

**THE CHILDREN ARE OUR FUTURE (NOT OUR FUTURE CRIMINALS):
PROTECTING SOUTH CAROLINA’S YOUNGEST CITIZENS BY SETTING A
MINIMUM AGE OF JUVENILE COURT JURISDICTION**

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I. INTRODUCTION

*“I don’t want handcuffs on, no, don’t put handcuffs on. Help me, help me, please, help me.”***

- Kaia Rolle, six-year-old child, during her arrest at school in Orlando, Florida

Kaia Rolle was having a hard day when she arrived at school on September 19, 2019. It became a nightmare. Kaia has physical impairments which cause her to experience sleep apnea. These sleep disruptions impact her behavior and emotional regulation at school. As a first grader in 2019, this manifested as tantrums, kicking, and crying. Kaia’s grandmother was working with the school to get the right supports in place. However, on September 19, Kaia came to school after a bad night; she had slept poorly and her eyes hurt. Her teacher told her she could not wear her sunglasses in class and took them away. Kaia lashed out, screaming, hitting staff, and trying to run away. School staff calmed Kaia and moved her to an administrator’s office. That’s when the School Resource Officer, a sworn law enforcement officer stationed at the school, walked in, zip-tied Kaia’s hands over the objections of school staff, and took her in a police car to the Juvenile Assessment Center for processing.¹

The officer’s body cam footage of Kaia’s arrest is upsetting.² Even more upsetting is that the same officer also arrested another six-year-old student on

** Mihir Zaveri, *Body Camera Footage Shows Arrest by Orlando Police of 6-Year-Old at School*, N.Y. Times (Feb. 27 2020), <https://www.nytimes.com/2020/02/27/us/orlando-6-year-old-arrested.html?auth=login-google1tap&login=google1tap> [<https://perma.cc/QLU2-B6FN>];

1. The details of Kaia’s story were obtained from various media accounts of the incident. See *id.*; Andrea Ball et al., *‘She Looks Like a Baby’: Why Do Kids as Young as 5 or 6 Still Get Arrested at Schools?*, THE CTR. FOR PUB. INTEGRITY: CRIMINALIZING KIDS (Feb. 10, 2022), <https://publicintegrity.org/education/criminalizing-kids/young-kids-arrested-at-schools/> [<https://perma.cc/9L6X-RFAM>].

2. Zaveri, *supra* note 1.

the same day in a separate episode.³ Most disconcerting is that these incidents are not isolated to this particular officer, school, or state. Thousands of young children,⁴ including children as young as six, are arrested each year in states that have a very low or no minimum age of juvenile court referral, including South Carolina.⁵

Although South Carolina has no minimum age for arresting and referring children to court, the state has made important juvenile justice reforms in recent years. In 2019, the same year that Kaia's incident occurred, South Carolina enacted major court reform by raising the maximum age of family court jurisdiction from age sixteen to age seventeen.⁶ In South Carolina, family court is the arm of the court system that exercises exclusive jurisdiction over minors alleged to have violated any state law or municipal ordinance, including criminal and status offenses.⁷ Status offenses are those offenses which would not be a crime if committed by an adult, such as incorrigibility, running away, and truancy.⁸ For purposes of this Article, juvenile court and family court will be used interchangeably to describe the court forum responsible for processing minors accused of criminal and status offenses.

Prior to South Carolina's 2019 legislation, all seventeen-year-olds in the state were automatically treated as adults for criminal processing, regardless of their individual circumstances, maturity, or nature of the offense.⁹ In raising the maximum age of family court jurisdiction from age sixteen to age seventeen, South Carolina joined the majority of states who recognize that children under the age of eighteen do not belong in the adult criminal system,

3. *Id.*

4. This Article uses the term "young children" to describe the group of children age twelve and younger who should be excluded from juvenile court jurisdiction due to their diminished culpability and decreased ability to benefit from juvenile court intervention. There are disagreements about the age at which children have sufficient culpability to warrant court processing, with international standards setting the minimum age at fourteen years old and some state statutory schemes setting the age at ten years old. *See* NAT'L JUV. JUST. NETWORK, BRIEF: CHARTING U.S. MINIMUM AGES OF JURISDICTION, DETENTION, AND COMMITMENT (2023), https://www.njjn.org/uploads/digital-library/UPDATED%20February%202024_Minimum%20Age%20Laws%20for%20Juvenile%20Court%20Jurisdiction%20and%20Confinement.pdf [https://perma.cc/XJF8-FEG9]. This Article adopts a compromise approach to define "young children" as children age twelve and younger.

5. *Id.*; *see also* S.C. CODE ANN. § 63-19-10 to -2460 (2010 & Supp. 2023) (establishing no minimum age for court processing).

6. *See* S.C. CODE ANN. §§ 63-3-510, -19-20(1) (Supp. 2023).

7. *See Family Court*, S.C. JUD. BRANCH, <https://www.sccourts.org/familycourt/> [https://perma.cc/E369-MCKN].

8. S.C. CODE ANN. § 63-19-20(9) (2010).

9. *See* § 63-3-510.

which is more punitive than juvenile court and ill-equipped to address the needs of children.¹⁰

However, despite South Carolina's willingness to increase its *maximum* age of juvenile court jurisdiction, it has not yet set a *minimum* age. This means that young children in South Carolina are continually at risk of being arrested and referred to juvenile court. Notably, in Fiscal Year 2018, over 1,200 juvenile court referrals were made for children age twelve and under in South Carolina.¹¹ While juvenile court may be preferable to adult criminal court, juvenile court involvement still carries significant legal, educational, psychological, and familial harms that can last far beyond childhood.¹² Juvenile court intervention also has few benefits for young children, who lack the maturity and reasoning capacity to adequately understand and participate in the court process.¹³ Instead, research shows that juvenile court referral for young children may actually increase their risk of recidivism, harming overall public safety.¹⁴

Given the ineffectiveness of juvenile court for young children, alongside the risk of harm, there is an emerging national trend of states raising the floor, or minimum age, at which a child can be referred to and processed through the juvenile courts.¹⁵ This trend has been spurred by scientific research that supports raising age boundaries to developmentally appropriate levels and utilizing non-legal responses to more effectively address childhood misbehavior.¹⁶ Often, these reforms also come on the heels of highly publicized arrests of young children like Kaia Rolle. In the wake of Kaia's arrest, Florida passed a new law, the "Kaia Rolle Act", establishing a minimum age of seven for juvenile court jurisdiction.¹⁷

10. See discussion *infra* Section II.D (describing the rationales supporting "Raise the Maximum Age" legislation).

11. See S.C. DEP'T OF JUV. JUST., 2019 DATA RESOURCE GUIDE 8–9 (2019), <https://djj.sc.gov/sites/djj/files/Documents/Resource%20Guide%202019-Final%20Draft.pdf> [<https://perma.cc/MT4F-6WEX>]. This Article utilizes data from 2018–2019, as it is the most recent publicly available data that is not impacted by the drop in cases due to the COVID pandemic and its concurrent effects on the juvenile justice system.

12. See discussion *infra* Sections II.D (describing harms of juvenile court generally) and IV.C.3 (describing harms of juvenile court specifically as it relates to young children).

13. See discussion *infra* Section IV.C.5 (describing the research that supports diminished culpability in young children).

14. See discussion *infra* Section IV.C.4 (providing overview of research that shows juvenile court referral for young children reduces public safety).

15. See generally discussion *infra* Part IV.

16. *Id.*

17. FLA. STAT. ANN. § 985.031 (West 2024); see also Cheryl Corley, *In Some States, Your 6-Year-Old Child Can Be Arrested. Advocates Want That Changed*, NPR: CRIM. JUST. COLLABORATIVE (May 2, 2022, 5:55 PM), <https://www.npr.org/2022/05/02/1093313589/states-juvenile-minimum-age-arrested-advocates-change> [<https://perma.cc/6LMW-KWUC>].

This Article makes the case that South Carolina should build on its successful “Raise the Maximum Age” efforts and join the majority of states who have set a statutory minimum age of juvenile court jurisdiction in order to protect young children and better serve public safety. In making the case, Part II examines the evolution of juvenile court in the United States, beginning with its origination in the 1800s with a focus on distinguishing children from adults and the “rehabilitative ideal” that children could outgrow challenging behavior if given the right treatment and services.¹⁸ After a long period of “adultification” of the juvenile court in response to rising crime rates, more recent reform efforts have focused on returning to the early court’s rehabilitative model.¹⁹ With this context in mind, Part III describes South Carolina’s unique history of juvenile court development and reform up to the current moment. National trends have heavily influenced South Carolina’s juvenile system, but there are also state-specific legislative and judicial factors that inform any proposals to protect young children from juvenile court processing in the state.²⁰

Part IV outlines national efforts to keep young children out of juvenile court by setting a statutory minimum age of juvenile court jurisdiction. Currently, over half of states set a minimum age of juvenile court jurisdiction, with fifteen states passing legislation since 2012 that either set a minimum age for the first time or increased the existing minimum age.²¹ Part IV explores the justifications that support the “Raise the Minimum Age” movement, as well as the success of the movement in the last decade. Finally, Part V turns back to South Carolina, analyzing the opportunities and challenges of passing minimum age legislation in the state. Ultimately, the Article concludes that South Carolina is primed for minimum age reform and makes recommendations to advance such reform given the current climate.

18. See AM. BAR ASS’N, *DIALOGUE ON YOUTH AND JUSTICE* 5 (2007), https://www.americanbar.org/content/dam/aba/administrative/public_education/resources/DYJ_full.pdf [<https://perma.cc/C2KP-WYTE>]; Marygold S. Melli, *Juvenile Justice Reform in Context*, 1996 WIS. L. REV. 375, 378–79 (1996).

19. See *infra* Sections II.B–II.D for a discussion on recent juvenile court reform efforts.

20. See generally John L. Trotti, *A Brief History of Juvenile Justice in South Carolina*, S.C. DEP’T OF JUV. JUST., <https://djj.sc.gov/agency/agency-history> [<https://perma.cc/YMB6-ZGCJ>]; JOSH GUPTA-KAGAN ET AL., *EFFECTIVE SOLUTIONS TO SOUTH CAROLINA’S JUVENILE JUSTICE CRISIS* 29–33 (2017), <http://www.pandasc.org/wp-content/uploads/2017/04/Juvenile-Justice-Report.pdf> [<https://perma.cc/NH6A-VEBM>]; Alexander S. *ex rel.* Bowers v. Boyd, 876 F. Supp. 773, 781–83 (D.S.C. 1995).

21. Compare *Upper and Lower Age of Juvenile Court Delinquency and Status Offense Jurisdiction*, OFF. OF JUV. JUST. AND DELINQ. PREVENTION, https://ojjdp.ojp.gov/statistical-briefing-book/structure_process/faqs/qa04102 [<https://perma.cc/TV5P-L3SZ>] (choose “2012” from the dropdown), with NAT’L JUV. JUST. NETWORK, *supra* note 4.

II. THE EVOLUTION OF JUVENILE COURT NATIONALLY

In every U.S. state, a specialized trial court handles various proceedings concerning children,²² often known as juvenile court or family court.²³ These courts typically have exclusive original jurisdiction over four major categories of proceedings involving children: delinquency, status offenses, abuse and neglect, and adoption.²⁴ This Article focuses on the jurisdiction of juvenile court that covers delinquency and status offenses. A delinquency proceeding alleges that the child has committed an act that would be a felony or misdemeanor if committed by an adult.²⁵ Status offenses are offenses which would not be a crime if committed by an adult, such as incorrigibility, running away, and truancy.²⁶ Although states, including South Carolina, often prescribe slightly different treatment for children accused of delinquency offenses, as compared to those accused of status offenses, the court processes for both include many of the same procedures, decision-makers, and potential consequences.²⁷

A. Origins of Juvenile Court

Prior to the creation of separate juvenile courts, the adult criminal court used common law to determine when a child accused of criminal conduct could be prosecuted. Under common law, children under seven could not be found guilty of a felony or punished for any capital offense.²⁸ Essentially, children under the age of seven were determined not to have a “vicious will”

22. DOUGLAS E. ABRAMS ET AL., CHILDREN AND THE LAW: DOCTRINE, POLICY, AND PRACTICE 15 (7th ed. 2020).

23. *Id.* In South Carolina, this court is referred to as “family court.” See *Family Court*, *supra* note 7.

24. ABRAMS ET AL., *supra* note 22, at 15–16. (“In some states, the juvenile court is a distinct trial court. In some states, the general jurisdiction trial court has juvenile jurisdiction. In other states, the juvenile court is a separate division of the general jurisdiction trial court, such as ‘the juvenile division of the superior court.’”).

25. *See id.* at 941.

26. *See* OFF. OF JUV. JUST. & DELINQ. PREVENTION, STATUS OFFENDERS (2015), https://ojjdp.ojp.gov/model-programs-guide/literature-reviews/education_for_youth_under_for_mal_supervision_of_the_juvenile_justice_system.pdf [<https://perma.cc/3RJS-XA74>]; S.C. CODE ANN. § 63-19-20(9) (2010).

27. *See* OFF. OF JUV. JUST. & DELINQ. PREVENTION, *supra* note 26, at 1–2; *see generally* CHILD.’S L. CTR., UNIV. OF S.C. SCH. OF L., QUICK REFERENCE GUIDE TO JUVENILE COURT IN SOUTH CAROLINA (2019), https://sc.edu/study/colleges_schools/law/centers/childrens_law/docs_general/juvenile_justice_publications/jj_quick_reference_guide_for_judges_attorneys.pdf. [<https://perma.cc/YK86-ZYP5>].

28. *Allen v. United States*, 150 U.S. 551, 558 (1893).

to commit crime; therefore, they could not be held criminally responsible.²⁹ The same presumption applied for children between the ages of seven and fourteen, but it could be rebutted if there was evidence the child knew right from wrong.³⁰ If the *prima facie* presumption was overcome, the child could “suffer the full consequences of the crime.”³¹ Children over the age of fourteen were treated as adults and given no special treatment if found guilty of a crime.³² Children over fourteen were processed in the same courts, faced the same punishments, and were incarcerated in the same jails as adults.³³

States moved away from the common law conception of juvenile culpability throughout the late nineteenth and early twentieth centuries with the creation of separate juvenile courts to process children accused of criminal offenses.³⁴ This was a natural extension of the growing sentiment that children should be separated and protected from the dangers of the adult criminal system.³⁵ There had already been efforts throughout the nineteenth century to provide separate correctional facilities, often called reformatories, for juveniles sentenced to prison.³⁶ The idea of a separate juvenile court spread quickly and within twenty-five years, most states had set up their own juvenile court system focused on rehabilitating young offenders to help them avoid a future life of crime.³⁷

This was a marked departure from the more punitive approach of the adult court system. Another departure was the juvenile court’s more informal procedures. Since the court exercised only civil jurisdiction and was seen by many as a quasi-welfare agency, it dispensed with many of the procedural rules and protections of adult criminal court.³⁸ Juvenile courts were also less public, with proceedings, dispositions, and records treated as confidential in most circumstances.³⁹ As separate juvenile courts were established to process young offenders, the common law protections that exempted young children

29. See 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 13–14 (1769); see also AM. BAR ASS’N, *supra* note 18, at 4–5.

