graham’s* conclusions have become even stronger.”).

159. *Roper*, 543 U.S. at 569-70 (laying out three general differences between juveniles and adults).

160. *Id.* at 569.

161. *Id.* at 570.

162. CTR. FOR L., BRAIN, & BEHAV. AT MASS. GEN. HOSP., WHITE PAPER ON THE SCIENCE OF LATE ADOLESCENCE: A GUIDE FOR JUDGES, ATTORNEYS, AND POLICY MAKERS 11 (2022) [hereinafter WHITE PAPER ON THE SCIENCE OF LATE ADOLESCENCE].

163. *Id.* at 13.

164. *Id.*

165. *Id.* at 14.

166. *Id.* at 15.

167. Cavanaugh, *supra* note 154, at 141-42.

168. WHITE PAPER ON THE SCIENCE OF LATE ADOLESCENCE, *supra* note 162, at 11.

169. *Roper v. Simmons*, 543 U.S. 551, 570 (2005).

system, exposing these young children to arrest, court proceedings, detention, and more.¹⁷⁰

Second, the United States Supreme Court has stated that “juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure.”¹⁷¹ Because of this, the Court has stated, juveniles should be more easily “forgiven for failing to escape negative influences in their . . . environment.”¹⁷² Research continues to indicate that a child’s environment significantly influences their brain development.¹⁷³

Studies on adverse childhood experiences (“ACEs”) demonstrate the impact of a child’s environment on their development.¹⁷⁴ ACEs are potentially traumatic events occurring in childhood that have been linked to negative outcomes.¹⁷⁵ While each adverse childhood experience negatively impacts an individual’s behavior, health, and/or psychological development, experiencing multiple ACEs has a much more harmful effect.¹⁷⁶

The concept was first introduced in a 1998 medical study examining the relationship between ACEs and the leading causes of death in adults.¹⁷⁷ Subsequent research on ACEs has shown that individuals with more than one ACE have more mental health and psychological issues including anxiety, eating disorders, post-traumatic stress disorder, depression, insomnia, conduct disorder, and substance abuse disorder.¹⁷⁸ Further, higher ACE scores have been linked to an increased risk of problematic behaviors such as smoking, heavy drinking, poor education and employment outcomes, risky sexual behavior, and involvement in violence.¹⁷⁹ Additionally, research suggests that many of the negative outcomes associated with high ACE scores are inherent solutions that individuals adopt to respond to trauma in the absence of healthier coping options.¹⁸⁰

Youth who are involved with the juvenile justice system often experience multiple types of trauma before reaching the system.¹⁸¹ Specifically, 90% of

170. See, e.g., SDCL § 26-7A-12 (2016) (providing the circumstances under which a child may be taken into temporary custody by a law enforcement officer without a court order); SDCL § 26-7A-13 (providing that the court may order temporary custody of any child); SDCL § 26-11-2 (2016) (providing that an arrested delinquent child “shall be taken directly before the circuit court”); SDCL § 26-11A-7 (2016) (providing for the jurisdiction and custody of adjudicated children).

171. *Roper*, 543 U.S. at 569.

172. *Id.* at 570.

173. WHITE PAPER ON THE SCIENCE OF LATE ADOLESCENCE, *supra* note 162, at 17.

174. See *Fast Facts: Preventing Adverse Childhood Experiences*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <https://perma.cc/U9CV-ZSWA> (last visited June 29, 2023).

175. See *id.*

176. Bryanna Hahn Fox et al., *Trauma Changes Everything: Examining the Relationship Between Adverse Childhood Experiences and Serious, Violent and Chronic Juvenile Offenders*, 46 CHILD ABUSE & NEGLECT 163, 165 (2015).

