

**THE LAST ONE STANDING: HOW THE UNITED STATES’  
DECISION NOT TO RATIFY THE CONVENTION ON THE RIGHTS OF  
A CHILD IMPACTED ITS JUVENILE MENTAL HEALTH COURTS IN  
COMPARISON TO CANADA**

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**I. INTRODUCTION**

In 2008, Judith Crane—a mother in Alameda County, California—made the hard decision to call the police on her daughter, Cindy, who often struggles with post-traumatic stress disorder.<sup>1</sup> Cindy flew into a rage and started grabbing her mother’s hair, throwing knives at her sister, overturning furniture, and threatening

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<sup>1</sup> Laurie Udesky, *A Safe Place for Troubled Teens*, EAST BAY EXPRESS (Oct. 28, 2009), <https://www.eastbayexpress.com/oakland/a-safe-place-for-troubled-teens/Content?oid=1371786>.

self-harm, causing her mother to make the call.<sup>2</sup> As difficult as this would be for any parent, this call would help change Cindy's life for the better.<sup>3</sup>

Many of the 120,000 minors in the United States who encounter the juvenile justice system are placed in detention center cells; but some counties, such as Alameda, have developed diversion opportunities for juveniles who struggle with mental illnesses but do not have criminal propensities.<sup>4</sup> Through a unique county-sponsored program, Cindy received help for her mental illnesses, allowing her to address various factors in her home and school life that ultimately prevented her from ending up back in juvenile court.<sup>5</sup> One year after admittance into the Alameda County Juvenile Collaborative Court, Cindy graduated from the program with new-found skills for handling her anger and has plans to move out and go to college.<sup>6</sup>

These types of diversion programs also exist in other countries, such as Canada. That same year in Canada, the New Brunswick ombudsman, Bernard Richard, called for the province to do a better job of diverting youth with mental illnesses away from the criminal justice system after the 2007 death of Ashley Smith.<sup>7</sup> Ashley was first sentenced to 90 days in prison when she was 15; and due to her behavioral problems linked to her mental illness, several years were added on to her sentence.<sup>8</sup> Before she took her own life by choking herself in her cell, Ashley had been transferred to various facilities 17 times in less than a year.<sup>9</sup> Ashley's family believes this constant movement prevented her from receiving the treatment she ultimately needed.<sup>10</sup>

Despite the fact both stories took place around the same time, they resulted in distinct outcomes due to the resources that were available to teenagers through their local justice system. However, diversion programs that serve juveniles with mental illnesses have not always existed, and both countries have unique histories when it comes to juvenile justice.<sup>11</sup> One of the major differences that has impacted this history is the United States' decision not to ratify the Convention on the Rights

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<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> Udesky, *supra* note 1.

<sup>7</sup> Michael MacDonald, *Mentally Ill Youth Needing Treatment Get It Through Criminal Justice System*, THE GLOBE AND MAIL (December 15, 2010), <https://www.theglobeandmail.com/news/national/mentally-ill-youth-needing-treatment-get-it-through-criminal-justice-system/article1319974/>.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> Patrick Gardner, *An Overview of Juvenile Mental Health Courts*, AMERICAN BAR ASSOCIATION (Sept. 01, 2011), [https://www.americanbar.org/groups/public\\_interest/child\\_law/resources/child\\_law\\_practice\\_online/child\\_law\\_practice/vol30/september\\_2011/an\\_overview\\_of\\_juvenilementalhealthcourts/](https://www.americanbar.org/groups/public_interest/child_law/resources/child_law_practice_online/child_law_practice/vol30/september_2011/an_overview_of_juvenilementalhealthcourts/).

of a Child (the Convention) because of the autonomy the Convention gives children.<sup>12</sup>

This Note discusses the juvenile mental health courts already established in the United States. Part II of this Note will examine the legal background of juvenile mental health courts, as well as juvenile justice in relation to United Nation's guidelines and the Convention. Part III provides a brief legal background of juvenile justice in the United States and how juvenile mental health courts have developed and functioned here. Part IV summarizes the history of juvenile justice in Canada and examines the juvenile justice courts in the different provinces, while also comparing how they differ from the United States. In Part V, this Note makes recommendations for how these courts should progress. It will discuss how, in order to progress with these courts, the United States should consider aligning their juvenile mental health courts—and how they deal with adjudicating juveniles with mental illness—with Articles 37 and 40 of the Convention and other United Nation guidelines. This Note will examine the juvenile mental health courts in the United States and Canada and how they differ and the legal history behind each court. Since the United States has not ratified the Convention, this Note will also examine how that impacts the juvenile mental health court systems in these countries. Lastly, this Note concludes with a discussion of whether the United States should make policy changes that align more with their foreign counterparts.

## **II. LEGAL BACKGROUND OF JUVENILE JUSTICE AND JUVENILE MENTAL HEALTH COURTS AND THE UNITED NATIONS**

The original idea for a distinct juvenile court system in the United States originated from England.<sup>13</sup> A separate justice system for juveniles arose in England in 1873 after a member of the London school board proposed the idea, and it soon became an international trend.<sup>14</sup> In the United States, the first juvenile court was formed in Illinois on July 1, 1899.<sup>15</sup> Canada, on the other hand, did not establish its first juvenile court until 1908, when the Juvenile Delinquents Act, which changed the charges against juveniles from the same charges as adults to charges of

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<sup>12</sup> See David P. Stewart, *Ratification of the Convention on the Rights of the Child*, 5 GEO. J. ON FIGHTING POVERTY 161, 174; Cynthia L. Schirmer, Note, *Punishing Children As Adults: On Meeting International Standards and U.S. Ratification of the U.N. Convention on the Rights of the Child*, 16 MICH. ST. J. INT'L L. 715, 721-22 (2008).

<sup>13</sup> Thomas L. Hafemeister, *Parameters and Implementation of a Right to Mental Health Treatment for Juvenile Offenders*, 12 VA. J. SOC. POL'Y & L. 61, 72 n.37 (2004).

<sup>14</sup> Candace Zierdt, *The Little Engine that Arrived at the Wrong Station: How to Get Juvenile Justice Back on the Right Track*, 33 UNIV. S.F. L. REV. 401, 405-06 (1999).

<sup>15</sup> Hafemeister, *supra* note 13, at 72 n.37.

delinquency, was passed.<sup>16</sup> It would be over a century before both countries established the first juvenile mental health court, with the United States establishing its first one in 2001 in Santa Clara County, California,<sup>17</sup> which now has over 50 juvenile mental health courts as of 2019.<sup>18</sup> And it was not until 2011 when Canada created its first juvenile mental health court in the province of Ontario.<sup>19</sup> This ten-year difference, however, is not the only reason that these countries' juvenile mental health courts have developed differently—in particular, federal legislation and Canada's adoption of the United Nations' Convention on the Rights of the Child have also had important impacts.

### A. The United Nations

Although each country establishes its own juvenile justice system, the United Nations creates treaties and other guidelines that countries may choose to ratify and implement. The Convention on the Rights of the Child is the United Nations' treaty that established the rights of children in many areas, such as justice.<sup>20</sup> Prior to the Convention, the United Nations adopted the Declaration of the Rights of the Child in 1959, which recognizes children's right to play, education, health care, and a supportive environment.<sup>21</sup> In 1985, before the Convention was ratified, the United Nations created the United Nations Standard for Minimum Rules of Administration of Juvenile Justice, which details how the juvenile justice system should work in the best interest of the child.<sup>22</sup> The United Nations also provided additional guidance for juvenile justice with the Guidelines for the Prevention of Juvenile Delinquency, which was created at the World Summit for Children held in New York in 1990.<sup>23</sup>

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<sup>16</sup> Jay Makarenko, *Youth Justice in Canada: History and Debates*, Mapleleafweb (Mar. 1, 2007), <https://www.mapleleafweb.com/features/youth-justice-canada-history-debates.html>.

