ELIMINATING THE COMPETENCY PRESUMPTION IN JUVENILE DELINQUENCY CASES

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The legal presumption used in virtually all juvenile delinquency cases in the U.S. is that all juveniles are competent to stand trial. This Article calls for the elimination of that legal presumption, which is historically based on the Dusky v. United States *decision and in the adult criminal justice system. The recent decisions of the U.S. Supreme Court recognize the developmental and organic brain differences between adults and juveniles. Current research demonstrates a higher frequency rate of incompetence based on intellectual deficiencies among children when compared with adults found to be not legally competent to stand trial. By eliminating the competency presumption for juveniles in both delinquency and adult criminal proceedings, the party seeking an adjudication would be responsible for establishing that the accused juvenile is in fact, competent to stand trial. Foreign jurisdictions in Europe, Asia, Africa, and South America have long required higher thresholds—at least fourteen years of age—for holding juveniles accountable for criminal misconduct, none of them presuming that juveniles are competent to go to trial. In the alternative, by expanding the factors currently in use for determination of juvenile competency by adding developmental immaturity and mental illness, juvenile justice systems could identify the reduction of recidivist offending as the primary systemic objective.*

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INTRODUCTION

As the nation's juvenile court system evolved since its introduction in 1899 in Chicago,[1] some substantive and procedural rules have been drafted specifically for this system, whereas other rules—such as the legal presumption of competency—have been extrapolated from the adult criminal justice system.[2] This Article suggests that the legal presumption that all juveniles are competent to stand trial once they are charged is fundamentally flawed, and should be modified or eliminated altogether. Although the legal system inconsistently recognizes the legal rights and responsibilities of juveniles,[3] there should be a consistent application of the underlying theory, which justifies the continued use of a separate court of limited jurisdiction for juveniles in delinquency matters.[4] By examining the flaws of the legal presumption of competency of juveniles, this Article encourages states to modify or eliminate their statutory competency rules based upon current understanding of the developmental stage of adolescence and adolescent behaviors, and to identify the most effective approaches to reduce or eliminate recidivist behaviors.[5] By eliminating the legal presumption of competency, which originated in the adult criminal justice system, the juvenile system can re-establish as its main systemic goal the reduction of juvenile recidivism.[6] This Piece will examine current legal presumptions of competency in adult and juvenile proceedings, then it will examine the recent arguments challenging the competency paradigm, and it will then con-

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1 *See generally* 1899 Ill. Laws 131–37.

2 *See generally* Sanford J. Fox, *Juvenile Justice Reform: A Historical Perspective*, 22 STAN. L. REV. 1187 (1970).

3 *See* Paula Donnolo & Kim K. Azzarelli, *Ignoring the Human Rights of Children: A Perspective on America's Failure to Ratify the United Nations Convention on the Rights of the Child*, 5 J.L. & POL'Y 203, 203–07 (1996) (stating that despite 191 countries ratifying the U.N. Convention on the Rights of the Child, the U.S. ranks among only two nations refusing to ratify the Convention).

4 *See* 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, 346 (2006).

5 *See, e.g.*, Linda L. Dahlberg & Thomas R. Simon, *Predicting and Preventing Youth Violence*, *in* PREVENTING VIOLENCE: RESEARCH AND EVIDENCE BASED INTERVENTION STRATEGIES, 97, 97–98 (J.R. Lutzker ed., 2006).

6 *See generally* Michelle India Baird & Mina B. Samuels, *Justice for Youth: The Betrayal of Childhood in the United States*, 5 J.L. & POL'Y 177 (1966) (discussing international juvenile justice and restorative measures as well as the need for restructuring current U.S. practices).

clude with a proposal for adopting new competency provisions in delinquency cases.[7]

Scholars have found that "Just as the issue of juvenile competence was neglected by the legal community until a decade ago, psychologists devoted little attention to the study of juveniles' psycholegal capacities until recently."[8] The attention, which social scientists have given to the capacities of juveniles to meaningfully engage in the juvenile justice system, is a major factor that compels the re-examination of the legal presumption of competency in delinquency proceedings.[9] The vast majority of delinquency cases are brought in state courts rather than in federal courts. Each state delinquency system either tacitly assumes or expressly presumes that juveniles brought into court are legally competent to stand trial.[10]

This legal competence presumption has been carried over from the adult criminal system and has gone relatively unchallenged since the creation of independent juvenile courts.[11] Courts have followed the language of Blackstone explaining the application of the competency principle in adult criminal trials, indicating that:

> [I]diots and lunatics are not chargeable for their own acts, if committed when under these incapacities: no, not even for treason itself. Also, if a man in his sound memory commits a capital offence, and before arraignment for it, he becomes mad, he ought not to be arraigned for

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7 In general:

> [A] competent defendant must have capacities to understand information and participate in the justice system process. These include the capacities to acquire and use information about the nature of the charges, trial process, and potential outcomes; appreciate the significance of this information for one's own situation; and communicate with and assist counsel in one's own defense, including participation in the trial process and decision making about relevant trial issues. Included in the question about juveniles' capacity is the issue of whether mental illness and mental retardation, the clinical factors responsible for most adult impairments operate similarly for adolescents.

Jennifer L. Woolard & N. Dickon Reppucci, *Researching Juveniles' Capacities as Defendants*, *in* YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE 173, 177 (Thomas Grisso & Robert G. Schwartz eds., 2000).

8 Randy K. Otto & Alan M. Goldstein, *Juveniles' Competence to Confess and Competence to Participate in the Juvenile Justice Process*, *in* JUVENILE DELINQUENCY: PREVENTION, ASSESSMENT, AND INTERVENTION, 179, 199 (Kirk Heilbrun et al. eds., 2005) (citation omitted).

9 Kellie M. Johnson, *Juvenile Competency Statutes: A Model for State Legislation*, 81 IND. L.J. 1067, 1069–70 (2006).

10 Darla M.R. Burnett et al., *Adjudicative Competency in a Juvenile Population*, 31 CRIM. JUST. & BEHAV. 438, 439 (2004).

11 The one exception to this is that the Oklahoma Court of Criminal Appeals held several years ago that due to the rehabilitative nature of juvenile court proceedings, competency is not required of juvenile defendants. *See* G.J.I. v. State, 778 P.2d 485, 487 (Okla. Crim. App. 1989).

> it: because he is not able to plead to it with that advice and caution that he ought. And if, after he has pleaded, the prisoner becomes mad, he shall not be tried: for how can he make his defence? If, after he be tried and found guilty, he loses his senses before judgment, judgment shall not be pronounced; and if, after judgment, he becomes of nonsane memory, execution shall be stayed: for peradventure, says the humanity of the English law, had the prisoner been of sound memory, he might have alleged something in stay of judgment or execution.[12]

Why would we ever challenge the notion that children might not possess the same capacities as their adult counterparts[13] when they engage in acts of misconduct?[14] Psychologists tell us that:

> Since modern views of mental illness began to emerge in the late 18th and early 19th centuries, the study of psychopathology in children has lagged behind that of adults. For example, in 1812, Benjamin Rush, the first American psychiatrist, suggested that children were less likely to suffer from mental illness than adults because the immaturity of their developing brains would prevent them from retaining the mental events that caused insanity. However, it is now well established that many childhood disorders are common, early-occurring, and chronic, and that they exact a high toll from children, their families and society.[15]

Surely any parent knows better and well understands the myriad differences between adult decision-making and adolescent decision-making.[16] Yet, in the evolution of the juvenile court system, many of the same legal presumptions that govern adult matters have been matter-of-factly applied to juvenile matters.[17] Otto and Goldstein explain that:

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12 Ford v. Wainwright, 477 U.S. 399, 406–07 (1986) (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *24–25) (internal quotation marks omitted).

13 The U.S. Supreme Court recognized in *Miller v. Alabama* that: "[o]ur history is replete with laws and judicial recognition that children cannot be viewed simply as miniature adults." 132 S. Ct. 2455, 2470 (2012) (quoting J.D.B. v. North Carolina, 131 S. Ct. 2394, 2404 (2011)) (internal quotation marks omitted).

14 *See* Thomas Grisso, *Dealing With Juveniles' Competence to Stand Trial: What We Need to Know*, 18 QUINNIPIAC L. REV. 371, 373 (1999).

15 Elizabeth P. Hayden & Eric J. Mash, *Child Psychopathology: A Developmental-Systems Perspective*, *in* CHILD PSYCHOPATHOLOGY 3, 3 (Eric J. Mash & Russell Barkley eds., 3rd ed. 2014) (citations omitted).

16 *See* Elizabeth S. Scott, *Judgment and Reasoning in Adolescent Decisionmaking*, 37 VILL. L. REV. 1607, 1622 (1992).

17 Not surprisingly, many aspects of the study of child psychopathy have been extrapolated from earlier studies exclusively involving adults. Until fairly recently much of the fields'

> The physical, cognitive, social, and emotional capacities of children and adolescents are continually evolving. It is this constant and ongoing change, as well as differences in capacities, that differentiate adolescents from adults. Too frequently, judgments about adolescents' maturation are based on their age or physical development and characteristics or the nature and severity of the delinquent acts they are accused of committing. These factors, however, are not reliable indicators of the capacities that are most relevant to understanding their behavior.[18]

Modern day forensic clinical psychology "can trace its roots to the juvenile courts and the juvenile justice system, as it was in that venue that psychologists first came to regularly assist judges and attorneys in their decision making."[19] Surprisingly, while the juvenile justice system has played a major role in expanding the professional disciplines, which address juvenile misconduct and delinquent behaviors, much of the system continues to be based on legal processes and assumptions that, while appropriate for adult matters, are incompatible with juvenile capacities and behaviors.[20]

While it is true that the sentencing options in juvenile systems vary widely from adult systems,[21] the legal presumptions in these two systems are often tantamount, if not identical.[22] It may be that the juvenile system created so many challenges, that attention was given to what appeared to be the most pressing concerns, such as funding, defining intervention services, and determining what processes would apply in juvenile courts.[23] The notion that juveniles might not have the same de-

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accumulated knowledge about the phenomenology of disorders of childhood was extrapolated from work with adults. For example, only in recent decades have child-focused models of depressive disorders emerged. *See* Hayden & Mash, *supra* note 15, at 4; *see also* HANDBOOK OF DEPRESSION IN CHILDREN AND ADOLESCENTS (John R. Z. Abela & Benjamin L. Hankin eds., 2008).

18 Otto & Goldstein, *supra* note 8, at 180–81 (citations omitted).

19 *Id.* at 179.

20 As Justice Sotomayor indicated in her opinion in *J.D.B. v. North Carolina*, "officers and judges need no imaginative powers, knowledge of developmental psychology, training in cognitive science, or expertise in social and cultural anthropology to account for a child's age. They simply need the common sense to know that a 7-year-old is not a 13-year-old and neither is an adult." 131 S. Ct. 2394, 2407 (2011).

21 *See* Brandi Miles Moore, *Blended Sentencing for Juveniles: The Creation of a Third Criminal Justice System?*, 22 J. JUV. L. 126, 130–31 (2001).

22 This result occurs despite the Supreme Court's recognition in *Miller v. Alabama* that "We have by now held on multiple occasions that a sentencing rule permissible for adults may not be so for children." 132 S. Ct. 2455, 2470 (2012).

23 "More broadly, police arrest nearly 2 million juveniles each year, and demographers predict that one in three American schoolchildren will be arrested by the age of twenty-three.

cisional capacities as adults,[24] or that their comprehension skills might not be equivalent with their adult counterparts[25] may simply not have been on anyone's radar as this unique court system developed.[26] Eliminating or modifying the legal presumption of competence is but one step in the identification of and reassertion of the main objective of the juvenile delinquency system, the reduction or elimination of recidivist offending.[27]

I. CURRENT LEGAL PRESUMPTIONS OF COMPETENCE IN ADULT AND JUVENILE PROCEEDINGS

The modern legal concept of competency to stand trial is based upon three main contributing sources: 1) individual state statutes governing adult criminal and/or juvenile procedures; 2) state court decisions at both the trial and appellate levels; and 3) federal court decisions, including a select number of cases decided by the United States Supreme Court.[28] Much of the current literature focuses solely upon Supreme Court decisions, and not infrequently only upon the holdings of such cases with little regard for facts or background that gave rise to the legal dispute that eventually brought the case into the federal court system. It is helpful to have a better understanding and background of these cases so frequently referenced in discussions about legal competency.

The United States Supreme Court first addressed the legal issue of a defendant's competency to stand trial *not* in a case involving a juvenile but in a case involving an adult criminal defendant. The 1960 landmark

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All this is so despite the fact that juvenile crime is steadily declining." NELL BERNSTEIN, BURNING DOWN THE HOUSE: THE END OF JUVENILE PRISON 7 (2014).

[24] *See* Carrie S. Fried & N. Dickon Reppucci, *Criminal Decision Making: The Development of Adolescent Judgment, Criminal Responsibility, and Culpability*, 25 LAW & HUM. BEHAV. 45, 46 (2001).

[25] *See* Vance L. Cowden & Geoffrey R. McKee, *Competency to Stand Trial in Juvenile Delinquency Proceedings—Cognitive Maturity and the Attorney-Client Relationship*, 33 U. LOUISVILLE J. FAM. L. 629, 656 (1995).

[26] The unanticipated high frequency of psychiatric illnesses in juveniles in detention facilities is one such challenge. *See* Linda A. Teplin et al., *Psychiatric Disorders in Youth in Juvenile Detention*, 59 ARCHIVES GEN. PSYCHIATRY 1133, 1137 (2002).

[27] *See* Erika K. Penner et al., *Procedural Justice Versus Risk Factors for Offending, Predicting Recidivism in Youth*, 38 L. & HUM. BEHAV. 225, 225 (2014) (explaining that by treating juveniles in a fair and just manner, justice professionals may be able to reduce the likelihood that adolescents will reoffend).

[28] Article III, Section 1 of the United States Constitution established the Supreme Court as the focal point of all judicial power:

> The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behaviour, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.

U.S. CONST. art. III, § 1.

decision, *Dusky v. United States*, was a per curiam opinion that was barely half a page in length.[29] The Court rejected a federal district court's determination that first found the defendant was competent, and subsequently convicted him of unlawfully transporting in interstate commerce a girl who had been kidnapped. The Supreme Court concluded that the record below was simply insufficient to support a finding that the defendant had been competent to stand trial under the federal statute, 18 U.S.C. § 4244.[30] The Court wrote that:

> [I]t [is] not enough for the trial court to find that "the defendant [is] oriented to time and place and [has] some recollection of events," but that the "test must be whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him."[31]

There was no lengthy or detailed discussion about legal competency, no legal analysis of the history of the legal concept, just an assertion that the record below was not sufficient to conclude that the accused was in fact competent at the time of the trial. This case of first impression focused on *adult* competency, and so, the application of legal rights of adolescents in separate *juvenile* delinquency proceedings remained unaddressed

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[29] 362 U.S. 402 (1960). The opinion *in its entirety* is as follows:

> The motion for leave to proceed in forma pauperis and the petition for a writ of certiorari are granted. Upon consideration of the entire record we agree with the Solicitor General that "the record in this case does not sufficiently support the findings of competency to stand trial," for to support those findings under 18 U.S.C. § 4244, 18 U.S.C. § 4244 the district judge "would need more information than this record presents." We also agree with the suggestion of the Solicitor General that it is not enough for the district judge to find that "the defendant [is] oriented to time and place and [has] some recollection of events," but that the "test must be whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him."
>
> In view of the doubts and ambiguities regarding the legal significance of the psychiatric testimony in this case and the resulting difficulties of retrospectively determining the petitioner's competency as of more than a year ago, we reverse the judgment of the Court of Appeals affirming the judgment of conviction, and remand the case to the District Court for a new hearing to ascertain petitioner's present competency to stand trial, and for a new trial if petitioner is found competent. It is so ordered.
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> Reversed and remanded with directions.