177. *Id.* The original ACE score included the following items: “emotional, physical, and sexual abuse; witnessing household violence; household substance abuse; household mental illness; and having an incarcerated household member.” *Id.*

178. *Id.*

179. *Id.*

180. *Id.*

181. Carly B. Dierkhising et al., *Trauma Histories Among Justice-Involved Youth: Findings from the National Child Traumatic Stress Network*, 4 EUROPEAN J. PSYCHOTRAUMATOLOGY 1, 1 (2013).

youth offenders in the United States have experienced a traumatic event in their childhood.¹⁸² Youth offenders report higher rates of exposure to trauma, post-traumatic stress disorder, depression, and anxiety.¹⁸³ Further, a 2014 study examining the prevalence of ACEs in a population of juvenile offenders in Florida found that juvenile offenders are four times more likely to report four or more ACEs and thirteen times less likely to report zero ACEs than the participants in the original 1998 ACEs study.¹⁸⁴

Children who have experienced this kind of adversity possess an altered neurodevelopment, which makes them vulnerable to the negative impact of high-stress environments.¹⁸⁵ Due to this, young children who become involved with the juvenile justice system can be re-traumatized during the arrest process.¹⁸⁶ For the children who enter detention facilities, the needs assessment process is inadequate, they do not receive the emotional and educational services they need, and the mental health services are poor.¹⁸⁷ Additionally, seclusion, staff insensitivity, and loss of privacy at correctional facilities can exacerbate the feelings created by previous trauma.¹⁸⁸ Further, incarcerated youth often fail to develop social skills, like conflict resolution and self-control, in the same way as those who remain in the community.¹⁸⁹

Individuals with ACEs often use antisocial or maladaptive behaviors to cope with stress.¹⁹⁰ However, these behaviors do not dissipate through detention or incarceration.¹⁹¹ Recognizing this, researchers recommend that law enforcement and the judicial system should become aware of ACEs to ensure that the root causes of problematic behaviors are addressed through behavioral health and social services.¹⁹² A focus on identifying ACEs and interventions with a goal of improving children's life circumstances and preventing criminal behavior may lessen the likelihood of juvenile criminal activities.¹⁹³

Due to their increased vulnerability, children are also less able to effectively navigate interactions with law enforcement officers.¹⁹⁴ These interactions may

182. Fox et al., *supra* note 176, at 164.

183. Dierkhising et al., *supra* note 181, at 1.

184. Michael T. Baglivio et al., *The Prevalence of Adverse Childhood Experiences (ACE) in the Lives of Juvenile Offenders*, 3 J. JUV. JUST. 12, 21 (2014). This study utilized the following ACEs: emotional abuse, physical abuse, sexual abuse, emotional neglect, physical neglect, family violence, household substance abuse, household mental illness, parental separation or divorce, and household member incarceration. *Id.* at 17.

185. Natalia Orendain et al., *Juvenile Confinement Exacerbates Adversity Burden: A Neurobiological Impetus for Decarceration*, 16 FRONTIERS NEUROSCIENCE 1, 3 (2022).

186. Wade Askew, *Keeping Promises to Preserve Promise: The Necessity of Committing to a Rehabilitation Model in the Juvenile Justice System*, 20 GEO. J. ON POVERTY L. & POL'Y 373, 382 (2013).

187. *Id.* at 382-84.

188. ERICA J. ADAMS, HEALING INVISIBLE WOUNDS: WHY INVESTING IN TRAUMA-INFORMED CARE FOR CHILDREN MAKES SENSE 6 (2010).

189. *Id.* at 7.

190. Baglivio et al., *supra* note 184, at 22.

191. *Id.*

192. *Id.*

193. *Id.*

194. WHITE PAPER ON THE SCIENCE OF LATE ADOLESCENCE, *supra* note 162, at 27.

include decisions about whether to assert *Miranda* rights, whether to make a statement during police interrogation, and whether to disclose information to law enforcement.¹⁹⁵ Additionally, a juvenile's susceptibility to adult influence affects how they deal with the legal system.¹⁹⁶ They may be less able to make good judgments during plea bargaining and to meaningfully assist in their own defense.¹⁹⁷

In fact, research has shown that children younger than sixteen are significantly more likely to be impaired in a way that compromises their ability to act as a competent defendant in a criminal prosecution.¹⁹⁸ Approximately one-third of children ages eleven to thirteen are as impaired, in terms of adjudicative competence, as mentally ill adults who would likely be considered incompetent to stand trial.¹⁹⁹ Although a great number of children under the age of fourteen are incompetent, South Dakota law does not have separate competency standards for juveniles to allow for the consideration of their developmental deficiencies.²⁰⁰

