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Adjudicative Competence in the Modern Juvenile Court

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INTRODUCTION

The touchstone of Anglo-American jurisprudence is that criminal defendants must be competent to stand trial.1 Dating as far back as fourteenth century England, defendants in criminal cases were given the opportunity for meaningful participation in their case out of recognition that anything less would render the right to trial an empty right.2 Today, it is unconstitutional to try an incompetent defendant: “fundamental to the adversary system of justice”3 is the requirement that the defendant have a rational and factual understanding of the proceedings against him, and the ability to consult with counsel and assist in preparing his defense.4 As the “most significant mental health inquiry pursued in the system of criminal law,”5 approximately 60,000 pretrial competency evaluations are conducted each year.6

The adjudicative competence doctrine serves at least three important interests.7 First, it ensures that defendants are able to assist in their defense, which helps guarantee accurate adjudications.8 An incompetent defendant may not, for example, be able to direct his attorney to relevant information or witnesses. Second, it increases the likelihood that a defendant’s decisions (e.g., whether to accept a plea bargain) are, in fact, autonomous decisions reflecting his or her wishes.9 Third, it preserves the dignity of the criminal justice process by ensuring that defendants have a moral understanding of the purposes of the proceedings against them.10

Despite the constitutional significance of adjudicative competence with respect to adult criminal defendants, incompetent juveniles are adjudicated in juvenile courts across the nation every day. Established in 1899, the modern juvenile court was designed to effect rehabilitative, non-punitive adjudications that take into account juveniles’ incompetence and immaturity. Indeed, the assumption of adolescent incompetence is at the heart of the juvenile court system.

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2 See id. at 76.
3 See id. at 76.
4 See id.
5 See id.
6 See id.
7 See id.
8 See id.
9 See id.
10 See id.
In other words, because the “values underlying the doctrine of adjudicative competence in criminal cases are closely tied to the logic of the adversary system,” juvenile court proceedings were designed to be largely non-adversarial.

Perhaps for these reasons, the Supreme Court has never addressed whether the adjudicative competence requirement also applies to juvenile proceedings. In In re Gault, the U.S. Supreme Court extended to juveniles the constitutional due process rights of notice of charges, assistance of counsel, confrontation and cross-examination of witnesses, and the privilege against self-incrimination. In re Winship further established that guilt must be proved beyond a reasonable doubt in delinquency proceedings. Although these cases established due process safeguards in juvenile delinquency proceedings, the Court has never enunciated a decision regarding juvenile competency to stand trial, thus leaving the states to shape the doctrine vis-a-vis its application in the juvenile court.

Recently, the jurisprudential landscape has been shifting, with state courts and legislatures recognizing that the adjudicative competence requirement should also be applied to delinquency proceedings in the juvenile court. This new jurisprudence is the result of rather dramatic changes over the last two decades in the nature, purposes, and consequences of juvenile court adjudications. Juvenile adjudications, which increasingly resemble criminal convictions, now have far more serious ramifications. Consequences of a juvenile adjudication may include open hearings and no guarantee of confidentiality or expungement of court records, a long-term determinate sentence in a juvenile correctional facility, use of juvenile adjudications to enhance an adult sentence, and the possibility that a juvenile adjudication may count as a “strike” under the three strikes laws in some states. In addition, some states have moved towards “blended sentencing” systems, which allow juvenile courts to impose lengthy adult sentences in certain types of cases. Thus, despite the lack of U.S. Supreme Court precedent on the issue, many commentators argue “the due process clause bars adjudication of delinquency against a child who lacks the minimum capacity to understand the proceedings and participate in their own defense.”

As juvenile justice systems across the country become more punitive and courts hold that juveniles are entitled to adult-like levels of due process protection, the adjudicative competence of juveniles has increasingly come into question. This article provides an overview of the principles of adjudicative competence and how these principles are applied in the adult context and how these principles should be applied in the juvenile courts, in order to provide coherent guidance to an area of the law that is not yet well-defined. This overview serves as a background for a detailed discussion of the state of Virginia’s recent experience in passing legislation that sets the legal standard for juvenile adjudicative competence. Virginia’s own successes and failures serve as an example to other states that may follow.

Part I of this article provides an overview of adult adjudicative competence jurisprudence in the criminal court. As the arena in which the doctrine has traditionally been applied, it is the starting point for the application of the doctrine in the juvenile court. Part II reviews the current

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11 Id. at 93.
12 In re Gault, 387 U.S. 1, 31-59 (1967).
15 Bonnie & Grisso, supra note 1, at 94.
state of the law in the 50 states and the District of Columbia, focusing on recent court opinions and legislation that reflect the new jurisprudence of adjudicative competence in the juvenile court as of January of 2002. Parts III and IV discuss empirical research on juveniles’ competence-related capacities in delinquency proceedings and research on competency restoration services for juveniles.

As an example of the issues that arise, Part V focuses on the state of Virginia, and provides an analysis of the legal, clinical, and practical considerations involved when adjudicative competence is required in the juvenile court. Virginia recently enacted comprehensive legislation on juvenile adjudicative competence that set forth legal standards for competence, standards for conducting competency evaluations, a system for restoring incompetent juveniles to competency, and a dispositional system for juveniles found to be unrestorably incompetent. The legislation followed vigorous debate throughout the state and the appointment of a legislative task force that brought together lawyers, advocates, and clinicians for a comprehensive study of the issue. The authors were actively involved in these efforts, serving on the task force, conducting research on adjudicative competence in juveniles, and training lawyers and clinicians throughout Virginia on the implementation of the new juvenile competence law. Part VI then discusses such a statute’s implications for law and forensic practice.

Finally, based on our research and experience, we conclude that the passage of a juvenile competence statute does not necessarily lead to an overwhelming number of juveniles being found incompetent. Nevertheless, with quality training of evaluators and attorneys, further research on clinical components of adjudicative competence in juveniles, and adequate legislative support and funding, a juvenile competence requirement can help ensure for the juvenile a fair trial in the modern juvenile court.

I. ADJUDICATIVE COMPETENCE IN THE CRIMINAL COURT

A. The Legal Standard and Attorney Practices

Unlike the issue of sanity, which is a retrospective inquiry concerned with the defendant’s criminal responsibility, adjudicative competence is only concerned with a defendant’s current capacities in pretrial and trial proceedings. A finding of competency has no bearing on a possible plea of insanity. Competency is distinct from issues concerning the ability to represent oneself, culpability, offense mitigation, or the need for mental health treatment. As a practical matter, however, the competency requirement will have the salutary effect in some cases of diverting mentally ill defendants from the criminal justice system for mental health care.

According to the U.S. Supreme Court, in order to be competent to stand trial, a defendant must have: “sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding;” 16 a “rational as well as factual understanding of the proceedings against him;” 17 and the capacity “to assist in preparing his defense.” 18 In other words, the defendant must understand the nature and purpose of the proceedings, be able to make competent decisions about his defense, and be able to work actively with counsel in preparing his defense.

17 Id.
In practice, however, the bar for competence is set rather low, requiring only a minimal capacity to comprehend and communicate. Even though defense attorneys question the competence of their adult clients in about 8-15 percent of all felony cases, a competency evaluation is requested in only about half of these cases,19 and only about 10-30 percent of defendants evaluated are found to be incompetent.20 The low frequency of incompetency findings occurs despite the fact that the prevalence of low IQ, learning disabilities, brain damage, neuropsychological disorders, and serious mental illness is much higher among criminal defendants than the general population.21 One reason why defense attorneys do not always request a competency evaluation is that, in many cases, initial concerns about competence can be overcome through further consultation with the client and involved family members and others who can provide the attorney with insights as to how best to communicate and work with the client.22 A competence evaluation is not a substitute for the attorney educating the client about the pretrial and trial process.

B. Components of Competence

In addition to the Dusky v. United States and Drope v. Missouri criteria, which provide few specifics about competence, certain abilities have become accepted as part of the adjudicative competence criteria, including the ability to understand the charges, the current legal situation, relevant facts, legal issues and procedures, the roles of court personnel, and potential legal defenses and dispositions.23 In its application, competency has also come to include the defendant’s ability to understand legal strategy and to relate to the defense attorney and communicate effectively, including being able to explain pertinent facts surrounding the alleged offense. It also entails the ability to follow ongoing courtroom proceedings, to tolerate the stress of trial, and to behave appropriately in court.24

Defendants may lack a number of these abilities yet still be found legally competent, even in cases where the defendant may be impaired in making particular key decisions about his own defense (such as whether to plead guilty, or waive the Fifth Amendment right against self-
incrimination). In *Godinez v. Moran*, the U.S. Supreme Court held that the standard for competency to stand trial also applies to competence to waive the rights to counsel or to plead guilty.25 The Court noted, however, that waivers of constitutional rights require the *additional* inquiry of whether such waivers are “knowing and voluntary.”26 Thus, unlike legal scholars, the Court has refused to differentiate varying standards of competence. According to the Court, “[w]hile psychiatrists and scholars may find it useful to classify the various kinds and degrees of competence . . . the Due Process Clause does not impose these additional requirements.”27 From a legal standpoint, therefore, the competency determination is an omnibus one. A defendant is competent for adjudication or he is not; doctrinally speaking, the law does not disaggregate the components of adjudicative competence (e.g., to plead, to testify, to tolerate the stress of trial).

The *Godinez* decision has created a number of practical problems for courts faced with the defendant who, while generally competent, may be incompetent to make certain key decisions concerning his or her defense. Theodore Kaczynski (the Unabomber, a former mathematician who acted upon his objections to modern technology by mailing bombs to scientists and anonymous letters to the media) is a case in point.28 Although Kaczynski was *clearly* competent when it came to an understanding of the nature and purposes of the trial process and was found competent to stand trial by the District Court, a number of clinical evaluators and lawyers questioned his competence to decide whether to mount an insanity defense, which Kaczynski refused to allow his attorneys to do.29 Paranoid schizophrenia may have impaired Kaczynski’s judgment on this and other key decisions surrounding his own defense.

These kinds of situations led Law Professor Richard J. Bonnie to propose a theoretical reformulation of adjudicative competence, defined in terms of the legal and social purposes it is designed to serve. Bonnie’s formulation challenges the position that competence is a single construct: “competence in the criminal process is best viewed as two related but separable constructs” consisting of “a foundational concept of competence to assist counsel and a contextualized concept of decisional competence,”30 each of which includes capacities to understand and reason, and to appreciate one’s legal predicament. In addition, there is a third component: the defendant must be able to make and articulate legal choices.31

According to Bonnie’s formulation, a competent defendant possesses the emotional and cognitive capacities required to share the information and perform the behavior necessary for planning and executing a defense strategy, as well as the cognitive and emotional abilities required for making informed and rational decisions.32 These abilities are context-specific,

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26 Id. at 400-01.
27 Id. at 402.
28 See United States v. Kaczynski, 239 F.3d 1108, 1111-12 (9th Cir. 2001).
29 See William Finnegan, Defending the Unabomber, The New Yorker, March 16, 1998, at 52, 54-55; Michael Mello, The Non-Trial of the Century: Representations of the Unabomber, 24 Vt. L. Rev. 417, 446-54 (2000) (detailing the opinions of experts on Kaczynski’s competency to stand trial). Mello argues that because Kaczynski was found competent to stand trial, his lawyers should not have been able to raise a “mental illness” defense against his will. See id. at 428; Joel S. Newman, Doctors, Lawyers, & the Unabomber, 60 Mont. L. Rev. 67, 78-79 (1999) (detailing the process through which Kaczynski was determined competent to make decisions about his defense).
30 Bonnie, supra note 2, at 294.
31 See id. at 296.
32 See id. at 297. Under Bonnie’s formulation, adjudicative competence includes three components. The first component is competence to assist counsel, which requires (1) an understanding of the basis of the adversarial system and the consequences of a conviction; (2) the ability to understand which facts are relevant to the case; and (3) the ability to assess one’s legal predicament. The second component is decisional competence, which requires (1) the capacity to understand information specific to decisions and to waive the constitutional right to trial by pleading
shaped by the nature of the case, court situation, and penalty. Although Godinez forces courts to make an omnibus determination of competence, lawyers and clinicians alike have found Bonnie’s formulation useful in considering the components of competence and the meaning of competence in practice.