Id. at 402–03.

[30] *Id.* at 402.

[31] *Id.* The Supreme Court reversed and remanded the case with directions because of the "ambiguities regarding the legal significance of the psychiatric testimony in [the] case and the resulting difficulties of retrospectively determining the petitioner's competency as of more than a year ago." *Id.* at 403.

for the next seven years.[32] Assuming that the requirements announced in *Dusky* for adult competency to stand trial were appropriate at the time of the decision in 1960, there is no reason to assume that the Supreme Court had anticipated such legal standards would also be applied to juveniles as young as ten years old, let alone that any such legal standards would be appropriate for measuring juvenile competency to stand trial.

The state of mental health treatment and the mental health profession was far different in 1960 than it is today,[33] yet the present day legal concept of competency remains firmly rooted in this per curiam decision that simply remanded the *Dusky* case back to the lower court without discussion. By 1960, frontal lobotomies had been performed on tens of thousands of mental patients,[34] and one physician was awarded a Nobel Prize for doing so.[35] Many of these operations were performed by physicians with little or no surgical training, and there was no widespread consensus among physicians about the effectiveness of the procedures.[36]

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[32] Nevertheless, state legislatures started enacting statutory provisions using *Dusky* defining competency and addressing legal procedures to challenge it and the protocol to be followed should the accused be found not to be competent. *See, e.g.*, ARK. CODE ANN. § 9-27-502(a)(1) (2008); ME. REV. STAT. ANN. tit. 15, § 3318 (2003); N.C. GEN. STAT. § 7B-2401 (2007); S.C. CODE ANN. § 44-23-410(A) (Supp. 2008); W. VA. CODE ANN. § 27-6A-9 (LexisNexis 2008); State v. J.S., No. 0312013339, 2005 Del. Fam. Ct. LEXIS 75, at *10–15 (Aug. 2, 2005), *rev'd*, 918 A.2d 1144 (Del. 2007); *In re* T.D.W., 441 N.E.2d 155, 156–57 (Ill. App. Ct. 1982), *overruled by* People v. Gentry, 815 N.E.2d 27, 32 (Ill. App. Ct. 2004); *In re* K.G., 808 N.E.2d 631, 637–38 (Ind. 2004); *In re* A.B., No. 5-791/05-0868, 2006 Iowa App. LEXIS 189, at *7–9 (Ct. App. Mar. 1, 2006); *In re* Carey, 615 N.W.2d 742, 746–47 (Mich. Ct. App. 2000); *In re* Two Minor Children, 592 P.2d 166, 169 (Nev. 1979); *In re* Johnson, No. 7998, 1983 Ohio App. LEXIS 14017, at *12–14 (Ct. App. Oct. 25, 1983); State v. E.C., 922 P.2d 152, 155–56 (Wash. Ct. App. 1996).

[33] These observations are of course applicable to the legal system of the 1960s as well, which tolerated much that today would seem surprising, if not shocking. *See generally* Franz G. Alexander & Sheldon T. Selesnick, THE HISTORY OF PSYCHIATRY: AN EVALUATION OF PSYCHIATRIC THOUGHT AND PRACTICE FROM PREHISTORIC TIMES TO THE PRESENT 269–401 (1966) (describing various psychiatric treatment used in the 1960s).

[34] *See* ELLIOTT S. VALENSTEIN, GREAT AND DESPERATE CURES: THE RISE AND DECLINE OF PSYCHOSURGERY AND OTHER RADICAL TREATMENTS FOR MENTAL ILLNESS 228 (1986) (describing the history of lobotomy).

[35] In 1949, the inventor of the frontal lobotomy—António Caetano de Abreu Freire Egas Moniz, known in psychiatry only as Egas Moniz, a *nom de guerre*, and the head of neurology at University of Lisbon—was awarded the Nobel Prize. Marshall J. Getz, *The Ice Pick of Oblivion: Moniz, Freeman and the Development of Psychosurgery*, 13 TRAMES 129, 135, 138–39 (2009). Lobotomy, also referred to as "leucotomy," and other forms of psychosurgery are still used today despite documented terrible results, albeit not nearly as frequently as in the 1950s and 1960s. *See* Jacqueline Klein, *A Theory of Punishment: The Use of Mechanical Restraints in Psychiatric Care*, 21 S. CAL. REV. L. & SOC. JUST. 47, 62–63 (2011). The lobotomized patient, following surgery, " 'was confused and apathetic, blood pressure dropped, and body weight increased at a striking rate . . . gave monosyllabic responses to questions in a flat tone; had a blank expression; lost control over bowel and bladder; had to be fed like an infant.' " *Id.* at 62 (quoting LELAND V. BELL, TREATING THE MENTALLY ILL: FROM COLONIAL TIMES TO THE PRESENT 145 (1980)).

[36] *See* VALENSTEIN, *supra* note 34, at 222.

In the wake of the Kennedy family's decision to have their daughter, Rosemary, lobotomized in 1941, and the very poor reaction to that procedure resulting in her spending the remainder of her life secluded in a convent in Wisconsin until her death in 2005,[37] coupled with the much publicized involuntary lobotomy of the then rising Hollywood actress, Frances Farmer,[38] public knowledge and resistance to the growing utilization of "psychosurgery"[39] as it was then called, began slowly to develop.[40] The procedures employed for the treatment of patients with mental problems in 1960 were significantly different than practices utilized today.

By 1952, a French pharmaceutical company had refined phenothiazine to chlorpromazine (or "thorazine") to control the psychotic symptoms in patients, and this would forever change the face of psychiatry.[41] Nevertheless, also by 1952, the team of Walter Freeman and James Winston Watts—who had been performing lobotomies using an icepick since 1947[42]—had performed over 600 lobotomies,[43] while about 5,000 such operations throughout the country were being done annually.[44] Current estimates suggest that as many as 40,000 Americans were "psychosurgery" patients during the decades-long period[45] this surgery was being performed.[46]

Long term hospitalizations were commonplace for those with sufficient funds or insurance, and the American Psychiatric Association was still using the first edition of the *Diagnostic and Statistical Manual of Mental Disorders*, first published in 1952, but still in use in 1960 when *Dusky* was decided.[47] The diagnosis of homosexuality in 1960 was con-

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37 Martin Weil, *Rosemary Kennedy, 86; President's Disabled Sister*, WASH. POST, Jan. 8, 2005, at B06.

38 *See generally* FRANCES FARMER, WILL THERE REALLY BE A MORNING? AN AUTOBIOGRAPHY (1972).

39 WALTER FREEMAN & JAMES W. WATTS, PSYCHOSURGERY IN THE TREATMENT OF MENTAL DISORDERS AND INTRACTABLE PAIN, at xx–xxiii (2d ed. 1950).

40 *See* Getz, *supra* note 35, at 146; Gretchen J. Diefenbach et al., *Portrayal of Lobotomy in the Popular Press: 1935–1960*, 8 J. HIST. NEUROSCIENCES 60, 66 (1999).

41 *See generally* Thomas A. Ban, *Fifty Years Chlorpromazine: A Historical Perspective*, 3 NEUROPSYCHIATRIC DISEASE & TREATMENT 495 (2007) (detailing the creation of Chlorpromazine at Laboratoires Rhône-Poulenc).

42 Mical Raz, *The Painless Brain: Lobotomy, Psychiatry, and the Treatment of Chronic Pain and Terminal Illness*, 52 PERSP. BIOLOGY & MED. 555, 556 (2009).

43 But by 1956, Watts and his team were reviewing cases of over 3,000 lobotomies they had performed. *See* Walter Freeman, *Frontal Lobotomy, 1936–1956: A Follow-Up Study of 3000 Patients from One to Twenty Years*, 113 AM. J. PSYCHIATRY 877, 877–78 (1957); Walter Freeman, *Psychosurgery*, 106 AM. J. PSYCHIATRY 534 (1950).

44 Getz, *supra* note 35, at 146.

45 *Id.* at 147.

46 *Id.*

47 As of this publication, the DSM-V, or 5th edition is the current authoritative version, or "the bible of psychiatry." *See* MAKING THE DSM-5, CONCEPTS AND CONTROVERSIES, at v

sidered a "mental illness."[48] In the 1960s, American psychiatry was primarily focused on psychoanalysis, and its legitimacy in medicine was seriously called into question.[49] This is not meant to be a general criticism of mental health services as they existed in 1960. Rather, the classifications of mental illness, the experimental surgical procedures utilized, and the reliance on analysis primarily rather than medication-based treatments was considered the state of the art for that era.

Today, many of these procedures and classifications would be viewed with a great deal of skepticism—and perhaps with some degree of shock—but this was a discipline in transition as the rise of administering medication and psychopharmacology was essentially in its infancy. There are more than a few legal cases and laws that existed during the same era, which, if viewed through the lens of our current legal understanding, would create more than a little controversy. The point being that behavioral science has made great strides over the past fifty years, and that the methods of psychiatric and psychological assessment of patients have come a long way. The limited factors that governed mental health evaluations fifty years ago would be dated and in some instances inappropriate by today's measure.[50] Given the substantial progress made over the past fifty years in mental health treatments and understanding,[51] surely the legal system should not be bound to a stagnant definition of legal competency or to antiquated policies affecting offenders with mental health issues or developmental immaturity.[52]

In 1966, the Supreme Court once again addressed the competency to stand trial issue, in *Pate v. Robinson*, where the Court declared that the failure to observe procedures adequate to protect a defendant's right not to be tried or convicted while incompetent to stand trial deprived the accused of his due process right to a fair trial.[53] The Due Process Clause

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(Joel Paris & James Phillips eds., 2013). The DSM-I was in use from 1952 until 1968 when the American Psychiatric Association published the DSM-II. *Id.* at 6–7.

48 *See* Andreas DeBlock & Pieter R. Adriaens, *Pathologizing Sexual Deviance: A History*, 50 J. SEX RES. 276, 280–82 (2013) (describing how both American and European psychiatrists have categorized sexual behaviors over the past 150 years); Owen Whooley & Allan V. Horwitz, *The Paradox of Professional Success: Grand Ambition, Furious Resistance, and the Derailment of the DSM-5 Revision Process*, *in* MAKING THE DSM-5, CONCEPTS AND CONTROVERSIES 75, 78 (Joel Paris & James Phillips eds., 2013).

49 *Id.*

50 *See* Mark R. Fondacaro & L.G. Fasig, *Judging Juvenile Responsibility: A Social Ecological Perspective*, *in* HANDBOOK OF CHILDREN, CULTURE, AND VIOLENCE 355, 369 (Nancy E. Dowd et al. eds., 2006).

51 *See* Mical Raz, *Between the Ego and the Icepick: Psychosurgery, Psychoanalysis, and Psychiatric Discourse*, 82 BULL. HIST. MED. 387, 415–20 (2008).

52 *See* Jennifer L. Skeem et al., *Correctional Policy for Offenders with Mental Illness: Creating a New Paradigm for Recidivism Reduction*, 35 L. & HUM. BEHAV. 110, 111 (2011).

53 383 U.S. 375, 385–86 (1966).

of the 14th Amendment had become the focal point of the Court's legal inquiry where competence had been challenged.

The course of juvenile justice in this country was changed forever seven years after *Dusky*, when the United States Supreme Court forged its 1967 landmark decision in *In re Gault*.[54] Fifteen-year-old Gerald Gault had been charged with using lewd and indecent language in a phone call to a neighbor in Arizona. Gerald Gault was arrested, detained, and tried without notice of the charges against him, without a lawyer, and without any testimony from either the accuser or from any of his own defense witnesses. He was sentenced to the Fort Grant Reform School until his 21st birthday, or a six-year sentence for his offense.[55] In an eight-to-one decision, the United States Supreme Court held that children charged in juvenile court were entitled to the assistance of legal counsel, to confront and cross-examine their accusers, and to the protection of the privilege against self-incrimination.[56] Thus, juvenile courts and their legal procedures were radically changed, and much of the western world took note. Nevertheless, it was the language of the lower state court's decision in *Gault* by Justice Charles C. Bernstein—writing for the Arizona Supreme Court—that best explains to this day the raison d'être of the modern American juvenile court:

> [J]uvenile courts do not exist to punish children for their transgressions against society. The juvenile court stands in the position of a protecting parent rather than a prosecutor. It is an effort to substitute protection and guidance for punishment, to withdraw the child from criminal jurisdiction and use social sciences regarding the study of human behavior which permit flexibilities within the procedures. The aim of the court is to provide individualized justice for children. Whatever the formulation, the purpose is to provide authoritative treatment for those who are no longer responding to the normal restraints the child should receive at the hands of his parents. The delinquent is the child of, rather than the enemy of society, and their interests coincide.[57]

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54 387 U.S. 1 (1967).

55 *See* Wallace J. Mlyniec, In re Gault *at 40: The Right to Counsel in Juvenile Court—A Promise Unfulfilled*, 44 CRIM. L. BULL. 371, 371 (2008). Gault actually spent only six months in the state training school. *Id.* at 379 n.5.

56 *Id.* at 371. Yet, juveniles were *not* guaranteed a right to bail, the right to trial by jury, the right to a speedy trial, or the right to represent themselves. *Id.*

57 *In re* Gault, 407 P.2d 760, 765, 99 Ariz. 181, 188 (Ariz. 1965), *rev'd*, 387 U.S. 1 (1967).

In re Gault changed everything in the application of procedures and substantive law as it related to juveniles, but the decision—which occurred at the height of the Warren Court's judicial activism—had been based also upon the application of the Fourteenth Amendment's Due Process Clause, not the substantive provisions of the Sixth Amendment.[58] Although much earlier court decisions involving the rights of juveniles had been based upon application of the Due Process Clause,[59] *Gault* ushered in a radical shift in the legal procedures applied in juvenile delinquency adjudication hearings (trials).

By 1975, the Supreme Court was again asked to resolve a competency matter in *Drope v. Missouri*.[60] The defendant, James Edward Drope, convicted in the St. Louis Circuit Court of the capital offense of the forcible rape of his wife, was absent during parts of his trial proceedings due to his attempt to kill his wife on the Sunday prior to his trial, followed by his own attempted suicide by shooting himself on the second day of the trial. The trial court denied defense counsel's motion for mistrial, ruling that the defendant's absence was voluntary, and that the trial would go forward while the defendant remained hospitalized. The defendant was found guilty and sentenced to life imprisonment. The *Drope* Court unanimously (Chief Justice Burger penned the opinion) declared that the defendant was denied due process of law because of the failure of the trial court to order a psychiatric examination of the accused. The Supreme Court relied upon the Due Process Clause as the focal point for the Court's decision.[61]

By the mid-2000s, the application of the Court's recognition of developmental limitations of adolescents resulted in several separate decisions, *Roper v. Simmons*,[62] *Graham v. Florida*,[63] and *Miller v. Alabama*.[64] In these three cases, the Supreme Court compared outcomes with adult offenders charged with similar crimes, but decreed that

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58 *See* Irene Merker Rosenberg, Gault *Turns 40: Reflections on Ambiguity*, 44 CRIM. L. BULL. 3 (2008).

59 *See, e.g.*, People v. Turner, 55 Ill. 280 (1870) (citing to the state's recently-enacted constitution's Due Process Clause where the Illinois Supreme Court released a fourteen-year-old boy from incarceration in the Chicago Reform School and struck down key provisions in the state reform school laws).

60 420 U.S. 162 (1975).

61 *Id.* at 163–64.

62 543 U.S. 551 (2005) (holding that it was cruel and unusual punishment to execute anyone for a crime committed under the age of eighteen).

63 560 U.S. 48 (2010) (holding that is was unconstitutional to impose a life without parole—LWOP—sentence on anyone who committed a nonhomicide offense under the age of eighteen).