The final general difference the United States Supreme Court noted is that “[t]he personality traits of juveniles are more transitory [and] less fixed” than adults.²⁰¹ This malleable character, the Court has held, means that even a heinous crime committed by a juvenile is not “evidence of irretrievably depraved character.”²⁰² Research continues to demonstrate that a child's brain is malleable and responsive to environmental stimuli.²⁰³

Ongoing research in this area indicates that, because of their enhanced malleability, an adolescent's brain is able to change in response to experiences.²⁰⁴ A juvenile's ability to desist from delinquent behavior is tied to their developing psychosocial maturity.²⁰⁵ As children mature, continued brain development increases their ability to regulate their emotions and behaviors.²⁰⁶ In turn, it decreases their impulsivity and sensation-seeking behaviors.²⁰⁷ Therefore, most

195. *Id.*

196. *Id.*

197. *Id.*

198. Thomas Grisso et al., *Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants*, 27 L. & HUM. BEHAV. 333, 356 (2003). Although this is an old study, it is the most recent research of its kind, and the findings continue to be used today. See, e.g., Kaitlin O'Dowd, *A Review of Maryland's Juvenile Justice System: Are the Adjudicative Competency Standards and Procedures Incompetent?*, 52 U. BALT. L. REV. 177, 186 (2022) (explaining that almost twenty years have passed since the last study, but still utilizing the research findings).

199. Grisso et al., *supra* note 198, at 356.

200. See SDCL § 23A-10A (2016) (laying out the processes used in South Dakota to find a defendant mentally incompetent).

201. *Roper v. Simmons*, 543 U.S. 551, 570 (2005).

202. *Id.*

203. See Cavanaugh, *supra* note 154, at 143; WHITE PAPER ON THE SCIENCE OF LATE ADOLESCENCE, *supra* note 162, at 11.

204. See WHITE PAPER ON THE SCIENCE OF LATE ADOLESCENCE, *supra* note 162, at 11.

205. RICHARD MENDEL, WHY YOUTH INCARCERATION FAILS: AN UPDATED REVIEW OF THE EVIDENCE 20 (2022). “Psychosocial maturity” refers to “the abilities to control impulses, delay gratification, weigh the consequences of their actions, consider others' perspectives, and resist peer pressure.” *Id.*

206. Cavanaugh, *supra* note 154, at 142.

207. *Id.*

youth will outgrow the tendency to engage in risk-taking behaviors on their own.²⁰⁸

C. THE SOCIAL IMPLICATIONS OF EXPOSING YOUNG CHILDREN TO THE LEGAL SYSTEM

Most juvenile offenders are not young criminals destined for a life of crime, but rather, are disadvantaged victims.²⁰⁹ These problems are inadequately addressed, and further exacerbated, by the current juvenile justice system.²¹⁰ Although these children may believe they are leaving their involvement with the legal system behind when they complete their adjudication terms, it can follow them for the rest of their lives.²¹¹ Unanticipated, harmful impacts often attach to juveniles as they are making their way out of the juvenile justice system.²¹² These obstacles can impede, or even devastate, a child's future opportunities to fulfill their potential.²¹³

Consequences that a child or their family may be subject to include significant hurdles to attaining education, barriers to college entrance and employment, denial of medical services, loss of driving privileges, termination of the right to vote or to serve on a jury, and publicly available court records.²¹⁴ One study found that appearing in court hinders educational attainment and increases the probability of dropout.²¹⁵ Another study found that early exposure to the criminal justice system reduces the chances of attending college.²¹⁶ Further, one study found that incarceration in a juvenile facility led to fewer weeks worked, less job experience, and lower wages by age thirty-nine.²¹⁷ Additionally, if a juvenile is convicted of a sex crime, they must register as a sex offender, which is an extremely punitive, collateral consequence, antithetical to rehabilitation and difficult to remove.²¹⁸

208. *Id.* at 146.