C. Legal Standards in Relation to Clinical Issues

Although a few states predicate a finding of incompetence upon the existence of mental illness or mental retardation, courts do not equate incompetence with any particular mental illness, psychiatric diagnosis, or IQ score. Given that the Supreme Court’s standard established in Dusky and Drope is concerned only with the defendant’s functional capacities in pretrial or trial proceedings, competency depends upon the capacities that the defendant may be called upon to demonstrate, and how the defendant’s mental or physical disability affects those capacities in particular legal contexts (e.g., depending upon the seriousness of the charges and case complexity). A mentally retarded defendant, for example, may be functionally competent for adjudication in a relatively simple felony case, yet be incompetent to stand trial in a more complex case involving more serious charges.

The fact that the defendant is under the influence of psychotropic medication will not bar a finding of competency if the defendant is otherwise competent. Indeed, some mentally ill defendants will require medication to restore and maintain their trial competence. Many states, at common law or by statute, also provide that a defendant’s claimed amnesia about the events surrounding the alleged offense “shall not, by itself, bar a finding of competency,” although amnesia may require a finding of incompetency if there is insufficient reliable extrinsic information available to the defense concerning the circumstances of the offense.

Finally, tests of adjudicative competence are concerned with a defendant’s capacity to participate in the adjudication, not his willingness to participate. For example, a tax protester who refuses to acknowledge the jurisdiction of the court would be considered unwilling to participate, whereas a person with schizophrenia who suffers from a paranoid delusion that the judge is a communist spy would lack the capacity to rationally understand the trial process and would likely be found incompetent.

D. Raising the Competency Issue

The court must hold a competency hearing when the issue of the defendant’s competency is raised, with the burden of proof upon the defendant to show incompetence by a preponderance of the evidence. Because the right not to be adjudicated while incompetent is a constitutional guarantee, officers of the court may be ethically obligated to raise the issue when

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they have reason to doubt a defendant’s competence. It may be raised by the defense attorney, the prosecutor, or the court, and at any time (even multiple times) before and during trial. Typically, it is the defense attorney who requests a pretrial competency evaluation since the defense attorney normally has the first and more frequent contact with the defendant as well as the strongest motivation to raise the issue.

As Bonnie and Thomas Grisso point out, however, parties may have reasons for seeking a competency evaluation above and beyond safeguarding the defendant’s constitutional rights. Defense attorneys may use it as a way to obtain information about the client’s mental status that may be useful as mitigation evidence or in making strategic decisions about the case, or they may view it as an indirect vehicle for obtaining mental health treatment by “disguis[ing] the referral as a forensic question of competence.” Prosecutors and criminal justice personnel may also view a competency evaluation as a vehicle for obtaining treatment for defendants who should be diverted out of the criminal justice system. In these ways, competency evaluations often serve purposes collateral to the competency issue itself and sometimes lead to alternative dispositions for defendants.

E. The Clinical Evaluation of Competency

In accordance with the standard set by the U.S. Supreme Court in Dusky and Drope, most states order a competency evaluation upon the court’s finding of “probable cause to believe that the defendant lacks substantial capacity to understand the proceedings against him or to assist his attorney in his own defense.” Unless the defendant otherwise requires psychiatric hospitalization, the evaluation is performed on an outpatient basis by a licensed clinical psychologist or psychiatrist. Some states also allow non-psychiatrist physicians, master’s level psychologists, or clinical social workers to conduct the evaluation.

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39 Cf. Pate v. Robinson, 383 U.S. 375, 385 (1966) (holding that the court must order inquiry when a “bona fide doubt” exists about a defendant’s competence). But cf. Enriquez v. Procunier, 752 F.2d 111, 114 (5th Cir. 1984) (indicating the defense counsel’s decision not to raise competency issue was a “tactical” one). See also American Bar Association (ABA) Criminal Justice Mental Health Standards, Standard 7-4.2 (3d ed. 1989) (stating that the court, prosecutor, and defense attorney each have an ethical obligation to raise the issue of competency when there is a “good faith doubt” about defendant’s competence). But see Rodney J. Uphoff, The Role of the Criminal Defense Lawyer in Representing the Mentally Impaired Defendant: Zealous Advocate or Officer of the Court?, 1988 Wis. L. Rev. 65, 89-98 (1988) (criticizing the ABA standard and arguing that defense attorneys should not be obligated to raise the issue of competency when doing so is not in client’s best interest); Bonnie, supra note 2, at 303-04 (arguing that the ABA standard should provide greater discretion to defense counsel). The ABA standards acknowledge that there are legitimate reasons why a defense attorney may feel that raising the issue of competence is unnecessary or not in the client’s best interests. See ABA Criminal Justice Mental Health Standards, Standard 7-4.2 commentary at 177 (noting that the defense may not wish to raise the issue of competence due to the stigma of a finding of mental illness, involuntary commitment that may extend beyond the maximum sentence, or the waste of time and resources when a defendant faces minor charges or the prosecution’s case is very weak).

40 See Melton et al., supra note 20, at 125-27.
41 See Bonnie & Grisso, supra note 1, at 76-78.
42 See id. at 78.
44 See Bonnie & Grisso, supra note 1, at 78.
Clinicians have the knowledge and tools to conduct comprehensive competency evaluations that are richly informative to courts. The competency evaluation for an adult defendant typically will assess three domains: (1) the ability to rationally understand the legal process, including the ability to appreciate the significance of the legal circumstances and options, (2) the ability to communicate information to counsel, and (3) the defendant’s reasoning and decision-making capabilities. These domains may be assessed through the use of open-ended questions, structured interview questions, or standardized instruments designed to test adjudicative competence. Prior IQ or educational testing results are frequently consulted, and brief IQ tests are occasionally administered. If deficits in competence-related abilities are found, the evaluator usually will conduct a clinical assessment to diagnose mental disorder, cognitive impairments, or other factors contributing to the deficits.

A number of competence-related assessment instruments—are available, including: the Competency Screening Test, the Competency to Stand Trial Assessment Instrument, the Computer-Assisted Determination of Competency to Proceed Instrument, the Interdisciplinary Fitness Interview, and the Georgia Court Competency Test. The newly developed MacArthur Competence Assessment Tool, Criminal Adjudication (MacCAT-CA), which overcomes many shortcomings of other instruments, is particularly useful because it is a standardized instrument with objective scoring criteria (and norms) that measures understanding, decisional competence, and competence to assist counsel.

Clinicians have methods for detecting malingering among those defendants who feign incompetence in an effort to “beat the rap.” Although a small minority of defendants will attempt to malinger as incompetent, they are rarely successful in doing so because mental health professionals have a variety of techniques in their arsenals for detecting malingering, including psychological assessments that check for over- and under-endorsement of symptoms, interviewing techniques that draw out psychologically inconsistent symptoms, and review of collateral information to validate a defendant’s accounts.


See id. at 138-53; Grisso, supra note 47, at 62-112.

For an evaluation of each of the assessment instruments, see Melton et al., supra note 20, at 139-49; Robert A. Nicholson, Forensic Assessment in Psychology and Law: The State of the Discipline 121, 137-51 (Ronald Roesch et al., eds., 1999).


**F. Factors Relating to Competency**

As an issue so central to the forensic legal system, competency to stand trial “has been among the most thoroughly researched psycholegal issues in the past 20 years.”\(^{53}\) Across all demographic groups, studies have consistently found that incompetence usually is due to low IQ and/or serious mental illness, particularly schizophrenia.\(^{54}\) As a result, attorneys are well advised to question a defendant’s competence in cases where the client has a history of mental retardation, very low educational achievement, or serious mental illness, particularly if the illness has psychotic features. Psychological factors less strongly related, but potentially contributing to competence, may include depression, social withdrawal, and hostility.\(^{55}\)

**G. Court Review of Clinicians’ Reports**

Evaluators provide a written report that goes to the court, and in most states, to defense counsel and the prosecution. The typical report addresses: (1) the defendant’s capacity to understand the proceedings, (2) the defendant’s ability to assist the attorney, and (3) the defendant’s need for treatment to restore his competency if found by the court to be incompetent to stand trial. Because of the Fifth Amendment privilege against self-incrimination, some states explicitly provide that any statements made by the defendant during the evaluation concerning the alleged offense are privileged information not to be included in the evaluator’s report, not discoverable by the prosecution, and not to be used against the defendant at adjudication.\(^{56}\)

The clinician’s report is often dispositive because courts frequently base their determinations of competence on the evaluation provided by the mental health professional.\(^{57}\) However, the extent to which evaluators should give their opinion on the ultimate legal issue of whether the defendant is “competent” for adjudication is controversial in both the legal and mental health communities.\(^{58}\) In any case, the evaluator’s report should contain enough factual information about the defendant’s relevant abilities and impairments to allow the court to make an independent legal determination of the defendant’s adjudicative competence. Reports should identify the specific competence-related abilities in which the defendant is impaired, provide specific recommendations for restoring competency in those areas, and provide an estimate of the time required to restore competency and the likelihood of restoration.

In a substantial minority of cases in which a client’s competency is questioned, it is because the attorney has failed to communicate effectively with a minimally competent client who may be poorly educated, culturally different, or mentally ill. Thus, reports often provide advice to

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\(^{55}\) Hoge et al., supra note 51, at 160.


\(^{57}\) See Gary B. Melton et al., Community Mental Health Centers and the Courts: An Evaluation of Community-Based Forensic Services 70-75 (1985); James H. Reich & Linda Tookey, Disagreements Between Court and Psychiatrist on Competency to Stand Trial, 47 J. Clin. Psychiatry, 29-30 (1986).

\(^{58}\) See Solomon M. Fulero & Norman J. Finkel, Barring Ultimate Issue Testimony: An “Insane” Rule?, 15 L. & Human Behav. 495, 504 (1991) (finding that the level of an expert’s testimony regarding a defendant’s sanity had no effect on the jury’s verdict pattern); Melton et al., supra note 20, at 17 (advising that mental health professionals should usually “refrain from giving opinions as to ultimate legal issues” because such opinions “usurp the role of the factfinder and may mislead the factfinder by suggesting that the opinions are based on specialized knowledge specific to the profession”).
attorneys on how best to communicate with the defendant and prepare him for trial.\(^5^9\) Similar advice is helpful in cases where the defendant is marginally competent, with reports often focusing on useful steps that may be taken to ameliorate the defendant’s limitations.