64 132 S. Ct. 2455 (2012).

juveniles were less culpable than adults, deserving of less punishment than adult offenders.[65]

In *Roper*, Justice Kennedy in the majority opinion cited scientific and sociological studies of juvenile brain development as authority for the ruling that application of the death penalty to juveniles would be violative of the Eighth Amendment's prohibition against cruel and unusual punishment.[66] The noninvasive techniques developed by neuroscientists to study the juvenile brain since the 1990s include magnetic resonance imagining (MRI) and functional magnetic resonance imaging (fMRI),[67] which contribute to the conclusion that the adolescent brain—once thought to be fully developed—actually continues to develop until the early to mid-twenties.[68]

In *Graham v. Florida*, the Supreme Court concluded that life-without-parole sentence for juveniles, like capital punishment, may violate the Eighth Amendment when imposed on juveniles.[69] The Court found that because "[t]he heart of the retribution rationale" relates to an offender's blameworthiness, "the case for retribution is not as strong with a minor as with an adult."[70] Additionally, the deterrent impact is negligible because "'the same characteristics that render juveniles less culpable than adults'"—immaturity, recklessness, and impetuosity—make them less likely to consider potential punishment.[71]

In *Miller v. Alabama*, the Supreme Court held a statutory scheme that mandates life imprisonment without the possibility of parole for offenders under the age of eighteen at the time of the offense would be unconstitutional, even for minors who have been convicted of homicide.[72] The reduced culpability of juveniles was a defining component of the Court's analysis.[73] *Miller* involved two cases in which juvenile defendants received mandatory life sentences for having been convicted of homicides when they were fourteen years old. Miller had been raised in

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65 *See* Laurence Steinberg & Elizabeth Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOL. 1009 (2003).

66 543 U.S. at 569–76.

67 *See* Kent A. Kiehl et al., *Temporal Lobe Abnormalities in Semantic Processing by Criminal Psychopaths As Revealed by Functional Magnetic Resonance Imaging*, 130 PSYCHIATRY RES.: NEUROIMAGING 297 (2004).

68 *See* William J. Katt, Roper *and the Scientific Amicus*, 49 JURIMETRICS J. 253, 266–67 (2009).

69 560 U.S. 48 (2010).

70 *Id.* at 71 (quoting Tison v. Arizona, 481 U.S. 137, 149 (1987); *Roper*, 543 U.S. at 571).

71 *Id.* at 72 (quoting *Roper*, 543 U.S. at 571).

72 132 S. Ct. 2455 (2012).

73 *See* Barry C. Feld, *Adolescent Criminal Responsibility, Proportionality, and Sentencing Policy:* Roper*,* Graham*,* Miller/Jackson*, and the Youth Discount*, 31 LAW & INEQ. 263 (2013).

foster homes, had been physically abused by his stepfather,[74] had parents who suffered drug addictions, while his mother also suffered from alcoholism, and the juvenile himself regularly used illegal drugs as well as alcohol.[75] Miller had also attempted suicide on four different occasions, the first when he should have been in kindergarten.[76] Miller was tried as an adult, was convicted of murder, and was sentenced to mandatory life without parole.[77] The Court ruled that "children are constitutionally different from adults for purposes of sentencing."[78] The Court cited to behavioral studies that affirmed notions that minors are less responsible, more impulsive, and more amenable to rehabilitation than their adult counterparts.[79]

One scholar has argued that following the Supreme Court decisions in *J.D.B. v. North Carolina*,[80] and the *Roper/Graham/Miller* line of cases, the Court may be developing a constitutional distinction between minors and adults that applies across a range of contexts, making children constitutionally different from adults "for many purposes beyond criminal sentencing."[81] Nevertheless, critics have argued that some of the studies cited by the Supreme Court are either insufficient or just outdated.[82] Other critics have taken issue with the Court's conclusion that scientific studies tend to demonstrate that adolescents are not morally responsible for their misconduct.[83] Even though *Roper/Graham/Miller* appears to introduce the Supreme Court's recognition of the diminished responsibility of adolescent offenders, the cases are limited to prohibiting the application of the death penalty and life without parole for juvenile offenders.[84] The Court's utilization of adolescent developmental research[85] could easily be applied beyond the limitations of these hold-

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74 *Miller*, 132 S. Ct. at 2469.

75 *Id.* at 2462.

76 *Id.* at 2469.

77 *Id.* at 2462–63.

78 *Id.* at 2464.

79 *Id.*

80 131 S. Ct. 2394, 2403 (2011) (The Court found that the age of a suspect was relevant to whether a suspect was "in custody" for Miranda purposes under the 5th Amendment, and that a "reasonable child subjected to police questioning will sometimes feel pressured to submit when a reasonable adult would feel free to go.").

81 John F. Stinneford, *Youth Matters:* Miller v. Alabama *and the Future of Juvenile Sentencing*, 11 OHIO ST. J. CRIM. L. 1, 2 (2013).

82 Deborah W. Denno, *The Scientific Shortcomings of* Roper v. Simmons, 3 OHIO ST. J. CRIM. L. 379, 379 (2006).

83 Stephen J. Morse, *Brain Overclaim Syndrome and Criminal Responsibility: A Diagnostic Note*, 3 OHIO ST. J. CRIM. L. 397, 407 (2006) (arguing that the studies cited in the *Roper* decision do not confirm that adolescents are less responsible for their misconduct).

84 *See* Barry C. Feld, *The Youth Discount: Old Enough to Do the Crime, Too Young to Do the Time*, 11 OHIO ST. J. CRIM. L. 107 (2013); Stinneford, *supra* note 81, at 7.

85 *See* James M. Bjork et al., *Developmental Differences in Posterior Mesofrontal Cortex Recruitment by Risky Rewards*, 27 J. NEUROSCIENCE 4839 (2007); Neir Eshel et al., *Neural*

ings,[86] and considered by state legislators seeking to better respond to juvenile misconduct.[87]

One group of researchers has concluded:

> Defense attorneys did not begin to raise the question of competency in juvenile court until the 1990's. As new laws were passed to treat youth more harshly and more like adult defendants, defense attorneys started raising competency to protect their clients in juvenile court. Since no juvenile competency standards existed, either in case law or statute, attorneys and courts frequently relied on their state's criminal competency statute as the standard. Currently, all states except Oklahoma now recognize that youth in juvenile court must be competent to stand trial . . . .[88]

In addition to the decisions by the Supreme Court, the most important legal sources for defining juvenile competency include state statutes[89] and various court decisions from the lower courts.[90] While many states enacted statutory provisions following the *Dusky* decision that define

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Substrates of Choice Selection in Adults and Adolescents: Development of the Ventrolateral Prefrontal and Anterior Cingulate Cortices, 45 NEUROPSYCHOLOGICA 1270 (2007), *cited in* Brief for Petitioner at 42, Graham v. Florida, 560 U.S. 48 (2010) (No. 08-7412).

86 *But see* Emily Buss, *What the Law Should (and Should Not) Learn from Child Development Research*, 38 HOFSTRA L. REV. 13, 34, 37–48 n.144 (2009) (arguing for the reevaluation of "[c]onventional wisdom" that the law should "assign rights and responsibilities" based upon "assessments of children's capacities documented in the scientific research" because such an approach incorrectly assumes that children's capacities are "ascertainable and fixed").

87 *See* Nina W. Chernoff & Marsha L. Levick, *Beyond the Death Penalty: Implications of Adolescent Development Research for the Prosecution, Defense and Sanctioning of Youthful Offenders*, 209 CLEARINGHOUSE REV. J. POVERTY L. & POL'Y 213 (2005).

88 NAT'L JUVENILE JUSTICE NETWORK, MODELS FOR CHANGE POLICY UPDATE: COMPETENCY TO STAND TRIAL IN JUVENILE COURT: RECOMMENDATIONS FOR POLICYMAKERS 2 (2012), *available at* http://www.njjn.org/uploads/digital-library/NJJN_MfC_Juvenile-Competency-to-Stand-Trial_FINAL-Nov2012.pdf [hereinafter POLICY UPDATE].

89 *See infra* Appendix A.

90 Some of the lower court decisions include:

> [A] ruling from the Iowa Court of Appeals that immaturity and intellectual capacity can lead to a finding of incompetency to stand trial, and an opinion from the Michigan Court of Appeals that "competency evaluations should be made in light of juvenile, rather than adult, norms." Similarly, Ohio appellate courts refer to the adult statute on competency to stand trial as applying to juvenile court, provided that "juvenile norms" are utilized. These rulings appear to permit a "watering down" of *Dusky* standards for defendants in juvenile court.
>
> The eighteen jurisdictions that have a statute or court rule for juvenile court tend to hold that competency to stand trial requires only an ability to understand the proceedings and to assist counsel. For example, Virginia's statute provides:
>
> > If the juvenile is otherwise able to understand the charges against him and assist in his defense, a finding of incompetency shall not be made based solely on any or all the following: (i) the juvenile's age or developmental factors; (ii) the juvenile's claim to be unable to remember the time period surrounding the

competency to stand trial using the exact same language found in the Court decision, other states have enacted their own language without reliance on *Dusky* as the sole factor for the definition of legal competency. Some states have adopted specific requirements defining juvenile competency, while still other states have simply applied the same definition of competency as applied to adults for juveniles who challenge competency. A single unified definitional approach to competency may have some limitations. In the National Juvenile Justice Network's overview to the Models for Change initiative guide *Developing Statutes for Competence to Stand Trial in Juvenile Delinquency Proceedings: A Guide for Lawmakers*, developed through the John D. and Catherine T. MacArthur Foundation,[91] it is noted:

> While many adult criminal competency statutes refer to mental illness and intellectual disability as underlying factors for incompetence, none refer to a defendant's developmental maturity—a critical factor to consider when evaluating the competency of a youth to stand trial. The ongoing process of adolescent development can amplify mental illness or intellectual disabilities that are already affecting a youth's competence. And developmental immaturity alone can raise concerns about a youth's competence to stand trial. . . . It would be foolish to neglect these major components of human development when making such determinations.[92]

By examining some of the more recent criticisms of the status quo juvenile competency definitions, we can better appreciate why the brief

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alleged offense, or (iii) the fact that the juvenile is under the influence of medication.

The only special consideration for juveniles among these jurisdictions can be found in four states. Florida's and Maryland's competency laws include a capacity to appreciate the charges, range of penalties, and adversarial nature of the process; to disclose pertinent facts to counsel; to display appropriate courtroom behavior; and to testify relevantly. Louisiana holds that incompetency to stand trial can stem from immaturity. Vermont's juvenile court rule mentions age and developmental maturity, mental illness, developmental disorders, any other disability, and "any other factor" that could affect competency in juvenile court.

Most of the law related to competency to stand trial in juvenile court addresses the mental illness or mental retardation connection to competency (and treatment prognosis and restoration services) and what should be done with defendants who are incompetent to stand trial.

Joseph B. Sanborn, Jr., *Juveniles' Competency to Stand Trial: Wading Through the Rhetoric and the Evidence*, 99 J. CRIM. L. & CRIMINOLOGY 135, 141–42 (2008) (citations omitted).

91 KIMBERLY LARSON ET AL., DEVELOPING STATUTES FOR COMPETENCE TO STAND TRIAL IN JUVENILE DELINQUENCY PROCEEDINGS: A GUIDE FOR LAWMAKERS (2011), http://www.njjn.org/uploads/digital-library/Developing_Statutes_for_Competence_to_Stand_Trial_in_Juvenile_Delinquency_Proceedings_A_Guide_for_Lawmakers-MfC-3_1.30.12_1.pdf.

92 POLICY UPDATE, *supra* note 88, at 4.

Dusky decision to simply remand the case for further findings fifty years ago should not be the sole foundation for defining juvenile competency to stand trial today.

II. RECENT ARGUMENTS CHALLENGING THE COMPETENCY PARADIGM

Recognizing the ever increasing body of literature focused on the very high rates of mental disabilities of the children involved in juvenile and adult criminal systems[93]—almost 65% of incarcerated juveniles and 60% of detained juveniles meet criteria for one or another DSM-V disorder[94]—the interdisciplinary study initiated by the MacArthur Foundation Research Network on Adolescent Development and Juvenile Justice focused on the impact of adolescent developmental immaturity and juvenile competency to stand trial.[95] One conclusion reached by the multi-year study was considered the "uncomfortable reality" that "[u]nder well-accepted constitutional restrictions on the state's authority to adjudicate those charged with crimes, many young offenders—particularly among those under 14—may not be appropriate participants for criminal adjudication."[96]

Today, neuroscience recognizes that one of the last areas of the adolescent brain to develop is the prefrontal cortex, serving as the center for "executing cognitive functions" such as planning, organizing information, and thinking about possible consequences of one's actions.[97] The prefrontal cortex also controls the capacity to inhibit or to delay impulsive and emotional reactions sufficiently to allow for the rational consideration or appropriate responses, also called "affect regulation."[98]

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93 Additionally, many believe that the estimated numbers of incarcerated offenders suffering from mental illness are under-representative of actual prevalence rates, and that persons with mental illness have increased disproportionately over the last ten years leaving the U.S. with three times more individuals with severe mental illness in prison than in psychiatric hospitals. Robert D. Morgan et al., *Treating Offenders with Mental Illness: A Research Synthesis*, 36 LAW & HUM. BEHAV. 37, 37 (2012).

94 Machteld Hoeve et al., *The Influence of Mental Health Disorders on Severity of Reoffending in Juveniles*, 40 CRIM. JUST. & BEHAV. 289, 289 (2013) (describing a multisite study involving almost 10,000 youths in a range of juvenile justice settings, compared to only 15% of youths in the general population with mental health prevalence rates).

95 Thomas Grisso, Laurence Steinberg, Jennifer Woolard, Elizabeth Cauffman, Elizabeth Scott, Sandra Graham, Fran Lexcen, N. Dickon Reppucci & Robert Schwartz, *Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants*, 27 LAW & HUM. BEHAV. 333, 333 (2003) [hereinafter *MacArthur Study*].

96 *Id.* at 358.

97 *See* Elizabeth S. Scott & Thomas Grisso, *Developmental Incompetence, Due Process, and Juvenile Justice Policy*, 83 N.C. L. REV. 793, 812–13 (2005).

98 As the Supreme Court noted in *Miller v. Alabama*:

> In *Roper*, we cited studies showing that "'[o]nly a relatively small proportion of adolescents'" who engage in illegal activity "'develop entrenched patterns of problem behavior.'" Roper v. Simmons, 570 U.S. 551, 570 (2005) (quoting Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmen-*

Current studies and research reveal that juveniles in early to mid-adolescence are generally neurologically immature,[99] and their brains are unstable in comparison to their adult counterparts.[100] They tend to act more impulsively and without any planning in comparison to adults.[101] Adolescents appear to be more focused on short-term risks and benefits of their decision-making and pay far less attention to possible long-term consequences of their decisions than do adults.[102] Of course, these assertions may be accurate for normative juvenile and adult development, but many of the juveniles in criminal and delinquency systems demonstrate abnormal developments[103] coupled with environmental, familial, peer, social, and biological influences, which require further empirical studies.

In addition, noted developmental gaps exist between adolescents in the fourteen and under age range when compared to adolescents in the sixteen to eighteen year age range.[104] Attempting to equate adult competency issues with adolescent competency issues can be misleading, if not misapplied.[105] For example, in one jurisdictional study, adults with intellectual deficits as measured by IQ results tend to be found not competent

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tal Immaturity, Diminished Responsibility, and the Juvenile Death Penalty, 58 AM. PSYCHOLOGIST 1009, 1014 (2003)). And in *Graham*, we noted that "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds"—for example, in "parts of the brain involved in behavior control." Graham v. Florida, 560 U.S. 48, 68 (2010). We reasoned that those findings—of transient rashness, proclivity for risk, and inability to assess consequences—both lessened a child's "moral culpability" and enhanced the prospect that, as the years go by and neurological development occurs, his "'deficiencies will be reformed.'" *Id.* (quoting *Roper*, 543 U.S. at 570).

