

PUNISHMENT V. RESTORATION: A
COMPARATIVE ANALYSIS OF JUVENILE
DELINQUENCY LAW IN THE UNITED STATES
AND MEXICO

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I. INTRODUCTION

Juvenile justice policies in countries throughout the world have become polarized on opposite ends of a spectrum. On one end, the “punitive model” prioritizes crime control, punishment,

and incarceration; on the other, the “restorative model” emphasizes human rights, youth development research, and repairing harm to victims.¹ Countries such as the United States and the United Kingdom have led the movement towards the punitive end of the spectrum.² Others such as New Zealand and Finland have taken another path, utilizing alternatives to incarceration to address youth crime.³ Factors such as the number of minors who are incarcerated, the minimum jurisdictional age for juvenile court, and compliance with international human rights standards tend to signal which approach a particular country favors.⁴

U.S. juvenile justice policy has become increasingly punitive

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¹ See Barry Goldson & John Muncie, *Rethinking Youth Justice: Comparative Analysis, International Human Rights and Research Evidence*, 6 YOUTH JUSTICE 91 (2006), available at <http://yjj.sagepub.com/content/6/2/91.full.pdf> (distinguishing between countries whose juvenile justice systems favor a “culture of control” and those which prioritize human rights compliance). These distinct approaches are also apparent in the context of criminal justice systems for adults. See DAVID CAYLEY, *THE EXPANDING PRISON: THE CRISIS IN CRIME AND PUNISHMENT AND THE SEARCH FOR ALTERNATIVES* 1-11 (1998).

² Goldson & Muncie, *supra* note 1 (discussing two major assumptions regarding youth justice, one which favors a culture of control and punishment and the other which emphasizes human rights, penal tolerance, and a child centered approach); YOUTH, GLOBALIZATION, AND THE LAW 7-8 (Sudhir Alladi Venkatesh & Ronald Kassimir eds., 2007) (identifying two, contradictory trends in the 1990s regarding youth and the law—one trend towards increased punishment and the other towards protecting the rights of youth); John Muncie, *Youth Justice and the Governance of Young People: Global, International, National, and Local Contexts*, in YOUTH, GLOBALIZATION, AND THE LAW 26 (Sudhir Alladi Venkatesh & Ronald Kassimir eds., 2007) (discussing the exportation of American penal policies to other countries). See also NILS CHRISTIE, *CRIME CONTROL AS INDUSTRY: TOWARDS GULAGS, WESTERN STYLE* 91-110 (3d ed. 1993).

³ Goldson & Muncie, *supra* note 1, at 95. Finland, for example, embarked on a penal reform project that has resulted in a steady decrease in its incarceration rate. *Id.* at 96. The reforms have had a particular impact on the juvenile population. As of 1998, Finland had a juvenile incarceration population of ten. CAYLEY, *supra* note 1, at 270-71. New Zealand replaced juvenile court hearings with “family group conferences” that brought together everyone involved with the case, including victims, to develop solutions to the problem. CAYLEY, *supra* note 1, at 170-75. This change reduced the number of youth in detention facilities from 4,397 in 1985 to 939 in 1991. *Id.* at 175.

⁴ See, e.g., Goldson & Muncie, *supra* note 1, at 95-99 (discussing comparisons between the youth justice systems of various countries, including an analysis of minimum ages of responsibility and the use of incarceration).

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in the past twenty-five years, resulting in the transfer of significantly more juveniles to adult courts and rising youth incarceration rates.⁵ The State of California has led the way in the country's movement towards imposing harsher sanctions upon juvenile offenders;⁶ its juvenile delinquency code epitomizes the punitive nature of juvenile justice in the United States. Two recent Supreme Court cases, however, may indicate the beginning of a shift in the direction of youth justice policy in the United States. In 2005, the Supreme Court held that sentencing juvenile offenders to death violates the Constitution.⁷ In 2010, the Court held that imposing the sentence of life without the possibility of parole for juveniles convicted of non-homicide offenses is unconstitutional.⁸ Both cases relied upon adolescent brain development research and internationally accepted human rights principles to impose limits on the types of punishments that can be imposed on juvenile offenders.⁹

As the United States begins to take research regarding adolescent development and international human rights agreements more seriously in relation to juvenile justice policy, it is important to consider other legal systems that approach juvenile delinquency law from this perspective. Mexico recently amended its constitution to require the creation of juvenile justice systems modeled after the principles of the United Nations Convention on the Rights of the Child.¹⁰ Mexico's juvenile justice codes follow an

⁵ See ELIZABETH S. SCOTT & LAURENCE STEINBERG, *RETHINKING JUVENILE JUSTICE* 4-11 (2008) (chronicling the increasingly punitive nature of juvenile courts in the United States over the past twenty-five years). Despite this punitive trend, the U.S. Supreme Court has made two important rulings over the past six years that have limited the punitive growth expansion of the law. In *Roper v. Simmons*, 543 U.S. 551 (2005), the Court held that it was unconstitutionally cruel and unusual punishment to impose the death penalty on a juvenile. In *Graham v. Florida*, 130 S. Ct. 2011 (2010), the Court held that imposing a sentence of life without the possibility of parole on a juvenile offender who was not convicted of a homicide offense constituted cruel and unusual punishment, in violation of the Constitution.

⁶ See IRA M. SCHWARTZ, (IN)JUSTICE FOR JUVENILES: RETHINKING THE BEST INTERESTS OF THE CHILD 47-50 (1989); Linda S. Beres & Thomas D. Griffith, *Demonizing Youth*, 34 *LOYOLA L. REV.* 747, 754-56 (2001). See also SASHA ABRAMSKY, *HARD TIME BLUES* xvi (2002) (indicating that California "has most visibly embraced the goals of punishment over rehabilitation, and imprisonment over alternatives to incarceration" and that "[t]he old adage, 'where California goes, the nation follows,' is particularly true in the area of contemporary crime and punishment.").

⁷ *Roper v. Simmons*, 543 U.S. 551, 573-78 (2005).

⁸ *Graham v. Florida*, 130 S. Ct. 2011, 2030 (2010).

⁹ See *supra* note 5 (discussing *Roper* and *Graham*).

¹⁰ United Nations Convention on the Rights of the Child, *opened for signature* Nov. 20,

approach rooted in human rights, victims' rights, and adolescent development research.¹¹ Within Mexico, the State of Oaxaca has developed a code that incorporates these human rights principles and sets forth procedures for using restorative justice conferences as an alternative to the adversarial court system. While California's juvenile delinquency laws represent the punitive model popular in the United States, Oaxaca's approach exemplifies the restorative model contemplated in Mexico's national constitutional reforms. The distinct approaches of California and Oaxaca highlight some of the major ways in which U.S. juvenile delinquency law fails to comport with international human rights standards and research about adolescent development.

This Article compares the juvenile delinquency codes of Oaxaca and California in order to explore contrasting approaches to juvenile justice, addressing each country's practices in light of research regarding adolescent development and international human rights standards. The use of restorative justice in Oaxaca's legal code—and the accompanying emphasis on victims' rights—are contrasted with California's focus on punishing juvenile offenders. Part II of this Article sets forth a brief history of Mexico's recent criminal justice reforms. Part III provides contextual information regarding the socio-political climate of Oaxaca and the creation of its new juvenile justice system. The Article discusses California's approach to juvenile crime in Part IV. Part V begins the comparative analysis by addressing the ways in which each state defines juvenile crime. In Part VI, the Article addresses each state's compliance with international human rights standards, specifically considering the treatment of juveniles as adults, the use of incarceration, and the characterization of juvenile offenses as prior convictions for sentencing enhancements in the future. Part VII discusses the restorative justice conferences utilized in Oaxaca to resolve most juvenile delinquency cases and explores the role of victims in the juvenile justice process.

One inherent challenge to an analysis of legal frameworks is that the written law often differs from the reality of its enforcement. In addition to drawing upon the written legal codes of each state, this Article integrates personal observations and

1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990), available at <http://www2.ohchr.org/english/law/pdf/crc.pdf>.

¹¹ See *infra* Part II.

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interviews regarding the application of the law in each state to augment the analysis of the written law.¹² The Article concludes that despite some troubling issues regarding implementation of the law in Oaxaca, its juvenile delinquency code is more just and effective than California's. The U.S. approach to youth justice violates international human rights standards, fails to adequately provide for the differences between adolescents and adults, and focuses on punishment at the expense of victims, children who break the law, and communities. The Supreme Court's recent analysis of draconian sentencing policies for minors provides a glimmer of hope that American juvenile justice law will become more similar to the juvenile delinquency law of Oaxaca. This Article discusses some of the primary areas that will need to change in this process of reincorporating a measure of justice into American responses to juvenile crime.

II. LEGAL REFORMS IN MEXICO

The Mexican government passed two major constitutional reform packages within the past five years that collectively transform the country's approach to juvenile justice. In 2005, Article 18 of the Mexican Constitution¹³ was modified to require each state to design and implement a juvenile delinquency system that operates separately from the adult criminal justice system.¹⁴ In 2008, Mexico amended its national constitution again to incorporate numerous due process rights for criminal defendants, including the right to oral trials.¹⁵ The 2008 reforms require a

¹² Observations regarding California were obtained through the author's practice of juvenile delinquency law as a public defender in Los Angeles, California. Information regarding Oaxaca was gained through research conducted in Oaxaca for a six-month period in 2009 and 2010. This research included interviews with key personnel in the state's prosecuting agency and judiciary, the prosecutor's specialized office for adolescent crime, and the Center for Restorative Justice (where restorative justice conferences were observed). Observations were also conducted in Oaxaca's juvenile court.

¹³ Constitución Política de los Estados Unidos Mexicanos [C.P.], *as amended*, art. 18, Diario Oficial de la Federación [DO], 12 de Diciembre de 2005 (Mex.).

¹⁴ See Rubén Vasconcelos Méndez, *LA JUSTICIA PARA ADOLESCENTES EN MEXICO: ANÁLISIS DE LAS LEYES* [JUSTICE FOR ADOLESCENTS IN MEXICO: ANALYSIS OF THE LAWS] 1 (2009); Efrén Arellano Trejo, *Sistema Integral de Justicia Para Adolescentes* [*Integral Justice System for Adolescents*] 3, (Centro de Estudios Socializes y de Opinión Pública, Documento de Trabajo Numero 3, 2006) (tracing the history of adolescent penal law in Mexico).

¹⁵ See Untitled Article, PROCESO, Feb. 17, 2008, at 1, *available at* www.msiworldwide.com/files/proderechomarcharticle.pdf. See also MATT INGRAM & DAVID A. SHIRK,

complete restructuring of the country's State and Federal criminal justice systems and are scheduled to be fully implemented by 2016.¹⁶

In addition to providing criminal defendants the right to oral trials, the 2008 reforms grant the accused fundamental due process rights, including the presumption of innocence,¹⁷ the right to competent counsel,¹⁸ the right to testify or to remain silent,¹⁹ and the right to a speedy trial.²⁰ In addition, the reforms limited pre-trial detention,²¹ required the physical presence of a judge during hearings,²² and made confessions obtained by torture inadmissible in court.²³ These due process reforms, including the right to oral trials, extend to juveniles in delinquency proceedings and have

TRANS-BORDER INSTITUTE, *JUDICIAL REFORM IN MEXICO: TOWARD A NEW CRIMINAL JUSTICE SYSTEM* (2010).

¹⁶ C.P. arts. 16-22, 73, 115, 123 (Mex.). *See also* INGRAM & SHIRK, *supra* note 15.

¹⁷ *Id.* art. 20(B)(I).