30. See *Allen*, 150 U.S. at 558; BLACKSTONE, *supra* note 29, at 14–15; AM. BAR ASS’N, *supra* note 18, at 4.

31. AM. BAR ASS’N, *supra* note 18, at 4; see also BLACKSTONE, *supra* note 29, at 14–15; *Allen*, 150 U.S. at 558.

32. See BLACKSTONE, *supra* note 29, at 14; AM. BAR ASS’N, *supra* note 18, at 4.

33. See *Juvenile Justice History*, CTR. ON JUV. & CRIM. JUST., <https://www.cjcj.org/history-education/juvenile-justice-history> [https://perma.cc/N4YW-M8HD].

34. AM. BAR ASS’N, *supra* note 18, at 5.

35. See *id.*; Melli, *supra* note 18, at 375.

36. Melli, *supra* note 18, at 377.

37. *Id.*; ABRAMS ET AL., *supra* note 22, at 951–52; AM. BAR ASS’N, *supra* note 18, at 5.

38. ABRAMS ET AL., *supra* note 22, at 952–55.

39. *Id.* at 955–56.

from criminal prosecution no longer applied and, as a result, many young children ended up in the juvenile court system.⁴⁰

B. “Adultification” of the Juvenile Court

By the mid-twentieth century, criticism emerged that the juvenile court’s expressed goal of rehabilitation was not realistic in many cases due to inadequate facilities, unqualified staff, and a lack of understanding on how to support children with a variety of complex needs.⁴¹ Cries to prioritize “public safety” led many juvenile courts to adopt a more punitive approach.⁴² As juvenile courts started to look more like adult criminal courts, advocates questioned whether these courts had sufficient “due process” to protect the children’s rights and interests.⁴³ As a result, various constitutional challenges made their way to the U.S. Supreme Court, establishing and strengthening due process protections for children in juvenile court.⁴⁴ State legislative action incorporated many of these protections into state juvenile codes, formalizing juvenile court procedures using criminal court protections as the baseline.⁴⁵

Around this same time, crime rates began to rise nationwide, including increases in violent crime and juvenile crime.⁴⁶ Although this rise in crime, which lasted until the mid-1990s, has not been fully explained,⁴⁷ this spike led

40. See AM. BAR ASS’N, *supra* note 18, at 6.

41. Melli, *supra* note 18, at 383; see FRANCIS A. ALLEN, *THE BORDERLAND OF CRIMINAL JUSTICE* 49–54 (1964) (reasons for failure to rehabilitate included inadequate facilities and personnel, as well as lack of knowledge on how to rehabilitate adolescents who had experienced trauma and had little societal or family support).

42. See Melli, *supra* note 18, at 383.

43. *Id.* at 384; Joel F. Handler, *The Juvenile Court and the Adversary System: Problems of Function and Form*, 1965 WIS. L. REV. 7, 8 (1965); see ANTHONY M. PLATT, *THE CHILD SAVERS: THE INVENTION OF DELINQUENCY* 135–36 (1969);

44. See *In re. Gault*, 387 U.S. 1 (1967) (applying criminal due process requirements to juvenile court cases; holding due process requires juveniles receive adequate notice of charges against them, opportunity to confront and cross-examine their accuser, court-appointed counsel, and warning of their right against self-incrimination); *In re Winship*, 397 U.S. 358 (1970) (requiring that state establish proof beyond a reasonable doubt); *Breed v. Jones*, 421 U.S. 519 (1975) (prohibiting double jeopardy).

45. See Melli, *supra* note 18, at 375.

46. ABRAMS ET AL., *supra* note 22, at 943.

47. Many theories have been advanced to explain this spike in crime and subsequent decline, including but not limited to changing population demographics, rapid urbanization, economic shifts, childhood lead exposure, and changes in policing tactics. See generally, e.g., JAMES ALAN FOX, NE. UNIV., *TRENDS IN JUVENILE VIOLENCE: A REPORT TO THE UNITED STATES ATTORNEY GENERAL ON CURRENT AND FUTURE RATES OF JUVENILE OFFENDING* (1996), <https://bjs.ojp.gov/content/pub/pdf/tjvfox.pdf> [https://perma.cc/36A5-JN8A] (attributing the explosion of crime during the 1960s and 1970s as the result of demographic shifts as baby boomers reached their late adolescence and early twenties, an age at which

to the adoption of a “tough on crime” approach by policymakers.⁴⁸ For example, during this time period, most states modified their laws to allow more youth to be tried as adults.⁴⁹ Additionally, sentences for youth crime grew increasingly severe, including a rise in the use of life without parole sentences for juvenile offenders.⁵⁰ The attitude of “old enough to do the crime, old enough do the time” became prevalent.⁵¹ This attitude was fueled by highly publicized accounts of violent crimes committed by youth.⁵² The rise in youth crime and the punitive response drove the juvenile arrest rate to peak in 1996, with nearly 2.7 million arrests of youth aged seventeen and under.⁵³

C. A Return to the “Rehabilitative Ideal”

In the past 25 years, the juvenile court pendulum has swung back towards rehabilitation. One factor is the decreasing rates of violent juvenile crime,⁵⁴ alongside revelations that the perceived spike in juvenile crime in the 1980s and 90s was overblown in many cases.⁵⁵ Another factor was the economic

aggressive tendencies are strongest); Edward L. Glaeser & Bruce Sacerdote, *Why Is There More Crime in Cities?* 107 J. POL. ECON. 225 (1999) (exploring possible factors in the higher crime rates of big cities when compared to small cities or rural areas); OLIVER ROEDER ET AL., BRENNAN CTR. FOR JUST. AT N.Y.U. SCH. OF L., WHAT CAUSED THE CRIME DECLINE? (2015), <https://www.brennancenter.org/our-work/research-reports/what-caused-crime-decline> [<https://perma.cc/CT4M-4JS7>] (exploring reasons for the dramatic decline in crime; highlighting the significant role of various social, economic, and environmental factors, as well as the role of data-driven policing); *Studies Show Lead Linked to Violent Crime Trends*, EJI (Jan. 9, 2013), <https://eji.org/news/studies-show-lead-linked-to-violent-crime-trends/> [<https://perma.cc/3PEU-CUBA>] (summarizing studies that link childhood lead exposure to violent crime).

48. ABRAMS ET AL., *supra* note 22, at 942–43.

49. Shannon F. McLatchey, *Juvenile Crime and Punishment: An Analysis of the “Get Tough” Approach*, 10 U. FLA. J. L. & PUB. POL’Y 401, 407 (1999); NAT’L JUV. JUST. NETWORK, POLICY PLATFORM: YOUTH IN THE ADULT SYSTEM (2013), <https://www.njjn.org/uploads/Youth-in-Adult-System-policy-platform-FINAL.pdf?phpMyAdmin=14730ab3483c51c94ca868bccffa06ef> [<https://perma.cc/BUC3-TWA5>].

50. See Priyanka Boghani, *They Were Sentenced as “Superpredators.” Who Were They Really?*, PBS: FRONTLINE (May 2, 2017), <https://www.pbs.org/wgbh/frontline/article/they-were-sentenced-as-superpredators-who-were-they-really/> [<https://perma.cc/KTP5-TZ79>].

51. Akiva M. Liberman et al., *Labeling Effects of First Juvenile Arrests: Secondary Deviance and Secondary Sanctioning*, 52 CRIMINOLOGY 345, 345–46.

52. See McLatchey, *supra* note 49, at 401–02. (highlighting several accounts of violent crimes committed by children and adolescents).

53. Nickolas Bagley, *National Juvenile Arrests, 1980–2019*, YOUTH TODAY (May 20, 2021), <https://youthtoday.org/2021/05/national-juvenile-arrests-1980-2019/> [<https://perma.cc/7BJG-2TDB>].

54. ABRAMS ET AL., *supra* note 22, at 942.

55. See JAMES C. HOWELL, *JUVENILE JUSTICE & YOUTH VIOLENCE* 49, 52–57 (1997) (noting that in 1994, adults accounted for 86% of clearances for violent crimes, and for 90% of clearances for murder).

recession that led state policymakers to question whether the costly incarceration of youth was a good use of dwindling state budgets.⁵⁶

Additionally, during the past few decades, a growing body of scientific research concerning adolescent brain development has demonstrated juveniles have “diminished culpability” based on three distinguishing characteristics of youth development.⁵⁷ First, youth lack the same maturity and sense of responsibility as adults.⁵⁸ As a result, they are more likely to engage in impetuous actions and make ill-considered decisions. Second, children are more vulnerable to negative influences and outside pressures than adults.⁵⁹ This vulnerability is heightened by their lack of control over their own environment. Finally, children’s character is still forming and their personality traits are less fixed, making them more likely to grow out of irresponsible behavior.⁶⁰ These scientific findings spurred decision-makers across all law-making bodies to confront the reality that children are different from adults in the criminal context. From the Supreme Court to state legislatures to Congress, there has been a resounding call to keep children out of adult court and develop a juvenile system that is developmentally appropriate for the youth it serves.⁶¹

D. Rise of “Raise the Age” and Other Juvenile Justice Reforms

The first wave of juvenile court reform that came with the resurgence of the “rehabilitative ideal” in the early twenty-first century was fixated on keeping children out of the adult system.⁶² One of the primary reform mechanisms utilized by states was raising the age at which juveniles could be treated as adults in the criminal court context.⁶³ In 2009, thirteen states set their upper age of juvenile court delinquency jurisdiction at fifteen or sixteen;

56. ABRAMS ET AL., *supra* note 22, at 942.

57. *Roper v. Simmons*, 543 U.S. 551, 569–71 (2005).

58. *Id.* at 569.

59. *Id.*

60. *Id.* at 570.

61. *See, e.g., id.* at 551–79; MACARTHUR FOUND., JUVENILE JUSTICE IN A DEVELOPMENTAL FRAMEWORK: A 2015 STATUS REPORT 20–21 (2015) (demonstrating state after state has adopted developmentally appropriate legislation); Juvenile Justice Reform Act of 2018, Pub. L. No. 115-385, 132 Stat. 5127 (demonstrating bipartisan support for Juvenile Justice Reform Act of 2018, which requires states receiving federal funding to submit plans to improve juvenile justice by “taking into account scientific knowledge regarding adolescent development and behavior.”).

62. *See* NAT’L GOVERNORS ASS’N, AGE BOUNDARIES IN JUVENILE JUSTICE SYSTEMS (2021), https://www.nga.org/wp-content/uploads/2021/08/Raise-the-Age-Brief_5Aug2021.pdf [<https://perma.cc/NE4J-Y7V2>].

63. *See* NAT’L JUV. JUST. NETWORK, *supra* note 49, at 2; NAT’L GOVERNORS ASS’N, *supra* note 62, at 2.

all children above that age were processed through the adult criminal court.⁶⁴ By 2019, only five states had not raised their upper age of juvenile court delinquency jurisdiction to seventeen in line with national norms.⁶⁵ Currently, all but three states (Georgia, Wisconsin, Texas) have raised the maximum age of juvenile court jurisdiction to seventeen for most offenses.⁶⁶ Some states have gone even further, expanding juvenile court jurisdiction in some circumstances to young adults who are eighteen based on scientific research that shows brain development continues up to age twenty-six.⁶⁷

Alongside the success of the “Raise the Maximum Age” movement came the concurrent recognition that although it was better for children to be processed in juvenile court, for many children, the best option was no court intervention at all.⁶⁸ Research exposed that juvenile court intervention may actually harm youth and undermine public safety.⁶⁹ Studies revealed that even brief involvement with the formal juvenile court system results in negative short- and longer-term psychological, educational, and employment consequences that outweigh any potential benefit received from that involvement.⁷⁰

Additionally, even though juvenile dispositions are supposed to be focused on rehabilitation, the requirements of juvenile court orders, including probation, can be expensive and burdensome for juveniles and their families.⁷¹ Since children don’t often have control over their circumstances, they are frequently wrongfully punished for non-compliance with probation conditions which can then lead to stricter sanctions and a cycle of re-

64. *Upper Age of Juvenile Court Delinquency Jurisdiction*, OFF. OF JUV. JUST. & DELINQ. PREVENTION, https://ojjdp.ojp.gov/statistical-briefing-book/structure_process/faqs/qa/04101 [<https://perma.cc/GP72-EQBK>] (select “2009” from the “Available versions” dropdown menu).

65. *Id.* (select “2019” from the “Available versions” dropdown menu).

66. Chuck Carroll, *Raise the Age: Where Legislation Stands in the Final Three States*, THE IMPRINT: YOUTH SERVS. INSIDER (Feb. 24, 2017, 7:00 PM), <https://imprintnews.org/justice/raise-age-where-legislation-stands-final-three-states/52186> [<https://perma.cc/Q7AY-83NE>].

67. Katie Dodds, *Why All States Should Embrace Vermont’s Raise the Age Initiative*, COAL. FOR JUV. JUST. (July 22, 2020), <https://www.juvjustice.org/blog/1174> [<https://perma.cc/QS4Q-9E7S>]; NAT’L GOVERNORS ASS’N, *supra* note 62, at 2.

68. See NAT’L GOVERNORS ASS’N, *supra* note 62, at 3.

69. See generally Richard Mendel, *Why Youth Incarceration Fails: An Updated Review of the Evidence*, THE SENTENCING PROJECT (Mar. 1, 2023) <https://www.sentencingproject.org/reports/why-youth-incarceration-fails-an-updated-review-of-the-evidence/> [<https://perma.cc/6HFU-WPA2>].

70. See ROBERT L. LISTENBEE, JR. ET AL., REPORT OF THE ATTORNEY GENERAL’S NATIONAL TASK FORCE ON CHILDREN EXPOSED TO VIOLENCE 171, 174–76 (2012).

71. See Michelle S. Phelps, *Ending Mass Probation: Sentencing, Supervision, and Revocation*, FUTURE OF CHILD., Spring 2018, at 125, 126.

incarceration.⁷² Further, children often lack adequate counsel in juvenile court, meaning they aren't sufficiently protected from excessive or inappropriate charges or probation conditions.⁷³ Ultimately, juvenile court intervention is associated with an increased risk of future juvenile and criminal legal system involvement.⁷⁴ Instead of effectively addressing juvenile crime, juvenile court referral may actually be fueling it.

