

# I WISH I KNEW THEN WHAT I KNOW NOW: LOOKING TO THE OBJECTIVE SCIENCE IN EVALUATING JUVENILES' (IN)COMPETENCY.

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## INTRODUCTION

Tommy, a nine-year-old boy with no prior juvenile court involvement, is charged with a crime serious enough in his state to be transferred automatically to adult court.<sup>1</sup> At the recommendation of a medical professional team, Tommy was deemed incompetent, and the court ordered him to an outpatient psychiatric facility to “restore” his competency. After eight one-hour sessions, Tommy learned to repeat his charges, appeared to understand their meaning, learned each of the various court personnels’ roles, described evidence that potentially could be presented in his case, and repeated potential consequences of being found guilty. Nonetheless, there was something lacking in Tommy’s responses, which became evident during the last session. First, in answer to what his job in court was, Tommy stated, “[t]o do nothing . . . no, my job is to sit there and . . . whatever the witness says I can tell my lawyer, and whatever the judge asks me I don’t have to answer it.” When asked whether there was anything else that may help his case, he answered “no.” The evaluator then asked Tommy whether he thought he should share with his lawyer specific facts that may help his case. Tommy’s answer was “[n]o, it wouldn’t be good for me to tell my lawyer, because I wouldn’t want people to know I’m scared of things . . . and [my friends] will make fun of me.” It was evident that while Tommy could regurgitate factual understandings, rational reasoning was not present. Yet some states, based on their statutes,<sup>2</sup> would still deem Tommy competent.

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1. See Frank Fortunati et al., *Juveniles and Competency to Stand Trial*, PSYCHIATRY, Mar. 2006, at 36, [https://www.researchgate.net/publication/49631689\\_Juveniles\\_and\\_Competency\\_to\\_Stand\\_Trial](https://www.researchgate.net/publication/49631689_Juveniles_and_Competency_to_Stand_Trial) (download PDF). This case vignette is from the Fortunati et al. article. *Id.* at 36-38.

2. *Id.* at 36.

A defendant must be competent to stand trial.<sup>3</sup> Generally, competency becomes an issue when the defendant has a mental illness or mental impairment.<sup>4</sup> While these both can and often do apply to juveniles, one other area unique to this population that should be considered is immaturity.<sup>5</sup> Yet many states fail to recognize this and either have no competency requirements for juveniles or use adult standards.<sup>6</sup> Additionally, there has been a vast increase in transferring juveniles to adult court<sup>7</sup> along with the trend of creating a more punitive juvenile justice system.<sup>8</sup> This has made juvenile competency become a critical area of inquiry in forensic psychology.<sup>9</sup>

Forensic psychologists, along with legal experts and juvenile advocates, have been arguing for decades that juveniles—especially adolescents age and younger—cannot be competent.<sup>10</sup> Although some change has been made according to neuroscience,<sup>11</sup> the law has been a dinosaur in catching up with the objective research that has shown proof of what scholars have been arguing for years. Recently, modern technology has provided means to conduct objective studies that further support the argument that juvenile statutes should be redefined in order to be specific to juvenile competency issues.<sup>12</sup> While papers have addressed this scientific evidence, specifically about the evidence regarding juveniles' underdeveloped prefrontal cortex,<sup>13</sup>

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3. See *Medina v. California*, 505 U.S. 437, 446 (1992).

4. See David R. Katner, *Eliminating the Competency Presumption in Juvenile Delinquency Cases*, 24 CORNELL J. L. & PUB. POL'Y 403, 418 (2015).

5. *Id.*

6. See Christopher A. Mallet, *Juvenile Competency Standards' Perfect Storm: Ineffective Punitive Policies; Undetected Incompetent Youth; Roper v. Simmons*, 44 CRIM. L. BULL. 848, 851 (2008) (explaining that while twenty-one states and the District of Columbia do have statutes with significant differences between determining adult and youth incompetence, eighteen states still rely on adult standards and eleven states have no juvenile competency statutes).

7. See KIMBERLY LARSON ET AL., NAT'L YOUTH SCREENING & ASSESSMENT PROJECT, DEVELOPING STATUTES FOR COMPETENCE TO STAND TRIAL IN JUVENILE DELINQUENCY PROCEEDINGS: A GUIDE FOR LAWMAKERS 2, 10 (2011), [http://www.njjn.org/uploads/digital-library/Developing\\_Statutes\\_for\\_Competence\\_to\\_Stand\\_Trial\\_in\\_Juvenile\\_DelinQUENCY\\_Proceedings\\_A\\_Guide\\_for\\_Lawmakers-MfC-3\\_1.30.12\\_1.pdf](http://www.njjn.org/uploads/digital-library/Developing_Statutes_for_Competence_to_Stand_Trial_in_Juvenile_DelinQUENCY_Proceedings_A_Guide_for_Lawmakers-MfC-3_1.30.12_1.pdf).

8. See RICHARD E. REDDING ET AL., JUVENILE DELINQUENCY: PREVENTION, ASSESSMENT, AND INTERVENTION 6 (Kirk Heilbrun et al. eds., 2005).

9. See Deborah K. Cooper, *Juveniles' Understanding of Trial-Related Information: Are They Competent Defendants?*, 15 BEHAV. SCI. L., 167, 167 (1997); Lois B. Oberlander et al., *Preadolescent Adjudicative Competence: Methodological Considerations and Recommendations for Practice Standards*, 19 BEHAV. SCI. L. 545, 545 (2001).

10. See generally Katner, *supra* note 4.

11. *Id.* at 403.

12. *Id.*

13. See Morgan Tyler, *Understanding the Adolescent Brain and Legal Culpability*, 34 CHILD. L. PRAC. 124, 124 (2015); see also Sarah Spinks, *Adolescent Brains are Works in Progress*, PBS:

little has been discussed about how modern technology has been used to show juveniles also have other underdeveloped parts of the brain, including how research has given objective data on how psychosocial development, along with other biological factors, are intertwined and affect competency.<sup>14</sup> This note will argue that it is time for states to catch up with the times and create statutes based on this collaborative, objective evidence. In addition, this note will argue that based on this objective information, there is a strong argument that not only are juveniles not able to be competent, but that based on science, a juvenile's brain is malleable<sup>15</sup> and therefore, they should not be automatically sent to juvenile facilities that promote recidivism versus rehabilitation—as is the current norm<sup>16</sup>—but instead be placed in treatment facilities according to their deficiencies. This would restore the original intent of the juvenile justice system—rehabilitation, not punishment.

Part I of this note will review the history of the juvenile justice system, including the original intent of creating a separate justice system for juveniles and how that intent has morphed from rehabilitation to punishment. In addition, it will review the history of juvenile competency. Part II will discuss how advanced research and recent U.S. Supreme Court decisions support the argument that states need to create juvenile competency statutes based on science. This Part will also include a discussion of recent research addressing both neuroscience and psychosocial deficiencies in juveniles that should help play an integral part in arguing that juveniles should not be transferred to adult courts, and even if a state does choose to do so, redefining state juvenile statutes that address how a juvenile's competency to stand trial should be examined. Part III will argue that current state statutes are insufficient in addressing juvenile competency. In addition, it will argue that transfer statutes and policies regarding the placement of incompetent juveniles in most states go against the original rehabilitative intent of the juvenile justice system. Finally, there will be a brief conclusion.

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FRONTLINE, <https://www.pbs.org/wgbh/pages/frontline/shows/teenbrain/work/adolescent.html> (last visited Dec. 27, 2019).

14. See Tommy Meixner Jr., *Neuroscience and Mental Competency: Current Uses and Future Potential*, 81 ALB. L. REV. 995, 996 (2018).