After receiving reports from one or more evaluators, the court may enter a stipulated finding if all parties agree on the defendant’s competency status or it may hold a competency hearing if the issue is contested. If the court finds the defendant to be competent, the adjudication proceeds, though parties may again raise the competency issue if circumstances raise a new bona fide doubt about competency.\(^6^0\) Even if a defendant is found to be incompetent, the court may proceed to adjudicate certain pretrial issues (e.g., challenges to the sufficiency of the indictment) where the defendant’s participation is not required.\(^6^1\)

### H. Restoration to Competency and Disposition for Unrestorably Incompetent Juveniles

The number of defendants who never stand trial because of a legal finding that they are unrestorably incompetent is very small and most typically involve defendants who are seriously and chronically mentally ill or mentally retarded. In about 10-30 percent of the roughly 5 percent of all felony cases in which a competency evaluation is ordered, the court initially finds the defendant to be incompetent.\(^6^2\) This means that no more than one to two percent of all felony defendants are initially found to be incompetent for adjudication. Furthermore, in only a minority of the cases in which the defendant is initially found to be incompetent, is the defendant later found to be unrestorably incompetent.\(^6^3\) “[B]arring an irreversible condition . . . most defendants are restorable.”\(^6^4\)

In the vast majority of cases, the court orders restoration services to restore the defendant’s competence so that adjudication may proceed. For mentally ill defendants, restoration usually entails a relatively brief period of roughly six months of psychiatric hospitalization to stabilize and medicate the defendant so as to eliminate or reduce psychotic symptoms such as paranoia, thought disorder, loose associations, and delusions or hallucinations.\(^6^5\) For defendants with mental retardation, low educational levels, poor fluency in English, or few years in the United States, restoration to competency (or, more accurately, development of competency) may require outpatient psychoeducation that teaches defendants about the legal proceedings and any social or communication skills necessary to work with their attorney and comport themselves appropriately in court.\(^6^6\)

In a number of states, the facility or service provider ordered to provide restoration services must periodically report to the court on the progress of the restoration efforts, and must report if the defendant has been restored or is unlikely to be restored to competence in the near future.\(^6^7\)

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\(^5^9\) See, e.g., Melton et al., supra note 20, at 150.

\(^6^0\) See Pate v. Robinson, 383 U.S. 375, 385 (1966) (holding that a court should order an inquiry any time there is a “bona fide doubt” about competency).


\(^6^2\) See Melton et al., supra note 20, at 135.

\(^6^3\) See id. at 154-55.

\(^6^4\) Id. at 155.

\(^6^5\) See id. at 154-55.


\(^6^7\) While Jackson v. Indiana, 406 U.S. 715, 737-38 (1972), allows states to attempt restoration only for “a reasonable period of time,” many states still have not legislatively mandated a procedure to provide judicial oversight of the restoration process. See Melton et al., supra note 20, at 131.
Upon receipt of that report, the court determines the defendant’s current competency and restorability. If the defendant is found to be competent, the adjudicatory process resumes. If the defendant is found to be incompetent but restorable, the court may order a period of continued treatment. If, however, the defendant is found to be incompetent and likely to remain so for the foreseeable future, then in accord with Jackson v. Indiana, the court shall order that the defendant be (1) dismissed, (2) civilly committed if mentally ill, or (3) civilly certified if mentally retarded (a voluntary procedure requiring the defendant’s consent to institutionalization). With the latter two options, the state’s criteria for civil commitment or guardianship must be satisfied.

II. EXTENDING THE DOCTRINE TO JUVENILE COURTS: CONTOURS OF ADJUDICATIVE COMPETENCE JURISPRUDENCE IN THE JUVENILE COURT

With the above discussion regarding the process for determining an adult’s adjudicative competence in mind, we consider several ways in which the doctrine may be usefully modified for application in the juvenile court. In so doing, we discuss the statutes and case law in the 50 states and the District of Columbia concerning adjudicative competence in the juvenile court. As shown in Appendix A, as of January of 2002, 35 states and the District of Columbia have case law and/or statutory provisions pertaining to adjudicative competence in the juvenile court. Fifteen states have not addressed the issue and one state—Oklahoma—has case law rejecting a competency requirement in juvenile court.

A. State Statutes

Twenty-six states address juvenile competency by statute, with statutes varying considerably in the amount of detail provided. (See Appendix A.) Some statutes simply reference the adult competency to stand trial statutes, providing no special provisions for juveniles. Others give broad procedural guidance on matters such as evaluation time frames and restoration procedures, but fail to set forth substantive standards for competence.

The following subsections describe the statutory provisions pertaining to the age of the juvenile, types of offenses and proceedings to which they apply, the competency standard and permissible bases for findings of incompetence, legal presumptions and evidentiary standards, provisions for competency evaluations and restoration to competence, and dispositions for unrestorably incompetent juveniles, as referenced in Appendix A.

1. Age of the Juvenile

No state has a minimum age threshold that must be satisfied for the issue of competence to be raised (other than the court’s minimum age for delinquency adjudication).

2. Applicability to Types of Offenses and Proceedings

There is considerable variation in defining the group of offenders for which competence is relevant. Most states restrict the doctrine to delinquency proceedings, while some states apply the doctrine more broadly to include status offenses or any cases arising under the juvenile

Some state statutes require that juveniles be competent before being transferred for trial in the criminal court.  

3. Legal Standards for Findings of Juvenile Incompetence

In all states, competence is presumed and the defense bears the burden of proving incompetence. Several states permit a jury to make the determination. The definition of juvenile competence is not consistent across states. Some states apply the *Dusky/Drope* functional standard discussed in Part I, tracking the Supreme Court’s language almost verbatim. In contrast, many states apply a seemingly more restrictive competency standard in the juvenile context, requiring that the incompetence be due to mental illness or mental retardation. Arizona, for example, specifically provides that a finding of incompetence cannot be based on mental illness or mental retardation alone (i.e., that disability does not per se make a juvenile incompetent). Florida, however, permits age or immaturity alone to be the basis for a finding of incompetence. Quixotically, Wyoming not only requires the presence of mental illness or mental retardation, but also requires that the juvenile meet the criteria for involuntary civil commitment, a psycholegal issue with an entirely different rationale.

4. Competency Evaluations

All states require a court order, based on probable cause, before an evaluation may be undertaken. The state or locality usually pays for the evaluation; some states note that parents may choose to pay for a private evaluator. States vary as to the number of evaluations required, with many requiring two competency evaluations in order to find a juvenile incompetent. Though generally only a licensed physician, psychiatrist, or psychologist may perform the evaluation, South Carolina requires two examiners designated by the Department of Mental Health or Disabilities and Special Needs. Virginia is the only state specifically providing that licensed clinical social workers and licensed professional counselors may conduct the evaluations.
evaluation. Most states prefer that evaluations be performed on an outpatient basis when possible.

The evaluator’s report is submitted to the court, with some states also providing that the defense attorney, prosecutor, or guardian ad litem receive the report. Other states are silent as to who will receive the report. A few states, although not many, make explicit the Fifth Amendment protections that ensure that information gathered for the report cannot be used against the juvenile at adjudication because the state-compelled competency interview requires the defendant to share potentially incriminating evidence. Many states specify what information the evaluator must include in the report, detailing the issues to be addressed relating to abilities, deficits, and recommended treatments to restore competency. Most states require the evaluator to provide an estimate of the likelihood of restoration.

5. Restoration to Competence

Not all state statutes address restoration to competence of juveniles found incompetent to stand trial. Appendix B lists the statutory provisions concerning restoration to competence and the disposition of unrestorably incompetent juveniles. As with competency evaluations, states generally prefer that restoration occur on an outpatient basis. Restoration may occur for a varied length of time, depending on the state; many statutes are silent on this issue. The requirements for competency update reports and hearings also vary significantly across states.

6. Disposition of Unrestorably Incompetent Juveniles

When a court determines that a juvenile cannot be restored to competency, some statutes provide for dismissal of the charges (with the criteria and time-frames for dismissal varying widely), others provide for civil commitment of the juvenile (if the commitment criteria are met), and several provide a range of options including dismissal, probation, commitment, or filing a child in need of services petition. In general, the dispositional options are largely based on the nature of the alleged offense. Remarkably, many statutes are silent on the dispositional issue.

B. Case Law

It is difficult to determine how frequently the issue of competence is raised in juvenile courts. Until very recently, appellate courts seldom addressed adjudicative competence with respect to juveniles. Perhaps because it was thought that the traditional parens patriae mission of the juvenile court made juvenile incompetence irrelevant, defense counsel often viewed their role as that of a guardian or arm of the court rather than adversarial legal advocate, juvenile

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81 In this context, the term “outpatient” refers to evaluations completed outside of a hospital setting. Thus, the juvenile may be confined in detention or jail and still receive an “outpatient” evaluation.
87 See Thomas Grisso et al., Competency to Stand Trial in Juvenile Court, 10 Int’l J.L. & Psychiatry 1, 6-7 (1987).
cases were seldom appealed, and lawyers and courts often failed to recognize the issue. The issue is, however, increasingly being litigated in the face of a more punitive and adversarial juvenile justice system, which is paralleling or even blending with the adult criminal justice system. As a consequence, many states now have appellate case law on juvenile competence to stand trial, including nine states that establish the doctrine through case law alone.

1. Does the Doctrine of Adjudicative Competence Apply in Juvenile Court?

Some state courts have held that constitutional due process requires that juveniles be competent in delinquency proceedings. “Principles of fundamental fairness... require that juveniles be afforded the same protection against being tried while incompetent as adults.” Most courts find this right inherent in the \textit{In re Gault} decision, which holds that juveniles have the due process right to representation by counsel. If a juvenile is incompetent, she cannot assist her attorney, who therefore cannot provide effective assistance.

Only one state has explicitly rejected the doctrine of adjudicative competence in juvenile court. In \textit{G.J.I. v. Oklahoma}, the Oklahoma Supreme Court held that, because juvenile proceedings are rehabilitative rather than criminal and because the intent of Oklahoma’s juvenile code is to allow juvenile courts to adjudicate cases regardless of a child’s mental state, the juvenile court procedures for children with mental disorders are “a comprehensive substitute for the competency statutes” (with procedures permitting mental health evaluations that may be used by courts in determining dispositions). However, this case was decided in 1989, a time when juvenile justice systems were on the cusp of transitioning from a largely rehabilitative system into a penal system. It may be an open question, therefore, whether the Oklahoma Supreme Court would decide the issue the same way in today’s more punitive juvenile justice climate.

Cases in several states have held that competency is required before the juvenile may be transferred to criminal court, with the defense bearing the burden of proving incompetence. This is consistent with the view of many legal scholars who argue that the juvenile court should be required to find the juvenile competent to stand trial as an adult before being transferred to criminal court.