132 S. Ct. 2455, 2464–65 (2012).

99 *See id.* at 2465 n.5: "It is increasingly clear that adolescent brains are not yet fully mature in regions and systems related to higher-order executive functions such as impulse control, planning ahead, and risk avoidance." *See also* Terry A. Maroney, *Adolescent Brain Science After* Graham v. Florida, 86 NOTRE DAME L. REV. 765, 767 (2011) ("Over the last decade, developmental neuroscience has generated a scientific consensus that, when considered in the aggregate, teen brains are structurally and functionally different from those of both children and adults. As those differences are nonnegligible and as they appear to map onto teens' social and decisional immaturity, juvenile advocates and defenders quickly began to incorporate neuroscientific claims into ones grounded in developmental psychology.").

100 *See* M. Davis & P.J. Whalen, *The Amygdala: Vigilance and Emotion*, 6 MOLECULAR PSYCHIATRY 13 (2001).

101 *Id.*

102 *See* Carrie S. Fried & N.D. Reppucci, *Criminal Decision Making: The Development of Adolescent Judgment, Criminal Responsibility and Culpability*, 25 LAW & HUM. BEHAV. 45, 46 (2001).

103 *See generally* Randall T. Salekin et al., *Juvenile Transfer to Adult Courts: A Look at the Prototypes for Dangerousness, Sophistication-Maturity, and Amenability to Treatment Through a Legal Lens*, 8 PSYCHOL. PUB. POL'Y & L. 373, 373 (2002).

104 For a detailed review of developmental stage-based approaches to juvenile justice reform, see NAT'L RESEARCH COUNCIL, REFORMING JUVENILE JUSTICE: A DEVELOPMENTAL APPROACH (Richard J. Bonnie et al. eds., 2013).

105 *See MacArthur Study*, *supra* note 95 (revealing through a multi-jurisdictional study comparing adolescents' abilities to those of young adults that juveniles are relatively incompe-

at vastly different rates than adolescents falling within the same lower range of IQ results.[106] Not unlike adults, juveniles may have low IQs,[107] learning disabilities, and other neuropsychological impairments[108] that impact competency,[109] but current research demonstrates a higher frequency rate of incompetence based on intellectual deficiencies among children when compared with the rate among adults found to be lacking legal competence to stand trial.[110]

In the medical community, studies done on common disorders such as attention deficit hyperactivity disorder (ADHD) demonstrate that pharmacological treatment with medications such as methylphenidate, atomoxetine, and, rarely, amphetamines and dextroamphetamines can reduce the risk of criminal behaviors especially in adolescents.[111] Roughly 5% of all children in the western world meet the diagnostic criteria for ADHD,[112] and researchers frequently associate this disorder with criminal misconduct and externalizing disorders.[113] Yet, one of the more compelling problems with pharmacological treatment of adolescents with this disorder—without any therapy component—is the frequent discontinuation of the regimen of medication.[114] Child and adolescent psychology researchers continue to develop psychometric instruments designed to assess predicted recidivism among youthful offenders.[115]

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tent, and addressing developmental immaturity and its impact on a juvenile's ability to assist counsel).

106 The data of McGaha and colleagues found that fifty-eight percent of youths were found incompetent in a Florida sample, compared to six percent of adults with an intellectual disability diagnosis in the same jurisdiction. Annette McGaha et al., *Juveniles Adjudicated Incompetent to Proceed: A Descriptive Study of Florida's Competence Restoration Program*, 29 J. AM. ACAD. OF PSYCHIATRY & LAW 427 (2001).

107 *See* Geoffrey R. McKee, *Competency to Stand Trial in Low-IQ Juveniles*, 19 AM. J. FORENSIC PSYCHIATRY 3 (1998).

108 *See* Kaitlyn McLachlan et al., *Evaluating the Psycholegal Abilities of Young Offenders with Fetal Alcohol Spectrum Disorder*, 38 LAW & HUM. BEHAV. 10 (2014).

109 *See* Frances J. Lexcen et al., *Juvenile Competence to Stand Trial*, 24 CHILD. LEGAL RTS. J. 2 (2004).

110 *See* POLICY UPDATE, *supra* note 88, at 3.

111 Paul Lichtenstein et al., *Medication for Attention Deficit-Hyperactivity Disorder and Criminality*, 367 NEW ENG. J. MED. 2006 (2012) (discussing a three year study involving 25,656 patients in Sweden wherein a significant reduction of 32% in the criminality rate for men and a reduction of 41% for women who remained on their regimen of medication).

112 Guilherme Polanczyk et al., *The Worldwide Prevalence of ADHD: A Systematic Review and Metaregression Analysis*, 164 AM. J. PSYCHIATRY 942, 945 (2007).

113 *See* James H. Satterfield et al., *A 30-year Prospective Follow-Up Study of Hyperactive Boys with Conduct Problems: Adult Criminality*, 46 J. AM. ACAD. CHILD ADOLESCENT PSYCHIATRY 601, 601 (2007).

114 *See* Suzanne McCarthy et al., *Attention-Deficit Hyperactivity Disorder: Treatment Discontinuation in Adolescents and Young Adults*, 194 BRIT. J. PSYCHIATRY 273, 273 (2009).

115 *See* Mark E. Olver et al., *Short and Long-Term Prediction of Recidivism Using the Youth Level of Service/Case Management Inventory in a Sample of Serious Young Offenders*, 36 LAW & HUM. BEHAV. 331, 331 (2012).

A growing body of literature examines the effectiveness of diverting people (mainly adults)[116] with serious mental illness[117] from the criminal justice system into mental health treatment programs.[118] The time frame for these diversions (i.e. prebooking and postbooking) may have very little impact on the outcome[119] of the services provided.[120] Many states have developed mental health courts as a form of diversion from the criminal justice system,[121] seeking to enroll the mentally ill into outpatient programs for treatment rather than handling their cases in a more traditionally adversarial approach.[122] There were two such courts in 1997, but by 2008 the number of mental health courts had increased to approximately 150.[123] It is not without some measure of irony, however, that the patients selected to participate in most mental health court programs must voluntarily, knowingly, and with sufficient adjudicative competence agree to have their cases handled in such diversionary court systems.[124] There is much that remains to be studied in regards to effective intervention strategies for juvenile offenders, and it may be inappropriate to extrapolate assumptions about the effectiveness of such

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116 *See* Henry J. Steadman & Michelle Naples, *Assessing the Effectiveness of Jail Diversion Programs for Persons with Serious Mental Illness and Co-Occurring Substance Use Disorders*, 23 BEHAV. SCI. & L. 163, 163, 165, 168 (2005).

117 *See generally* Nahama Broner et al., *Criminal Justice Diversion of Individuals with Co-Occurring Mental Illness and Substance Use Disorders: An Overview*, *in* SERVING MENTALLY ILL OFFENDERS: CHALLENGES AND OPPORTUNITIES FOR MENTAL HEALTH PROFESSIONALS 83 (Gerald Landsberg et al. eds., 2002); Alexander J. Cowell et al., *The Cost-Effectiveness of Criminal Justice Diversion Programs for People with Serious Mental Illness Co-Occurring with Substance Abuse: Four Case Studies*, 20 J. CONTEMP. CRIM. JUST. 292, 292–93, 306 (2004).

118 *See* Frank Sirotich, *The Criminal Justice Outcomes of Jail Diversion Programs for Persons with Mental Illness: A Review of the Evidence*, 37 J. AM. ACAD. PSYCHIATRY & L. 461,e461,e465, 469–70 (2009) (examining evidence from twenty-seven studies or publications supporting the use of diversion initiatives to reduce recidivism and incarceration among adults with serious mental illness).

119 *See* Henry J. Steadman et al., *Comparing Outcomes for Diverted and Nondiverted Jail Detainees with Mental Illness*, 23 LAW & HUM. BEHAV. 615, 615–16 (1999).

120 *See* Pamela K. Lattimore et al., *A Comparison of Prebooking and Postbooking Diversion Programs for Mentally Ill Substance-Using Individuals with Justice Involvement*, 19 J. CONTEMP. CRIM. JUST. 30, 30–31, 42 (2003).

121 *See* Carol Fisler, *Building Trust and Managing Risk: A Look at a Felony Mental Health Court*, 11 PSYCHOL. PUB. POL'Y, & L. 587, 588–89 (2005).

122 *See* MICHAEL THOMPSON ET AL., COUNCIL OF STATE GOV'TS JUSTICE CTR, IMPROVING RESPONSES TO PEOPLE WITH MENTAL ILLNESSES: THE ESSENTIAL ELEMENTS OF A MENTAL HEALTH COURT 6–8 (2007).

123 Allison D. Redlich et al., *Enrollment in Mental Health Courts: Voluntariness, Knowingness, and Adjudicative Competence*, 34 LAW & HUM. BEHAV. 91, 91 (2010).

124 *See* Virginia G. Cooper & Patricia A. Zapf, *Psychiatric Patients' Comprehension of Miranda Rights*, 32 LAW & HUM. BEHAV. 390, 390–92 (2008).

programs from adult treatment programs and apply them to juvenile treatment programs.[125]

III. ELIMINATING OR MODIFYING CURRENT COMPETENCY STANDARDS IN DELINQUENCY CASES

The main difference between juvenile and adult offenders is the inherent disparity resulting from their developmental stages.[126] The social contract theory underlying much of the adult criminal justice system, i.e., a person is held accountable when he or she breaks the social contract and engages in unacceptable misconduct,[127] is much more difficult to routinely apply in cases involving adolescents.[128] In most jurisdictions, juveniles either cannot enter into legally binding contracts or such agreements may be voided at the request of the juvenile.[129] Our society's embrace of social accountability has led to the enactment of numerous transfer statutes,[130] each seeking to increase the punitive response to juvenile misconduct[131] by removing juveniles from the jurisdiction of juvenile courts[132] and trying them in adult court systems.[133] This move towards accountability and increasing the punitive response to juvenile misconduct may well satisfy some general urge to react harshly[134] to

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125 *See* Robert J. Zagar et al., *Delinquency Best Treatments: How to Divert Youths from Violence While Saving Lives and Detention Costs*, 31 BEHAV. SCI. & L. 381, 381–84, 388 (2013).

126 *But see* Donald R. Lynam et al., *Longitudinal Evidence that Psychopathy Scores in Early Adolescence Predict Adult Psychopathy*, 116 J. ABNORMAL PSYCHOL. 155, 155, 161–62 (2007).

127 This theoretical construct is the culmination of several secular philosophers, including Thomas Hobbes, Jean Jacques Rousseau, John Locke, and John Rawls. *See generally* David McCord & Sandra K. Lyons, *Moral Reasoning and the Criminal Law: The Example of Self Defense*, 30 AM. CRIM. L. REV. 97, 114–17; JOHN RAWLS, A THEORY OF JUSTICE 10–14 (2d ed. 1999).

128 *See* Michael J. Vitacco & Gina M. Vincent, *Applying Adult Concepts to Youthful Offenders: Psychopathy and Its Implications for Risk Assessment and Juvenile Justice*, 5 INT'L J. FORENSIC MENTAL HEALTH 29, 29, 31 (2006).

129 *See* THOMAS A. JACOBS, CHILDREN AND THE LAW: RIGHTS & OBLIGATIONS §§ 11:9–11:12 (Supp. 2004).

130 *See* Franklin E. Zimring & Stephen Rushin, *Did Changes in Juvenile Sanctions Reduce Juvenile Crime Rates? A Natural Experiment*, 11 OHIO ST. J. CRIM. L. 57, 57–60 (2013).

131 *See* Mark Fondacaro, *The Injustice of Retribution: Toward a Multisystemic Risk Management Model of Juvenile Justice*, 20 J.L. & POL'Y 145, 149 (2011).

132 *See* PATRICK GRIFFIN ET AL., DEP'T OF JUSTICE, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, TRYING JUVENILES AS ADULTS: AN ANALYSIS OF STATE TRANSFER LAWS AND REPORTING 5 (2011).

133 *See* Elizabeth S. Scott, *"Children Are Different": Constitutional Values and Justice Policy*, 11 OHIO ST. J. CRIM. L. 71, 71 (2013).

134 *See* Elizabeth S. Scott & Laurence Steinberg, *Blaming Youth*, 81 TEX. L. REV. 799, 809 (2003).

behaviors that appear to have become ever more offensive over time,[135] but little consideration has been given to the consequences to the punished individuals once they are released back into society.[136] Moreover, researchers have given even less attention to whether such transfer provisions[137] have actually reduced crime or violence.[138] The punitive theories that underlie adult criminal systems often appear to have serious backlash effects when they are applied to cases involving juveniles.[139]

A modern functional juvenile justice system seeking to recognize and respect the due process rights of the offenders who have been adjudicated delinquent should focus on eliminating, or at least reducing, recidivist misconduct[140] as the main systemic goal.[141] This is not in any way a new proposition, or a recently identified systemic goal. In describing the evolution of the modern juvenile justice system from the early 1900s, David Tanenhaus writes:

> Although the earliest political battles waged over the juvenile court focused on its handling of dependency cases, progressive child savers were also concerned that high recidivism rates in delinquency cases, if unchecked, threatened to undermine the system's legitimacy. To prevent this from happening, Judge Merritt Pinckney assembled a research committee to investigate the problem of recidivism, which recommended that the juvenile court install a clinic to study these persistent offenders. The subsequent opening in 1909 of the Juvenile Psychopathic Institute, the world's first such institute dedicated to studying the causes of delinquency, not only transformed the administration of juvenile justice in Chicago

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135 *See* Richard E. Redding, *Adult Punishment for Juvenile Offenders: Does It Reduce Crime?*, *in* HANDBOOK OF CHILDREN, CULTURE, AND VIOLENCE 375 (Nancy E. Dowd et al. eds., 2006).

136 *See* David O. Brink, *Immaturity, Normative Competence, and Juvenile Transfer: How (Not) to Punish Minors for Major Crimes*, 82 TEX. L. REV. 1555, 1565 (2004).

137 *See* Richard E. Redding, *Juvenile Transfer Laws: An Effective Deterrent to Delinquency?*, JUV. JUST. BULL. (Dep't Of Justice/Office of Juv. and Delinq. Prevention), June 2010.

138 *See* Jonathan E. Fielding et al., *Recommendation Against Policies Facilitating the Transfer of Juveniles from Juvenile to Adult Justice Systems for the Purpose of Reducing Violence*, 32 AM. J. OF PREVENTIVE MED. S5 (Supp. 4, Apr. 2007)

139 *See* Jessica Ann Garascia, Note, *The Price We Are Willing to Pay for Punitive Justice in the Juvenile Detention System: Mentally Ill Delinquents and Their Disproportionate Share of the Burden*, 80 IND. L.J. 489, 515 (2005).

140 *See* John F. Edens & Melissa A. Cahill, *Psychopathy in Adolescence and Criminal Recidivism in Young Adulthood: Longitudinal Results from a Multiethnic Sample of Youthful Offenders*, 14 ASSESSMENT 57, 57 (2007).

141 *See* Mark W. Lipsey, *The Primary Factors That Characterize Effective Interventions with Juvenile Offenders: A Meta-Analytic Overview*, 4 VICTIMS & OFFENDERS 124 (2009).

> but also helped to mold popular understandings of child development and rearing. The child savers' response to the problem of recidivism thus paved the way for intensive scrutiny of the emotional needs of the nation's children and youth, the vast majority of whom never entered a juvenile court.[142]

Identifying the reduction of recidivism as the main objective of the juvenile court system as it relates to delinquency cases[143] is as compelling today as it was 1909.[144] Our modern juvenile correctional facilities, however, have frequently failed to achieve any such goal,[145] and more often than not, have been responsible for inflicting additional pain and suffering upon a population,[146] the majority of whom will return to our communities and their own homes and families.[147]

While many states have initiated improvements in their detention facilities[148]—especially jurisdictions which have emulated reforms pioneered in Missouri[149]—to provide services to juveniles both pre-adjudi-

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142 DAVIDE S. TANENHAUS, JUVENILE JUSTICE IN THE MAKING 111 (2004).