15. See REDDING ET AL., *supra* note 8, at 7.

16. *Id.* at 10; see also MAUREEN WASHBURN, CTR. ON JUVENILE AND CRIMINAL JUSTICE, CALIFORNIA'S DIVISION OF JUVENILE JUSTICE REPORTS HIGH RECIDIVISM DESPITE SURGING COSTS 2 (2017), [http://www.cjcj.org/uploads/cjcj/documents/californias\\_division\\_of\\_juvenile\\_justice\\_reports\\_high\\_recidivism\\_despite\\_surging\\_costs.pdf](http://www.cjcj.org/uploads/cjcj/documents/californias_division_of_juvenile_justice_reports_high_recidivism_despite_surging_costs.pdf).

## I. BACKGROUND AND HISTORY

To understand why juveniles should have different standards for competency, or may not even be competent at all, it is useful to look to the historical developments of both the juvenile justice system itself, and the addition of competency into that system.

*A. The History of the Juvenile Justice System—From Rehabilitative to Punitive*

The first juvenile court was founded in Chicago in 1899,<sup>17</sup> with the original intent being rehabilitation—not punishment.<sup>18</sup> The view was that children are more malleable and more amenable to rehabilitation than adults,<sup>19</sup> based on a belief that other factors contributed to their criminal conduct such as poverty and parental neglect.<sup>20</sup> The juvenile court's focus was to identify underlying causes of the juveniles' delinquent behavior and rehabilitate them through therapeutic dispositions.<sup>21</sup> As Justice Charles C. Bernstein explained in his opinion for the Arizona Supreme Court, “juvenile courts do not exist to punish children for their transgressions against society” but to stand in the position of a “protecting parent rather than a prosecutor.”<sup>22</sup>

However, fueled by high-profile cases of violent juvenile crimes and persistent news reports of violence in the schools, reformers of the juvenile justice system severely altered their approach to drafting criminal policies in the latter part of the 1980s and into the early 1990s.<sup>23</sup> In response to sensationalizing juvenile crime, rising juvenile crime rates, and perceptions by legislators and policymakers that the public wanted more punitive responses to juvenile crime, laws were enacted to “get tough” on crime.<sup>24</sup> Unfortunately, the public continues to believe that violent juvenile crime is rising and out of control, with concern about a wave of “superpredators.”<sup>25</sup> In reality, juvenile crime rates have declined, and high-profile incidents of

17. See LARSON ET AL., *supra* note 7, at 9.

18. See ASHLEY NELLIS, SENTENCING PROJECT, THE LIVES OF JUVENILE LIFERS: FINDINGS FROM A NATIONAL SURVEY 5 (2012), <https://www.sentencingproject.org/wp-content/uploads/2016/01/The-Lives-of-Juvenile-Lifers.pdf>.

19. See REDDING et al., *supra* note 8, at 7.

20. *Id.*

21. *Id.*

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

23. See NELLIS, *supra* note 18, at 5-6.

24. See REDDING ET AL., *supra* note 8, at 6.

25. See generally John Dilulio, *The Coming of the Superpredators*, WEEKLY STANDARD (Nov. 27, 1995, 12:00 AM), <https://www.washingtonexaminer.com/weekly-standard/the-coming-of-the-super-predators>.

violent juvenile crime are not the norm.<sup>26</sup> But still the public continues to favor punitive responses to juvenile offenders rather than the rehabilitative ideal of juvenile justice.<sup>27</sup>

Driven by media reports of juvenile crimes and public fears, catch phrases such as “adult crime, adult time” were popularized.<sup>28</sup> Policymakers responded by creating tough laws that ignored the developmental differences between youths and adults.<sup>29</sup> By the mid-1990s, laws were enacted to remove more serious or violent offenders from juvenile court jurisdiction and into the adult courts.<sup>30</sup> This included many states allowing District Attorneys to determine whether a juvenile is competent enough to be transferred to adult court.<sup>31</sup> Additionally, some states even changed the purpose clause in their juvenile code to make accountability or punishment, rather than rehabilitation, the primary goal.<sup>32</sup>

Even with this misguided attitude by the public, the U.S. Supreme Court, recognizing the difference in maturity between juveniles and adults, began creating precedent protecting adolescent rights as far back as 1967.<sup>33</sup> The first of these was *In re Gault*, where the court determined that juvenile offenders have their right to Due Process, regardless of their age.<sup>34</sup> Following *Gault*, the Court expanded the Due Process rights of juveniles, reaffirming its recognition that juveniles are vulnerable.<sup>35</sup> Although these decisions were intended to protect juveniles, they had the “unintended impact of shifting the focus from the juvenile to the offense, making the [juvenile] court experience nearly identical to the adult criminal court despite attempts to maintain important differences.”<sup>36</sup> For instance, many state transfer statutes allow a juvenile to be transferred to adult court based on age and/or the crime

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26. See NELLIS, *supra* note 18, at 6, 27, 32.

27. See REDDING ET AL., *supra* note 8, at 6.

28. See NELLIS, *supra* note 18, at 6.

29. See generally *id.* at 5.

30. See *id.* at 6; see also REDDING ET AL., *supra* note 8, at 9.

31. See *Juvenile Justice Reform Initiatives in the States 1994-1996*, OJJDP.OJP.GOV, [https://www.ojjdp.gov/pubs/reform/ch2\\_j.html](https://www.ojjdp.gov/pubs/reform/ch2_j.html) (last visited March 30, 2019).

32. See REDDING ET AL., *supra* note 8 at 9.

33. See NELLIS, *supra* note 18, at 27.

34. See REDDING ET AL., *supra* note 8, at 8.

35. See *Schall v. Martin*, 467 U.S. 253, 265 (1984) (stating that juveniles’ liberty interests differ from those of adults because they are always in some form of custody); *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971) (stating juveniles need not be given the right to a jury trial).

36. ASHLEY NELLIS, A RETURN TO JUSTICE: RETHINKING OUR APPROACH TO JUVENILES IN THE SYSTEM 32 (2016).

committed, without any consideration of the juvenile's competency.<sup>37</sup> Additionally, questions have rarely been raised regarding whether juveniles, no matter their age, are even competent to stand trial.<sup>38</sup>

*B. The History of Competency and How It Became Applied to Juveniles*

The principle that a defendant must be competent to stand trial can be traced as far back as sixteenth-century English common law.<sup>39</sup> It developed from the idea that a trial was meaningless if the person could not be mentally present because this would put that defendant on unequal footing compared to the state, preventing the assurance of Due Process.<sup>40</sup> Consequently, the notion arose that in order to be required to stand trial, a defendant had a right to understand the proceedings and participate in his or her defense, otherwise they were deemed incompetent.<sup>41</sup> The United States Supreme Court adopted this concept in its landmark case *Dusky v. United States*, elevating this right to a constitutional requirement, where it stated that the test of competence must be whether the defendant has both "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and "a rational as well as factual understanding of the proceedings against him."<sup>42</sup> In *Godinez v. Moran*, the court expanded this definition, including the consideration of the defendant's decision-making abilities in determining competency.<sup>43</sup>

Once the issue of competency is raised, the court may order an evaluation of the defendant's competence to stand trial, staying the trial until the court makes a determination of the defendant's competence based on the

37. See Anne Teigan, *Juvenile Age of Jurisdiction and Transfer to Adult Court Laws*, NCSL (Jan. 11, 2019), [www.ncsl.org/research/civil-and-criminal-justice/juvenile-age-of-jurisdiction-and-transfer-to-adult-court-laws.aspx](http://www.ncsl.org/research/civil-and-criminal-justice/juvenile-age-of-jurisdiction-and-transfer-to-adult-court-laws.aspx).