209. Askew, *supra* note 186, at 381.

210. *Id.*

211. MODELS FOR CHANGE, AVOIDING AND MITIGATING THE COLLATERAL CONSEQUENCES OF A JUVENILE ADJUDICATION 1 (2013).

212. *Id.*

213. *Id.*

214. *See id.*

215. *See* Gary Sweeten, *Who Will Graduate? Disruption of High School Education by Arrest and Court Involvement*, 23 JUST. Q. 462, 477-78 (2006).

216. *See* Davis S. Kirk & Robert J. Sampson, *Juvenile Arrest and Collateral Educational Damage in the Transition to Adulthood*, 86 SOCIO. EDUC. 36, 54-55 (2013).

217. MENDEL, *supra* note 205, at 15.

218. *See* SDCL § 22-24B-1 (2017 & Supp. 2021) (listing crimes that qualify as a sex crime in South Dakota); SDCL § 22-24B-2 (2017) (explaining the requirements and procedures of sex offender registration). There appears to be a gap in South Dakota law which allows juveniles to petition for removal of an adjudication for rape, but not for other juvenile sex crimes including sexual contact with a person incapable of consenting, possession of child pornography, indecent exposure, and more. *See* SDCL § 22-24B-19(2)(b) (2017) (laying out the criteria for removal from the sex offender registry). Additionally, South Dakota does not allow a juvenile to petition for removal of an adjudication for sexual contact if the victim was younger than thirteen years old. *See* SDCL § 22-24B-19(3) (2017 & Supp. 2020). Furthermore, even if a juvenile successfully petitions an adjudicated delinquency and it is discharged, the

Contact with the juvenile justice system at a young age also increases the likelihood of future involvement with the justice system.²¹⁹ In fact, 68% of state prisoners in the United States were first arrested before they turned nineteen.²²⁰ Further, 38% of these state prisoners were first arrested before they turned sixteen.²²¹ In South Dakota, of the juvenile offenders that were released in 2019, 33.6% had returned by the end of 2022.²²² Of the juveniles who returned to placement, 12.4% returned for technical violations and 21.2% returned for a new charge.²²³ Of that same group, 47% of the juveniles returned within the first year, including 29% during the first six months.²²⁴ Thirty-two percent returned in the second year and 21% returned in the third year.²²⁵ Additionally, 66% of those who returned were admitted to the adult prison system.²²⁶

D. A MORE APPROPRIATE AVENUE

To raise the minimum age of criminal responsibility to fourteen, South Dakota needs a plan to better manage juvenile delinquency in children ages ten to fourteen. A more appropriate, effective alternative for delinquent children between ages ten and fourteen is the use of community-based services.²²⁷ Youth justice and child development scholars agree that the most effective interventions are those that provide support and assistance to children and their families through mental health providers, community organizations, and the child welfare system when necessary.²²⁸ “Programs that offer therapeutic counseling, skill building, and case management” have proven to be the most effective way to rehabilitate juvenile offenders.²²⁹ In these programs, “[t]he skills most important to address are anger management, ‘anti-social feelings, lack of self-control, lack of affection or weak supervision from parents, lack of role models, and poor academic skills.’”²³⁰

juvenile’s removal from the sex offender registry will be open to public inspection. See SDCL § 22-24B-2.

219. HEALTH GROUP STATEMENT OF SUPPORT, *supra* note 129. This is, in part, caused by labeling children as “delinquent” and fostering a criminal identity. *Id.* The increase is also a consequence of removing children from normal social and educational activities. *Id.*

220. Leah Wang et al., *Beyond the Count: A Deep Dive into State Prison Populations*, PRISON POLICY INITIATIVE (April 2022), <https://perma.cc/8EES-J489>.

221. *Id.*

222. S.D. DEP’T OF CORR., EXTERNAL DATA BRIEF: JUVENILE RECIDIVISM 3 (No. 4-E 2023).

223. *Id.* A technical violation results from failing to comply with a condition of probation or parole. NAT’L CONF. OF STATE LEGISLATURES, *Limiting Incarceration for Technical Violations of Probation and Parole*, <https://perma.cc/SA75-NW77> (last updated Feb. 6, 2023). Failing to check in with a probation or parole officer or failing a drug test would constitute a technical violation. *Id.*

224. S.D. DEP’T OF CORR., EXTERNAL DATA BRIEF: JUVENILE RECIDIVISM 4 (No. 4-E 2023).

225. *Id.*

226. *Id.* at 7.