143 *See* John F. Edens et al., *Youth Psychopathy and Criminal Recidivism: A Meta-Analysis of the Psychopathy Checklist Measures*, 31 LAW & HUM. BEHAV. 53 (2007); John F. Hemphill, *The Hare Psychopathy Checklist and Recidivism: Methodological Issues and Guidelines for Critically Evaluating Empirical Evidence*, *in* THE PSYCHOPATH: THEORY, RESEARCH, & PRACTICE 141–70 (Hugues Hervé & John C. Yuille eds., 2007).

144 *See* Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104 (1909).

145 *See* Jeremiah Bourgeois, *The Irrelevance of Reform: Maturation in the Department of Corrections*, 11 OHIO ST. J. CRIM. L. 149, 159 (2013) (arguing that the juvenile justice system operates under the pretense of rehabilitation, and, in combination with the criminal justice system, they fail to recognize the distinction between crimes committed by children and those committed by adults).

146 *See* Allen J. Beck & David Cantor, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SEXUAL VICTIMIZATION IN JUVENILE FACILITIES REPORTED BY YOUTH: NATIONAL SURVEY OF YOUTH IN CUSTODY, 2012, at 9 (2013), *available at* http://www.bjs.gov/content/pub/pdf/svjfry12.pdf.

147 *See* BERNSTEIN, *supra* note 23, at 290–306 (2014) (describing the violence and torture of children for more than a century at the Arthur G. Dozier School for Boys in Marianna, Florida, up until 2011, despite more than a dozen official inquiries, including by a Florida grand jury and the U.S. Senate Subcommittee on Juvenile Delinquency).

148 *See* RICHARD A. MENDEL, ANNIE E. CASEY FOUNDATION, NO PLACE FOR KIDS: THE CASE FOR REDUCING JUVENILE INCARCERATION 34–39 (2011), *available at* http://www.aecf.org/m/resourcedoc/aecf-NoPlaceForKidsFullReport-2011.pdf (describing suggested reforms for juvenile correctional facilities but arguing that, ultimately, states should try to limit the number of juveniles in detention).

149 *See* JUSTICE POLICY INST., THE COSTS OF CONFINEMENT: WHY GOOD JUVENILE POLICIES MAKE GOOD FISCAL SENSE (2009), *available at* http://www.justicepolicy.org/images/upload/09_05_rep_costsofconfinement_jj_ps.pdf; Richard B. Teitelman & Gregory J. Linhares, *Juvenile Detention Reform in Missouri: Improving Lives, Improving Public Safety, and Saving Money*, 76 ALB. L. REV. 2011, 2011 (2013) (discussing the Annie E. Casey Foundation's efforts in Missouri to promote evidence-based pretrial juvenile detention practices, treatment programs, and monitoring of juveniles); *see also* RICHARD A. MENDEL, ANNIE E. CASEY FOUNDATION, THE MISSOURI MODEL: REINVENTING THE PRACTICE OF REHABILITATING

cation[150] and post-adjudication,[151] many initiatives tend to be somewhat short lived, as funding evaporates, and state budgetary constraints force states to prioritize other spending.[152]

There is much to learn from the jurisdictions that have implemented "restorative justice" models, and many decisions that state legislatures may face as more information about the successes of these alternative correctional programs develop.[153] However, crafting a new definition for juvenile competency will achieve very little should states not provide adequate funding to address the issues that contribute greatly to the determination that so many of these young people are not competent to stand trial.[154] Following in the pathway of the status quo, which often embraces so-called juvenile competence restoration courses, or programs that may offer little more than repeated identification of the various parties involved in juvenile trial proceedings[155] or the roles of the individuals along with recitation of the basic rights of the juveniles, does little to

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YOUTHFUL OFFENDERS (2010), *available at* http://www.aecf.org/m/resourcedoc/aecf-MissouriModelFullreport-2010.pdf.

150 *See* Joseph J. Cocozza et al., *Diversion from the Juvenile Justice System: The Miami-Dade Juvenile Assessment Center Post-Arrest Diversion Program*, 40 SUBSTANCE USE & MISUSE 935, 937 (2005).

151 *See* NAT'L CTR. FOR JUVENILE JUSTICE, STATE JUVENILE JUSTICE PROFILES, 2005 (2012), *available at* http://www.ncjj.org/pdf/1State_Juvenile_Justice_Profiles_2005.pdf. Some of these listed states have restorative justice legislation specifically for juveniles. Some of these states have legislation that covers adult and juvenile courts concurrently. States with restorative justice legislation include: Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Kansas, Louisiana, Maine, Maryland, Minnesota, Montana, Nebraska, Nevada, New Jersey, New Mexico, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, Tennessee, Utah, Vermont, Virginia, Washington, and Wisconsin. *Id. See also* Marlyce Nuzum, *Summaries of State Restorative Justice Legislation*, STOPVIOLENCE.COM, http://www.stopviolence.com/restorative/rjleg-detail.htm (last visited Nov. 23, 2014).

152 *See* JUSTICE POLICY INST., *supra* note 149.

153 *See* Mark S. Umbreit et al., *Restorative Justice in the Twenty-First Century: A Social Movement Full of Opportunities and Pitfalls*, 89 MARQ. L. REV. 251, 251 (2005) (providing an overview of the history and current research on the restorative justice movement); Gabrielle Maxwell & Allison Morris, *Youth Justice in New Zealand: Restorative Justice in Practice?*, 62 J. OF SOC. ISSUES 239, 245–46 (2006) (New Zealand's juvenile justice system is almost entirely based upon restorative justice, except for murder, manslaughter, arson and aggravated robbery offenses).

154 *See* MARK W. LIPSEY ET AL., CTR. FOR JUVENILE JUSTICE REFORM, IMPROVING THE EFFECTIVENESS OF JUVENILE JUSTICE PROGRAMS: A NEW PERSPECTIVE ON EVIDENCE-BASED PRACTICE 9–10, 48–50 (2010), *available at* http://cjjr.georgetown.edu/pdfs/ebp/ebppaper.pdf (describing the challenges faced by states to adequately fund evidence-based juvenile justice programs).

155 *But see* Jodi L. Viljoen et al., *Teaching Adolescents and Adults About Adjudicative Proceedings: A Comparison of Pre- and Post-Teaching Scores on the MacCAT-CA*, 31 LAW & HUM. BEHAV. 419, 428 (2007) (analyzing study results wherein teaching associated with 927 youths and 466 young adults who completed the MacArthur Competence Assessment Tool-Criminal Adjudication, the Massachusetts Youth Screening Instrument—Second Version, and the Wechsler Abbreviated Scale of Intelligence showed adolescents aged thirteen and younger were less likely than older individuals to improve competency scores with teaching courses).

advance the interests of the community or the individual juveniles found to be lacking in competence.[156]

A. *Limiting Juvenile Competency*

One response to the current state statutory provisions for juvenile competency would be to eliminate all legal competency presumptions for children aged fourteen and under. Such juveniles would be presumed *not* to be competent.[157] In all instances, should the state seek to bring a juvenile to trial (adjudication), the state would bear the legal burden of proving the juvenile's competency.[158] This process would essentially neutralize the current legal presumption of juvenile competency in both juvenile delinquent and adult criminal cases.[159] The data documenting the highly elevated rates of mental illness[160] and developmental immaturity within the population of accused delinquents would lead to the conclusion that the default position for juvenile and adult criminal courts should be the application of a neutral legal presumption of competency.[161]

The application of this new legal principle does not eliminate the accountability of juveniles for misconduct that is petitioned prior to the adolescent turning whatever threshold age the jurisdiction adopts, but it

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156 *See, e.g.*, Ronald Schouten, *Commentary: Training for Competence—Form or Substance?*, 31 J. AM. ACAD. PSYCHIATRY & L. 202, 202 (2003) (criticizing practices of "competency restoration programs" which overlook the ability of the individual to meaningfully participate in the trial process).

157 *See* Lois B. Oberlander et al., *Preadolescent Adjudicative Competence: Methodological Considerations and Recommendations for Practice Standards*, 19 BEHAV. SCI. & L. 545, 545 (2001).

158 *See* Richard E. Redding et al., *What Judges and Lawyers Think About the Testimony of Mental Health Experts: A Survey of the Courts and Bar*, 19 BEHAV. SCI. & L. 583, 591–93 (2001) (arguing, based on a survey, that Virginia judges, prosecutors, and defense attorneys find the testimony of psychiatrists more probative on questions of competency than other forms of expert testimony, and suggesting that mental health and social science professionals help educate the courts and bar about the value of research data and statistically based information).

159 *See* Darla M.R. Burnett et al., *Adjudicative Competency in a Juvenile Population*, 31 CRIM. JUST. & BEHAV. 438, 461 (2004) (arguing, based on a psychological study utilizing the MacArthur Competence Assessment Tool-Criminal Adjudication, that "adolescents below the ages of 15 to 16 years cannot be assumed to be competent" to stand trial).

160 "[Adult] individuals with serious and often disabling mental illnesses like schizophrenia, bipolar disorder, and major depression are grossly overrepresented in the criminal justice system . . . . Moreover . . . nearly three out of every four jail detainees with a serious mental illness have a co-occurring substance abuse disorder." Jennifer L. Skeem et al., *Correctional Policy for Offenders with Mental Illness: Creating a New Paradigm for Recidivism Reduction*, 35 LAW & HUM. BEHAV. 110, 110 (2011).

161 *See* Jennifer M. Cox et al., *The Impact of Juveniles' Ages and Levels of Psychosocial Maturity on Judges' Opinions About Adjudicative Competence*, 36 LAW & HUM. BEHAV. 21, 21 (2012) (reviewing 342 judges' responses to the age and maturity of juveniles which play major roles in decisions on juvenile competency).

does prevent the juveniles from being adjudicated delinquent at the earlier stages of adolescence,[162] and it also eliminates the collateral consequences of such adjudications later in the juvenile's life.[163]

In stark contrast to the juvenile delinquency laws of most U.S. states, foreign jurisdictions have recognized some of the developmental limitations of adolescents and established higher threshold requirements for holding juveniles accountable for misconduct. In some such foreign jurisdictions, criminal responsibility cannot occur in the legal system until minors reach the age of fifteen.[164] In Great Britain, under the Children and Young Persons Act of 1933,[165] criminal responsibility could occur under the criminal justice statutes as young as eight years of age;[166] however, there is a rebuttable legal presumption that children between the ages of ten and fourteen cannot distinguish between right and wrong, and are therefore, incapable of committing a crime.[167] British courts handling juvenile misconduct[168] separate adolescent capacities into three categories: (1) a conclusive presumption that children under the age of ten cannot be held criminally responsible for their behavior; (2) children between the ages of ten and fourteen can be held criminally responsible for misconduct, but the prosecution must first satisfy a heightened burden of proof that the child committed a criminal act, but also that the act was committed with "mischievous discretion," or that they were able to understand the difference between right and wrong; and (3) children between the ages of fourteen and eighteen—where the legal presumption of incapacity is no longer applied—and the law

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162 The fiscal consequences of preventing youth reoffending are not insignificant, as well. *See* M.A. Cohen, *The Monetary Value of Saving a High-Risk Youth*, 14 J. QUANTITATIVE CRIMINOLOGY 5 (2013).

163 This might include the enhanced sentencing provisions of the federal sentencing act based upon juvenile delinquency adjudications (convictions), should the juvenile become involved in the federal criminal system later in life, in addition to impacting the child's educational opportunities, employability, and other consequences. *See* Jeremiah Rygus, *Collateral Damage: Saddling Youth with a Lifetime of Consequences*, 26 CRIM. JUST. 37, 37 (2012).

164 In Finland, children below the age of fifteen involved in delinquent misconduct are referred to the social services agencies, rather than juvenile justice or adult criminal systems. *See* Tapio Lappi-Seppälä, *Finland: A Model of Tolerance?*, *in* COMPARATIVE YOUTH JUSTICE 177 (John Muncie & Barry Goldson eds., 2006).

165 *See* Children and Young Person's Act, 1933, 23 & 24 Geo. 5, ch. 12 (Eng.).

166 *See* Glanville L. Williams, *The Criminal Responsibility of Children*, 1954 CRIM. L. REV. 493.

167 *See* Stephanie J. Millet, Note, *The Age of Criminal Responsibility in an Era of Violence: Has Great Britain Set a New International Standard?*, 28 VAND. J. TRANSNAT'L L. 295, 305 (1995).

168 In Britain, separate juvenile courts do not exist; rather, special sittings of Magistrates' Court hear juvenile matters. *See* RICHARD J. TERRILL, WORLD CRIMINAL JUSTICE SYSTEMS: A SURVEY 85 (1992).

presumes that these children are fully responsible for their misconduct.[169]

The age of criminal responsibility in Belgium is eighteen (or sixteen for certain more serious offenses).[170] In France, the minimum age of criminal responsibility for juveniles is thirteen years (yet children as young as ten can appear before judges who impose community or educational orders).[171] Despite a rising crime rate among juvenile offenders in France, the country has not lowered the age of criminal responsibility.[172] In Sweden, the minimum age of criminal responsibility is fifteen years.[173] In Japan, the minimum age of criminal responsibility for juveniles is fourteen years.[174] In the former Soviet Union, the minimum age of criminal responsibility for juveniles was sixteen for most offenses.[175]

Countries other than the United States have adopted legal provisions that hold juveniles accountable for criminal misconduct at later stages of adolescent development than does the U.S. These foreign statutes and court procedures effectively raise the age of criminal responsibility of adolescents within their jurisdictions, resulting in a similar outcome to this competency presumption proposal. The United States is now the only country—other than Somalia—not to adopt or ratify the single most important international treaty in this area, the United Nations' Convention of the Rights of the Child (UNCRC).[176] According to the UNCRC's

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169 J.C. SMITH & BRIAN HOGAN, CRIMINAL LAW 189 (7th ed. 1992).

170 THE HOWARD LEAGUE FOR PENAL REFORM, PUNISHING CHILDREN: A SURVEY OF CRIMINAL RESPONSIBILITY AND APPROACHES ACROSS EUROPE 3 (2008), *available at* www.howardleague.org/fileadmin/howard_league/user/online_publications/Punishing_Children.pdf.

171 TERRILL, *supra* note 168, at 162.

172 Code Pénal [C. PÉN.] art. 122-8 (FR).

173 TERRILL, *supra* note 168, at 229.

174 *See id.* at 286.

175 *Id.* at 396.