Certain groups of children are also disproportionately referred to the juvenile system, increasing their exposure to the associated harms. For youth of color, especially Black and Indigenous youth, data reveals their overrepresentation at every stage in the juvenile court process.⁷⁵ The research shows that race effects are greatest at earlier stages in the process, including arrest, referral to court, and placement in secure detention.⁷⁶ Further, youth of color tend to remain in the system longer than White youth.⁷⁷ These racial disparities are not explained by higher levels of offending, but rather more likely due to “subjective decision making . . . , intentional or unintentional

72. In one study, youth who were put on probation were 12 times more likely to be arrested as adults than youth who were not put on probation. JOHN A. TUELL ET AL., TRANSLATING THE SCIENCE OF ADOLESCENT DEVELOPMENT TO SUSTAINABLE BEST PRACTICE 8 (2017), https://rfknrcjj.org/wp-content/uploads/2017/09/Developmental_Ref_orm_in_Juvenile_Justice_RFKNRCJJ.pdf [<https://perma.cc/4AFL-2L8F>] (citing Uberto Gatti et al., *Tatrogenic Effect of Juvenile Justice*, 50 J. CHILD PSYCH. & PSYCHIATRY 991 (2009)).

73. See JESSICA FEIERMAN ET AL., JUV. L. CTR., THE PRICE OF JUSTICE: THE HIGH COST OF “FREE” COUNSEL FOR YOUTH IN THE JUVENILE JUSTICE SYSTEM 4 (2018), <https://debtors-prison.jlc.org/documents/JLC-Debtors-Price-of-Justice.pdf> [<https://perma.cc/SM8T-2NQR>].

74. Elizabeth S. Barnert et al., *Setting a Minimum Age for Juvenile Justice Jurisdiction in California*, 13 INT'L J. PRISONER HEALTH 49, 52 (2017); *JJIE Hub: Key Issues – Community-Based Alternatives*, JUV. JUST. INFO. EXCH., <https://jjie.org/jjie-hub/community-based-alternatives/key-issues/> [<https://perma.cc/YE26-3H43>] (citing Anthony Petrosino et al., *Formal System Processing of Juveniles: Effects on Delinquency*, in CAMPBELL SYSTEMATIC REVIEWS 2010:1, at 38 (2010)). One finding in this report required further study: three studies with participants who had committed first-time offenses reported positive results for system processing. See also NAT'L JUV. JUST. NETWORK, FACT SHEET: EMERGING FINDINGS AND POLICY IMPLICATIONS FROM THE PATHWAYS TO DESISTANCE STUDY 2 (2012), https://www.njjn.org/uploads/digital-library/Pathways-to-Desistance-Findings-and-Implications-9-11-12_FINAL.pdf?phpMyAdmin=14730ab3483c51c94ca868bccffa06ef [<https://perma.cc/7EFR-Q9YV>]; WASH. STATE BD. OF HEALTH, HEALTH IMPACT REVIEW OF S-6720.1 CONCERNING THE JURISDICTION OF JUVENILE COURT (2021 LEGISLATIVE SESSION) 7 (2020), <https://sbob.wa.gov/sites/default/files/2022-01/HIR-2020-15-S-6720.1.pdf> [<https://perma.cc/N3DK-E7LQ>].

75. See NAT'L JUV. JUST. NETWORK, NJJN POLICY PLATFORM: RAISE THE MINIMUM AGE FOR TRYING CHILDREN IN JUVENILE COURT 11–12 (2020), https://www.njjn.org/uploads/digital-library/updated%20March%2021%20NJJN%20Policy%20Platform_RaiseTheMinimumAge.pdf [<https://perma.cc/7CN6-YRXN>].

76. NAT'L RSCH. COUNCIL OF THE NAT'L ACADS., REFORMING JUVENILE JUSTICE: A DEVELOPMENTAL APPROACH 3 (Richard J. Bonnie et al. eds., 2013).

77. *Id.*; ABRAMS ET AL., *supra* note 22, at 957.

profiling, biased policies, economic disadvantage, and inadequate community resources.⁷⁸

Children and teens with disabilities are also overrepresented in juvenile court referrals and detainments, making up at least two-thirds of all youth involved in the juvenile legal system.⁷⁹ There is also evidence that children who identify as LGBT, questioning or gender nonconforming are confined in juvenile detention facilities at three times the rate as the general youth population.⁸⁰ Once confined, these youth are also more at risk of experiencing sexual assault.⁸¹

All of these factors led to a growing public sentiment that children need protection rather than an ineffective and potentially harmful juvenile court response.⁸² This is especially true for young children. As explored in Part IV, the juvenile court system has an established history of treating young children differently. This history laid the foundation for advocates to advance the next chapter of reform, pushing states to set or raise the minimum age at which children can be referred to juvenile court.

III. THE EVOLUTION OF JUVENILE COURT IN SOUTH CAROLINA

The evolution of South Carolina's juvenile court system has largely followed national trends. However, it has also been shaped by unique legislative and judicial factors, including several class-action lawsuits.⁸³ This state-specific context is important to understand when considering what future juvenile justice reforms may be appropriate and feasible in South Carolina.

A. *Origins of Juvenile Court in South Carolina*

Like many states, the early beginnings of South Carolina's juvenile system can be traced to the nineteenth century, with the establishment of

78. Barry Krisberg & Angela M. Wolf, *Juvenile Offending*, in *JUVENILE DELINQUENCY: PREVENTION, ASSESSMENT, AND INTERVENTION* 67, 80 (Goldstein & Redding eds. 2005); ABRAMS ET AL., *supra* note 22, at 957–58.

79. Matt Krupnick, *Disabled Students at Higher Risk for Arrests, Dropping Out and Being Unready for Adulthood*, JUV. JUST. INFO. EXCH. (Mar. 8, 2023), <https://jjie.org/2023/03/08/disabled-students-at-higher-risks-for-arrests-dropping-out-and-being-unready-for-adulthood/> [<https://perma.cc/5XMC-U88E>].

80. SHANNON WILBER, *LESBIAN, GAY, BISEXUAL AND TRANSGENDER YOUTH IN THE JUVENILE JUSTICE SYSTEM* 4 (2015), https://www.nclrights.org/wp-content/uploads/2015/09/A_ECF_LGBTinJJS_FINAL2.pdf [<https://perma.cc/74JY-TLQA>].

81. *Id.*

82. See Elizabeth S. Scott & Laurence Steinberg, *Adolescent Development and the Regulation of Youth Crime*, *FUTURE OF CHILD.*, Fall 2008, at 15, 16 (“[O]pinion polls show that public anger has abated and that more paternalistic attitudes toward offenders have resurfaced.”).

83. See Trotti, *supra* note 20.

separate confinement facilities for youth accused of criminal offenses.⁸⁴ In 1893, South Carolina designated a wing of the state penitentiary as a “reformatory” for boys accused of delinquency.⁸⁵ In 1906, the South Carolina legislature established a segregated industrial school system for delinquent boys, which led to the building of a “Reformatory for Negro Boys” and an “Industrial School for White Boys.”⁸⁶ This was followed by the establishment of an “Industrial School for (white) Girls” a little over a decade later.⁸⁷ Eventually, in 1946, a Board of State Industrial Schools was created to oversee these facilities.⁸⁸

South Carolina’s recognition that children accused of criminal activity should be treated differently and detained separately from adults followed the overarching national trend of the time. However, in South Carolina, most funding that went towards serving these youth was used for physical improvements to the facilities where children were detained.⁸⁹ Therefore, the institutions were largely punitive with little focus on rehabilitative services or training for staff.⁹⁰ There was no unified statewide court system to process these youth and no state-level agency that held the responsibility and resources to ensure appropriate services were provided.⁹¹ Instead, youth accused of crimes were referred to and processed through individual county Family Courts, with little consistency or oversight.⁹²

B. First Wave of Rehabilitative Reform

It was not until the late 1960s that an emphasis on treatment and rehabilitation of youth emerged in South Carolina.⁹³ During this time, in response to leadership changes, a class-action lawsuit, and a federal court order, South Carolina’s juvenile system was desegregated and began to dedicate more funding for trained staff and improvements to academic and vocational instruction.⁹⁴ A new focus on community-based treatment and rehabilitation led to a drop in the number of youth incarcerated in “reformatories.”⁹⁵

84. *See id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *See id.*

92. *See id.*

93. *See id.*

94. *Id.*

95. *Id.*

Reform efforts during this time included the deinstitutionalization of youth charged with status offenses such as truancy and running away.⁹⁶ In 1976, legislation expanded the network of individual county Family Courts that processed youth accused of crimes into a unified state-operated Family Court system.⁹⁷ Two years later, in 1978, the administration of juvenile intake, probation, and detention/release screening was consolidated under one state agency.⁹⁸ In 1981, South Carolina passed legislation that prohibited the commitment of status offenders to secure facilities, except for evaluation, and increased the minimum age for institutionalization of all other offenders from age ten to twelve.⁹⁹ Similarly, the new law required a court order before an eleven-year-old or twelve-year-old could be detained in a local jail and prohibited such confinement for any child under the age of eleven.¹⁰⁰

C. *Adultification and Juvenile Justice Crises in South Carolina*

Despite these reform efforts, South Carolina's juvenile system was racked with challenges by 1990.¹⁰¹ Like most states, juvenile crime rates were on the rise, with referrals for offenses classified as violent and serious peaking in 1994–1995.¹⁰² Although South Carolina already treated all youth age seventeen and older as adults for criminal processing, regardless of the youth's individual circumstances, the fear of the “juvenile super predator” and the perceived need for a punitive response led South Carolina to enlarge the pool of youth who could be sent to adult criminal court.¹⁰³ Prior to 1996, South Carolina law permitted only one form of juvenile transfer to adult court, which gave a judge discretion to send a child from family court to adult court if certain established criteria were met.¹⁰⁴ In 1996, the South Carolina General

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. GUPTA-KAGAN ET AL., *supra* note 20, at 29; Alexander S. *ex rel.* Bowers v. Boyd, 876 F. Supp. 773, 782–83 (D.S.C. 1995).

102. S.C. DEP'T OF JUV. JUST., ANNUAL STATISTIC REPORT 2 (2015), <https://djj.sc.gov/sites/djj/files/Documents/2015-Annual-Statistical-Report.pdf> [https://perma.cc/4JNU-MWM7] (citing FY 1994/1995 as peak year for referrals to DJJ Family Court for offenses classified as violent and serious).

103. *See generally* Boghani, *supra* note 50.

104. HOWARD N. SNYDER ET AL., OFF. OF JUV. JUST. & DELINQ. PREVENTION, JUVENILE TRANSFERS TO CRIMINAL COURT IN THE 1990'S: LESSONS LEARNED FROM FOUR STUDIES 9–10 (2000), <https://www.ojp.gov/pdffiles1/ojdp/181301.pdf> [https://perma.cc/G3BH-DKYQ] (criteria included if youth was charged with murder or criminal sexual conduct; if youth age 16+ was charged with a delinquency offense; if youth age 15 was charged with drug trafficking or carrying certain weapons on school property; or a youth age 14–15 with two prior unrelated

Assembly passed legislation mandating that any child aged fourteen years or older be transferred to adult court if the child was charged with a serious offense and had two prior adjudications or convictions for serious offenses.¹⁰⁵

At the same time, due to underfunding and poor management, juvenile jails were overcrowded and understaffed.¹⁰⁶ There were reports of abysmal conditions, such as food containing “cockroaches and other foreign matter” and guards using tear gas to discipline children.¹⁰⁷ A class action lawsuit, *Alexander S. v. Boyd*, 876 F. Supp. 773 (D.S.C. 1995), was brought to challenge these conditions.¹⁰⁸ In 1995, after five years of litigation, a federal judge found that the state had violated its constitutional duty to provide “minimally adequate level of programming . . . in order to provide juveniles with a reasonable opportunity to accomplish the purpose of their confinement, to protect the safety of the juveniles and the staff, and to ensure the safety of the community once the juveniles are ultimately released.”¹⁰⁹

Alexander S. was a landmark decision that established a constitutional minimum that the South Carolina Division of Juvenile Justice¹¹⁰ (SCDJJ) must follow in the provision of services and treatment to juveniles.¹¹¹ However, the court found its authority to issue sweeping remedies was

adjudications for enumerated person or property offenses was charged with a third or subsequent such offense).

105. Bill 3535, S.C. Gen. Assembly, 111th Session, 1995–1996, https://www.scstateho.gov/sess111_1995-1996/bills/3535.htm (“(10) If a child fourteen years of age or older is charged with an offense which, if committed by an adult, provides for a term of imprisonment of ten years or more and the child previously has been adjudicated delinquent in family court or convicted in circuit court for two prior offenses which, if committed by an adult, provide for a term of imprisonment of ten years or more, the court acting as committing magistrate shall bind over the child for proper criminal proceedings to a court which would have trial jurisdiction of the offense if committed by an adult. For the purpose of this item, an adjudication or conviction is considered a second adjudication or conviction only if the date of the commission of the second offense occurred subsequent to the imposition of the sentence for the first offense.”).

106. See *Alexander S.*, 876 F. Supp. at 783–98 (findings of fact).

107. *Id.* at 785–88.

108. *Id.* at 777.

109. *Id.* at 790.

110. In 1993, the South Carolina Department of Juvenile Justice (SCDJJ) was established as a cabinet-level agency, with a Director appointed by the Governor with the advice and consent of the Senate. Trotti, *supra* note 20. This structure persists today and states a mission “to protect the public and reclaim juveniles through prevention, community services, education, and rehabilitative services in the least restricted environment.” *Division of Community Services: Family Preservation Community Services*, S.C. DEP’T OF JUV. JUST. (Sept. 6, 2016), <https://djj.sc.gov/sites/djj/files/Documents/Family%20Preservation%20Community%20Services%20Fact%20Sheet%20Revised%2009-6-2016.pdf> [<https://perma.cc/P4D3-YPPQ>]. The SCDJJ has multiple divisions responsible for a range of functions including educational services, community service, planning and programs, and rehabilitative services. See S.C. DEPT. OF JUV. JUST., <https://djj.sc.gov> [<https://perma.cc/5ZBG-P4DP>]; see also S.C. CODE ANN. § 1-30-60 (2005) (establishing the SCDJJ).

111. See *Alexander S.*, 876 F. Supp. at 779.

limited.¹¹² While the opinion encouraged SCDJJ to consider adopting certain standards and practices, it ultimately found that mandating those actions was outside the court's jurisdiction and the task of building a model juvenile justice system was left to "the state of South Carolina, through its duly elected representatives."¹¹³ Still, *Alexander S.* had an overall positive impact, including a significant reduction in the number of children incarcerated at SCDJJ's biggest facility, some improved programs and services, and a prohibition on the use of tear gas at SCDJJ except in extraordinary circumstances.¹¹⁴

D. Modern Era of Reform in South Carolina

The past twenty years represent the modern era of juvenile justice reform in South Carolina. Like most of the country, South Carolina has seen a continual overall decline in delinquency referrals to family court since the mid-1990s peak.¹¹⁵ By 2019, "only about 9% of youth cases involved violent or serious offenses."¹¹⁶ Further, sixty percent of all youth cases heard in family court resulted in probation only.¹¹⁷ Despite these improvements, the path forward has not been smooth. Specifically, SCDJJ has experienced a myriad of challenges, including violent riots in its facilities, a South Carolina Legislative Audit Council report that criticized the agency for failing to adequately monitor paroled youths, and a civil rights investigation by the U.S. Department of Justice's Civil Rights Division focused on how the agency evaluates and incarcerates youth with disabilities.¹¹⁸

The disarray of SCDJJ, the long-term decline in juvenile crime, and the growing national recognition of the ineffectiveness and potentially harmful impacts of punitive responses on youth helped lay the foundation for the most recent major reform in South Carolina. In 2016, South Carolina joined the growing number of states that passed legislation to increase the maximum age of juvenile court jurisdiction, with the intention of keeping more children out of the adult criminal system and affording them an additional year of

112. *Id.*

113. *Id.*

114. *Id.* at 785–86; see also S.C. DEP'T OF JUV. JUST., *supra* note 102, at 2 (attributing steady decline in referrals and detention population to the conclusion of *Alexander S.* litigation).