¹⁸ *Id.* art. 20(B)(VIII). Prior to the reforms, defense advocates were not required to be attorneys. Under the reforms, defense counsel must be attorneys. INGRAM & SHIRK, *supra* note 14, at 13. Further, Article 17 of the Mexican Constitution was amended to require a strong system of public defenders. *Id.*

¹⁹ C.P. art. 20(B)(II) (Mex.).

²⁰ C.P. art. 20(B)(VII) (Mex.). These due process rights, however, do not apply to those accused of participating in "organized crime." INGRAM & SHIRK, *supra* note 15, at 15. The reforms have been criticized for creating a two-track justice system; due process rights apply to the average criminal defendant while another set of rules involving much fewer rights applies to those accused of participating in organized crime. Untitled Article, *supra* note 15.

²¹ C.P. art. 19 (Mex.). Lengthy pre-trial detention has been a major problem in Mexico. Prior to the reforms, people were often incarcerated for lengthy periods of time and were housed in the same prison facilities as people who had been convicted. INGRAM & SHIRK, *supra* note 14, at 12. Under the reforms, access to bail has been expanded, a pre-trial judge is specifically responsible for setting bail and handling pre-trial matters, and defendants have speedy trial rights, which are meant to ensure that people do not languish for months or years while awaiting trial. DAVID A. SHIRK, TRANS-BORDER INSTITUTE, *JUDICIAL REFORM IN MEXICO: CHANGE & CHALLENGES IN THE JUSTICE SECTOR* 17 (2010). However, human rights critics have concerns regarding whether the reforms adequately address the problems with pre-trial detention in Mexico. Judges do not have the discretion to set bail in cases where people are charged with certain offenses. *See* HUMAN RIGHTS WATCH, *WORLD REPORT 2009, Mexico*, at 191-95 (2009), http://www.hrw.org/sites/default/files/reports/wr2009_web_1.pdf [hereinafter HUMAN RIGHTS WATCH, *Mexico*]. In addition, for people accused of participating in organized crime, the law allows for people to be incarcerated for up to eighty days even when no charges have been filed. *Id.* *See also* INGRAM & SHIRK, *supra* note 15, at 15.

²² C.P., art. 20(A)(II).

²³ C.P., art. 20(A)(IX) ("Any proof obtained in violation of fundamental rights will be null.") SHIRK, *supra* note 21, at 16. Torture is a major problem in Mexico's criminal justice system, as documented by Human Rights Watch. *See* HUMAN RIGHTS WATCH, *Mexico*, *supra* note 21.

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informed the design of individual Mexican state's juvenile justice laws and procedures.

Mexico's 2005 juvenile justice reforms were greatly influenced by the United Nations' Convention on the Rights of the Child (CRC) and accordingly prioritize due process rights and procedures that take into account adolescents' diminished capacity²⁴ due to their age.²⁵ Each of Mexico's thirty-two states and the Federal District²⁶ were responsible for designing their own unique juvenile delinquency codes in accordance with the standards set forth in the national constitutional reforms.²⁷ Previously, most states operated juvenile delinquency proceedings as administrative hearings with no due process rights for the accused and no procedural safeguards.²⁸ These administrative hearings treated children who were abused or neglected in the same way as children who were accused of committing a crime, often depriving children who had not committed crimes of their liberty.²⁹ Adolescents accused of committing more serious

²⁴ Diminished capacity refers to the concept that some people should be held less morally responsible for their actions because their decision-making abilities are compromised in some way, as in the case of developmentally disabled individuals. See JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL LAW* 341-45 (2d ed. 1995), for a discussion of diminished capacity in criminal law. In the case of adolescents, a growing body of research regarding brain development suggests that adolescents' brains do not yet function as do the brains of adults. See SCOTT & STEINBERG, *supra* note 5.

²⁵ CARLOS RIOS ESPINOSA, *PRODERECHO, REQUERIMIENTOS DE ADECUACION LEGISLATIVA EN MATERIA DE JUSTICIA JUVENIL DE CONFORMIDAD CON LA REFORMA AL ARTICULO 18 CONSTITUCIONAL* (Raul Gonzalez Salas-Campos et al. eds., 2006); MÉNDEZ, *supra* note 14, at 1; Trejo, *supra* note 14 (tracing the history of adolescent penal law in Mexico).

²⁶ The Federal District (Distrito Federal) refers to the area surrounding Mexico City, which is not a state but is similar to the Washington D.C. area.

²⁷ See generally MENDEZ, *supra* note 14.

²⁸ See Martha Frías-Armenta & Graciela Jassa-Silveira, *An Evaluation of Process Rights Applying the U.N. Standard Minimum Rules for the Administration of Juvenile Justice and U.N. Convention on the Rights of the Child: A Study of Mexican Children* (Justice in Mexico Project, UCSD Center for US-Mexican Studies and USD Trans-Border Institute, Working Paper, No. 2, 2006). A study indicating frequent human rights violations of children and adolescents under Mexico's administrative procedures motivated politicians to support reforms to Mexico's juvenile justice system. ESPINOSA, *supra* note 25. See also MENDEZ, *supra* note 14, at 1-8.

²⁹ MENDEZ, *supra* note 14, at 8-9 (explaining that adolescents could be deprived of their liberty even without committing a crime simply for being poor, for having family problems, or for not having a home with no systems to regulate such deprivations of liberty). See also Mary Jordan, *Mexico's Children Suffer in "Little Jails,"* WASH. POST, Nov. 4, 2002, <http://www.washingtonpost.com/ac2/wp-dyn?pagename=article&node=&contentId=A64160-2002Nov3¬Found=true> (detailing abuse within juvenile detention facilities in Mexico in 2002 and describing the juvenile justice system at that time, which

offenses were regularly punished under the adult criminal justice system.³⁰ The 2005 constitutional amendment requires each state to develop distinct juvenile delinquency procedures that incorporate due process rights for adolescents accused of committing crimes.

Anticipating this national constitutional mandate, the State of Oaxaca began to develop a juvenile justice system prior to 2005.³¹ Key leaders in the state's judicial system learned about successful models for juvenile justice systems from other countries.³² They learned that most juvenile delinquency cases do not go to trial.³³ Rather, the vast majority are resolved through alternatives to trials, such as plea bargains or diversion programs.³⁴ In designing a system to address juvenile crime, leaders in the State of Oaxaca wrote restorative justice processes into the code as the primary mechanism for resolving cases.³⁵ Oaxaca has received national attention for the extent to which mediation and restorative justice processes are utilized to address juvenile crime.³⁶ Because of this innovative approach, Oaxaca's Penal Code for Adolescents has been referred to as a model for other states.³⁷

included administrative judges, no lawyers, no judicial follow up, and much discretion vested in directors of detention centers to determine how long to detain the children. Often, children were detained because they would otherwise be homeless.).

³⁰ Miguel Carbonell, *Prologue* to RUBÉN VASCONCELOS MÉNDEZ, *LA JUSTICIA PARA ADOLESCENTES EN MEXICO: ANÁLISIS DE LAS LEYES* [JUSTICE FOR ADOLESCENTS IN MEXICO: ANALYSIS OF THE LAWS], at xvii (2009).

³¹ Interview with Candelaria Chiñas, Director, Sub-Procuraduría de Adolescentes, in Oaxaca, Mexico (Sept. 14, 2009). The Sub-Procuraduría de Adolescentes is the government agency responsible for prosecuting juvenile delinquency cases in the State of Oaxaca.

³² *Id.* See also *Dictamen* to Ley de Justicia para Adolescentes del Estado de Oaxaca [Legal Opinion Regarding the Adolescent Justice Law] 279, Periódico Oficial del Gobierno del Estado, 1 de Septiembre de 2006 (Mex.), available at http://www.congresooaxaca.gob.mx/lxi/info/biblioteca/Cod_Procesal_Penal/Ley%20Justicia%20Adolescentes-Dictamen.pdf (referring to practices used in the Dominican Republic).

³³ Interview with Candelaria Chiñas, *supra* note 31.

³⁴ *Id.*

³⁵ *Id.* See also Ley de Justicia Para Adolescentes del Estado de Oaxaca [Adolescent Justice Law in the State of Oaxaca], arts. 41-46, Periódico Oficial del Gobierno del Estado, 6 de Octubre de 2007 (Mex.), available at http://www.congresooaxaca.gob.mx/lxi/info/biblioteca/Cod_Procesal_Penal/Ley%20Justicia%20Adolescentes-texto%20actualizado.pdf.

³⁶ Interview with Jacibe Valencia, Director, Center for Restorative Justice in Oaxaca, Mexico (Sept. 8, 2009) (explaining that representatives from other states have visited Oaxaca to learn about its restorative justice practices.)

³⁷ Nancy Flemming, Oaxaca Regional Proderecho Coordinator & Alejandra de las Casas, Chihuahua Regional Proderecho Coordinator, Successful Application of Restorative Justice in Mexico, Congreso Internacional de Justicia Restaurativa [Int'l

III. “OAXACA IS COMPLICATED”—THE SOCIO-POLITICAL CONTEXT

There is a common saying that people from Oaxaca use to describe the myriad of social, economic, and political issues affecting the state: “*Oaxaca es complicado*” (“Oaxaca is complicated”). While a thorough exploration of the social, political, economic, and legal issues that combine to create this complexity is beyond the scope of this Article, a cursory overview of some of the major issues facing the state provides the appropriate context in which to address the state’s legal reforms.

Oaxaca’s population, geography, and poverty coalesce to present major challenges to its government.³⁸ Its population is extremely diverse, consisting of at least seventeen different indigenous groups, each speaking their own languages and practicing their own customs.³⁹ Many indigenous communities are ruled by *usos y costumbres*,⁴⁰ whereby the government does not intervene in legal matters.⁴¹ Instead, the community is allowed to govern by its traditional practices and customs.

Oaxaca is characterized by steep mountain ranges that limit transportation between towns and villages. Communication is a challenge because many communities are not connected by roads. Oaxaca is one of the poorest states in Mexico—people lack food, water, shelter, and medical care.⁴² In more recent years,

Restorative Justice Conference], Oaxaca, Mexico (Sept. 26, 2008). Given that each state’s youth justice system is different, the procedures, categorizations of crimes, alternative dispute mechanisms, and sentencing options vary from state-to-state. Hector Fix-Fierro & Susana Sottoli, *Prologue* to RUBÉN VASCONCELOS MÉNDEZ, *LA JUSTICIA PARA ADOLESCENTES EN MÉXICO: ANÁLISIS DE LAS LEYES* [JUSTICE FOR ADOLESCENTS IN MEXICO: ANALYSIS OF THE LAWS], at xiv (2009).

³⁸ Unless otherwise cited, information about Oaxaca was obtained through interviews and observations conducted in Oaxaca in 2009 and 2010 through a Fulbright fellowship.

³⁹ See JOSE SOTELO MARBAN, *OAXACA: INSURGENCIA CIVIL Y TERRORISMO DE ESTADO* 25 (2008) (reporting that more than one million indigenous people reside in 2563 localities in the state of Oaxaca, comprising 33% of the state’s population, from groups including: Amuzgos, Cuicatecos, Chatinos, Chinantecos, Chochohlecoc, Chontales, Cuicatecos, Haves, Ixcatecos, Mazatecos, Mixes, Mixtecoc, Nahuas, Tacuates, Triquis, Zapotecoc, and Zoques).

⁴⁰ This translates to mean “practices and customs.” It refers to community-based norms and customs for governance.

⁴¹ See Todd A. Eisenstadt, *Usos y Costumbres and Postelectoral Conflicts in Oaxaca, Mexico, 1995-2004: An Empirical and Normative Assessment*, *LATIN AMERICAN RES. REV.* 42.1, 52-77 (2007) (comparing post-electoral conflicts in Oaxacan municipalities governed by *usos y costumbres* to those that are not).