2. Legal Standards of Competence

Courts that have addressed the legal standard for competence have all held that, in the absence of an explicit statutory distinction between adults and juveniles, competence is the same for juveniles as it is for adults—the Dusky/Drope standard. Many cases further reason that the

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89 These states include: Alabama, California, Georgia, Illinois, Iowa (in the context of transfer), Michigan, Nevada, Vermont, Washington. See Appendix A for case citations.
91 In re Gault, 387 U.S. 1, 34-42 (1967).
standard must be the same as a matter of due process.\textsuperscript{96} For example, In the Matter of the Welfare of D.D.N., the Minnesota Court of Appeals held that “the level of competence required to permit a child’s participation in juvenile court proceedings can be no less than the competence demanded for trial or sentencing of an adult.”\textsuperscript{97} and rejected the suggestions of some legal and psychological scholars that the standards and bar for competency should be lower for juveniles facing less punitive dispositions.\textsuperscript{98} According to the court, such proposals “overlook the reality that rehabilitative sanctions can and do involve a major loss of a child’s liberties.”\textsuperscript{99}

Several other courts have noted, however, that the \textit{Dusky/Drope} standard may be operationalized somewhat differently when applied to juveniles, though without specifying what those differences might be. “Juveniles are assessed by juvenile rather than adult norms”\textsuperscript{100} and “even a normal juvenile often will not have the same ‘rational’ understanding of the proceedings as an adult would, nor be able to consult with his lawyer with the same understanding.”\textsuperscript{101} Only one court has held that a juvenile may be found incompetent due to “tender years” alone.\textsuperscript{102}

In summary, an increasing number of state legislatures and courts have considered the relevancy of a competency requirement in juvenile court. Consequently, as of January of 2002, 34 states and the District of Columbia had statutes or case law that detailed a competency requirement. Some of the state provisions differ in their approaches,\textsuperscript{103} and some are very broad, simply referencing the adult competency statutes without considering the special needs of juveniles.\textsuperscript{104} In fashioning an effective approach to juvenile competency issues, it is essential to consider the fundamental state of the research on the topic and include those insights in any legislative initiative.

### III. Empirical Research on Adjudicative Competence of Juveniles

While research on adjudicative competence in juveniles is newly emerging, the body of empirical research is developing such that tentative conclusions may be drawn concerning children’s competence-related abilities at different ages and the impact of mental illness and mental retardation on competence.\textsuperscript{105} First, as expected, age is strongly related to competence.

\textsuperscript{97} In the Matter of the Welfare of D.D.N., 582 N.W.2d 278, 281 (Minn. Ct. App. 1998).
\textsuperscript{98} See id. at 280-81. For an argument that the competency bar should be lower for juveniles facing less serious charges, see Thomas Grisso, The Competence of Adolescents as Trial Defendants, 3 Psychol., Pub. Pol’y, & L. 3, 26 (1997).
\textsuperscript{99} In the Matter of the Welfare of D.D.N. 582 N.W.2d at 280.
\textsuperscript{101} In the Matter of W.A.F., 573 A.2d at 1268 (Farrell, J., concurring).
\textsuperscript{102} See In re Causey, 363 So. 2d 472, 476 (La. 1978).
Research findings suggest that many children younger than age 13 or 14 are incompetent and that, coincident with developing abilities in abstract thinking, most children aged 14 to 15 and older are competent.\textsuperscript{106} Ages twelve to fourteen represent a transitional period vis-a-vis competence.\textsuperscript{107} However, there is considerable heterogeneity within age groups. “[T]he more critical information for policy debate is the heterogeneity and variability among adolescents in their relevant abilities. . . . As a consequence, for youths aged 14 through 16, age itself tends to be a poor indicator of abilities associated with the defendant role.”\textsuperscript{108} Second, IQ is consistently related to competence, with the likelihood of competence declining with lower IQ scores.\textsuperscript{109} Third, juveniles with a history of severe mental illness (particularly psychosis), mental retardation, or special educational placements, are more likely to be incompetent.\textsuperscript{110}

As compared to adults, serious mental illness will be a less frequent cause of incompetence in juveniles because psychosis is relatively uncommon in children and adolescents. Significantly, it is generally more difficult to identify mental disorders in adolescents as compared to adults.\textsuperscript{111} Early adolescent forms of psychosis may go undetected by clinicians and thus unidentified as the cause of competence-related deficits, leading to erroneous findings of competence, particularly in those states requiring that a finding of incompetence be based upon mental illness or mental retardation.\textsuperscript{112} Grisso urges attorneys to routinely consider the possibility that their juvenile client may be incompetent, particularly when the juvenile has a history of mental illness, mental retardation, or learning disabilities, or when the juvenile is younger than age fourteen.\textsuperscript{113}

Recent research provides a picture of the percentage of juveniles that may be incompetent as a function of age and disability. In a sample of 136 juveniles (age 9-16 years) referred for pretrial competency evaluations, Law Professor Vance Cowden and Professor of Neuropsychiatry and Behavioral Science Geoffrey McKee, report that the evaluators judged as competent: 72 percent of the 16-year-olds; 84 percent of the 15-year-olds; 67.7 percent of the of the 14-year-olds; 55.6 percent of 13-year-olds; 27.3 of the 12-year-olds; and 18.2 percent of the 11-year-olds.\textsuperscript{114} Only 28 percent of the juveniles who had a severe mental illness and 46 percent who had a history of special education placements were judged to be competent.\textsuperscript{115} In McKee’s sample of 112 juveniles (age 12 to 16 years, with mean age of 14.2) referred for pretrial competency evaluations, about 15 percent were considered by the evaluators to be incompetent.\textsuperscript{116} Moreover, roughly 50 percent of the juveniles found to be competent nonetheless had at least one serious deficit in competence-related abilities.\textsuperscript{117} Based on such

\textsuperscript{106} See Cooper, supra note 105, at 177; Cowden & McKee, supra note 88, at 652-53; Savitsky & Karras, supra note 105, at 355-57.
\textsuperscript{107} See id.
\textsuperscript{108} Grisso, supra note 98, at 21.
\textsuperscript{109} See McKee & Shea, supra note 105, at 69-72.
\textsuperscript{110} See Cowden & McKee, supra note 88, at 653; Melton et al., supra note 20, at 136-37.
\textsuperscript{112} See Bonnie & Grisso, supra note 1, at 87.
\textsuperscript{113} See Grisso, supra note 98, at 22-23.
\textsuperscript{114} See Cowden & McKee, supra note 88, at 652-53.
\textsuperscript{115} See id. at 653.
\textsuperscript{116} See McKee, supra note 53, at 94-95.
\textsuperscript{117} See McKee & Shea, supra note 105, at 72.
findings, McKee and Shea conclude that “many adjudicated juveniles may likely be undetected incompetents,” and Grisso has suggested that there should be a legal presumption of incompetence to stand trial for juveniles younger than age fourteen. No state, however, has adopted such an approach. All states presume competence, with the defense bearing the burden of proving incompetence.

Which competency-related deficits are most commonly seen in juvenile defendants? In most cases, incompetence in juveniles is due to some mix of youth, immaturity, lack of knowledge, or mental retardation. McKee found that most juveniles younger than age thirteen could not describe the charges against them or the nature of the adversarial process, could not report facts relevant to their defense, and half did not understand plea-bargaining. Furthermore, young adolescents often incorrectly believe that their attorney will reveal confidential information to the judge or police and have difficulty calibrating their decisions about whether to plead guilty based on the likelihood of being found guilty. Older adolescents generally have a sufficient understanding of the nature of the proceedings, but many do not fully understand the advocacy role of the attorney and the concept of legal rights, perceiving such rights (e.g., to remain silent) as conditional or revocable by adults.

In addition, many juveniles have impaired judgment relative to adults in the following areas: responses to peer and parental pressure, time perspective, attitudes toward risk, temperance, reactions to stress, and responsibility. For example, adolescents tend to focus on short-term consequences, weigh more strongly the possible benefits of a decision, discount possible risks, and are more susceptible to pressure from peers and parents than are their adult counterparts. One study has found differences between juveniles and adults on these judgment factors as affecting adjudicative competence. Grisso provides case examples of juveniles whose immaturity adversely affected their trial competence, such as the 13-year-old “wannabe” who is only peripherally involved in the gang offense with which he is charged, but refuses to talk about the involvement of the rest of the gang even when informed by his attorney that the others will be witnesses against him.

At present, clinicians, lawyers and courts do not know whether, or how, to incorporate factors relating to juvenile immaturity into considerations regarding trial competency because such judgment-related factors are not normally considered in evaluations of adult competency to stand trial. As Bonnie and Grisso note, “[e]xisting law provides no formal basis for relying upon

118 Id.
119 Grisso, supra note 98, at 23.
120 See McKee, supra note 53, at 95-96.
121 See Peterson-Badali & Abramovitch, supra note 105, at 546-47.
123 See Woolard, supra note 105, at 71-73 (finding that the “differences between adults and adolescents are indeed real and a more encompassing consideration of competence that includes developmental factors is necessary to understand adolescents’ capacities as criminal defendants”).
developmental immaturity as a reason for . . . a declaration of adjudicative incompetence.” 130 Grisso further opines that the “proper remedial prescription for youths who are incompetent due to developmental immaturity rather than mental disorder is an unanswered question.” 131

IV. COMPETENCY RESTORATION SERVICES FOR JUVENILES

States have little experience in the provision of competency restoration services to juveniles found to be incompetent because adjudicative competence is a relatively new concern in the juvenile court. Following the passage of its juvenile competency law in 1997, however, Florida established a fairly comprehensive restoration system by contracting with the Brown Schools. The Brown Schools provide, for at least 3-6 hours per juvenile per week, a variety of restoration services (individual and group competency training, special education, behavioral management, social skills training, psychiatric services) in three settings: in-home, group homes/specialized foster care, and secure confinement. 132

There is virtually no systematic research on the restoration of juveniles found to be incompetent, except for data on the Florida experience provided by McGaha and colleagues, on 471 juveniles adjudicated incompetent to proceed in Florida from May 1997 to August 2000. 133 Male and African-American youth were substantially over-represented in those adjudicated incompetent. 134 Notably, none of the juveniles adjudicated incompetent had been charged with homicide offenses. Most were charged with assault and battery or property crimes. 135 Eighteen percent had at least one charge occurring at school. 136 As the predicate condition for the finding of incompetence, 30 percent of the juveniles were mentally ill, 30 percent were mentally retarded, and 40 percent had both mental illness and mental retardation. 137 Thus, 70 percent of the juveniles were mentally ill and 70 percent were mentally retarded. 138 The average IQ was 61 (mild mentally retarded range). 139 Psychosis was evident in 17 percent of the juveniles. 140 Other data indicate that virtually all the juveniles had been placed in special education classes at school, and 40 percent had been diagnosed with brain damage. 141

For fifty percent of the juveniles, restoration services were provided only in the home (65% of those with mental retardation, 52% of those with mental illness, and 37% with mental illness and mental retardation). 142 Twenty-nine percent received some services in a secure residential facility and 22 percent in a residential treatment facility, although 83 percent of juveniles received at least some services at home. 143 Once restoration services began, it took an average of about six months until the service provider determined that the juveniles had been restored to

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130 Bonnie & Grisso, supra note 1, at 88.
131 Grisso, supra note 43, at 96.
132 The setting is determined by court order or administratively by the Florida Department of Child and Family Services.
134 See id. at 429-30.
135 See id. at 431.
136 See id.
137 See id. at 430.
138 See id.
139 See id.
140 See id.
141 See A. Butler, Juvenile Competency/Restoration, Presentation to the Virginia Workgroup on Juvenile Competency in Richmond, Virginia (August, 1998).
142 See McGaha et al., supra note 133, at 432.
143 See id.
competence or was unrestorable. The picture emerging from these findings is that unlike adult defendants, for whom serious mental illness is the most frequent cause of incompetence, mental retardation is the most common cause of incompetence in juveniles. The relatively high incidence of school- and assault-related charges suggests that mentally retarded juveniles are being prosecuted for the disruptive behaviors that may accompany mental retardation. In addition, although not the most common cause of incompetence, psychosis was also evident in a relatively high proportion of juveniles.

