JUVENILE COMPETENCY RESTORATION

by
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Despite legal competence presumptions about juveniles facing delinquency charges, tens of thousands of forensic mental health evaluations challenge the status of court-involved children in the United States each year. Researchers now find mental health disorders prevalent among juveniles in the justice system, with up to 70% having a diagnosable mental health problem. It is inappropriate to think of adolescents as younger versions of adults whose behaviors can be viewed through the same lens as adult behaviors. The Article will explore some of the causes and conclusions about why many juveniles are not competent and why many of them may not become legally competent. Prenatal exposure to alcohol creates an especially complex problem for a system that seeks to hold juveniles accountable for misconduct considering the juveniles' congenital birth defects and the difficulties in identifying the condition. Comorbid disabilities within this population are rarely properly identified, making the current forms of intervention services equally inappropriate and often unsuccessful. Many other countries do not follow the lead of the United States in imposing legal sanctions on youthful offenders. Our juvenile justice system requires proper assessment and diagnostic and treatment modalities for this large segment of the juvenile population where recidivism ushers many from juvenile courts into adult criminal courts.

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INTRODUCTION

Legal competency presumptions are routinely applied to juvenile delinquency cases throughout this country. Competence to stand trial evaluations and assessments are requested from forensic mental health evaluators more frequently than any other type of forensic evaluation, with roughly 60,000 requested annually.[1] But this has not always been the case. As early as 1899, one federal circuit court of appeals found that requiring defendants to be competent at their trials was a fundamental right.[2] Over time, juvenile delinquency cases in the United States have gone through various stages as communities have labored over how to treat allegations of misconduct by children. Initially, all juveniles were charged in the same courts that handled adult criminal matters.[3] Subsequently, their cases were designated and sent to specialized juvenile courts.[4] By 1967, however, during the height of the Warren Court's judicial activism, the U.S. Supreme Court determined in *In re Gault*[5] that

[1] Nancy L. Ryba, Virginia G. Cooper & Patricia A. Zapf, *Juvenile Competence to Stand Trial Evaluations: A Survey of Current Practices and Test Usage Among Psychologists*, 34 PRO. PSYCH.: RSCH. & PRAC. 499, 499 (2003).

[2] Youtsey v. United States, 97 F. 937, 940 (6th Cir. 1899).

[3] *See* Richard S. Tuthill, *History of the Children's Court in Chicago*, *in* CHILDREN'S COURTS IN THE UNITED STATES 1, 1 (Richard H. Ward & Austin Fowler eds., AMS Press Inc. 1973) (1904).

[4] ANTHONY M. PLATT, THE CHILD SAVERS: THE INVENTION OF DELINQUENCY 3, 10 (1969).

[5] *In re* Gault, 387 U.S. 1 (1967).

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. In an eight-to-

children were entitled to some protections under the Fourteenth Amendment's Due Process Clause, not the substantive provisions of the Sixth Amendment.[6] *Gault* recognized similar due process rights for children in delinquency cases as adults had enjoyed in criminal cases,[7] thus expanding the legal rights of children in all adjudication hearings.[8]

One aspect of due process recognition came in the form of challenging a child's legal competency to stand trial.[9] *In re Gault* has been relied upon as the legal foundation for recognizing a juvenile's fundamental due process right to challenge competency to stand trial.[10] The legal standard for competency to stand trial was estab

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> 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.

David R. Katner, *Eliminating the Competency Presumption in Juvenile Delinquency Cases*, 24 CORNELL J.L. & PUB. POL'Y 403, 413 (2014) (footnotes omitted).

[6] *In re Gault*, 387 U.S. at 41; *see* Irene Merker Rosenberg, Gault *Turns 40: Reflections on Ambiguity*, 44 CRIM. L. BULL. 330, 336–37 (2008).

[7] *But see* Wallace J. Mlyniec, In re Gault *at 40: The Right to Counsel in Juvenile Court—A Promise Unfulfilled*, 44 CRIM. L. BULL. 371, 371–72 (2008) (arguing that *Gault* failed to grant juveniles with key protections offered to adults in criminal proceedings such as the right to a jury, a speedy trial, and against double jeopardy).

[8] *See* Kellie M. Johnson, *Juvenile Competency Statutes: A Model for State Legislation*, 81 IND. L.J. 1067, 1070 (2006) ("Before *In re Gault*, it was possible for juveniles to be institutionalized because of their misconduct, but the informal juvenile proceedings lacked many of the procedural safeguards of the adult criminal system. The *In re Gault* decision held that the informal procedure of the juvenile system violated the Due Process Clause of the Fourteenth Amendment. '[I]t would be extraordinary if our Constitution did not require the [juvenile system to have the] procedural regularity and the exercise of care implied in the phrase "due process." Under our Constitution, the condition of being a boy does not justify a kangaroo court.' The decision specifically extended certain procedural rights to juveniles during the adjudication of delinquency proceedings, including the right to counsel, the right to notice of charges, the right to confrontation, the privilege against self-incrimination, the right to appellate review, and the right to a transcript of the proceedings." (footnotes omitted) (quoting *In re Gault*, 387 U.S. at 27–28)).

[9] The Supreme Court's definition of competence for criminal defendants came in the 1960 decision, *Dusky v. United States*. 362 U.S. 402, 402 (1960) (per curiam).

[10] *See* Joseph B. Sanborn, Jr., *Juveniles' Competency to Stand Trial: Wading Through the Rhetoric and the Evidence*, 99 J. CRIM. L. & CRIMINOLOGY 135, 138–39 (2009) (citing State v. J S, No. 0312013339, 2005 WL 3507990, at *11, n.2 (Del. Fam. Ct. Aug. 2, 2005), *aff'd sub nom.* Smith v. State, 918 A.2d 1144 (Del. 2007); *In re* K.G., 808 N.E.2d 631, 635 (Ind. 2004); State *ex rel.* Causey, 363 So. 2d 472, 474 (La. 1978); *In re* S.W.T., 277 N.W.2d 507, 512 (Minn. 1979); *In re* Jeffrey C., 366 N.Y.S.2d 826, 829–30 (Fam. Ct. 1975); *In re* B.M.S., 847 N.E.2d 506, 509–10 (Ohio Ct. App. 2006); *In re* Smith, No. 5-01-34, 2002 WL 255126, at *2, n.5 (Ohio Ct. App. Feb. 22, 2002); *In re* Lloyd, No. 96-CA-86, 1997 WL 115886, at *4–5 (Ohio Ct. App. Jan. 27, 1997); *In re* McWhorter, No. CA94-02-047, 1994 WL 673098, at *4 (Ohio Ct. App. Dec. 5, 1994); *In re* Johnson, No. 7998, 1983 WL 2516, at *12 (Ohio Ct. App. Oct. 25, 1983); *In re* D.G., 698 N.E.2d 533, 534–35 (Ohio Ct. C.P. 1998); *In re* B.M.R., Nos. 2005-CA-1, 2005-CA-18, 2005 WL 2978951, at *2 (Ohio Ct. App. Nov. 4, 2005); *In re* Wood, No.

lished by the Supreme Court's earlier 1960 decision in *Dusky v. United States*,[11] which imposed a two-prong test. The defendant being "oriented to time and place and [having] some recollection of events" was not enough.[12] Instead, 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."[13]

Because the Supreme Court found the record from the lower court to be ambiguous, the matter was remanded.[14] Following the *Dusky* decision, in 1975, the Supreme Court once again focused upon an individual's competency to stand trial in *Drope v. Missouri*,[15] in which the Court overturned a trial court's finding the defendant guilty after refusing to order a psychiatric examination, concluding the lower court decision violated the defendant's rights under the Due Process Clause.[16]

Today, in many states children enjoy the same legal right as adults to challenge

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04-CA-0005, 2004 WL 2808913, at *2 (Ohio Ct. App. Dec. 8, 2004); *In re* Adams, No. 01-CA-237, 2003 WL 21783682, at *5 (Ohio Ct. App. July 29, 2003); *In re* Bailey, 782 N.E.2d 1177, 1179 (Ohio Ct. App. 2002); *In re* Grimes, 769 N.E.2d 420, 422–23 (Ohio Ct. App. 2002); *In re* Anderson, No. 2001-AP-030021, 2002 WL 253855, at *3 (Ohio Ct. App. Feb. 13, 2002); *In re* Williams, 687 N.E.2d 507, 510–11 (Ohio Ct. App. 1997); State v. E.C., 922 P.2d 152, 155–56 (Wash. Ct. App. 1996)).

[11] *Dusky*, 362 U.S. 402.

[12] *Id.*

[13] *Id.* (citation omitted).

[14] *Id.* at 403. Contrary to many misunderstandings about *Dusky*, the Supreme Court and agreed with the Solicitor General and concluded that the record from the district court was ambiguous and that it was not enough to find that the defendant was "oriented to time and place" and had "some recollection of events," as that did not "sufficiently support the findings of competency to stand trial." To support those findings under 18 U.S.C. § 4244, the Court ruled that the district judge "would need more information than this record presents." *Id.* at 402 (citations omitted).

[15] Drope v. Missouri, 420 U.S. 162 (1975).

> 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 Drape 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.

Katner, *supra* note 5, at 414 (citing *id.* at 163–64).

[16] *Drope*, 420 U.S. at 183.

their competency to stand trial.[17] In the first published study and compilation of state statutes and case law pertinent to juvenile competency to stand trial, Richard Redding and Lynda Frost listed 22 states with formal juvenile laws regarding competency to stand trial, 4 states with juvenile proceedings incorporated into adult statutory procedures, 9 states with case law suggesting the use of juvenile competency evaluations, 15 states with no provisions addressing juvenile competency whatsoever, and one state—Oklahoma[18]—with case law holding that competency issues were irrelevant in juvenile cases.[19] Although the precise number of defendants who raise competency challenges is not known,[20] the American Academy of Psychiatry and the Law concluded that the number of defendants challenging competency

[17] Adults were granted the right to challenge their competency to stand trial in English common law as early as 1790. *See* GARY MELTON, JOHN PETRILA, NORMAN POYTHRESS & CHRISTOPHER SLOBOGIN, PSYCHOLOGICAL EVALUATIONS FOR THE COURTS 120–23 (2d ed. 1997), *reprinted in* RALPH REISNER, CHRISTOPHER SLOBOGIN & ARTI RAI, LAW AND THE MENTAL HEALTH SYSTEM: CIVIL AND CRIMINAL ASPECTS 963–64 (4th ed. 2004) (citing Frith's Case, 22 How. St. Tr. 307, 318 (1790)). Although most states' juvenile delinquency systems legally presume that all juveniles are competent to stand trial, some outliers, such as Arkansas, presume incompetency for juveniles under the age of 13 who are charged with capital or first degree murder. ARK. CODE ANN. § 9-27-502(b)(1)(A) (2022). Adults are generally presumed to be competent to stand trial. *See* 18 U.S.C. § 4241(a) (2018) (providing that a competency hearing shall be held only "if there is reasonable cause to believe that the defendant may presently be suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense"). Nevertheless, some states do not embrace competency challenges for juveniles. For instance:

> Oklahoma case law flatly rejects that a juvenile has a right to be found competent. The Oklahoma court stated, "[T]he nature of juvenile proceedings themselves, being specifically not criminal proceedings and being directed towards rehabilitation of a juvenile, indicates to this Court the intent of the [Oklahoma] legislature to deal with juveniles regardless of mental state in an effort to provide rehabilitation and necessary treatment."

Johnson, *supra* note 8, at 1074 (quoting G.J.I. v. State, 778 P.2d 485, 487 (Okla. Crim. App. 1989)). As of 2006, "Oklahoma [was] the only state to explicitly reject a juvenile's right to be found competent before a delinquency proceeding." *Id.* at 1074 n.59.

[18] The one exception came from a case where the Oklahoma Court of Criminal Appeals held that because of the rehabilitative nature of juvenile court proceedings, competency was not required for juvenile defendants. *G.J.I.*, 778 P.2d at 487. *But see* Cooper v. Oklahoma, 517 U.S. 348, 369 (1996) (holding unconstitutional Oklahoma's requirement of proof by "clear and convincing evidence" standard to show a defendant's incompetence).

[19] Richard E. Redding & Lynda E. Frost, *Adjudicative Competence in the Modern Juvenile Court*, 9 VA. J. SOC. POL'Y & L. 353, 368–72, 400–01 app. A (2001).

[20] Angela Harvey, *Juvenile Courts and Competency to Stand Trial*, 5 SOCIO. COMPASS 439, 439 (2011) ("Currently, it is unclear how many defendants in the United States are assessed for CST [competency to stand trial]. Scholars provide a conservative national estimate of 5% or 60,000 pre-trial competence assessments conducted per year for adults, but similar estimates for juvenile defendants are not available. Of the small number of adult defendants referred for CST

to stand trial has increased over recent years:

> Although no precise U.S. statistics are available, the best estimates suggest that the frequency of evaluations of competence to stand trial has risen significantly in recent years. The often-cited 1973 estimate by McGarry put the number of competence evaluations at 25,000 to 36,000 each year in the United States. Estimates from 1998 and 2000 put the annual number of competence evaluations at 50,000 and 60,000, respectively.[21]

By 1975, the Supreme Court had recognized that the "prohibition [of an incompetent to stand trial] is fundamental to an adversary system of justice."[22] In 1986, the American Bar Association asserted that "competence to stand trial [was] the most important issue in the field of mental disability criminal law" because of the "ease in which it can be evoked, the relatively large numbers of persons to whom it can be applied, and the many points in the criminal trial process in which the question can be raised."[23] Researchers of competency issues have recognized that juvenile competency issues did not arise among defense attorneys until the early 1990s.[24] With new tough-on-crime laws arising, "defense attorneys started raising competency to protect their clients in juvenile court," but without existing juvenile competency standards, "attorneys and courts frequently relied on their state's criminal competency statute as the standard."[25]

Increased numbers of challenges to juvenile competency in court proceedings should come as no surprise given the scrutiny paid to the prevalence of mental health problems of adolescents in the juvenile justice system. Researchers have found mental health disorders to be "prevalent among youths in the juvenile justice system," with up to 70% of youths having "a diagnosable mental health problem."[26] Other

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assessments, the estimates of those found incompetent to stand trial range from 10% to 30%." (citations omitted)).

[21] Douglas Mossman, Stephen G. Noffsinger, Peter Ash, Richard L. Frierson, Joan Gerbasi, Maureen Hackett, Catherine F. Lewis, Debra A. Pinals, Charles L. Scott, Karl G. Sieg, Barry W. Wall & Howard V. Zonana, *AAPL Practice Guideline for the Forensic Psychiatric Evaluation of Competence to Stand Trial*, 35 J. AM. ACAD. PSYCHIATRY & L. (SUPPLEMENT) 3 (2007) (citations omitted).

[22] Drope v. Missouri, 420 U.S. 162, 172 (1975).

[23] Caroline T. Everington, *The Competence Assessment for Standing Trial for Defendants with Mental Retardation (CAST-MR): A Validation Study*, 17 CRIM. JUST. & BEHAV. 147, 147–48 (1990) (citations omitted).

[24] NAT'L JUV. JUST. NETWORK, COMPETENCY TO STAND TRIAL IN JUVENILE COURT: RECOMMENDATIONS FOR POLICYMAKERS 2 (2012), *cited in* Katner, *supra* note 5, at 417.

[25] *Id.*

[26] *See, e.g.*, U.S. DEP'T OF JUST., NCJ-251500, OJJDP LITERATURE REV.: INTERSECTION BETWEEN MENTAL HEALTH AND THE JUVENILE JUSTICE SYSTEM 1 (2017) [hereinafter OJJDP] (citation omitted).

studies similarly demonstrate that youths with mental health disorders are overrepresented in the juvenile justice system.[27] This disparity increases "the further that youths were processed in the juvenile justice system."[28]

In those instances where children are found to lack competency to stand trial, the legal system must determine what systemic response must follow the finding.[29] It is inappropriate to think of adolescents as younger versions of adults whose behaviors can be viewed in the same fashion that one would react to an adult's behavior. Psychologist Linda Spear suggests that the risk of emergent mental health disorders is the largest during adolescence, "ranging from a marked rise in the incidence of depression, anxiety, and conduct disorders beginning in the early-to mid-adolescence, to the increased incidence of schizophrenia that emerges during the late-adolescent to adult transition."[30] Additionally, adolescence is a common starting point for drug and alcohol use.[31] Nonetheless, Spear suggests that "[e]xciting advances in our understanding of the adolescent brain are beginning to provide important pieces of the puzzle as to why different youth are particularly vulnerable or resistant to the emergence of such disorders during the transitions of adolescence."[32]

Should these children have their cases dismissed altogether? Should these cases be treated in something other than delinquency courts? Should these children be placed in protective settings until their competency is restored, or should they simply be held accountable for their original petitions once their competency has been restored? Reviewing the practices in other countries might help inform U.S. reform efforts. This Article will explore some of the causes of legal conclusions that children are not competent,[33] and then attempt to identify some interventions which might prove to help the competency restoration process.[34] Finally, the Article

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[27] *Id.* (citations omitted).

[28] *Id.* (citation omitted).

[29] *See, e.g.*, Annette McGaha, Randy K. Otto, Mary Dell McClaren & John Petrila, *Juveniles Adjudicated Incompetent to Proceed: A Descriptive Study of Florida's Competency Restoration Program*, 29 J. AM. ACAD. PSYCHIATRY & L. 427 (2001). One observer concluded that "[a] finding of competency to stand trial requires little, probably because the more it demands, the fewer the defendants that will answer for their crimes." Sanborn, *supra* note 10, at 137.

[30] LINDA PATIA SPEAR, THE BEHAVIORAL NEUROSCIENCE OF ADOLESCENCE 4–5 (2010).

[31] *Id.* at 5.

[32] *Id.*

[33] *See also* 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 (2006).