<sup>17</sup> *Improving Outcomes for Youth in Juvenile Justice System: A Review of Alameda County's Collaborative Mental Health Court*, NATIONAL CENTER FOR YOUTH LAW 2 (Feb. 2011), [https://www.courts.ca.gov/documents/Improving\\_Outcomes\\_NCYL\\_Pub.pdf](https://www.courts.ca.gov/documents/Improving_Outcomes_NCYL_Pub.pdf) [hereinafter *Improving Outcomes*].

<sup>18</sup> Kelly Rain Collin, *L.A. County's Juvenile Mental Health Court: A Unique Approach to Reducing Recidivism*, AMERICAN BAR ASSOCIATION (Dec. 12, 2019), <https://www.americanbar.org/groups/litigation/committees/childrens-rights/articles/2019/winter2020-a-unique-approach-to-reducing-recidivism/>.

<sup>19</sup> Lisa Kasper, *The State of Mental Health Treatment for Youth in the Justice System*, LAW NOW (Dec. 12, 2017), <https://www.lawnow.org/the-state-of-mental-health-treatment-for-youth-in-the-justice-system/>.

<sup>20</sup> *History of Child Rights*, UNICEF, <https://www.unicef.org/child-rights-convention/history-child-rights> (last visited Oct. 9, 2020).

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

These guidelines were established to protect juveniles at risk of committing a crime.<sup>24</sup> Also, in 1990, the United Nations adopted the United Nations Standard Minimum Rules for Non-custodial Measures, which helped protect the rights of offenders when non-custodial measures are applied and to ensure that there is a formal complaint system in case an offender feels like their rights have been violated.<sup>25</sup> This Note will focus specifically on the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (also known as the Beijing Rules); the United Nations Guidelines for the Prevention of Juvenile Delinquency (also known as the Riyadh Guidelines); the United Nations Standard Minimum Rules for Non-custodial Measures (also known as the Tokyo Rules); and the Convention on the Rights of a Child, specifically Articles 37 and 40.

### 1. United Nations General Assembly Resolutions

The General Assembly adopted the Beijing Rules on November 29, 1985.<sup>26</sup> The Beijing Rules aim to promote the welfare of youth in the juvenile justice system.<sup>27</sup> These rules also consider the national frameworks and legal structures that can be seen internationally.<sup>28</sup> The Beijing Rules have sections pertaining to all steps of the juvenile justice system, including general principles and ones relating to investigation and prosecution; adjudication and disposition; non-institutional treatment; institutional treatment; and research, planning, policy formulation and evaluation.<sup>29</sup> Rule 5 establishes the aims of juvenile justice, which are “[to] emphasize the well-being of the juvenile and [to] ensure that any reaction to juvenile offenders shall always be in proportion to the circumstances of both the offenders and the offence.”<sup>30</sup> Rule 5 also emphasizes the importance of considering the personal circumstance of the juvenile offender when deciding how to respond rather than the gravity of the offense.<sup>31</sup> Rule 11 focuses on diversion, with discretion given to police, prosecution, and other agencies with juvenile cases as to whether or not to proceed with formal hearing or go another route; however, the juvenile must give their consent for any diversion involving referrals.<sup>32</sup> The Beijing Rules also establish that for juvenile cases, competent authorities should try them, and these authorities should consider the living circumstances of the juvenile before making a decision and also consider different dispositions, such as counseling on treatment.<sup>33</sup> The Beijing Rules also emphasize the importance on providing juveniles necessary assistance, such as psychological services, when it comes to

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<sup>24</sup> *Id.*

<sup>25</sup> *Frequent Questions*, INTERNATIONAL JUVENILE JUSTICE OBSERVATORY, <http://www.oijj.org/en/preguntas-frecuentes> (last visited Oct. 11, 2020).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> G.A. Res. 40/33 (Nov. 29, 1985).

<sup>30</sup> *Id.* at 2.

<sup>31</sup> *Id.* at 3.

<sup>32</sup> *Id.* at 6.

<sup>33</sup> *Id.* at 8–11.

non-institutional treatment, institutional treatment, and semi-institutional arrangements.<sup>34</sup>

Adopted December 14, 1990, by the General Assembly, the Riyadh Rules aim to prevent juvenile delinquency and to protect juveniles that could be considered “social risks.”<sup>35</sup> When drafting these guidelines, the General Assembly also considered previous United Nations treaties and guidelines pertaining to children’s rights, such as the Declaration of the Rights of a Child, the Convention on the Rights of a Child, and the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules), as a framework for how these guidelines should be interpreted and implemented.<sup>36</sup> Since the Riyadh Rules are considered to be soft law rules, they are not legally binding<sup>37</sup> and can only truly be implemented through the binding agreements of the United Nations, such as the Convention.<sup>38</sup>

The Riyadh Rules concentrate on preventing juveniles from facing any conditions that may negatively impact their ability to have a healthy development.<sup>39</sup> These rules provide a multidisciplinary approach involving family, media, the educational system, community, and the juvenile themselves, to help prevent juveniles from committing crimes or being victimized or in conflict with the law.<sup>40</sup> These guidelines believe that the juveniles should have an active role in society, rather than being seen as an object of control.<sup>41</sup> Since these guidelines are a preventive measure, they provide opportunities to meet the needs of juveniles, especially those in danger of offending.<sup>42</sup> An important focus of the guidelines is the socialization process, with the key areas being family, education, community, and media.<sup>43</sup> Families are considered to be the primary source of socialization, and it is believed that the government should help promote “stable and settled family environments.”<sup>44</sup> Education is the next important part of the socialization process, with a need for every child to access an education that provides them with information about the legal process and their rights within the legal system.<sup>45</sup> The third part of the socialization process is community, which focuses on providing programs and facilities within the community to meet the needs of juveniles within those communities.<sup>46</sup> Media plays an essential role in providing information to

<sup>34</sup> G.A. Res. 40/33, *supra* note 29, at 13–17.

<sup>35</sup> *Frequent Questions*, *supra* note 25.

<sup>36</sup> G.A. Res. 45/112, ¶ 7 (Dec. 14, 1990).

<sup>37</sup> *Hard Law / Soft Law*, EUROPEAN CENTER FOR CONSTITUTIONAL AND HUMAN RIGHTS E.V., <https://www.ecchr.eu/en/glossary/hard-law-soft-law/> (last visited Feb. 1, 2021).

<sup>38</sup> *Frequent Questions*, *supra* note 25.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Frequent Questions*, *supra* note 25.

<sup>44</sup> G.A. Res. 45/112, *supra* note 36, ¶¶ 11–14.

<sup>45</sup> *Id.* ¶¶ 20–25.