38. See Cooper, *supra* note 9, at 168.

39. See *Medina v. California*, 505 U.S. 437, 446 (1992) ("[T]he rule that a criminal defendant who is incompetent should not be required to stand trial has deep roots in our common-law heritage."); *Drope v. Missouri*, 420 U.S. 162, 171 (1975) ("Blackstone wrote that one who became 'mad' after the commission of an offense should not be arraigned for it 'because he is not able to plead to it with that advice and caution that he ought.' Similarly, if he became 'mad' after pleading, he should not be tried, 'for how can he make his defense?'" (quoting 4 WILLIAM BLACKSTONE COMMENTARIES \*24).

40. See *Medina*, 505 U.S. at 446; *Drope*, 420 U.S. at 171.

41. See *Medina*, 505 U.S. at 448; *Drope*, 420 U.S. at 171.

42. 362 U.S. 402, 402 (1960).

43. See 509 U.S. 389, 400-01 (1993) ("[A] finding that a defendant is competent to stand trial, however, is not all that is necessary before he may be permitted to plead guilty or waive his right to counsel. In addition to determining that a defendant who seeks to plead guilty or waive counsel is competent, a trial court must satisfy itself that the waiver of his constitutional rights is knowing and voluntary.").

evaluation.<sup>44</sup> If the defendant is deemed competent, the proceedings continue, but for those not deemed competent, most statutes provide for a period of treatment to restore competence.<sup>45</sup> If competency cannot be achieved, most states specify a defendant must be dismissed for the charged crime after a specified period of time, except if the defendant remains dangerous and mentally ill, in which case that defendant may be civilly committed.<sup>46</sup>

Modernly, the standard for competency continues to vary state by state.<sup>47</sup> Although the issue of competency was first raised in juvenile court in the 1990s,<sup>48</sup> most states have not yet created statutory guidance to assist in determining whether a juvenile is competent to stand trial.<sup>49</sup> Furthermore, among the few states that do have statutes in place, some simply use the same definition of adult competency.<sup>50</sup> Although lack of competency is typically associated with mental illness, recent scientific research suggests a juvenile's maturity should also be considered.<sup>51</sup> Still, most competency standards for juveniles fail to consider a juvenile's maturity, which recent research shows may have dire consequences.<sup>52</sup> Given the substantial progress made over the past two decades in neuroscience and behavioral science, "the legal system should not be bound to a stagnant definition of legal competency or to antiquated policies affecting offenders with mental health issues or developmental immaturity."<sup>53</sup>

## II. THE SCIENCE—HOW IT INFORMS US ON JUVENILE COMPETENCY

The assurance that a person accused of crimes be mentally competent to understand and participate in his or her own trial is "one of the pillars of the

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44. *Dusky*, 362 U.S. at 402.

45. LARSON ET AL., *supra* note 7, at 31; *see also Dusky*, 362 U.S. at 402.

46. *See Jackson v. Indiana*, 406 U.S. 715, 738 (1972) (holding unconstitutional to confine defendant indefinitely solely on basis of adjudicative incompetence; confinement may continue only for a reasonable period to determine likelihood of competence restoration or be justified by progress toward that goal).

47. *See Katner*, *supra* note 4, at 417-18.

48. *Id.* at 418.

49. *See* LARSON ET AL., *supra* note 7 and accompanying text.

50. *Id.*

51. *Id.*

52. Recent studies show that juveniles under the age of sixteen are likely not competent to stand trial, yet some state laws allow fourteen-year-old children to be tried in adult court for more heinous crimes, and to be sentenced to life in prison. *See generally* Susan LaVelle Ficke et al., *The Performance of Incarcerated Juveniles on the MacArthur Competence Assessment Tool-Criminal Adjudication (MacCAT-CA)*, 34 J. AM. ACAD. PSYCHIATRY L. 360 (2006).

53. Katner, *supra* note 4, at 412.

American justice system.”<sup>54</sup> However, incompetent youth are tried in juvenile courts every day either due to transfer statutes that automatically transfer a juvenile to adult court based on age or crime, or because some states’ definition of juvenile competency is based on narrow, adult standards—if juvenile competency is defined at all.<sup>55</sup> Generally when defendants are declared incompetent, it is due to mental illness or intellectual disability.<sup>56</sup> However, recent scientific research shows that a third reason for incompetence in juveniles is developmental immaturity.<sup>57</sup> Although some states have acknowledged juveniles are not at the same cognitive development as adults,<sup>58</sup> no state has developed competency standards for juveniles based on recent neuroscience or behavioral science data.<sup>59</sup> With the surge of research in these areas over the past two decades, scientific evidence can inform courts and legislatures on how to effectively determine juvenile competency.<sup>60</sup> While this research does not excuse juvenile crimes or ignore the need for the balance of public safety and individual accountability, it “confirms a guiding principle—the distinction between youth and adults is not simply one of age, but one of motivation, impulse control, judgment, culpability, and physiological maturation.”<sup>61</sup>

#### A. Support for Considering Objective Science

There is strong support for considering neuroscience and psychosocial science when determining competency for juveniles. The opinions of forensic psychology experts have long been used by judges and attorneys to inform them on matters of juvenile justice.<sup>62</sup> Yet still today, courts fail to look to these experts in formulating competency standards, but instead use assumptions based on adults.<sup>63</sup> Even so, the psychological experts, joined by

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54. MACARTHUR FOUND. RESEARCH NETWORK, ADOLESCENT LEGAL COMPETENCE IN COURT (2009), <http://www.modelsforchange.net/publications/854> [hereinafter MACARTHUR STUDY] (download PDF).

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

56. See NAT’L JUVENILE JUSTICE NETWORK, COMPETENCY TO STAND TRIAL IN JUVENILE COURT: RECOMMENDATIONS FOR POLICYMAKERS (2012), <http://www.njjn.org/our-work/juvenile-justice-competency-to-stand-trial-recommendations> (download PDF).

57. See *id.*

58. *Id.*

59. Meixner, *supra* note 14, at 1022.

60. *Applying Research to Practice: What Are the Implications of Adolescent Brain Development for Juvenile Justice?* COAL. FOR JUVENILE JUSTICE (2006), [http://www.juvjustice.org/sites/default/files/resource-files/resource\\_138\\_0.pdf](http://www.juvjustice.org/sites/default/files/resource-files/resource_138_0.pdf) [hereinafter COAL. FOR JUVENILE JUSTICE].

61. *Id.*

62. Katner, *supra* note 4, at 407.

63. *Id.*

legal experts and juvenile advocates, continue to raise the question of juveniles' competency to stand trial—especially in light of the fact that the presence of juveniles in criminal court has vastly increased over the past three decades.<sup>64</sup> These experts have conducted research supporting their argument that due to juveniles' deficiencies in maturity, they cannot be deemed competent to stand trial.<sup>65</sup> More recently, this argument has been backed by studies in neuroscience that use modern technology such as brain imaging.<sup>66</sup> These studies are relevant, considering competency deals with a criminal defendant's current mental state during the litigation process.<sup>67</sup> Also strengthening this argument are recent decisions by the U.S. Supreme Court, which have acknowledged the differences in juvenile brain development and culpability when evaluating juveniles' rights.<sup>68</sup>

Three recent landmark decisions by the Court have begun to recognize that juveniles are constitutionally different than adults, and they have attributed this difference in part to science and social science.<sup>69</sup> First, in *Roper v. Simmons*, the Court abolished the use of the death penalty for juveniles who committed their crime under the age of eighteen.<sup>70</sup> It recognized that, compared to adults, juveniles have a “lack of maturity and an underdeveloped sense of responsibility,” that they “are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure,” and their characters are “not as well formed.”<sup>71</sup> Then, in *Graham v. Florida*, the Court held that juveniles could not be sentenced to life imprisonment without parole for committing non-homicide offenses.<sup>72</sup> The Court recognized that “developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds.”<sup>73</sup> It went on to explain that “parts of the brain involved in behavior control continue to mature through late adolescence” and that juveniles' actions are less likely “to be evidence of ‘irretrievably depraved character’

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64. Joseph B. Sanborn, *Juvenile's Competency to Stand Trial: Wading Through the Rhetoric and the Evidence*, 99 J. CRIM. L. & CRIMINOLOGY 135, 149 (2009).