115. See S.C. DEP'T OF JUV. JUST., *supra* note 11, at 1.

116. *Id.*

117. *Id.*

118. Michael Majchrowicz, *SC's Raise the Age Law Is About to Go into Effect. How It Will Be Implemented Remains Vague*, THE POST & COURIER (June 25, 2019), https://www.postandcourier.com/news/scs-raise-the-age-law-is-about-to-go-into-effect-how-it-will-be/article_69335050-8bb0-11e9-b95a-ffa4649741db.html [<https://perma.cc/F3FX-XTPE>].

eligibility for youth-focused rehabilitative programming.¹¹⁹ Among other changes, South Carolina’s “Raise the Maximum Age” law expanded the maximum age a child could be processed through family court from age sixteen to seventeen with limited exceptions for the most serious crimes.¹²⁰ It also extended the maximum age that a child could remain under the family court’s jurisdiction from age twenty to twenty-one.¹²¹

The legislation, which was pushed by a coalition of state legislators, local advocates, and national youth justice organizations, passed with overwhelming bipartisan support in 2016.¹²² However, the legislation did not go into effect until 2019 and was contingent on the legislature committing appropriate funds to SCDJJ for implementation. Although South Carolina’s “Raise the Maximum Age” legislation represented a significant step towards reform, many advocates expressed concern about the lack of detail in how the law would be implemented.¹²³ Further, the legislation, which would add more children to the state’s juvenile system, did not address how the system would be improved to appropriately serve those children.¹²⁴ This was especially concerning given the number of violent and abusive incidents that had taken place in SCDJJ facilities leading up to the law’s passage.¹²⁵ Ultimately, appropriate funding, which the legislature made implementation contingent on, came down to the wire, with lawmakers inserting a temporary law into the state budget in 2019 that allowed for excess funds to be spent on Raise-the-Age-related efforts.¹²⁶

Given the lack of specifics on implementation of “Raise the Maximum Age” as the law went into effect, policymakers, SCDJJ staff, and advocates recognized the need to ensure appropriate funding and additional guidance for

119. See Raise the Age Act, S. 916, 121st Gen. Assemb., Reg. Sess. (S.C. 2016); see also Majchrowicz, *supra* note 118.

120. See S.C. CODE ANN. § 63-19-20(1) (Supp. 2023).

121. § 63-3-510(B).

122. See Michael Fitzgerald & Chuck Carroll, *Advocates Tout Data Showing Raise the Age Laws Haven’t Overwhelmed States’ Juvenile Facilities*, THE IMPRINT (June 29, 2021, 7:18 PM), <https://imprintnews.org/justice/juvenile-justice-2/advocates-tout-data-showing-raise-the-age-laws-havent-overwhelmed-states-juvenile-facilities/56595> [<https://perma.cc/KVE2-V85U>]; Brian Evans, *Black History Month: Leaders of the “Raise the Age” Movement*, CAMPAIGN FOR YOUTH JUST. (Feb. 8, 2020), <https://www.campaignforyouthjustice.org/news/blog/item/black-history-month-leaders-of-the-raise-the-age-movement> [<https://perma.cc/4NMA-NUCR>]; Mary Mistrett, *15 Years of Impact: How We Won*, CAMPAIGN FOR YOUTH JUST., <https://www.campaignforyouthjustice.org/15-years-of-impact-how-we-won> [<https://perma.cc/SM8Q-9PPE>].

123. See Eli Hager, *In Some States, Raising the Age for Adult Court Is the Easy Part*, THE MARSHALL PROJECT (Sept. 27, 2016), <https://www.themarshallproject.org/2016/09/27/in-some-states-raising-the-age-for-adult-court-is-the-easy-part> [<https://perma.cc/HTJ7-TPGH>]; Majchrowicz, *supra* note 118.

124. See Hager, *supra* note 123; Majchrowicz, *supra* note 118.

125. See Hager, *supra* note 123; Majchrowicz, *supra* note 118.

126. Majchrowicz, *supra* note 118.

SCDJJ moving forward. In June 2019, a Senate Select Committee on Raise the Age was established to look at the impact of implementation and make recommendations for further reform.¹²⁷ The Select Committee conducted various activities, including but not limited to, regular meetings, SCDJJ and community resource site-visits, research and review of pressing issues, and consultation with stakeholders.¹²⁸ Their work culminated in a report of recommendations.¹²⁹ The Committee's recommendations were guided by the principle that South Carolina's "juvenile justice system should follow a rehabilitative model, and children should only be prosecuted, detained, or committed to SCDJJ custody when that is the least restrictive option to achieve those rehabilitative goals."¹³⁰ These comprehensive recommendations, which stressed the need for improvements to juvenile diversion programs, probation and commitment, procedure, and education, were codified in a draft bill.¹³¹ Unfortunately, the bill has yet to pass.¹³²

The Select Committee's recommendations represent important and needed improvements to South Carolina's juvenile system in the wake of raising the maximum age of juvenile court jurisdiction. However, they do not address the unique needs and vulnerabilities of young children in the juvenile system. Although some recommendations, such as increased diversion opportunities and limits on school-based referrals, would benefit young children, there were no recommendations specifically tailored to keeping young children out of court.¹³³ The report did not address the fact that, under South Carolina's current legislative scheme, young children of any age can still be referred to court for delinquency or status offenses.¹³⁴

This oversight is important to acknowledge and remedy given that thousands of young children receive delinquency referrals to South Carolina's

127. See S.C. S. SELECT COMM. ON RAISE THE AGE, SOUTH CAROLINA SENATE SELECT COMMITTEE ON RAISE THE AGE REPORT TO THE SENATE 4-5 (Sept. 1, 2020), <https://www.scstatehouse.gov/CommitteeInfo/RaiseTheAgeSelectCommittee/S.C.%20Senate%20Select%20Committee%20on%20Raise%20the%20Age%20Report%20to%20the%20Senate.pdf> [<https://perma.cc/KAR4-ZEKH>].

128. *Id.*

129. *Id.*

130. *Id.* at 12.

131. S. 1018, 123rd Gen. Assemb., Reg. Sess. (S.C. 2020), https://www.scstatehouse.gov/sess123_2019-2020/bills/1018.htm [<https://perma.cc/D7CX-JG82>].

132. The bill has been introduced in three separate legislative sessions; however, it has yet to receive a vote. See *id.* (referred to Subcommittee; no further action taken); S. 53, 124th Gen. Assemb., Reg. Sess. (S.C. 2021), https://www.scstatehouse.gov/sess124_2021-2022/bills/53.htm [<https://perma.cc/ZRP4-W3V3>] (received favorable Committee report; no further action taken); S. 278, 125th Gen. Assemb., Reg. Sess. (S.C. 2023), https://www.scstatehouse.gov/sess125_2023-2024/bills/278.htm [<https://perma.cc/R9QV-EWJ5>] (referred to Committee; no further action taken).

133. See generally S.C. S. SELECT COMM. ON RAISE THE AGE, *supra* note 127.

134. See generally *id.*

family court each year.¹³⁵ Children age twelve and under represent around 11% of South Carolina's delinquency referrals.¹³⁶ The high rates of referral for this group of children in South Carolina is concerning given the ineffectiveness and potential harm of juvenile court intervention for young children. Many states have addressed this problem by revising their juvenile codes to set a minimum age at which a child can be subjected to juvenile court processing.¹³⁷ As part of its continued efforts to reform, South Carolina has an opportunity to join the growing number of states in protecting these young children by adopting a statutory minimum age of family court jurisdiction for delinquency and status offenses.

IV. RAISE THE MINIMUM AGE NATIONALLY

Before looking at the possibility of setting a minimum age of juvenile court jurisdiction in South Carolina, it is important to first understand the rise of "Raise the Minimum Age" efforts more broadly, including the history of different treatment for young children in juvenile court, the rationales used to support setting or raising a state's minimum age of juvenile court jurisdiction, and the growing trend of states adopting "Raise the Minimum Age" legislation.

A. History of Different Treatment for Young Children in Juvenile Court

From the criminal legal system's earliest days, young children have typically received different treatment than older children and adolescents in many contexts. Common law recognized that court intervention was not appropriate for all children under age seven and most children under age fourteen.¹³⁸ Even once the juvenile court was established specifically to handle youthful offenders, legal mechanisms developed to provide different treatment or consideration in the cases of young children. For example, some states allow a juvenile defendant in delinquency court to raise an infancy defense asserting that the juvenile should not be subject to criminal prosecution because they are too young or immature to form criminal intent.¹³⁹

135. See S.C. DEP'T OF JUV. JUST., *supra* note 11, at 9.

136. *Id.*

137. See NAT'L JUV. JUST. NETWORK, *supra* note 75, at 3.

138. See BLACKSTONE, *supra* note 29, at 14; NAT'L JUV. JUST. NETWORK, *supra* note 75, at 9.

139. *Intoxication, Ignorance, and Mistake*, PRESSBOOKS: ALASKA CRIM. L. – 2022 ED., <https://pressbooks.pub/alaskacriminallaw2022/chapter/infancy-intoxication-ignorance-and-mistake/> [<https://perma.cc/82C5-76MP>]; Where infancy defense is recognized, courts weigh various

Similarly, most states have some legal mechanism allowing a young defendant to raise an incompetency defense in delinquency proceedings.¹⁴⁰ This stems from the recognition that due process requires a defendant have sufficient present ability to consult with their lawyer with a reasonable degree of rational understanding of the proceedings against them.¹⁴¹ Behavioral research indicates children under age 15 are considerably less able than older children to understand the meaning of trial, assist counsel, or make decisions in their own defense.¹⁴² Thus, most states allow juvenile competency to be challenged based on mental illness, disability, or developmental immaturity.¹⁴³ Some courts have found particularly young children incompetent even when they do not have a mental disability.¹⁴⁴

In South Carolina, family court judges can order competency evaluations and hold a competency hearing whenever they have reason to believe a juvenile is unable to understand the nature of the delinquency proceedings against him or to assist in his defense due to lack of mental capacity.¹⁴⁵ At least one study suggests a strong correlation between age and the likelihood of being deemed incompetent to stand trial in South Carolina.¹⁴⁶ In 1995, researchers looked at 136 juveniles between the ages of nine and sixteen who were referred for competency assessments in South Carolina.¹⁴⁷ They found that none of the nine- and ten-year-olds were deemed competent; however,

factors to determine whether the juvenile knew the wrongfulness of their actions, including looking at the child's age and maturity. See Jacquelyn Greene, *Including Young Children in Delinquency Jurisdiction: Issues of Infancy and Capacity*, in JUVENILE LAW BULLETIN, at 3 (U.N.C. Juv. L. Bulletin Ser. No. 2021/01, 2021).

140. See Abrams ET AL., *supra* note 22, at 951–52.

141. *Dusky v. United States*, 362 U.S. 402, 402 (1960).

142. See Thomas Grisso et al., *Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants*, 27 L. & HUM. BEHAV. 333, 356 (2003). This 2003 study found that juveniles under 16 are significantly more likely than older adolescents and young adults to be impaired in ways that compromise their ability to serve as competent defendants in a criminal proceeding and approximately one-third of 11- to 13-year-olds and one-fifth of 14- to 15-year-olds were “as impaired . . . as are seriously mentally ill adults who would likely be considered incompetent to stand trial by clinicians who perform evaluations for courts.” *Id.* See also NAT'L RSCH. COUNCIL OF THE NAT'L ACADS., *supra* note 76, at 121 (finding notable developmental gaps between youth aged 16- to 18-years-old and those 14-years-old and younger, which could impact their ability to understand trial matters).

143. See, e.g., *In re Charles B.*, 978 P.2d 659, 660 (Ariz. Ct. App. 1998) (analyzing competency challenge where 11-year-old defendant was charged with aggravated assault).

144. See *id.* at 661–62.

145. S.C. CODE ANN. § 44-23-410 (2018); see also *State v. Singleton*, 322 S.C. 480, 483–84, 472 S.E.2d 640, 642 (Ct. App. 1996) (explaining that ordering of competency examination is within trial judge's discretion).

146. Vance L. Cowden & Geoffrey R. McKee, *Competency to Stand Trial in Juvenile Delinquency Proceedings—Cognitive Maturity and the Attorney-Client Relationship*, 33 UNIV. LOUISVILLE J. FAM. L. 629, 652 (1995).

147. *Id.* at 648–50.

18.2% of eleven-year-olds were deemed competent and 27.3% of twelve-year-olds were deemed competent.¹⁴⁸ The researchers concluded that this association between age and competency could be a function of cognitive maturity.¹⁴⁹

Age is also an important factor in determining the level of Constitutional protection a child receives when undergoing a search by a government official or facing a custodial interrogation.¹⁵⁰ Some states have gone beyond the federal constitutional standard, mandating heightened protection during custodial interrogations for younger juveniles.¹⁵¹ For example, in Washington, where the juvenile is under twelve, only the child's parent or guardian can waive the child's right against self-incrimination or their right to counsel.¹⁵² The U.S. Justice Department backs this approach¹⁵³ and research that shows young children are especially prone to giving false confessions.¹⁵⁴

Some states that have no minimum age or a low minimum age of juvenile court jurisdiction still create carve-outs for young children when it comes to detention or commitment in a secure juvenile facility.¹⁵⁵ For example, in South Carolina, children who are ten or younger cannot be incarcerated in a jail or detention facility for any reason.¹⁵⁶ Children ages eleven and twelve who are taken into custody for committing a criminal offense or who violate

148. *Id.* at 652.

149. *Id.*

150. Courts have considered a child's age when determining whether a search of a student by a public-school official meets the reasonableness standard under the Fourth Amendment. *E.g.*, *New Jersey v. T.L.O.*, 469 U.S. 325, 342 (1985) (considering age as a factor in determining whether scope of a public-school official's search of a student was constitutional). Similarly, in a court's analysis of whether Fifth and Sixth Amendment protections apply, age is a factor in determining if a child was "in custody" or if a child voluntarily, knowingly, and intelligently waived their privilege against compulsory self-incrimination and right to counsel. *See J.D.B. v. North Carolina*, 564 U.S. 261, 281 (2011) (holding juvenile's age relevant to whether juvenile is "in custody" for *Miranda* purposes); *Fare v. Michael C.*, 442 U.S. 707 (1979) (holding totality-of-the-circumstances approach, including consideration of age, is adequate to determine whether juvenile has voluntarily, knowingly, and intelligently waived privilege against compulsory self-incrimination and right to counsel).