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

will explore those scenarios where it appears unlikely that children will ever be declared competent to stand trial.[35] The significance and impact on the juvenile defendant cannot be minimized, as "[a]n incorrect competence finding not only involves the loss of liberty and the violation of the right to a fair trial, but such a finding can also have an irreversible impact on the defendant's life."[36] Ultimately, the procedural due process rights of juveniles to challenge their competency will be balanced against systemic goals of rehabilitation or reducing recidivism among juveniles,[37] in order that we not express mere opinions without intelligence like the "blind men who feel their way along the road."[38]

I. OVERVIEW AND BRIEF HISTORY

Existing juvenile courts are the culmination of several eras of change,[39] including legislative initiatives and judicial decisions which recognized the rights of children in some instances while upholding restrictions on the rights of children in other cases.[40] The systemic changes that have altered the juvenile court system over time[41]

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[35] *See also* Karen L. Hubbard, Patricia A. Zapf & Kathleen A. Ronan, *Competency Restoration: An Examination of the Differences Between Defendants Predicted Restorable and Not Restorable to Competency*, 27 LAW & HUM. BEHAV. 127, 136–38 (2003).

[36] Everington, *supra* note 23, at 148.

[37] Harvey, *supra* note 20, at 439–40 ("The struggle to balance the court's rehabilitative goal and maintain legitimacy as a formal legal organization is exemplified in the adoption of criminal CST laws and policies for youth in juvenile courts. One might argue that the construct of CST does not make sense in a civil court where youth are adjudicated rather than convicted, juveniles are not granted all the constitutional rights given to adults (e.g., right to trial, the right to bail, and the right to appeal), and the entire premise of the *parens patriae* or rehabilitative philosophy for juvenile court is a presumption of juvenile incompetence. By ensuring youth are competent to stand trial, the court may be realigning the juvenile court to be more similar to the criminal court, which may introduce greater punitiveness to case processing decisions.").

[38] PLATO, REPUBLIC bk. VI, at 216 (Elizabeth Watson Scharffenberger ed., Benjamin Jowett trans., Barnes & Noble 2004) (c. 350 B.C.E.) ("And do you not know, I said, that all mere opinions are bad, and the best of them blind? You would not deny that those who have any true notion without intelligence are only like the blind men who feel their way along the road?").

[39] *See* DAVID S. TANENHAUS, JUVENILE JUSTICE IN THE MAKING, at xxviii–xxix (2004).

[40] *See* Richard E. Redding, Naromi E. Sevin Goldstein & Kirk Heilbrun, *Juvenile Delinquency: Past and Present*, *in* JUVENILE DELINQUENCY: PREVENTION, ASSESSMENT, AND INTERVENTION 3, 5–9 (Kirk Heilbrun, Naomi E. Sevin Goldstein & Richard E. Redding eds., 2005).

[41] Philip C. O'Donnell & Bruce Gross, *Developmental Incompetence to Stand Trial in Juvenile Courts*, 57 J. FORENSIC SCIS. 989, 989 (2012) ("At the turn of the 20th century, juvenile courts were founded in the United States based upon the notion that delinquent minors required specialized care, distinct from adults. Within this context, juveniles' competency to participate in delinquency proceedings was irrelevant, as legal intervention was directed toward rehabilitation and premised upon the best interests of the minor. Proceedings were informal by design and lacked the procedural due process afforded to criminal defendants.").

should reinforce the notion that this is not a stagnant process,[42] but rather, one that attempts to improve as we continue to learn more about children and their behaviors that result in their court involvement.[43] In 1899, "the world's first juvenile court law, 'an Act to Regulate the Treatment and Control of Dependent, Neglected, and Delinquent Children,'" passed in Illinois.[44] The Act "asserted state responsibility for both dependent and delinquent children and thus merged concerns about child welfare with crime control," and became a model law for both other states and other countries.[45]

One of the first recognized concerns about establishing a special juvenile court system was the high rates of recidivism in delinquency, which threatened to undermine the new system's legitimacy.[46] Concerns about the functionality of juvenile courts with limited jurisdiction have shifted over numerous issues in the decades since their inception, and today's focus is often on the very issue of whether juveniles are competent to be held accountable and tried for accused acts of misconduct.[47] Because there is no unified federal jurisdiction governing cases of juvenile delinquency,[48] we must examine individual state statutory provisions dealing with juvenile competency to stand trial.

II. STATE COMPETENCY STATUTES

When we examine laws regulating competency matters, we must begin by looking at the various enactments at the state level, as that is where competency challenges occur. Many jurisdictions have enacted statutes pertaining to challenging competency in juvenile proceedings, usually referred to as adjudication hearings.[49]

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[42] *See generally* Redding & Frost, *supra* note 19.

[43] *See* Laurence Steinberg, *Should the Science of Adolescent Brain Development Inform Public Policy?*, 64 AM. PSYCH. 739, 744, 748 (2009).

[44] TANENHAUS, *supra* note 39, at 4 (citing Illinois Juvenile Court Act, 1899 Ill. Laws 131).

[45] *Id.* at 4 (citing HERBERT H. LOU, JUVENILE COURTS IN THE UNITED STATES 23–25 (1927)).

[46] *Id.* at 111 ("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 but also helped to mold popular understandings of child development and rearing.").

[47] MEGAN KURLYCHEK, PATRICIA TORBET & MELANIE BOZYNSKI, U.S. DEP'T OF JUST., NCJ-177611, JAIBG BULL.: FOCUS ON ACCOUNTABILITY: BEST PRACTICES FOR JUVENILE COURT AND PROBATION 2–3 (1999).

[48] JOHN SCALIA, U.S. DEP'T OF JUST., NCJ -163066, BUREAU OF JUST. STAT. SPECIAL REP.: JUVENILE DELINQUENTS IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 1 (1997).

[49] *See, e.g.*, ARIZ. REV. STAT. ANN. § 8-291.01(B) (2022); ARK. CODE ANN. § 9-27-502(a), (b)(2)(B) (2022); CAL. WELF. & INST. CODE § 709(a) (West 2022); COLO. REV. STAT. § 19-2.5-

Most juvenile justice systems rely on two categories of tools to identify the mental health needs of court-involved adolescents: screening and assessment.[50] Competency challenges and the laws structuring such legal issues on behalf of juveniles in delinquency courts have been scrutinized by mental health scholars for decades.[51] Many states with juvenile competency statutes only focus on the child's ability to understand the proceedings and to assist counsel.[52] However, the legal concept of

703 (2022); FLA. STAT. § 985.19(1)(a) (2022); GA. CODE ANN. § 15-11-152(1) (2022); IDAHO CODE § 20-519A(1) (2022); IND. CODE § 31-37-11-11 (2022); KAN. STAT. ANN. § 38-2348(b)(1) (2022); LA. CHILD. CODE ANN. art. 832 (2022); ME. STAT. tit. 15, § 3318-A(3) (2022); MD. CODE ANN., CTS. & JUD. PROC. § 3-8A-17(a) (LexisNexis 2022); MINN. STAT. § 20.01 (2023); NEB. REV. STAT. § 43-258 (2022); N.H. REV. STAT. ANN. § 169-B:20 (2022); NEV. REV. STAT. § 62D.145(1) (2022); OHIO REV. CODE ANN. § 2152.51(C) (LexisNexis 2022); OKLA. STAT. tit. 10A, § 2-2-401.2(A)(1) (2022); S.D. CODIFIED LAWS § 26-7A-32.3 (2023); TEX. FAM. CODE ANN. § 51.20(a) (West 2021); UTAH CODE ANN. § 80-6-402 (LexisNexis 2022); VA. CODE ANN. § 16.1-356(A) (2022); WIS. STAT. § 938.295(1)(a) (2022). For an analysis of all of the state juvenile competency to stand trial statutes, see Nancy Ryba Panza, Emily Deutsch & Kelsey Hamann, *Statutes Governing Juvenile Competency to Stand Trial Proceedings: An Analysis of Consistency with Best Practice Recommendations*, 20 PSYCH., PUB. POL'Y & L. 274 (2020). *See also* LINDA A. SZYMANSKI, JUV. JUST. GPS, JUVENILE COMPETENCY PROCEDURES (2013).

[50] OJJDP, *supra* note 26, at 2. The OJJDP discussed some of the common tools within these categories:

> Screening. The purpose of screening is to identify youths who might require an immediate response to their mental health needs and to identify those with a higher likelihood of requiring special attention. It is similar to a triage process in a hospital emergency room. Although there are numerous screening instrument options, two commonly used are the Massachusetts Youth Screening Instrument–Version 2 and the Diagnostic Interview Schedule for Children. In addition to tools that screen for multiple mental health-related issues, there are also tools that screen for specific problems, such as the Children's Depression Inventory or the Suicidal Ideation Questionnaire, which can help determine if a youth should be monitored for suicide attempts upon entry to detention or residential facility.
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> Assessment. The purpose of assessment is to gather a more comprehensive and individualized profile of a youth. Assessment is performed selectively with those youths with higher needs, often identified through screening. Mental health assessments tend to involve specialized clinicians and generally take longer to administer than screening tools. There are numerous mental health assessments. One widely studied assessment is the Achenbach System of Empirically Based Assessment, which includes three instruments completed by youths (Youth Self-Report), parents (Child Behavior Checklist), or teachers (Teachers Report Form).

Id. (citations omitted).

[51] *See* Thomas Grisso, Michael O. Miller & Bruce Sales, *Competency to Stand Trial in Juvenile Court*, 10 INT'L J. L. & PSYCHIATRY 1, 1 (1987); KIMBERLY LARSON & THOMAS GRISSO, NAT'L YOUTH SCREENING & ASSESSMENT PROJECT, DEVELOPING STATUTES FOR COMPETENCE TO STAND TRIAL IN JUVENILE DELINQUENCY PROCEEDINGS: A GUIDE FOR LAWMAKERS 1, 17–18 (2011).

[52] As of 2009, 18 jurisdictions had "a statute or court rule for juvenile court tend[ing] to hold that competency to stand trial requires only an ability to understand the proceedings and to assist counsel." Sanborn, *supra* note 10, at 142.

competency to stand trial has expanded so as to include considerations of the juvenile's developmental immaturity,[53] and how that might impact the ability of juveniles to interact with their counsel[54] and to understand and be cognitively aware of the legal process in which they must participate.[55]

Once mental health experts are appointed to make competency assessments, psychologists may utilize psychometric tests[56] to evaluate an adolescent's status, and

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

Id. (footnotes omitted).

[53] According to the National Juvenile Justice Network:

> 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.

NAT'L JUV. JUST. NETWORK, *supra* note 24, at 4.

[54] *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, 634 (1995).

[55] *See* Richard J. Bonnie & Thomas Grisso, *Adjudicative Competence and Youthful Offenders*, *in* YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE 76 (Thomas Grisso & Robert G. Schwartz eds., 2000).

[56] Psychometric theory and its role in measuring the usefulness of psychological assessments dates back to the 19th century:

> Sir Frances Galton, the father of modern psychometrics, pioneered efforts to measure physical, psychophysical, and mental abilities in his London Anthropometric Laboratory. Galton quantified everything from fingerprint characteristics and weather patterns to audience boredom in scientific meetings, as measured by fidgets and yawns per minute. Derived from the Greek *psyche* (soul) and *metro* (measure), Galton defined *psychometry* as the "art of imposing measurement and number upon operations of the mind." On the basis of these foundations, modern psychometric theories have evolved as a set of scientific rules for creating and measuring the usefulness of psychological tests.

the results are presented in court and subjected to cross-examination and scrutiny by both litigating parties and the presiding judge.[57] There are some unresolved issues about the reliability of psychological tests,[58] and their admissibility under the *Daubert* decision and its progeny.[59] Further, *Daubert* applies to federal cases, so some state jurisdictions continue to follow the older *Frye* decision, while still others follow the *Kumho Tire* decision.[60] Thus, multiple legal precedents exist and compliance depends on the jurisdictional rules.[61] While this discussion goes beyond the scope of this Article, it nevertheless needs to be addressed.

Tess M.S. Neal, Christopher Slobogin, Michael J. Saks, David L. Faigman & Kurt F. Geisinger, *Psychological Assessments in Legal Contexts: Are Courts Keeping "Junk Science" Out of the Courtroom?*, 20 PSYCH. SCI. PUB. INT. 135, 136 (2019) (citations omitted).

[57] *Cf. id.* ("Virtually all jurisdictions charge judges with the responsibility of evaluating the admissibility of expert evidence. . . . Yet judges frequently have trouble evaluating the scientific merits of various expert methods, and major investigations have revealed that courts routinely admit evidence with poor or unknown scientific foundations." (citations omitted)).

[58] *Id.* ("When poor science is not recognized as such and is used to reach legal decisions, the risk of error rises and the legitimacy of the legal system is threatened. Consider, for example, the global crisis of confidence about scientific evidence that has erupted in response to damning reports about the scientific validity of many forensic-science techniques. There are real-world consequences of poor validity in forensic-science techniques: Up to 45% of known cases of false conviction involve faulty forensic-science evidence." (citations omitted)).

[59] Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 587–90, 593–94 (1993) (citing FED. R. EVID. 401; FED. R. EVID. 702; Frye v. United States, 293 F. 1013 (D.C. Cir. 1923)) (holding that the Federal Rules of Evidence, and not the *Frye* decision from the Court of Appeals for the District of Columbia Circuit, provide the standard for admitting expert scientific testimony into a federal trial and that therefore an expert may testify about scientific knowledge that assists the jury in understanding the evidence or determining a fact in issue in the case; factors that a judge should consider include whether the theory or technique can be and has been tested, whether it has been subjected to peer review and publication, its known or potential error rate, the existence and maintenance of standards controlling its operation, and whether it is widely accepted in the relevant scientific community).

[60] *Frye*, 293 F. at 1014 (ruling that expert testimony must be based on scientific methods that are sufficiently established and accepted); Kumho Tire Co. v. Carmichael, 526 U.S. 137, 149 (1999).

[61] Robert P. Archer, Jacqueline K. Buffington-Vollum, Rebecca Vauter Stredny, Richard W. Handel, *A Survey of Psychological Test Use Patterns Among Forensic Psychologists*, 87 J. PERSONALITY ASSESSMENT 84, 84 (2006) ("[T]he 1999 *Kumho Tire Co. v. Carmichael* Supreme Court decision expanded the applicability of the *Daubert* ruling to include expert testimony derived from 'other specialized knowledge' or technical knowledge, the former generally serving as the basis of psychologists' expert testimony. Although many states have elected to employ the *Daubert* standard, other states continue to use the earlier federal standard, that is, the *Frye v. United States* (1923) standard, which primarily emphasizes general acceptance of a technique in a given scientific field as the necessary basis for the admissibility of testimony. Therefore, forensic psychologists' knowledge of the accepted practices of their peers is often an essential part of ensuring that useful and admissible information is provided to the legal system.").

III. SELECTED CAUSES AND CONTRIBUTORS TO LACK OF COMPETENCY

Diverse factors may cause or contribute to a juvenile's lack of competence to stand trial.[62] The MacArthur Competency Study focused upon developmental immaturity,[63] bringing to light the need to incorporate ordinary developmental growth as a basis to consider whether delinquency[64] or adult criminal courts seek to hold young people accountable for their misconduct.[65] Mental illness,[66] mental health disorders,[67]

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[62] Janet I. Warren, Jeff Aaron, Eileen Ryan, Preeti Chauhan & Jeanette DuVal, *Correlates of Adjudicative Competence Among Psychiatrically Impaired Juveniles*, 31 J. AM. ACAD. PSYCHIATRY & L. 299, 301 (2003). *See generally* Linda A. Teplin, Karen M. Abram, Gary M. McClelland, Mina K. Dulcan & Amy A. Mericle, *Psychiatric Disorders in Youth in Juvenile Detention*, 59 ARCHIVES GEN. PSYCHIATRY 1133 (2002).

[63] In the MacArthur study, which studied 1,393 youths aged 11 to 24, almost one-third of 11- to 13-year-olds, and 19% of 14- to 15-year-olds performed as poorly on adjudicative competence measures as adults who were found to be incompetent to stand trial, whereas 16- to 17-year-olds performed much like adults. 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, 336–37, 343–44 (2003).

[64] Spear suggests that "[h]ow adolescent-typical behaviors, expectations, and emotions are interpreted, however, is strongly dependent on the overall sociocultural environment. In many modern societies, a certain proportion of adolescents are more or less expected to be delinquents; yet adolescents engaging in similar behaviors may not be viewed as delinquent in other cultures." SPEAR, *supra* note 30, at 4, 7.

[65] *See* Grisso et al., *supra* note 63, at 358–59.

[66] *See* Kathleen Ries Merikangas, Jian-Ping He, Marcy Burstein, Sonja A. Swanson, Shelli Avenevoli, Lihong Cui, Corina Benjet, Katholiki Georgiades & Joel Swendsen, *Lifetime Prevalence of Mental Disorders in U.S. Adolescents: Results from the National Comorbidity Survey Replication—Adolescent Supplement (NCS-A)*, 49 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 980, 986 (2010).

[67] According to the fifth edition of the *Diagnostic and Statistical Manual of Mental Disorders* (DSM-5):

> A mental disorder is a syndrome characterized by clinically significant disturbance in an individual's cognition, emotion regulation, or behavior that reflects a dysfunction in the psychological, biological, or developmental processes underlying mental functioning. Mental disorders are usually associated with significant distress or disability in social, occupational, or other important activities. An expectable or culturally approved response to a common stressor or loss, such as the death of a loved one, is not a mental disorder. Socially deviant behavior (e.g., political, religious, or sexual) and conflicts that are primarily between the individual and society are not mental disorders unless the deviance or conflict results from a dysfunction in the individual, as described above.

AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (DSM-5) 20 (5th ed. 2013) [hereinafter DSM-5].

intellectual disabilities,[68] congenital conditions, substance abuse,[69] major depressive episodes (MDEs),[70] and various types of trauma exposure also contribute significantly to determinations[71] that juveniles lack competency.[72] Perhaps one of the more compelling conditions which remains understudied and often undetected is Fetal Alcohol Spectrum Disorder (FASD).[73] This disorder, referred to in the DSM-

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[68] Once called "mental retardation" the DSM-5 indicates:

> The diagnostic term *intellectual disability* is the equivalent term for the ICD-11 diagnosis of *intellectual developmental disorders*. . . . Moreover, a federal statute in the United States replaces the term *mental retardation* with *intellectual disability*, and research journals us the term *intellectual disability*. Thus, *intellectual disability* is the term in common use by medical, educational, and other professions and by the public and advocacy groups.

Id. at 33 (citing Rosa's Law, Pub. L. No. 111-256, 124 Stat. 2643 (2010)).