65. *Id.* at 149-50; see generally MACARTHUR STUDY, *supra* note 54.

66. MACARTHUR STUDY, *supra* note 54.

67. Meixner, *supra* note 14, at 995.

68. NAT'L JUVENILE JUSTICE NETWORK, *supra* note 56.

69. See *Miller v. Alabama*, 567 U.S. 460, 471 (2012) (“Our decisions rested not only on common sense—on what ‘any parent knows’—but on science and social science as well.”) (quoting *Roper v. Simmons*, 543 U.S. 551, 579 (2005)).

70. 543 U.S. at 578.

71. *Id.* at 569 (quoting *Johnson v. Texas*, 509 U.S. 350, 370 (1993)).

72. 560 U.S. 48, 82 (2010).

73. *Id.* at 68.

than are the actions of adults.”<sup>74</sup> Finally, in *Miller v. Alabama*, the Court held that juveniles could not be sentenced to life without parole for any crime, explaining that “sentencers must be able to consider the mitigating qualities of youth.”<sup>75</sup>

Additional support for looking to modern science comes from the Court’s reasoning in *Miller* when it addressed the state’s argument that the Court should consider the fact that most jurisdictions allowed a juvenile to be sentenced without parole.<sup>76</sup> The Court pointed out that while this fact may be true, the penalty for juveniles in those states had not been given deliberate, express, and full legislative consideration as evidenced by the fact that most of those states had not created separate penalty provisions for those juvenile offenders.<sup>77</sup> The same reasoning can be applied to competency standards. As mentioned *supra*, there has been a vast increase in transfers of juveniles to adult court.<sup>78</sup> However, most states either have not created statutory guidance for determining whether a juvenile is competent to stand trial or rely on adult competency standards, showing, as in *Miller*, there has not been full legislative consideration—including relying on recent science.<sup>79</sup> In addition, the states that have created statutory guidance do not consider a juvenile’s maturity,<sup>80</sup> which—as pointed out in *Roper*, *Graham*, and *Miller*—is what the U.S. Supreme Court has looked to when deciding on a juvenile punishment.<sup>81</sup> Also, no state’s rules have been informed by recent developments in neuroscience and social science.<sup>82</sup> Therefore, following in line with the recent U.S. Supreme Court cases, this research must be considered.

### *B. Neurobiological and Psychosocial Research—The Differences in Juveniles*

For a defendant to be deemed competent, several factors must be considered.<sup>83</sup> These include an understanding of the charges; an appreciation of the potential consequences of being found guilty or pleading guilty; an

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74. *Id.* (quoting *Roper*, 543 U.S. at 570).

75. 567 U.S. at 460.

76. *See generally Graham*, 560 U.S. at 48.

77. *Miller*, 567 U.S. at 486.

78. LARSON ET AL., *supra* note 7.

79. *See Medina v. California*, 505 U.S. 437, 446 (1992); *see also LARSON ET AL.*, *supra* note 7, at 2, 10.

80. NAT’L JUVENILE JUSTICE NETWORK, *supra* note 56.

81. *See generally Miller*, 567 U.S. at 460; *Graham*, 560 U.S. at 48; *Roper*, 543 U.S. at 551.

82. Katner, *supra* note 4, at 521; Meixner, *supra* note 14, at 1017.

83. Fortunati et al., *supra* note 1.

understanding of the role of justice system participants such as judges, the jury, and the prosecutor; the capacity to confront witnesses; and an understanding of basic constitutional rights such as being innocent until proven guilty.<sup>84</sup> However, a factual understanding of these factors is not sufficient.<sup>85</sup> The defendant must have a rational understanding in order to rationally participate in one's own defense—something that cannot be learned, but develops with maturity.<sup>86</sup> Recent scientific research informs us that the immaturity of juveniles' alone—besides the fact that most juveniles in the justice system suffer from some sort of mental illness or intellectual disability<sup>87</sup>—points to the fact that juveniles, especially those under the age of fifteen, cannot be competent.<sup>88</sup>

The ongoing development of juveniles' hormonal, cognitive, social, and emotional capacities distinguishes them from adults and are relevant to their competency to understand and participate in the legal process.<sup>89</sup> These capacities, which are present in average functioning adults but deficient in juveniles, can be placed into two categories: cognitive<sup>90</sup> and psychosocial deficiencies.<sup>91</sup> Cognitive differences include deficiencies in the way a juvenile thinks, while psychosocial differences include deficiencies in juveniles' social and emotional capability.<sup>92</sup> Both these differences affect the juveniles' "maturity in judgement"—a term used "to refer to the complexity and sophistication of the process of individual decision-making as it is affected by a range of cognitive, emotional, and social factors."<sup>93</sup> While these capacities mature from childhood through adolescence, "development does not end there as young adulthood also provides new challenges and experiences that may continue to impact brain development."<sup>94</sup> It is because

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84. *Id.*

85. *Id.*

86. *Id.*

87. Katner, *supra* note 4, at 419 (pointing to research that shows "65% of incarcerated juveniles and 60% of detained juveniles meet criteria for one or another DSM-V disorder . . .").

88. See MACARTHUR STUDY, *supra* note 54, at 1-3.

89. Randy K. Otto, *Considerations in the Assessment of Competent to Proceed in Juvenile Court*, 34 N. KY. L. REV. 323, 330 (2007).

90. Outside the scope of this note are other contributing factors to cognition, including IQ and mental illness. However, it should be noted that most, if not all, of the heinous offenders have some sort of mental illness and/or a low IQ. For further discussion on this matter, see MACARTHUR STUDY, *supra* note 54, at 3.

91. See Elizabeth Cauffman & Laurence Steinberg, *(Im)maturity of Judgment of Adolescence: Why Adolescents May Be Less Culpable than Adults*, 18 BEHAV. SCI. & L. 741, 742-43 (2000).

92. *Id.*

93. *Id.*

94. Catherine Lebel & Christian Beaulieu, *Longitudinal Development of Human Brain Wiring Continues from Childhood into Adulthood*, 31 J. OF NEUROSCIENCE 10937, 10937 (2011).

of this lack in capacity that juvenile advocates have argued for years that juveniles may lack competence to stand trial,<sup>95</sup> and now we have modern science to support this.<sup>96</sup>

Because how a person's abilities is linked to the development of one's brain structure, knowledge about the development of these structures is essential in understanding how changes occur from youth until adulthood.<sup>97</sup> Recent advances in modern technology, such as magnetic brain imaging and diffusion tensor imaging, have contributed to this knowledge, providing visible scientific evidence that most juveniles may not be capable of being competent.<sup>98</sup> This section will first discuss in Parts 1 and 2 how modern technology provides support for the conclusion that juveniles are deficient in cognitive abilities and psychosocial abilities, two areas that are crucial for developing the maturity required for competency. Second, Part 3 will discuss how these deficiencies practically affect a juvenile's competency.