⁴² See DAVID BACON, *ILLEGAL PEOPLE: HOW GLOBALIZATION CREATES*

subsistence farming has been diminished, as it is no longer a viable option for small farmers faced with competition from large corporations as a result of NAFTA.⁴³ This has propelled migration to urban areas, to other states, and to the United States, as larger numbers of people leave in search of work.⁴⁴ Such extreme poverty has also contributed to public outcry against the government and to political instability.⁴⁵

Anti-government sentiment has been heightened in recent years in large part due to the actions of the state's former governor, Ulises Ruiz.⁴⁶ As state governor, Ruiz was responsible for ordering the use of extreme military force against a group of protesting teachers and supporters, resulting in the state-sponsored killing of twenty-three people during protests in the capital in 2006.⁴⁷ Governor Ruiz's government is widely believed to have incarcerated political activists despite a lack of evidence.⁴⁸ In addition, Ruiz's government tortured and murdered those who were deemed political threats.⁴⁹ International attention has

MIGRATION AND CRIMINALIZES IMMIGRANTS 24 (2008) (describing poor economic conditions in Oaxaca); JOHN GIBLER, *MEXICO UNCONQUERED: CHRONICLES OF POWER AND REVOLT* 144 (2009) (reporting that only half of Oaxaca's population has access to basic services such as sewage, running water, and electricity).

⁴³ See LYNN STEPHEN, *TRANSBORDER LIVES: INDIGENOUS OAXACANS IN MEXICO, CALIFORNIA, AND OREGON* 125-33 (2007) (tracing how NAFTA has propelled trans-border migration from two Oaxacan communities as corn growers have lost the ability to support themselves by farming due to competition from lower-priced imported American corn). See also BACON, *supra* note 42, at 23 (2008).

⁴⁴ BACON, *supra* note 42, at 24-26.

⁴⁵ BACON, *supra* note 42.

⁴⁶ Ruiz was still the Governor in 2009-2010 while the research for this article was conducted in Oaxaca. His term ended in 2010 when he did not run for re-election due to term limits.

⁴⁷ BACON, *supra* note 42, at 27-29 (describing the 2006 political unrest and government response in Oaxaca). A recent report analyzes the status of the judiciary in Oaxaca, particularly with regards to the influence exerted by the Executive branch over the judiciary. The report emphasizes the importance of the protests and government repression in 2006 and 2007 in Oaxaca with regards to the state's ongoing legal reforms. It highlights concerns with Governor Ruiz's influence over the judicial branch, including the appointment of magistrates and the political nature of the appointment of the President of the Tribunal. See DUE PROCESS OF LAW FOUNDATION, *INDEPENDENCIA JUDICIAL EN OAXACA, MEXICO: UNA FICCION?*, at vi (2009), available at <http://www.dplf.org/uploads/1256055467.pdf> (last visited Dec. 1, 2010).

⁴⁸ See GIBLER, *supra* note 42, at 160, 179, 182.

⁴⁹ See GIBLER, *supra* note 42. See also DUE PROCESS OF LAW FOUNDATION, *supra* note 47, at 4 (discussing problems in Oaxaca with judges whose decision-making is directed by those in political power, resulting in the long-term pre-trial detention of leaders and participants in social movements).

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focused on the human rights abuses perpetrated by the government of Oaxaca in recent years.⁵⁰

In this context, it is perhaps surprising that the state, under the leadership of Governor Ruiz, developed and implemented a set of juvenile justice procedures that prioritize human rights and rely upon mediation and restorative justice to respond to juvenile crime. There are a variety of factors that may have contributed to this perplexing development.⁵¹ 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. In many of the communities governed by *usos y costumbres*, for example, community members typically address crimes in meetings where the problem is discussed and responses are developed that satisfy the parties and minimize the likelihood of future problems.⁵² The use of restorative justice conferences in lieu of trials is also motivated by necessity, given the lack of infrastructure that would be needed to process all of the state's juvenile delinquency cases through court proceedings. Given the financial constraints of this poor state, it would have been virtually impossible to comply with the federal mandates if the state were to resolve all of its juvenile cases through oral hearings and court trials.⁵³

⁵⁰ See AMNESTY INT'L, OAXACA—CLAMOUR FOR JUSTICE (July 2007).

⁵¹ Although the written code prioritizes human rights, there are major differences between the written law and the reality of how it is enforced. People in Oaxaca indicate that torture remains a major problem within the criminal justice system, and juveniles continue to be incarcerated with adults, in contrast to the information provided by government officials. This is a problem that has been noted in various Latin American countries, where lip service is given to international human rights standards due to a desire to qualify for funding through the world monetary systems. See Muncie, *supra* note 2, at 30.

⁵² See LITTLE INJUSTICES – LAURA NADER LOOKS AT THE LAW (PBS Video 1980). This documentary by anthropologist Laura Nader presents detailed accounts of how a small indigenous village in Oaxaca utilized local courts to solve problems in a manner that prioritized resolving conflicts, finding balance, and maintaining harmony among community members. The problem-solving approach of the courts depicted in the documentary parallel the legal reforms Oaxaca has codified in 2009, including prioritizing mediation, conciliation, and restorative justice through the state's penal code. The documentary also explores how this approach differs dramatically from the U.S. legal system, where average citizens do know how to access justice through the courts and face numerous obstacles to receiving help in resolving injustices from official entities.

⁵³ Key members of Oaxaca's Subprocuraduria para Adolescentes—the body charged with designing the state juvenile justice system and prosecuting juvenile crime—indicated that the state would not have been able to comply with the constitutional mandate without incorporating an alternative to court that could resolve large numbers of cases. Interview

IV. LOCK 'EM UP AND THROW AWAY THE KEY: CALIFORNIA'S APPROACH TO JUVENILE JUSTICE

California is tough on juvenile crime, and, as a result, well over ten thousand minors are incarcerated each year in the state.⁵⁴ California's juvenile courts are increasingly limited to addressing less serious offenses, while juveniles accused of more serious charges are routinely processed through adult courts.⁵⁵ California's juvenile justice trends are closely aligned with punitive juvenile justice trends throughout the United States⁵⁶ that have been fueled by popular fears of youth as "super-predators" who are beyond redemption.⁵⁷

with Jacibe Valencia, *supra* note 36; Interview with Pedro Celestino Guzman Rodriguez, Subprocurador, Restorative Justice Center of the State of Oaxaca (Sept. 8, 2009). Prior to the reforms, there was no infrastructure in place to handle juvenile cases separately from adults. As of 2009, the state of Oaxaca had one juvenile court building with three small courtrooms that were responsible for processing all of the juvenile delinquency cases from all but one of the state's seven Regions. The state would not have had the capacity to process all of the state's juvenile crime through this court. The author, for example, observed an arraignment in this court that lasted for four hours. By contrast, an arraignment in a U.S. court would generally take five to twenty minutes.

⁵⁴ See *infra* note 61.

⁵⁵ In 2008, for example, 866 juvenile cases were directly filed in adult criminal courts in California, and an additional 525 fitness hearings were held in juvenile courts where the prosecution sought to transfer the cases to adult court. PACIFIC JUVENILE DEFENDER CENTER, *Juveniles Tried in Adult Court in California* (2009), <http://www.pjdc.org/wp/wp-content/uploads/2009/06/Fact-Sheet-for-Upload-Juveniles-in-Adult-Court.pdf>.

⁵⁶ Barry C. Feld, *Will the Juvenile Court System Survive?*, 564 ANNALS 10 (1999); Hon. John B. Leete, *They Grow Up So Fast: When Juveniles Commit Adult Crimes*, 29 AKRON L. REV. 491 (1996) (exploring increasingly punitive trends in Pennsylvania's juvenile justice system); Michael E. Tigar, *What Are We Doing to the Children?: An Essay on Juvenile (In)justice*, 7 OHIO ST. J. CRIM. L. 849 (2010) ("The rate of juvenile incarceration has increased by forty-three percent in the last twenty-five years. The use of "regular" criminal law punitive sanctions against juveniles has been a driving force for this dramatic increase. In each year from 1985 through 2004, about 8,500 children under eighteen were referred into the adult criminal law system, for a total of 174,332. More than 1,600 children so referred were thirteen years of age or under, 4,740 were fourteen, and 17,204 were fifteen. Fifty-four percent of these children were African-American."). The United States has an international reputation for being at the forefront of the movement towards increased punishment, criminalization, and retribution in juvenile justice. Goldson & Muncie, *supra* note 1, at 93.

⁵⁷ Beres & Griffith, *supra* note 6, at 754. See also MARC MAUER, RACE TO INCARCERATE 126 (1999); Barry C. Feld, *The Transformation of the Juvenile Court—Part II: Race and the "Crack Down" on Youth Crime*, 84 MINN. L. REV. 327 (1999) (discussing the link between the public depiction of youth as super-predators and the growth of more punitive juvenile justice policies in the United States); HUMAN RIGHTS WATCH, THE REST OF THEIR LIVES (2005), <http://www.hrw.org/reports/2005/10/11/rest-their-lives> [hereinafter HUMAN RIGHTS WATCH, THE REST OF THEIR LIVES] (linking John Dilulio's warning regarding growing numbers of youth "super-predators" to the expansion of

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American juvenile courts were originally established in 1899 with the goals of protecting the best interests of youth offenders and providing rehabilitative services.⁵⁸ These goals have changed over time, and most juvenile courts now prioritize punishment as much if not more than rehabilitation.⁵⁹ In California, incarceration is widely used to punish juveniles who break the law.⁶⁰ Juvenile “convictions”⁶¹ are used for the purpose of enhancing sentences for future cases in adult court and can substantially increase such sentences.⁶² For example, a criminal defendant with two qualifying strike convictions from juvenile court can be sentenced to twenty-five years to life for committing any felony (including a non-violent felony) under California’s “Three Strikes Law.”⁶³ Juvenile sex offenses also trigger lifetime sex offender registration

punitive juvenile justice laws).

⁵⁸ See generally FRANKLIN E. ZIMRING, *AMERICAN JUVENILE JUSTICE* (2005).

⁵⁹ Although originally the mission of juvenile courts was rehabilitation, the “purpose clauses” of juvenile courts throughout the United States have been modified to make punishment rather than rehabilitation the primary objective of juvenile courts. Richard J. Bonnie & Thomas Grisso, *Adjudicative Competence and Youthful Offenders*, in *YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE* 95 (Thomas Grisso & Robert G. Schwartz eds., 2000). California’s purpose clause, for example, tempers the focus on rehabilitation with language prioritizing public safety and punishment, stating that delinquent youth “shall, in conformity with the interests of public safety and protection, receive care, treatment, and guidance that is consistent with their best interest, that holds them accountable for their behavior, and that is appropriate for their circumstances. This guidance may include punishment that is consistent with the rehabilitative objectives of this chapter.” CAL. WELF. & INST. CODE § 202(b) (West 2010).

⁶⁰ The average daily population of youth incarcerated in state and county facilities in 2005 was 14,000. ELIZABETH G. HILL LEGISLATIVE ANALYST’S OFFICE, *CALIFORNIA CRIMINAL JUSTICE SYSTEM: A PRIMER* 58 (2007). California housed 14,855 juvenile offenders in residential facilities on a given day in 2006. U.S. DEP’T OF JUSTICE, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, *JUVENILE OFFENDERS AND VICTIMS: NATIONAL REPORT SERVICES BULLETIN – JUVENILE RESIDENTIAL CENSUS, 2006: SELECTED FINDINGS 2* (2009), available at <https://www.ncjrs.gov/pdffiles1/ojdp/228128.pdf>.