<sup>46</sup> *Id.* ¶¶ 32–39.

juveniles; and therefore, should portray information in a positive and encouraging manner to juveniles.<sup>47</sup>

The Riyadh Rules also highlight social policy by stating that “[t]he institutionalization of young persons should be a measure of last resort and for the minimum necessary period, and the best interests of the young person should be of paramount importance.”<sup>48</sup> These rules also consider what type of legislation should be enacted and how it should be enforced, calling for legislation that promotes and protects the rights of juveniles, as well as establishing an office of ombudsman or something similar to help further promote the interest of the juveniles.<sup>49</sup> Along with legislation, the General Assembly also calls for research on different ways to prevent crime, encouraging interdisciplinary studies to be done.<sup>50</sup>

The final “soft law” rules this paper will examine is the Tokyo Rules. Adopted by the General Assembly on December 14, 1990, the Tokyo Rules focus on promoting the use of non-custodial measures within the legal system.<sup>51</sup> The hope is that involving the community in the management of criminal justice will reduce imprisonment.<sup>52</sup> The rules should be applied when someone is going through criminal prosecution when alternatives to imprisonment, such as treatment, can be presented.<sup>53</sup>

## 2. The Convention on the Rights of a Child

On September 2, 1990, the United Nations Convention on the Rights of the Child became effective and currently has over 191 members,<sup>54</sup> making it the “most widely ratified human rights treaty in history.”<sup>55</sup> After Somalia and South Sudan ratified the Convention in 2015,<sup>56</sup> the United States remains the only country in the world that is not signatory.<sup>57</sup> The Convention covers a variety of topics in its 54 articles, but Articles 37 and 40 cover the topics of juvenile justice.<sup>58</sup>

Article 37 of the Convention pertains to how member states should handle the punishment of juveniles who enter the justice system. This article bans the use of capital punishment and life imprisonment as forms of punishment against children, as no child should be tortured or punished or treated in a cruel, inhumane,

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<sup>47</sup> *Id.* ¶¶ 40–44.

<sup>48</sup> *Id.* ¶ 46.

<sup>49</sup> G.A. Res. 45/112, *supra* note 36, ¶¶ 52–59.

<sup>50</sup> *See id.* ¶¶ 40–44.

<sup>51</sup> *Frequent Questions*, *supra* note 25.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> Schirmer, *supra* note 12, at 718.

<sup>55</sup> *Conventions on the Rights of the Child*, UNICEF, <https://www.unicef.org/child-rights-convention> (last visited Oct. 9, 2020).

<sup>56</sup> *History of Child Rights*, *supra* note 20.

<sup>57</sup> Schirmer, *supra* note 12, at 716.

<sup>58</sup> *See generally* G.A. Res. 44/25, Convention on the Rights of a Child (Nov. 20, 1989).

and degrading way.<sup>59</sup> The Convention also views punishment as a last resort and should only be done for the shortest amount of time necessary.<sup>60</sup> The punishment must conform to the law and should not deprive a child of their liberty without reason.<sup>61</sup> If a child is deprived of their liberty, their needs should be considered based on their age, and they should still be treated with dignity and respect.<sup>62</sup> These children should also be separated from adults, unless best interests suggest otherwise, and they should maintain the right to have contact with their family unless there are exceptional circumstances.<sup>63</sup> This Article also gives children paths to challenge their deprivation of liberty, with the ability to challenge the legality of the situation with legal assistance and other appropriate assistance.<sup>64</sup>

While Article 37 of the Convention pertains to punishment; Article 40 establishes how member states should handle children during the criminal process. The Convention protects children who have been “alleged as, accused of, or recognized as” breaking the law and should be “treated in a manner consistent with the promotion of the child's sense of dignity and worth.”<sup>65</sup> It is important to treat the children in a way that “reinforces the child's respect for the human rights and fundamental freedoms of others” in such a way that considers the child, their role in society, and how to reintegrate them into society in a constructive role.<sup>66</sup> Children are protected from being accused of wrongdoing if the acts or omissions are not prohibited by national or international law at the time of the acts or omissions.<sup>67</sup>

The Convention also guarantees accused children the following: presumed innocence until proven guilty; the right to be promptly and directly informed about their charges; the right to legal and other appropriate assistance with preparation for their defense; the right to have the matter decided “without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law” and with legal assistance (unless it is not in the best interest of the child due to their age or circumstances); the right to not be forced to confess or testify and the right to examine adverse witnesses; the right to have the decision reviewed by higher judicial bodies; the right to have an interpreter if they do not speak the language used; and the right to privacy during the trial.<sup>68</sup> States that are parties to the Convention must establish a justice system that fits the needs of children with laws, procedures, authorities, and institutions for children.<sup>69</sup> These states should establish a minimum age that a child can be considered liable for the wrongdoing, as well establishing ways to handle these children without resorting to judicial

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<sup>59</sup> See generally *id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> G.A. Res. 44/25, *supra* note 58.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> G.A. Res. 44/25, *supra* note 58.

<sup>69</sup> *Id.*

proceedings to help protect human rights and legal safeguards.<sup>70</sup> Alternative dispositions are presented in the Convention and include: “care, guidance and supervision orders; counselling; probation; foster care; education and vocational training [programs] and other alternatives to institutional care.”<sup>71</sup> These alternatives should be considered in a manner that takes into consideration the child’s well-being, offense, and circumstances.<sup>72</sup>

Neither the United States nor Canada has to follow the “soft law” guidelines created by the United Nations,<sup>73</sup> but these guidelines can act as guidance for each country’s legislation. However, as a party to the Convention, Canada’s juvenile justice system will reflect the ideas in the Convention; while the United States, who is not a party of the Convention, does not have to follow them.

### III. UNITED STATES

Even though the United States does not follow the Convention, it has established its own standards for the juvenile justice system through case law and legislation, both state and federal. The impact of how the United States has handled juvenile justice is also reflected in the juvenile mental health courts that currently exist within the United States.

#### A. History of Juvenile Justice in the United States

With the first juvenile court established 121 years ago in the United States, the United States has seen most of the changes in juvenile justice starting in the 50s and 60s, when public concern about these courts grew.<sup>74</sup> In the 1960s, the Supreme Court heard its first case pertaining to juvenile justice, *Kent v. United States*, in which the Court ruled that due process must be applied before moving a case from juvenile court to adult court.<sup>75</sup> In the year following *Kent*, the Supreme Court made a pivotal decision in *In re Gault*, which provided juveniles with the same rights as adults, such as the right to counsel, the right to notice of charges, the right to remain silent, and the right to a trial.<sup>76</sup> Other Supreme Court cases have provided that the standard of proof is beyond a reasonable doubt in juvenile cases;<sup>77</sup> juveniles do not

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<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Hard Law/ Soft Law*, *supra* note 37.

<sup>74</sup> *Juvenile Justice History*, CENTER ON JUVENILE AND CRIMINAL JUSTICE, <http://www.cjcj.org/education1/juvenile-justice-history.html> (last visited Nov. 11, 2020).

<sup>75</sup> *Kent v. United States*, 383 U.S. 541, 553–54 (1966).

<sup>76</sup> *In re Gault*, 387 U.S. 1 (1967).