[69] *See* Carol A. Schubert, Edward P. Mulvey & Cristie Glasheen, *Influence of Mental Health and Substance Use Problems and Criminogenic Risks on Outcomes in Serious Juvenile Offenders*, 50 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 925, 932–33 (2011).

[70] A study analyzing 176,245 adolescents aged 12- to 17-years-old indicated that MDEs in adolescents and young adults are increasing nationally:

> The 12-month prevalence of MDEs increased from 8.7% in 2005 to 11.3% in 2014 in adolescents and from 8.8% to 9.6% in young adults. . . . The increase was larger and statistically significant only in the age range of 12 to 20 years. The trends remained significant after adjustment for substance use disorders and sociodemographic factors.

Ramin Mojtabai, Mark Olfson & Beth Han, *National Trends in the Prevalence and Treatment of Depression in Adolescents and Young Adults*, 138 PEDIATRICS 1878, 1878 (2016).

[71] Surveys of forensic psychologists indicate heavy reliance on tests such as the Minnesota Multiphasic Personality Inventory (MMPI) assessment for both competency-to-stand-trial assessments, as well as child custody evaluations in civil disputes:

> [T]he predominant popularity of the MMPI-2 among multiscale inventories in this study is consistent with prior reports . . . [that] found the MMPI to be the most widely used test in child custody evaluations and the findings . . . that the MMPI and MMPI-2 were the dominant instrument in their survey used to evaluate competence to stand trial.

Archer et al., *supra* note 61, at 91 (citations omitted).

[72] *See* OJJDP, *supra* note 26, at 2 ("A broader categorization divides mental health disorders into two categories: internalizing and externalizing. *Internalizing disorders*, which are negative behaviors focused inward, include depression, anxiety, and dissociative disorders. *Externalizing disorders* are characterized by behaviors directed toward a youth's environment and include conduct disorders, oppositional defiant disorder, and antisocial behaviors.").

[73] Jennifer D. Thomas, Kenneth R. Warren & Brenda G. Hewittt, *Fetal Alcohol Spectrum Disorders, From Research to Policy*, 33 ALCOHOL RSCH. & HEALTH 118, 121–22 (2010) ("The neuropathology associated with FASD leads to a range of behavioral effects. Early studies demonstrated general impairments in intelligence (although there is quite a range of IQ scores among individuals exposed to alcohol prenatally), impaired reflex development, deficits in motor coordination, and hyperactivity. More recent studies suggest that deficits in attention, learning and memory, emotional dysregulation, and executive functioning are core deficits, likely reflecting the dysfunction of the frontal lobe. . . . Moreover, prenatal alcohol-induced alterations in cognitive functioning and stress responses may contribute to secondary disabilities, including psychiatric comorbidities and vulnerability to addiction."). The DSM-5, which was released in

5 as Neurobehavioral Disorder Associated with Prenatal Alcohol Exposure (ND-PAE), is characterized by symptoms such as "marked impairment in global intellectual performance (IQ) or neurocognitive impairments in any of the following areas: executive functioning, learning, memory, and/or visual-spatial reasoning."[74] ND-PAE impairs mood, behavior, attention, impulse control, communication, interaction, daily living, and motor skills, among other functions.[75] Due to the challenges presented in accurately assessing the abilities of infants and toddlers, the *Diagnostic and Statistical Manual of Mental Disorders* (DSM-5) recommends waiting until at least three years of age to diagnose.[76] As empirical studies focus on the widespread percentage of children in the juvenile justice system with a history of prenatal exposure to alcohol and FASD,[77] competence evaluations must incorporate testing and assessments to determine the presence of this frequently undiagnosed and undetected condition[78]:

> [FASD] is a term used to characterize the broad ranging damage arising from maternal alcohol consumption during pregnancy. In the United States (US), FASD describes the continuum or spectrum of neurodevelopmental/neurobehavioral conditions resulting from prenatal alcohol exposure (PAE) including fetal alcohol syndrome (FAS), partial FAS, alcohol-related neurodevelopmental disorder (ARND), and alcohol related birth defects (ARBD). In many other parts of the world, such as Canada, Australia, Germany, New Zealand, Africa, Italy, France, etc. FASD is a diagnostic term used to describe significant neurodevelopmental impairments in people caused specifically by PAE, which may or may not include dysmorphic facial features. It should be noted

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2013, classifies FASD and affiliated material as a "Condition for Further Study." *See* DSM-5, *supra* note 67, at 798.

[74] DSM-5, *supra* note 67, at 799.

[75] *Id.* at 798.

[76] *Id.* at 799.

[77] According to researchers Jennifer D. Thomas, Kenneth R. Warren & Brenda G. Hewittt:

> [Fetal alcohol syndrome (FAS)] is characterized by three diagnostic criteria: a distinct pattern of facial dysmorphology, pre- and postnatal growth deficiencies, and central nervous system dysfunction. However, it was readily apparent to all involved in the early days of alcohol and pregnancy research that prenatal alcohol exposure could produce a range of effects that fell short of meeting all of the diagnostic criteria for full-blown FAS. Over the years, a number of terms have been used to describe these alcohol-attributed effects, including partial FAS, fetal alcohol effects, alcohol-related birth defects, and alcohol-related neurodevelopmental disorders, with the Institute of Medicine providing some standardization in their 1996 report. Subsequently, a general acceptance emerged that the adverse outcomes fall across a spectrum, and an umbrella term was introduced for this full spectrum: fetal alcohol spectrum disorders (FASD).

Thomas et al., *supra* note 73, at 119–20 (citations omitted).

[78] *See* Kaitlyn McLachlan, Ronald Roesch, Jodi L. Viljoen & Kevin S. Douglas, *Evaluating the Psycholegal Abilities of Young Offenders with Fetal Alcohol Spectrum Disorder*, 38 LAW & HUM. BEHAV. 10, 14–15 (2014).

> that only about 10% of those with FASD demonstrate the specific facial features associated with PAE, and those features are often less prominent as the person ages, resulting in the disorders often being referred to as "invisible" disabilities. Unfortunately, many of those with FASD, particularly those without physical features indicative of PAE, are typically not diagnosed. Without a diagnosis, they physically appear typical and the expectations of others, including those in the criminal justice system, are that they will function typically. They often do not receive appropriate interventions or accommodations early in life, often resulting in negative life outcomes, including involvement in the criminal justice system.[79]

The first clinical reports of FAS did not appear until 1973.[80] Because facial abnormalities occur in only ten percent of individuals with this impairment, and among the ten percent, identifiable facial features become less noticeable as the individual ages,[81] lawyers with no medical training will be hard-pressed to correctly identify a client's possible prenatal exposure to alcohol. Lawyers alone are not to blame for undiagnosed FASD.[82] In general, there are many factors that have

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[79] Jerrod Brown, Alec Jonason, Erik Asp, Valerie McGinn, Megan N. Carter, Vanessa Spiller & Amy Jozan, *Fetal Alcohol Spectrum Disorder and Confabulation in Psycholegal Settings: A Beginner's Guide for Criminal Justice, Forensic Mental Health, and Legal Interviewers*, 40 BEHAV. SCI. & L. 46, 47 (2022) (citations omitted).

[80] *See, e.g.*, Kenneth L. Jones, David W. Smith, Christy N. Ulleland & Ann Pytkowicz Streissguth, *Pattern of Malformation in Offspring of Chronic Alcoholic Mothers*, 301 LANCET 1267 (1973); Kenneth L. Jones & David W. Smith, *Recognition of the Fetal Alcohol Syndrome in Early Infancy*, 302 LANCET 999 (1973). Although these initial English publications appeared in 1973, a French publication in 1968 described children with birth defects and neurodevelopmental disorders associated with prenatal alcohol exposure. *See* P. Lemoine, H. Harousseau, J.P. Borteyru & J.C. Menuet. *Les Enfants de Parents Alcooliques: Anomalies Observées à Propos de 127 cas* [*The Children of Alcoholic Parents: Anomalies Observed in 127 Cases*], 21 OUEST-MÉDICALE 476 (1968).

[81] Brown et al., *supra* note 79, at 47; *see* Thomas et al., *supra* note 73, at 118 ("Forty [now over 50] years ago, alcohol was not commonly recognized as a teratogen, an agent that can disrupt the development of a fetus. Today we understand that prenatal alcohol exposure induces a variety of adverse effects on physical, neurological, and behavioral development.").

[82] Sarah N. Mattson & Edward P. Riley, *A Review of the Neurobehavioral Deficits in Children with Fetal Alcohol Syndrome or Prenatal Exposure to Alcohol*, 22 ALCOHOLISM: CLINICAL & EXPERIMENTAL RSCH. 279, 279 (1998) ("Throughout history, the negative effects of maternal drinking on offspring have been suspected. Aristotle has been quoted as saying that 'foolish, drunken, or hare-brain women, for the most part bring forth children like unto themselves, *morosos et languidos*,' and in Carthage and Sparta, laws prohibited the use of alcohol by newlyweds presumably to prevent conception during intoxication. During the 'gin epidemic' in England, in the first half of the 18th century, physicians warned against alcohol consumption during pregnancy, claiming this was the cause of 'weak, feeble, and distempered children.' Such beliefs continued until the early 20th century. In the post-prohibition medical community, however, the idea that alcohol taken during pregnancy could be harmful to the developing fetus was dismissed as moralism. It was thought that harmful effects noted in the offspring of alcoholic women were

contributed to the under-diagnosing of children with FASD.[83]

In addition, individuals diagnosed with FASD have a high rate of comorbid mental disorders. A 2022 Canadian study reported FASD diagnoses in 46% of justice-involved individuals, a rate "double the previously found rate among youths admitted for psychiatric assessment and other incarcerated individuals," and further suggesting that "there are likely higher rates of FASD in forensic-psychiatric facilities than previously reported."[84] This is an amazingly high percentage of the detained youths in Canada. The overall prevalence of FASD is estimated to be four percent of the general population, but the rate of FASD among court-involved individuals in this Canadian sample is 11 times higher than the general population.[85] In addition to the elevated FASD diagnosis rate, detected comorbid disorders among these incarcerated individuals were high, with 27% diagnosed with major depressive disorder, 70% diagnosed with Attention Deficit Hyperactivity Disorder (ADHD), and 77% diagnosed with substance use disorder.[86] Other clinically relevant comorbid mental health diagnoses included post-traumatic stress disorder (14%) and oppositional defiant disorder (14%).[87] In a study of youths in foster care, a full "85% of those with FASD had no prior diagnosis of FASD, but were instead previously misdiagnosed with another disability."[88]

Clearly, FASD deserves to be the focus of studies in the U.S. juvenile justice

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the result of constitutional factors that also were the cause of the alcohol problem. It was not until the late 1960s and early 1970s that interest in the adverse effects of alcohol was renewed.").

[83] Jeffrey R. Wozniak, Edward P. Riley & Michael E. Charness, *Clinical Presentation, Diagnosis, and Management of Fetal Alcohol Spectrum Disorder*, 18 LANCET NEUROLOGY 760, 760 (2019) ("Although prenatal alcohol exposure causes craniofacial anomalies, growth retardation, neurological abnormalities, cognitive impairment, and birth defects, fetal alcohol spectrum disorder is underdiagnosed. Global prevalence of fetal alcohol spectrum disorder is 0.77%, with a higher prevalence of 2–5% in Europe and North America, highlighting the need for increased diagnosis and treatment. However, diagnosis remains challenging because of the poor reliability of self-reported maternal drinking histories, an absence of sensitive biomarkers, and the infrequency of diagnostic dysmorphic facial features among individuals with fetal alcohol spectrum disorder.").

[84] Mansfield Mela, Linnea Wall, Pam Buttinger, Andrea DesRoches & Andrew J. Wrath, *Rates and Implications of Fetal Alcohol Spectrum Disorder Among Released Offenders with Mental Disorder in Canada*, 40 BEHAV. SCI. & L. 144, 150 (2022). For a comparison between U.S. and Canadian research on the prevalence of FASD in justice-involved youth, see Jacqueline Pei, Katherine Flannigan, Sarah Keller, Michelle Stewart & Alexandra Johnson, *Fetal Alcohol Spectrum Disorder and the Criminal Justice System: A Research Summary*, 2 J. MENTAL HEALTH & CLINICAL PSYCH., no. 4, 2018, at 48, 49.

[85] Mela et al., *supra* note 84, at 150.

[86] *Id.*

[87] *Id.*

[88] *Id.* at 152 (citing Ira J. Chasnoff, Anne M. Wells & Lauren King, *Misdiagnosis and Missed Diagnoses in Foster and Adopted Children with Prenatal Alcohol Exposure*, 135 PEDIATRICS 264, 266 (2015)).

system, and lawyers, who are responsible for raising the competency issue,[89] must be made aware of these studies so as to ensure that juveniles in the United States do not remain undiagnosed or underdiagnosed.[90] As long-term outcomes of FASD are studied[91] and public awareness of the disorder becomes more widespread, the impact on juvenile competency in court-involved cases may expand the frequency of challenges to client competency. Intellectual functioning of FASD children may be detected utilizing a number of different existing psychological testing instruments,[92] but no results will be obtained if lawyers fail to understand what indicators may be present in this client population.[93] Until then, children may continue to be misdiagnosed and treatment programs may be misapplied.[94] Attempting to "restore

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[89] For over 20 years, psychological tests for juveniles have been employed to evaluate competency to stand trial. *See, e.g,.* Ryba et al., *supra* note 1.

[90] Lawyers must become familiar with the *Standards for Educational and Psychological Testing* designated as authoritative sources for answers to technical and psychometric questions about psychological tests. *See* Neal et al., *supra* note 56, at 137 ("The [*Standards*] have provided guidance about appropriate test development and criteria for evaluating tests for more than half a century. The result of a long-standing collaboration among three associations—the American Educational Research Association, American Psychological Association, and National Council on Measurement in Education—the *Standards* provide criteria designed to 'promote sound testing practices and to provide a basis for evaluating the quality of those practices.' The U.S. Supreme Court has relied on the *Standards* as an authoritative source for answers to technical and psychometric questions about psychological tests." (citations omitted)).

[91] *See, e.g.*, H.C. Steinhausen, Judith Willms, Hans-Ludwig Spohr, *Long-Term Psychopathological and Cognitive Outcome of Children with Fetal Alcohol Syndrome*, 32 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 990 (1993).

[92] Matttson & Riley, *supra* note 82, at 284 ("The predominant tests that have been used are the Bayley Scales of Infant Mental and Motor Development (subsequently called the Bayley), which provides a Mental Development Index (MDI); the Stanford-Binet Intelligence Scale; and the Wechsler scales that include the Wechsler Preschool and Primary Scale of Intelligence, original and revised versions (WPPSI and WPPSI-R); Wechsler Intelligence Scale for Children, original and revised versions (WISC and WISC- R); and the Wechsler Adult Intelligence Scale, original and revised versions (WAIS and WAIS-R). The Stanford-Binet and the Wechsler scales provide Intelligence Quotients or IQ scores based on comparison with large standardization groups."); *see also* D. Lachar, *Personality Inventory for Children*, *in* ENCYCLOPEDIA OF CLINICAL NEUROPSYCHOLOGY 1921 (Jeffrey S. Kreutzer, John DeLuca & Bruce Caplan eds., 2d ed. 2011).

[93] In addition to the increased percentage of adolescents with FASD:

> Multiple studies confirm that a large proportion of youths in the juvenile justice system have a diagnosable mental health disorder. Studies have suggested that about two thirds of youth in detention or correctional settings have at least one diagnosable mental health problem, compared with an estimated 9 to 22 percent of the general youth population. The 2014 National Survey on Drug Use and Health found that 11.4 percent of adolescents aged 11 to 17 had a major depressive episode in the past year, although the survey did not provide an overall measure of mental illness among adolescents.

OJJDP, *supra* note 26, at 2–3 (citations omitted).

[94] Wozniak, et al., *supra* note 83, at 761 ("An epidemiological study of 6639 children (mean age 6.7 years) used active surveillance across four US school districts, maternal interviews,

competency" for this population where competency has been challenged may continue to present inadequate legal responses. FASD may include "lifelong physical and cognitive disability, psychiatric and medical comorbidity, diminished productivity, unemployment, homelessness, and incarceration."[95] Despite the prevalence of FASD—which "is as common as autism spectrum disorder with a global prevalence of 0.6%"—FASD is still underdiagnosed due to "social stigma, diagnostic complexity, reliance on facial features, and characteristics that overlap with those of alternative diagnoses, including attention deficit hyperactivity disorder."[96] As such, in some people with FASD, effects are subtle and "do not prompt clinical attention on their own."[97]

By definition, FASD manifest in varying ways and in different degrees of severity and disability.[98] While the disorder has been found to be greatly underdiagnosed, it can be seen in much larger percentages of children who are court-involved.[99] Accordingly, if it remains relatively unfamiliar with this disorder, the legal system will continue to apply antiquated notions of restoring competency, without

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dysmorphology exams, and neurobehavioral testing to estimate prevalence of fetal alcohol spectrum disorder in those children. The prevalence of fetal alcohol spectrum disorder in these four different regions of the USA ranged from 1.1% to 5.0%, and regional distribution of diagnoses ranged from 0.0% to 0.8% (27 of 6639 children across all regions) for fetal alcohol syndrome, from 0.0% to 0.8% (27 of 6639 children across all regions) for fetal alcohol syndrome, from 0.8% to 5.9% (104 of 6639) for partial fetal alcohol syndrome, and from 0.9% to 5.0% (91 of 6639) for alcohol-related neurodevelopmental disorder. Alcohol-related neurodevelopmental disorder, which has the most inclusive criteria, was the most common diagnosis, with 3.4 cases for every fetal alcohol syndrome case. Among 222 children with fetal alcohol spectrum disorder, only two (<1%) had been diagnosed previously, confirming that fetal alcohol spectrum disorder is often overlooked." (footnotes omitted)).

[95] *Id.* at 760.

[96] *Id.*

[97] *Id.*

[98] *See* Ann P. Streissguth, Helen M. Barr, Paul D. Sampson & Fred L. Bookstein, *Prenatal Alcohol and Offspring Development: The First Fourteen Years*, 36 DRUG & ALCOHOL DEPENDENCE 89, 96 (1994).