V. THE DEVELOPMENT AND IMPLEMENTATION OF JUVENILE COMPETENCE LEGISLATION: THE VIRGINIA EXPERIENCE

The state of Virginia, which recently enacted comprehensive juvenile competence legislation and mechanisms for implementing an adjudicative competence requirement in the juvenile court, provides an example of the legal, clinical, and practical considerations involved in the process.

A. The Virginia Problem and Need for a Study

In 1994 and 1996, the Virginia General Assembly enacted a number of revisions to the juvenile code that represented an increased criminalization of juvenile court procedures and dispositions. These reforms included: lowering the minimum age for transfer to criminal court to age 14, providing for determinate juvenile sentences of up to seven years; eliminating the confidentiality of proceedings and expungement of records for all juveniles age 14 and older charged with felonies; and providing for the enhancement of adult sentences based on juvenile felony adjudications of delinquency and prior juvenile commitments to correctional facilities. Similar reforms have been enacted in many other states. In addition, the federal sentencing guidelines, U.S.S.G. Sec. 4A1.1-.2, provide for sentencing enhancement based upon prior juvenile adjudications. These changes raised significant concerns in the legal community about the need to ensure the due process protection of the right to be competent in juvenile delinquency proceedings. But as of 1998, Virginia had neither case law nor statutes on adjudicative competence in juvenile court delinquency proceedings in which transfer to criminal court is not an issue.
Despite the lack of legal authority, some Virginia judges, defense attorneys, and prosecutors operated under the assumption that competency was a requirement in the juvenile court, just as it is in the criminal court and, accordingly, the issue of competence was sometimes raised in the juvenile courts in selected jurisdictions throughout the state. The juvenile courts in one major metropolitan jurisdiction were finding a number of juveniles incompetent, without any statutory or judicial authority for doing so, and there was wide variation across the state in how the matter was handled and great confusion as to the appropriate procedures. Uncertainties surrounded whether competence should be an issue in delinquency proceedings in the first place, the standards for competence, procedures for restoration to competency, and the appropriate dispositions for unrestorably incompetent juveniles (e.g., what is the scope of the judge’s authority, where should these juveniles be placed, what agency has responsibility for serving these juveniles, who pays for their treatment?). In a survey of juvenile court judges, prosecutors, public defenders, and forensic evaluators across the state, less than half of those with competency evaluation experience reported that their jurisdictions had a standard process in place to handle the competency evaluation or necessary follow-up services, and they also reported a lack of restoration services.

Given the due process concerns about the need to ensure the right to competency in juvenile court, the lack of Virginia case law or statutory guidance on the issue, and the confusion and the wide variation across the state in practices for handling juvenile adjudicative competence and restoration, the Virginia legislature directed the Virginia Commission on Youth to conduct a study examining issues related to a juvenile’s competency to stand trial in juvenile court proceedings. The workgroup included representatives from a number of constituencies and agencies: juvenile court judges, juvenile court service unit staff, public defenders, prosecutors, the Office of the Attorney General, the Department of Juvenile Justice, the Department of Mental Health, Mental Retardation and Substance Abuse Services, community mental health agencies, the University of Virginia Institute of Law, Psychiatry & Public Policy, forensic psychologists, and law professors from Virginia law schools.

The legislature requested that the workgroup determine the relevance of competency in juvenile court proceedings, and if the workgroup determined that competency to stand trial should apply in juvenile court, to establish the standard for competency, develop statutory guidance, and identify dispositional and funding mechanisms. As a starting point, the workgroup collected statewide data on how competency was presently addressed in juvenile courts throughout the state, and conducted a statewide survey to ascertain the views and practices of lawyers and juvenile court judges.

B. Data on Current Practices and Views

Statewide data revealed that the number of evaluations completed by juvenile courts in Virginia had roughly doubled between 1997 (54 juveniles evaluated) and 1998 (103 juveniles evaluated), probably due to increased awareness of the issue. While there was no discernible

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153 See id.
154 See id. at 28-29.
155 See id. at 1.
156 See id. at 4-5.
157 See id.
158 See id. at 25.
pattern of factors determining which jurisdictions had ordered evaluations, competency evaluations were more frequently ordered in metropolitan jurisdictions. Jurisdictions with public defenders accounted for 83 percent of the juvenile courts in which the issue of competency had been raised. It is likely that public defenders specializing in juvenile cases had a greater awareness of legal developments in juvenile justice, such as adjudicative competence, and possessed the expertise to represent their juvenile clients more vigorously.

Surveys were sent to juvenile court judges, prosecutors, public defenders, and forensic evaluators throughout the state to determine current practices with respect to juvenile competency and their views about the relevance and importance of the issue in juvenile court proceedings. With respect to current practices, the respondents cited very different Virginia Code provisions (i.e., the adult competency statute, the juvenile transfer statute, statutes on the adjudication of mental illness or mental examination and care) as their source for guidance on the consideration of competency even though Virginia had no juvenile competency statute for delinquency proceedings.

Forty-three percent of respondents reported that their jurisdiction had procedures in place for the evaluation of juvenile competence, with roughly 35 percent reporting that their jurisdiction had procedures to handle restoration. Surprisingly, most of the respondents (65%) reported having been involved in at least one proceeding in which the issue of competence was raised (usually by the defense attorney), although most indicated they (59%) had received no training on the issue. One hundred percent of the defense attorneys, 94 percent of the juvenile court judges, and 62 percent of the prosecutors considered competency to be relevant in juvenile court proceedings.

C. Workgroup Deliberations and Legislative Response

This subsection discusses the workgroup deliberations with respect to each of the key issues involved in the development and implementation of the new juvenile competency legislation in Virginia, and the key provisions of the legislation subsequently passed by the Virginia General Assembly in 1999 and amended in 2000.

1. Need for a Statute

Consistent with the overwhelming majority of state courts that have addressed the issue, available scholarly commentary, and views of the Virginia juvenile justice system professionals surveyed, the workgroup concluded that fundamental fairness and due process requires that juveniles be competent before they can be subject to delinquency adjudication. The serious consequences of juvenile delinquency adjudications prompt the need for adult-like due process protections. At the same time, however, the workgroup decided that competence should not be
required in status offense proceedings where the court acts in its traditional \textit{parens patriae} capacity, because status offenses do not carry the same potential restrictions on liberty.\textsuperscript{169}

The workgroup determined that a statute was needed, not only to establish the doctrine of adjudicative competence in delinquency proceedings but also to establish the procedures for competency evaluations, dispositional options, and the necessary service delivery and funding mechanisms.\textsuperscript{170} The consensus was that a statewide statute would unify practice across jurisdictional lines and would enable state agencies to define their roles in providing appropriate services.

2. Competency Standards and Bases for a Finding of Incompetency

Virginia adopted the adult \textit{Dusky/Drope} standard for competence: a juvenile must have “substantial capacity to understand the proceedings against him or to assist his attorney in his own defense.”\textsuperscript{171} Considerable debate surrounded what role immaturity and tender years should have in findings of incompetence and whether the threshold for competence should be lower in juvenile court than it is in criminal court.

The \textit{Dusky/Drope} competency standard does not name or even address psychological factors that might cause a defendant to be incompetent. The background to the workgroup’s debate was the recognition that for adult defendants, adjudicative incompetence is nearly always caused by serious mental illness or mental retardation.\textsuperscript{172} In contrast, younger defendants without any psychological differences from their peer group might be too immature to meet the functional criteria of the \textit{Dusky/Drope} standard.\textsuperscript{173} The workgroup struggled with the appropriate role of the juvenile’s age and level of psychosocial maturity in determining adjudicative competence.\textsuperscript{174}

The workgroup’s opinion was that a juvenile charged with delinquency should not escape adjudication solely because of tender years or immaturity, without any relevant functional impairment.\textsuperscript{175} There was a concern, chiefly of prosecutors, that clinicians and lawyers might successfully argue that a juvenile should be found incompetent simply because of age or immaturity, without respect to the juvenile’s cognitive capacity to understand, both factually and rationally, the court proceedings and assist his attorney.\textsuperscript{176} Thus, the statute includes the provision that a finding of incompetence cannot be based on age or developmental immaturity alone.\textsuperscript{177} This was considered to be an important and necessary provision, as many thought the legislation would not pass the General Assembly without it because of likely opposition from the prosecution bar.

In some cases, differences in competence-related abilities due to age or immaturity may lead to a finding of incompetence. However, the statutory provision helps ensure that courts engage in a case-specific analysis of all factors relevant to a juvenile’s competence in the context of what will be required in the particular legal proceeding. While the adult standards of competence apply, in practice it must be recognized that juveniles will often be less mature, and less

\textsuperscript{169} See id.  
\textsuperscript{170} See id. at 31-33.  
\textsuperscript{172} See Va. Comm’n on Youth, supra note 152, at 9.  
\textsuperscript{173} See id.  
\textsuperscript{174} See id. at 9-16.  
\textsuperscript{175} See id. at 30-31.  
\textsuperscript{176} See id.  
experienced than their adult counterparts, even when they meet the minimal standards of competence under Dusky and Drope. Indeed, the juvenile court was created to take into account the differences between juveniles and adults in terms of maturity, competence, and culpability, with juveniles facing differing dispositions as a function of age and culpability. In Virginia, for example, a juvenile may not be committed to a juvenile correctional facility until age eleven and may not be transferred to criminal court until age fourteen.178

Considerable debate also surrounded the issue of whether to have differing competency thresholds depending upon the type of juvenile proceeding or the dispositional consequences of the adjudication, as has been proposed by several leading legal and psychological scholars.179 It may, for example, make sense to require that juveniles be competent to stand trial for serious offenses, the dispositional for which could carry punitive sentences and long-term ramifications, but not for less serious offenses. In addition, a lower standard of competence for juvenile proceedings may promote public safety by ensuring that charges are not simply dismissed in cases where a juvenile does not meet the adult competency standards.180 Bonnie and Grisso suggest that:

> [T]he meaning of adjudicative competence in delinquency adjudication should turn on the consequences of a delinquency finding (or conviction). If the jeopardy to which the juvenile is exposed in juvenile court is equivalent to the consequences of a criminal adjudication, the requirements of adjudicative competence should apply with full, undiluted force. However, if the juvenile is exposed to dispositions that expire at the age of majority, then the criteria of adjudicative competence should be limited to baseline cognitive abilities to understand the proceedings and communicate with counsel. In the rare situations in which the juvenile lacks even these abilities, delinquency jurisdiction would have to be foreclosed in favor of the residual parens patriae jurisdiction of the juvenile court (for example, PINS, or mental health commitment). . . [T]he competence requirement in juvenile adjudication serves the limited, though important, purpose of reducing the risk of an erroneous finding of guilt. An autonomous decision-making role by the minor is aspirational, not obligatory, and the youth’s decisional competence therefore should not be regarded as a constitutional prerequisite to adjudication. . . Deficits in the juvenile’s ability to appreciate counsel’s role or to engage in reasoned decision making should not bar adjudication.181

The workgroup, however, decided not to pursue the option of creating different competence standards for a number of reasons.182 First, no state has yet adopted this approach and the effects of doing so were unknown. Second, in exempting status offense cases from the competency requirement, the legislation effectively rendered moot the issue of whether a different standard should apply in those proceedings. (Although misdemeanor and felony cases are considered “delinquency proceedings” under the statute, it was decided not to have differing

179 While Godinez v. Moran, 509 U.S. 389 (1993), stands for the proposition that there is one unitary, invariant standard of competence, it is unclear whether this holding applies in the juvenile context because the U.S. Supreme Court has not addressed the right to, and scope of, adjudicative competence in juvenile delinquency proceedings. See Bonnie & Grisso, supra note 1, at 93-96; Grisso, supra note 98, at 26.
180 See Grisso, supra note 98, at 26.
181 Bonnie & Grisso, supra note 1, at 97-98 (italics added).
States considering the development or revision of juvenile competency laws may seriously want to consider the Bonnie and Grisso proposals, particularly if the adjudicative competency doctrine is to be applied to status offenses, misdemeanors, and felonies alike. Based on research indicating that many juveniles younger than age 13 to 14 are incompetent, Grisso proposes that courts be required to consider the competency question vis-a-vis all juveniles younger than age 13 to 14.183 Such a rule would not require that competency evaluations be ordered, only that the court addresses the issue of the juvenile’s competence, possibly via administrative screening procedures.184 This proposal was rejected because of a fear that such a broad requirement would doom any proposed legislation.