227. Hess & Verhine, *supra* note 123, at 587.

228. YCLJ Statement, *supra* note 25.

229. Hess & Verhine, *supra* note 123, at 587.

230. *Id.*

South Dakota has already made strides to use community-based services to address delinquent behavior.²³¹ Since the JJPSIA was passed in 2015, the Department of Social Services has expanded the use of community-based services statewide.²³² These services, referred to as Juvenile Justice Reinvestment Initiative services, include Functional Family Therapy, Moral Reconciliation Therapy, and Aggression Replacement Training.²³³ Functional Family Therapy is a state-wide, short-term program that addresses a range of antisocial behaviors.²³⁴ Moral Reconciliation Therapy is a program designed to help youth address negative behavior and thought patterns.²³⁵ It is available in eight locations and via telehealth statewide.²³⁶ Aggression Replacement Training is a program that trains youth to cope with their violent and aggressive behaviors.²³⁷ It is available in six locations around South Dakota.²³⁸ The South Dakota Juvenile Justice Oversight Council reported that these services have already had positive effects on individuals and communities in the state.²³⁹

In addition to improving the outcomes for delinquent children between ten and fourteen years old in South Dakota, raising the minimum age of criminal responsibility to fourteen will not overwhelm the system.²⁴⁰ In the past few years, a common perception was that the rate of young juveniles entering the juvenile justice system had increased.²⁴¹ To the contrary, arrest rates for very young juveniles has declined considerably since 2001.²⁴² In 2001, there were 6,273

231. JJPSIA 2017 ANNUAL REPORT, *supra* note 122, at 16.

232. *Id.*

233. *Id.*

234. *Id.*

235. *Id.*

236. *Id.* In South Dakota, there is a Moral Reconciliation Therapy (“MRT”) provider in each of the seven judicial circuits. See S.D. DEP’T OF SOC. SERVS., TARGETED SERVICES FOR JUSTICE INVOLVED ADULTS SERVICE COVERAGE MAP 1 (2022). The MRT providers include Lutheran Social Services in the First Circuit, Volunteers of America in the Second Circuit, Lutheran Social Services in the Third Circuit, Compass Point in the Fourth Circuit, Lutheran Social Services in the Fifth Circuit, Capital Area Counseling Services and South Dakota Urban Indian Health in the Sixth Circuit, and Pennington County Sheriff’s Officer Addiction Treatment Services and Addiction Recovery Center of the Black Hills in the Seventh Circuit. *Id.* MRT is also offered statewide via telehealth through Volunteers of America and Lutheran Social Services. *Id.*

237. JJPSIA 2017 ANNUAL REPORT, *supra* note 122, at 16.

238. *Id.* Although it is unclear which specific South Dakota providers offer Aggression Replacement Training programming, 100% of youth clients served and 100% of parents or guardians reported ease and convenience when accessing these treatment services in 2020. See S.D. DEP’T OF SOC. SERVS., FISCAL YEAR 2020 STATE PROFILE EXECUTIVE SUMMARY: BEHAVIORAL HEALTH TREATMENT SERVICES IN SOUTH DAKOTA 60 (2020) [hereinafter BEHAVIORAL HEALTH TREATMENT SERVICES IN SOUTH DAKOTA].

239. JJPSIA 2017 ANNUAL REPORT, *supra* note 122, at 18.

240. See BEHAVIORAL HEALTH TREATMENT SERVICES IN SOUTH DAKOTA, *supra* note 238, at 57-64 (demonstrating the outcomes achieved from the implementation of community-based services in South Dakota); NJJN POLICY PLATFORM, *supra* note 127, at 5 (“Most delinquency cases do not involve young children.”).

241. NAT’L CENTER FOR JUV. JUST., JUVENILE OFFENDERS AND VICTIMS: 2014 NATIONAL REPORT 123 (Melissa Sickmund & Charles Puzanhera eds., 2014).