[99] Beginning with the selection of the appropriate psychometric test instruments to be used in making competency evaluations is crucial:

> The psychometric properties of potential instruments should also guide the decision, and peer-reviewed empirical research on the reliability and validity of an instrument should be evaluated. In regard to risk assessment instruments, reliability generally refers to the consistency of results when the assessment is repeated, and validity addresses whether the instrument's scores accurately predict the occurrence of the outcome of interest. Contrary to what the term "properties" suggests, reliability and validity are not intrinsic features of any risk assessment instrument; they are not static characteristics that automatically translate to other settings, populations, and evaluators.

Tamara L.F. De Beuf, Corine de Ruiter, John F. Edens & Vivienne de Vogel, *Taking "the Boss" into the Real World: Field Interrater Reliability of the Short-Term Assessment of Risk and Treatability: Adolescent Version*, 39 BEHAV. SCI. & L.123, 124 (2021) (citations omitted).

studying the impact of modern, legally defined intervention (*e.g.*, classes that acquaint juveniles with the various individuals in a court room,[100] or that review the basic legal rights and concepts with juveniles found to be lacking competence[101]), and thus waste taxpayer dollars and make no progress with such afflicted children.[102] As one scholar noted, "defendants who have been declared by the courts as incompetent to stand trial are often institutionalized in forensic mental health facilities until competence is restored through psychiatric treatment and/or medical intervention."[103] For defendants with decreased intellectual functioning—a common condition found in FASD youths—though not a requirement for diagnosis, the institutionalization approach is "generally ineffective as the critical issue for this group is not the restoration of competence, but rather the effecting of competence. As a result, these defendants are subject to prolonged institutionalization with minimal prospects for return to trial or release to the community."[104]

A. Developmental Immaturity and the MacArthur Study[105]

Adolescent judgment and maturity in decision-making has been the focus of behaviorists and psychology scholars for well over 30 years.[106] Cognitive maturity is

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[100] Mattson & Riley, *supra* note 82, at 281–83 ("Although the diagnosis of FAS does not require frank mental retardation, intellectual capacity is very often compromised in these children. In fact, FAS has been called the leading known cause of mental retardation in the Western world. The average IQ of children with FAS falls close to 70, although the range is quite large (*e.g.*, 20 to 100). In exposed children who do not meet the criteria for FAS, some of the previously mentioned features may still be present. Importantly, in the absence of the specific facial malformations, and thus the diagnosis of FAS, cognitive deficits, even mental retardation can still be present." (footnotes omitted)).

[101] Accepting the studies that document low intellectual functioning for FAS-afflicted children is a good starting point; "It is clear, however, that FAS is related to decreased intellectual functioning with an average IQ between 65 and 75, and that this level of performance is stable across time. Furthermore this decrease in performance is also seen in children with prenatal alcohol exposure in the absence of FAS." *Id.* at 287.

[102] *Id.* at 279 ("[I]t is estimated that FAS affects approximately 0.29 to 0.48/l000 live born children. Prevalence estimates vary depending on socioeconomic and ethnic factors, and those that include Native American populations report incidences of up to 2.99/1000 births. In the United States, at least 1200 children are born each year with FAS, and the annual cost associated with caring for such infants is estimated at 74.6 million dollars. These estimates are strictly limited to those children who meet the clinical criteria for FAS and do not include the spectrum of effects caused by prenatal alcohol exposure." (footnote omitted)).

[103] Everington, *supra* note 23, at 148 (citing James W. Ellis & Ruth Luckasson, *If Your Client Is Mentally Retarded*, CRIM. JUST., Winter 1988, at 12).

[104] *Id.*

[105] *See generally* Grisso et al., *supra* note 63.

[106] *See* Laurence Steinberg & Elizabeth Cauffman, *Maturity of Judgment in Adolescence: Psychosocial Factors in Adolescent Decision Making*, 20 LAW & HUM. BEHAV. 249 (1996).

not as fully developed in children as we would anticipate in adults, and this plays a large role in defining a child's competency to stand trial.[107] Thus, we should not assume that by comparing adult competency assessments we would see similar assessment results for adolescents assessed for competency to stand trial.[108] While most states recognize competency to stand trial as a due process right, only a small number explicitly consider age or maturity in competency-to-stand-trial decisions.[109] Scholars have widely noted that "youthfulness or immaturity of youth is why most juveniles under the age of 16 are more likely to have legal deficits that render them incompetent to stand trial."[110] However, how competency is evaluated in the juvenile court context is less studied.[111] The introduction of developmental immaturity as a factor impacting juvenile competency creates a far more complex scenario than lawmakers and courts confront when dealing with challenges raised by adult defendants:

> Although immaturity and mental illness or disability may all produce cognitive and behavioral deficits that impede trial competence, several distinctive features of developmental incompetence create major challenges for policymakers devising juvenile crime policy. Relatively few adult defendants are found to be incompetent to stand trial, and procedures for restoration to competence are straightforward and usually effective. In contrast, powerful research evidence indicates that many younger adolescents may lack the capacities needed to participate as defendants in a criminal proceeding. An important study sponsored by the MacArthur Foundation recently found a high risk of trial incompetence among younger teens and even mid-adolescents using the measures applied to adults. This research confirms earlier studies of youths' capacities in legal settings as well as general developmental psychology evidence about maturation. It shows that the risk of developmental incompetence is correlated predictably with age and concentrated in a readily identified group—younger teens. In that group, the incidence of developmental incompetence is likely to be high. Moreover, the conventional remedy for incompetent defendants, the restoration of competence, may often have little meaning as applied to youths who have never been competent, and for whom maturation is the only effective remedy.[112]

Thus, the statutory enactments that focus on providing competency restoration services, including classes, instruction on the legal concepts and rights of individuals, and the value of such protocols, employed in adult competency matters might be

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[107] *See* Cowden & McKee, *supra* note 54, at 647.

[108] *See* Grisso et al., *supra* note 63, at 359.

[109] Harvey, *supra* note 20, at 440 (citing Grisso et al., *supra* note 63).

[110] *Id.* (citing Grisso et al., *supra* note 63).

[111] *Id.*

[112] Elizabeth S. Scott & Thomas Grisso, *Developmental Incompetence, Due Process, and Juvenile Justice Policy*, 83 N.C. L. REV. 793, 797 (2005) (footnotes omitted).

completely inapplicable in the case of juveniles found to be developmentally immature. Class participation will not eliminate or speed up the time period during which a youth is determined to be developmentally immature.[113]

B. Low-IQ Juveniles[114]

This group of juveniles pose a problem for evaluators in that the level of cognitive understanding and performance may prevent them from ever being determined to be competent to stand trial. Thus, the assessment of these juveniles is crucial.[115] According to the DSM-5:

> IQ test scores are approximations of conceptual functioning but may be insufficient to assess reasoning in real-life situations and mastery of practical tasks. For example, a person with an IQ score above 70 may have such severe adaptive behavior problems in social judgment, social understanding, and other areas of adaptive functioning that the person's actual functioning is comparable to that of individuals with a lower IQ score. Thus, clinical judgment is needed in interpreting the results of IQ tests.[116]

The assessment of juveniles with low IQs[117] poses serious problems for juvenile justice systems as the assumption that courts of limited jurisdiction serve the purpose of better tailoring legal accountability for adolescents implicates the fact that these courts face resource limitations, and requires a recognition of the reality that there are no medications or treatment interventions that might have an impact on a large percentage of these adolescents.[118]

C. Psychosis

During the 1990s, very few competency studies examined psychiatric symptoms and legal competence determinations, usually noting whether symptoms were

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[113] *Id.* ("In contrast to adults, many immature youths cannot attain competence through medical or instructional interventions.").

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

[115] *See generally* Everington, *supra* note 23.

[116] DSM-5, *supra* note 67, at 37.

[117] *See* DAVID WECHSLER, WECHSLER INTELLIGENCE SCALE FOR CHILDREN MANUAL [WISC-III] (Psych. Corp. ed., 3rd ed. 1991); PSYCH. CORP., WECHSLER INDIVIDUAL ACHIEVEMENT TEST MANUAL (1992).

[118] Amelia Vorpahl, *New 50-State Report Finds Most Juvenile Court Systems Lack Adequate Resources and Supports to Inform Judicial Decisions*, COUNCIL OF STATE GOV'TS JUST. CTR. (May 5, 2022), https://csgjusticecenter.org/2022/05/05/new-50-state-report-finds-most-juvenile-court-systems-lack-adequate-resources-and-supports-to-inform-judicial-decisions.

present or absent, but not focusing on the severity of symptoms.[119] Rather, early studies "typically found psychotic symptoms (*e.g.*, delusions, hallucinations, thought disorder) to be the strongest predictors of IST [i.e., not competent to stand trial] findings."[120] Further, "a systematic review by Fazel and Langstrom (2008) found that youths in detention and correctional facilities were almost 10 times more likely to suffer from psychosis than youths in the general population."[121] This issue becomes yet another weighty subject that must be incorporated into any future competency restoration service regimen.

D. Substance Abuse and Mental Health Issues of Juveniles[122]

One of the complications of substance abuse among juveniles—and adults alike—is that substance abuse is considered a stand-alone, diagnosable condition, but it might also be a major factor in hiding comorbid disorders.[123] Thus, an individual may suffer from alcohol abuse alone, but another individual may suffer from alcohol abuse along with other diagnosable conditions which may be veiled by the alcohol abuse.[124] If competency evaluations are not structured to determine and assess all contributing and comorbid conditions contributing to a juvenile's competency to stand trial, then treatment programs might not sufficiently address the issues resulting in the juvenile's lack of competency.[125] Treating alcohol abuse but not diagnosing ADHD, or severe depression,[126] or FASD might result in a juvenile completing some court-ordered regimen but remaining not competent to stand trial

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[119] *See* Barry Rosenfeld & Alysa Wall, *Psychopathology and Competence to Stand Trial*, 25 CRIM. JUST. & BEHAV. 443, 445 (1998).

[120] *Id.*

[121] OJJDP, *supra* note 26, at 3 (citation omitted).

[122] *See also* Schubert et al., *supra* note 69.

[123] *See* Sarah M. Hartz, Carlos N. Pato, Helena Medeiros, Patricia Cavazos-Rehg, Janet L. Sobell, James A. Knowles, Laura J. Bierut & Michele T. Pato, *Comorbidity of Severe Psychotic Disorders with Measures of Substance Use*, 71 JAMA PSYCHIATRY 248 (2014).

[124] For example, according to the Substance Abuse and Mental Health Services Administration: "Among people aged 12 or older in 2020, 22.2 percent (or 61.6 million people) were binge alcohol users in the past month." Adolescents aged 12 to 17 constituted 4.1% (or 1.0 million people). Further, "[a]mong adolescents aged 12 to 17 in 2020, 20.9 percent (or 5.1 million people) had either an SUD [substance use disorder] or an MDE in the past year." SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN. [SAMHSA], U.S. DEP'T OF HEALTH & HUM. SERVS., PEP21-07-01-003, KEY SUBSTANCE USE AND MENTAL HEALTH INDICATORS IN THE UNITED STATES: RESULTS FROM THE 2020 NATIONAL SURVEY ON DRUG USE AND HEALTH 1, 3 (2021).

[125] For a discussion of treatment complications caused by comorbidity, see Ramin Mojtabai, Lian-Yu Chen, Christopher N. Kaufmann & Rosa M. Crum, *Comparing Barriers to Mental Health Treatment and Substance Use Disorder Treatment Among Individuals with Comorbid Major Depression and Substance Use Disorders*, 46 J. SUBSTANCE ABUSE TREATMENT 268 (2014).

[126] For treatment for depression, see Motjabai et al., *supra* note 70.

because the initial diagnosis failed to incorporate comorbid disorders.[127]

E. Conduct and Personality Disorders[128]

Many diversionary juvenile mental health courts will not permit adolescents with certain types of diagnosed conditions to participate in their programs.[129] These excluded diagnosed conditions may include: "adjustment disorder, oppositional defiant disorder, conduct disorder, personality disorder, and sexual offending behavior if unaccompanied by a qualifying mental illness."[130] These specialized court rules do not control the majority of jurisdictional rules concerning which adolescents gain admission to treatment programs, but they suggest that these complications will weigh heavily when designing effective competency restoration services in the future.[131]

F. Post-Traumatic Stress Disorder (PTSD)[132]

As the literature expands and studies are commissioned to focus on PTSD in children and adolescents, the juvenile court system must recognize and incorporate into its procedures the impact PTSD has on the lives of children and adolescents who are court involved. According to the National Institute of Mental Health, in-

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[127] *See generally* Katherine E. Watkins, Sarah B. Hunter, M. Audrey Burnam, Harold Alan Pincus & Gina Nicholson, *Review of Treatment Recommendations for Persons with a Co-Occuring Affective or Anxiety and Substance Use Disorder*, 56 PSYCHIATRIC SERVS. 913 (2005).

[128] *See also* EFRAIN BLEIBERG, TREATING PERSONALITY DISORDERS IN CHILDREN AND ADOLESCENTS: A RELATIONAL APPROACH (2004).

[129] Patrick Gardner, *An Overview of Juvenile Mental Health Courts*, ABA CHILD L. PRAC., Sept. 2011, at 97, 104.

[130] *Id.*

[131] *See* Marit Haugen, Comment, *The Last One Standing: How the United States' Decision Not to Ratify the Convention on the Rights of a Child Impacted Its Juvenile Mental Health Courts in Comparison to Canada*, 39 ARIZ. J. INT'L & COMPAR. L. 201, 213–14 (2022); *see also* Redding & Frost, *supra* note 19, at 381.

[132] According to the National Institute of Mental Health:

> Anyone can develop PTSD at any age. This includes combat veterans as well as people who have experienced or witnessed a physical or sexual assault, abuse, an accident, a disaster, a terror attack, or other serious events. . . . Not everyone with PTSD has been through a dangerous event. In some cases, learning that a relative or close friend experienced trauma can cause PTSD. According to the National Center for PTSD . . . about seven or eight of every 100 people will experience PTSD in their lifetime. Women are more likely than men to develop PTSD. Certain aspects of the traumatic event and some biological factors (such as genes) may make some people more likely to develop PTSD. , and genes may make some people more likely to develop PTSD than others.

Post-Traumatic Stress Disorder, NAT'L INST. OF HEALTH, https://www.nimh.nih.gov/health/topics/post-traumatic-stress-disorder-ptsd (last visited May 21, 2023).

dividuals living with PTSD may have other ongoing traumas and disorders, including but not limited to panic disorder, depression, substance abuse, and suicidal feelings.[133]

G. Comorbid Conditions

While assessing juveniles for competency to stand trial, evaluators must consider undetected or undiagnosed co-occurring psychological disorders that may be masked by one prominent diagnosed disorder. Some researchers have explained:

> Substance use disorders, mood disorders and other anxiety disorders are the most commonly occurring comorbid conditions with PTSD. Therefore, as suggested by the NIMH/NC-PTSD guidelines, a comprehensive assessment for co-occurring psychological disorders is recommended, using either a clinical interview or other psychometrically sound self-report measures. It is important to remember that individuals with a trauma history may not be forthcoming about reporting the trauma in clinical settings. This may [be] due to a fear of negative reaction to disclosing the trauma, including disbelief and blame, or an inability of the client in recognizing the experience as traumatic and understanding the impact on current life functioning.[134]

For co-occurring mental health issues and substance use disorder,[135] the Substance Abuse and Mental Health Services Administration of the U.S. Department of Health and Human Services reported that in 2020, over 20% of 12- to 17-year-old adolescents had either a substance use disorder or an MDE in the past year.[136] Further, over 14% had an MDE without a substance use disorder, while just under 4% had a substance use disorder without an MDE.[137] Further, 2.7% had both an MDE and a substance use disorder within the past year.[138]

Thus, hundreds of thousands of adolescents experience both substance abuse and MDEs in any given year, so counsel for children must be aware of the frequency of comorbid disorders and comorbid issues that might not get identified during a competency assessment. Providing the evaluators with the client's medical or birth records, assuming counsel has access to such documents, may help to identify any

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[133] *Id.*

[134] Paula Brough, Amanda Biggs, Briana Brandon & Victoria Follette, *Occupational Stress and Traumatic Stress*, *in* THE CAMBRIDGE HANDBOOK OF FORENSIC PSYCHOLOGY 697, 706 (Jennifer M. Brown & Miranda A.H. Horvath eds., 2d ed. 2022) (citations omitted).

[135] It should be noted that "substance use disorder" criteria changed from DSM-4 to DSM-5 in 2013. *Compare* AM. PSYCHIATRIC ASS'N, DIAGNOSTICS AND STATISTICAL MANUAL OF MENTAL DISORDERS (DSM-IV) 182–83 (4th ed. 1994), *with* DSM-5, *supra* note 67, at 483–84.

[136] SAMHSA, *supra* note 124, at 3.

[137] *Id.*

[138] *Id.*

disorders and issues. However, if the child's biological parents have had their parental rights terminated, or the child is already in the state foster care system, such documents may not be available, or there may be other factors—such as parental embarrassment or fear of stigmatization—which might prevent counsel from gaining access to the child's medical or birth records.

Placing responsibility on defense attorneys to properly identify and raise competency challenges based upon complex and sometimes comorbid client mental health issues goes well beyond the professional training of most attorneys. It may be beneficial, if juvenile due process rights to challenge their competency are to have any meaning, to consider the creation and funding of holistic interdisciplinary defense teams.[139]

IV. PROCEDURES FOLLOWING A COURT'S RULING OF LACK OF COMPETENCY

Based on the rulings of the U.S. Supreme Court between 2005 and 2016, judges must give special consideration to juveniles when they are sentenced in homicide cases in adult criminal court.[140] In *Roper v. Simmons*, the Court in 2005 prohibited application of the death penalty for a juvenile convicted of homicide.[141] In 2010, the Court prohibited sentences of life without parole in juvenile non-homicide sentencing in *Graham v. Florida*.[142] In 2012, the Court prohibited mandatory life-without-parole sentencing schemes for juvenile homicide sentences in *Miller v. Alabama*.[143] In *Montgomery v. Louisiana*, the Court in 2016 required the *Miller* rule

[139] *See* Stephen Phillippi, Casey L. Thomas, Yilin Yoshida & Hasheemah Afaneh, *Holistic Representation in Juvenile Defense: An Evaluation of a Multidisciplinary Children's Defense Team*, 39 BEHAV. SCI. & L. 65, 65 (2021) ("Findings indicate that holistic defense was significantly associated with improved outcomes among juvenile clients, including increased mental health assessment resulting in treatment, increased employment and educational attainment, and decreased odds of recidivism. Favorable court or dispositional outcomes, including lower adjudication or early termination from custody, were also reported. Further practice-level, controlled research is necessary to evaluate these models and offer comparison to other models for holistic defense.").