176 *See* United Nations Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3, *available at* http://www.ohchr.org/documents/professionalinterest/crc.pdf. The 1989 UNCRC contains many provisions affecting children in conflict with the law. Key articles of the UNCRC concerning youth justice are Articles 3, 37 and 40. Article 3 provides that in all actions concerning children, whether undertaken by public or private social welfare institutions, Courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration. *Id.* art. 3, ¶ 1. Parties undertake to ensure the child receives such protection and care as is necessary for his or her well-being, and, to this end, shall take appropriate legislative and administrative measures. *Id.* art. 3, ¶ 2. Article 37 provides for minimum standards in treatment and punishment of juvenile offenders, to ensure that "no child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment." *Id.* art. 37(a). It also provides that "neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age." *Id.* Importantly, Article 37(b) provides that "no child shall be deprived of his or her liberty unlawfully or arbitrarily. *Id.* art. 37(b). The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last

International Committee on the Rights of the Child, the age of criminal responsibility in other UN member countries includes the following: Albania, 16 years old; Andorra, 16 years old; Angola, 16 years old; Argentina, 18 years old; Armenia, 16 years old; Azerbaijan, 16 years old; Bahrain, 15 years old; Belarus, 16 years old; Benin, 13 years old; Bosnia and Herzegovina, 14 years old; Bulgaria, 14 years old; Cape Verde, 16 years old; Central African Republic, 14 years old; Chile, 16 years old; China, 16 years old; Croatia, 14 years old; Cuba, 16 years old; Czech Republic, 15 years old; Democratic People's Republic of Korea, 14 years old; Denmark, 15 years old; Equatorial Guinea, 18 years old; Estonia, 15 years old; Georgia, 16 years old; Guinea-Bissau, 16 years old; Kazakhstan, 16 years old; Kyrgyzstan, 16 years old; Lao People's Democratic Republic, 15 years old; Latvia, 16 years old; Liberia, 16 years old; Libyan Arab Jamahiriya, 14 years old; Liechtenstein, 14 years old; Lithuania, 16 years old; Luxembourg, 16 years old; Macedonia, Former Yugoslav Republic, 14 years old; Maldives, 15 years old; Mali, 13 years old; Marshall Islands, 14 years old; Mauritania, 14 years old; Monaco, 13 years old; Mongolia, 16 years old; Mozambique, 16 years old; New Zealand, 14 years old; Norway, 15 years old; Panama, 14 years old; Paraguay, 14 years old; Portugal, 16 years old; Republic of Korea, 14 years old; Republic of Moldova, 16 years old; Romania, 14 years old; Russian Federation, 16 years old; Rwanda, 14 years old; Sao Tome and Principe, 16 years old; Slovakia, 15 years old; Slovenia, 14 years old; Somalia, 14/15 years old; Spain, 14 years old; Sweden, 15 years old; Tajikistan, 16 years old; Turkmenistan, 16 years old; Uruguay, 18 years old; Uzbekistan, 16 years old; Vietnam, 16 years old; Yugoslavia, 14 years old.[177] This extensive list of nations which recognize that children should not be held legally accountable for criminal misconduct until they reach fourteen years of age or older, is not intended to advance the argument that the U.S. must follow suit. Rather, it is intended to demonstrate that a broad base of other nations has already concluded that juveniles should

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resort and for the shortest appropriate period of time." *Id.* Article 40 provides for recognition of the welfare, dignity and privacy of the child by ensuring that parties treat children:

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

Id. art. 40, ¶ 1. Details of each country's signing, along with additional interpretive declarations and reservations, can be found on the Information on the Convention on the Rights of the Child, UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en (last visited Feb. 19, 2015).

[177] *International Comparative Information on the Minimum Age of Criminal Responsibility*, AMAZONAWS, http://www.pmg.org.za/docs/2003/appendices/030310minimumage.htm (last visited Feb. 19, 2015).

not be presumed legally competent and held accountable in criminal proceedings for their misconduct until they reach an older threshold age than that adopted in the United States. By eliminating the current legal presumption that juveniles are competent to stand trial, the various state legislatures would be joining an impressive group of foreign countries that do not view this as a radical or inappropriately lenient response to adolescent misconduct.

B. Modifying the Legal Definition of Juvenile Competency

A separate and distinct proposal for modification of the current competency paradigm would involve expanding the factors used in the determination of juvenile competency, adding developmental immaturity[178] and mental illness to the *Dusky* factors present in most state provisions.[179] Because the vast majority of juvenile delinquency cases and criminal cases involving juveniles transferred into adult systems[180] are held in state court systems, individual state legislatures should be approached to re-examine current statutory definitions of juvenile competency,[181] and to update their statutes by incorporating developmental immaturity and mental illness as factors comprising main components of their statutory definition.[182] The MacArthur Foundation's longitudinal study on juvenile competence provides a solid foundation for the amending of current statutory schemes that fail to incorporate developmental immaturity as an issue for mental health professionals to include in their competency evaluations.[183]

Of course, the process of waiting for the juveniles to mature so that they become capable of participating in their delinquency adjudications need not divest the juvenile court of jurisdiction over the accused offenders.[184] Similarly, if adjudications are delayed as a result of a juvenile's mental health problems,[185] then using the time effectively while juveniles receive specialized mental health treatments—such as multisys-

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178 *See* Cox et al., *supra* note 161, at 25 ("Currently, few statutes governing the standards for rulings of incompetence to stand trial recognize immaturity as an independent basis for incompetence.").

179 *See* Thomas Riffin, *Competence to Stand Trial Evaluations with Juveniles*, 32 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 15, 16 (2006).

180 *See* Ivan P. Kruh et al., *Historical and Personality Correlates to the Violence of Juveniles Tried as Adults*, 32 CRIM. JUST. & BEHAV. 69, 70 (2005).

181 *See* Johnson, *supra* note 9, at 1082.

182 *See* David R. Katner, *The Mental Health Paradigm and the MacArthur Study: Emerging Issues Challenging the Competence of Juveniles in Delinquency Systems*, 32 AM. J.L. & MED. 503, 516 (2006).

183 *MacArthur Study*, *supra* note 95.

184 *See* Marty Beyer, *Immaturity, Culpability & Competency in Juveniles: A Study of 17 Cases*, 15 CRIM. JUST. 26, 26 (2000).

185 *See* Thomas Grisso, *Juvenile Offenders and Mental Illness*, 6 PSYCHIATRY, PSYCHOL. & L. 143, 144 (1999).

temic therapy[186]—or medications does not divest the juvenile court of jurisdiction over these adolescents.[187] During this waiting process,[188] the court might provide a variety of treatment programs designed to address the specific behavioral or mental health problems[189] identified during the competency assessment process.[190] Tate and Redding have been quick to note, however, that the term "treatment" carries different meanings in juvenile justice systems and mental health systems.[191] It is a broader concept used interchangeably with "rehabilitation" or efforts to help delinquents modify offending and antisocial behavior, frequently relying on standard mental health interventions such as individual therapy, and family therapy.[192] Such intervention services should be relied upon only to the extent that evidence-based reviews can document the effectiveness of the interventions.[193]

The term "treatment" as used in a mental health context, by comparison, is tied to psychiatric or medical models focused on "alleviating symptoms." These distinctions are reflective of the systems rather than the needs of the juveniles.[194] By adopting "treatment" services as understood in the medical context, the scope of the involvement of the medical and mental health providers—psychologists, social workers, and psychiatrists—would expand far beyond the artificial limitations imposed under the fifty-plus-year-old legal decision of *Dusky*.[195] The overall objective

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186 *See* CYNTHIA CULPIT SWENSON ET AL., MULTISYSTEMIC THERAPY AND NEIGHBORHOOD PARTNERSHIPS: REDUCING ADOLESCENT VIOLENCE AND SUBSTANCE ABUSE (2009); Eileen C. Murphy, *Multisystemic Therapy in Juvenile Justice System: Changing Punishment into Treatment*, 25 CHILD. LEGAL RTS. J. 29 (2005).

187 *See* James Preis, *Advocacy for the Mental Health Needs of Children in California*, 31 LOY. L.A. L. REV. 937, 937–44 (1998).

188 *See* Greg Wolber, *The Unreasonable Incompetent Defendant: Length of Attempted Restoration and Factors Contributing to a Decision of Unrestorable*, 26 AM. J. FORENSIC PSYCHOL. 63 (2008).

189 *See* Kathleen R. Skowyra et al., *Blueprint for Change: A Comprehensive Model for the Identification and Treatment for Youth with Mental Health Needs in Contact with the Juvenile Justice System*, *in* REPORT FOR THE NATIONAL CENTER FOR MENTAL HEALTH AND JUVENILE JUSTICE (2007).

190 *See* Karen L. Cropsey et al., *Predictors of Involvement in the Juvenile Justice System Among Psychiatric Hospitalized Adolescents*, 33 ADDICTIVE BEHAVS. 942 (2008).

191 David C. Tate & Richard E. Redding, *Mental Health and Rehabilitative Services in Juvenile Justice: System Reforms and Innovative Approaches*, *in* JUVENILE DELINQUENCY, PREVENTION, ASSESSMENT, & INTERVENTION 134, 134–35.

192 *See* Michael D. Pullman et al., *Juvenile Offenders with Mental Health Needs: Reducing Recidivism Using Wraparound*, 52 CRIME & DELINQ. 375, 387 (2006).

193 *See* Richard E. Redding, *Evidence-Based Sentencing: The Science of Sentencing Policy and Practice*, 1 CHAPMAN J. CRIM. JUST. 1, 1–3 (2009).

194 *Id.*

195 *See* Robert D. Hoge, *An Expanded Role for Psychological Assessments in Juvenile Justice Systems*, 26 CRIM. JUST. & BEHAV. 251, 260 (1999).

of revising competency standards should remain as reducing recidivism.[196]

Should state statutory provisions on competence be redrafted, it may be that juvenile courts would assume more of the traits of specialized mental health courts[197] while the competency of the juveniles remains in doubt or goes undocumented.[198] The principles of therapeutic jurisprudence,[199] or the use of social science to study the extent to which a legal rule or practice promotes the psychological or physical wellbeing of the people it affects,[200] should be applied to the process of redrafting competency statutes.[201] Should this develop, jurisdictions would need to be aware of the results of existing mental health courts[202] and their effectiveness[203] in reducing recidivism and violence.[204] Intensive case management for those juveniles found to be lacking in competency should be a significant component in redeveloping the juvenile justice system.[205] Incorporating "collaboration"[206] at the county level of agency service providers to ensure optimum supervision and services to juveniles in the

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196 *See* Jennifer L. Skeem, Sarah Manchak & Jillian K. Peterson, *Correctional Policy for Offenders with Mental Illness: Creating a New Paradigm for Recidivism Reduction*, 35 LAW & HUM. BEHAV. 110, 111 (2011).

197 ELLEN HARRIS & TAMMY SELTZER, THE ROLE OF SPECIALTY MENTAL HEALTH COURTS IN MEETING THE NEEDS OF JUVENILE OFFENDERS 3 (2004), *available at* www.bazelon.org/issues/criminalization/juvenilejustice.

198 *See* Gwen Levitt & Jeffrey Trollinger, *Juvenile Competency to Stand Trial: Challenges, Frustrations and Rewards of Restoration Training*, 23 AM. J. FORENSIC PSYCHIATRY 57 (2002).

199 *See* Kathryn C. Sammon, *Therapeutic Jurisprudence: An Examination of Problem-Solving Justice in New York*, 23 ST. JOHN'S J. LEGAL COMMENT. 923, 923–29 (2008).

200 David B. Wexler, *Reflections on the Scope of Therapeutic Jurisprudence*, 1 PSYCHOL. PUB. POL'Y & L. 220, 224 (1995).

201 *See* Gene Griffin & Michael J. Jenuwine, *Using Therapeutic Jurisprudence to Bridge the Juvenile Justice and Mental Health Systems*, 71 U. CIN. L. REV. 65, 66–67, 87 (2002).

202 *See* Patrick Gardner, *An Overview of Juvenile Mental Health Courts*, 30 ABA CHILD LAW PRAC. 101, 101–02 (2011).

203 *See* Michael Caldwell et al., *Treatment Response of Adolescent Offenders with Psychopathy Features: A Two-Year Follow-Up*, 33 CRIM. JUST. & BEHAV. 571, 584, 590–93 (2006).

204 *See* Dale E. McNiel & Renée L. Binder, *Effectiveness of a Mental Health Court in Reducing Criminal Recidivism and Violence*, 164 AM. J. PSYCHIATRY 1395, 1395 (2007); Nancy Wolff & Wendy Pogorzelski, *Measuring the Effectiveness of Mental Health Courts: Challenges and Recommendations*, 11 PSYCHOL. PUB. POL'Y & L. 539, 539 (2005); Marlee E. Moore & Virginia A. Hiday, *Mental Health Court Outcomes: A Comparison of Re-Arrest and Re-Arrest Severity Between Mental Health Court and Traditional Court Participants*, 30 L. & HUM. BEHAV. 659, 659 (2006); Merith Cosden et al., *Efficacy of a Mental Health Treatment Court with Assertive Community Treatment*, 23 BEHAV. SCI. & L. 199, 199–200, 211 (2005).

205 *See* David Loveland & Michael Boyle, *Intensive Case Management as a Jail Diversion Program for People with a Serious Mental Illness: A Review of the Literature*, 51 INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 130, 133–45 (2007).

206 U.S. DEP'T OF JUSTICE & CRIME AND JUSTICE INST., IMPLEMENTING EVIDENCE-BASED PRINCIPLES IN COMMUNITY CORRECTIONS: LEADING ORGANIZATIONAL CHANGE AND DEVELOPMENT (2004), *available at* http://www.in.gov/idoc/files/BASICS2-EBP.pdf.

system[207] should be another essential component[208] of any court-ordered pre-adjudication program utilized either until the juvenile matures sufficiently to be found competent,[209] or until an alternative to delinquency adjudication is found to be appropriate.[210]

Current state statutes, which define juvenile competency based upon paradigms applicable to adult offenders, fail to incorporate the vast body of research conducted on and about adolescents and their behaviors over the past five decades. Current statutes, which define juvenile competency based on extrapolations from the Supreme Court's *Dusky* decision, fail to recognize the historical context in which that case occurred, let alone the fact that, at the time of *Dusky*, child and adolescent psychiatry and psychology were in the earliest stages of development. However appropriate it was to apply the *Dusky* standard over the past decades, today, additional factors of developmental immaturity and mental illness, at the very least, should be incorporated into legal statutes defining juvenile competency,[211] or, in the alternative, the legal presumption of competency as applied to juveniles should simply be abolished.

As for a recommended protocol for legislatures reconfiguring their juvenile competency laws, states that utilize teams of mental health experts (i.e. psychiatrists *and* psychologists) to perform competency evaluations should follow a two-step process. First, the psychologist(s) should be appointed to conduct psychometric tests. Second, after these psychometric tests have been administered, results compiled and diagnoses determined, the final reports should then be provided to the psychiatrists, and other members of the competency evaluation team.[212] This allows the psychometric test results to be considered by mental health professionals—who might otherwise rely on mental status examinations or in-

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207 *See* PETER LEONE ET AL., COLLABORATION IN THE JUVENILE JUSTICE SYSTEM AND YOUTH SERVING AGENCIES: IMPROVING PREVENTION, PROVIDING MORE EFFICIENT SERVICES, AND REDUCING RECIDIVISM FOR YOUTH WITH DISABILITIES (2002).

208 *See* KERRY BAKER & ALEX SUTHERLAND, MULTI-AGENCY PUBLIC PROTECTION ARRANGEMENTS AND YOUTH JUSTICE (2009).

209 *See* Royce Baerger et al., *Competency to Stand Trial in Preadjudicated and Petitioned Juvenile Defendants*, 31 J. AM. ACAD. PSYCHIATRY & L. 314, 316–20 (2003).

210 *See* N. Prabha Unnithan & Janis Johnston, *Collaboration in Juvenile Justice: A Multi-Agency Study*, FED. PROBATION, Dec. 2012, at 22; Jeffrey M. Jenson & Cathryn C. Potter, *The Effects of Cross-System Collaboration on Mental Health and Substance Abuse Problems of Detained Youth*, 13 RES. ON SOC. WORK PRAC. 588, 599–604 (2003).

211 *See* Jodi L. Viljoen & Twila Wingrove, *Adjudicative Competence in Adolescent Defendants: Judges' and Defense Attorneys' Views of Legal Standards for Adolescents in Juvenile and Criminal Court*, 13 PSYCHOL. PUB. POL'Y & L. 204, 204–06 (2008).