<sup>77</sup> *In re Winship*, 397 U.S. 358, 368 (1970).

have a right to a jury trial;<sup>78</sup> the Double Jeopardy Clause in the Fifth Amendment applies to juveniles;<sup>79</sup> juveniles cannot be sentenced to the death penalty,<sup>80</sup> and a juvenile's age informs *Miranda's* custody analysis.<sup>81</sup>

Though case law plays an important role in the juvenile justice system, so does legislation. Since local and state legislation vary in each locality and state, this Note will focus on federal legislation. In 1974, the Juvenile Justice & Delinquency Prevention Act (JJDP) was signed into law and would later be reauthorized in 2002, and again in 2018 when it was amended by Juvenile Justice Reform Act.<sup>82</sup> There are four core requirements for the JJDP: deinstitutionalization of status offenders (DSO), adult jail and lock-up removal, sight and sound separation, and racial and ethnic disparities.<sup>83</sup> With the core requirement of DSO, the JJDP focuses on alternatives for juveniles who committed crimes that would not be considered crimes if committed by an adult; such as truancy, running away, possession of alcohol or tobacco, etc.<sup>84</sup> The second requirement focuses on removing juveniles from adult jails and detention facilities.<sup>85</sup> The sight and sound separation requirement ensures juveniles are not detained or confined in any institution where they may have contact with adult inmates.<sup>86</sup> The final core requirement focuses on addressing and eliminating racial disparities within the juvenile justice system.<sup>87</sup>

The JJDP established the Office of Juvenile Justice & Delinquency Protection (OJJDP), which works with state and local governments to improve the juvenile justice system and help prevent delinquency.<sup>88</sup> The OJJDP acts as “home” within the federal government for juvenile justice, helping with research, policies and grants.<sup>89</sup> The grants provided to states and localities help with “planning, establishing, operating, coordinating, and evaluating projects for the development of more effective education, training, research, prevention, diversion, treatment, and rehabilitation in the areas of juvenile delinquency prevention and systems improvements.”<sup>90</sup> This funding helps establish a collaborative relationship between

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<sup>78</sup> *McKeiver v. Pennsylvania*, 403 U.S. 528, 551 (1971) (stating that if juvenile courts were to have juries there would be no difference between them and adult courts).

<sup>79</sup> *Breed v. Jones*, 421 U.S. 519, 541 (1975).

<sup>80</sup> *Roper v. Simmons*, 543 U.S. 551 (2005). *See also* *Miller v. Alabama*, 567 U.S. 460 (2012); *Graham v. Florida*, 130 S.Ct. 2011 (2010).

<sup>81</sup> *J.D.B. v. North Carolina*, 564 U.S. 261, 265 (2011).

<sup>82</sup> *Legislation*, OFF. OF JUV. JUST. & DELINQ. PREVENTION, <https://ojjdp.ojp.gov/about/legislation> (last visited Nov. 12, 2020).

<sup>83</sup> *Juvenile Justice and Delinquency*, COAL. FOR JUV. JUST., <https://www.juvjustice.org/federal-policy/juvenile-justice-and-delinquency-prevention-act> (last visited Jan. 17, 2021).

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Legislation*, *supra* note 82.

<sup>89</sup> *Juvenile Justice and Delinquency*, *supra* note 83.

<sup>90</sup> *Id.*

the state and the federal governments, so the needs of the localities can be met to help create practices for juveniles and the community.<sup>91</sup> States can also act as incubators for innovation through this funding.<sup>92</sup>

### **B. Juvenile Mental Health Courts in the United States**

With up to 65 to 70 percent of juveniles in detention centers with a diagnosable mental illness,<sup>93</sup> it is essential to find alternatives to locking up juveniles who get entangled in the justice system due to mental illness—which is why juvenile mental health courts are important. Because the United States has not ratified the Convention, which would help provide guidance on how juvenile mental health courts should function, the American Bar Association (ABA) provides information on the background and purposes of the juvenile justice courts in the United States that can be seen throughout the country.<sup>94</sup> Despite the fact each juvenile mental health court in the United States functions differently, they all share the same principles—mainly to provide treatment to the juveniles that enter these courts.<sup>95</sup> The juvenile mental health courts also share other principles; such as the idea that juveniles should not be entangled in the system solely because they are mentally ill and providing juveniles with the care they need, whether that be ensuring they reside somewhere less restrictive or taking a more community-oriented approach when it comes to treatment.<sup>96</sup> These courts also focus on a collaborative approach, where professionals in the juvenile justice system and behavioral health work together to focus on treatment instead of punishment of juveniles that enter these courts.<sup>97</sup> Juvenile mental health courts also focus on different diagnoses that may affect mental health in juveniles.<sup>98</sup> These diagnoses include: brain conditions with a genetic component (e.g. schizophrenia), developmental disabilities, organic brain syndromes, Fetal Alcohol Syndrome, Severe Post Traumatic Stress Disorder, conduct disorders, and co-occurring mental illnesses and substance abuse issues.<sup>99</sup>

Juvenile mental health courts are regional courts and currently only exist in 17 states.<sup>100</sup> One of these juvenile mental health courts is the Alameda County Juvenile Collaborative Court (ACJCC). The ACJCC was started in 2007 in order

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<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Improving Outcomes, supra* note 17.

<sup>94</sup> Gardner, *supra* note 11.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> Gardner, *supra* note 11.

<sup>100</sup> *Juvenile Mental Health Treatment Locator*, SUBSTANCE ABUSE AND MENTAL HEALTH SERVICES ADMINISTRATION, [https://www.samhsa.gov/gains-center/mental-health-treatment-court-locator/juveniles?field\\_gains\\_mhc\\_state\\_value=IA](https://www.samhsa.gov/gains-center/mental-health-treatment-court-locator/juveniles?field_gains_mhc_state_value=IA) (last visited Nov. 12, 2020).

to acknowledge the unmet mental health needs of juveniles who become involved in the justice system.<sup>101</sup> Started in October 2001 as the first juvenile mental health court, Los Angeles County focuses on juveniles who enter the system because of their mental health disorder or learning disability.<sup>102</sup> Both these courts also look at ways to work within the home of the juvenile, in order to keep them there.<sup>103</sup> Some of these courts, such as the one in Denton County, Texas, focus on the child's home life and issues that may be occurring there that cause the dysfunction in the juveniles.<sup>104</sup>

Even though all these courts focus on the same issues, how they handle these issues is different. Both the ACJCC and the Los Angeles County's juvenile mental health court are collaborative, involving the public defender's offices, prosecutors, local mental health providers, civil advocates, and schools.<sup>105</sup> Originally in LA County, roles such as the psychologist, psychiatrist, and education liaison were county entities, but have since been privatized.<sup>106</sup> Unlike the AJCC and LA County, Denton County focuses on working inside the juvenile's home, by collaborating with families and community services (such as rehabilitative and supportive services) that help the juvenile stay in their home, because lessened chance of removal from home also helps lessen recidivism in juveniles.<sup>107</sup> Denton County also divides the juvenile mental health court program into four phases, with each stage having differing standards for frequency of court review hearings, therapeutic services, case management services, and cognitive behavioral group services, as well as what mandatory meetings involve.<sup>108</sup> The first phase is the thirty-day orientation period, followed by the months two to four phase of stabilization, then months five to six phase of transition and finally ninety days of aftercare.<sup>109</sup> The first three phases all have the same requirements for the frequency of each of the services, but vary in what is discussed in the mandatory meetings.<sup>110</sup>

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<sup>101</sup> *Juvenile, ALAMEDA COUNTY PUBLIC DEFENDER*, <http://www.co.alameda.ca.us/defender/services/juvenile.htm#juv13> (last visited Nov. 13, 2020) [hereinafter *Juvenile Alameda County*].

<sup>102</sup> *Juvenile Mental Health Court: Holistic Legal Advocacy*, LAW OFFICES OF LOS ANGELES COUNTY: PUBLIC DEFENDER, <https://pubdef.lacounty.gov/juvenile/jmhc/> (last visited Nov. 13, 2020).