[140] *See* ANTOINETTE KAVANAUGH & THOMAS GRISSO, EVALUATIONS FOR SENTENCING OF JUVENILES IN CRIMINAL COURT 2 (2021).

[141] Roper v. Simmons, 543 U.S. 551, 568 (2005) (holding that executing anyone for a crime committed while the defendant was under the age of 18 constituted cruel and unusual punishment).

[142] Graham v. Florida, 560 U.S. 48, 82 (2010) (declaring that the imposition of a sentence of life without parole—"LWOP"—for anyone convicted of a non-homicide offense while under the age of 18 was unconstitutional).

[143] Miller v. Alabama, 567 U.S. 460, 489 (2012).

to be applied retroactively,[144] which resulted in many jurisdictions having to resentence the former juvenile defendants. Consequently, developmental immaturity of children charged with serious offenses has now become a framework which legal scholars argue creates a constitutional requirement applicable to all juvenile sentencing in criminal proceedings.[145] The U.S. Supreme Court has yet to decide whether these considerations apply in all juvenile delinquency sentencing procedures as well,[146] but the rationale underlying the Court's series of decisions concerning juvenile sentencing should be advocated by counsel for juveniles in all delinquency cases.

Because of the extended sentences adopted by many jurisdictions that expose juveniles to possible incarceration following adjudication well into adulthood,[147] the application of a finding of competency or a lack of competency may impact a juvenile for years.[148]

A. Placement of the Child in a Secure Facility

If the placement facility is a detention center, then factors for consideration include whether there are staff available to provide medications for the juvenile (assuming that the child requires prescribed medication), and whether the setting is appropriate for therapeutic intervention services. If the placement facility is not a detention center, but a hospital or mental health clinical program, then the duration of the placement should be a factor for consideration.[149] Many hospital facilities and clinical programs operate under strict mandates for short-term inpatient placement.[150] These mandates may be the result of managerial decisions relative to the profit objectives of the facility or they may be restricted based upon decisions made

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[144] Montgomery v. Louisiana, 577 U.S. 190, 212 (2016).

[145] *See* KAVANAUGH & GRISSO, *supra* note 140, at 2.

[146] *But cf. id.* ("Legal scholars have argued that *Miller* created a constitutional requirement that applies to all juvenile sentencing in criminal court, not only *Miller* cases." (citation omitted)).

[147] *See* Richard E. Redding, *Adult Punishment for Juvenile Offenders: Does It Reduce Crime?*, *in* HANDBOOK OF CHILDREN, CULTURE, AND VIOLENCE 375, 377, 389 (Nancy E. Dowd, Dorothy G. Singer & Robin Fretwell Wilson eds., 2006).

[148] In many states, juvenile court sentences and adjudications extend well into adulthood, and juvenile court convictions are used when considering adult sentencing determinations as well. *See* Richard E. Redding & James C. Howell, *Blended Sentencing in American Juvenile Courts*, *in* THE CHANGING BORDERS OF JUVENILE JUSTICE: TRANSFER OF ADOLESCENTS TO THE CRIMINAL COURT 145, 146 (Jeffrey Fagan & Franklin E. Zimring eds., 2000).

[149] *See generally* Robert D. Miller, *Hospitalization of Criminal Defendants for Evaluation of Competence to Stand Trial or for Restoration of Competence: Clinical and Legal Issues*, 21 BEHAV. SCI. & L. 369 (2003).

[150] *See* SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN. [SAMHSA], U.S. DEP'T OF HEALTH & HUM. SERVS., CIVIL COMMITMENT AND THE MENTAL HEALTH CARE CONTINUUM: HISTORICAL TRENDS AND PRINCIPLES FOR LAW AND PRACTICE 6–12 (2019).

by third parties, such as insurers.[151] The period of time for inpatient placement may also be the result of patient demand in the community where the placement facility is located. For example, in New Orleans, Louisiana, following Hurricane Katrina, some estimates of the loss of mental health providers for the community were as high as 70%, so the feasibility for long-term placements—let alone any placements—of individuals requiring mental health services was dismal.[152]

Placing juveniles in secure facilities while they receive mental health treatment may serve different purposes than providing mental health services outside of secure facilities. British researchers have noted that:

> There are many more mentally disordered offenders in correctional services and the community than in secure hospitals. For example, international prevalence rates of mental health problems among people in prisons indicate not only disproportionately high rates of mental disorder in comparison to the community but also extensive mental health problems among this population. The development, design, implementation and evaluation of interventions for mentally disordered offenders are influenced by the organizational context within which the mentally disordered offender is located. This adds to the explanation of why research base stems from secure mental health hospitals, where there is a dual function to reduce risk and restore mental health. The emphasis in correctional services is to reduce offending behavior through targeting criminogenic (risk-related) needs, rather than mental health needs.[153]

The purpose of the mental health treatment may depend on whether the services are inpatient or outpatient, and it may also be tied to whether the people treated attend services voluntarily or involuntarily.[154] Some jurisdictions have established mental health courts to create diversionary programs to traditional criminal court proceedings for those who qualify for participation.[155] Dating back to the first such mental health court in Santa Clara County, California, in 2001, there were

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[151] *Id.* at 7–8; AM. PSYCHIATRIC ASS'N, THE PSYCHIATRIC BED CRISIS IN THE US: UNDERSTANDING THE PROBLEM AND MOVING TOWARD SOLUTIONS 30 (2022).

[152] *See* Heather D'Antonio, Comment, *The State of Mental Health Care in Post-Katrina New Orleans*, 69 LA. L. REV. 661, 677 (2009). The shortage of mental health professionals is not unique to post-Katrina New Orleans. Rather, the country as a whole has experienced a decline in mental health professionals and access to psychiatric care. *See* NAT'L COUNCIL FOR MENTAL WELLBEING, THE PSYCHIATRIC SHORTAGE: CAUSES AND SOLUTIONS (2018).

[153] Emily Glorney, *Forensic Mental Health Interventions*, *in* THE CAMBRIDGE HANDBOOK OF FORENSIC PSYCHOLOGY, *supra* note 134, at 493, 494 (citations omitted).

[154] *Id.* at 495–96; Allison D. Redlich, Steven Hoover, Alicia Summers & Henry J. Steadman, *Enrollment in Mental Health Courts: Voluntariness, Knowingness, and Adjudicative Competence*, 34 LAW & HUM. BEHAV. 91, 92 (2010).

[155] *See* Gardner, *supra* note 129, at 97 ("In 33 states, juvenile detention centers hold mentally ill youth without charges. A majority of detention centers report holding children aged 12 and under; and 117 centers reported jailing children 10 and under." (footnotes omitted)).

more than 40 juvenile mental health courts by 2011.[156]

B. Return of the Child to the Home Environment

If a child is already subject to a court's jurisdictional powers, then the court ordering the child's placement might include factors beyond the scope of what is the most beneficial for the child. If the community perception includes fear that a child released to his or her home for placement creates a public security threat—whether this is accurate or not—it might create a political burden for the judge. In cases where elected judges focus on their political futures, the wellbeing of the community or of the child in state custody may play a secondary or perhaps even a tertiary role among factors to be considered. Nevertheless, the utilization of ankle monitors, although not a panacea for all forms of juvenile crime and misconduct, is promoted as significantly decreasing the danger and risk elements for a community seeking to downsize detention numbers while not compromising community safety.[157] In California alone, more than 10,000 young people were tracked with ankle monitors in 2017.[158] Research suggests that the two types of electronic monitoring ankle bracelet devices[159] actually increase the amount of time adolescents remain involved in court proceedings and there is little evidence to suggest they contribute to rehabilitation, especially during the Covid pandemic years.[160] Although the ankle monitors share the tracking information among law enforcement agencies, the costs of the monitoring are often passed on directly to the juveniles

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[156] *Id.*

[157] *See* April Glaser, *Incarcerated at Home: The Rise of Ankle Monitors and House Arrest During the Pandemic*, NBC NEWS (July 5, 2021, 8:30 AM), https://www.nbcnews.com/tech/tech-news/incarcerated-home-rise-ankle-monitors-house-arrest-during-pandemic-n1273008 ("Ankle monitors were first developed by social psychologists in the 1960s in an effort to offer positive reinforcement to juvenile offenders. They came into use by the justice system in the 1980s and early 1990s.").

[158] Catherine Crump, *Electronic Monitoring of Youth, and Data Sharing, Widely Used in California's Juvenile Justice System*, BERKELEY BLOG (Nov. 16, 2020), https://blogs.berkeley.edu/2020/11/16/report-finds-widespread-use-of-electronic-monitoring-of-youth-in-the-california-juvenile-justice-system-as-well-as-data-sharing-with-law-enforcement/.

[159] *Id.* ("[T]here are two types of electronic monitoring ankle bracelets. Radio-frequency ankle bracelets can only detect a person's distance from a home-based receiver. By contrast, GPS ankle bracelets can track people wherever they go. Of the 53 counties [in California] with electronic monitoring programs, 44 use GPS in whole or in part. GPS is now the dominant technology for electronic monitoring.").

[160] Glaser, *supra* note 157 ("Now, early data shows how much the use of electronic ankle monitoring rose nationwide during [the pandemic], according to research from Kate Weisburd, a law professor at George Washington University and a former juvenile defender. Researchers are finding that ankle monitors are keeping people connected to the prison system longer than ever, as more remain strapped to the devices for over a year.").

wearing them,[161] and they disproportionately affect communities of color.[162] Critics have challenged the "intuitive appeal of electronic monitoring," asserting that ankle monitors do not lower incarceration rates, they are not cost-effective, and they do not further the goal of rehabilitating youth.[163]

C. Oversight of the Child While Competency Issues Remain Unresolved—Individualized Treatment Plans for Restoration[164]

If one of the causes of the child's incompetency is developmental immaturity, then it is foreseeable that years may pass before the child might be found competent to stand trial. This complicates the legal process as the child's placement then takes on new considerations, such as what financial resources are available to provide a secure location for the child pending the restoration of competency.[165] If the possibility that large numbers of children are found to be lacking competence, especially in larger urbanized communities, then the expense to the state of housing a large number of children waiting to go to trial may appear to be cost prohibitive. In one study, individualized treatment programs, which "usually lasted 1 to 30 weeks and involved continuous contact and sessions that ranged from once or twice per week to daily, for 1/2 hour to 10 hours per week," resulted in a 12% decrease in recidivism rates for juveniles.[166] The study also found that some treatment programs, such as

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[161] *Id.*

[162] Leah Mack, *Electronic Monitoring Hurts Kids and Their Communities*, JUV. JUST. INFO. EXCH. (Oct. 24, 2018), https://jjie.org/2018/10/24/electronic-monitoring-hurts-kids-and-their-communities/ ("Electronic monitoring disproportionately affects communities of color. The majority of children placed on electronic monitors are children of color and children from low-income families. According to legal scholar and juvenile defender Kate Weisburd, for these young people, 'electronic monitoring represents another way that every aspect of their daily lives is subject to surveillance and control.'" (citation omitted)).

[163] *See, e.g.*, Kate Weisburd, *Monitoring Youth: The Collision of Rights and Rehabilitation*, 101 IOWA L. REV. 297 (2015).

[164] *See also* Lisa Jo Bertman, John W. Thompson, Jr., William F. Waters, Laura Estupinan-Kane, James A. Martin & Lori Russel, *Effect of an Individualized Treatment Protocol on Restoration of Competency in Pretrial Forensic Inpatients*, 31 J. AM. ACAD. PSYCHIATRY & L. 27, 27 (2003) ("The most common reasons for deficits in pretrial competency abilities are psychotic symptoms and mental retardation, with the former being the most frequent. Mental illness or retardation *per se* do not, however, predict legal incompetency." (footnotes omitted)).

[165] *See* Jeffrey L. Geller, William H. Fisher & Neil S. Kaye, *Effect of Evaluations of Competency to Stand Trial on the State Hospital in an Era of Increased Community Services*, 42 HOSP. CMTY. PSYCHIATRY 818, 821 (1991).

[166] MARK W. LIPSEY, DAVID B. WILSON & LYNN COTHERN, U.S. DEP'T OF JUST., NCJ-181201, OJJDP JUV. JUST. BULL: EFFECTIVE INTERVENTION FOR SERIOUS JUVENILE OFFENDERS 2 (2000) ("Overall, juveniles who received treatment showed an average 12-percent decrease in recidivism. This result, while not enormous, was positive, statistically significant, and large enough to be meaningful.").

wilderness challenges, early release from probation or parole, and deterrence and vocational programs, were not as effective as programs that were closely monitored and those lasting 25 weeks or longer.[167]

D. Diverting Juvenile Cases to Non-Delinquency Systems

Although the American Bar Association (ABA) has endorsed diverting juveniles with mental illness from the traditional juvenile justice system into evidence-based treatments within their communities,[168] the possibility of such alternatives is often limited by available resources and legislative support.[169] The prospects of transferring a juvenile's case from a delinquency petition to whatever legal alternatives exist in the state law often depends upon the seriousness of the initial delinquency petition.[170] For those accused of serious crimes of violence, the likelihood that a court would be willing to transfer the pending matter to an alternative trial format that does not include the type of sentencing options available in delinquency matters would raise the same issues previously discussed of political pressure on the judge. In the event that the child recidivates after having the delinquency case reduced to

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[167] *Id.* at 3.

[168] The ABA's Child Law Practice group provides that:

> In addition to emphasizing treatment, [juvenile mental health courts] share several other foundational principles:
>
> - Youth should not become entangled in the juvenile justice system solely because of their mental illness or need to access mental health services.
> - Young people with mental illness should be diverted from the traditional juvenile justice system into evidence-based treatments in their communities whenever possible and appropriate, consistent with public safety concerns.
> - Youth should reside in the least restrictive setting possible.
> - Information obtained in mental health screening or treatment should not jeopardize a youth's legal interests.
> - Treatment should be culturally appropriate and consider gender, ethnicity, race, age, sexual orientation, socioeconomic status, and faith.
> - Mental health diagnoses and treatment should take into account developmental differences between young people and adults that may affect behavior.

Gardner, *supra* note 129, at 97, 102 (footnote omitted).

[169] *See* Redding & Frost, *supra* note 19, at 317.

[170] *See* PATRICK GRIFFIN, SEAN ADDIE, BENJAMIN ADAMS & KATHY FIRESTINE, U.S. DEP'T OF JUST., NCJ-232434, TRYING JUVENILES AS ADULTS: AN ANALYSIS OF STATE TRANSFER LAWS AND REPORTING 2, 10 (2011). As diversion relates to some adults with serious mental illness involved in criminal cases, 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, 461, 465 (2009) (examining evidence from 27 studies or publications supporting the use of diversion initiatives to reduce recidivism and incarceration among adults with serious mental illness).

an alternative disposition,[171] the community will likely hold the prosecutor's office, as well as the judge, responsible for any recidivist offenses the child is accused of committing.

Surprisingly, the more serious the charged offense, the less likely the charge will remain in the juvenile delinquency system, and the more likely it will be transferred into the adult criminal system.[172] The theory which gave rise to a separate court system for charging and adjudicating juveniles holds true for lesser offenses, but most jurisdictions have created statutory provisions allowing more serious offenses to be transferred to adult courts, exposing the juveniles to much more significant sentences in the event they are found guilty of the offenses.[173] Thus, the legal theory is followed at least until the behavior charged is serious enough to draw the public's attention and perhaps until it creates significant political pressure on the officials entrusted with administering the juvenile justice system.

For those cases where juveniles have been found to lack competence to stand trial, similar political pressure will likely be placed on officials, especially on the judges and the prosecutors involved in the juvenile justice system. Thus, the notion that a juvenile's case might be eligible to be handled in a non-delinquency process[174] will not escape the prospect of public scrutiny where the juvenile has been charged

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[171] *See* Machteld Hoeve, Larkin S. McReynolds, Gail A. Wasserman & Cary McMillan, *The Influence of Mental Health Disorders on Severity of Reoffending in Juveniles*, 40 CRIM. JUST. & BEHAV. 289 (2013).

[172] *See* Randall T. Salekin, Rachel M.A. Yff, Craig S. Neumann, Anne-Marie R. Leistico & Alecia A. Zalot, *Juvenile Transfer to Adult Courts: A Look at the Prototypes for Dangerousness, Sophistication-Maturity, and Amenability to Treatment Through a Legal Lens*, 8 PSYCH., PUB. POL'Y & L. 373, 374 (2022).

[173] *Id.* at 373–75; *Judicial Waiver Offense and Minimum Age Criteria, 2019*, OFF. OF JUV. JUST. & DELINQ. PREVENTION, U.S. DEP'T OF JUST. (Apr. 18, 2022), https://www.ojjdp.gov/ojstatbb/structure_process/qa04110.asp?qaDate=2019.

[174] The ABA's Child Law Practice group provides that:

> Existing [juvenile mental health courts] have included the following mental health conditions as potentially qualifying diagnoses:
>
> - Brain conditions with a genetic component (e.g., major depression, bipolar disorders, schizophrenia, schizoaffective disorders, severe anxiety disorders, and ADHD with significant functional impairment)
> - Developmental disabilities (pervasive developmental disorder, mental retardation, and autism spectrum disorders)
> - Organic brain syndromes (severe head injuries, severe cognitive deficit, and degenerative diseases of the brain)
> - Fetal Alcohol Spectrum Disorder
> - Severe Post Traumatic Stress Disorder
> - Co-occurring mental illness and substance abuse
> - Conduct disorder, oppositional defiant disorder, impulse control disorder, adjustment reactions, or personality disorders

Gardner, *supra* note 129, at 104.

with a serious violent offense. If that factor does not weigh into the process, and if the child is eligible as a matter of law for the case to be converted from a delinquency matter into a non-delinquency matter, the new process might offer greater treatment resources for the juvenile and the juvenile's family. The reason for this outcome is that criminal justice and delinquency systems frequently lack significant resources for treatment interventions, whereas cases addressing families in need of services or children in need of services are differentiated from delinquency matters in that the resources for such cases are often more therapeutic and treatment oriented than would otherwise be available in criminal or delinquency matters.[175]

E. Dismissal of the Child's Case

To the casual observer, the prospect of having a court dismiss a pending case against a juvenile after the juvenile has been declared to be incompetent seems incomprehensible, and yet state statutes often provide for that very legal option.[176] In jurisdictions where mental health services are scarce or unavailable for indigent recipients, this may become a viable legal option. In those cases involving very young children, once again the option of dismissing the case altogether may be a viable option.[177] From the perspective of victims of juvenile misconduct, this particular option is less than satisfactory and it negates any semblance of accountability for the child's conduct.