### 1. Neurological Development as It Relates to Cognitive Functions

Recent imaging research shows that the average human brain is not fully developed until the age of twenty-five.<sup>99</sup> One of the last areas to develop in the adolescent brain is the prefrontal cortex, which undergoes the greatest and most important developmental changes during adolescence.<sup>100</sup> Functions of the prefrontal cortex are relevant to juvenile competency because it is associated with the ability to think abstractly, organize information, plan ahead, weigh consequences of decisions, and disregard emotional and impulsive reactions in order to make appropriate choices.<sup>101</sup> In addition to studies showing an underdeveloped prefrontal cortex in juveniles, one recent study by Lebel and Beaulieu ("Lebel Study") used diffusion tensor imaging, a technology more advanced than MRI imaging, to show that association tracts in the brain also continue to develop during late adolescence and early adulthood.<sup>102</sup> These tracts are responsible for linking perceptual and memory

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95. See generally NAT'L CONFERENCE OF STATE LEGISLATURES, ADOLESCENT DEVELOPMENT & COMPETENCY: JUVENILE JUSTICE GUIDE BOOK FOR LEGISLATURES, <http://www.ncsl.org/documents/cj/jjguidebook-adolescent.pdf> (last visited Nov. 22, 2018).

96. See NAT'L JUVENILE JUSTICE NETWORK, *supra* note 56, at 3-4; see generally Lebel & Beaulieu, *supra* note 94, at 10937.

97. Lebel & Beaulieu, *supra* note 94, at 10937.

98. See NAT'L CONFERENCE OF STATE LEGISLATURES, *supra* note 95, at 4; Lebel & Beaulieu, *supra* note 94, at 10937; see also NAT'L JUVENILE JUSTICE NETWORK, *supra* note 56, at 4.

99. See NAT'L CONFERENCE OF STATE LEGISLATURES, *supra* note 95, at 4.

100. *Id.*

101. See LARSON ET AL., *supra* note 7, at 18.

102. Lebel & Beaulieu, *supra* note 94, at 10943.

centers of the brain<sup>103</sup> and are “needed for complex cognitive tasks such as inhibition, executive functioning, and attention.”<sup>104</sup>

In addition to providing support for the fact that the prefrontal cortex is underdeveloped, modern science also informs us that due to this region being underdeveloped, other biological factors step in to influence decision making.<sup>105</sup> This research accounts for changes in cognition that characterize adolescent behavior.<sup>106</sup> These biological factors include an increase in dopamine receptors, changes in hormone levels, and an underdeveloped limbic system.<sup>107</sup> Dopamine is a chemical found in the brain that “affects memory, concentration, problem solving, and mental associations connecting actions and pleasure in the frontal lobe.”<sup>108</sup> Brain imaging has shown an increase in dopamine levels in the adolescent brain, affecting feedback learning, sensitivity to social evaluation and loss, and incentive-driven responses.<sup>109</sup> This increase in dopamine, coupled with hormonal imbalance, also step in to influence decision making in place of the underdeveloped prefrontal cortex and explains why adolescents especially are inclined to reward-seeking or sensation-seeking behavior.<sup>110</sup> Hormonal imbalance begins to occur during adolescence, with surges of testosterone and estrogen.<sup>111</sup> As even adults can testify to, these hormones have a direct effect on decision making.<sup>112</sup> Finally, the limbic system, comprised primarily of the nucleus accumbens, hippocampus, hypothalamus, is associated with processing and managing emotions.<sup>113</sup> This system also steps in to compensate for the underdeveloped pre-frontal cortex.<sup>114</sup> However, the limbic system is also still maturing in juveniles, meaning there is an immature system of managing emotions making executive function decisions.<sup>115</sup> The effect is impulsive

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103. *White Matter Tracts*, ANATOMYBOX (June 21, 2012), <http://www.anatomybox.com/white-matter-tracts/>.

104. Lebel & Beaulieu, *supra* note 94, at 10943.

105. See NAT'L JUVENILE JUSTICE NETWORK, *supra* note 56, at 4.

106. *Id.*

107. Elizabeth Scott et al., *Brain Development, Social Context, and Justice Policy*, 57 WASH. U. J. L. & POL'Y 13, 22 (2018).

108. COAL. FOR JUVENILE JUSTICE, *supra* note 60, at 5-6.

109. See Scott et al., *supra* note 107.

110. *Id.*

111. *Id.*

112. *Id.*

113. See Rand Swenson, *Review of Clinical and Functional Neuroscience*, DARTMOUTH MEDICAL SCHOOL (2006), [https://www.dartmouth.edu/~rswenson/NeuroSci/chapter\\_9.html](https://www.dartmouth.edu/~rswenson/NeuroSci/chapter_9.html).

114. See LARSON ET AL., *supra* note 7, at 13-14.

115. See Mariam Arian et al., *Maturation of the Adolescent Brain*, NEUROPSYCHIATRIC DISEASE AND TREATMENT (Apr. 3, 2013), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3621648/>.

behavior and mood swings.<sup>116</sup> The combination of the influence of these biological factors on the brain, specifically the pre-frontal cortex, all play an important role when informing us of juvenile decision making and behavior that affects a juvenile's competence.<sup>117</sup>

## 2. How Objective Research in Psychosocial Science Factors into It All

There has been little scholarly discussion of how the impact of the underdevelopment of a juvenile's deficiency in emotional development affects competency.<sup>118</sup> In the past, the development of the psychosocial systems has been a more difficult area to objectively measure,<sup>119</sup> creating questions on the effect it has on juvenile behavior. However, recent technology, research, and testing provide an objective measurement of how underdeveloped a juvenile's psychosocial capacity is, which in turn can affect juvenile competency.<sup>120</sup> That we should look to this additional research is further supported by the U.S. Supreme Court in *Miller v. Alabama*, where the Court acknowledged social and emotional development as contributing factors of juvenile decision making.<sup>121</sup> The Court explained that the emotional disturbance of a juvenile was “‘particularly relevant’—more so than it would have been in the case of an adult offender.”<sup>122</sup>

This reasoning by the Court is supported by recent research, which shows juveniles lack maturity in psychosocial development and in turn influences the way they approach decisions.<sup>123</sup> Different from decreased cognitive developments, which includes deficiencies in the way a person thinks, decreased psychosocial development includes deficiencies in adolescents' social and emotional capability.<sup>124</sup> However, the two are intertwined and together affect juvenile competency—“the complexity and sophistication of the process of individual decision-making . . . is affected by a range of cognitive, emotional, and social factors.”<sup>125</sup> This is especially true for juveniles in the criminal justice system, given that many of them demonstrate abnormal development coupled with negative social, emotional,

116. NAT'L JUVENILE JUSTICE NETWORK, *supra* note 56.

117. *See* Scott et al., *supra* note 107, at 22.

118. *See id.* at 13.

119. *See id.*

120. *See* Beatriz Luna et al., *What Has fMRI Told Us About the Development of Cognitive Control Through Adolescence*, 72 BRAIN & COGNITION 101, 101-02 (2010).

121. 567 U.S. 460, 476 (2012).

122. *Id.* (quoting *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982)).

123. Elizabeth S. Scott & Thomas Grisso, *Developmental Incompetence, Due Process, and Juvenile Justice Policy*, 83 N. C. L. REV. 793, 815 (2005).