<sup>103</sup> *Juvenile Alameda County*, supra note 101; *Juvenile Mental Health Court: Holistic Legal Advocacy*, supra note 102.

<sup>104</sup> *Juvenile Mental Health Court, SOAR, DENTON COUNTY- TEXAS*, <https://www.dentoncounty.gov/680/Juvenile-Mental-Health-Court-SOAR> (last visited Nov. 13, 2020).

<sup>105</sup> *Juvenile Alameda County*, supra note 101; *Juvenile Mental Health Court: Holistic Legal Advocacy*, supra note 102.

<sup>106</sup> Collin, supra note 18.

<sup>107</sup> *Juvenile Mental Health Court, SOAR*, supra note 104.

<sup>108</sup> *Juvenile Mental Health Court: Summary of Program Phases, SOAR, DENTON COUNTY- TEXAS*, <https://www.dentoncounty.gov/1105/Summary-of-Program-Phases> (last visited Apr. 10, 2021).

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

In the fourth phase, services are provided as needed.<sup>111</sup> Another juvenile mental health court in Michigan provides “[C]linical Assessments, Home-Based therapy, medication reviews, and other clinical groups,” as well as home-based therapy for anywhere between two to twenty hours a week, drug testing, assessment and treatment referrals, case management, and other community services.<sup>112</sup> This court is overseen by a judge, who, in order to encourage progress, offers incentives and gives sanctions for noncompliance with graduated sanctions.<sup>113</sup> Similar to the juvenile mental health courts in Texas and Michigan, the juvenile mental health court in Jefferson and Gilpin County in Colorado also focus on working with families to ensure that juveniles follow the program through incentives and sanctions.<sup>114</sup> This court also requires each juvenile to enter into a contract for the program and requires the families to agree to the conditions and to support the juvenile throughout the program.<sup>115</sup>

It is also important to consider how juveniles become eligible to be a part of the juvenile mental health courts. Both courts in California and the court in Michigan divert juveniles from regular court to juvenile mental health court.<sup>116</sup> For example, the Texas court looks at juveniles that are at risk from being removed from their home,<sup>117</sup> and the Colorado court goes through a referral process.<sup>118</sup> The referral process involves a member of the community referring a child and a screening process.<sup>119</sup> Afterward, a committee decides if a child will be a good candidate and if the family will support that child.<sup>120</sup> Once accepted, the child may take one of two tracks with each being a maximum of one or two years, and after completion the juvenile’s case will be dismissed.<sup>121</sup>

These courts also have different eligibility requirements for juveniles to participate in these courts. One requirement that can differ from court to court is age, as shown in this paragraph. Jefferson and Gilpin County, Colorado, requires juveniles to be between the ages of 12 to 18;<sup>122</sup> however in Denton County, Texas, the court allows juveniles from 10 to 17 to participate in the program.<sup>123</sup> Another factor that needs to be considered is the diagnoses of these juveniles. For example,

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<sup>111</sup> *Id.*

<sup>112</sup> *Services at JMHC*, THIRD JUD. CIR. OF MICHIGAN, <https://www.3rdcc.org/divisions/family-juvenile/juvenile-mental-health-court/services-at-jmhc> (last visited Nov. 13, 2020).

<sup>113</sup> *Id.*

<sup>114</sup> *Juvenile Mental Health Court*, DISTRICT ATT’Y: JEFFERSON AND GILPIN CTY., <https://www.jeffco.us/2203/Juvenile-Mental-Health-Court> (last visited Nov. 13, 2020) [hereinafter *Juvenile Mental Health Court Jefferson and Gilpin*].

<sup>115</sup> *Id.*

<sup>116</sup> *Juvenile Alameda County*, *supra* note 101; *Juvenile Mental Health Court: Holistic Legal Advocacy*, *supra* note 102.

<sup>117</sup> *Juvenile Mental Health Court, SOAR*, *supra* note 104.

<sup>118</sup> *Juvenile Mental Health Court Jefferson and Gilpin*, *supra* note 114.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Juvenile Mental Health Court, SOAR*, *supra* note 104.

primary diagnoses such as Oppositional Defiant Disorder (ODD), Conduct Disorder, or ADHD can disqualify juveniles from participating in these programs in places such as Denton County.<sup>124</sup> Similarly, ACJCC excludes juveniles with ODD, conduct disorders, personality disorders, and adjustment disorders, unless they are co-occurring with a qualifying disorder.<sup>125</sup>

The most important question is how the courts determine success and how successful are these courts. In Colorado, the court determines success by parent and child commitment, as the families need tools to help the child deal with their lifelong battle with mental illness.<sup>126</sup> The tools given to the parents should help them solve problems constructively and manage the juvenile's behavior so they do not later end up in the adult justice system and hopefully can become productive members of society.<sup>127</sup> In Denton County, the success includes a reduction in recidivism, more accountability from offenders, and rehabilitation of the offender through a community-based system that includes the family dynamic.<sup>128</sup> In 2011, the National Center for Youth Law reviewed the first three years of the ACJCC, and they found that detentions had decreased by about 60 percent and hospitalizations have decreased by about 34 percent from prior to court involvement to 14 to 24 months following participation in the program and new law violations decreased by 68 percent as well.<sup>129</sup> While it is important to consider the success of juveniles that complete the program, not all juveniles complete the program.<sup>130</sup> The reasons some juveniles are terminated from the program include: continued non-participation, violation of probation, commission of a new offense, and withdrawal by the juvenile or parent.<sup>131</sup>

The study done on the ACJCC not only looked at how the court currently functioned, but also provided recommendations for future improvements.<sup>132</sup> These recommendations covered the design of the court, the process, the outcomes, and sustainability and growth.<sup>133</sup> For design, the major areas of reform include: establishing and ensuring funding for the court, family engagement and participation, formal mental health training of team members in the court, and whether the court should focus on diversion or reentry.<sup>134</sup> As far as recommendations for the process, the researchers suggest improving the administrative policies and procedures, refine eligibility to make sure the match between the juvenile and intervention is effective, routine mental health screening, and working on outreach.<sup>135</sup> For outcomes, the researchers recommended the ACJCC work on measuring and reporting accomplishments, increasing access to

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*Id.*

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*Improving Outcomes*, supra note 17, at 22.

126

*Juvenile Mental Health Court Jefferson and Gilpin*, supra note 114.

127

*Id.*

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*Juvenile Mental Health Court, SOAR*, supra note 104.

129

*Improving Outcomes*, supra note 17, at 53.

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*See id.* at 33.

131

*Id.* at 31.

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Gardner, supra note 11; *Improving Outcomes*, supra note 17, at 7.

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*Improving Outcomes*, supra note 17, at 7.

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*Id.*

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*Id.*

services, and making referrals to ineligible juveniles.<sup>136</sup> Concerning sustainability and growth, the researchers recommend the ACJCC try to sustain the existing program and expand the model.<sup>137</sup>

Although the United States seems to have developed a good system within the existing juvenile mental health courts, there is still a need to expand these programs—both by expanding the original programs and creating additional programs in other counties and states.

#### IV. CANADA

Although the United States chose not to ratify the Convention, Canada ratified it, and this decision is reflected within Canada’s juvenile legislation. However, it is important to note that Canada does not have the same background in juvenile mental health courts as the United States.