⁶¹ In California, the equivalent of a conviction in adult court is referred to as a “sustained petition” in juvenile court; the language of adult court, such as “conviction,” is not used in juvenile courts due to the historic rehabilitative emphasis of juvenile court. See, e.g., WELF. & INST. § 203 (“An order adjudging a minor to be a ward of the juvenile court shall not be deemed a conviction of a crime for any purpose, nor shall a proceeding in the juvenile court be deemed a criminal proceeding.”).

⁶² CAL. PENAL CODE § 667(d)(3) (West 2011).

⁶³ See *People v. Nguyen*, 209 P.3d 946 (Cal. 2009) (holding that despite the fact that the accused does not have the opportunity to have a jury trial in juvenile court, juvenile petitions can be used in adult court as strikes for the purpose of enhancing sentences under California’s “Three Strikes Law”).

in California, which has a much tougher policy towards juvenile sex offenders than other states.⁶⁴

The increasingly punitive nature of juvenile delinquency law in California is exemplified by the changes to the law enacted by the passage of Proposition 21 by California voters in 2000. Otherwise known as the Gang Violence and Juvenile Justice Prevention Act, the initiative greatly expanded the circumstances under which juveniles could be transferred to adult court, eliminating judicial discretion in many cases.⁶⁵ Prior to Proposition 21, fitness hearings were required to be held in juvenile court prior to a juvenile being transferred to adult court.⁶⁶ In fitness hearing, courts consider five factors in order to assess whether the particular offense, and the characteristics of the offender, warrant transfer to adult court.⁶⁷ The initiative lowered the minimum age at which juveniles may be transferred to adult court from sixteen to fourteen years old.⁶⁸ It also categorically excluded minors accused of specific offenses from the jurisdiction of the juvenile court if the offender was at least fourteen years old at the time of the offense⁶⁹ and granted prosecutors the discretion to file some cases directly in adult court without a fitness hearing in juvenile court.⁷⁰ In addition, Proposition 21 prohibited a

⁶⁴ See *In re J.L.*, 119 Cal. Rptr. 3d 40, 46-48 (Cal. Ct. App. 2010) (review granted by California Supreme Court, 2011) (discussing the more punitive nature of California's sex offender registration requirements for juveniles in relation to the policies in other states).

⁶⁵ See also Beth Caldwell & Ellen C. Caldwell, "Superpredators" and "Animals" – *Images and California's "Get Tough on Crime" Initiatives*, 11 J. INST. JUST. & INT'L STUDIES 61, 66-67 (2011) (describing the legal changes brought about by Proposition 21 and the surrounding political climate).

⁶⁶ See Beres & Griffith, *supra* note 6, at 749-50.

⁶⁷ WELF. & INST. § 707(a)(1), (c) ("(1) The degree of criminal sophistication exhibited by the minor; (2) Whether the minor can be rehabilitated prior to the expiration of the juvenile court's jurisdiction; (3) The minor's previous delinquent history; (4) Success of previous attempts by the juvenile court to rehabilitate the minor; and (5) The circumstances and gravity of the offense alleged in the petition to have been committed by the minor.").

⁶⁸ See WELF. & INST. § 707(c).

⁶⁹ Section 602(b) of California Welfare & Institutions Code was amended by Proposition 21 to require automatic filing in adult court for minors fourteen and older charged with murder with special circumstances or specific sex offenses with special circumstances. See WELF. & INST. § 602(b).

⁷⁰ WELF. & INST. § 707(d)(1) ("[T]he district attorney or other appropriate prosecuting officer may file an accusatory pleading in a court of criminal jurisdiction against any minor 16 years of age or older who is accused of committing an offense enumerated in subdivision (b)."). See *infra* note 71, for a list of the offenses enumerated in section 707(b) of California Welfare & Institutions Code. Subdivision (d)(2) of section 707 further

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minor's release from detention prior to a judicial hearing for minors charged with violating an offense listed in Welfare & Institutions Code section 707(b)⁷¹ and prohibited the sealing of records for such offenses committed when a minor is fourteen or older.⁷² Thousands of people who have been processed through California's adult criminal courts as juveniles are serving such lengthy prison sentences that they will likely never be released from prison.⁷³ Others are sentenced to life without the possibility of parole, meaning that they will spend the rest of their lives in prison.⁷⁴

Since the 1990s, states throughout the United States have lowered the statutory ages for which juveniles are prosecuted in adult court,⁷⁵ expanded automatic waiver provisions (mandating that certain offenses allegedly committed by juveniles of specific ages be filed in adult court),⁷⁶ and added to the lists of offenses for

provides that prosecutors may file charges against a minor who is fourteen years or older directly in adult criminal court when the minor is accused of committing an offense that is punishable by death or life imprisonment for adults, when the minor is alleged to have personally used a firearm in the commission of the offense, when the minor has a previously sustained petition for an offense listed in section 707(b), when the offense was committed in association with a gang, when the offense constitutes a hate crime, or when the victim of the offense was elderly or disabled.

⁷¹ Section 707(b) includes the following offenses:

[M]urder, arson robbery, forcible rape, forcible sodomy, lewd or lascivious acts with a child, oral copulation by force, various kidnapping offenses, attempted murder, assault with a firearm or destructive device, assault by means likely to cause great bodily injury, discharge of a firearm into an inhabited building, certain crimes involving elderly or disabled victims, offenses where a firearm is discharged or personally used, witness tampering, escape from a juvenile detention facility, torture, aggravated mayhem, carjacking, voluntary manslaughter, and manufacturing or selling on half-ounce or more of any salt or solution of a controlled substance.

Id. §707(b).

⁷² *See* WELF. & INST. § 781(a) ("[T]he court shall not order the person's records sealed in any case in which the person has been found by the juvenile court to have committed an offense listed in subdivision (b) of Section 707 when he or she had attained 14 years or older.").

⁷³ *See* DVD: *JUVIES* (Chance Films 2001) (on file with the author) (presenting case studies of juveniles who were tried as adults in California and received lengthy prison sentences).

⁷⁴ HUMAN RIGHTS WATCH, *THE REST OF THEIR LIVES*, *supra* note 57, app. D.

⁷⁵ *See* RICHARD E. REDDING, U.S. DEP'T OF JUSTICE, OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, *JUVENILE TRANSFER LAWS: AN EFFECTIVE DETERRENT TO DELINQUENCY* (2010) (the age that juvenile court jurisdiction ends and teenagers are automatically processed through adult criminal court has been lowered to the age of fifteen or sixteen in thirteen U.S. states).

⁷⁶ *See id.* at 1 (in 2010, twenty-nine states had automatic transfer laws, whereas in 1979,

which waiver to adult court is permissible.⁷⁷ As a result, thousands of juveniles are tried in adult courts and are serving time in adult jails and prisons.⁷⁸ The American juvenile justice system has been eroded as more and more juvenile offenders are being either categorically excluded from its jurisdiction or determined unfit to be prosecuted in juvenile court at the discretion of judges of prosecutors.⁷⁹

V. SOCIAL CONSTRUCTION OF JUVENILE CRIME IN OAXACA AND CALIFORNIA

The U.S. Supreme Court has relied upon research regarding adolescent development in recognizing the diminished culpability of juvenile offenders.⁸⁰ However, the Court's reasoning has been limited to the context of the most "severe punishment[s]"⁸¹ in the criminal justice system—i.e., the death penalty and life without the possibility of parole.⁸² The Court did not state that its reasoning in these cases should extend to other facets of juvenile delinquency law. However, the fact that the Court has relied upon research in the field of adolescent development has important implications for the future of juvenile in the United States.⁸³ Adolescent brain

only fourteen states had such provisions).

⁷⁷ However, these trends may be reversing. See NEELUM ARYA, CAMPAIGN FOR YOUTH JUSTICE, STATE TRENDS: LEGISLATIVE VICTORIES FROM 2005 TO 2010 REMOVING YOUTH FROM THE ADULT CRIMINAL JUSTICE SYSTEM (2011).

⁷⁸ HUMAN RIGHTS WATCH, THE REST OF THEIR LIVES, *supra* note 57. Nationally, the number of youth in adult prisons increased 366% between 1983 and 1998. U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE ASSISTANCE, JUVENILES IN ADULT PRISONS AND JAILS: A NATIONAL ASSESSMENT 5 tbl.2 (2000).

⁷⁹ HUMAN RIGHTS WATCH, THE REST OF THEIR LIVES, *supra* note 57, at 16-19 (According to this report, all but three states had changed their laws by 1997, making it easier to try and sentence juveniles in adult court. As such, the numbers of juveniles processed through adult courts increased. Whereas in 1996, 27,000 youth were processed through adult court, this number nearly doubled to 55,000 in 2000.).

⁸⁰ See *Roper v. Simmons*, 543 U.S. 551, 570-71 (2005); *Graham v. Florida*, 130 S. Ct. 2011, 2026-27 (2010).

⁸¹ *Roper*, 543 U.S. at 568-69.

⁸² In *Graham*, the Court relied on a line of death penalty cases that address the categorical distinction between homicide and non-homicide crimes. The Court reasoned that "defendants who do not kill, intend to kill, or foresee that life will be taken are categorically less deserving of the most serious forms of punishment than are murderers." *Graham*, 130 S. Ct. at 2027. The Court specifically limited its decision in *Graham* to apply to juveniles convicted of non-homicide crimes.

⁸³ The Court's reliance on research regarding adolescent development has opened the door for arguing that such research should also be considered in other contexts. For example, transferring juveniles to adult court is arguably inconsistent with this research.

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development research, and the diminished decision-making capacity of youth, are important considerations in the development of appropriate responses to all youth crime. Oaxaca's Justice Law for Adolescents exemplifies how youth development research can be incorporated more comprehensively into a delinquency code.⁸⁴

Differences in the social construction of juvenile crime in California and Oaxaca demonstrate the distinct values of the respective legal systems. The definitions employed in Oaxaca's juvenile code reflect an understanding of the diminished capacity of adolescents by strictly limiting the sanctions a court may impose based upon the age of the offender.⁸⁵ Similarly, Oaxaca's legal code specifically decriminalizes certain conduct to avoid criminalizing the normative behavior of adolescence.⁸⁶ In contrast, California's delinquency law holds juveniles criminally responsible for all of the crimes set forth in the adult penal code.⁸⁷ In addition, California youth are criminalized more widely than adults through status offenses, a body of juvenile offenses that are only defined as crimes for minors.⁸⁸

See Neelum Arya, *Using Graham v. Florida to Challenge Juvenile Transfer Laws*, 71 LA. L. REV. 99 (2010); Marsha Levick, *Kids Really Are Different: Looking Past Graham v. Florida*, CRIM. L. REP. (2010).

⁸⁴ Oaxaca's code, for example, relies upon brain development research to create three distinct age brackets that are subject to different penalties due to their developmental differences. *See* Ley de Justicia Para Adolescentes del Estado de Oaxaca [Adolescent Justice Law in the State of Oaxaca], art. 5, Periódico Oficial del Gobierno del Estado, 6 de Octubre de 2007 (Mex.). Furthermore, based upon research indicating that most adolescent offenders do not continue to commit crimes as adults, Oaxaca requires that juvenile records be destroyed. *See* Ley de Justicia Para Adolescentes del Estado de Oaxaca [Adolescent Justice Law in the State of Oaxaca], art. 31, Periódico Oficial del Gobierno del Estado, 6 de Octubre de 2007 (Mex.).

⁸⁵ *See* Ley de Justicia Para Adolescentes del Estado de Oaxaca [Adolescent Justice Law in the State of Oaxaca], art. 5, Periódico Oficial del Gobierno del Estado, 6 de Octubre de 2007 (Mex.) (distinguishing between three stages of adolescence for purposes of the code: (1) between twelve and fourteen years old; (2) between fourteen and sixteen years old; and (3) between sixteen and eighteen years old.).

⁸⁶ *See infra* note 99.