124. Cauffman & Steinberg, *supra* note 91, at 742-43.

125. *Id.* at 743.

and familial influences<sup>126</sup> and occurrences.<sup>127</sup> Additionally, this intertwining is apparent from the Lebel Study, which showed that the development of the association tracts that support complex cognitive processing is influenced by complex and demanding life experiences, including education and social/family relationships.<sup>128</sup> Furthermore, the Lebel Study suggested that social and emotional experiences during development may influence cognitive development.<sup>129</sup> This can be explained by the underdeveloped limbic system, dopamine levels, and hormonal changes, as discussed *supra*.<sup>130</sup>

One study identifies four psychosocial factors that are relevant to juveniles' legal decision making: responsibility, time perspective, social perspective, and temperance.<sup>131</sup> Responsibility refers to a juvenile's ability to be self-reliant (the ability to make decisions on one's own and not be influenced by external pressures) and to have a sense of identity (self-esteem and clarity of the self).<sup>132</sup> Time perspective refers to the juvenile's ability to understand and consider short and long term consequences of decisions.<sup>133</sup> The interpersonal perspective describes the juvenile's ability to take into consideration the perspectives of others.<sup>134</sup> Finally, temperance refers to the juvenile's ability to manage and control emotions, impulses, and behavior, such as not acting before contemplating and not acting aggressively when angered.<sup>135</sup>

The conclusions of this study are supported by recent research by the MacArthur Foundation, which stated that emotional maturity plays an important part in the legal decision-making context.<sup>136</sup> Specifically, the study identified similar relevant aspects of emotional maturity—"the ability to take into consideration long-term consequences (future orientation), perceive and comprehend risks, deflect peer influence, and weigh whether to comply with authority figures."<sup>137</sup> Therefore, recent research in the psychosocial immaturity, also known as emotional immaturity, of juveniles provides

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126. See Katner, *supra* note 4, at 520.

127. See RICHARD ROSS, *JUVENILE IN JUSTICE* 21 (Laura Lindgren ed., 2012) (stating that 100% of the girls at the facility visited by the author had been sexually assaulted in the past).

128. Lebel & Beaulieu, *supra* note 94, at 10943.

129. *Id.*

130. See Scott et al., *supra* note 107, at 16, 20-24.

131. Cauffman & Steinberg, *supra* note 91, at 746.

132. *Id.* at 745, 748.

133. *Id.*

134. *Id.*

135. *Id.*

136. MACARTHUR STUDY, *supra* note 54.

137. See *id.* at 2.

further support that juveniles are not capable of being competent, and why courts and legislators should take notice.

### *B. The Practical Effect*

The science showing how the dynamic interaction of brain development, hormonal imbalance, dopamine levels, and psychosocial development provides a strong argument on how juveniles may not be competent.<sup>138</sup> However, giving courts and legislatures evidence on how these deficiencies impact juvenile competence in the criminal justice system may be more persuasive to state legislatures and courts in creating guidelines to determine juvenile competency. Studies have provided evidence of this impact, including a study by the MacArthur Foundation that looked at the “ability [of juveniles] to understand the purpose and nature of the trial process; the capacity to provide relevant information to counsel and to process that information; and the ability to apply information to one’s own situation in a manner that is neither distorted nor irrational.”<sup>139</sup>

The first area the study looked at was a juvenile’s competence to proceed, specifically whether the juvenile understood the nature of the trial process.<sup>140</sup> When questioned about the intent and nature of the adjudication process, the results were as follows:

[T]he youngest group was nearly three times more likely than youth older than fifteen to be significantly impaired in reasoning and understanding, two important components of legal competence. In other words, nearly one-third of children ages 11-13 and one-fifth of teenagers ages 14-15 had both reasoning skills and an understanding of the process that were weak enough to seriously call into question their ability to stand trial.<sup>141</sup>

Next, the researchers assessed the ability to “take into consideration long-term consequences (future orientation), perceive and comprehend risks, deflect peer influence, and weigh whether to comply with authority figures.”<sup>142</sup> To measure this, participants were asked to imagine they were being interrogated by police for a crime they had committed and to choose from one of three options what they would do: “confess to the police, deny the offense, or refuse to speak.”<sup>143</sup> The results showed that more than 50% of children ages eleven to thirteen and 40% of teenagers ages fourteen to

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138. See Scott et al., *supra* note 107, at 16, 20-24.

139. MACARTHUR STUDY, *supra* note 54, at 1.

140. *Id.*

141. *Id.* at 2.

142. *Id.*

143. *Id.*

fifteen chose to confess and “to endorse decisions that comply with what an authority seemed to want.” In addition, children and young teenagers were found to be significantly less likely than teenagers older than sixteen and adults to recognize the risks of their legal defense decisions and the likely outcome of those decisions.<sup>144</sup>

Also, “younger teens were significantly less likely to recognize the inherent risks in various decisions,” and “less likely to comprehend the long-term consequences of their decisions.”<sup>145</sup>

Other research in plea bargaining also shows that juveniles are likely not competent to make this important legal decision.<sup>146</sup> The decision whether or not to take a plea bargain based on numerous factors, including being able to understand the law, the seeming strength of evidence, the probability that one will be convicted at trial, the value of the plea offer, and the ability to decipher whether the advice from attorneys is effective.<sup>147</sup> One study looked to whether the juvenile participants could even understand the plea colloquy,<sup>148</sup> which is a conversation between a judge and a criminal defendant who has been sworn under oath to be sure the defendant is making the plea knowingly, intelligently, and voluntarily.<sup>149</sup> The study included a group that was instructed on the meaning of the terms of the colloquy and one that was not.<sup>150</sup> On average, the instructed group only defined five of the thirty-six words correctly, while the uninstructed group only two.<sup>151</sup>

Other examples of juvenile deficiencies are equally as shocking. With immaturity resulting in the juvenile’s tendency to please authority figures, studies have shown that juveniles are more inclined to make decisions that align with what they think authority figures want, even if that means confessing or agreeing to a plea bargain.<sup>152</sup> Additionally, studies have shown that juveniles are less likely to trust and effectively communicate with their lawyers.<sup>153</sup> This may be partly due to the fact that juveniles are highly influenced by their peers and have only limited abilities to see the long-term consequences of their actions, as demonstrated in the hypothetical about

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144. *Id.* at 2-3.

145. *Id.*

146. See Allison D. Redlich, *The Susceptibility of Juveniles to False Confessions and False Guilty Pleas*, 62 RUTGERS L. REV. 943, 946, 948 (2010).

147. *Id.* at 945.

148. Barbara Kaban & Judith C. Quinlan, *Rethinking a “Knowing, Intelligent, and Voluntary Waiver” in Massachusetts’ Juvenile Courts*, 5 J. CTR. FAM., CHILD., & CTS. 35, 35-36 (2004).

149. See generally *Boykin v. Alabama*, 395 U.S. 238, 242 (1969).

150. Kaban & Quinlan, *supra* note 148, at 40-41.

151. *Id.* at 42.

152. NAT’L CONFERENCE OF STATE LEGISLATURES, *supra* note 95, at 7.

153. *Id.*

Tommy *supra*.<sup>154</sup> The results of another study also provides information about the effect a juvenile's brain has on communication with counsel, showing an inability to lack of attention span in live conversations.<sup>155</sup> In that study, while juvenile participants were able to give "rapt attention" to an educational video, after the video, they were unable to pay attention to the questions of peers or investigators' responses.<sup>156</sup>

In summary, the science and the practical application of the effects of the science both show that juveniles, especially those under the age of fifteen, may not be competent. Additionally, those over the age of fifteen should have their competency determined by recent scientific research. The next question is, in light of this evidence, what should courts and legislators do to correct the current juvenile justice system.

### III. THE SOLUTION—REDEFINING AND REHABILITATION

"The greatest cure of delinquency is maturation," asserts Judge Paul H. Lawrence, 2006 CJJ National Chair and presiding juvenile court judge in Goffstown District Court New Hampshire.<sup>157</sup> However, the current juvenile justice system has strayed away from this concept and instead has gone towards a more punitive approach similar to the adult justice system.<sup>158</sup> This is in direct conflict with recent Supreme Court reasoning that juveniles are different than adults.<sup>159</sup> In addition, with objective science to back up that juveniles are different, it is time for change. Therefore, courts and legislatures should look to both the U.S. Supreme Court's reasoning and the objective science to make changes that will give juveniles an opportunity to rehabilitate and avoid recidivism. This can be done by eliminating altogether automatic transfers into adult court, defining better competency standards for juveniles, and by altering what happens when a juvenile is deemed incompetent.