##### A. History of Juvenile Justice in Canada

Unlike the United States, Canada has an extensive history with federal legislation on juvenile justice. The first act was the Juvenile Delinquents Act, which governed from 1908-1984.<sup>138</sup> This act created a separate court system for juveniles and kept the minimum age of being charged at seven and only allowed those under 12 to be committed to an institution as a last resort.<sup>139</sup> Since juveniles were not charged for breaking a specific statute, but rather delinquency, judges could focus more on rehabilitation, instead of punishing based on the seriousness of the event.<sup>140</sup>

The Young Offenders Act (YOA), which governed from 1984-2003, followed the Juvenile Delinquents Act.<sup>141</sup> The YOA focused more on holding juveniles accountable for their actions. Under this act, instead of being charged for delinquency like was previously done under the Juvenile Delinquents Act, juveniles were charged with breaking a specific statute.<sup>142</sup> Another change under the YOA was the minimum age of a juvenile who could be charged, which was raised from seven to 12.<sup>143</sup> The YOA also acknowledged the legal rights and freedoms of juveniles.<sup>144</sup> Currently, the Youth Criminal Justice Act (YCJA), enacted in 2003,

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<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *The Youth and Criminal Justice Act Summary and Background*, GOVERNMENT OF CANADA, <https://www.justice.gc.ca/eng/cj-jp/yj-jj/tools-outils/back-hist.html> (last visited Nov. 15, 2020).

<sup>139</sup> Makarenko, *supra* note 16.

<sup>140</sup> *Id.*

<sup>141</sup> *The Youth and Criminal Justice Act Summary and Background*, *supra* note 138.

<sup>142</sup> Makarenko, *supra* note 16.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

is the governing law of juvenile justice.<sup>145</sup> The YCJA guarantees the children the rights given to them in the Convention.<sup>146</sup> The YCJA encourages the use of extrajudicial measures for less serious offenses, as they allow for early intervention and allow the juvenile to play an important role in the community.<sup>147</sup> The YCJA has successfully decreased charges and increased police diversions of cases through extrajudicial measures since its enactment.<sup>148</sup>

### **B. Juvenile Mental Health Courts in Canada**

In 2016 a study conducted by the Mental Health Commission of Canada, researchers found that 900,000 adolescents ages 13 to 19 suffered from mental health problems or illnesses, with 9.9% dealing with substance use.<sup>149</sup> Unlike the United States, juvenile mental health courts have existed in Canada for less than a decade.<sup>150</sup> Therefore, Canada has a shorter legal history for these courts to follow. Despite this, the Canadian Mental Health Association does provide guidance for how the country should handle juvenile offenders with mental illness.<sup>151</sup> Ontario, Ottawa, and Toronto specifically, do have designated juvenile mental health courts;<sup>152</sup> whereas other provinces, such as Manitoba and British Columbia, offer services to youth in the criminal justice system who have a mental illness or behavior problems.<sup>153</sup> Prince Edward Island also offers a diversion program, but youth do not have to have a mental illness or behavior issues to participate.<sup>154</sup>

These juvenile mental health courts are assigned a courtroom, with a Crown (the prosecutor), duty counsel (public defenders), and the judge overseeing

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<sup>145</sup> *The Youth and Criminal Justice Act Summary and Background*, *supra* note 138.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Crime Prevention: Youth Mental Health, Mental Illnesses, and Crime*, PUBLIC SAFETY CANADA, <https://www.publicsafety.gc.ca/cnt/rsrscs/pblctns/2017-h01-cp/index-en.aspx> (last visited Jan. 16, 2021).

<sup>150</sup> Kasper, *supra* note 19.

<sup>151</sup> *Youth Criminal Justice*, THE CANADIAN BAR ASSOCIATION, <https://www.cba.org/Publications-Resources/Practice-Tools/Child-Rights-Toolkit/legalAreas/Youth-Criminal-Justice> (last visited Oct. 8, 2020).

<sup>152</sup> *Id.*

<sup>153</sup> *Youth Forensic Psychiatric Services*, BRITISH COLUMBIA, <https://www2.gov.bc.ca/gov/content/justice/criminal-justice/bcs-criminal-justice-system/youth-justice/youth-justice-in-british-columbia/serving-a-youth-sentence/youth-forensic-psychiatric-services> (last visited Jan. 17, 2021); *Youth Forensic Services*, MANITOBA ADOLESCENT TREATMENT CENTRE, <https://matc.ca/services/yfs/> (last visited Jan. 17, 2021).

<sup>154</sup> *Youth Extra-Judicial Sanctions*, GOVERNMENT OF PRINCE EDWARD ISLAND, <https://www.princeedwardisland.ca/en/information/justice-and-public-safety/youth-extra-judicial-sanctions> (last visited Jan. 17, 2021).

the proceedings.<sup>155</sup> There are certain criteria that need to be met to be seen in the juvenile mental health court, and the criteria will change based on the courthouse and its process. If the juvenile feels their case should be heard there, they should inform their lawyer, duty counsel, Crown Attorney, or mental health worker.<sup>156</sup> Even if the case is not heard in mental health court, the mental health worker can help provide the juvenile access to community-based resources at any stage of the proceeding.<sup>157</sup> In these courts, the Crown will usually take a position on the case, including how they would like to sentence the juvenile and if the juvenile is eligible for extrajudicial sanctions, mental health diversion, or other programs.<sup>158</sup> During the process, the Crown will disclose evidence against the juveniles, such as police notes, witness statements, audio or video evidence, etc.<sup>159</sup> The extrajudicial sanctions allow juveniles to take responsibility for their action without having to plead guilty; however, the sanctions may be revoked if the juvenile does not complete the program.<sup>160</sup>

In Ottawa, members of the Youth Mental Health Court Implementation Accelerator (YMHCIA) have requested a review of juvenile mental health courts in order to figure out what factors make them effective.<sup>161</sup> After reviewing 14 relevant articles on youth mental health courts, the YMHCIA determined the success factors or the important components of youth mental health courts, which were chosen after examining these articles.<sup>162</sup> This list included factors and components such as: a multi-disciplinary team approach; youth, family, and community approach; early screening and comprehensive assessment; addressing criminogenic needs; therapeutic jurisprudence; treatment planning and services; supervision and monitoring compliance; education and training; and evaluation and funding support.<sup>163</sup> These factors were chosen based on if the factors improved outcomes for juveniles or if the factors were outcomes authors of the review felt were essential for the success of these courts.<sup>164</sup>

Toronto also has a youth mental health court, that provides juveniles 12-17 years old with mental health concerns with assessment, counseling, and

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<sup>155</sup> *Youth Mental Health and Justice*, CANADIAN MENTAL HEALTH ASSOCIATION, <https://ontario.cmha.ca/documents/youth-mental-health-and-justice/> (last visited Jan. 15, 2021).

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> *Youth Mental Health and Justice*, *supra* note 155.