⁸⁷ CAL. WELF. & INST. CODE § 602(a) (West 2010).

⁸⁸ Youth are criminalized for "status offenses" which are behaviors that are criminalized only because of a minor's "status" as a youth and are not criminalized for adults. Section 601 of California Welfare & Institutions Code, for instance, provides that a minor may become a ward of the juvenile court for being chronically disobedient or truant. WELF. & INST. § 601.

A. Minimum Age of Criminal Responsibility

An individual's age at the time a criminal act occurs determines whether the conduct falls under the jurisdiction of the juvenile court and thus constitutes a juvenile crime. The minimum age of criminal responsibility established by a government is an important benchmark by which to measure a state's orientation towards juvenile justice.⁸⁹ It represents a socially accepted belief that a child cannot morally be held accountable for his or her actions below this age.⁹⁰

Oaxaca's juvenile delinquency code categorically excludes children under twelve years old, based upon a consensus that children of this age do not have sufficient maturity to be held accountable for their actions in a court of law.⁹¹ Youth ages twelve and thirteen may be prosecuted through the juvenile justice system and may receive rehabilitative services, but they are not believed to have sufficient developmental capacity to be detained.⁹² As such, youth under the age of fourteen may not legally be detained in Oaxaca.⁹³ Youth ages fourteen to eighteen have a greater capacity to understand the wrongfulness of their actions and to engage in higher order reasoning.⁹⁴ As such, youth in this age range may be incarcerated if convicted of a serious crime in Oaxaca.⁹⁵

⁸⁹ In a comparative article focusing on youth justice policy in England and Wales, Goldson and Muncie assert that age of criminal responsibility and the use of incarceration are two of the most telling factors to consider when examining whether a country follows a model based on a culture of control or one that is more oriented towards human rights compliance. Goldson & Muncie, *supra* note 1, at 95-96.

⁹⁰ Although the CRC does not set forth a specific age range, it does provide that countries should establish "a minimum age below which children shall be presumed not to have the capacity to infringe the penal law." Convention on the Rights of the Child, *supra* note 10, at art. 40(3)(a). Both California and Oaxaca comply with this guideline.

⁹¹ See *Exposicion de Motivos* to Ley de Justicia para Adolescentes, p. 251, Diario Oficial de la Federación [DO], 21 de Julio de 2006 (Mex.). Oaxaca's code states that a child under twelve years old is exempt from responsibility under the delinquency code. Ley de Justicia Para Adolescentes del Estado de Oaxaca, art. 4, Periódico Oficial del Gobierno del Estado, 6 de Octubre de 2007 (Mex.).

⁹² MENDEZ, *supra* note 14, at 42-43.

⁹³ Ley de Justicia Para Adolescentes art. 64.

⁹⁴ See SCOTT & STEINBERG, *supra* note 5.

⁹⁵ In Oaxaca, 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. Ley de Justicia Para Adolescentes art. 93(I). Youth in this age range may be detained for a maximum of four years. *Id.* Youth ages sixteen to eighteen may be detained for a maximum of seven to ten

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In stark contrast to the protections afforded to young adolescents under Mexican law, youth as young as eight years old may be processed through adult courts in the United States.⁹⁶ Various states allow children as young as eight, ten, or twelve to be sentenced to prison for the rest of their lives.⁹⁷ California statutory law does not set a minimum age for juvenile court jurisdiction. Rather, the penal code sets forth a presumption that a minor under the age of fourteen is not criminally responsible unless he or she is shown to have known the wrongfulness of his or her actions by clear and convincing proof.⁹⁸ Sixteen American states have statutes that set a minimum age for juvenile court jurisdiction, ranging from six or seven years old to ten years old.⁹⁹ The remaining thirty-four states take California's approach, relying on case law and common law to assess the minimum age. Generally, a juvenile must be capable of forming criminal intent, and of distinguishing the difference between right and wrong, to be held responsible for breaking the law.¹⁰⁰ Despite the existence of this presumption in the written law, minors under the age of fourteen are routinely found to understand the wrongfulness of their actions in California juvenile courts through a process whereby the judge asks the child whether he or she knows the difference between right and wrong.

Thomas Hammarberg, the Council of Europe Commissioner for Human Rights, argues in favor of raising the minimum age of criminal responsibility to eighteen and suggests relying upon non-punitive approaches rooted in education, reintegration, and

years for the preceding offenses, as well as for corrupting minors to engage in prostitution, drug use, or other sex offenses, child pornography, assault, and torture. *Id.* at art. 93(II).

⁹⁶ HUMAN RIGHTS WATCH, *THE REST OF THEIR LIVES*, *supra* note 57, at 18.

⁹⁷ *Id.*

⁹⁸ CAL. PENAL CODE § 26(1) (West 2010) ("All people are capable of committing crimes except those belonging to the following classes. (1) Children under the age of 14, in the absence of clear proof that at the time of committing the act charged against them, they knew its wrongfulness."). There is a presumption that a juvenile under fourteen years old is incapable of understanding the wrongfulness of his or her actions, and is therefore not capable of committing a crime. This presumption must be overcome by clear and convincing evidence. *Id.*; *In re Manuel L.*, 7 Cal. 4th 229 (Cal. 1994). To determine whether a child is capable of committing a crime, the judge must consider the child's age, experience, knowledge, and conduct. *In re Gladys R.*, 1 Cal. 3d 855 (Cal. 1970).

⁹⁹ MELISSA SICKMUND, OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, *JUVENILE JUSTICE: A GUIDE TO THEORY, POLICY & PRACTICE* 22 (2003).

¹⁰⁰ *Id.*

rehabilitation for those under the age of eighteen.¹⁰¹ This approach would be similar to that followed by Oaxaca for youth ages twelve and thirteen and would shift juvenile courts' growing emphasis on punishment to a focus on meeting the needs of youth who get into trouble with the law so that future delinquent behavior can be prevented.

B. Criminalization of Normal Adolescent Behavior

In Oaxaca, the decision was made to decriminalize some adolescent conduct that would be criminal for adults, in accord with the "social reality" of adolescents.¹⁰² For example, simple battery—a harmful touching that does not result in injuries, such as a slap or a push—does not constitute a criminal offense for juveniles in Oaxaca.¹⁰³ The rationale for this exclusion provided by members of the state's judiciary is that it is normal for children and teenagers to fight or play roughly. The state chose not to criminalize this behavior because it is expected that friends, siblings, and neighbors will physically play with each other as adolescents. In contrast, a battery that does not result in injuries can be punished by six months to one year in custody under California law, depending on who the victim is and where the battery occurs.¹⁰⁴ Any unwanted touching done in an angry or offensive manner constitutes a battery under California law—including wrestling, horseplay, and other typical teenage behaviors.¹⁰⁵ Increasingly, young people are prosecuted for these types of cases, such as fights at school or between siblings.¹⁰⁶

While Oaxaca's code criminalizes fewer acts for adolescents in relation to adults, California's code criminalizes more. In

¹⁰¹ Thomas Hammarberg, *A Juvenile Justice Approach Built on Human Rights Principles*, 8 *YOUTH JUSTICE* 194 (1993).

¹⁰² *Exposicion de Motivos* to Ley de Justicia para Adolescentes, p. 250, Diario Oficial de la Federación [DO], 21 de Julio de 2006 (Mex.).

¹⁰³ Ley de Justicia Para Adolescentes art. 2 (listing a series of penal code violations that adolescents will not be charged with violating, including Penal Code section 264 (making threats) and section 326 (punches and other simple physical acts of violence). See *Codigo Penal Para el Estado Libre y Soberano de Oaxaca*, Periodico Oficial, 9 de Septiembre de 2006 (Mex.).

¹⁰⁴ See PENAL §§ 242, 243(e).

¹⁰⁵ PENAL § 242.

¹⁰⁶ See SCOTT & STEINBERG, *supra* note 5, at 5 (“[T]he normative misbehavior of adolescence—such as fighting in school or staying out too late at night—are increasingly being handled in court rather than at the kitchen table or in the principal’s office.”).

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California, all adult crimes also constitute juvenile crimes. The California Welfare & Institutions Code includes two sections concerning juvenile delinquency: section 601 and section 602. Section 602 incorporates the state's entire adult Penal Code and applies it to juveniles.¹⁰⁷ Section 602, therefore, addresses juveniles who have engaged in behaviors that are also criminal for adults. Section 601 sets forth a variety of circumstances under which juveniles fall within the jurisdiction of the delinquency court for actions that would not constitute criminal behavior for adults.¹⁰⁸ These are otherwise referred to as "status offenses," because but for an individual's status as a juvenile, these actions would not be considered crimes.¹⁰⁹ Common status offenses include running away, curfew violations, truancy, ungovernability, and liquor law violations.¹¹⁰ Under Welfare & Institutions Code section 601, youth who are chronically truant from school or who are habitually disobedient can be adjudged wards of the juvenile court and can be detained for violating court orders.¹¹¹ In Los Angeles County, for example, minors are regularly detained in juvenile hall for missing school.¹¹²

C. *Prior Convictions*

Oaxaca's treatment of a minor's prior convictions also contrasts sharply with California's approach. In Oaxaca, an adolescent's prior record cannot be used in a subsequent case under any circumstances.¹¹³ Further, the records of a juvenile case must be destroyed as soon as the matter is concluded.¹¹⁴ In contrast, California law allows for sustained juvenile petitions—the juvenile court equivalent of convictions—to be used to

¹⁰⁷ CAL. WELF. & INST. CODE § 602 (West 2010) (“[A]ny person who is under the age of 18 years when he or she violates any law of this state or of the United States or any ordinance of any city or county of this state defining crime other than an ordinance establishing a curfew based solely on age, is within the jurisdiction of the juvenile court.”).

¹⁰⁸ WELF. & INST. § 601.

¹⁰⁹ See ANNE L. STAHL, U.S. DEP'T OF JUSTICE, PETITIONED STATUS OFFENSE CASES IN JUVENILE COURTS 1 (2004).

¹¹⁰ *Id.*

¹¹¹ WELF. & INST. § 601.

¹¹² This information is derived from the author's experience as a public defender in juvenile delinquency court in Los Angeles County.

¹¹³ *Exposicion de Motivos to Ley de Justicia para Adolescentes*, p. 249, Diario Oficial de la Federación [DO], 21 de Julio de 2006 (Mex.).

¹¹⁴ *Id.*

enhance sentences in adult court under California's Three Strikes law.¹¹⁵ Notably, a minor who has two sustained petitions of qualifying strike offenses in juvenile court can be sentenced to twenty-five years to life for committing any felony as an adult.¹¹⁶ Further, California does not allow juvenile records to be sealed when a minor age fourteen or older has committed a crime listed under Welfare & Institutions Code section 707(b), which lists over thirty crimes.¹¹⁷ Whereas Oaxaca provides minors who break the law the opportunity to start with a clean slate, California allows juvenile records to result in life-long consequences.

VI. INTERNATIONAL HUMAN RIGHTS STANDARDS

International human rights agreements and practices have taken on a particular legal significance in the U.S. Supreme Court's recent analyses of cruel and unusual punishment for juvenile offenders. The Court specifically stated in *Roper v. Simmons*:

Our determination that the death penalty is disproportionate punishment for offenders under 18 finds confirmation in the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty.¹¹⁸

In *Graham v. Florida*, the Court considered the fact that there is a global consensus against imposing the punishment of life without parole for youth under the age of eighteen, and that the United States and Israel are the only countries in the world that impose this sentence upon youth.¹¹⁹

The CRC is the most important and universally accepted treaty regarding international human rights for youth.¹²⁰ The

¹¹⁵ CAL. PENAL CODE § 667(d)(3) (West 2010). *See also* *People v. Nguyen*, 209 P.3d 946, 959 (Cal. 2009).