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154. See Scott et al., *supra* note 107, at 15, 23, 50 (explaining that "the power of peer influence on the individual adolescent operates even without overt peer pressure or even peer presence" and therefore, "a second form of peer influence occurs if a teenager acts with the goal of positively impressing his peer group").

155. See Cooper, *supra* note 9, at 178.

156. *Id.*

157. *Juvenile Justice and Delinquency Prevention Act: Overview and Perspectives: Hearing Before the Subcomm. on Healthy Families and Communities of the H. Comm. on Education and Labor and the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 110th Cong. 11, 27 (2008) (statement of Paul Lawrence, J. of Goffstown Dist. Ct.).

158. See REDDING ET AL., *supra* note 8 and accompanying text.

159. See *Miller v. Alabama*, 567 U.S. 460, 471 (2012); see also *Roper v. Simmons*, 543 U.S. 551, 569-571 (2005); see *supra* notes 64-66.

A. *Statutory Redefinition of Transfers and Competency Statutes*

As discussed *supra*, some states have transfer statutes that automatically transfer a juvenile into adult court based on the age of the juvenile or the crime committed, without any evaluation as to whether the juvenile is even competent to stand trial.<sup>160</sup> Additionally, most states have no statutory guidance on how to determine whether a juvenile is competent to stand trial and the few that do have not used science to inform them.<sup>161</sup> This has the effect of “‘processing’ children and incarcerating children who should be identified and removed from the process of criminal prosecution.”<sup>162</sup> By allowing juveniles to be tried as adults, this perpetuates behavior that causes juveniles to get caught up in the criminal justice system.<sup>163</sup> Transfer statutes do not account for this, nor the possibility that simply growing up, with proper support, could eliminate this criminal behavior. They should either be eliminated completely or severely modified. At the least, looking to the MacArthur Study, we should eliminate transfer statutes for juveniles under sixteen years of age. However, if we are going to keep these transfer statutes, legislatures should require a competency evaluation, along with a redefinition of competency statutes to account for juvenile behavior due to lack of maturity. In addition, new statutes should be created that afford greater protections to prevent incompetent juveniles from being processed through the criminal justice system as if they were competent.<sup>164</sup> Recommendations for how to do this are backed by scientific evidence on the juvenile brain and based on what is best for both the juvenile and society.<sup>165</sup> These recommendations should not go unnoticed by courts and legislators.

The argument for redefining or simply creating competency statutes that apply specifically to juveniles is a strong one. For years scholars have argued that the legislatures and courts should be considering not only the mental illness or mental disability of juveniles, but also the other cognitive and

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160. See NAT’L JUVENILE JUSTICE NETWORK, *supra* note 56; see also LARSON ET AL., *supra* note 7 and accompanying text.

161. See *Medina v. California*, 505 U.S. 437, 446 (1992); *Drope v. Missouri*, 420 U.S. 162, 171 (1975).

162. David R. Katner, *The Mental Health Paradigm and the MacArthur Study: Emerging Issues Challenging the Competence of Juveniles in Delinquency Systems*, 32 AM. J.L. & MED. 503, 521 (2006).

163. See *Juvenile Justice Reform Initiatives in the States 1994-1996*, OJJDP.OJP.GOV, [https://www.ojjdp.gov/pubs/reform/ch2\\_j.html](https://www.ojjdp.gov/pubs/reform/ch2_j.html) (last visited Dec. 20, 2019).

164. See LARSON ET AL., *supra* note 7, at 22-23; MACARTHUR STUDY, *supra* note 54.

165. See LARSON ET AL., *supra* note 7, at 23; MACARTHUR STUDY, *supra* note 54.

psychosocial deficiencies discussed *supra*.<sup>166</sup> That is because many juveniles are “unidentified incompetents.”<sup>167</sup> Currently, some states have created juvenile competency statutes that only include specific functional abilities to determine competency.<sup>168</sup> Functional abilities would include what an individual is able to accomplish, such as explain who the players are in the courtroom.<sup>169</sup> This can be problematic because some of the abilities can be accomplished by rote memorization (factual understanding), ignoring that the juvenile does not have enough understanding and ability to withstand trial and assist in a proper defense (rational understanding). Instead, competency statutes should define broader cognitive concepts, which are the cognitive and psychosocial abilities the juvenile possesses to accomplish the functions that make an individual competent to stand trial.<sup>170</sup> Examples of cognitive concepts would include possessing both a factual and rational understanding of the proceedings, along with the ability to assist counsel,<sup>171</sup> and possessing the capacity to make decisions.<sup>172</sup> Factual understandings include the ability to understand various facts, such as who the judge is and what role the defense attorney plays.<sup>173</sup> Conversely, rational understanding refers to the ability to apply the factual information without distortions created by mental illness, mental disability, or developmental immaturity.<sup>174</sup> By separating these out and including both in a statute, this will provide greater assurance that a juvenile who can regurgitate factual understandings but cannot rationally apply those facts, will not be found competent.<sup>175</sup>

Additionally, there is a strong argument that transfer statutes need to account for juvenile incompetency.<sup>176</sup> States often transfer juveniles into the adult system either because of the belief that the types of services and

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166. See Katner, *supra* note 4, at 418; LARSON ET AL., *supra* note 7; MACARTHUR STUDY, *supra* note 54; Mallet, *supra* note 6, at 854-55.

167. See Mallet, *supra* note 6, at 858.

168. See LARSON ET AL., *supra* note 7, at 34.

169. See THOMAS GRISSO, *EVALUATING COMPETENCIES: FORENSIC ASSESSMENTS AND INSTRUMENTS* §3, at 67 (2nd ed. 2003).

170. See Franz E. Weinert, *Concepts of Competence: A Conceptual Clarification*, in *DEFINING AND SELECTING KEY COMPETENCIES* 44, 44-65 (Dominique Simone Rychen & Laura Hersh Salganik eds., 2001).

171. See LARSON ET AL., *supra* note 7, at 32; see also NAT'L JUVENILE JUSTICE NETWORK, *supra* note 56.

172. See *Godinez v. Moran*, U.S. 509 U.S. 389, 398-99 (1993).

173. See LARSON ET AL., *supra* note 7, at 32.

174. *Id.* at 34.

175. *Id.* at 35.

176. See Lois B. Oberlander et al., *Preadolescent Adjudicative Competence: Methodological Considerations and Recommendations for Practice Standards*, 19 *BEHAV. SCI. & L.* 545, 561 (2001).

dispositions—dismissal of charges, eligibility for civil commitment—in the juvenile justice system can no longer be offered by the juvenile judge or that society considers the type of crime the juvenile was charged with as deserving punishment rather than rehabilitation.<sup>177</sup> This ignores the recent scientific research that many juveniles may not be capable of being competent and do not stand a chance in adult court. In addition, research shows the effects of sending a juvenile to adult prison has both financial consequences to society<sup>178</sup> and promotes recidivism.<sup>179</sup> As one judge stated, “a child is unlikely to succeed in the long, difficult process of rehabilitation when his teachers during his confinement are adult criminals.”<sup>180</sup> This approach also ignores the fact that some juveniles can be rehabilitated, even some of the more violent ones.<sup>181</sup> The statutes would be properly modified by mandating a mental health professional to determine whether a juvenile is competent to be transferred to adult court based on a competency evaluation, not at the discretion of District Attorneys.<sup>182</sup> This is because although courts are experts in the law, the factors contributing to juvenile delinquency are not easy to identify.<sup>183</sup> Therefore it should be left up to these experts to decide appropriate rehabilitative treatments, or at the least raise the age of these transfer statutes as many other countries have done.<sup>184</sup>

Finally, further protections should be provided to juveniles in order to prevent incompetent juveniles from being deemed competent. This is because juvenile deficits, such as acute mental illness or intellectual disabilities, are not as obvious as in adults because symptoms often present more subtly.<sup>185</sup> Due to this vulnerability, although the U.S. Supreme Court

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177. See LARSON ET AL., *supra* note 7, at 91.