As in Virginia’s adult statute, the juvenile statute provides that a finding of incompetence cannot be based solely on claimed amnesia concerning the events surrounding the alleged offense or the fact that the juvenile is medicated,185 although either of these factors may be considered in determining competency. Also, as with adults, competency is presumed and the defense bears the burden of proving incompetence by a preponderance of the evidence.

3. Raising the Competency Issue

The competency issue may be raised at any point in a delinquency proceeding, by either party or the court.186 The court must order a competency evaluation if the moving party demonstrates probable cause to doubt the juvenile’s competence.187 So that the evaluator may know the concerns that gave rise to questions about competence, the moving party is required to provide the evaluator with a summary of the reasons for the evaluation.188

4. Qualifications of Competency Evaluators

In considering the requirements for competency evaluators and the procedures for conducting the evaluations, several departures were made from the adult procedures in Virginia. Importantly, evaluators are required to be licensed professionals with “training and experience in the forensic evaluation of juveniles.”189 Specialized training in adolescent psychology or psychiatry is required due to the unique characteristics of juveniles. Children are not simply “little adults,” and the forensic evaluation of juveniles varies considerably from that of adults, as does the evaluation and treatment of juvenile mental health needs.

As in many states with extensive rural regions, Virginia has a shortage of child and adolescent psychologists and psychiatrists available to its community mental health agencies responsible for conducting many of the evaluations. For this reason, it was decided to allow master’s-level licensed clinical social workers with training and experience in the forensic evaluation of juveniles to conduct the evaluations. The legislation was subsequently amended to

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183 See Grisso, supra note 98, at 23-24.
184 See id.
allow licensed professional counselors—master’s or doctoral level therapists having credentials in allied fields such as counseling or family therapy—to conduct evaluations.190

To date, Virginia is the only state that allows, by statute, social workers and licensed professional counselors to conduct competency evaluations. It remains to be seen whether evaluations provided by these professionals, who do not have extensive training in psychological assessment and diagnosis, will be of the same quality as those provided by psychologists and psychiatrists. Competency evaluations typically require less expertise in these areas and in forensic evaluation generally than do other kinds of forensic evaluations such as sanity dispositional and sentencing evaluations, and even trained laypersons can make fairly valid and reliable assessments of competence.191 However, social workers and licensed professional counselors may have difficulty determining the likelihood of restoration of seriously ill juveniles and the treatments required to restore competency.192 On the one hand, psychosis is rare in adolescence, so incompetence will usually be due to some mix of youth, immaturity, lack of knowledge, or mental retardation, rather than serious mental illness. On the other hand, Grisso notes that mental disorders other than serious mental illness, such as attention-deficit/hyperactivity disorder, must be considered as possible factors contributing to functional deficits.193 The workgroup debated whether it would be optimal for the juvenile evaluators to have their primary training and experience as forensic evaluators or as juvenile specialists. While the importance of a sophisticated forensic perspective should not be minimized, the workgroup ultimately concluded that significant knowledge of child and adolescent psychology and experience with the age group was of first concern. Intensive training could help juvenile specialists develop forensic expertise (as in the long-running adult forensic training program in Virginia), but it would be difficult to cultivate juvenile expertise in adult forensic practitioners within a short period of time since the assessment and diagnosis of adolescent mental disorder differs substantially from adult practice.

Pursuant to the statutory mandate, the Virginia Department of Mental Health, Mental Retardation and Substance Abuse Services promulgated administrative guidelines to assist courts in the appointment of evaluators of juvenile competency to stand trial.194 The guidelines call for evaluators to have: (1) training in psycholegal assessment, the legal standard of competency to stand trial, and risk assessment, (2) formal education in child and adolescent development and psychopathology and knowledge of the secure and non-secure facilities for juveniles in Virginia and the continuum of available community resources for juveniles, and (3)

191 See Melton et al., supra note 20, at 138.
192 Credentializing social workers and counselors as competency evaluators may be more problematic in jurisdictions that recognize the insanity defense in the juvenile court, as these professionals may not be qualified to perform sanity evaluations. Not uncommonly, sanity evaluation orders also include orders for competency evaluations, and competency evaluation orders may include sanity evaluation orders. Any indication of psychological problems past or present may raise questions of the duration of the disorder, and thus, its relevance to both current adjudicative competency and earlier mental state at the time of the offense. In addition, in jurisdictions that provide information only to the defense attorney unless the insanity defense is actually raised, defense attorneys sometimes use the insanity evaluation process as a kind of fishing expedition to try to uncover mitigating mental health or other background information. Thus, in addition to a competency evaluation, the defense might request a sanity evaluation (which the court usually orders), even though they may not seriously question their client’s sanity or plan to mount an insanity defense. At least eight jurisdictions explicitly recognized a juvenile insanity defense in their code or case law as of 2000. See Va. Bar Ass’n, Report on the Adjudication of the Insanity Defense in Juvenile Delinquency Proceedings, H. Doc. No. 60, at 17-19 (2000).
193 See Grisso, supra note 43, at 98.
a minimum of two years of graduate or postgraduate experience in providing mental health evaluation or treatment services to children and adolescents, under the supervision of a licensed mental health services provider. Knowledge of juvenile risk assessment and service availability was considered necessary in making recommendations to the court on whether or not the juvenile requires secure confinement while restoration is ongoing.

5. Location of Evaluations

For adult defendants, Virginia has over two decades of experience with a community-based forensic evaluation system. Consistent with this practice, the workgroup concurred that evaluations must be performed in the least restrictive setting consistent with public safety requirements. Despite the practical difficulties of locating qualified juvenile evaluators throughout the state, the workgroup decided that all evaluations are to be conducted on an outpatient basis (or in the detention home) unless psychiatric hospitalization is clinically indicated. A variety of significant negative clinical effects have been shown to result from the unnecessary psychiatric hospitalization of children. Additionally, because of the need to ensure that consequences have immediacy for juveniles, evaluations are to be conducted within ten days of the court order, a shorter time frame than the Virginia statutory period for adult evaluations.

6. The Evaluation Report and Competency Hearing

The evaluation report is to be provided to the court, the defense attorney, and the prosecutor. To protect the juvenile’s Fifth Amendment rights, it must contain no statements of the juvenile relating to the alleged offense, and no such statements may be used against the juvenile at adjudication or disposition hearings. The report should describe any deficits and how they may affect the juvenile’s ability to understand court proceedings and assist counsel. The report should also address the restoration services needed in the event the juvenile is found incompetent, and the least restrictive setting available to provide such services. A hearing on competence is not required unless requested by the defense or prosecution. The juvenile has the right to notice and to participate in the hearing.

7. Restoration Services

If the court finds the juvenile to be incompetent but potentially restorable, the proceedings are stayed and the court orders restoration services. The provider of restoration services must notify the court immediately upon concluding that the juvenile has been restored to competency or that the juvenile is unrestorably incompetent, or at the end of three months, at which time the court must hold a hearing and may order that services be renewed for another three months. Frequent judicial reviews are necessary due to the relatively malleable nature of child and

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adolescent mental status and the need to ensure that adjudication is not delayed any longer than necessary. As with the competency evaluation, any statements about the alleged offense made by the juvenile pursuant to restoration services may not be used against the juvenile.205

The workgroup noted that in comparison to adults, restoration of juveniles more frequently entails education rather than psychiatric treatment. The group discussed the merits of pedagogical training and experience for restoration service providers, in addition to familiarity with juvenile mental health treatment. After the enactment of the juvenile competency statute, the Virginia Department of Mental Health, Mental Retardation and Substance Abuse Services established administrative requirements for the training and qualifications of providers of outpatient restoration (i.e., psychoeducational) services. Restoration services must be provided under the direct supervision of a licensed professional qualified to conduct evaluations of juvenile competency to stand trial. In addition, providers must have the following minimum qualifications: (1) a bachelor’s degree in a human services field, education, or nursing, and (2) two years post-baccalaureate experience providing mental health related services to children or adolescents, under the supervision of a mental health provider licensed to provide services to children and adolescents.

8. Dispositions for Unrestorably Incompetent Juveniles

The workgroup struggled over the problem of inadequate dispositions for unrestorably incompetent juveniles. Because the legal proceedings cannot be initiated until the juvenile is competent, the court is limited in its options for addressing any perceived public safety or rehabilitative needs. States face similar legal barriers to providing assistance and supervision of incompetent adults, but because of the traditional parens patriae philosophy of the juvenile court, the lack of an effective option seemed particularly objectionable. In the end, the legislation provides four options if the court finds the juvenile to be incompetent and unrestorable. The court may: (1) dismiss the juvenile, (2) file a Child in Need of Supervision (“CHINS”) Petition, placing him or her on supervised probation and/or ordering treatment, (3) civilly commit the juvenile to a mental health facility under the usual juvenile commitment procedures, or (4) certify the juvenile for commitment to a facility for the mentally retarded.206 The court also has the authority to commit a juvenile who turns 18 during the time in which the court finds him to be unrestorably incompetent.207 Many juveniles are not expected to meet the civil commitment or certification criteria (particularly when incompetence is due partly to developmental immaturity), and outright release is generally considered inappropriate. Thus, it is important that courts and prosecutors have the option of initiating CHINS proceedings to ensure adequate supervision and the provision of treatment services. Lastly, charges against unrestorably incompetent juveniles must be dismissed within three years from the date of arrest for felony charges, and within one year from the date of arrest for misdemeanor charges.208

9. Funding, Staffing, and Training Needs

The workgroup also addressed issues of funding and training for competency evaluations, restoration services, and services for the unrestorably incompetent. It was noted that most judges, prosecutors, defense attorneys, and clinicians would require training on juvenile competency and restoration assessment and adjudication, since very few had such training. The

Florida experience has been that the issue of competence is often not raised simply because of a lack of training and understanding of the issue. In addition, sufficient statewide capacity would need to be developed among community mental health providers and inpatient facilities in order to conduct necessary outpatient evaluations as well as a small number of inpatient evaluations annually. Restoration services, ranging from home-based placement to placement in a secure facility, would need to be developed and maintained. Based on extrapolations from adult competency data in Virginia (i.e., estimating the juvenile competency workload based on adult ratios of statewide arrest to evaluations and determinations) along with empirical studies of juvenile adjudicative competence and the experiences of other states, the workgroup estimated that 609 competency evaluations would be requested per year, and that about 20 percent of these juveniles would be found incompetent, more than half of whom could be restored to competency in a community setting.