151. *See, e.g.*, WASH. REV. CODE ANN. § 13.40.140(11) (West 2024) (providing that for juveniles under twelve, waiver of *Miranda* rights may be made only by parent or guardian); *State v. Presha*, 163 N.J. 304, 315 (2000) (finding totality-of-the-circumstances test insufficient for juveniles under age fourteen).

152. WASH. REV. CODE ANN. § 13.40.140(11) (West 2024).

153. *See* JUDITH B. JONES, OFF. OF JUV. JUST. & DELINQ. PREVENTION, U.S. DEP'T OF JUST., NCJ 204063, ACCESS TO COUNSEL 2 (2004) https://isc.idaho.gov/juvenile/pdfs/OJJDP_Juvenile_Justice_Bulletin_Access_to_Counsel.pdf [<https://perma.cc/JQP3-Z4V8>] (affirming that many younger juveniles "do not know the meaning of the word 'waive' or understand its consequences.").

154. Allison D. Redlich & Gail S. Goodman, *Taking Responsibility for an Act Not Committed: The Influence of Age and Suggestibility*, 27 LAW & HUM. BEHAV. 141, 141 (2003).

155. *See* NAT'L JUV. JUST. NETWORK, *supra* note 4.

156. S.C. CODE ANN. § 63-19-820(F) (2010).

probation conditions may only be incarcerated in a jail or detention facility by family court order.¹⁵⁷

These attempts to provide different treatment and protection to young children in the juvenile system recognize the ineffectiveness and inappropriateness of juvenile court intervention at younger ages. However, they do little to mitigate harm since they are all protections that can only be raised post-arrest or referral. While they may have some chilling effect, they do not adequately keep young children out of the court system altogether or prevent the harm of juvenile arrest or referral.¹⁵⁸

B. Keeping Young Children Out of Court by Setting a Minimum Age of Juvenile Court Jurisdiction

The harm of juvenile court coupled with the inadequacy of current protections for young children have caused many to push for reforms that prohibit the use of juvenile court intervention for children under a particular age.¹⁵⁹ These reforms often garner bipartisan support.¹⁶⁰ One of the most effective reform tools for keeping young children out of court has been setting a statutory minimum age of juvenile court jurisdiction, below which a child cannot be referred to court.

Until recently, the majority of states had no minimum age for prosecuting children in the juvenile court system.¹⁶¹ In this respect, the United States is an outlier internationally, with most countries recognizing fourteen as the minimum age of criminal responsibility.¹⁶² The lack of minimum age has allowed young children to be arrested and referred to juvenile court in droves.

157. *Id.*

158. See Joy Radice, *The Juvenile Record Myth*, 106 GEO. L.J. 365, 365, 386–87 (2018); ELIZABETH GLADDEN KEHOE & KIM BROOKS TANDY, NAT'L JUV. DEF. CTR. & CENT. JUV. DEF. CTR., INDIANA: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS 35–36, 45–46 (2006), <http://njdc.info/wp-content/uploads/2013/11/Final-Indiana-Assessment.pdf> [<https://perma.cc/VT6P-V55L>].

159. NAT'L CONF. OF STATE LEGISLATURES, TRENDS IN JUVENILE JUSTICE: STATE LEGISLATION 2011–2015 3–5 (2015), https://www.njjn.org/uploads/digital-library/NCSL-Trends_in_Juvenile_Justice_State_Legislation_2011-2015_Nov-2015.pdf [<https://perma.cc/N5S4-PPWG>] (“Today, juvenile justice reform has become a largely bipartisan issue as lawmakers work together to develop new approaches in justice systems to align sound fiscal responsibility, community safety and better outcomes for youth.” “[New legislative] reforms reflect an interest in developmentally appropriate approaches to more evidence-based methods and cost-effective alternatives to incarceration.”).

160. *Id.* at 3.

161. Caitlin Cavanagh et al., *The Developmental Reform in Juvenile Justice: Its Progress and Vulnerability*, 28 PSYCH. PUB. POL'Y & L. 151, 162 (2022).

162. *Raising the Minimum Age for Prosecuting Children*, NAT'L JUV. JUST. NETWORK, <https://www.njjn.org/our-work/raising-the-minimum-age-for-prosecuting-children> [<https://perma.cc/W7PV-NTVC>].

Between 2013–2018, 30,467 children under age ten and 266,321 children aged ten to twelve years old were arrested in the United States.¹⁶³ While the overall arrest rate for young children has declined from 1980 to 2010, tens of thousands of young children are still arrested each year.¹⁶⁴

In states with no minimum age, like South Carolina, few protections exist to keep young children out of the court system for relatively low-level misbehavior. In Michigan, a ten-year-old was arrested for throwing a ball at a child’s face during a dodgeball game.¹⁶⁵ In Missouri, a seven-year-old was arrested for refusing to go to the principal’s office.¹⁶⁶ These stories have been met with a resounding and often bi-partisan call from advocates to keep young children out of court by setting or raising the statewide minimum age of juvenile court jurisdiction.¹⁶⁷

C. *Reasons to “Raise the Minimum Age”*

The justifications supporting a statutory minimum age for juvenile court jurisdiction range from the fact that most crimes committed by young children are not serious, to the short- and long-term harms that juvenile court intervention can cause to young children, to the financial and administrative costs of juvenile court. Each of these justifications in support of raising the minimum age are explored below.

1. *Young Children Rarely Commit Serious Offenses*

Nationally, children under twelve represent a small portion (8%) of total arrests of youth under eighteen.¹⁶⁸ Of that 8%, most arrests of children under twelve are for non-violent offenses, such as property crimes or theft.¹⁶⁹ The same holds true in South Carolina, where children age twelve and under made up only 11% of juvenile referrals in 2019.¹⁷⁰ Although there is no public data on the severity of the offenses that led to these referrals, it is telling that children age twelve and under made up only 1% of juvenile detentions, 4% of

163. Bill Hutchinson, *More than 30,000 Children Under Age 10 Have Been Arrested in the US since 2013: FBI*, ABC NEWS (Oct. 1, 2019, 9:31 AM), <https://abcn.ws/3owx2HE> [<https://abcn.ws/3owx2HE>].

164. *Arrests, by Age, 2019*, FBI: UCR, <https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019/topic-pages/tables/table-38> [<https://perma.cc/XAH2-RHLA>].

165. Hutchinson, *supra* note 163.

166. *Id.*

167. See Corley, *supra* note 17.

168. *Arrests, by Age, 2019*, *supra* note 164.

169. See NAT’L CTR. FOR JUV. JUST. & OFF. OF JUV. JUST. & DELINQ. PREVENTION, JUVENILE OFFENDERS AND VICTIMS: 2014 NATIONAL REPORT 160–61 (2014), <https://www.ojjdp.gov/ojstatbb/nr2014/downloads/NR2014.pdf> [<https://perma.cc/M6GJ-YHGT>].

170. S.C. DEP’T OF JUV. JUST., *supra* note 11, at 9.

juvenile evaluations, and 2% of juveniles probations in South Carolina in 2019.¹⁷¹ This indicates that most children twelve and under referred to juvenile court in the state are not referred for serious offenses that require further court evaluation, oversight, or secure detention. Given the small risk to public safety posed by young children, there is a strong argument that they should be excluded from juvenile court intervention, instead reserving the court's resources for older youth charged with more serious crimes that threaten public safety or endanger lives.¹⁷²

2. *Juvenile Court Doesn't Adequately Address Underlying Issues*

Despite the professed goal of rehabilitation, juvenile courts are ill-equipped to adequately assess and treat underlying mental health disorders or substance abuse problems, especially in young children.¹⁷³ Nine out of ten children in the juvenile court system have experienced some traumatic event in their life, with approximately three out of ten meeting the criteria for post-traumatic stress disorder.¹⁷⁴ An overwhelming majority (70%) of children in juvenile court also meet the criteria for some mental health disorder.¹⁷⁵ Likely due to unaddressed trauma and mental illness, 78.4% of youth taken into custody suffer from substance abuse; similarly, youth in custody are at four times greater risk of suicide than their peers.¹⁷⁶ In South Carolina, nearly 10% of all children committed to SCDJJ qualify as having a serious mental illness.¹⁷⁷

Although some juvenile courts have made efforts to increase substance abuse and mental health programming, it is not enough to keep up with the

171. *Id.* at 10–12.

172. See ALEXIA COOPER & ERICA L. SMITH, BUREAU OF JUST. STAT., U.S. DEP'T OF JUST., NCJ 236018, HOMICIDE TRENDS IN THE UNITED STATES, 1980–2008 (2011), <https://bjs.ojp.gov/content/pub/pdf/htus8008.pdf> [<https://perma.cc/3QPB-HFH7>]; NAT'L CTR. FOR JUV. JUST. & OFF. OF JUV. JUST. & DELINQ. PREVENTION, *supra* note 169.

173. NAT'L RSCH. COUNCIL & INST. OF MED., JUVENILE CRIME, JUVENILE JUSTICE 191 (Joan McCord et al. eds. 2001).

174. Carley B. Dierkhising et al., *Trauma Histories Among Justice-Involved Youth: Findings from the National Child Traumatic Stress Network*, 4 EUR. J. PSYCHOTRAUMATOLOGY art. no. 20232, at 1 (2013), <http://doi.org/10.3402/ejpt.v4i0.20274> [<https://perma.cc/AA8D-4H7P>].

175. *Id.*

176. *Criminal Neglect: Substance Abuse, Juvenile Justice and the Children Left Behind*, CTR. ON ADDICTION (Oct. 2004), <https://www.centeronaddiction.org/addiction-research/reports/criminal-neglect-substance-abuse-juvenile-justice-and-children-left> [<https://perma.cc/2XY5-S278>]; *Juvenile Justice*, NAT'L ALL. ON MENTAL ILLNESS, <https://www.nami.org/Learn-More/Mental-Health-Public-Policy/Juvenile-Justice> [<https://perma.cc/NZ5G-ZL6Y>].

177. GUPTA-KAGAN ET AL., *supra* note 20, at 32.

demand and often isn't developed with young children in mind.¹⁷⁸ This holds true in South Carolina.¹⁷⁹ In 2015, only 35% of children with serious mental illness were placed in mental health facilities, with the rest detained in secure SCDJJ facilities ill-equipped to offer appropriate services and treatment.¹⁸⁰

A statutory minimum age removes juvenile court as an available tool to address the behavior of young children. Instead of wasting precious time and court resources going through an ineffective juvenile court intervention, those responsible for the young child must look at other options, such as behavioral health treatment or community-based supports that are better equipped to address the underlying issues. Further, research shows that the earlier evidence-based interventions can be applied, the more likely the child is to benefit from those interventions and experience associated improvements in academic achievement, behavior, and educational progression.¹⁸¹ Finally, with juvenile court off the table, children and families are often more likely to access treatment because they don't fear legal repercussions.¹⁸²

3. *Juvenile Court Harms Young Children*

Young children in the juvenile system experience direct and indirect harms, whose impact can last far beyond the period of court involvement. One of the possible outcomes of juvenile court referral is incarceration in a juvenile detention facility. Unfortunately, there is widespread documentation of abuse in these facilities, including systemic violence, physical or sexual abuse by facility staff, and excessive use of isolation and restraints.¹⁸³ A 2018 national

178. See *Criminal Neglect: Substance Abuse, Juvenile Justice and the Children Left Behind*, *supra* note 176 (In 2000, 1.9 million of the 2.4 million juveniles arrested in the country had substance abuse or addiction problems, yet only 68,600 received treatment.); see generally RECLAIMING FUTURES, MODEL POLICIES FOR JUVENILE JUSTICE AND SUBSTANCE ABUSE TREATMENT: A REPORT BY RECLAIMING FUTURES (Joey Binard & Mac Prichard eds. 2008), http://www.njjn.org/uploads/digital-library/resource_860.pdf [https://perma.cc/J4TX-AFSM] (In recent years, juvenile justice systems have increased the number of substance abuse programs to keep up with the demand of juveniles needing assistance, however, it is still not enough to keep up with the growing drug epidemic in the United States.).

179. GUPTA-KAGAN ET AL., *supra* note 20, at 32.

180. *Id.* at 32–33.

181. RAND CORP., RB-9145-PNC, PROVEN BENEFITS OF EARLY CHILDHOOD INTERVENTIONS 1 (2005), https://www.rand.org/pubs/research_briefs/RB9145.html [https://perma.cc/LL4V-C8FY].

182. NAT'L JUV. JUST. NETWORK, *supra* note 75, at 13.

183. RICHARD A. MENDEL, ANNIE E. CASEY FOUND., MALTREATMENT OF YOUTH IN U.S. JUVENILE CORRECTIONS FACILITIES: AN UPDATE 2 (2015).

survey of youth incarcerated in juvenile facilities found that 7% of surveyed youth reported being victimized sexually in the prior year.¹⁸⁴

South Carolina is no exception. A 2013 Department of Justice survey revealed that 29.2% of youth reported victimization at SCDJJ's Birchwood facility and 20% of youth reported victimization at SCDJJ's John G. Richards facility.¹⁸⁵ The facilities ranked third and twelfth, respectively, for the highest rates of sexual victimization nationally in this survey.¹⁸⁶ The state's own Legislative Audit Council has also criticized SCDJJ for its lack of compliance with the federal Prison Rape Elimination Act.¹⁸⁷ These harms are amplified for younger children. Nationally, "more than one-quarter of youth under 13 years old were victims of some type of violence while confined, compared to nine percent of 20-year-olds."¹⁸⁸

Additionally, children confined in SCDJJ facilities are at risk of being subjected to "segregation," which is confinement to an individual cell for a vast majority of the day.¹⁸⁹ In 2016, an average of 16.8% of all children housed at SCDJJ's Broad River Road Complex were in segregation on any given day.¹⁹⁰ Secure isolation, also called solitary confinement, can have extremely harmful effects on youth, including traumatization or re-traumatization,¹⁹¹ contribution to onset or exacerbation of mental illness,¹⁹² and negative physical health impacts.¹⁹³ Raising the minimum age of juvenile

184. ERICA L. SMITH & JESSICA STROOP, BUREAU OF JUST. STAT., U.S. DEP'T OF JUST., NCJ 253042, SEXUAL VICTIMIZATION REPORTED BY YOUTH IN JUVENILE FACILITIES, 2018, at 1 (2019), <https://bjs.ojp.gov/content/pub/pdf/svryjf18.pdf> [<https://perma.cc/H5V6-TGAT>].

185. ALLEN J. BECK ET AL., BUREAU OF JUST. STAT., U.S. DEP'T OF JUST., NCJ 241708, SEXUAL VICTIMIZATION IN JUVENILE FACILITIES REPORTED BY YOUTH, 2012, at 12 (2013), <https://www.bjs.gov/content/pub/pdf/svjfry12.pdf> [<https://perma.cc/E6S6-T2UQ>].