¹¹⁶ Under California law, a minor must be at least sixteen years old at the time of the offense for the charge to count as a strike. PENAL § 667(d)(3).

¹¹⁷ CAL. WELF. & INST. CODE § 781(a) (West 2010). *See also supra* note 71 for a list of the offenses specified in section 707(b) of California Welfare & Institutions Code.

¹¹⁸ *Roper v. Simmons*, 543 U.S. 551, 575 (2005).

¹¹⁹ *Graham v. Florida*, 130 S. Ct. 2011, 2033 (2010). The Court further considered the fact that the United States is the only country that imposes life without parole on juveniles convicted of non-homicide offenses. *Id.* at 2034.

¹²⁰ The CRC—a binding treaty—has become the most widely accepted statement of human rights with regards to children. *See* Goldson & Muncie, *supra* note 1. According to Argentinian legal scholar Mary Beloff, the CRC has had a dramatic effect on Latin

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Supreme Court specifically referenced the internationally accepted rights set forth in the CRC in reaching its conclusions in both *Graham* and *Roper*.¹²¹ The constitutional reforms of Mexico's youth justice policies were shaped in accordance with the CRC, and Oaxaca's Justice Law for Adolescents incorporates its spirit, specifically referencing it throughout the explanation that accompanies its juvenile delinquency code.¹²² Every member of the United Nations has ratified the CRC, with the exception of the United States and Somalia.¹²³ Several sections of the CRC specifically address the rights of children and adolescents who are charged with committing crimes.¹²⁴ The CRC emphasizes that juveniles accused of crimes must be afforded the same due process rights as adults, though different standards must be applied to adolescents because they are immature and do not have the same cognitive capacity as adults.¹²⁵

American countries, which have had to shift their juvenile justice systems from administrative models to systems that provide due process rights to juveniles charged with crimes. Mary Beloff, *Los Adolescentes y el Sistema Penal [Adolescents and the Penal System]*, 6 *Revista Juridica de la Universidad de Palermo* 97, 98-101 (2005). Other major human rights treaties relating to juvenile justice include: United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules), G.A. Res.40/33, U.N. Doc. A/RES/40/33 (Nov. 29, 1985); United Nations Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines), G.A. Res. 45/112, U.N. Doc. A/RES/45/112 (Dec. 14, 1990); and United Nations Rules of the Protection of Juveniles Deprived of their Liberty (The Havana Rules), G.A. Res. 45/113, U.N. Doc. A/RES/45/113 (Dec. 14, 1990). See Goldson & Muncie, *supra* note 1, at 96.

¹²¹ See *Roper*, 543 U.S. at 576; *Graham*, 130 S. Ct. at 2034 (quoting *Roper*, 543 U.S. at 578) (“[T]he overwhelming weight of international opinion against’ life without parole for nonhomicide offenses committed by juveniles ‘provide[s] respected and significant confirmation for our own conclusions.’”).

¹²² *Exposicion de Motivos to Ley de Justicia para Adolescentes*, pp. 246, 249, *Diario Oficial de la Federación [DO]*, 21 de Julio de 2006 (Mex.). Oaxaca began to implement its reforms on January 1, 2007. MENDEZ, *supra* note 14, at 26. The codes of many Mexican states similarly incorporate the CRC, as well as other international human rights treaties. MENDEZ, *supra* note 14, at 26. Deference to the rights of adolescents characterizes many of the state codes. *Id.* States such as Oaxaca and Tlaxcala, for example, specifically provide that if there is any discrepancy in the law, the side that favors the rights of the adolescent should always prevail. See *Ley de Justicia Para Adolescentes* art. 23; MENDEZ, *supra* note 14, at 26.

¹²³ See *Roper*, 543 U.S. at 576.

¹²⁴ Convention on the Rights of the Child, *supra* note 10, at art 37.

¹²⁵ The Exposition of Motives proceeding Law of Justice for Adolescents specifically explains, “it is possible to recognize in them [adolescents] certain responsibility, although limited, for the conduct they engage in.” *Exposicion de Motivos to Ley de Justicia para Adolescentes*, p. 246, *Diario Oficial de la Federación [DO]*, 21 de Julio de 2006 (Mex.). It emphasizes the importance of creating a youth justice system that holds youth responsible for their actions that takes into account the normative development of adolescents,

The CRC has a restorative, rather than a punitive aim, stating that children accused of breaking the law should:

[B]e treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.¹²⁶

Specifically, the CRC emphasizes the importance of treating juveniles differently than adults, minimizing the use of incarceration, and protecting young people's physical safety and liberty interests.¹²⁷ The CRC specifically bans capital punishment and life without the possibility of release for crimes committed by youth under the age of eighteen.¹²⁸ The U.S. Supreme Court has referenced the CRC¹²⁹ in determining what constitutes cruel and unusual punishment in accordance with "evolving standards of decency."¹³⁰ In the future, the rights set forth in the CRC should be incorporated more comprehensively into youth justice policy within the United States.

International human rights guidelines address two primary issues that relate to the need for separate systems for juveniles and adults. First, cognitive differences between adolescents and adults require that distinct procedures apply to crimes committed by minors. Such procedures must be tailored in accordance with the developmental capacity of adolescents. Second, it is important to separate juveniles from adults in detention facilities, and to have separate facilities for juveniles, so that they are not subject to physical, sexual, and emotional abuse by adults.

A. Developmental Capacity: The Importance of Different Standards for Youth

Under Mexico's reformed constitution, juveniles between the ages of twelve and eighteen must be tried through the juvenile

specifically referencing the CRC. *Id.* at 246, 249.

¹²⁶ Convention on the Rights of the Child, *supra* note 10, at art. 40.

¹²⁷ Convention on the Rights of the Child, *supra* note 10, at arts. 37(b), (c).

¹²⁸ Convention on the Rights of the Child, *supra* note 10, at art. 37(a).

¹²⁹ See *Roper*, 543 U.S. at 576; *Graham v. Florida*, 130 S. Ct. 130 S. Ct. 2011, 2034 (2010).

¹³⁰ *Roper*, 543 U.S. at 561 (quoting *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958) (plurality opinion)).

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justice system, which was created with the developmental capacity of adolescents in mind. The government document that outlines the rationale underlying the code states:

[A]dolescents are in the process of maturing. The word adolescent, which is the term that our Constitution uses, derives from Latino “adolescere” and means “one who grows or is in the process of growing.”¹³¹

Thus, the law is based on a clear understanding that adolescents cannot be treated using the same procedures as those that are used for adults because the levels of responsibility appropriate for society to impose upon adolescents differ from those appropriate for adults.¹³² Oaxaca’s law provides, “in no case may [a juvenile] be tried as an adult or punished by general [adult] penal laws. Adolescents will respond for their conduct according to their culpability in a different form than adults.”¹³³ Juveniles may be incarcerated for an absolute maximum of ten years in Oaxaca, and this is allowed only under very limited circumstances.¹³⁴

In contrast, trying minors in adult courts is a widely accepted practice in the United States.¹³⁵ The U.S. trend of increasingly sending juveniles to adult court reflects a profound shift in the country’s orientation towards youth crime. According to juvenile court expert Barry Feld, “[t]he changes in waiver policy reflect a fundamental cultural and legal reconceptualization of youth from innocent and dependent children to responsible and autonomous adult-like offenders.”¹³⁶ California allows juveniles as young as fourteen to be tried in adult court.¹³⁷ Juveniles in California are

¹³¹ *Exposicion de Motivos* to Ley de Justicia para Adolescentes, p. 249, Diario Oficial de la Federación [DO], 21 de Julio de 2006 (Mex.).

¹³² See MENDEZ, *supra* note 14, at 12 (citing Argentinian legal expert Mary Beloff, whose work and philosophy was very influential in Mexico’s reform efforts).

¹³³ Ley de Justicia Para Adolescentes art. 3.

¹³⁴ See *infra* pp. 27-29.

¹³⁵ Almost every state in the United States allows for youth to be tried in adult court. Some states specifically exclude youth from juvenile court if they are accused of committing certain offenses. SCOTT & STEINBERG, *supra* note 5, at 4. ARYA, *supra* note 77, at 3 (“[Within the United States,] [a]n estimated 250,000 youth under 18 are prosecuted in the adult criminal justice system each year.”).

¹³⁶ Barry Feld, *supra* note 57, at 368.

¹³⁷ See WELF. & INST. § 707(c). Other states allow children as young as seven or ten to be processed through adult courts. See Ellen Marrus & Irene Merker Rosenberg, *After Roper v. Simmons: Keeping Kids out of Adult Criminal Court*, 42 SAN DIEGO L. REV. 1151; ARYA, *supra* note 77, at 7.

routinely sentenced to serve hundreds of years in prison. In California, juveniles can also be sentenced to life without the possibility of parole—a sentence that almost no other country in the world allows for juvenile offenders.¹³⁸

Article 37 of the CRC states that “[e]very child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age.”¹³⁹ Article 40 mandates that the rights of youth accused of breaking the law be treated in a manner that “takes into account the child’s age and the desirability of promoting the child’s reintegration and the child’s assuming a constructive role in society.”¹⁴⁰ Trying juvenile cases in adult courts is not a practice that takes a child’s age and developmental needs into account, nor that promotes his or her reintegration into society. As such, the California practice of handling juvenile cases in adult courts is out of line with the standards set forth in the CRC.

Article 37 of the CRC unequivocally states, “neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age.”¹⁴¹ The United States allowed capital punishment for juvenile offenders until 2005, when the Supreme Court ruled in *Roper* that this practice violated the Constitution’s Eighth Amendment prohibition against cruel and unusual punishment.¹⁴² In *Roper*, the Court noted three major differences between minors and adults: (1) juveniles tend to engage in reckless behavior due to their general lack of maturity and developing levels of responsibility;¹⁴³ (2) minors are more susceptible to the influence of peer pressure;¹⁴⁴ and (3) minors’ character traits are in the process of development and are more likely to change over

¹³⁸ In *Graham*, the Supreme Court held that life without the possibility of parole is cruel and unusual punishment for juveniles convicted of non-homicide offenses and therefore violates the Constitution. *Graham v. Florida*, 130 S. Ct. 2030 (2010). However, the sentence of life without the possibility of parole is still constitutionally permissible for juveniles convicted of homicide crimes in the United States. *Id.* at 2027, 2034. The Court’s reasoning in *Graham* rested in part upon a distinction between homicide offenses and other crimes. *See id.* at 2027-28.

¹³⁹ Convention on the Rights of the Child, *supra* note 10, at art. 37.

¹⁴⁰ *Id.* at art. 40.

¹⁴¹ *Id.* at art. 37.

¹⁴² *Roper v. Simmons*, 543 U.S. 551, 578 (2005).

¹⁴³ *Id.* at 569.

¹⁴⁴ *Id.*

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time than those of adults.¹⁴⁵ In *Graham*, the Supreme Court ruled that imposing the sentence of life without the possibility of parole for a juvenile offender convicted of a non-homicide offense also constituted unconstitutional cruel and unusual punishment.¹⁴⁶ The Court relied on its “observations in *Roper* about the nature of juveniles.”¹⁴⁷ Currently, U.S. minors may constitutionally be sentenced to life without the possibility of parole if they are convicted of homicide offenses.¹⁴⁸

Adolescent brain development research supports an approach that takes into account an offender’s age and developmental stage, as mandated by the CRC and written into law in Oaxaca’s code.¹⁴⁹ The U.S. Supreme Court decisions in *Roper* and *Graham* relied upon such research to reach the conclusion in both cases that juveniles should be treated differently than adults.¹⁵⁰ In both of these cases, the Court acknowledged the diminished moral culpability of juveniles.¹⁵¹ However, the Supreme Court has only applied this rationale to the imposition of the death penalty and to life without the possibility of parole for juveniles convicted of non-homicide offenses. In contrast, Oaxaca’s code incorporates this recognition of the diminished capacity of adolescents into its entire juvenile justice system.