It would constitute a significant contribution to the literature for researchers to study the systems where dismissals are permitted as a matter of statute and to determine what sort of outcomes result when dismissals have been granted. This falls outside the scope of this Article, but it remains a factor that should be studied and findings should help to inform whether such legal options should continue to be included in the juvenile justice system. Needless to say, in matters where the evidence is simply insufficient to prove a charge beyond a reasonable doubt, statutory provisions allowing for dismissal of such cases is not the issue; rather the concern is only where the child has been declared not to be competent—regardless of the strengths or weaknesses of the delinquency case.

If a juvenile charged with delinquent misconduct appears not to be competent and there appears to be no reason to assume that the juvenile will ever become competent, the mandate that only those who are competent may be held accountable in criminal and delinquency systems may not be a popular outcome, but dismissal may

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[175] For a discussion of the treatment and services resources available to juveniles and their families, see BARBARA J. BURNS, JAMES C. HOWELL, JANET K. WIIG, LEENA K. AUGIMERI, BRENDAN C. WELSH, ROLF LOEBER & DAVID PETECHUK, U.S. DEP'T OF JUST., NCJ-193410, OJJDP BULL: TREATMENT, SERVICES, AND INTERVENTION PROGRAMS FOR CHILD DELINQUENTS (2003).

[176] *See* Gardner, *supra* note 129, at 102; sources cited *supra* note 49.

[177] Gardner, *supra* note 129, at 103.

be legally required.[178] In such scenarios, should legal systems seek alternative adjudication outcomes? In addressing this question, it might be helpful to look at juvenile systems in other communities and examine how other countries address delinquent conduct within their jurisdictions.

V. COMPARING THE UNITED STATES WITH FOREIGN JURISDICTIONS

A comparison of the U.S. juvenile justice system to other countries' systems for handling juvenile offenses reveals major distinctions by which the rights of children are recognized and respected.[179] However, contrary to what many in the United States might otherwise assume to be the case, other nations protect the legal rights of juveniles in their respective countries more aggressively than the United States.[180] Because of the differences in legislation, jurisdictional rules, and rules of civil and criminal procedure, and because of the variations in maintaining databases in different countries, it is challenging to make an apples-to-apples comparison of the U.S. concept of competency restoration to its application in foreign countries. However, in many nations, the use of diversionary procedures or alternative sentencing schemes approximates a similar outcome for juveniles declared to be not competent in proceedings in U.S. courts. At the very least, reviewing the differences in age requirements for courts of limited jurisdiction in other countries might help expand our familiarity with alternatives to the approach to juvenile justice that many see as having originated in the United States.

The 1989 U.N. Convention on the Rights of the Child (CRC) is "a human rights treaty that delineates the political, civil, economic, health, social and cultural rights of children (including those who are justice-involved). The CRC *is* legally binding on the 196 countries and states that have ratified it."[181] However, the United States is the only U.N. nation–state that has not ratified the CRC.[182]

The minimum age of criminal responsibility (MACR) refers to the youngest

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[178] *See* Scott & Grisso, *supra* note 112, at 830.

[179] Stephen L. Golding & Ronald Roesch, *Competency for Adjudication: An International Analysis*, *in* 4 LAW AND MENTAL HEALTH: INTERNATIONAL PERSPECTIVES 73 (D.N. Weisstub ed. 1988).

[180] *See* Michelle India Baird & Mina B. Samuels, *Justice for Youth: The Betrayal of Childhood in the United States*, 5 J.L. & POL'Y 177 (1996) (comparing juvenile justice and restorative practices in foreign jurisdictions to those of the United States).

[181] KIRK HEILBRUN, DAVID DEMATTEO, CHRISTOPHER KING & SARAH FILONE, EVALUATING JUVENILE TRANSFER AND DISPOSITION: LAW, SCIENCE, AND PRACTICE 262 (2017); Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3.

[182] *Ratification Status for the CRC—Convention on the Rights of the Child*, U.N. HUM. RTS. TREATY BODY DATABASE, https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?Treaty=CRC&Lang=en (last visited May 21, 2023).

age at which an individual can be formally processed in the justice system.[183] A child who commits a penal offense but falls below the MACR cannot be held responsible for the crime.[184] Generally, legislatures are responsible for setting the MACR within their jurisdictions.[185] When developing an MACR, the United Nations recommends that nation-states consider the emotional, mental, and intellectual maturity of the average child at that age.[186] The CRC broadly requires countries to establish "a minimum age below which children shall be presumed not to have the capacity to infringe the penal law."[187] However, the United Nations cautions that an MACR below the age of 12 is "not . . . internationally acceptable."[188]

Federally, the United States has established no such threshold.[189] Therefore, despite being a founding member of the United Nations and a permanent member of the U.N. Security Council, the United States is not in compliance with the United Nation's directives regarding MACRs. Many American states have taken it upon themselves to establish an MACR.[190] Twenty states have established an MACR between 6 and 11 years of age.[191] However, California and Massachusetts are the only American jurisdictions that conform with the U.N. MACR at 12 years of age.[192]

In contrast to the juvenile delinquency laws in the United States, foreign jurisdictions have recognized some of the developmental limitations of adolescents and

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[183] Comm. on the Rights of the Child, General Comment No. 10 Children's Rights in Juvenile Justice, ¶ 31, U.N. Doc. CRC/C/GC/10 (2007) [hereinafter CRC General Comment No. 10].

[184] *Id.*

[185] *Id.*; Convention on the Rights of the Child, *supra* note 181, art. 40, ¶ 3.

[186] CRC General Comment No. 10, *supra* note 183, ¶ 32.

[187] Convention on the Rights of the Child, *supra* note 181, art. 40, ¶ 3(a).

[188] CRC General Comment No. 10, *supra* note 183, ¶ 32.

[189] Laura S. Abrams, Elizabeth S. Barnert, Matthew L. Mizel, Antoinette Bedros, Erica Webster & Isaac Bryan, *When Is a Child too Young for Juvenile Court? A Comparative Case Study of State Law and Implementation in Six Major Metropolitan Areas*, 66 CRIME & DELINQ. 219, 220 (2019).

[190] *Id.*

[191] *Id.*

[192] *Id.*

established higher threshold requirements for holding juveniles accountable for misconduct. The MACR in U.N. nation–states ranges from 6 to 16 years.[193] The median age is 12 years old.[194] Notably, many of these nation–states derive their provisions from historical English common law.[195]

Countries other than the United States have adopted legal provisions that hold juveniles accountable for criminal misconduct at later stages of adolescent development generally than do statutory provisions in the United States.[196] These foreign statutes and court procedures effectively raise the age of criminal responsibility of adolescents within their jurisdictions, resulting in a roughly similar outcome as a successful competency challenge declaring a juvenile not competent to go to trial.[197] The United States is now the only country[198] that has not adopted or ratified the single most important international treaty in this area, the CRC.[199] The age of criminal responsibility varies widely by country and in most countries, there is no set

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[193] *See* UNICEF, LEGAL MINIMUM AGES AND THE REALIZATION OF ADOLESCENTS' RIGHTS: MINIMUM AGE OF CRIMINAL RESPONSIBILITY (2017), https://www.unicef.org/lac/media/2771/file/PDF%20Minimum%20age%20for%20criminal%20responsibility.pdf. For a more detailed analysis of the MACR in various countries and the legal mechanisms that dictate its applicability and scope, see Appendix.

[194] *See* UINCEF, *supra* note 193. This median illustrates the number of countries with an MACR below 12 years old. Indeed, of the countries analyzed in this Article, more than a dozen still set the MACR at seven years old. *See* app.

[195] *See* Richard Chisholm, *Children and the Law in Australia*, 13 COLUM. HUM. RTS. L. REV. 1, 3 (1981).

[196] *See* app.

[197] Katner, *supra* note 5, at 429.

[198] On January 20, 2015, Somalia ratified the CRC. *UN Lauds Somalia as Country Ratifies Landmark Children's Rights Treaty*, U.N. NEWS (Jan. 20, 2015), https://news.un.org/en/story/2015/01/488692. Further, South Sudan, which only became a nation in 2011, ratified the CRC on May 4, 2015. *UN Lauds South Sudan as Country Ratifies Landmark Child Rights Treaty*, U.N. NEWS (May 4, 2015), https://news.un.org/en/story/2015/05/497732; *Ten Years After Gaining Independence, Civilians in South Sudan Still Longing for Sustainable Peace, National Cohesion, and Accountability–UN Experts Note*, U.N. HUM. RTS. OFF. OF THE HIGH COMM'R (July 9, 2021), https://www.ohchr.org/en/press-releases/2021/07/ten-years-after-gaining-independence-civilians-south-sudan-still-longing.

[199] Convention on the Rights of the Child, *supra* note 181. The 1989 CRC contains many provisions affecting children in the justice system. Key articles of the CRC concerning youth justice are articles 3, 37, and 40. Article 3 provides that:

> 1. 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.
> 2. State 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, ¶¶ 1–2. Article 37 provides for minimum standards in treatment and punishment of juvenile offenders to ensure that "[n]o child shall be subjected to torture or other cruel, inhuman

age; rather, it depends on a multitude of factors including the nature of the offense, the type of punishment, and the applicable jurisdiction.[200] Notably, some jurisdictions have lowered their MACR in recent years (i.e., South Korea, China).[201]

For jurisdictions that do not include juveniles under the age of 16 as eligible to have cases handled in court systems, such approaches may reflect similar outcomes to the results of a competency challenge in state juvenile courts in the United States.[202] That is, the juveniles will not enter systems where outcomes are similar for older juveniles as well as adults. Thus, the prospect of transferring a case in a U.S. court out of a delinquency system and into a more therapeutic-oriented system would appear to be consistent with these foreign sovereigns. If that is an accurate conclusion, then the U.S. statutory schemes that permit the transfer of cases where juveniles do not appear likely to become competent would not be controversial, or at the very least, it would be far less controversial in light of the similarity to other nations' handling of similar matters in their own countries.

Many countries have high rates of diversionary adjudications of juveniles, or they have high dismissal rates of juvenile cases overall. For instance:

> In Germany, in the 1980s, a major movement toward diversion and new educational alternative sanctions occurred. Diversion rates increased considerably from slightly more than 40% in the early 1980s to 70% in 2008. Although

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or degrading treatment or punishment." *Id.* art. 37(a). It also provides that "[n]either 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 "[n]o child shall be deprived of his or her liberty unlawfully or arbitrarily. 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 resort and for the shortest appropriate period of time." *Id.* art. 37(b). 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. For details of each country's signing, along with additional interpretive declarations and reservations, see *Information on the Convention on the Rights of the Child*, U.N. TREATY COLLECTION, https://treaties.un.org/Pages/showDetails.aspx?objid=08000002800007fe&clang=_en (last visited May 21, 2023).

[200] *See* app.

[201] *See* Lee Jung-Youn, *Ministry Eyes Allowing Younger Teens to Face Criminal Trials*, KOR. HERALD (Oct. 26, 2022, 5:51 PM), https://www.koreaherald.com/view.php?ud=20221026000594; *China Lowers Age of Criminal Responsibility to 12 for 'Abominable' Crimes*, REUTERS (Dec. 26, 2020, 2:10 AM), https://www.reuters.com/article/uk-china-parliament-crime/china-lowers-age-of-criminal-responsibility-to-12-for-abominable-crimes-idUKKBN290085.

[202] *See* Katner, *supra* note 5, at 429–31.

> a considerable number of violent and more serious offenders entered the juvenile justice system in the beginning of the 1990s, an amazing stability of the sanctioning practice remains characteristic. Unconditional juvenile imprisonment accounts for only 2%–3% of all informally (prosecutors and youth courts) or formally (youth courts after a trial) sanctioned juveniles and young adults aged 14–20. However, another 5% of the juveniles and young adults experience the disciplinary measure of short-term detention of up to four weeks. . . . Altogether, the sentencing practice is oriented to the minimum intervention model (including some restorative elements, mediation, and community service orders).[203]

Greece has provided informal diversion sanctions only rarely since 2003, but imposes educational measures in 75% of all cases, while short periods of imprisonment occur in about 20% of all dispositions with roughly 70% of these sentences being less than one month in duration and 90% lasting less than six months.[204] Since Ireland's adoption of the Children Act in 2001, custodial sentences have diminished, with the number of juveniles in reformatory and industrial schools dropping from 159 in 1978 down to only 41 in 2005.[205] In Italy, "[a]lthough statistical data are rarely available and not always validated," since the country's reform law of 1988, the use of judicial diversionary adjudications (*perdono giudiziare*) has increased and resulted in "amazingly low incarceration rates, particularly for juvenile offenders."[206] Even Russia has engaged in alternative sentencing practices, which have resulted in reductions in custodial sentences as compared to the Soviet era; with the trend in utilizing alternative sanctions, the Soviet era proportion of 30% to 50% of convicted juveniles placed in jail decreased to 24% of convicted juveniles in jail facilities by 2005.[207] Further, Russia reduced its juvenile jail population from 18,677 in 2001 down to 2,300 by 2012—a massive decrease of 88% of detained juveniles.[208]

India passed the Juvenile Justice (Care and Protection of Children) Act (JJA) in 2000, which now governs all aspects of juvenile justice for children under the age of 18 at the time of the offense.[209] The JJA recodified the long-established rebuttable

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[203] Frieder Dünkel, *Juvenile Justice and Crime Policy in Europe*, *in* JUVENILE JUSTICE IN GLOBAL PERSPECTIVE 9, 45 (Franklin Zimring, Máximo Langer & David S. Tanenhaus eds., 2015) (emphasis omitted).

[204] *Id.* at 45–46.

[205] *Id.* at 46.

[206] *Id.* at 46–47.

[207] *Id.* at 48.

[208] *Id.* (citing Frieder Dünkel, *Jugendkriminalpolitik in Europa und den USA: von Erziehung zu Strafe und Zurück?*, 43 DEUTSCHEN VEREINIGUNG FÜR JUGENDGERICHTE UND JUGENDGERICHTSCHILFEN [D.V.J.J.] 527 (2013) (Ger.)).

[209] Juvenile Justice (Care and Protection of Children) Act, 2000, pmbl., § 2(k) (India) (citations omitted).

presumption of *doli incapax* (incapable of criminal intent) for children between the ages of 7 and 12 who stood accused of crimes:

> While children committing crimes in India were subject to different and favored treatment in the old Hindu law, as well as under the Muslim law, 1850 saw the first modern law dealing with children who committed offenses. The Apprentices Act 1850 provided that vagrant and children below the age of 15 who committed petty offenses could be bound over as apprentices to learn a trade, craft, or employment instead of being sent to prison. In 1860, the Indian Penal Code (IPC) introduced the presumption of *doli incapax* for children below the age of seven years and a rebuttable presumption of *doli incapax* for those between the ages of seven and 12 years. This policy continues today.[210]

For U.S. lawmakers to become more familiar with the jurisdictional requirements for holding juveniles accountable in courts of law, it may be necessary to rethink the very foundations of our juvenile justice system. Considering that the United States provided the world with the very first model of a court of limited jurisdiction devoted entirely to the needs and problems of juveniles,[211] it may be that the United States should explore how these other nations have approached the U.S.-conceived juvenile court system and the directions that they have moved in deciding which adolescents should be brought into court proceedings, and which adolescents should be diverted from court proceedings given their age, mental health, and developmental issues.

CONCLUSION

The application of competency challenges in delinquency cases should incorporate societal goals of reducing recidivism or rehabilitating juveniles, balanced against the constitutional due process rights identified by the U.S. Supreme Court in *In re Gault* and its progeny. Before the Supreme Court issued its landmark decision in *Gault*, the case went before the Arizona Supreme Court where Justice Charles C. Bernstein indicated the reason he believed for the existence 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

[210] Ved Kumari, *Juvenile Justice in India*, *in* JUVENILE JUSTICE IN GLOBAL PERSPECTIVE, *supra* note 203, at 145, 147.

[211] Charles L. Chute, *Fifty Years of the Juvenile Court*, *in* CURRENT APPROACHES TO DELINQUENCY 1, 1 (Marjorie Bell ed., 1949).

> 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.[212]

These goals, however, become especially challenging in instances where it appears unlikely that a juvenile's competency can be restored, as it was never attained in the first place.[213] The competency challenge raised on behalf of a court-involved juvenile is not intended to serve as an advocacy tool designed to gain strategic advantage in contested proceedings. Rather, the purpose of challenging children's competency should be to prevent vulnerable individuals from defending themselves in a court of law during a process in which their participatory skills and cognitive understanding is limited to the point where they may not understand their legal rights nor their involvement, and thus cannot participate in defending themselves.[214] Foreign jurisdictions that adopted the model juvenile court created in the United States frequently do not permit young adolescents to be exposed to adversarial court proceedings following their involvement in acts of misconduct.[215] These restrictions on the ages of court-involved juveniles serve much the same purpose as challenging juvenile competency in U.S. juvenile court systems. If these challenges result in court-ordered mental health or behavioral therapeutic services,[216] we should anticipate that rates of recidivist behaviors will decrease and these children

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[212] *In re* Gault, 407 P.2d 760, 765 (Ariz. 1965), *rev'd*, 387 U.S. 1 (1967).

[213] Katner, *supra* note 5, at 419 ("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—almost 65% of incarcerated juveniles and 60% of detained juveniles meet criteria for one or another DSM-V disorder—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. One conclusion reached by the multiyear 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.'" (citations omitted) (quoting Grisso et al., *supra* note 63, at 358)).

[214] Bonnie & Grisso, *supra* note 55, at 73–74.