242. *Id.*

children under the age of fourteen in residential placements in the United States.²⁴³ In 2019, there were only 2,120 children under the age of fourteen in residential placements in the United States.²⁴⁴

In South Dakota, thirty-nine children under the age of fourteen were in residential placements in 2001.²⁴⁵ In 2019, this number dropped to twenty-four children in South Dakota.²⁴⁶ Additionally, the violent crime index for juveniles in South Dakota has significantly decreased from fifty-one in 2001 to thirty in 2021.²⁴⁷ Therefore, with so few children between the ages of ten and fourteen being handled through the juvenile justice system, and South Dakota's efforts to expand the use of community-based services in the state, raising the minimum age of criminal responsibility to fourteen will not be overly burdensome on the system.²⁴⁸

V. CONCLUSION

One year after his encounter with police at his elementary school, J.H.'s parents sued the Sheriff's Office and School Board.²⁴⁹ J.H. has significant trauma from the incident.²⁵⁰ He continues to suffer from shock, anguish, humiliation, distress, and loss of enjoyment of life.²⁵¹ Friends and family of J.H. have noticed a significant decrease in his sociability and demeanor since his arrest.²⁵² He now has heightened anxiety and is extremely fearful of police officers.²⁵³ Even months after the incident, J.H. was playing basketball when two police cars drove past his house: "he ran inside in terror."²⁵⁴

In order to protect young children from situations like this, South Dakota should raise the minimum age of criminal responsibility to fourteen.²⁵⁵ The United States is an outlier in the practice of exposing young children to the justice

243. C. Puzzanchera et al., *supra* note 27, tbl. Age on Census Date by Sex for U.S., 2001 [<https://perma.cc/2SLT-EG4A>].

244. *Id.* tbl. Age on Census Date by Sex for U.S., 2019 [<https://perma.cc/CF3F-ZJDP>].

245. *Id.* tbl. Age on Census Date by Sex for S.D., 2001 [<https://perma.cc/ZG29-859J>]. It should be noted that the census cautions that 30% or more of the information for age was imputed because some facilities were not able to provide all of the information requested. *Id.*

246. *Id.* tbl. Age on Census Date by Sex for S.D., 2019 [<https://perma.cc/BVB3-Z4VZ>].

247. *Compare Id.* tbl. Detailed Offense Profile by Placement Status for S.D., 2001 [<https://perma.cc/GMU8-TYFH>] (providing the violent crime index for 2001), *with id.* tbl. Detailed Offense Profile by Placement Status for S.D., 2021 [<https://perma.cc/YY52-WXK3>] (providing the violent crime index for 2021).

248. *Id.* tbl. Age on Census Date by Sex for S.D., 2021 [<https://perma.cc/8V6D-B2TX>] (showing the number of juveniles in residential placement in South Dakota in 2021 by age); *see also* JJPSIA 2017 ANNUAL REPORT, *supra* note 122, at 16 (discussing South Dakota's recent juvenile justice reform efforts).

249. Complaint, *supra* note 1, at 1.

250. *Id.* at 15.

251. *Id.* at 22.

252. *Id.* at 16.

253. *Id.* at 15.

254. *Id.*

255. *See* discussion *supra* Part IV (recommending an amendment to current South Dakota legislation).

system.²⁵⁶ The practice is developmentally inappropriate and only exacerbates the problems created by ACEs, preexisting stressors, immaturity, and more.²⁵⁷ Further, it imposes long-lasting collateral consequences and makes future contact with the legal system more likely.²⁵⁸ Amending current South Dakota law and handling delinquent children ages ten to fourteen through community-based services would not overwhelm the system and would provide a better outcome for those children and society.²⁵⁹ A ten-year-old is a child, not a criminal, and South Dakota law should acknowledge the very same.²⁶⁰

256. See discussion *supra* Section IV.A (reviewing international differences in managing juvenile delinquency).

257. See discussion *supra* Section IV.B (discussing the developmental and neurological consequences of exposing young children to the legal system).

258. See discussion *supra* Section IV.C (discussing the social implications of exposing young children to the legal system).

259. See discussion *supra* Section IV.D (suggesting a more appropriate solution and explaining that this legislative change will not be overly burdensome).

260. See discussion *supra* Part VI (proposing an amendment to current South Dakota legislation).