<sup>161</sup> *What Factors Make Youth Mental Health Courts Successful at Serving Youth with Mental Illness? Evidence Brief*, EVIDENCE EXCHANGE NETWORK FOR MENTAL HEALTH AND ADDICTIONS, Nov. 28, 2016, <https://www.eenet.ca/resource/what-factors-make-youth-mental-health-courts-successful-serving-youth-mental-illness>.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

treatment when referred to by the court or through probation.<sup>165</sup> An empirical study was done on Toronto's first youth mental health court examining six key areas, including: demographics, court processing (referral information, involvement of parents, court appearances, contact dates, and what the charges were), mental health functioning of the juvenile, treatment motivation, treatment referral, and program completion.<sup>166</sup> After reviewing court dockets and files, the researchers found that most youths were referred by legal professionals associated with the court who do not have training in screening for mental health needs.<sup>167</sup> For this court, there are different programs available for youth with varying services and varying availabilities.<sup>168</sup> The average treatment lasted around three months.<sup>169</sup> While cases in the mental health court tend to take slightly longer than the regular juvenile court, almost half of that time is before the juvenile is transferred to the juvenile court and the fact the court only sits twice a month.<sup>170</sup> The youths that typically come in contact with the juvenile mental health courts have usually committed a property crime or assault.<sup>171</sup>

In the United States, juvenile mental health courts are county or district courts.<sup>172</sup> In Canada, these courts are also local courts.<sup>173</sup> Ottawa has its own youth mental health court, with the goal of increasing cooperation between the criminal justice system and the mental health system.<sup>174</sup> The courts aim to improve the general well-being of youth with mental illnesses and should not be mistaken for youth diversion or a crisis response.<sup>175</sup> This court serves youth between the ages of 12–17, but may serve those older if the charges occurred before their eighteenth birthday and the youth must have either mental health disorders, developmental needs, or chronic behavior problems.<sup>176</sup> The Ottawa Youth Mental Health Court provides services such as:

[D]etermining whether referred youth are appropriate for the program, [i]dentifying the mental health needs of presenting youth, [f]acilitating referrals to community-based mental health resources and services, [p]roviding information and support to family members and caregivers [p]roviding support

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<sup>165</sup> *Turning Point Youth Services*, TORONTO CENTRAL HEALTHLINE (Oct. 17, 2019) <https://www.torontocentralhealthline.ca/displayService.aspx?id=132615>.

<sup>166</sup> Krista M. Davis, Michele Peterson-Badali, Brian Wegant & Tracey A. Skilling, *A Process Evaluation of Toronto's First Youth Mental Health Court*, 57 CANADIAN J. CRIMINOLOGY & CRIM. JUST. 159, 164–65 (2015).

<sup>167</sup> *Id.* at 174.

<sup>168</sup> *Id.* at 175.

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> Davis et al., *supra* note 166, at 176.

<sup>172</sup> *See supra* Part III.

<sup>173</sup> *See supra* Part IV.

<sup>174</sup> Youth Mental Health Court Core Committee, *Youth Mental Health Court—Ottawa*, 1 (Feb. 2017) <https://hsjcc.on.ca/wp-content/uploads/Ottawa-Youth-Mental-Health-Court-Guide-English-2017-02.pdf>.

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

and monitoring of youth's progress while under court supervision.<sup>177</sup>

The goal of this court is to provide greater access to community resources, reduce recidivism and help reduce barriers that limit access to appropriate resources, and enhance collaboration among the different parts of the judiciary.<sup>178</sup> While defense counsel may refer a youth to the court, the Crown will consider program criteria, the youth's desire to participate, the current charges and previous charges, and reasons the youth was referred.<sup>179</sup> The referral may be denied if the youth is not interested, the referral is not appropriate, or the program is not a good fit, along with other reasons.<sup>180</sup> There are many different parties that participate in the youth mental health courts in order to help them be successful, such as probation officers and youth mental health court workers.<sup>181</sup>

Even though they do not have youth mental health courts, provinces such as British Columbia and Manitoba offer services to youth in the criminal justice system with mental illnesses or behavior problems. Both these provinces offer assessment and treatment to youths in the criminal justice system through these programs.<sup>182</sup> In Manitoba, this program is not only offered through the court system, but also in Agassiz Youth Centre (AYC) and Probation Services.<sup>183</sup> The referrals to this system take place through the courts, children, and mental health system.<sup>184</sup> In British Columbia, on the other hand, the juveniles referred to this service are usually already in custody or under community supervision and are referred due to mental illness or behavior problems and their involvement in a sexual or violent offence.<sup>185</sup>

There are also types of services offered to juveniles involved in the justice system through this program, which are delivered through specific outpatient centers in the province's major urban centers.<sup>186</sup> They offer two services: assessment services and treatment services.<sup>187</sup> Half of the referrals for assessments made in British Columbia are made by the court, usually to help with sentencing, and the other half are made by probation officers and/or custody services to help with case management or to help with determining treatment goals.<sup>188</sup> The other service offered by British Columbia is treatment, which is delivered by mental

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177 *Id.*

178 *Id.*

179 Youth Mental Health Court Core Committee, *supra* note 174, at 2.

180 *Id.*

181 *Id.* at 3.

182 *Youth Forensic Psychiatric Services, supra* note 153; *Youth Forensic Services, supra* note 153.

183 *Youth Forensic Services, supra* note 153.

184 *Id.*

185 *Youth Forensic Psychiatric Services, supra* note 153.

186 *Id.*

187 *Id.*

188 *Id.*

health professionals.<sup>189</sup> Treatment can include medication, cognitive behavioral therapy, functional family therapy, and general mental health services, among other things.<sup>190</sup> Other services are also available for juveniles involved in a sexual or violent offense and are at risk of repeating their behavior.<sup>191</sup> All treatments are offered at outpatient clinics or youth custody centers.<sup>192</sup>

Manitoba, in comparison, offers services involving an interdisciplinary team, which includes psychiatrists, psychologists, and mental health clinicians.<sup>193</sup> In British Columbia, additional services are offered by the Burnaby Inpatient Assessment Unit (IAU), which doubles as a mental health facility and a place of custody.<sup>194</sup> The Burnaby IAU provides assessments and treatments when ordered by the court, and also provides short term custody and care for juveniles who have been found not criminally responsible due to a mental disorder or those who are unable to stand trial.<sup>195</sup>

### **C. How Canada Differs from the United States**

As previously established in this Note, Canada has chosen to ratify the Convention, while the United States has not, and the impact on this decision can be seen by how each country views juvenile justice and how each country handles their juvenile mental health courts. One of the major differences between the United States and Canada is each countries' history of juvenile justice legislation. Canada's legislation dates to 1908 and has continued to develop throughout the years.<sup>196</sup> The United States, on the other hand, did not establish legislation on juvenile justice until 1974.<sup>197</sup> Both countries have aimed to protect juveniles that enter the justice system; with Canada, however, the Convention helps guide policy and adds some greater protections for juveniles. While both countries have a federalist system, when it comes to juvenile justice, the United States provides greater power to the states than Canada does.<sup>198</sup>

The two countries also differ on how they handle juvenile justice. Canada is considered to be a modified justice model, and the United States is a crime control model.<sup>199</sup> The age range of criminal responsibility for juveniles in Canada is 12–18.<sup>200</sup> However, in the United States, the age range of criminal responsibility for

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<sup>189</sup> *Id.*

<sup>190</sup> *Youth Forensic Psychiatric Services, supra* note 153.

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

<sup>193</sup> *Youth Forensic Services, supra* note 153.

<sup>194</sup> *Youth Forensic Psychiatric Services, supra* note 153.

<sup>195</sup> *Id.*

<sup>196</sup> Makarenko, *supra* note 16.

<sup>197</sup> *Juvenile Justice and Delinquency, supra* note 83.

<sup>198</sup> *See supra* Part III & IV.

<sup>199</sup> John Winterdyk, *One Size Does Not Fit All: Juvenile Justice in the International Arena and a Call for Comparative Analysis*, 2013 ANALELE UNIVERSITATII DIN BUCURESTI: SERIA DREPT 28, 33 (2013).