186. *Id.*

187. S.C. GEN. ASSEMB. LEGIS. AUDIT COUNCIL, A LIMITED REVIEW OF THE S.C. DEPARTMENT OF JUVENILE JUSTICE 1 (2017), https://lac.sc.gov/sites/lac/files/Documents/Legislative%20Audit%20Council/Reports/A-K/DJJ_Summary.pdf [<https://perma.cc/JSP9-RU9B>].

188. NAT'L JUV. JUST. NETWORK, *supra* note 75, at 2.

189. GUPTA-KAGAN ET AL., *supra* note 20, at 13.

190. *Id.*

191. Laura Anne Gallagher, *More Than a Time Out: Juvenile Solitary Confinement*, 18 U.C. DAVIS J. JUV. L. & POL'Y 244, 253 (2014); AFRAID: CHILDREN HELD IN SOLITARY CONFINEMENT AND ISOLATION IN JUVENILE DETENTION AND CORRECTIONAL FACILITIES 5 (2014), <https://www.aclu.org/publications/alone-afraid#:~:text=Children%20Held%20in%20Solitary%20Confinement%20and%20Isolation%20in%20Juvenile%20Detention%20and%20Correctional%20Facilities&text=The%20solitary%20confinement%20of%20children,their%20care%20to%20solitary%20confinement.> [<https://perma.cc/43EP-R2MU>].

192. Gallagher, *supra* note 191, at 250; *see also* Juv. Just. Reform Comm., *Solitary Confinement of Juvenile Offenders*, AM. ACAD. OF CHILD & ADOLESCENT PSYCHIATRY (Apr. 2012), https://www.aacap.org/aacap/Policy_Statements/2012/Solitary_Confinement_of_Juvenile_Offenders.aspx [<https://perma.cc/A7Z3-QGCB>].

193. Gallagher, *supra* note 191, at 254; AM. C.L. UNION, *supra* note 191, at 4-5.

court jurisdiction ensures young children are not exposed to the potential harms that flow from secure detention or commitment in a juvenile facility.

In addition to the direct risk of abuse, young children also face collateral consequences of juvenile court referral.¹⁹⁴ Collateral consequences are indirect or secondary impacts of juvenile court involvement that “can negatively impact youth and their families upon even the lowest level of engagement with the juvenile justice system.”¹⁹⁵ These can include barriers to future education, employment and housing; financial penalties such as fines, court fees, and restitution; a bar or revocation of certain privileges such as getting a driver’s or firearms license; and negative psychological impacts.¹⁹⁶

Many of these consequences are intensified by state policies that allow certain juvenile court information to become public in some circumstances.¹⁹⁷ For example, in South Carolina, law enforcement records identifying a child involved in a delinquency matter may be released to the victim of a crime, a school the child is enrolled in, or to a newspaper when specific circumstances are present.¹⁹⁸ In most states, including South Carolina, the juvenile record is not automatically expunged when the child turns eighteen; rather, a child must petition the court and pay various fees to expunge their juvenile court record.¹⁹⁹ Ultimately, setting a minimum age ensures that a juvenile court referral for something a child did in elementary school does not lead to devastating life-long impacts.

194. S.C. COMM’N ON INDIGENT DEF., THE SOUTH CAROLINA JUVENILE COLLATERAL CONSEQUENCES CHECKLIST 2–3 (2013).

195. NAT’L GOVERNORS ASS’N, STATE STRATEGIES TO ADDRESS THE NEEDS OF JUSTICE-INVOLVED YOUTH IMPACTED BY COLLATERAL CONSEQUENCES 2 (2023), https://www.nga.org/wp-content/uploads/2023/02/NGA_Juvenile_Justice_Collateral_Consequences_Feb2023.pdf [<https://perma.cc/DRG5-KZ7R>].

196. MODELS FOR CHANGE, INNOVATION BRIEF: AVOIDING AND MITIGATING THE COLLATERAL CONSEQUENCES OF A JUVENILE ADJUDICATION 1 (2013), https://njjn.org/uploads/digital-library/Innovation_Brief_Avoiding_and_Mitigating_the_Collateral_Consequences_of_a_Juvenile_Adjudication-Dec2013.pdf [<https://perma.cc/U8Y8-BZDL>]; see also NAT’L GOVERNORS ASS’N, *supra* note 195, at 3–4.

197. See Jeffrey A. Butts & Ojmarrh Mitchell, *Brick by Brick: Dismantling the Border Between Juvenile and Adult Justice*, in CRIM. JUST. 2000, at 167, 190 (2000); see also Radice, *supra* note 158, at 375.

198. S.C. CODE ANN. §§ 63-19-2030(E) and -2040(A) (Supp. 2023).

199. Radice, *supra* note 158, at 375, 409; see S.C. CODE ANN. § 63-19-2050(A) (2010); see also, e.g., IND. CODE § 31-39-8-3 (2019); *How to Expunge Your Juvenile Records*, IND. PUB. DEF. COUNCIL, <https://www.in.gov/ipdc/juvenile-justice/information-for-youth-and-parents/how-to-expunge-your-juvenile-records/> [<https://perma.cc/3AML-GP2B>].

4. *Juvenile Court Referral for Young Children Reduces Public Safety*

Referring young children to juvenile court can actually increase the likelihood of re-arrest later on.²⁰⁰ Research shows that early contact with the juvenile court system has a negative impact on future behavior of children, increasing inversely with the age of the first contact.²⁰¹ Most young children are likely to age out of criminal behavior as they develop psychological maturity.²⁰² In general, 63% of youth referred to juvenile court on delinquency charges never return.²⁰³ However, incarcerating youth impedes their psychological development. Rather than aiding public safety, formal processing often has “a negative or backfire effect” for young children, actually making them more likely to have future involvement with the juvenile and criminal legal systems.²⁰⁴

In South Carolina, a 2011 study found an 80.2% recidivism rate within thirty-six months for children who were prosecuted in family court and found delinquent.²⁰⁵ Research suggests that the large-scale secure evaluation centers in South Carolina, which are built like jails and handle more than 1,000 children a year, may increase recidivism by as much as one-third as compared to smaller, community-based facilities tasked with the same evaluative purpose.²⁰⁶ One additional longitudinal study of children referred to family court in South Carolina found that children referred for less serious first-time offenses had lower recidivism rates when diverted than when adjudicated.²⁰⁷ Thus, juvenile court processing may increase recidivism and create unnecessary threats to public safety. Raising the minimum age to keep young children out of the system will have inherent overall benefits for public safety

200. *See Juvenile Justice*, *supra* note 176.

201. Barnert et al., *supra* note 74.

202. RICHARD MENDEL, THE SENTENCING PROJECT, WHY YOUTH INCARCERATION FAILS: AN UPDATED REVIEW OF THE EVIDENCE 20 (2022), www.sentencingproject.org/app/uploads/2023/03/Why-Youth-Incarceration-Fails.pdf. [<https://perma.cc/3L29-A2SE>].

203. *See id.*

204. *JJIE Hub: Key Issues – Community Based Alternatives*, *supra* note 74; *see also* Barnert et al., *supra* note 74.

205. GEORGE W. APPENZELLER ET AL., SYS. WIDE SOLS., AN EVALUATION OF THE SOUTH CAROLINA JUVENILE ARBITRATION PROGRAM 37 (2011).

206. There were 1,051 residential evaluations in the 2015–16 fiscal year. S.C. DEP’T OF JUV. JUST., ANNUAL STATISTICAL REPORT 2015–2016, at 6 (2016). *See also* Cheri J. Shapiro et al., *Natural Experiment in Deviant Peer Exposure and Youth Recidivism*, 39 J. CLINICAL CHILD & ADOLESCENT PSYCH. 242, 250 (2010); *Incarcerating Young People Affect Their Adult Health Outcomes?*, 139 PEDIATRICS art. no. e20162624, at 7 (2017), https://www.researchgate.net/publication/312632636_How_Does_Incarcerating_Young_People_Affect_Their_Adult_Health_Outcomes [<https://perma.cc/G3RY-UKB8>].

207. David E. Barrett & Antonis Katsiyannis, *The Clemson Juvenile Delinquency Project: Major Findings from a Multi-Agency Study*, 26 J. CHILD & FAM. STUDS. 2050, 2051 (2017).

since those children will be less likely to commit any harm to others in the future.

5. *Research Supports the Idea of Diminished Culpability of Young Children*

The U.S. Supreme Court has recognized research that adolescent brains are not as developed as adult brains, making adolescents generally, less culpable.²⁰⁸ A growing body of research has shown that pre-pubescent children are even less equipped than adolescents to make mature decisions and fully understand the consequences of their actions.²⁰⁹ Scientific technology has demonstrated that “[f]rom age two through seven, children undergo the ‘preoperational stage’ in which they learn to communicate. However, they do not have the ability to understand the consequences of their actions.”²¹⁰ Researchers conclude that young children “lack the cognitive maturity to comprehend or benefit from formal juvenile justice processing.”²¹¹ Even once puberty starts, generally between the ages of eleven to fourteen for males and nine to twelve for females, the part of the brain that controls reasoning, thought, and impulse control is the final part of the brain to mature.²¹² Therefore, young children who have not reached puberty or are going through it, are much less likely to have the requisite culpability for processing through the juvenile court system as compared to older adolescents.²¹³

208. *Roper v. Simmons*, 543 U.S. 551, 569 (2005) (quoting *Johnson v. Texas*, 509 U.S. 350, 367 (1993)); see also *Barnert et al.*, *supra* note 74; GUPTA-KAGAN ET AL., *supra* note 20, at 12.

209. See generally COAL. FOR JUV. JUST., WHAT ARE THE IMPLICATIONS OF ADOLESCENT BRAIN DEVELOPMENT FOR JUVENILE JUSTICE? (2006), https://www.juvjustice.org/sites/default/files/resource-files/resource_134.pdf [<https://perma.cc/YN3B-EZY5>] (exploring implications of such research “for policy and practice in juvenile justice and delinquency prevention.”).

210. Larry Cunningham, *A Question of Capacity: Towards a Comprehensive and Consistent Vision of Children and Their Status Under Law*, 10 U.C. DAVIS J. JUV. L. & POL’Y 275, 282 (2006).

211. *Barnert et al.*, *supra* note 74, at 49.

212. See COAL. FOR JUV. JUST., *supra* note 209, at 3; see generally ADVOCS. FOR YOUTH, GROWTH AND DEVELOPMENT, AGES NINE TO TWELVE – WHAT PARENTS NEED TO KNOW (2016) <http://www.advocatesforyouth.org/publications/155-parents>. [<https://perma.cc/FBH9-7EMJ>] (providing developmental guidelines applicable to most children between nine and twelve years old); *Puberty: Normal Growth and Development in Boys*, SAINT LUKE’S, <https://www.saintlukeskc.org/health-library/puberty-normal-growth-and-development-boys> [<https://perma.cc/Y8EZ-PPGW>]; *Puberty: Normal Growth and Development in Girls*, SAINT LUKE’S, <https://www.saintlukeskc.org/health-library/puberty-normal-growth-and-development-girls#:~:text=Girls%20begin%20to%20grow%20taller,by%20the%20end%20of%20puberty.> [<https://perma.cc/83UH-RZZ4>]; Stephanie Tabashneck, “*Raise the Age*” Legislation: *Developmentally Tailored Justice*, 32 CRIM. JUST. 13, 16 (2018).

213. See COAL. FOR JUV. JUST., *supra* note 209, at 3; see also Tabashneck, *supra* note 212.

6. *Juvenile Court is Costly Intervention*

Juvenile court has associated costs that are borne by both the child's family and the state.²¹⁴ For example, many states require families to pay court costs and other fees related to their child's involvement in juvenile court.²¹⁵ In South Carolina, the state constitution grants victims the right to restitution from children or youth in juvenile court.²¹⁶ State law also allows the court to order fines on a juvenile as a condition of probation.²¹⁷ Additionally, there are a variety of costs that can be imposed on children and their families, including the costs of evaluation and treatment while in placement, fees for participation in programs as part of a disposition or pretrial diversion, and reimbursements for court-appointed counsel.²¹⁸ These costs can place an extreme financial burden on the child's family, the majority of whom are already low-income.²¹⁹

Placing young children in the juvenile court system also burdens the state.²²⁰ Juvenile detention is expensive, as the state must take on all costs associated with the child's housing, education, and medical and behavioral health care.²²¹ According to one SCDJJ official, as of September 2014, "costs per youth per day for a long-term residential facility were \$426, evaluation center is \$154, detention is \$242, the wilderness program is \$111, foster care is up to \$142, group homes are \$83.23, intensive placements are an average of \$180.46, and shelter homes are \$50."²²² Even when a child is not detained,

214. JESSICA FEIERMAN ET AL., *JUV. L. CTR., DEBTORS' PRISON FOR KIDS? THE HIGH COST OF FINES AND FEES IN THE JUVENILE JUSTICE SYSTEM* 3, 24 (2016), <http://debtorsprison.jlc.org/documents/jlc-debtors-prison.pdf> [https://perma.cc/E2GM-BZFT].

215. *Id.* at 5.

216. S.C. CONST. art. I, § 24(A)(9) (West, Westlaw through 2023 Act No. 102) (providing victims' right to restitution from "the person[] convicted of the criminal conduct that caused the victim's loss or injury, including both adults and juvenile[s].").

217. S.C. CODE ANN. § 63-19-1410(A)(3) (Supp. 2023) (allowing fine of up to \$200 as a condition of probation).

218. *See* § 63-19-410(A) (allowing DJJ to impose and collect fees for cost of evaluation and treatment); § 63-19-2440(B) (2010) (allowing fee up to \$150 for alcohol prevention education or intervention program); § 63-19-1430(B) (allowing fee for participation in youth mentor program as part of disposition or pretrial diversion); § 63-19-1040 (allowing court to order parents to reimburse or pay court-appointed counsel in an amount to be determined by court if they are able to afford counsel but refuse to obtain counsel); *see also* FEIERMAN ET AL., *supra* note 214, at 3–5.

219. *See* Peter M. Cicchino, *The Problem Child: An Empirical Survey and Rhetorical Analysis of Child Poverty in the United States*, 5 J.L. & POL'Y 5, 28–29 (1996).

220. FEIERMAN ET AL., *supra* note 214, at 23–24; *see also, e.g.*, IND. DEP'T OF CORR., 2016 ANNUAL REPORT 59 (2016), <https://www.in.gov/idoc/files/2016-DOC-Annual-Report-Final-1.9.18.pdf> [https://perma.cc/6FJ5-GJXS].

221. SHOCK: CALCULATING THE FULL PRICE TAG FOR YOUTH INCARCERATION (2014), http://www.justicepolicy.org/uploads/justicepolicy/documents/sticker_shock_final_v2.pdf [https://perma.cc/P3A9-968K] (explaining the high cost juvenile incarceration places on states).