Prior to the legislation, disagreement pervaded the Virginia system regarding whether the courts, the juvenile justice system, or the mental health system should oversee and fund evaluation and restoration services. To implement the services detailed in the new statute, the legislature provided over two million dollars in the first year for the following: evaluation services (including court testimony), the development and dissemination of competency assessment and restoration tools, administrative staff oversight, and restoration services. In addition, a juvenile forensic database was established to track the number of evaluations conducted as well as who is conducting them, the demographic and mental status characteristics of the juveniles evaluated, methods and information used to conduct evaluations, and evaluator’s opinions regarding juveniles’ capacities and deficits and likelihood of restoration. For each evaluation conducted, evaluators are required to complete the two-page form shown in Appendix C. The database will be useful for research on adjudicative competence in juveniles and for service delivery planning.

10. Effects of the Juvenile Competence Legislation

By establishing legal standards of competence and the procedures for competency evaluation, restoration, and the disposition of unrestorably incompetent juveniles, the new competency statute has minimized the confusion and controversy that had previously existed across the state in handling the issue of competence in the juvenile court. It also has had the salutary effect of reducing the number of contested competency cases. Prior to the legislation, when raised, the question of competence often was litigated in a formal hearing. Now, in most cases, competence or incompetence is stipulated by the parties, following the results of the competency evaluation.

At the time the competency legislation was enacted, the legal and service provider communities had four chief concerns about its implementation and practical effects. First, there was the concern that the statute might be abused by the defense bar as a way to slow down the adjudicatory process, to gather mitigating evidence, or to use as leverage against prosecutors in plea bargaining. Second, there was the concern that juveniles would languish in already overcrowded detention homes while being evaluated and restored. Third, it was feared that there would be a grossly inadequate number of service providers for performing the evaluations and providing restoration services. Most clinicians had never been trained to evaluate competency in

209 See Butler, supra note 141. 210 See R.D. Taylor, Competency in the Juvenile Court, Presentation at the 5th Annual Juvenile Law and Education Seminar at the University of Richmond School of Law (August, 2000). 211 See id.
juveniles or to provide restoration services, and there was a lack of clarity as to the best practices for restoring juveniles to competence. Fourth, state agencies were concerned about the level of ancillary services that some incompetent juveniles might require and the system’s capacity to provide services to unrestorably incompetent juveniles, particularly given the limited funding available and lack of public residential mental health facilities for children and adolescents in the state of Virginia.

Most of these concerns have not been realized. The state funded extensive training efforts for clinicians and lawyers and contracted with several companies to provide restoration services. In the first eight months after the enactment of the statute, there were only 41 court referrals for restoration services. Over half of these came from one metropolitan jurisdiction, the same jurisdiction that had been finding a number of juveniles incompetent prior to the legislation. Thus, in the first year after the enactment of the statute, the level of juvenile competency evaluation and restoration services required did not overburden the system. One problem has emerged, however, in those jurisdictions that more frequently order competency evaluations. Word apparently has spread in the juvenile detention centers that you can “beat the rap” if you mangle as incompetent.\(^\text{212}\) Juvenile forensic evaluators must be highly trained in the detection of malingering.\(^\text{213}\) Juvenile attorneys should also be aware that malingering could be contrary to their clients’ interests in at least two respects. First, it will adversely affect their credibility with the judge, and second, it may result in a longer detention stay during which time the clinicians sort out whether the incompetence is genuine or feigned.\(^\text{214}\)

While we cannot know whether the statute has been abused in individual cases, as a whole it is clear that the system is not flooded with requests for evaluations or restoration services, nor are large numbers of juveniles being found unrestorably incompetent. To the contrary, in comparison to base rates of adult defendants, it appears that the issue of competence is raised much less frequently than expected. It remains to be seen whether the numbers will increase substantially as the defense bar becomes more familiar and experienced with the statute.

VI. IMPLICATIONS FOR LAW AND FORENSIC PRACTICE

As states across the nation change the purposes and processes of their juvenile justice systems to reach more punitive ends, and as juveniles face long-term negative consequences of delinquency adjudications, the constitutional protection of an adjudicative competency requirement has gained new significance in juvenile court. For the requirement to play a fair and appropriate role in juvenile proceedings, education and research are essential in developing a skilled group of evaluators and attorneys who are charged with responding to signs of incompetency in juveniles facing charges.

Perhaps the most important factor in the implementation of a juvenile competency statute is quality training. With regard to the current state of the art in the evaluation of juvenile competency, Warren et al. note that:

\[\text{[F]orensic evaluators are struggling to make sense of these theoretical constructs and research findings as they are increasingly asked to evaluate juvenile adjudicative competence in both criminal and juvenile court. The approach that is being used thus far borrows liberally from adult practice. . . . Specific training in juvenile forensic evaluation, however, has begun to}\]

\(^\text{212}\) See id.  
\(^\text{213}\) See generally McCann, supra note 52.  
\(^\text{214}\) See Taylor, supra note 210.
appear... This type of training seeks to elucidate some of the ambiguity around the proper extrapolation of standards to juveniles who will remain in juvenile court, highlights the unique aspects of psychopathology and neuro-psychological impairment that is found in most juvenile populations, identifies concepts of maturity as they apply in the evaluative context, and explores the issues around restoration, commitment and certification that apply to juvenile offenders.215

Many clinicians asked to evaluate competency under a new statute will have minimal experience with forensic practice; significant education will be crucial to fostering their understanding of the underlying legal standards and factors relative to forming their clinical opinions.

To ensure that appropriate evaluation procedures are followed, evaluator training should include an overview of the legal rights of the juvenile. The development of the doctrine of juvenile adjudicative competency has occurred in a context of increasing concern over public safety driven by a perceived epidemic of juvenile crime. Juvenile court personnel, who historically concerned themselves with determining what would be best for the juvenile and providing a therapeutic environment, increasingly take a more adversarial role. In their new role, these individuals find their actions restricted by the juvenile’s constitutional rights. For example, in earlier years, information was passed freely among all individuals involved in a given case. Because the best interests of the juvenile governed the proceedings, participants felt that sharing information would fashion a better disposition for the juvenile. In the current juvenile justice system, however, information can be used against a juvenile to reach a more punitive disposition that might not be in the juvenile’s best interest. Consequently, juvenile court personnel must respect the juvenile’s Fifth Amendment privilege against self-incrimination and not share detrimental statements gathered during court-ordered procedures such as a competency evaluation or the provision of restoration services.

Education is important for more than clinicians; juvenile court judges and attorneys who practice in juvenile court need training to familiarize themselves with the legal doctrine of adjudicative competency and to detect symptoms that might indicate cognitive or decisional incapacity to a trained clinician. To date, research indicates that the question of competency is raised in a surprisingly small percentage of juvenile cases. Juvenile competency statutes are a relatively new phenomenon, and in relation to the number of juveniles likely to be incompetent, particularly given the high incidence of mental illness and learning disabilities among the juvenile offender population216 and the comparatively high number of competency evaluations requested in the adult context, both the Virginia and Florida experiences suggest that the issue of competency is raised all too infrequently in the courts. Education is key to the appropriate use of a juvenile adjudicative competency requirement.

Education alone cannot guarantee the effective implementation of a juvenile competency standard. Relevant research is scarce, and further work is essential to provide a more substantial base upon which to develop training programs and statutory amendments. Significantly, research is necessary to operationalize the legal terminology in juvenile competency statutes. States have generally adopted the notion of “competency” from the adult context of Dusky and Drope. Researchers have worked to translate the functional standard of those cases into clinically

215 Warren et al., supra note 105, at 10.
identifiable symptoms and behavior. Juveniles, however, may have different clinical presentations that bear on the issue of competency. In addition, age-appropriate developmental immaturity can affect competency in ways distinct from adults. Much research is necessary to clarify the clinical components of adjudicative competency in juveniles.

Successful malingering among juveniles is a significant risk to the integrity of the system, but it is a risk that can be reduced by further research and training. While adults faking incompetency are likely to be detected by forensic clinicians, juvenile evaluators are frequently less skilled in detecting malingering. Traditionally, juvenile court clinicians focused on developing a broad psychological picture of the juvenile rather than gathering information targeted toward answering a legal question. In addition, many psychological instruments that are particularly good at detecting malingering are not normed for use with juveniles. The paucity of research on malingering in juveniles complicates the task for the evaluators. To assist the juvenile court in making accurate determinations, juvenile evaluators must place a strong emphasis on distinguishing feigned from real impairment, and utilize future clinical research that elucidates the nature and characteristics of malingering in juveniles.

Legislatures and courts can further the development of the competency requirement through addressing procedural and resource questions as they arise. Complicated situations may occur involving younger juveniles and children who are charged with the most serious crimes. With many incompetent juveniles, restoration is a misnomer; the juvenile was never competent and the “restoration” process seeks to gain a new level of functioning, not to return the juvenile to a previous level. With younger juveniles, the restoration process could be quite lengthy. While political pressure may be strong to incapacitate an 8-year-old accused of a heinous crime, a restoration process lasting years could run afoul of constitutional presumptions of innocence and violate the principle of equal protection underlying Jackson v. Indiana. In addition, preservation of evidence can be complicated when a trial might be held years after the commission of the crime. States face a difficult task in drafting legislation that equitably and constitutionally balances public safety concerns against the rights of our youngest alleged offenders.

A practical challenge for legislatures lies in funding state mental health and juvenile justice systems to provide facilities appropriate for the evaluation and treatment of juveniles identified as possibly incompetent and those sent for restoration services. Juveniles should be evaluated and treated in the community whenever possible, but when public safety requires detention, potentially incompetent juveniles should be placed in a situation appropriate to their age and developmental level. Many states currently lack sufficient placements to support more than a handful of juveniles whose competency is in question. Through facing these challenges to meet new legislative needs and to support quality training and research, states can maximize the likelihood of the successful implementation of a juvenile adjudicative competency standard.

217 See Grisso, supra note 47, at 62-112; Melton et al., supra note 20, at 139-50.
218 See Jackson v. Indiana, 406 U.S. 715, 723-30 (1972). Jackson held a statute unconstitutional for imposing more lenient commitment standards and more strict standards of release on those against whom criminal charges were pending than for others subject to commitment procedures. Because there was no justification to support the difference in commitment standards for those charged with criminal offenses and those not charged with offenses, the Court held that the statute deprived the defendant of “equal protection of the laws under the Fourteenth Amendment.” Id. at 730.
CONCLUSION

Juvenile justice systems across the country have changed significantly over the last few decades. As the consequences of delinquency adjudication become more punitive and long lasting, courts have held that juveniles are entitled to adult-like levels of due process protection in juvenile court proceedings. As a result, many states now recognize an adjudicative competency requirement in those proceedings.