[215] STEPHANIE ELAINE RAP-LEURS, THE PARTICIPATION OF JUVENILE DEFENDANTS IN THE YOUTH COURT: A COMPARATIVE STUDY OF JUVENILE JUSTICE PROCEDURES IN EUROPE 37, 158 (2013).

[216] *See generally* Debra A. Pinals, *Where Two Roads Meet: Restoration of Competence to Stand Trial from a Clinical Perspective*, 31 NEW ENG. J. CRIM. & CIV. CONFINEMENT 81 (2005).

may not eventually find themselves involved in adult criminal proceedings.[217] However, we underestimate the number of children afflicted with FASD, and we also often misdiagnose the condition.[218] We have mandates within the legal system to compel children to undergo courses of instruction, theoretically designed to restore competency, yet we have no empirical studies suggesting such instructional programs serve any purpose other than having juveniles jump through legal hoops,[219] failure to comply with which may result in holding them in contempt if they fail to timely show up for the instructional classes. These types of programs fail to incorporate assessments for low IQ or for FASD among the population ordered to attend such competency restoration services.[220] There is little reason to think that adolescents with low intellectual functioning or those diagnosed with FASD will somehow be rendered competent by such classroom instruction. Congenital birth defects and low functionality are not likely to change during the course of classroom instruction. If the juveniles were properly diagnosed, and if they are shown to have FASD, then it would make sense to have better information about effective interventions that might actually serve a useful function for the community and for the child.

If the child's lack of competence is the result of developmental immaturity, then the passage of time may be the only effective intervention. This "solution," however, may result in the degradation of evidence and the availability of victims or witnesses over time. Such delays do not enhance the ability of the state to satisfy procedural requirements of proving cases beyond a reasonable doubt. Not a great deal of thought has gone into effective legal alternatives when a child's developmental condition must suspend legal proceedings designed to create accountability for misconduct.[221] This may be the legislative challenge for the next generation as we become more aware of the limitations of many juveniles eligible to be diagnosed with FASD, or of those children simply too young and immature to understand or be cognitively aware of exercising their legal rights. Currently, we do not even know

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[217] *See generally* Henry J. Steadman, Joseph J. Cocozza & Bonita M. Veysey, *Comparing Outcomes for Diverted and Nondiverted Jail Detainees with Mental Illnesses*, 23 LAW & HUM. BEHAV. 615 (1999).

[218] *See* Chasnoff et al., *supra* note 88, at 266.

[219] For example, among the limited studies published on FASD among young people in correctional systems, "[o]nly one of these studies involved active case ascertainment using clinical assessment to identify FASD using described diagnostic criteria for [FASD]." Carol Bower, Rochelle E. Watkins, Raewyn C. Mutch, Rhonda Marriott, Jacinta Freeman, Natalie R Kippin, Bernadette Safe, Carmela Pestell, Candy S.C. Cheung, Helen Shield, Lodewicka Tarratt, Alex Springall, Jasmine Taylor, Noni Walker, Emma Argiro, Suze Leitão, Sharynne Hamilton, Carmen Condon, Hayley M. Passmore & Roslyn Giglia, *Fetal Alcohol Spectrum Disorder and Youth Justice: A Prevalence Study Among Young People Sentenced to Detention in Western Australia*, BMJ OPEN, Feb. 2018, at 1, 1–2.

[220] *See* Katner, *supra* note 33, at 508–09, 558.

[221] *See generally* Mark R. Fondacaro, *The Injustice of Retribution: Toward a Multisystemic Risk Management Model of Juvenile Justice*, 20 J.L. & POL'Y 145, 161–63 (2011).

how many juveniles are already detained pending or following adjudications without having ever been assessed or evaluated for FASD. We have much to learn from other jurisdictions that have started studying factors contributing to competency determinations, such as the FASD studies from Canada and Australia.[222]

Providing better training to lawyers who represent children in the juvenile system is a necessary first step to taking juvenile competency seriously. In any event, trying to rush to judgment and ignore the very compelling limitations juveniles with FASD exhibit, or young and immature juveniles exhibit, would be tantamount to turning back the hands of time and failing to comply with or recognize the constitutional rights defined by the U.S. Supreme Court dating back to *Gault*. However difficult, time-consuming, and costly it may be to properly identify, assess and diagnose children with FASD and comorbid conditions, if the U.S. juvenile justice system fails to address this, these children—left undiagnosed and untreated—will likely find their way into further criminal misconduct in adulthood,[223] and the price to be paid by victims and society as a whole[224] will likely far exceed the costs of timely addressing this during childhood and adolescence.[225] What would be the measure of a due process right for adolescents to challenge their competency only to learn that juvenile justice systems refuse to assess, diagnose, and treat those who may benefit from access to treatment while simply transferring the cases with the most serious charges into adult courts where understanding adolescence plays a de minimis role? Surely, we need not continue to mimic Plato's blind men feeling their way along the road.[226]

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[222] *See* Mela et al., *supra* note 84; Bower et al., *supra* note 219.

[223] *See* Task Force on Cmty. Preventive Servs., *Recommendation Against Policies Facilitating the Transfer of Juveniles from Juvenile to Adult Justice Systems for the Purpose of Reducing Violence*, 32 AM. J. PREVENTIVE MED. (SUPPLEMENT) S5 (2007).

[224] *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, 489–90 (2005).

[225] *See generally* Robert John Zagar, William M. Grove & Kenneth G. Busch, *Delinquency Best Treatments: How to Divert Youths from Violence While Saving Lives and Detention Costs*, 31 BEHAV. SCI. & L. 381 (2013).

[226] PLATO, *supra* note 38, at 216.

APPENDIX

Country	Age	Citation & Notes
Afghanistan	12 years old	Afghanistan's Juvenile Code, adopted in 2005, provides that no child younger than 12 years old may be held criminally responsible. JUVENILE CODE art. 5(1) (Afg.). *But see* Comm. on the Rights of the Child, Consideration of Reps. of States Parties Under Art. 44: Afghanistan, ¶¶ 74, 75, U.N. Doc. CRC/C/AFG/CO/1 (2011) (expressing concern with the number of children younger than 12 years old who had been placed in detention centers).
Bahamas	10 years old	Penal Code, 1873–0015, S.L.B. ch. 84, tit. vi, § 91(1) (2010) (Bah.) ("Nothing is an offence which is done by a person under ten years of age."); *see also id.* § 91(2) ("Nothing is an offence which is done by a person of or above seven years of age and under twelve years of age, who has not attained sufficient maturity of understanding to judge of the nature and consequences of his conduct in the matter in respect of which he is accused.").
Bangladesh	9 years old	Penal Code, 1860 (Act No. XLV/1860) ch. IV, § 83 (Bangl.) ("Nothing is an offence which is done by a child above [nine] years of age and under twelve, who has not attained sufficient maturity of understanding to judge of the nature and consequences of his conduct on that occasion."). Bangladesh amended its Penal Code in 2007, changing the minimum age of criminal responsibility from seven years old to nine years old. Penal Code (Amendment) Act, 2004 (Act No. XXIV/2004), §§ 2, 3 (Bangl.).
Barbados	11 years old	Pursuant to the Barbados Juvenile Offenders Act, a "child who is not, in the opinion of the court, above the age of 11 years and of sufficient capacity to commit crime" may not be punished for any offense. Juvenile Offenders Act, 1932-8, L.R.O. Cap. 138 (1998) § 79 (Barb.).
Brazil	18 years old	Brazil's Constitution sets the minimum age of criminal responsibility at 18 years old. CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 228 (Braz.). Nevertheless, the country's Child and Adolescent Statute provides for various "socio-educative measures" for children older than 12 years old, including community service and partial or total institutionalization in socio-educative facility. Lei No. 8.069, de 13 de Julho de 1990, Diário Oficial da União [D.O.U.] de 16.07.1990, pág. nº 13563, arts. 2, 112 (Braz.).

Brunei	7 years old	Penal Code, 1951, 5 B.L.R.O. Cap. 22 § 82 (2021) (Brunei) ("Nothing is an offence which is done by a child under the age of 7 years."); *see also Brunei: Tough Islamic Penal Code Introduced*, CHILD RTS. INT'L NETWORK (Apr. 30, 2014), https://archive.crin.org/en/library/news-archive/brunei-tough-islamic-penal-code-introduced.html (discussing the effects of the Syariah Penal Code Order, which came into force on May 1, 2014, on sentencing provisions for juveniles).
Chile	18 years old	While Chile defines the minimum age of criminal responsibility as 18, it also provides that individuals who, at the time the crime was initiated, are over 14 years old, may be subject to a variety of sanctions, including socio-educative measures. Law No. 20.084 art. 6, Noviembre 28, 2005, DIARIO OFICIAL [D.O.] (Chile).
People's Republic of China	10 to 16 years old	The age of criminal responsibility in China is 16 years old. Xíngfǎ (**刑法**) [Criminal Law] (promulgated by the Standing Comm. Nat'l People's Cong., July 1, 1979, rev. by Order No. 83, effective Mar. 14, 1997), art. 17 (China). In Hong Kong, the age of criminal responsibility is 10 years old. Juvenile Offenders Ordinance, (2022) Cap. 226, 4, § 3 (H.K.). In Macau, persons under the age of 16 cannot be held criminally liable. CÓDIGO PENAL [Penal Code], art. 18 (Mac.). *But see* Lei n.° 2/2007 de 3 de Abril de 2007 [Act no. 2/2007 of 3 April], art. 1, no. 2, https://bo.io.gov.mo/bo/i/2007/16/lei02.asp?printer=1 (Mac.) (establishing an education scheme for offenders between the age of 12 and 16).
Comoros	13 to 15 years old	The Comoros Penal Code provides that the minimum age of criminal responsibility is 13. CODE PENAL [C. PÉN.] [PENAL CODE] art. 51 (Comoros). However, "the Criminal Code and Islamic law are both legally recognized sources, and there are no fixed age limits under Muslim law. Physical maturity or the age of 14–15 years confers criminal responsibility on boys, while marriage at any age confers criminal responsibility upon girls." DON CIPRIANI, CHILDREN'S RIGHTS AND THE MINIMUM AGE OF CRIMINAL RESPONSIBILITY: A GLOBAL PERSPECTIVE 194–95 n.27 (2009).
Democratic Republic of the Congo	14 years old	Loi 09-001 du 10 janvier 2009 portant protection de l'enfant [Law 09-001 of January 10, 2009 on Protection of the Child], JOURNAL OFFICIEL DE LA RÉPUBLIQUE DÉMOCRATIQUE DU CONGO [OFFICIAL JOURNAL OF THE

		DEMOCRATIC REPUBLIC OF CONGO], Jan. 12, 2009, p. 30, art. 95 (Dem. Rep. Congo) (providing that a child under the age of 14 benefits from an irrebuttable presumption of irresponsibility in criminal matters). *But see* Comm. on the Rights of the Child, Concluding Observations on Second Periodic Reps. of States Parties Under Art. 44: Democratic Republic of Congo, ¶ 90, U.N. Doc. CRC/C/COD/CO/2 (2009) (expressing concern with the fact that "children below 14 years are being charged" due to the country's failure to implement its legislation).
Cyprus	14 years old	In 2006, Cyprus increased the minimum age of criminal responsibility from 7 years old to 14 years old. Criminal Code, 1959 Cap. 154, 15 § 14 (Cyprus) ("A person under the age of seven years is not criminally responsible for any act or omission."), *amended by* Criminal Code (Amendment) Law No. 18(I)/2006 (Cyprus).
Czech Republic	15 years old	Trestní zákon [Criminal Code], provision 11, Zákon č. 140/1961 Sb. (Czech) (providing that, where the crime was committed before the child was 15 years old, the child will not be criminally liable).
Denmark	15 years old	STRAFFELOVEN [CRIMINAL CODE] ch. III, § 15 (Den.). Denmark lowered the age of criminal responsibility to 14 years old in July 2010, but the Danish Parliament subsequently raised it to 15 years old in March 2012. *See generally* Anna Piil Damm, Britt Østergaard Larsen, Helena Skyt Nielsen & Marianne Simonsen, *Lowering the Minimum Age of Criminal Responsibility: Consequences for Juvenile Crime and Education* (AARHUS Univ., Econ. Working Paper No. 2017-10, 2017) (analyzing the effects of the changes in legislation on the rates of juvenile offenses).
Egypt	12 years old	Law No. 12 of 1996 (Promulgating the Child Law), *al-Jarīdah al-Rasmīyah*, vol. 39, 28 Mar. 1996, art. 94 (Egypt) ("Criminal responsibility shall not apply to the child who has not reached the age of twelve (12) years at the time of committing the crime.").
France	10 years old	France's Penal Code does not set a threshold for a minor to be found criminally liable. *See* CODE PENAL [C. PÉN.] [PENAL CODE] art. 122-8 (Fr.) (providing that "[m]inors capable of discernment" are criminally responsible). However, a 1945 order relating to juvenile delinquency outlines possible sentences for juveniles based on their age. Ordonnance n°45-174 du 2 février 1945 relative à l'enfance délinquante [Ordinance No. 45-174 of February

		2, 1945 Relating to Delinquent Childhood], https://www.legifrance.gouv.fr/loda/article_lc/LEGIARTI000033460037/2017-08-22 (providing that minors under 10 years old may only be subject to educational assistance measures).
Gambia	12 years old	Children's Act, No. 90620 (2005) GAMBIA GAZETTE No. 13 § 209 (Gam.) ("The minimum age of criminal responsibility is twelve years.").
Ghana	12 years old	Criminal Code (1960) Cap. V § 26 (Ghana) ("Nothing is a crime which is done by a person under twelve years of age."). Thus, "A., aged eleven years administers poison to B. A. is deemed not criminally responsible and considered incapable of understanding the consequences of his actions from a legal perspective." *Id.* § 26 illus.
Greece	13 years old	POINIKOS KODIKAS [P.K.] [CRIMINAL CODE] 8:126(1) (Greece) (providing that an offense committed by a minor between the ages of 8 and 13 shall not be imputed to him or here). For minors who have committed a criminal act before the age of 15, only reformative or therapeutic measures are imposed. *Id.* 8:126(2). However, "[i]f from the circumstances under which the offence was committed and the entire personality of the offender the court finds that penal correction of the juvenile is necessary in order to prevent him/her from committing further offences, it shall sentence him/her to detention in a correctional institution." *Id.* 8:127(1).
Grenada	7 years old	Grenada's Criminal code sets the minimum age of criminal responsibility at seven years old. Criminal Code, No. 76 (1958) Cap. 72A § 50(1) (Gren.). In 2012, the country made significant amendments to the juvenile justice system with the enactment of the Juvenile Justice Act. *See, e.g.*, Juvenile Justice Act, No. 24 (2012) GRENADA GAZETTE 605, 654–55 § 46(1) (Gren.) ("The criminal responsibility of a child under the age of twelve years shall be proved by the State beyond reasonable doubt."); *id.* § 46(2), (4) (permitting requests for an assessment of the child's cognitive, emotional, psychological, and social development in determining whether a child under the age of 12 can be held criminally responsible). Nevertheless, the absolute minimum age remains at seven years old.
Guatemala	13 years old	Pursuant to Guatemala's Constitution, minors may not be held criminally responsible. CONSTITUTIÓN POLÍITICA DE LA REPÚBLICA DE GUATEMALA tit. II, ch. I, art. 20, 31 May 1985, as amended by Decreto No. 18-93, Nov. 17, 1993.

		But see Decreto No. 27-2003, 19 June 2003, Ley de Proección Integral de la Niñez y la Adolescenia [PINA] [Law for the Comprehensive Protection of Children and Adolescents] tit. II, ch. III, sec. II, art. 162 (Guat.) (providing that adolescents—defined as any person between the age of 13 and 18—may be detained in institutions).
Hungary	12 years old	Hungary's Criminal Code provides that children aged 12 years old and older may be held criminally responsible for certain crimes. 2012. évi C. törvény a Büntető Törvénykönyv (Act C of 2012 on the Criminal Code) § 16 (Hung.) (providing that, from the age of 12, a person may be held criminally responsible for homicide, homicide in the heat of passion, causing bodily harm, terrorist acts, robbery, or robbery of a vulnerable person, provided the he or she possessed the capacity to understand the nature and consequences of the acts).
India	7 years old	Indian Penal Code, 1860, §82 (India) ("N]othing is an offence which is done by a child under seven years of age."). *But see id.* §83 ("Nothing is an offence which is done by a child above seven years of age and under twelve, who has not attained sufficient maturity of understanding to judge of the nature and consequences of his conduct on that occasion.").
Indonesia	12 years old	Law on the Child Criminal Justice System, Law No. 11/2012, art. 1, ¶ 3 (July 7, 2012) (Indon.). Prior to 2012, the minimum age was eight, but the Indonesian government committed to revise its 1997 Juvenile Court Act and raise the minimum age to 12 in 2012. U.N. Doc. Comm. on the Rights of the Child, Consideration of Reps. of States Parties Under Art. 44: Indonesia, ¶ 165(a), CRC/C/IDN/3–4 (2012).
Iran	~8 to ~14 years old	The Civil Code defines puberty as 15 lunar years (14 years and 7 months) for boys and 9 lunar years (8 years and 9 months) for girls. QANUNI MADANI [CIVIL CODE] 1314 [1935], art. 147 (Iran).
Ireland	10 years	In 2001, Ireland raised the age of criminal responsibility from seven years old to 12 years old, meaning that children up to age of 12 cannot be charged with a criminal offense. Children Act, 2001 (Act No. 24/2001) § 52 (Ir.). That said, the Criminal Justice Act of 2006 amended § 52 of the Children Act to allow for children as young as 10 years old to be charged with certain offenses. Criminal Justice Act, 2006 (Act No. 26/2006) § 129 (Ir.) (providing that the prohibition on charging children younger than 12

		years old "does not apply to a child aged 10 or 11 years who is charged with murder, manslaughter, rape, . . . or aggravated sexual assault"); *see also id.* (requiring the consent of the Director of Public Prosecutions in the prosecution of a child under the age of 14).
Japan	14 years old	Japan's Penal Code provides that no child may be held criminally responsible for any act carried out while under the age of 14 years old. KEIHŌ [KEIHŌ] [PEN. C.] 1907, art. 41 (Japan).
Jordan	12 years old	Although Jordan's Penal Code sets the minimum age of criminal responsibility at seven years old, the Juvenile Law of 2014 raised the age to 12 years old, explicitly preempting the Code. Juvenile Law, No. 32 (2014) OFFICIAL GAZETTE No. 5310, art. 4(b) ("Despite what is stated in any other legislation, a person under the age of 12 shall not be criminally prosecuted.").
Kenya	8 years old	Kenya's Penal Code provides: (1) A person under the age of eight years is not criminally responsible for any act or omission. (2) A person under the age of twelve years is not criminally responsibility for an act of omission, unless it is proved that at the time of doing the act or making the omission he had capacity to know that he ought not to do the act or make the omission. (3) A male person under the age of twelve years is presumed to be incapable of having carnal knowledge. Penal Code (2012) Cap. 63 § 14 (Kenya). The provision in § 14(3) relates to the prosecution of younger boys for certain sexual offenses. *See Minimum Ages of Criminal Responsibility in Africa*, CHILD RTS. INT'L NETWORK, https://archive.crin.org/en/home/ages/Africa.html (last visited May 21, 2023).
Kuwait	7 years old	Penal Code (Law No. 16 of 1960) art. 18 (Kuwait) (providing that a child younger than seven years old may not be held criminally responsible in any regard). Pursuant to the Juveniles Act of 1983, which added various protective measures for juveniles charged with criminal offenses, the court may elect to only impose nonpunitive measures on children between seven years old and 15 years old (rather than the punitive sanctions contained in the Penal Code). Juveniles Act (Law No. 3 of 1983), art. 6 (Kuwait).