222. *Id.* at 11 n.46.

the state must cover the court-related costs not passed on to the family.²²³ Ultimately, given the ineffectiveness and potential harm of juvenile court intervention for young children, it is difficult to justify the significant financial costs associated with this intervention. Keeping young children out of the system through raising the minimum age allows the state to focus its resources on older juveniles, who are more likely to commit serious crimes and need substantial services.

7. *Raising the Minimum Age Protects Vulnerable Groups*

Minimum age laws can also serve as a mechanism to help disrupt disparities for children of color, children with disabilities, and LGBTQIA+ students.²²⁴ These groups are disproportionately represented in juvenile court referrals, making them more at risk for the increased recidivism associated with juvenile court intervention.²²⁵ In South Carolina in 2019, Black children accounted for only 31% of South Carolina's population under age eighteen, yet made up 57.6% of delinquency referrals.²²⁶ This early disproportionality can cause an escalating cycle that spurs further racial disparities in the juvenile and adult court systems. These groups also bear the disparate weight of the direct and collateral harms of juvenile court intervention, including educational and employment barriers.²²⁷ A broad prohibition on referring young children to the juvenile court system will reduce the number of children from marginalized groups who are referred, helping decrease the disparities in the system down the road.

For all these reasons, there has been an outgrowth of calls for state-level reform aimed at establishing or increasing a minimum age for juvenile court jurisdiction. These calls have gained the support of many prominent organizations, such as the American Bar Association, American Academy of Pediatrics, the National Juvenile Justice and Delinquency Prevention

223. See FEIERMAN ET AL., *supra* note 214, at 5; IND. DEP'T OF CORR., *supra* note 220.

224. See ADVANCEMENT PROJECT & ALL. FOR EDUC. JUST., WE CAME TO LEARN: A CALL TO ACTION FOR POLICE-FREE SCHOOLS 12 (2018).

225. See discussion *supra* Section II.D.

226. *Children Under 18 Years of Age by Race/Ethnicity in South Carolina*, THE ANNIE E. CASEY FOUND.: KIDS COUNT DATA CENTER (Apr. 20, 2023), <https://datacenter.aecf.org/data/tables/6132-children-under-18-years-of-age-by-race-ethnicity?loc=42&loct=2#detailed/2/any/false/2048,574,1729,37,871,870,573,869,36,868/66,67,4262,3,4267/12804,15653> [<https://perma.cc/F3V3-LNGK>] (describing racial demographics of South Carolina's juvenile population); S.C. GOVERNOR'S JUV. JUST. ADVISORY COUNCIL, S.C. DEP'T OF PUB. SAFETY, RECLAIMING THE PATHWAY FOR MINORITY YOUTH (2020), <https://dc.statelibrary.sc.gov/server/api/core/bitstreams/34fc332a-9094-4536-b51c-ddaca2aaaf7b/content> [<https://perma.cc/PN6G-C2LH>] (describing racial disparities in South Carolina's juvenile justice system).

227. See discussion *supra* Section IV.C.3.

Coalition, and the Society for Adolescent Health and Medicine.²²⁸ As described in the next section, the “Raise the Minimum Age” movement has had significant success over the past decade, with lawmakers in many states introducing bills to set a statutory minimum age or raise the current minimum age.²²⁹

D. Charting the “Raise the Minimum Age” Movement

Before charting the success of the “Raise the Minimum Age” movement, it is important to reiterate that the United States is an outlier in the practice of using juvenile court processing and detention to address the behaviors of young children.²³⁰ Fourteen is the most common minimum age of criminal responsibility internationally.²³¹ This has been affirmed by calls from the United Nations for nations to set their minimum age at fourteen years old.²³² Despite this, as of June 2023, only twenty-six states had established any minimum age of prosecution.²³³ Of the states that have set a minimum age, none have set the age at fourteen. Rather, the most typical minimum age is ten years old (sixteen states). The chart below details the minimum age (or lack thereof) in each of the U.S. states.²³⁴

228. AM. BAR ASS’N, REPORT TO THE HOUSE OF DELEGATES (2021), <https://www.americanbar.org/content/dam/aba/directories/policy/annual-2021/505-annual-2021.pdf> [https://perma.cc/NBC9-7A8K]. Mikah C. Owen et al., *Advocacy and Collaborative Health Care for Justice-Involved Youth*, 146 PEDIATRICS art. no. e20201755, at 14 (2020); NAT’L JUV. JUST. & DELINQ. PREVENTION COAL., THE FUTURE OF YOUTH JUSTICE 2021: A POLICY PLATFORM FOR THE BIDEN/HARRIS ADMINISTRATION 3 (2021) [http://www.act4jj.org/sites/default/files/resource-files/TransitionDoc%20\(2\).pdf](http://www.act4jj.org/sites/default/files/resource-files/TransitionDoc%20(2).pdf) [https://perma.cc/VS5C-KA4M]; Soc’y for Adolescent Health & Med., *International Youth Justice Systems: Promoting Youth Development and Alternative Approaches: A Position Paper of the Society for Adolescent Health and Medicine*, 59 J. ADOLESCENT HEALTH 482, 484–86 (2016).

229. See generally *Juvenile Justice Legislation Database*, NAT’L CONF. OF STATE LEGISLATORS (Mar. 14, 2024), <http://www.ncsl.org/research/civil-and-criminal-justice/ncsls-juvenile-justice-bill-tracking-database.aspx> [https://perma.cc/CLB6-LHXV].

230. NAT’L JUV. JUST. NETWORK, *supra* note 4; NAT’L JUV. JUST. NETWORK, *supra* note 75, at 6–8.

231. NAT’L JUV. JUST. NETWORK, *supra* note 4.

232. *Id.*

233. *Id.*

234. *Id.*

Minimum Age for Juvenile Court Jurisdiction (as of June 2023)		
Minimum Age of Jurisdiction	Number of States	States
None	24 states (& D.C.)	Alabama, Alaska, District of Columbia, Georgia, Hawaii, ²³⁵ Idaho, Illinois, Indiana, Iowa, Kentucky, Maine, Michigan, Missouri, Montana, New Jersey, New Mexico, Ohio, Oklahoma, Oregon, Rhode Island, South Carolina, Tennessee, Virginia, West Virginia, Wyoming
7	1 state	Florida ²³⁶
8	1 state	Washington ²³⁷
10	16 states	Arizona, Arkansas, ²³⁸ Colorado, Connecticut, Kansas, Louisiana, Minnesota, Mississippi, Nevada, ²³⁹ North Carolina, ²⁴⁰ North Dakota, Pennsylvania, South Dakota, Texas, Vermont, ²⁴¹ Wisconsin
11	1 state	Nebraska

235. Except that “[n]o child under the age of twelve shall be adjudged to come within [the court’s juvenile jurisdiction] without the written recommendation of a licensed psychologist[,] . . . psychiatrist[,] . . . or other physician . . .” HAW. REV. STAT. § 571-444 (2015).

236. Except that a child under seven “may be arrested, charged or adjudicated delinquent” if “the violation of the law is a forcible felony.” FLA. STAT. § 985.031(2) (2011).

237. Note that children between eight and twelve years old “are presumed to be incapable of committing crime, but this presumption may be removed by proof that they have sufficient capacity to understand the act or neglect, and to know that it was wrong.” WASH. REV. CODE § 9A.04.050 (2022).

238. An exception exists for capital murder and murder in the first degree. ARK. CODE ANN. § 9-27-303(15)(B) (2023).

239. An exception exists where a child over eight years old “is charged with murder or a sexual offense as defined in NRS 62F.100.” NEV. REV. STAT. § 194.010 (2021). Also note that “[c]hildren between the ages of 8 years and 14 years” are not considered capable of committing crimes “in the absence of clear proof that at the time of committing the act charged against them they knew its wrongfulness.” *Id*

240. An exception exists for children over eight years old charged with a Class A–G felony, or who have been previously adjudicated delinquent. N.C. GEN. STAT. § 7B-2501(7) (2022).

241. An exception exists for children under ten years old charged with “murder as defined in 13 V.S.A. § 2301 if committed by an adult.” VT. STAT. ANN. tit. 33, § 5102(2)(C)(i) (2018).

Minimum Age for Juvenile Court Jurisdiction (as of June 2023)		
Minimum Age of Jurisdiction	Number of States	States
12	5 states	California, ²⁴² Delaware, ²⁴³ Massachusetts, New York, ²⁴⁴ Utah ²⁴⁵
13	2 states	Maryland, ²⁴⁶ New Hampshire ²⁴⁷

As noted, some of the states do create exceptions where a child under the minimum age can be referred to the juvenile court. Typically, these exceptions are only in narrowly defined circumstances where the crime at issue is considered extremely serious or violent, such as murder or sexual assault. Further, some states may have an even higher minimum age restriction for pre-trial detention or long-term commitment in the juvenile system.²⁴⁸

When compared with international standards, the “Raise the Minimum Age” movement may appear unsuccessful. This is especially true when considering that most “Raise the Minimum Age” advocacy efforts have asked state legislatures to set a standard minimum age for juvenile justice jurisdiction at age fourteen, in line with the United Nations Convention of the Rights of the Child, and fallen short.²⁴⁹ However, while disappointing, the current laws reflect a drastic change over the past decade. In 2012, thirty-three states had no specified minimum age (compared to twenty-four now).²⁵⁰ At that time, the lowest minimum age set by a state was six and the highest

242. Exceptions exist for the commission of murder, rape, sodomy, oral copulation, and sexual penetration. CAL. WELF. & INST. CODE § 602(b) (2016).

243. Exceptions exist for the commission of murder in the first or second degree, rape in the first or second degree, and “using, displaying, or discharging a firearm during the commission of a Title 11 or Title 31 violent felony as set forth in § 4201(c) of Title 11.” DEL. CODE ANN. tit. 10 § 1002(b)(1) (2010).

244. Exceptions exist for children over seven charged with aggravated criminally negligent homicide, or certain manslaughter and murder offenses. N.Y. FAM. CT. ACT. § 302.2 (McKinney 2024).

245. Exceptions exist for various felonies, including murder, aggravated kidnapping, aggravated sexual assault, aggravated arson, aggravated burglary, and aggravated robbery. UTAH CODE ANN. § 80-6-305(2) (2004).

246. An exception exists for children over ten “alleged to have committed an act . . . [t]hat if committed by an adult, would constitute a crime of violence, as defined in § 14-101 of the Criminal Law Article.” MD. CODE ANN. CTS. & JUD. PROC. § 3-8A-03(a)(1)(ii) (West 2024).

247. An exception exists for a child under thirteen years old who “has committed a violent crime as defined in RSA 169-B:35-a, 1(c).” N.H. REV. STAT. ANN. § 169-B:2(IV) (2022).

248. See NAT’L JUV. JUST. NETWORK, *supra* note 4.

249. Cavanagh et al., *supra* note 161, at 162 n.4; Jay D. Blitzman, *The State of Juvenile Justice*, in THE STATE OF CRIMINAL JUSTICE 2020, at 155, 159–60 (2020).

250. Compare *Upper and Lower Age of Juvenile Court Delinquency and Status Offense Jurisdiction*, OFF. OF JUV. JUST. & DELINQ. PREVENTION (May 21, 2021), https://www.ojjdp.gov/v/ojstatbb/structure_process/qa04102.asp?qaDate=2012&text=no&maplink=link1 [https://perma.cc/AGS9-KRPP], with NAT’L JUV. JUST. NETWORK, *supra* note 4.

minimum age was ten. As of 2023, the lowest age is seven, and eight states have raised the minimum age beyond ten.²⁵¹ Since 2012, fifteen states have passed legislation that either set a minimum age for the first time or increased the minimum age.²⁵² This is a significant change in a short time period and represents a shift in the approach policy makers and the public view as appropriate for young children.

V. SETTING A STATUTORY MINIMUM AGE OF JUVENILE COURT JURISDICTION IN SOUTH CAROLINA

Without a minimum age, young children in South Carolina are continually at risk of being referred to family court. The data shows this risk is a reality. Young children age twelve and under made up 11% of South Carolina's juvenile referrals; that's more than one out of every ten referrals and over 1,200 total referrals of young children.²⁵³ Given South Carolina's recent commitment to juvenile justice reform and the establishment of a bipartisan and multi-stakeholder committee to study and make recommendations for further reform, there are opportunities to fold in additional recommendations explicitly aimed at protecting young children.²⁵⁴ South Carolina should set a statutorily defined minimum age of court referral or alternatively, begin taking steps to put a minimum age in place.

A. *South Carolina Should Set a Statutory Minimum Age of Juvenile Court Jurisdiction*

Ultimately, the best way to protect young children in South Carolina is a statutory change that redefines the term "child" and "juvenile" for purposes of delinquency processing in family court. Currently, South Carolina's Juvenile Justice Code defines "child" or "juvenile" as a person less than eighteen years of age, except in certain limited circumstances.²⁵⁵ To better protect young children, the Code could be amended to define "child" or "juvenile" as a person at least thirteen but less than eighteen years of age.²⁵⁶

251. Compare *Upper and Lower Age of Juvenile Court Delinquency and Status Offense Jurisdiction*, *supra* note 250, with NAT'L JUV. JUST. NETWORK, *supra* note 4.

252. Compare *Upper and Lower Age of Juvenile Court Delinquency and Status Offense Jurisdiction*, *supra* note 250, with NAT'L JUV. JUST. NETWORK, *supra* note 4.

253. S.C. DEP'T OF JUV. JUST., *supra* note 11, at 9, 14.

254. S.C. S. SELECT COMM. ON RAISE THE AGE, *supra* note 127, at 5–7.

255. S.C. CODE ANN. § 63-19-20(1) (2023).

256. Although research and international standards support setting this minimum age at fourteen, it is likely an unrealistic goal given that South Carolina currently has no minimum age and no state has yet adopted fourteen as its minimum age. A more realistic approach would be

Although a general minimum age has not yet been considered in South Carolina, the state has shown a willingness to set a minimum age for certain interventions. South Carolina law states that “[c]hildren ten years of age and younger must not be incarcerated in a jail or detention facility for any reason.”²⁵⁷ Similarly, the state sets a minimum age of twelve for institutional confinement under SCDJJ custody.²⁵⁸

It is expected that a minimum age proposal will receive pushback in South Carolina. In other states where a minimum age has been proposed, opponents raised concerns about how to address young children who commit particularly serious or violent offenses. The most common solution was to create statutory exceptions that allow for court processing of younger children in certain circumstances, such as when the offense at issue is especially serious or violent or when there is substantial evidence that court processing is appropriate despite the child’s young age.²⁵⁹ However, it is important to ensure any exceptions are narrow and clearly defined to avoid undermining the legislation’s ultimate goal of keeping young children out of the court system.

Further compromise might be reached on what the exact minimum age should be. This Article advocates for setting the minimum age at thirteen as a compromise between the international standard of fourteen and the most widely adopted state legislative standard of ten. However, further compromise will likely be necessary to pass minimum age legislation. This is what occurred in North Carolina, where despite recommendations from the Governor’s office that the minimum age should be set at twelve, a compromise age of ten was eventually reached.²⁶⁰ This still represented a significant increase from the state’s previous minimum age of six years old, the lowest of any state that set a minimum age.