¹⁴⁵ *Id.* at 570.

¹⁴⁶ *Graham v. Florida*, 130 S. Ct. 2011, 2030 (2010).

¹⁴⁷ *Id.* at 2026 (“As petitioner’s *amici* point out, developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds. For example, parts of the brain involved in behavior control continue to mature through late adolescence.”). Juveniles are more capable of change than are adults, and their actions are less likely to be evidence of “irretrievably depraved character” than are the actions of adults. *Id.* at 2026-27 (citation omitted) (quoting *Roper*, 543 U.S. at 570) (“It remains true that ‘[f]rom a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor’s character deficiencies will be reformed.’ . . . These matters relate to the status of the offenders in question; and it is relevant to consider next the nature of the offenses to which this harsh penalty might apply.”).

¹⁴⁸ *Graham*, 130 S. Ct. at 2034 (the holding of *Graham* applies only to juveniles convicted of non-homicide offenses).

¹⁴⁹ See Convention on the Rights of the Child, *supra* note 10, at art. 37(b) (“Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age.”).

¹⁵⁰ See *Roper*, 543 U.S. at 570-74; *Graham*, 130 S. Ct. at 2026-27.

¹⁵¹ *Roper*, 543 U.S. at 571; *Graham*, 130 S. Ct. at 2026-27.

B. Throwing Them into the Lion's Den: Incarcerating Juveniles with Adults

All of the major international human rights treaties regarding children's rights in relation to the justice system address the particular importance of separating juveniles from adults in custody, and the CRC is no exception.¹⁵² Under Mexico's reforms, juveniles are required to be housed in separate detention facilities from adults.¹⁵³ In contrast, juveniles who are tried in adult courts in the United States are routinely housed in the same jails and prisons as adults—in some cases even prior to being convicted.¹⁵⁴ The United States incarcerates 10,000 children in adult jails and prisons every day.¹⁵⁵

Research indicates that juveniles who are processed through adult criminal courts and penal institutions are significantly more likely to re-offend than those who are processed through the juvenile system.¹⁵⁶ One study in particular found a one hundred percent greater likelihood of re-arrest for a violent offense among juveniles whose cases were handled in adult court.¹⁵⁷ Furthermore, juveniles often suffer human rights abuses when they are incarcerated with adults. Juveniles incarcerated in adult facilities are eight times more likely to commit suicide, five times more likely to be sexually assaulted, and twice as likely to be attacked with a weapon or beaten by prison staff than adults in the same facilities.¹⁵⁸ Given this research, Oaxaca's decision to house juveniles in separate facilities from adults is more protective of the physical and emotional safety of youth accused and convicted of

¹⁵² See Havana Rules, *supra* note 120, ¶29 (stating that minors should be separated from adults in all detention centers unless they are family members); Beijing Rules, *supra* note 120, ¶26.3 (stating that no minors should be in adult jails or prisons); Convention on the Rights of the Child, *supra* note 10, at art. 37(C) (“In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so.”).

¹⁵³ See, e.g., Ley de Justicia Para Adolescentes, art. 19.

¹⁵⁴ ARYA, *supra* note 77, at 15-16.

¹⁵⁵ ARYA, *supra* note 77, at 15.

¹⁵⁶ REDDING, *supra* note 75, at 6 (Redding conducted a thorough literature review and stated that “all of the studies found higher recidivism rates among offenders who had been transferred to criminal court, compared with those who were retained in the juvenile system.”). See also Benjamin Steiner & Emily Wright, *Assessing the Relative Effects of State Direct File Waiver Laws on Violent Juvenile Crime: Deterrence or Irrelevance?*, 96 J. CRIM. L. & CRIMINOLOGY 1451, 1457-67 (2006).

¹⁵⁷ REDDING, *supra* note 75.

¹⁵⁸ *Id.*

crimes.

C. Incarcerating Youth

The CRC specifies that incarceration should “be used only as a measure of last resort” for juvenile offenders and should be imposed for “the shortest appropriate period of time.”¹⁵⁹ Accordingly, Oaxaca’s code places strict limits on incarcerating offenders and specifies that detention should only be imposed as a last resort.¹⁶⁰ As of October 2009, only twenty-six juveniles were incarcerated in the entire state of Oaxaca.¹⁶¹ This stands in stark contrast to California, which incarcerates well over 10,000 juveniles each year.¹⁶² Several aspects of Oaxaca’s code limit the use of detention. Oaxaca’s code specifically prohibits the detention of children under the age of fourteen.¹⁶³ Article 15 of the state’s Constitution states that detention should always be used as a last resort, for a determinate amount of time, and for the shortest time possible.¹⁶⁴ In Oaxaca, there are a very limited number of offenses for which a juvenile may be incarcerated. 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,

¹⁵⁹ Convention on the Rights of the Child, *supra* note 10, at art. 37(b).

¹⁶⁰ Ley de Justicia Para Adolescentes del Estado de Oaxaca, art. 89.

¹⁶¹ Interview with Jorge Abraham Gonzalez Ilescas, Director, Centro de Ejecucion de Medidas Para Adolescentes, Oaxaca (Sept. 14, 2009). This number rose to thirty-five as of January 2010. Juan Carlos Zavala, *Jóvenes Delincuentes: Historia de Jonathan*, ADIARIO, Jan. 22, 2010, www.oaxaca.adiario.mx/2010/01/jovenes-delincuentes-historia-de-jonathan. The Federal District of Mexico (“D.F.”) incarcerates more youth than Oaxaca. There were almost 945 juveniles incarcerated in D.F. in 2009. Laura Emilia Pacheco, *Jóvenes y Delincuencia: El Silencio del Viento*, PROCESO, Sept. 2009 (Edición Especial No. 26), at 72, 75. Human Rights Watch has criticized the poor conditions under which children are detained in Mexico, citing in particular a lack of access to educational programs in many detention facilities. HUMAN RIGHTS WATCH, *Mexico*, *supra* note 21.

¹⁶² The population of Oaxaca is approximately 3.8 million, whereas the population of California is over 37 million. Instituto Nacional de Estadística y Geografía, Mexico en Cifras, Oaxaca, <http://www.inegi.org.mx/sistemas/mexicocifras/default.aspx?ent=20>; U.S. Census Bureau, State & County QuickFacts, <http://quickfacts.census.gov/qfd/states/06000.html>.

¹⁶³ Ley de Justicia Para Adolescentes del Estado de Oaxaca, art. 19, Periódico Oficial del Gobierno del Estado, 6 de Octubre de 2007 (Mex.) (“The deprivation of liberty will be used as a sanction only as a last resort, will be imposed for a fixed time and for the shortest period possible. It will be carried out in centers exclusively for adolescents or, in their case, for young adults.”).

¹⁶⁴ Constitución Política del Estado Libre y Soberano de Oaxaca, *as amended*, art. 15, Periódico Oficial del Estado de Oaxaca, 15 de Junio de 2011 (Mex.).

and human trafficking of children.¹⁶⁵ Minors in this age range may be detained for a maximum of four years.¹⁶⁶ Those ages sixteen to eighteen may be detained for a maximum of seven to ten years for the offenses previously listed as well as for corrupting minors to engage in prostitution, drug use, or other sex offenses, child pornography, assault, and torture.¹⁶⁷ In contrast, youth may be incarcerated for non-violent, victimless crimes in California and throughout the United States. In fact, seventy percent of detained youth in the United States are incarcerated for nonviolent offenses.¹⁶⁸

Research indicates that there are compelling reasons to limit the practice of incarcerating youth due to the detrimental impacts of detention upon young people's mental health, educational functioning, future employment prospects, and physical safety.¹⁶⁹ Furthermore, incarcerating juveniles increases the likelihood that they will reoffend in the future.¹⁷⁰ Recidivism rates among juveniles in the United States range between sixty and seventy percent.¹⁷¹ These disturbingly high recidivism rates can be attributed to high juvenile incarceration rates in the United States. Conditions of confinement in juvenile detention facilities are troubling from a human rights perspective as well. According to Barry Feld, "[c]riminological research, judicial opinions, and investigative studies report staff beatings of inmates, the use of medications for social control purposes, extensive reliance on solitary confinement, and a virtual absence of meaningful rehabilitative programs."¹⁷² Overcrowding is also a major issue in juvenile detention facilities.¹⁷³ Furthermore, patterns of juvenile incarceration in California, as well as within the United States in general, disproportionately impact "minority youth," particularly

¹⁶⁵ Ley de Justicia Para Adolescentes art. 93(I).

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at art. 93(II).

¹⁶⁸ BARRY HOLMAN & JASON ZIEDENBERG, JUSTICE POLICY INSTITUTE, THE DANGERS OF DETENTION: THE IMPACT OF INCARCERATING YOUTH IN DETENTION AND OTHER SECURE FACILITIES 3 (2006), available at <http://www.justicepolicy.org/research/1978>.

¹⁶⁹ *Id.* at 2-10.

¹⁷⁰ *Id.* at 4-5. See generally PETER W. GREENWOOD, CHANGING LIVES: DELINQUENCY PREVENTION AS CRIME CONTROL POLICY (2005).

¹⁷¹ HOLMAN & ZIEDENBERG, *supra* note 168, at 4.

¹⁷² Feld, *supra* note 57, at 378-79.

¹⁷³ *Id.* at 379.

African American and Latino youth.¹⁷⁴

There is only one juvenile detention facility in Oaxaca, and it is designed to meet the developmental needs of young people who are incarcerated there.¹⁷⁵ The facility includes a school, library, computer lab, art workshop, a workshop for training youth as electricians, a carpentry training program, and a health clinic. The detention center conducts psychological, medical, and social work assessments of each detained youth and provides psychological services based on the needs of each minor.¹⁷⁶ Oaxaca's juvenile detention facility aims to rehabilitate while California's prisons are designed to punish. The United States tends to criticize Mexico for the country's human rights violations, with good reason in many instances. The comparison of juvenile delinquency law in Mexico and the United States, however, reveals that Mexico's law is more closely aligned with internationally accepted human rights standards than the law of the United States.

VII. RESTORATIVE JUSTICE

Mexico's criminal justice reforms aim to resolve the majority of the country's criminal cases through alternative dispute resolution methods.¹⁷⁷ Restorative justice conferences are one form of alternative dispute resolution that has been successful in responding to juvenile crime in other countries. New Zealand's juvenile justice system, for example, resolves ninety-five percent of its juvenile delinquency cases through family group conferences, which typically bring together an offender, the victim, family members of both parties, justice system professionals (such as police officers, social workers, and probation officers), and other

¹⁷⁴ See NATIONAL COUNCIL ON CRIME & DELINQUENCY, AND JUSTICE FOR SOME: DIFFERENTIAL TREATMENT OF YOUTH OF COLOR IN THE JUSTICE SYSTEM (2007).

¹⁷⁵ Interview with Jorge Abraham Gonzalez Ilescas, *supra* note 161.