Lebanon	7 years old	Law No. 422/2002 (Protection of Juveniles in Conflict with the Law or at Risk) art. 3 (Leb.).
Lesotho	10 years old	Children's Protection and Welfare Act 7 of 2011 §§ 79(1) (Lesotho) ("No child below the age of ten years shall be prosecuted for a Criminal offence."). The Act requires additional protective measures for juveniles younger than 14 years old: > No prosecution for a criminal offence may be instituted against a Child between the ages of ten and fourteen until an inquiry magistrate is satisfied that the child possesses the capacity to appreciate the difference between right and wrong and has the ability to act in accordance with that appreciation. > . . . . > It shall be presumed that a child between the ages of ten and fourteen lacks the capacity to appreciate the difference between right and wrong . . . . *Id.* § 79(2), (4).
Libya	14 years old	Libya's Criminal Code provides that juveniles who have not attained the age of 14 years old shall not be held criminally responsible, although the judge may take necessary "protective measures" if the juvenile was at least seven years old at the time of commission of the act. Law No. 48 of 1956 (Criminal Code), *al-Waqā'i'al-Mis. rīyah*, 1 Jan. 1954, arts. 80 (Libya); *see also id.* art. 81 (providing that juveniles between the age of 14 and 18 may be held criminally responsible, but that the penalty shall be reduced by two-thirds).
Malaysia	10 years old	The minimum age of responsibility in Malaysia depends on which branch of the law is applicable, due to the country's dual system of secular and Islamic law. *Compare* Penal Code, No. 574, (1936) F.M.S. Cap. 45, § 82 (Malay.) ("Nothing is an offence which is done by a child under ten years of age."), *with* Syariah Criminal Offences (Federal Territories) Act 1997, No. 251 (2013) F.M.S. Cap. VII, § 51 (Malay.) ("Nothing is an offence which is done by a child who [has not attained the age of puberty according to Islamic Law].").

Malawi	10 years old	Penal Code (1930), L.R.O. 1/2015, ch. IV, § 14(1) (Malawi) ("A person under the age of ten years is not criminally responsible for any act or omission."); *see also id.* § 14(2) ("A person under the age of fourteen years is not criminally responsible for an act or omission unless it is proved that at the time of doing the act or making the omission he had capacity to know that he ought not to do the act or make the omission."). In 2010, Malawi enacted a number of law reform processes to bring the country's Penal Code as applied to juvenile offenders—including raising the age of criminal responsibility from seven years old to ten years old—in line with the Convention on the Rights of the Child. Child Care, Protection and Justice Act, 2010 (Act No. 22/2010) pt. 3 (Malawi). *See generally* Comm. on the Rights of the Child, Consideration of Reps. of States Parties Under Art. 44: Malawi, ¶¶ 4–5, 105–09, U.N. Doc. CRC/C/MWI/3-5 (2016).
Maldives	15 years old	While the Maldives' Penal Code does not explicitly establish a minimum age of criminal responsibility, it provides for an immaturity defense. Penal Code, 2014 (Law No. 6/2014) §53(a) (Maldives). Individuals younger than 15 years old are presumed to have satisfied the requirements of the defense and thereby excused of liability for a criminal offense. Individuals younger than 18 years old are also presumed to have satisfied the requirements of the defense, but the prosecution may rebut the presumption. *Id.* §53(b)(1), (2).
Myanmar	10 years old	In 2019, Myanmar raised the age of criminal responsibility from seven years old to ten years old. Child Rights Law, 2019 (Law No. 22/2019) § 78(a) (Myan.) ("No actions of a child who has not attained the age of 10 years shall constitute a crime.").
Namibia	7 years old	A child over the age of seven years old may be convicted of a crime in Namibia. Comm. on the Rights of the Child, Consideration of Reps. of States Parties Under Art. 44: Namibia, ¶ 40, U.N. Doc. CRC/C/3/Add.12 (1993). In 2015, Namibia promulgated the Child Care and Protection Act, which *inter alia* substantially amended the country's sentencing procedures for juveniles. Child Care and Protection Act, No. 3 (2015) NAMIBIA GAZETTE No. 5744, pt. 2 (Namib.). The Act came into effect in 2019. Commencement of Child Care and Protection Act, 2015 (2019) NAMIBIA GAZETTE No. 6829, Government Notices No. 4 (Namib.).
New Zealand	10 years old	Children, Young Persons, and Their Families Act 1989, s 272(1)(a) (N.Z.) (providing that criminal proceedings

		may only be commenced in three situations, the youngest of which is "where the child is of or over the age of 10 years, and the offence is murder or manslaughter").
North Korea	15 years old	HYEONGBEOB [CRIMINAL LAW] 2009, art. 11 (N. Kor.); *see also* Comm. on the Rights of the Child, Consideration of Reps. of States Parties Under Art. 44: Democratic People's Republic of Korea, ¶¶ 14, 232–40, U.N. Doc. CRC/C/PRK/4 (2008) (addressing the effects of reforms to the Criminal Law in 2004 on juvenile justice).
South Korea	14 years old	Hyeongbeob [Criminal Act] art. 9 (S. Kor.). The Korean Ministry of Justice recently announced plans to lower the minimum age of criminal responsibility from 14 years old to 13 years old. *See* Lee Jung-Youn, *Ministry Eyes Allowing Younger Teens to Face Criminal Trials*, KOR. HERALD (Oct. 26, 2022, 5:51 PM), https://www.koreaherald.com/view.php?ud=20221026000594.
Nigeria	7 years old	Because Nigeria's federal law does not specify a minimum age of criminal responsibility, the age varies among Nigerian states. *See* Children's Rights Act (2003) Cap. (A451), § 204 (Nigeria). In southern states, the Criminal Code Act of 1916 sets the minimum age at seven years old. Criminal Code Act (1916) Cap. (C.38), § 30. In northern states, the Penal Code of 1960 also sets the minimum age at seven years old. Penal Code (Northern States) Federal Provisions Act (No. 25 of 1960) Cap. (P3), art. 50. Nevertheless, a number of individual Nigerian states have modified the definition of a juvenile, and have set different minimum ages of criminal responsibility. *See generally* CHILD RTS. INT'L NETWORK, INHUMAN SENTENCING OF CHILDREN IN NIGERIA: BRIEFING FOR THE 17TH SESSION OF THE HUMAN RIGHTS COUNCIL UNIVERSAL PERIODIC REVIEW 1–2 (2013).
Pakistan	10 years old	Pakistan amended its Penal Code in 2016 to raise the minimum age of criminal responsibility from seven years old to ten years old. PAK. PENAL CODE (1860), §§ 82, 83, *amended by* Criminal Laws (Amendment) Act, No. X of 2016, §§ 2, 3 (Pak.).
Papua New Guinea	7 years old	CRIMINAL CODE, Act of 1974, as amended § 30(1) (Papua N.G.) ("A person under the age of seven years is not criminally responsible for any act or omission."); *see also id.* § 30(2) ("A person under the age of 14 years is not criminally responsible for an act or omission, unless it is proved that at the time of doing the act or making the omission he had capacity to know that he ought not to do the act or make the omission.").

Peru	12 years old	Peru's Criminal Code provides that individuals under the age of 18 are exempt from criminal liability and subject to the Code's reduced sentencing guidelines, which may include sanctions constituting a deprivation of liberty. CÓDIGO PENAL [CÓD. PEN.] [CRIMINAL CODE], Law No. 635 arts. 20(2), 22, Abril 3, 1991 (Peru); *see also* CÓDIGO DE LOS NIÑOS Y ADOLESCENTES [CHILD & ADOLESCENCE CODE], Law No. 27337 art. IV (Diario Oficial del Bicentenario, El Peruano, 2000) (Peru) (providing that, in the case of a violation of criminal law, adolescents may be subject to protective and socio-educational measures); *id.* art. I (defining adolescents as between the age of 12 and 18).
Poland	15 years old	Poland's Penal Code only applies to individuals who are 17 years old or older. KODEKS KARNY [PENAL CODE] art. 10, § 1 (Pol.). However, children aged 15 years old or older may be criminally liable "if deemed appropriate given the circumstances of the case and the level of mental development of the ofender, the characteristics and personal situations, and especially if previously attempts at educational or correctional measures have been ineffective." *Id.* art. 10, § 2.
Qatar	7 years old	Law No. 14 of 1971, as amended by Law No. 2 of 2004, art. 53 (Penal Code), *al-Waqā'i'al-Mis. rīyah* (Qatar) ("If a juvenile is under seven years old when committing the crime, he shall not be considered responsible from a penal point of view.").
Russia	14 years old	The age of criminal responsibility in Russia is 16 years old. UGOLOVNYĬ KODEKS ROSSIĬSKOĬ FEDERATSII [UK RF] [Criminal Code] art. 20, ¶ 1 (Russ.). However, a child who, at the time of commission of the crime, was at least 14 years old, may be held criminally responsible for a number of specific offenses. *Id.* art. 20, ¶ 2 (including homicide, intentional infliction of grave bodily injury causing an impairment of health, intentional infliction of bodily injury of average gravity, kidnapping, rape, sexual assault, theft, robbery, brigandism, racketeering, unlawful occupancy of a car or any other transport vehicle without theft, intentional destruction or damage of property under aggravating circumstances, terrorism, seizure of a hostage, making a deliberately false report about an act of terrorism, hooliganism under aggravating circumstances, and vandalism).
Seychelles	7 years old	Penal Code (Act No. 12/1952) Cap. 158 § 15 (Sey.) ("A person under the age of seven years is not criminally responsible for any act or omission. A person under the

		age of twelve years is not criminally responsible for an act or omission, unless it is proved that at the time of doing the act or making the omission he had capacity to know that he ought not to do the act or make the omission.").
Singapore	10 years old	Singapore raised the age of criminal responsibility from seven years old to ten years old in 2019. Penal Code, 1871, Sing. Stats. ch. 4, § 82 (rev. ed. 2020) (Sing.) ("Nothing is an offence which is done by a child below 10 years of age."). *See generally* Tan Tam Mei, *Parliament: Minimum Age of Criminal Responsibility to Be Raised from 7 to 10*, STRAITS TIMES (May 7, 2019, 8:27 AM), https://www.straitstimes.com/politics/parliament-minimum-age-of-criminal-responsibility-to-be-raised-from-7-to-10. Regarding sentencing procedures and punitive measures for juvenile offenders, see Children and Young Persons Act, 1993, Sing. Stats. pt. 3, § 34 (rev. ed. 2020) (Sing.). The Act provides, for example, "[a] court is not to order a child below 10 years of age to be sent to a juvenile rehabilitation centre." *Id.* § 34(2).
South Africa	10 years old	Child Justice Act 75 of 2008 § 7(1) (S. Afr.) ("A child who commits an offence while under the age of 10 years does not have criminal capacity and cannot be prosecuted for that offence."). Section 9 of the Child Justice Act lays out specific procedures that law enforcement officers must take in dealing with children younger than ten years old. *Id.* § 9.
Sudan	12 years old	Sudan amended its Penal Code in 2020 to raise the age at which minors may be held criminally liable from seven years old to 12 years old. Miscellaneous Amendments Law of 2020, No. 12 (2020) SUDAN GAZETTE No. 1904 pt. 2, § (A)(2).
Swaziland	12 years old	Pursuant to the Children's Protection and Welfare Act of 2012, the minimum age of criminal responsibility is 12 years old. Children Protection and Welfare Act, 2012, S.G.G. SUPP. No. 121 § 79(1) (Swaz.). Further, a child between the ages of 12 years old and 14 years old is presumed to lack criminal responsibility, unless the prosecution can prove the contrary beyond reasonable doubt. *Id.* § 79(4).
Sweden	15 years old	Sweden's Penal Code provides that no child may be sanctioned for a criminal offense committed while under the age of 15. BROTTSBALKEN [BRB] [PENAL CODE] 1:6 (Swed.). Sweden has complex sentencing procedures which afford juveniles additional protections. *See* Nils Jareborg, *Sweden: Criminal Responsibility of Minors*, 75

		REVUE INTERNATIONALE DE DROIT PÉNAL 511, 518–25 (2004).
Switzerland	10 years old	SCHWEIZERISCHES STRAFGESETZBUCH [STGB] [CRIMINAL CODE] Dec. 21, 1937, SR 757 (1938), *as amended by* Gesetz, June 20, 2003, RS 311.1 (2003), art. 3, para. 1 (Switz.) (providing that the juvenile offender provisions of the Criminal Code only apply to children between the ages of 10 years old and 18 years old).
Syria	7 years old	Syria's Juvenile Delinquents Act provides that a child younger than seven years old does not bear any criminal responsibility. Law 18 of 1974 (Juvenile Delinquents Act) art. 2, amended by Decree No. 52 of 2003 (Syria). Children between the ages of seven years old and 18 years old may be prosecuted for any felonies or misdemeanors, but are only subject to reform measures (e.g., directing custody to different family members, reprimand to a juvenile reform institution, etc.). *Id.* arts. 3–28. *See generally* U.N. Dev. Programme, *Support to Juvenile Justice in Syria*, U.N. Doc. No. SYR/10/003 (2012).
Tanzania	10 years old	Penal Code (1945) Cap. 16 § 15(1) (Tanz.) ("A person under the age of ten years is not criminally responsible for any act or omission.").
Thailand	12 years old	In 2022, Thailand raised the age of criminal responsibility from seven years old to 12 years old. Criminal Code (Amendment Act) No. 29, THAI ROYAL GAZETTE, B.E. 2565 (2022) § 73 (Thai.)
Tonga	7 years old	Criminal Offences Act Cap. 10.09 (rev. ed. 2016) § 16(1) (Tonga) ("Nothing shall be deemed an offence which is done by a person under 7 years of age.").
Turkey	12 years old	CEZA KANUNU [PENAL CODE] art. 31 (Turk.). In Turkey, adolescent offenders between the ages of 12 years old and 15 years old are evaluated by a forensic specialist who determines whether the child understood the consequences of what they were doing and that it was criminal. *See generally* Brenda McKinney & Lauren Salins, *A Decade of Progress: Promising Models for Children in the Turkish Juvenile Justice System*, 12 UCLA J. ISLAMIC & NEAR E.L. 13, 20 (2013).
Trinidad & Tobago	7 years old	Summary Courts Act, 1918, L.R.O. ch. 4:20. § 2 (2016) (Trin. & Tobago) (defining "child" as "any person who, in the opinion of the Court before whom he appears is brought, is above seven and under fourteen years of age"); *see also* Comm. on the Rights of the Child, Consideration of Periodic Reps. of States Parties Under Art. 44: Trinidad

		and Tobago, ¶¶ 248–49, U.N. Doc. CRC/C/83/Add.12 (2004). Courts presume that children between the ages of seven years old and 14 years old cannot be held criminally responsible, but this presumption may be overcome by a showing that the child knew that his or her act was seriously wrong at the time of commission. *See* Mary Childs, *House of Lords: C v. DPP [1996] 2 All ER 43*, 17 LAW SOC. WELFARE & FAM. L. 461 (1995).
United Arab Emirates	7 years old	Juvenile Delinquency and Vagrants Act, 1976 (Law No. 9) art. 7 (U.A.E.) ("If the juvenile, who completed the age of seven and didn't reach the age of sixteen, perpetrated a crime sanctioned by the penal law or in any other law, the judge shall order to take the measures he deems adequate.").
United Kingdom	10 to 12 years old	In Northern Ireland, England, and Wales, children can be held criminally responsible from the age of ten. Children and Young Persons Act 1933, 23 & 24 Geo. 5 c. 12, § 50 (Eng.). In Scotland, "[a] child under the age of 12 years cannot commit an offence." Criminal Procedure (Scotland) Act 1995, (ASP 7) § 41 (Scot.). Further, "[a] child aged 12 years or more but under 16 years may not be prosecuted for any offence except on the instruction of the Lord Advocate." *Id.* § 42(1).
Yemen	7 years old	Republican Decree 12 of 1994 art. 31 (Crimes and Penalties) (Yemen) ("Any person who has not reached the age of seven years old is not accountable at the time of the act that constituted the crime."). The decree provides for different sentencing procedures based on the age of the minor when the offense was committed. For example, for children between the ages of seven years old and 15 years old, "the Judge may order any of the arrangements stipulated in the Law of Juveniles in lieu of the normal punishment for the crime." For children between the ages of 15 years old and 18 years old, " [they] shall be sentenced to a maximum of half the punishment set forth legally." *Id.*
Zambia	8 years old	Zambia's Penal Code Act provides that a child "under the age of eight years is not criminally responsible for any act or omission." Penal Code Act, Cap. 87 (1953) § 14(1) (Zam.). A child older than eight but younger than 12 "is not criminally responsible for any or omission, unless it is proved that at the time of doing the act or making the omission he had capacity to know that he ought not to do the act or make the omission." *Id.* § 14(2). *See also id.* § 14(3) (providing that a male child under the age of 12 is presumed incapable of having "carnal knowledge").