Additionally, policymakers considering minimum age legislation will need to address young children whose behavior may not be extremely violent, but is concerning enough to merit additional intervention. The goal in these cases is not to ignore concerning behavior that could harm the child or others, but rather to ensure there are effective and evidence-based supports to quickly intervene at the first sign of concern. Some have proposed that these young

to advocate for thirteen as the minimum age, recognizing that compromise may be required and that the most likely minimum age to garner support will be ten, the age used by the majority of states that have set a minimum age.

257. S.C. CODE ANN. § 63-19-820(F) (2010).

258. § 63-19-1440(A) (Supp. 2023).

259. See exceptions listed *supra* notes 235–247.

260. N.C. TASK FORCE FOR RACIAL EQUITY IN CRIM. JUST., REPORT 2020, at 81 (2020), https://ncdoj.gov/wp-content/uploads/2020/12/TRECReportFinal_12132020.pdf [<https://perma.cc/223T-VQR7>] (recommending minimum age of twelve); see S. 207, 2021 Gen. Assemb., Reg. Sess. (N.C. 2021) (setting minimum age at 10 for most offenses).

children could be rerouted to the arm of family court that adjudicates claims of parental abuse, neglect, and dependency, sometimes called “child welfare court.”²⁶¹ However, even though not intended to be punitive, intervention by the child welfare court raises many of the same concerns as juvenile delinquency court intervention, including ineffective interventions, overregulation of families, significant racial disparities, and financial and psychological costs.²⁶² If child welfare referrals become the primary alternative to handling young children with challenging behavior, it could result in unnecessary and harmful intervention, including unwarranted removal of children from their families.²⁶³

A better alternative would be to create a legislative process that allows children under the age of thirteen who commit delinquent or status offenses to receive appropriate services to address the child’s behavior.²⁶⁴ These services could include community-based therapy, case management, individual or family counseling, and social work services.²⁶⁵ This was attempted in North Carolina when they raised their minimum age from 6 to ten.²⁶⁶ In doing so, they created a new statutorily defined category of “vulnerable juveniles,” which includes any juvenile less than ten years old but at least six years old who commits a crime and does not meet the definition of “delinquent juvenile.”²⁶⁷ If a juvenile court counselor receives a complaint against a vulnerable juvenile, they cannot refer the child to court.²⁶⁸ Instead,

261. Louisiana and Minnesota are examples of states that have extended child welfare programming to include children who commit offenses but have not yet reached the age of juvenile court jurisdiction. See LA. CHILD. CODE ANN. art. 804(3) (2024); *Juvenile Justice Process*, STATE OF LA. OFF. OF JUV. JUST., <https://ojj.la.gov/page/juvenile-justice-process> [<https://perma.cc/48W5-J6V2>] (Louisiana’s FINS program processes cases involving truancy, disobeying parents, runaway behavior, or law violations by children under age ten.); *Child in Need of Protection or Services (CHIPS)*, MINN. JUD. BRANCH, [http://www.mncourts.gov/Help-Topics/Child-in-Need-of-Protection-or-Services-\(CHIPS\).aspx](http://www.mncourts.gov/Help-Topics/Child-in-Need-of-Protection-or-Services-(CHIPS).aspx) [<https://perma.cc/QJ98-ZVGD>] (Minnesota’s CHIPS program allows children who commit delinquencies under the age of ten to be processed as a CHIPS case instead of a juvenile case.); see also Travis Watson, *From the Playhouse to the Courthouse: Indiana’s Need for a Statutory Minimum Age for Juvenile Delinquency Adjudication*, 53 IND. L. REV. 433, 457–58 (2020) (advocating for Indiana to set a minimum age and expand child welfare court jurisdiction to capture young children accused of delinquency offenses).

262. See generally Dorothy Roberts, *Why Abolition*, 61 FAM. COURT REV. 229 (2023) (arguing in favor of abolishing “family policing” in the child welfare system).

263. Brianna Hill, *Legislative Update: Massachusetts Raises Minimum Age of Criminal Responsibility*, 39 CHILD.’S LEGAL RTS. J. 168, 169 (2020).

264. *Id.* at 170.

265. *Id.*

266. General Assembly of North Carolina, Session Law 2021–123, Senate Bill 207 <https://www.ncleg.gov/Sessions/2021/Bills/Senate/PDF/S207v6.pdf> [<https://perma.cc/CE3G-25LH>].

267. NCGA § 7B-1501 (27b).

268. NCGA § 7B-1701 (b).

North Carolina law allows the court counselor to provide “juvenile consultation” in which services, including screenings, assessments, community resources, and programming, are provided to the child and family.²⁶⁹ This is not a perfect solution since there is still the lingering threat of referral to the Department of Social Services if the child or family does not comply with the juvenile consultation services; however, it is preferable to using automatic child welfare court referral as a replacement to juvenile delinquency court referral.²⁷⁰ For any alternative processes involving court staff, there will need to be clear guidance and training to ensure effective interventions are provided to young children and to prevent unnecessary court referrals.

Additionally, setting a minimum age should be paired with investments in existing infrastructure aimed at providing early interventions to young children and their families. These include school-based supports and community-based mental and behavioral health services that can offer early identification and proactive interventions to young children. Many of the recommendations proposed by the South Carolina Senate Select Committee embody this need to establish community-based alternatives to court processing, including the Committee’s recommendations to establish a pre-detention intervention program in each circuit and to create a civil citation program to respond to minor offenses.²⁷¹

Since alternatives to court referral may take some time to adequately develop, lawmakers could consider a delayed implementation of any minimum age law to provide a runway for planning purposes. This is what South Carolina did when it raised its maximum age.²⁷² However, to avoid the confusion encountered with the delayed implementation of South Carolina’s Raise the Maximum Age legislation, it will be important to ensure the delay is not drawn out unnecessarily and that resources are dedicated to planning so the minimum age can be implemented with clear guidance and funding.²⁷³

Fortunately, raising the minimum age should not present the same funding challenges that raising the maximum age did in South Carolina. One of the biggest points of contention in South Carolina’s Raise the Maximum Age debate was how to secure funding to serve the influx of children into the juvenile system, which provides more intensive and comprehensive, and thus,

269. NCGA § 7B-1501 (17a); 7B-1706.1.

270. NCGA § 7B-2718 (c).

271. See S.C. S. SELECT COMM. ON RAISE THE AGE, *supra* note 127, at 13.

272. South Carolina Act No. 268 §12 (2016) (“Raise the Age”), https://www.scstatehouse.gov/query.php?search=DOC&searchtext=916&category=LEGISLATION&session=121&conid=8214053&result_pos=0&keyval=1210916&numrows=10 [https://perma.cc/VXA7-5X S8].

273. See Hager, *supra* note 123; Majchrowicz, *supra* note 118.

more expensive, services than the adult system.²⁷⁴ Although these funding fears were ultimately unsubstantiated,²⁷⁵ any further juvenile justice reforms are likely to raise the same conversations. However, in the case of “Raise the Minimum Age,” advocates can point to the high costs of juvenile court intervention and the cost savings that would directly flow from keeping young children out of the system.²⁷⁶

Another argument that may arise is that since referrals for young children are not resulting in significant juvenile court intervention in many cases, there is no need to set a minimum age in South Carolina. Opponents may prefer that the SCDJJ continue to perform a sorting function for young children who are referred. However, that argument ignores the harm that can result from even one juvenile court referral, including the lasting negative impacts of an interaction with law enforcement and juvenile court personnel, the realities of a juvenile court record, individual and family costs of participating in a court proceeding or diversion programs, the psychologically and stigmatizing effects of being involved, and the disproportionate referral of children from marginalized communities.²⁷⁷ Further, acknowledging that there will be some young children who need more intensive interventions, the juvenile court is ill-equipped to provide those interventions and may even create a backfire effect that worsens public safety.²⁷⁸ Instead, both the individual child and the broader community are better served by keeping young children out of the juvenile court system and establishing the non-court responses described above to address young children with more significant behavioral challenges.

B. Alternatively, South Carolina Should Take Incremental Steps Towards Establishing a Statutory Minimum Age

Given the fact that current juvenile justice reforms have temporarily stalled in South Carolina, a statutory minimum age may not be feasible in the

274. See Hager, *supra* note 123; Majchrowicz, *supra* note 118.

275. South Carolina’s Department of Juvenile Justice spent \$5 million less than what local officials anticipated in the first year the state’s raise the age law went into effect. Fitzgerald & Carroll, *supra* note 122.

276. See JOSH WEBER, CSG JUST. CTR. & NAT’L COUNCIL OF JUV. FAM. & CT. JUDGES, COURTING JUDICIAL EXCELLENCE IN JUVENILE JUSTICE: A 50-STATE STUDY 13 (Leslie Griffin ed. 2022), <https://csgjusticecenter.org/wp-content/uploads/2022/04/Courting-Judicial-Excellence-in-Juvenile-Justice-A-50-State-Study-2.pdf> [<https://perma.cc/34HF-DQAP>].

277. See discussion *supra* Parts II.D (describing harms of juvenile court generally) and IV.C.3 (describing harms of juvenile court specifically as it relates to young children).

278. See Barnert et al., *supra* note 74; *JJIE Hub: Key Issues – Community-Based Alternatives*, *supra* note 74; NAT’L JUV. JUST. NETWORK, *supra* note 74.

near future.²⁷⁹ Still, there are incremental steps that could get the state closer to setting a minimum age. For one, advocates could push for increased data collection, disaggregated by age and offense, to further understand the problem of family court referral for young children. Often, the public is not aware that young children can be referred to court and are often referred for minor offenses. Public awareness often leads to more pressure on policymakers to adopt reform, as it did in Kaia Rolle's case in Florida.²⁸⁰

Further, the stakeholders and advocates that contributed to the Senate Select Committee recommendations could add a statutory minimum age to their list of proposed reforms. In North Carolina, in the wake of legislation raising the maximum age, a group similar to the Select Committee was formed and tasked with planning for changes involved in the implementation of raise the age.²⁸¹ The group, the Juvenile Jurisdiction Advisory Committee (JJAC), submitted regular reports to the North Carolina General Assembly with updates and recommendations.²⁸² As part of the JJAC's work, a "Minimum Age Subcommittee" was formed in January 2020, which led to a recommendation to raise the minimum age of juvenile jurisdiction. This was ultimately codified and implemented in North Carolina in December 2021.²⁸³ Although South Carolina's Select Committee no longer formally convenes and makes reports to the legislature, many members are still involved in efforts to pass the bill that resulted from their recommendations.²⁸⁴ Those members are well-positioned to consider the best strategy for proposing minimum age legislation either as an addition to the existing draft bill or by introducing new legislation.

Another way to build support for raising the minimum age in South Carolina is for a local jurisdiction to establish a pilot program that lays the groundwork for statewide change. In some states, statewide reform was only

282. See S. 1018, 123rd Gen. Assemb., Reg. Sess. (S.C. 2020), https://www.scstatehouse.gov/sess123_2019-2020/bills/1018.htm [<https://perma.cc/D7CX-JG82>] (referred to Subcommittee; no further action taken); S. 53, 124th Gen. Assemb., Reg. Sess. (S.C. 2021), https://www.scstatehouse.gov/sess124_2021-2022/bills/53.htm [<https://perma.cc/ZRP4-W3V3>] (received favorable Committee report; no further action taken); S. 278, 125th Gen. Assemb., Reg. Sess. (S.C. 2023), https://www.scstatehouse.gov/sess125_2023-2024/bills/278.htm [<https://perma.cc/R9QV-EWJ5>] (referred to Committee; no further action taken).

280. See Corley, *supra* note 17.

281. *Juvenile Jurisdiction Advisory Committee*, N.C. DEP'T OF PUB. SAFETY, <https://www.ncdps.gov/our-organization/juvenile-justice/key-initiatives/raise-age-nc/juvenile-jurisdiction-advisory-committee> [<https://perma.cc/XWL3-W3NA>].

282. See *id.*

283. See S. 207, 2021 Gen. Assemb., Reg. Sess. (N.C. 2021).

284. Julia Kauffman, *South Carolina's Juvenile Justice System Could Get Major Overhaul*, NEWS 19 (Mar. 25, 2022), <https://www.wltx.com/article/news/local/south-carolina-lawmakers-look-to-overhaul-juvenile-justice-system-children-crime/101-f626d682-c888-4e6b-b4b5-22bb28ac3036> [<https://perma.cc/DB97-4AA8>] (discussing current legislative efforts to pass Select Senate Committee's recommendations).

possible after local jurisdictions implemented the practice and gathered the data needed to show that statewide reform was feasible. For example, in 2010, Santa Clara County in California adopted a twelve-and-over threshold for juvenile court adjudications.²⁸⁵ The success of this model led state senators to introduce legislation establishing a minimum age of twelve in California juvenile courts in 2019.²⁸⁶ The same approach might be possible in South Carolina if a willing local jurisdiction could be identified. It would not be the first time this approach was attempted in the state to promote juvenile justice reform. Specifically, York County has previously adopted a civil citation program to respond promptly to minor offenses and divert children from the court system.²⁸⁷ This process became a model for one of the S.C. Senate Select Committee's statewide recommendations and was adopted into the language of the draft bill that is currently pending.²⁸⁸

VI. CONCLUSION

Juvenile court began as an informal intervention aimed at keeping children out of the adult criminal system for childhood misbehavior.²⁸⁹ Over time, that system has evolved, leading to questions about the effectiveness of juvenile court intervention for young children.²⁹⁰ Across the country, an increasing number of state legislatures have recognized the need to protect young children by adopting a statutory minimum age of juvenile court jurisdiction that keeps young children out of juvenile delinquency court for misbehavior that can be better addressed through community- and evidence-based responses. South Carolina should join other states in recognizing the many rationales underlying "minimum age" reform and take steps towards setting a statutory minimum age for juvenile court jurisdiction. In adopting "Raise the Minimum Age" reform, South Carolina will be better positioned to protect both its youngest citizens and overall public safety.

285. Times Ed. Bd., *Editorial: How Young Is Too Young for Jail? California Doesn't Have an Answer, but It Should*, L.A. TIMES (Aug. 11, 2018, 4:15 AM), <http://www.latimes.com/opinion/editorials/la-ed-minimum-age-jail-20180811-story.html> [<https://perma.cc/M8MC-34BA>].

286. Maureen Washburn, *SB 439 Becomes Law, Ending the Prosecution of Children Under 12*, CTR. ON JUV. & CRIM. JUST. (Oct. 23, 2018), <https://www.cjcj.org/news/blog/sb-439-becomes-law-ending-the-prosecution-of-children-under-12> [<https://perma.cc/W5V4-HU7N>].

287. S.C. S. SELECT COMM. ON RAISE THE AGE, *supra* note 127, at 13.

288. *Id.*

289. See AM. BAR ASS'N, *supra* note 18; Melli, *supra* note 18.

290. See Watson, *supra* note 261 at 436.