¹⁷⁶ *Id.*

¹⁷⁷ Matthew C. Ingram, *State-Level Judicial Reform in Mexico: The Local Progress of Criminal Justice Reforms* (Trans-Border Institute, Working Paper, 2010), available at <http://catcher.sandiego.edu/items/peacestudies/Ingram-State%20Level%20Reform.pdf>. For example, mediation is widely used in Oaxaca to resolve disputes between adults. Interview with Maylo Gomez Alguilar, Director, Mediation Center of the Judicial Branch, Oaxaca (Sept. 7, 2008). Oaxaca has established over fifty mediation centers in communities throughout the state. *Id.* Each center employs a local mediator who assists people with resolving disputes before they are reported to authorities. *Id.* In addition, within the State Prosecutor's Office in Oaxaca City, a team of Mediators and Conciliators are employed to help parties to criminal actions resolve disputes. Interview with Pedro Celestino Guzman Rodriguez, *supra* note .

interested community members.¹⁷⁸ These conferences aim to respond to the needs of both victims and offenders in order to promote healing and prevent future criminality.¹⁷⁹ Oaxaca employs a similar approach, but its conferences typically include only the victim, the offender, and their respective family members.¹⁸⁰ Generally, restorative justice differs from the American adversarial model of criminal justice by prioritizing the needs and desires of victims.¹⁸¹ This emphasis on responding to the needs of victims has been incorporated into Oaxaca's juvenile delinquency code.¹⁸² In contrast to California, victims are given more decision-making power in Oaxaca's legal system.

*A. Oaxaca's Restorative Justice Conferences*¹⁸³

The vast majority of Oaxaca's juvenile delinquency cases are resolved through restorative justice conferences that bring together the victim, the offender, and their respective family members in order to develop appropriate sanctions for the offender and reparations for the victim.¹⁸⁴ Psychologists and attorneys who work at the state's Center for Restorative Justice do a great deal of preparation with the offenders and victims prior to facilitating a meeting that brings the parties together. They have had quite a bit of success with this model and have resolved serious cases including shootings and homicides through restorative justice conferences. The law provides that facilitators must keep all information obtained during the restorative justice process confidential; this information may not be used in court.¹⁸⁵ If an agreement is reached between the parties, it is presented to a

¹⁷⁸ See CAYLEY, *supra* note 1, at 170-75.

¹⁷⁹ *Id.*

¹⁸⁰ Interview with Jacibe Valencia, *supra* note 36.

¹⁸¹ See generally HOWARD ZEHR, *CHANGING LENSES* (1990).

¹⁸² See Ley de Justicia para Adolescentes, art. 33.

¹⁸³ Unless otherwise specified, the information provided in this section was obtained through observations by this author in the Centro de Justicia Restaurativa [Restorative Justice Center] of the Procuraduría de Justicia del Estado de Oaxaca [the prosecution agency of Oaxaca].

¹⁸⁴ See *Exposicion de Motivos* to Ley de Justicia para Adolescentes, pp. 254-55, Diario Oficial de la Federación [DO], 21 de Julio de 2006 (Mex.). An estimated 50% of Oaxaca's adult criminal cases are resolved through mediation, conciliation, and restorative justice processes. Interview with Pedro Celestino Guzman Rodriguez, *supra* note 53.

¹⁸⁵ Ley de Justicia Para Adolescentes del Estado de Oaxaca, art. 44, Periódico Oficial del Gobierno del Estado, 6 de Octubre de 2007 (Mex.).

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judge for approval. The restorative justice process must be resolved within thirty days.¹⁸⁶ If not, the case will proceed to trial.

In California, most juvenile delinquency cases do not go to trial. As in Oaxaca, most are resolved through alternative processes. There are many stages from the point of arrest through trial where juvenile cases can be diverted, dismissed, or negotiated within the California court process. Once a formal complaint has been filed in court, the most common way that cases are resolved is through a process of plea bargaining, whereby the defense attorney and the prosecutor negotiate a sentence in exchange for an admission of guilt by the accused young person. This typically occurs in busy courtrooms and hallways where lawyers negotiate in the midst of meeting with clients, conducting hearings and trials in court, and interviewing other clients. Although jurisdictions vary—and many localities within California have restorative justice programs available—such programs are not widely used throughout the state to resolve delinquency matters.

In contrast, Oaxaca's process takes the negotiation process out of the courtroom and into an environment where professionals specifically trained in the art of mediation and restorative justice conferencing spend a substantial amount of time with all of the parties involved. Procedurally, criminal offenses are divided into two categories: (1) serious offenses; and (2) other offenses. "Serious offenses" are a very limited group of offenses and are the only offenses for which juvenile offenders may be incarcerated.¹⁸⁷ These offenses are not referred to the Center for Restorative Justice. Instead, they proceed directly to court where oral trials are eventually held.¹⁸⁸ In contrast to the American legal system, plea bargains cannot be reached in court with regard to such cases—they must go to trial. All other offenses are routed through "salidas alternativas" (alternative exits), which include a variety of settlement and diversion options. Restorative justice conferences are the predominant manner of resolving such cases. If an agreement is reached through the restorative justice conference, the agreement is proposed to the court. Assuming that the judge accepts the agreement—as it typically is—the case is dismissed when the agreements have been completed.¹⁸⁹

¹⁸⁶ *Id.* at art. 45.

¹⁸⁷ *See supra* pp. 28-29.

¹⁸⁸ Ley de Justicia Para Adolescentes art. 42.

¹⁸⁹ Procedurally, if the agreements have been completed by the time the agreement

B. Victims' Rights

In addition to protecting the rights of the accused, justice also requires that victims be guaranteed rights in the criminal justice system. Although victims are the group most affected when a crime is committed, their needs are systematically ignored in the traditional juvenile and criminal justice systems of U.S. courts. The decision of whether to file charges for a particular crime, for example, does not lie with a victim, but instead lies with government representatives. Restorative justice conferences, on the other hand, prioritize the needs and wishes of victims in developing responses to juvenile crime. In California, victims have no role in the plea bargaining process or in determining what an appropriate punishment would be for the harm that they suffered. In contrast, many of the criminal justice reforms in Mexico integrate victim's rights into the penal code, thereby ensuring legal rights and participation of victims. These structural incorporations represent an important step towards developing a system that is designed to appropriately respond to those most impacted by crime.¹⁹⁰ Oaxaca's code, for example, vests victims with the decision-making authority regarding whether or not to enter into a restorative agreement with an offender.¹⁹¹ If the victim chooses not to do so, the case proceeds to trial. If the victim decides to enter into an agreement, the victim will play a significant role in determining the agreement's terms. For example, an agreement may include payment for financial losses and/or a letter of apology from the offender.

The California Penal Code sets forth a list of victims' rights, most of which focus on victims' rights to be notified regarding hearings, sentencing decisions, and the potential release of

reaches the court, the judge may dismiss the case upon accepting the terms of the agreement. Alternatively, if there are still pending issues, such as the payment of restitution or the completion of community service, the judge may suspend the proceedings until a future date. If the agreements have been completed at that time, the case is dismissed. Interview with Candelaria Chiñas, *supra* note 31. See also Ley de Justicia Para Adolescentes arts. 44-46.

¹⁹⁰ Article 20(c) of Mexico's Constitution was amended to provide crime victims with the right to file their own motions before judges under some circumstances. SHIRK, *supra* note 21, at 16.

¹⁹¹ Ley de Justicia para Adolescentes, art. 87 ("The Judge can only impose this sanction [a restorative agreement] when the victim has given consent and when the adolescent and responsible adult have agreed.").

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offenders.¹⁹² Victims are also guaranteed the right to appear at sentencing hearings in order “to reasonably express his or her views” in felony cases, including those handled in juvenile court.¹⁹³ Notably absent from California’s statutory rights of victims are any rights to make decisions regarding the outcome of a case. In 2008, California voters approved an amendment to the state constitution to include a “Victims Bill of Rights.”¹⁹⁴ Constitutional amendments enacted by this bill provide that victims have a right to safety, restitution, and to receive notice regarding court hearings and sentencing decisions.¹⁹⁵ Victims are also granted the right to express their opinions to prosecutors, probation officers, and judges at various stages in the court process.¹⁹⁶ Even the Victims Bill of Rights, however, does not grant victims any decision-making authority.

In contrast, Oaxaca’s code grants victims the power to “perdonar” the offender (i.e., decide to drop the charges).¹⁹⁷ In such cases, the government is obligated to close the case. This law is cited by personnel from the state prosecutor’s office as a particular obstacle to prosecuting domestic violence cases, where victims in relationships characterized by domestic violence often decide to drop the charges against the abuser.¹⁹⁸ Oaxaca’s law also provides victims the right to be informed and to participate in the process.¹⁹⁹ The Code states that “any decision about the non-exercise of the penal action” can be challenged by the victim.²⁰⁰ Victims may sit next to the prosecutor at the counsel table to advocate for their wishes in court. Overall, Oaxaca’s legal code grants more power to victims regarding the outcomes of juvenile delinquency cases through restorative justice conferences, as well as in trials and courtroom proceedings.

VIII. CONCLUSION

Although Oaxaca’s legal code takes a restorative approach to

¹⁹² CAL. PENAL CODE § 679.02 (West 2010).

¹⁹³ *Id.*

¹⁹⁴ VICTIMS’ BILL OF RIGHTS, http://ag.ca.gov/victimservices/content/bill_of_rights.php.

¹⁹⁵ CAL. CONST. art. I, § 28(b).

¹⁹⁶ *Id.*

¹⁹⁷ Ley de Justicia Para Adolescentes, art. 33.

¹⁹⁸ Interview with Jacibe Valencia, *supra* note 36.

¹⁹⁹ Ley de Justicia Para Adolescentes, art. 33.

²⁰⁰ *Id.*

responding to youth crime, there are indications that human rights abuses may continue to be a problem.²⁰¹ The practice of using torture to obtain confessions has been widespread in Mexico²⁰² and, until recently, confessions obtained through torture were admissible in court. Human Rights Watch reports that people in Mexican jails and prison continued to be tortured in 2009, even after implementation of the reforms.²⁰³

Nonetheless, the overarching theme of Oaxaca's juvenile justice system illustrates a distinct approach to responding to the unique needs and capacities of youth accused of breaking the law. Oaxaca's legal code sets forth policies that are consistent with social science research regarding adolescent brain development, developmental capacity, and responses to juvenile crime that prevent future criminality. In contrast, California's approach to juvenile crime prioritizes punishment and incarceration—despite evidence that its criminal justice policies are inconsistent with human rights principles and promote (rather than deter) future criminality. These differences may be attributed to the ways in which each legal code has been developed. California juvenile delinquency law has evolved over time and has been heavily influenced by a popularized fear of juvenile crime, which has impacted politicians and voters.²⁰⁴ In contrast, Oaxaca's juvenile law was developed by a team of university professors and justice professionals who reviewed social science research and visited other countries to learn about successful approaches to responding to juvenile crime.

International human rights standards and social science research regarding effective juvenile delinquency interventions favor the more restorative approach taken by Oaxaca's legal code. There are some indications that the direction of American juvenile justice policy may be shifting. Recent U.S. Supreme Court cases

²⁰¹ This author observed an arraignment in juvenile court, for example, wherein the public defender indicated that the juvenile defendant reported that police beat him while he was detained in a rural police station. In accordance with the law, the judge ordered a medical professional to examine the young man to assess any evidence of mistreatment or torture by the police. In this case, the medical examiner reported that there was no physical evidence that the young man had been tortured, and his complaints were ignored. Despite the alignment of Oaxaca's juvenile delinquency code with international human rights standards, these types of abuses still occur.

²⁰² SHIRK, *supra* note 21, at 8.

²⁰³ HUMAN RIGHTS WATCH, *Mexico*, *supra* note 21.

²⁰⁴ See Caldwell & Caldwell, *supra* note 65.

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such as *Roper* and *Graham*, have limited the types of punishments that can be imposed on juvenile offenders.²⁰⁵ Oaxaca's code provides a model of a juvenile delinquency code that incorporates developmental research regarding adolescents and international human rights principles that the United States, and individual states, should consider in order to craft a more just and developmentally appropriate framework for responding to youth crime.

²⁰⁵ See ARYA, *supra* note 77.

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