States vary widely in the degree of detail contained in their juvenile adjudicative competency case law and statutes. Virginia’s recent experience in developing and implementing relevant legislation highlights some of the complexities in applying the adult notion of adjudicative competency to juveniles. To the relief of many, the implementation of the Virginia statute has not led to an overwhelming number of incompetency claims. Accompanied by sufficient resources for effective training of clinicians and attorneys, the enactment of a juvenile competency statute in Virginia appears to be helping the juvenile justice system move appropriately toward its dual goals of ensuring public safety while also serving the best interests of juvenile offenders and protecting their due process rights.
### APPENDIX A: STATES WITH STATUTES OR CASE LAW ON JUVENILE COMPETENCY TO STAND TRIAL

<table>
<thead>
<tr>
<th>State</th>
<th>Juvenile Code/Rules Citation</th>
<th>No Statute, But Case Law Suggesting Use of Juvenile Competency Evaluations</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alabama</td>
<td>Ex parte Thomas Andrew Brown, Jr., 540 So. 2d 740 (Ala. 1989).</td>
<td></td>
</tr>
<tr>
<td>Maryland</td>
<td>Md. R. 11-105.</td>
<td></td>
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<tr>
<td>Minnesota</td>
<td>Minn. Juv. P. R. 20.01.</td>
<td></td>
</tr>
<tr>
<td>Missouri</td>
<td>Mo. Juv. P. R. 123.01.</td>
<td></td>
</tr>
<tr>
<td>Nevada</td>
<td>In the Matter of Two Minor Children, 592 P.2d 166 (Nev. 1979).</td>
<td></td>
</tr>
<tr>
<td>State</td>
<td>Statutes</td>
<td>Case</td>
</tr>
<tr>
<td>---------------</td>
<td>-------------------------------------------------------------------------</td>
<td>----------------------------------------------------------------------</td>
</tr>
<tr>
<td>State</td>
<td>Restorative Environment</td>
<td>Reports</td>
</tr>
<tr>
<td>---------</td>
<td>------------------------------------------------------------</td>
<td>-----------------</td>
</tr>
<tr>
<td>Arizona</td>
<td>Least restrictive alternative</td>
<td>Every 60 days</td>
</tr>
<tr>
<td>Arkansas</td>
<td>Arkansas State Hospital or a residential facility</td>
<td>Every 30 days</td>
</tr>
<tr>
<td>D.C.</td>
<td>Commitment to hospital or facility for the mentally ill</td>
<td>NS</td>
</tr>
<tr>
<td>Florida</td>
<td>No restoration for juveniles charged with misdemeanors, or if incompetent for reason other than MI/MR; otherwise least restrictive alternative</td>
<td>Every 6 months</td>
</tr>
<tr>
<td>Kansas</td>
<td>Commitment</td>
<td>Initial report after 90 days; second report after 6 months</td>
</tr>
<tr>
<td>State</td>
<td>Action</td>
<td>Legal Period</td>
</tr>
<tr>
<td>-----------</td>
<td>------------------------------------------------------------------------</td>
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</tr>
<tr>
<td>Louisiana</td>
<td>Commit or place child in custody of parents or other suitable person under conditions in best interest of child and public</td>
<td>NS</td>
</tr>
<tr>
<td>Maine</td>
<td>Initiate voluntary or involuntary commitment</td>
<td>NS</td>
</tr>
<tr>
<td>Maryland</td>
<td>NS</td>
<td>NS</td>
</tr>
<tr>
<td>Mass.</td>
<td>Commitment</td>
<td>NS</td>
</tr>
<tr>
<td>Minnesota</td>
<td>No restoration for misdemeanor charges; Commitment, CHIPS (child in need of protection and services) petition, or parental/guardian/custodian supervision for felony charges</td>
<td>Every 6 months</td>
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<tr>
<td>Missouri</td>
<td>NS</td>
<td>NS</td>
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<tr>
<td>Nebraska</td>
<td>NS</td>
<td>NS</td>
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<tr>
<td>New H.</td>
<td>NS</td>
<td>NS</td>
</tr>
<tr>
<td>New Jersey</td>
<td>Court to consider evaluation results in deciding disposition of case; proceedings continue</td>
<td>NS</td>
</tr>
<tr>
<td>New Mexico</td>
<td>Judge may order treatment</td>
<td>NS</td>
</tr>
<tr>
<td>State</td>
<td>Action</td>
<td>Frequency</td>
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<tr>
<td>--------------</td>
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<td>-------------------------------------------</td>
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<tr>
<td>New York</td>
<td>Commitment</td>
<td>Initial report after 45 days,</td>
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<td></td>
<td></td>
<td>second report after 90 days, then every 90 days</td>
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<tr>
<td></td>
<td></td>
<td>Anually</td>
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<tr>
<td>North Carolina</td>
<td>Judge may order involuntary commitment</td>
<td>Periodic reports</td>
</tr>
<tr>
<td>Ohio</td>
<td>NS</td>
<td>NS</td>
</tr>
<tr>
<td>Pennsylvania</td>
<td>NS</td>
<td>NS</td>
</tr>
<tr>
<td>South Carolina</td>
<td>Commitment</td>
<td>If likely to become fit in future, report in 60 days</td>
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<tr>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Tennessee</td>
<td>Commitment or voluntary admission, or release to appropriate guardian</td>
<td>NS</td>
</tr>
<tr>
<td>Custodian</td>
<td>Commitment or outpatient treatment</td>
<td>After 75 days</td>
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<tr>
<td>---------------------</td>
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</tr>
<tr>
<td>Texas</td>
<td>Secure facility or nonsecure community setting</td>
<td>Every 3 months</td>
</tr>
<tr>
<td>Virginia</td>
<td>Secure facility or nonsecure community setting</td>
<td>Every 3 months</td>
</tr>
<tr>
<td>West Virginia</td>
<td>NS</td>
<td>NS</td>
</tr>
<tr>
<td>Wisconsin</td>
<td>May be committed</td>
<td>Every 3 months</td>
</tr>
<tr>
<td>Wyoming</td>
<td>Commit if meet involuntary commitment criteria; otherwise continue with adjudication</td>
<td>NS</td>
</tr>
</tbody>
</table>

NS=Not Specified in the Code Provision
**Location of Evaluation:** Community [ ] Detention [ ] Inpatient/DMHMRAS [ ]
Inpatient/Private [ ] Other [ ]

**SECTION I**

Agency Name ____________ Highest Degree of Primary Evaluator ____________

Primary Evaluator _____ No. of Evaluators Involved: 1[ ] 2[ ] 3[ ] 4 [ ] unknown [ ]

Primary Evaluator Affiliation: [ ] CSB [ ] Contract/Private
[ ] DMHMRAS Faculty [ ] DJJ Facility [ ] Other ____________

Discipline: [ ] clinical psychologist [ ] licensed clinical social worker
[ ] psychiatrist [ ] licensed professional counselor
[ ] Other (specify) ______________________________________

No. of interviews: _____ Total hours of time spent:
Defendant Interview(s) ____ ___ Report writing ____ ___
Record review ____ ___ Testing ____ ___
Collateral Interviews ____ ___

**SECTION 2**

Name of Juvenile _________________________ Date of Birth _________________

Social Security No._____________ Race _______________ Gender _____________

Name and Address of Attorney Requesting Evaluation _______________________
____________________________________________________________________
____________________________________________________________________

**CST Evaluation Requested by:**

[ ] Defense [ ] Prosecution [ ] Neither (court without request by attorney)

Date of Evaluation Order / /
Date Information Received ________ Date of Report ______________________

Jurisdiction of the Court ______________________________________________

Date of Offense(s)/Offense(s) charged
(see classifications on back of instructions page):

<table>
<thead>
<tr>
<th>Date</th>
<th>Type</th>
<th>Number</th>
</tr>
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<tr>
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</tr>
</tbody>
</table>

a. Copy of warrant indictment [ ]Yes [ ]No
b. Information about alleged offense(s) [ ]Yes [ ]No
c. Reasons for evaluation request [ ]Yes [ ]No
d. Juvenile's statements at intake [ ]Yes [ ]No
e. Statements made by juvenile to police [ ]Yes [ ]No
f. Psychiatric/medical records [ ]Yes [ ]No
g. Juvenile's criminal record [ ]Yes [ ]No
h. Witnesses' statements [ ]Yes [ ]No
i. School Records [ ]Yes [ ]No
j. Parental/guardian information [ ]Yes [ ]No

SECTION 3

Were any of the following tests used?
a) Intelligence [ ] Yes [ ] No
   If so, please specify tests used_____________________________________
   Verbal ____________ Performance _______________ FSIQ____________

b) Functional [ ] Yes [ ] No
   If so, please specify tests used_____________________________________
   [ ] ABC [ ] ABC-School [ ] AAA

c) Neuropsychological [ ] Yes [ ] No
   If so, please specify tests used_____________________________________

d) Neurological [ ] Yes [ ] No
   If so, please specify tests used_____________________________________

History?
   Prior Delinquency Findings [ ] Yes [ ] No
   Prior Psychiatric Hospitalization [ ] Yes [ ] No
Diagnosis? Was a diagnosis made by the primary forensic evaluator? [ ] Yes [ ] No
If yes, please list all relevant diagnoses and indicate if made based on clinical evaluation (c), by history (h), or both (c & h):

Diagnosis

____________________________________________________________________
____________________________________________________________________
____________________________________________________________________

Basis: (c, h, or c & h)

____________________________________________________________________
____________________________________________________________________
____________________________________________________________________

If any competence instruments were used to assess competence, please check below.
[ ]
[ ]
[ ]

Symptoms? Mental status features observed by the forensic evaluator (mark box)

| [ ] angry or irritable mood | [ ] hyperactivity |
| [ ] avoidant relatedness    | [ ] impulsiveness |
| [ ] intellectual limitations| [ ] intrusive memories |
| [ ] confused or disorganized speech | [ ] language delay or impairment |
| [ ] delusions               | [ ] memory loss |
| [ ] depressed mood          | [ ] obsessions/compulsions |
| [ ] developmental immaturity| [ ] suicidal ideation |
| [ ] distractibility/attentional deficits | [ ] suspiciousness |
| [ ] hallucinations          | [ ] unstable affect |
| [ ] violent ideation        | |

List symptoms that contributed to an opinion of incompetence (if one opined by evaluator):
[ ]
[ ]
[ ]

SECTION 4

A. Type of Evaluation (please check as appropriate):

[ ] Competency to Stand Trial (CST):
  [ ] before initial CST determination
  [ ] to determine status of ICST delinquent/90 days
  [ ] to determine restoration of incompetent defendant
[ ] Other (specify) ____________________________

B. Opinion Regarding CST (please check as appropriate):

[ ] Competent
[ ] Incompetent
[ ] No opinion

1. Capacity to understand legal proceedings:
   [ ] significantly impaired [ ] not significantly impaired [ ] No opinion

2. Ability to assist in defense:
   [ ] significantly impaired [ ] not significantly impaired [ ] No opinion

3. Restorability (if significant impairment identified):
   [ ] probable [ ] uncertain [ ] unlikely

4. Restoration setting: [ ] Non-secure [ ] Secure