212 *See* Patricia A. Zapf et al., *Have the Courts Abdicated Their Responsibility for Determination of Competency to Stand Trial to Clinicians?*, 4 J. FORENSIC PSYCHOL. PRAC. 27, 39–42 (2004).

terviews of the juveniles without any additional objective data.[213] Presently, many jurisdictions fail to specify this procedure,[214] and the end result may be that various mental health experts are forced into making recommendations about juvenile competency without the benefit of their colleagues' psychometric test results, often resulting in a lack of consensus among the evaluators.[215]

A crucial step in the redrafting of competency laws would be for members of a state legislature to work in conjunction with members of the mental health profession during the process of adopting a new competency standard that incorporates developmental immaturity and mental illness as factors for evaluation.[216] The application of a legal doctrine that appears to be decades out of date[217] by the professionals who are compelled to perform the competency evaluations and assessments[218] is reason enough to include these non-lawyers in the process of drafting language of the new competency requirements.[219]

CONCLUSION

The process of creating a competency standard based upon the collective wisdom of members of the Supreme Court's understanding of adolescent behavioral development from fifty years in the past ignores the progress identified by science and social science over five decades of time, which could significantly improve the juvenile justice system's ability to reduce recidivism and violent behaviors[220] of those children involved in the court system.[221] By virtue of advocating for statutory

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213 *See* Michael L. Perlin, *"Everything's a Little Upside Down, As a Matter of Fact the Wheels Have Stopped": The Fraudulence of the Incompetency Evaluation Process*, 4 HOUS. J. HEALTH L. & POL'Y 239, 244–45 (2004).

214 *See* Richard Rogers & Jill Johansson-Love, *Evaluating Competency to Stand Trial with Evidence-Based Practice*, 37 J. ACAD. PSYCHIATRY & L. 450, 452–53 (2009).

215 *See* W. Neil Gowensmith et al., *Field Reliability of Competence to Stand Trial Opinions: How Often Do Evaluators Agree, and What Do Judges Decide When Evaluators Disagree?*, 36 LAW & HUM. BEHAV. 130, 130 (2012); Steinberg & Scott, *supra* note 65, at 8–9.

216 *Id.*

217 *See* D. A. Andrews & James Bonta, *Rehabilitating Criminal Justice Policy and Practice*, 16 PSYCHOL. PUB. POL'Y & L. 39, 41–42 (2010).

218 *See* D. A. Andrews et al., *The Recent Past and Near Future of Risk and/or Need Assessment*, 52 CRIME & DELINQ. 7, 22–23 (2006).

219 *See* Grisso, *supra* note 14, at 373–74.

220 *See* T.E. MOFFITT, THE CAMBRIDGE HANDBOOK OF VIOLENT BEHAVIOR AND AGGRESSION, A REVIEW OF RESEARCH ON THE TAXONOMY OF LIFE-COURSE PERSISTENT VERSUS ADOLESCENCE-LIMITED ANTISOCIAL BEHAVIOR (D. J. Flannery et al. eds., 2007).

221 Certainly not all youths will become adult offenders, and the work of Moffitt (1993, 2007) has suggested that the majority of antisocial behavior in youths is adolescence limited, with a minority of youths becoming adult offenders. Risk is arguably dynamic, and this may be particularly so for youths, given the developmental transitions inherent within adolescence.

change on a state-by-state basis, the strengths of federalism[222] may be realized, in that a single competency statute need not be adopted across the country. States legislatures are free to determine the language of their individual requirements for competency,[223] and then, over time, they might modify their initial enactments after assessing the impact and effectiveness of other states' statutory language on juvenile competency.[224] This legislative process would place the keys of change in the hands of the jurisdictions charged not only with the responsibility of addressing juvenile delinquency, but also with handling the reintegration of those juveniles as they move out of delinquency systems and back into their home communities.[225] There is no initial need for a one-size-fits-all solution for the statutory language or procedure of juvenile competency in all fifty states.[226]

In 2013, Robert Schwartz, cofounder of the Juvenile Law Center in Philadelphia, two-time chair of the American Bar Association's Criminal Justice Section's Juvenile Justice Committee, and recipient of the ABA's Livingston Hall Award, argued that state legislatures had been quietly and steadily finding "a new balance in juvenile justice policy between protecting the public and holding youth accountable in developmentally appropriate ways."[227] Schwartz identified these new laws as the result of

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Mark E. Olver et al., *Short and Long-Term Prediction of Recidivism Using the Youth Level of Service/Case Management Inventory in a Sample of Serious Young Offenders*, 36 LAW & HUM. BEHAV. 331, 333 (2012).

222 Although the actual word "federalism" does not appear in the text of the U.S. Constitution, it is considered a constitutional principle stretching beyond the list of limitations of congressional power over the states articulated in Article I, Section 10, and described by the Court in anti-commandeering cases such as *New York v. United States*, 488 U.S. 1041 (1992). *See* LAURENCE H. TRIBE, THE INVISIBLE CONSTITUTION (2009).

223 *See* Johnson, *supra* note 9, at 1074–75.

224 This process would be consistent with Justice Brandeis' dissenting opinion in the *New State Ice Co.* case:

> To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the nation. It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.

New State Ice Co. v. Liebmann, 285 U.S. 262, 310 (1932) (Brandeis, J., dissenting).

225 *See* He Len Chung et al., *An Empirical Portrait of Community Reentry Among Serious Juvenile Offenders in Two Metropolitan Cities*, 34 CRIM. JUST. & BEHAV. 1402, 1404–08 (2007); YOUTH JUSTICE BD., STOP THE REVOLVING DOOR: GIVING COMMUNITIES AND YOUTH THE TOOLS TO OVERCOME RECIDIVISM: RECOMMENDATIONS ON JUVENILE REENTRY IN NEW YORK CITY (2005).

226 *See* KATHLEEN R. SKOWYRA & JOSEPH J. COCOZZA, BLUEPRINT FOR CHANGE: A COMPREHENSIVE MODEL FOR THE IDENTIFICATION AND TREATMENT OF YOUTH WITH MENTAL HEALTH NEEDS IN CONTACT WITH THE JUVENILE JUSTICE SYSTEM 3–7 (2007), *available at* http://www.ncmhjj.com/wp-content/uploads/2013/07/2007_Blueprint-for-Change-Full-Report.pdf.

227 Robert G. Schwartz, *State Laws Rooted in Principles of Adolescent Development*, 27 CRIM. JUST. 52 (2013).

bipartisan cooperation that saved communities money, decreased recidivism, and recognized adolescent development; but still held youth accountable while preserving opportunities for them to become capable members of society.[228] State legislatures may continue on this path by amending current or adopting new statutory provisions of juvenile competency to take into consideration the advancements in child psychiatry, child psychology, neurology, child developmental biology, assessment instruments[229] for adolescent risk factors and future recidivism[230] over the past fifty years and subsequent to the *Dusky* decision recognizing developmental immaturity as well as mental illness, rational factual understanding, and the ability to assist counsel as cornerstones in the legal requirements before placing children on trial for delinquent or criminal misconduct.

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228 *Id.*

229 *See* Mark E. Olver et al., *Risk Assessment with Young Offenders: A Meta-Analysis of Three Assessment Measures*, 36 CRIM. JUST. & BEHAV. 329, 329–30 (2009); Craig S. Schwalbe, *Risk Assessment for Juvenile Justice: A Meta-Analysis*, 31 LAW & HUM. BEHAV. 449, 449–59 (2007).

230 *See* Fred Schmidt et al., *Comparative Analyses of the YLS/CMI, SAVRY, and PCL:YV in Adolescent Offenders: A 10-Year Follow-Up into Adulthood*, 9 YOUTH VIOLENCE & JUV. JUST. 23, 23–24 (2011).

APPENDIX

VARIOUS STATE STATUTES DEFINING JUVENILE COMPETENCY

ALASKA—ALASKA STAT. ANN. § 12.47.100 (West 2014): No mention of juveniles in the statute.

- "A defendant who, as a result of mental disease or defect, is incompetent because the defendant is unable to understand the proceedings against the defendant or to assist in the defendant's own defense may not be tried, convicted, or sentenced for the commission of a crime so long as the incompetency exists."
- (f) "In determining if the defendant is unable to understand the proceedings against the defendant, the court shall consider, among other factors considered relevant by the court, whether the defendant understands that the defendant has been charged with a criminal offense and that penalties can be imposed; whether the defendant understands what criminal conduct is being alleged; whether the defendant understands the roles of the judge, jury, prosecutor, and defense counsel; whether the defendant understands that the defendant will be expected to tell defense counsel the circumstances, to the best of the defendant's ability, surrounding the defendant's activities at the time of the alleged criminal conduct; and whether the defendant can distinguish between a guilty and not guilty plea."
- (g) "In determining if the defendant is unable to assist in the defendant's own defense, the court shall consider, among other factors considered relevant by the court, whether the defendant's mental disease or defect affects the defendant's ability to recall and relate facts pertaining to the defendant's actions at times relevant to the charges and whether the defendant can respond coherently to counsel's questions. A defendant is able to assist in the defense even though the defendant's memory may be impaired, the defendant refuses to accept a course of action that counsel or the court believes is in the defendant's best interest, or the defendant is unable to suggest a particular strategy or to choose among alternative defenses."

ARIZONA—ARIZ. REV. STAT. ANN. § 8-291 (West 2011): (2) "'Incompetent' means a juvenile who does not have sufficient present ability to consult with the juvenile's lawyer with a reasonable degree of rational understanding or who does not have a rational and factual understanding of the proceedings against the juvenile. *Age alone does not render a person incompetent.*" (emphasis added)

ARKANSAS—ARK. CODE ANN. § 9-27-502(a)(1) (West 2014): Subsection (b) of the statute requires the prosecution to overcome three presumptions by a preponderance of the evidence to prosecute a juvenile under the age of thirteen at the time of the alleged offense:

- Possess the necessary mental state required for the offense charged;
- Conform his or her conduct to the requirements of law; and
- Appreciate the criminality of his or her conduct.

CALIFORNIA—CAL. WELF. & INST. CODE § 709 (West 2014): Subsection (a) states, "A minor is incompetent to proceed if he or she lacks sufficient present ability to consult with counsel and assist in preparing his or her defense with a reasonable degree of rational understanding, or lacks a rational as well as factual understanding, of the nature of the charges or proceedings against him or her. If the court finds substantial evidence raises a doubt as to the minor's competency, the proceedings shall be suspended."

- "Upon suspension of proceedings, the court shall order that the question of the minor's competence be determined at a hearing. The court shall appoint an expert to evaluate whether the minor suffers from a mental disorder, developmental disability, developmental immaturity, or other condition and, if so, whether the condition or conditions impair the minor's competency."

COLORADO—COLO. REV. STAT. § 19-2-1301 (West 2014): (2) "A juvenile shall not be tried or sentenced if the juvenile is incompetent to proceed, as defined in section 16-8.5-101(11), C.R.S., at that stage of the proceedings against him or her."

COLO. REV. STAT. § 16-8.5-101 (West 2014): "(11) 'Incompetent to proceed' means that, as a result of a mental disability or developmental disability, the defendant does not have sufficient present ability to consult with the defendant's lawyer with a reasonable degree of rational understanding in order to assist in the defense, or that, as a result of a mental disability or developmental disability, the defendant does not have a rational and factual understanding of the criminal proceedings."

CONNECTICUT—CONN. GEN. STAT. § 54-56d (West 2014): No statute for juveniles. (a) "COMPETENCY REQUIREMENT. DEFINITION. A defendant shall not be tried, convicted or sentenced while the defendant is not competent. For the purposes of this section, a defendant is not competent if the defendant is unable to understand the proceedings against him or her or to assist in his or her own defense."

DELAWARE—DEL. CODE ANN. tit. 10, § 1007A (West 2014): "Not competentë shall mean a child who is unable to understand the nature of the proceedings against the child, or to give evidence in the child's own defense or to instruct counsel on the child's own behalf.

- Subsection (c)(3): If the Court finds that a child is not competent and is unable to have competency timely restored or acquired, the Court, after a hearing to consider the best interests of the child and the safety of the community, shall:
  - "Dismiss nonviolent misdemeanor charges within 6 to 12 monthsë;
  - "Dismiss violent misdemeanor or nonviolent felony charges within 12 to 24 monthsë;
  - "Dismiss violent felony charges at age 18, unless the child was under age 14 at the time of arrest for violent felonies in which case the Court shall consider dismissal of violent felonies within 18 to 36 months."

FLORIDA—FLA. STAT. ANN. § 985.19 (West 2014): Subsection (1)(f) states, "A child is competent to proceed if the child has sufficient present ability to consult with counsel with a reasonable degree of rational understanding and the child has a rational and factual understanding of the present proceedings. The report must address the child's capacity toë:

  - "Appreciate the charges or allegations against the childë;
  - "Appreciate the range and nature of possible penalties that may be imposed in the proceedings against the child, if applicableë;
  - "Understand the adversarial nature of the legal processë;
  - "Disclose to counsel facts pertinent to the proceedings at issueë;
  - "Display appropriate courtroom behaviorë;
  - "Testify relevantly."
- (3) "If the court finds that a child has mental illness, intellectual disability, or autism and adjudicates the child incompetent to proceed, the court must also determine whether the child meets the criteria for secure placement. A child may be placed in a secure facility or program if the court makes a finding by clear and convincing evidence that:
- The child has mental illness, intellectual disability, or autism and because of the mental illness, intellectual disability, or autism:
  - The child is manifestly incapable of surviving with the help of willing and responsible family or friends, including available alternative services, and without treatment or training the child is likely to suffer from neglect or refuse to care for self, and

such neglect or refusal poses a real and present threat of substantial harm to the child's well-being; or

- There is a substantial likelihood that in the near future the child will inflict serious bodily harm on self or others, as evidenced by recent behavior causing, attempting, or threatening such harm."

GEORGIA—GA. CODE ANN. § 15-11-651 (West 2014): "(3) 'Incompetent to proceed' means lacking sufficient present ability to understand the nature and object of the proceedings, to comprehend his or her own situation in relation to the proceedings, and to assist his or her attorney in the preparation and presentation of his or her case in all adjudication, disposition, or transfer hearings. Such term shall include consideration of a child's age or immaturity."

HAWAII—HAW. REV. STAT. §704-403 to 704-418 (West 2014): "No person who as a result of a physical or mental disease, disorder, or defect lacks capacity to understand the proceedings against the person or to assist in the person's own defense shall be tried, convicted, or sentenced for the commission of an offense so long as such incapacity endures."

IDAHO—IDAHO CODE ANN. § 20-519A (West 2014): "(2) A juvenile is competent to proceed if he or she has‡:

- "A sufficient present ability to consult with his or her lawyer with a reasonable degree of rational understanding‡;
- "A rational and factual understanding of the proceedings against him or her‡; and
- "The capacity to assist in preparing his or her defense."

ILLINOIS—725 ILL. COMP. STAT. 5/104-10 (West 2014): *Dusky* standard

- No mention of juveniles in the general competency statute.

INDIANA—IND. CODE. ANN. § 35-36-3-1 (West 2014): Adult Standard. "Sec. 1. (a) If at any time before the final submission of any criminal case to the court or the jury trying the case, the court has reasonable grounds for believing that the defendant lacks the ability to understand the proceedings and assist in the preparation of a defense, the court shall immediately fix a time for a hearing to determine whether the defendant has that ability."

- However, the adult standard does not apply to juveniles. *In re K.G.*, 808 N.E.2d 631, 635 (Ind. 2004): "Principles of fundamental fairness require that this right be afforded in juvenile proceedings. Thus, we summarily affirm the opinion of the Court of

> Appeals on this issue. We disagree with our colleagues, however, on the applicability of the adult competency statute."

IND. CODE. ANN. § 31-32-12-1 (West 2014): Provides mental health evaluations for juveniles.

IOWA—IOWA CODE. ANN. § 812.3 to 812.9 (West 2014): (1) "If at any stage of a criminal proceeding the defendant or the defendant's attorney, upon application to the court, alleges specific facts showing that the defendant is suffering from a mental disorder which prevents the defendant from appreciating the charge, understanding the proceedings, or assisting effectively in the defense, the court shall suspend further proceedings and determine if probable cause exists to sustain the allegations."

KANSAS—KAN. STAT. ANN. § 38-2348 (West 2014): (a) "For the purpose of this section, a person charged as a juvenile is incompetent for adjudication as a juvenile offender if, because of mental illness or defect, such person is unable to[ë]:

- "Understand the nature and purpose of the proceedings[ë]; or
- "Make or assist in making a defense."