<sup>200</sup> *Id.*

juveniles is 7–15+.<sup>201</sup> Some major differences in these two models include the tasks, the objectives, the key personnel and agencies, understanding of client behavior, and purpose of intervention.<sup>202</sup> In the modified justice model, as seen in Canada, the tasks are to diagnose and punish the juvenile; in the crime control model, as seen in the United States, the tasks are incarceration and punishment.<sup>203</sup> While the goal of the modified justice system is to respect individual rights and respond to special needs, the goal of the crime control model is to maintain order.<sup>204</sup> With different tasks and goals, both models have different key personnel and agencies. The modified justice model will include childcare experts and social work agencies, along with lawyers and the legal system.<sup>205</sup> On the other hand, the crime control model will include only lawyers and criminal justice actors within the legal system.<sup>206</sup> The amount of responsibility held by the individual varies within each model. The modified justice model views offenders as having diminished individual responsibility.<sup>207</sup> The crime control model views offenders as fully accountable and responsible for their actions.<sup>208</sup> While countries like Canada intervene to give sanctions for behavior while also providing treatment, countries like the United States intervene to protect society and deter offenders.<sup>209</sup>

Both the United States and Canada established a system of juvenile mental health courts being managed by the local governments.<sup>210</sup> However, in Canada the provinces tend to oversee these programs,<sup>211</sup> whereas in the United States these tend to be run by county or city governments.<sup>212</sup> One similarity between the two countries is how widespread juvenile mental health courts are: the United States only having juvenile mental health courts in seventeen states and Canada having only one province with a juvenile mental health court and two other provinces with similar services.<sup>213</sup> In the United States each juvenile mental health court functions differently, whereas in Canada, the courts function largely the same and the services provided also function in a similar manner. For example, in the United States, how the juvenile become involved with juvenile mental health courts varies from court to court; however, in Canada, for a juvenile to become involved with juvenile mental health court or similar service, the juvenile must be referred by someone involved with the court.<sup>214</sup> One major difference is the research that has been done

201

*Id.*

202

*Id.* at 32.

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Winterdyk, *supra* note 199, at 32.

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*Id.*

205

*Id.*

206

*Id.*

207

*Id.*

208

Winterdyk, *supra* note 199, at 32.

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*Id.*

210

*See supra* Part III & IV.

211

*See supra* Part IV.

212

*See supra* Part III.

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*Juvenile Mental Health Treatment Locator*, *supra* note 100; *Youth Criminal Justice*, *supra* note 151; *Youth Forensic Psychiatric Services*, *supra* note 153; *Youth Forensic Services*, *supra* note 153.

214

*See supra* Part III & IV.

on juvenile mental health courts in Canada, compared to the research done on those in the United States.<sup>215</sup> Research on Canadian juvenile mental health courts has examined the success factors of these courts, and why these success factors matter.<sup>216</sup> The research done in the United States mainly focused on if the Santa Clara County juvenile mental health court was successful, as well as ACJCC.<sup>217</sup>

## V. RECOMMENDATIONS

After researching both the United States and Canada in relation to juvenile justice law and juvenile mental health courts, in order to improve their juvenile mental health courts, the United States should: do more research on the success factors of these courts, provide more grants for states to establish these courts or similar programs, shift the model of juvenile criminal justice, and adopt some of the ideas set out in the Convention into legislation.

First, regarding research, the United States could benefit from a better understanding of what factors make a juvenile mental health court successful, so each of these courts can adapt to ensure these factors are included in each juvenile mental health court. Since the OJJDP acts as a home for juvenile justice and already provides grants, some grants could go towards researching these courts in different areas so other localities can apply this research to a juvenile justice court.

Along with more research to understand how to best implement juvenile mental health courts, more grants should be given to these courts. Currently, in the United States, there are around 300 adult mental health courts, with at least one in almost every state.<sup>218</sup> With both research and grants, states could apply what they have learned from the adult mental health courts towards juvenile mental health courts. Even though the OJJDP provides some grants to these courts, more money will be needed to expand these courts. One of the recommendations for the ACJCC was to secure more funding.<sup>219</sup>

Currently the United States is a crime control model, as mentioned previously in this note.<sup>220</sup> The United States should consider shifting to a modified justice model like Canada.<sup>221</sup> This model change would mean the United States

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<sup>215</sup> Davis et al., *supra* note 166, at 164-65; *Mental Health Courts*, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, [https://ojjdp.ojp.gov/sites/g/files/xyckuh176/files/media/document/mental\\_health\\_courts.pdf](https://ojjdp.ojp.gov/sites/g/files/xyckuh176/files/media/document/mental_health_courts.pdf) (last visited Jan. 17, 2021); *What Factors Make Youth Mental Health Courts Successful at Serving Youth With Mental Illness? Evidence Brief*, *supra* note 161.

<sup>216</sup> *What Factors Make Youth Mental Health Courts Successful at Serving Youth with Mental Illness? Evidence Brief*, *supra* note 161.

<sup>217</sup> *Mental Health Courts*, *supra* note 215; *Improving Outcomes*, *supra* note 17.

<sup>218</sup> *Mental Health Courts*, THE COUNCIL FOR STATE GOVERNORS: JUSTICE CENTER, <https://csgjusticecenter.org/projects/mental-health-courts/> (last visited Jan. 17, 2021).

<sup>219</sup> *See supra* Part III.

<sup>220</sup> Winterdyk, *supra* note 199, at 32.

<sup>221</sup> *Id.*

would focus more on working with the juveniles in the system and helping them get the treatment they need instead of just punishing them. Potentially, focusing on treatment instead of punishment could decrease recidivism.

Despite not adopting the Convention in its entirety, the United States should consider adopting some of the principles it provides. Article 37 of the Convention discusses punishment and how it should only be used as a last resort and for the shortest amount of time possible.<sup>222</sup> The United States could adopt a similar policy, such as using punishment when alternatives, such as juvenile mental health courts would not be successful. Article 40 of the Convention discusses rights of a child when accused of wrongdoing; it states that children should be treated with dignity and that there should be a minimum age for liability of a child.<sup>223</sup> The United States does not currently have a singular age that a child can be liable for a crime. Each state varies, with the youngest age being seven,<sup>224</sup> and should set a federal age of responsibility to prevent unfair adjudication. More juvenile mental health courts would also allow for more dignity of juveniles who enter the system because they have a mental illness.

## VI. CONCLUSION

The United States should adopt policies with ideas similar to those set out in Articles 37 and 40 of the Convention. The United States varies on how it handles juvenile mental health courts depending on the locality, whereas Canada has a more similar structure among its courts. Part of this is because of the federal legislation Canada has that provides more structure to the system there than the structure provided in the United States. Although the United States has made great strides regarding juvenile justice and the juvenile mental health courts, there is improvement still needed. The United States should also adopt policies similar to those of Canada, or amend the current policy, and provide federal backing, such as policy and funding, for these courts. Juveniles like Cindy Crane deserve to get the help they need when coming in contact with the juvenile justice system.

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<sup>222</sup> G.A. Res. 44/25, *supra* note 56.

<sup>223</sup> *Id.*

<sup>224</sup> *Minimum Age of Criminal Responsibility in the Americas*, CHILD RIGHTS INTERNATIONAL NETWORK, <https://archive.crin.org/en/home/ages/Americas.html> (last visited Apr. 10, 2021).