KENTUCKY—KY. REV. STAT. ANN. § 504.100 to 504.110 (West 2014): Not a juvenile statute. (1) "If upon arraignment, or during any stage of the proceedings, the court has reasonable grounds to believe the defendant is incompetent to stand trial, the court shall appoint at least one (1) psychologist or psychiatrist to examine, treat and report on the defendant's mental condition."

LOUISIANA—LA. CHILD. CODE ANN. art. 832 (West 2014): "A child's mental incapacity to proceed, as defined by this Title, may be raised at any time by the child, the district attorney, or the court. When the question of the child's mental incapacity to proceed is raised, there shall be no further steps in the delinquency proceeding, except the filing of a delinquency petition, until counsel is appointed and notified in accordance with Article 809(B) and the child is found to have the mental capacity to proceed."

- Comments 2004: (b) "The amendments to this Article emphasize the importance of having physicians who have expertise in child development to assess claims of incapacity. According to recent research, including the MacArthur Study, these factors or variables are associated with functional incompetency: age; intelligence quotient; a history of severe mental illness, particularly psychosis; mental retardation; a history of special educational placements or diagnosis of severe learning disabilities; and living in an extremely traumatic environment. More broadly, 'Deficien-

> cies in risk perception, as well as immature attitudes toward authority figures, may undermine competent decision making in ways that standard assessments of competence to stand trial do not capture', The MacArthur Juvenile Adjudicative Competence Study, published as Grisso et al., *Juveniles' and Adults' Competence as Trial Defendants*, 27 L. & Human Behavior 33 (2002)."

MAINE—ME. REV. STAT. ANN. tit. 15, § 3318-A (West 2014): Section 1A states, "'Chronological immaturity' means a condition based on a juvenile's chronological age and significant lack of developmental skills when the juvenile has no significant mental illness or mental retardation."

- Section 6E: "If the State Forensic Service examiner determines that the juvenile suffers from chronological immaturity, the examiner shall report a comparison of the juvenile to the average juvenile defendant."
- Section 8: "The burden of proof of competence is on the State if the juvenile is less than fourteen years of age at the time the issue of competence is raised. If the juvenile is at least fourteen years of age at the time the issue of competence is raised, the burden of proof is on the juvenile. In the event the State has the burden of proof, it must show by a preponderance of the evidence that the juvenile is competent to proceed. In the event the juvenile has the burden of proof, the juvenile must show by a preponderance of the evidence that the juvenile is not competent to proceed."

MARYLAND—MD. CODE ANN. CTS. & JUD. PROC. § 3-8A-17.3 (West 2014): Not a definition of competency, rather a statute that defines broader "cognitive concepts," rather than specific functional abilities.

- (a)(3) "In determining whether the child is incompetent to proceed, the qualified expert shall consider the following factors:"
  - "The child's age, maturity level, developmental stage, and decision-making abilities";
  - "The capacity of the child to":
    - "Appreciate the allegations against the child";
    - "Appreciate the range and nature of allowable dispositions that may be imposed in the proceedings against the child";
    - "Understand the roles of the participants and the adversary nature of the legal process";
    - "Disclose to counsel facts pertinent to the proceedings at issue";
    - "Display appropriate courtroom behavior"; and
    - "Testify relevantly"; and

- "Any other factors that the qualified expert deems to be relevant."

MASSACHUSETTS— MASS. GEN. LAWS. ANN. ch. 123, § 15 (West 2014): Provides for adult competency examination and commitment.

MICHIGAN—MICH. COMP. LAWS ANN. § 330.2020 (West 2014): Sec. 1020. (1) "A defendant to a criminal charge shall be presumed competent to stand trial. He shall be determined incompetent to stand trial only if he is incapable because of his mental condition of understanding the nature and object of the proceedings against him or of assisting in his defense in a rational manner. The court shall determine the capacity of a defendant to assist in his defense by his ability to perform the tasks reasonably necessary for him to perform in the preparation of his defense and during his trial."

MICH. COMP. LAWS ANN. § 330.2060a (West 2014): (3) "'Incompetent to proceed' means that a juvenile, based on age-appropriate norms, lacks a reasonable degree of rational and factual understanding of the proceeding or is unable to do 1 or more of the following:"

- "Consult with and assist his or her attorney in preparing his or her defense in a meaningful manner."
- "Sufficiently understand the charges against him or her."

MICH. COMP. LAWS ANN. § 330.2060a (West 2014): (1) "'Competency evaluation' means a court-ordered examination of a juvenile directed to developing information relevant to a determination of his or her competency to proceed at a particular stage of a court proceeding involving a juvenile who is the subject of a delinquency petition."

MICH. COMP. LAWS ANN. § 330.2062 (West 2014): (1) "A juvenile 10 years of age or older is presumed competent to proceed unless the issue of competency is raised by a party. A juvenile less than 10 years of age is presumed incompetent to proceed."

MINNESOTA—MINN. STAT. JUV. DEL. R. § 20.01 (West 2014): "SUBD. 1. INCOMPETENCY TO PROCEED DEFINED. A child is incompetent and shall not be permitted to enter a plea, be tried, or receive a disposition for any offense when the child lacks sufficient ability to:"

- "consult with a reasonable degree of rational understanding with the child's counsel; or
- "understand the proceedings or participate in the defense due to mental illness or mental deficiency."

MISSISSIPPI—MISS. UNIF. CIRCUIT AND CITY CT. PRAC. R. 9.06 (West 2014): "If before or during trial the court, of its own motion or

upon motion of an attorney, has reasonable ground to believe that the defendant is incompetent to stand trial, the court shall order the defendant to submit to a mental examination by some competent psychiatrist selected by the court in accordance with § 99-13-11 of the Mississippi Code Annotated of 1972."

- *Coleman v. State*, 127 So. 3d 161, 164 (Miss. 2013). Incorporates the *Dusky* standard for competency: "In order to be deemed mentally competent to stand trial, a defendant must have 'the sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding . . . and . . . a rational as well as factual understanding of the proceedings against him.'"

MONTANA—MONT. CODE ANN. § 46-14-103 (2013): "A person who, as a result of mental disease or defect or developmental disability, is unable to understand the proceedings against the person or to assist in the person's own defense may not be tried, convicted, or sentenced for the commission of an offense so long as the incapacity endures."

- *In re G.T.M.*, 354 Mont. 197, 201–02, 222 P.3d 626, 629 (2009). Immaturity does not determine competency: ¶ 14 "This critical distinction between youths and adults notwithstanding, G.T.M. complains that adults benefit from procedures to determine whether they are mentally competent to proceed, while youths are not protected by similar procedures to determine whether they are mentally competent to proceed. However, a youth alleging incompetency based on immaturity is not similarly situated to an adult criminal defendant alleging mental disease or defect. All youths experience a period of immaturity, which most youths outgrow. The same cannot be said for mental disease or defect. In fact, Montana law provides detailed procedures for determining incompetency based on mental disease or defect that are simply not applicable to youths claiming immaturity."

NEBRASKA—NEB. REV. STAT. ANN. § 43-258 (West 2014): (1) "Pending the adjudication of any case under the Nebraska Juvenile Code, the court may order the juvenile examined by a physician, surgeon, psychiatrist, duly authorized community mental health service program, or psychologist to aid the court in determining (a) a material allegation in the petition relating to the juvenile's physical or mental condition, (b) the juvenile's competence to participate in the proceedings, (c) the juvenile's responsibility for his or her acts, or (d) whether or not to provide emergency medical treatment."

NEVADA—NEV. REV. STAT. ANN. § 178.400 (West 2014): 2. "For the purposes of this section, "incompetentë means that the person does not have the present ability toë:

- "Understand the nature of the criminal charges against the personë;
- "Understand the nature and purpose of the court proceedingsë; or
- "Aid and assist the person's counsel in the defense at any time during the proceedings with a reasonable degree of rational understanding."

NEW HAMPSHIRE—N.H. REV. STAT. ANN. § 169-B:20 (West 2014): Determination of Competence. "I. As used in this section, unless the context otherwise indicates, the following terms have the following meaningsë:

  - "'Chronological immaturity' means a condition based on a juvenile's chronological age and significant lack of developmental skills when the juvenile has no significant mental illness or mental retardation."
  - "'Mental illness' means any diagnosable mental impairment supported by the most current edition of the Diagnostic and Statistical Manual of Mental Disorders, published by the American Psychiatric Association."
  - "'Developmental disability' means a disability which is attributable to an intellectual disability, cerebral palsy, epilepsy, autism, or a specific learning disability, or any other condition of an individual found to be closely related to an intellectual disability as it refers to general intellectual functioning or impairment in adaptive behavior or requires treatment similar to that required for persons with an intellectual disability."
  - "'Intellectual disability' means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior."
- "II. A minor is competent to proceed in a delinquency proceeding if the minor hasë:
  - "A rational as well as a factual understanding of the proceedings; andë
  - "A sufficient present ability to consult with counsel with a reasonable degree of rational understanding."

NEW MEXICO—N.M. STAT. ANN. § 32A-2-17 (West 2014): (B) "Where there are indications that the child may have a mental disorder or developmental disability, the court, on motion by the children's court attorney or that of counsel for the child, may order the child to be examined at a suitable place by a physician or psychiatrist, a licensed psy-

chologist, a licensed professional clinical counselor or a licensed independent social worker prior to a hearing on the merits of the petition. An examination made prior to the hearing or as a part of the predisposition study and report shall be conducted on an outpatient basis, unless the court finds that placement in a hospital or other appropriate facility is necessary."

NEW YORK—N.Y. MENTAL HYG. LAW § 1.03 (McKinney 2014): (22) "'Developmental disability' means a disability of a person which":

- (a)(1) "is attributable to mental retardation, cerebral palsy, epilepsy, neurological impairment, familial dysautonomia or autism"; or
- (2) "is attributable to any other condition of a person found to be closely related to mental retardation because such condition results in similar impairment of general intellectual functioning or adaptive behavior to that of mentally retarded persons or requires treatment and services similar to those required for such person; or"
- (3) "is attributable to dyslexia resulting from a disability described in subparagraph (1) or (2) of this paragraph";
- (b) "originates before such person attains age twenty-two";
- (c) "has continued or can be expected to continue indefinitely"; and
- (d) "constitutes a substantial handicap to such person's ability to function normally in society."

N.Y. FAM. CT. ACT § 322.2 (McKinney 2014): (1) "Upon the receipt of examination reports ordered under section 322.1, the court shall conduct a hearing to determine whether the respondent is an incapacitated person. The respondent, the counsel for the respondent, the presentment agency and the commissioner of mental health or the commissioner of mental retardation and developmental disabilities, as appropriate, shall be notified of such hearing at least five days prior to the date thereof and afforded an opportunity to be heard."

NORTH CAROLINA—N.C. GEN. STAT. § 7B-2401 (2014): *Dusky* standard.

- Same standard for juveniles and adults.

SOUTH CAROLINA—S.C. CODE ANN. § 44-23-410 (2013): *Dusky* standard.

- No reference to "juveniles." Only references to family court.

TEXAS—TEX. FAM. CODE ANN. § 55.31 (West 2013): (a) "A child alleged by petition or found to have engaged in delinquent conduct or con-

duct indicating a need for supervision who as a result of mental illness or mental retardation lacks capacity to understand the proceedings in juvenile court or to assist in the child's own defense is unfit to proceed and shall not be subjected to discretionary transfer to criminal court, adjudication, disposition, or modification of disposition as long as such incapacity endures."

VERMONT—VT. R. FAM. PROC. 1(I) (West 2014): (i) DETERMINATION OF COMPETENCE TO BE SUBJECT TO DELINQUENCY PROCEEDINGS. "(1) *In general.* The issue of a child's competence to be subject to delinquency proceedings may be raised by motion of any party, or upon the court's own motion, at any stage of the proceedings.

- (2) "*Mental Examination.* Competence shall be determined through a mental examination conducted by a psychologist or psychiatrist selected by the court. In addition to the factors ordinarily considered in determining competence in criminal proceedings, the examiner shall consider the following as appropriate to the circumstances of the childë:
  - "The age and developmental maturity of the childë;
  - "whether the child suffers from mental illness or a developmental disorder, including mental retardationë;
  - "whether the child has any other disability that affects the child's competenceë; and
  - "any other factor that affects the child's competence."
- "The child, or the state, shall have the right to obtain an independent examination by an expert."

VIRGINIA—VA. CODE ANN. § 16.1-356 (West 2014): If there is probable cause to believe that "the juvenile lacks substantial capacity to understand the proceedings against him or to assist his attorney in his own defense, the court shall order that a competency evaluation be performed by at least one psychiatrist, clinical psychologist, licensed professional counselor, licensed clinical social worker, or licensed marriage and family therapist, who is qualified by training and experience in the forensic evaluation of juveniles."

- (F) "If the juvenile is otherwise able to understand the charges against him and assist in his defense, a finding of incompetency shall not be made based solely on any or all of the following: (i) the juvenile's age or developmental factors, (ii) the juvenile's claim to be unable to remember the time period surrounding the alleged offense, or (iii) the fact that the juvenile is under the influence of medication."

WEST VIRGINIA—W. VA. CODE ANN. § 27-6A-9 (West 2014): States the procedure for finding incompetency for a juvenile is the same as for adults.

W. VA. CODE ANN. § 27-6A-3(c) (West 2014): Defines competency using the *Dusky* standard

WISCONSIN—WIS. STAT. ANN. § 938.295 (West 2014): EXAMINATION OR ASSESSMENT OF JUVENILE OR PARENT. (a) "After the filing of a petition and upon a finding by the court that reasonable cause exists to warrant a physical, psychological, mental, or developmental examination or an alcohol and other drug abuse assessment that conforms to the criteria under s. 938.547(4), the court may order a juvenile within its jurisdiction to be examined as an outpatient by personnel in an approved treatment facility for alcohol and other drug abuse, by a physician, psychiatrist, or licensed psychologist, or by another expert appointed by the court holding at least a master's degree in social work or another related field of child development, in order that the juvenile's physical, psychological, alcohol or other drug dependency, mental, or developmental condition may be considered."

WIS. STAT. ANN. § 51.01 (West 2014): (5)(a) "'Developmental disability' means a disability attributable to brain injury, cerebral palsy, epilepsy, autism, Prader-Willi syndrome, intellectual disability, or another neurological condition closely related to an intellectual disability or requiring treatment similar to that required for individuals with an intellectual disability, which has continued or can be expected to continue indefinitely and constitutes a substantial handicap to the afflicted individual. 'Developmental disability' does not include dementia that is primarily caused by degenerative brain disorder."

- (b) "'Developmental disability', for purposes of involuntary commitment, does not include cerebral palsy or epilepsy."

WYOMING—WYO. STAT. ANN. § 7-11-303 (West 2014): Competency for adults.

- (c) "Written reports of the examination shall be filed with the clerk of court. The report shall include":
  - "Detailed findings";
  - "An opinion as to whether the accused has a mental illness or deficiency, and its probable duration";
  - "An opinion as to whether the accused, as a result of mental illness or deficiency, lacks capacity to comprehend his position, to understand the nature and object of the proceedings against him, to conduct his defense in a rational manner, and to cooper-

> ate with his counsel to the end that any available defense may be interposedë;

WYO. STAT. ANN. § 14-6-219 (West 2014): (d) "The juvenile court shall retain jurisdiction of the child on the petition pending final determination of the commitment proceedings in the district court. If proceedings in the district court commit the child to the Wyoming state hospital, the Wyoming life resource center or any other facility or institution for treatment and care of people with a mental illness or an intellectual disability, the petition shall be dismissed and further proceedings under this act terminate. If proceedings in the district court determine the child does not have a mental illness or an intellectual disability to a degree rendering him subject to involuntary commitment, the court shall proceed to a final adjudication of the petition and disposition of the child under the provisions of this act."