178. See Jennifer Park, *Balancing Rehabilitation and Punishment: A Legislative Solution for Unconstitutional Juvenile Waiver Policies*, 76 GEO. WASH. L. REV. 786, 809-10 (2008) (stating that “it costs taxpayers between \$1.7 and \$2.3 million annually for one child to leave school for a life of crime and drug abuse”).

179. See *id.* at 809 (stating that studies show “youths tried in the juvenile court are less likely than those tried as adults to commit new offenses”).

180. *United States v. Bland*, 472 F.2d 1329, 1349-50 (D.C. Cir. 1972) (Wright, J., dissenting).

181. See Dana Royce Baerger et al., *Competency to Stand Trial in Preadjudicated and Petitioned Juvenile Defendants*, 31 J AM. ACAD. PSYCHIATRY L. 314, 320 (2003) (“[D]espite the common assertion during the 1970s that treatment of juvenile delinquents was uniformly unsuccessful, more recent research indicates that this is far from true.”).

182. See MACARTHUR STUDY, *supra* note 54, at 3 (“The findings [of this study] also suggest . . . making competency evaluations mandatory for adolescents below a certain age, and requiring competence evaluations for any youth sent to criminal court to be tried as an adult.”).

183. See LARSON ET AL., *supra* note 7, at 33.

184. See Katner, *supra* note 4, at 427-30.

185. See Tanya Peterson, *Mental Illness in Children: Types, Symptoms, Treatments, Healthy Place for Your Mental Health*, HEALTHYPLACE (Oct. 23, 2019), <https://www.healthyplace.com/other-info/mental-illness-overview/mental-illness-in-children-types-symptoms-treatments>.

has set the standard of proving competency by a preponderance of the evidence, the constitutional floor should be raised. Additionally, there could be a presumption that juveniles are incompetent, shifting the burden of proof to the government to prove that the juvenile is competent.<sup>186</sup> Another protection would be to require a lawyer to be present during the competency hearings, especially considering that in many jurisdictions juveniles are given competence evaluations without counsel or, if counsel is present, the counsel has no knowledge that an evaluation is being performed.<sup>187</sup> In addition, the information in these evaluations should not be used against the juvenile.<sup>188</sup> This is because often times the examiner, in an effort to evaluate the defendant's ability to relate events coherently, will ask the defendant to recite the facts of the events that led up to the crime and include the alleged offense—statements that obviously could be self-incriminating.<sup>189</sup> Additionally, the evaluation should be performed by either child psychologists or child psychiatrists—not just any mental health professional without training in juvenile mental illness or behavioral issues.<sup>190</sup> Furthermore, the evaluation should be performed in the least restrictive environment and within reasonable time limits.<sup>191</sup> Finally, juvenile competency statutes should instruct the court to allow medical professionals to determine both the most appropriate placement and services for the juvenile based on the reason for the juvenile's incompetence.<sup>192</sup>

These recommendations are backed by reports from juvenile experiences, such as one juvenile lifer in Illinois who states, “[h]ow is it you can be put in an extremely difficult situation, which you have no experience in and be expected to make adult decisions, when you really don't understand consequences? [And] then be considered an adult when you have never taken care of yourself or had adult responsibilities?”<sup>193</sup>

#### *B. What to Do with Juveniles Deemed Incompetent*

Generally, juveniles not found competent are civilly committed to either a treatment program, institution, or hospital to restore competency.<sup>194</sup> This

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186. See LARSON ET AL., *supra* note 7, at 43-46.

187. See Kellie M. Johnson, *Juvenile Competency Statutes: A Model for State Legislation*, 81 IND. L.J. 1068, 1079-83 (2006).

188. NAT'L JUVENILE JUSTICE NETWORK, *supra* note 56, at 5.

189. *Id.* at 5-6.

190. *Id.* at 6.

191. *Id.*

192. See LARSON ET AL., *supra* note 7, at 71-76.

193. NELLIS, *supra* note 18, at 18.

194. Katner, *supra* note 162, at 523.

includes sending them to juvenile detention hall until they are deemed competent.<sup>195</sup> Unfortunately, these facilities often fail to meet the goal of rehabilitation and instead, more often than not, inflict additional pain and suffering on the juvenile, promoting recidivism rather than the original intent of the juvenile system—rehabilitation.<sup>196</sup> In addition, many states have statutes limiting how long juveniles can be held at these juvenile detention halls.<sup>197</sup> This creates an issue since many juvenile offenders may not be competent for years due to deficiencies discussed *supra*.<sup>198</sup> Then the question is what to do with these juveniles.<sup>199</sup> One solution is to expand the court's options to allow for other treatment services<sup>200</sup> and perhaps a reform of these facilities.<sup>201</sup> This is because with the underlying reason for a juvenile's incompetence being different than adults, the type of services the juvenile receives to restore competence should be more tailored to the juvenile's deficits.<sup>202</sup> In addition, science shows us the juvenile brain is more malleable than an adult's brain, providing a much greater chance of rehabilitation if given the proper treatment.<sup>203</sup> Also, while this process of waiting for the juvenile to become competent does not have to divest the juvenile justice system of jurisdiction over accused offenders,<sup>204</sup> the court should let the experts—mental health professionals—decide a placement most effective for the juvenile's rehabilitation, not the court itself, for reasons discussed *supra*.<sup>205</sup>

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195. *Id.*

196. See Jeremiah Bourgeois, *The Irrelevance of Reform: Maturation in the Department of Corrections*, 11 OHIO ST. J. CRIM. L. 149, 159 (2013).

197. See *Jackson v. Indiana*, 406 U.S. 715, 738 (1972); LARSON ET AL., *supra* note 7 and accompanying text.

198. See MACARTHUR STUDY, *supra* note 54, at 1-2.

199. *Id.* at 3.

200. Katner, *supra* note 162, at 523-24.

201. While outside the scope of this paper, there is a lot of discussion arguing reform of these facilities, and some have already begun to do so such as one facility in California that has begun to incorporate the Integrated Behavioral Treatment Model. See generally NAT'L JUVENILE JUSTICE NETWORK, *supra* note 56; *Ventura Youth Facility Is Making State Safer Through Excellence in Academics, Sportsmanship*, INSIDE CR (Oct. 2, 2018), <https://www.insidecder.ca.gov/2018/10/ventura-youth-facility-is-making-state-safer-through-excellence-in-academics-sportsmanship-part-2/>.

202. See Kellie M. Johnson, *Juvenile Competency Statutes: A Model for State Legislation*, 81 IND. L.J. 1067, 1079 (2006).

203. MACARTHUR STUDY, *supra* note 54, at 2-3.

204. See Marty Beyer, *Immaturity, Culpability & Competency in Juveniles: A Study of 17 Cases*, 15 CRIM. JUST. 26, 35 (2000).

205. See Katner, *supra* note 162, at 523; LARSON ET AL., *supra* note 7, at 32.

There are other treatment options available besides civil commitment.<sup>206</sup> Because science shows juveniles have different needs in rehabilitation or restoring competence, the treatment should be specific to the juvenile since there is a wider variety of incompetency issues in juveniles versus adults.<sup>207</sup> For example, research shows multisystemic therapy programs—which include interventions involving family members, teachers, and other adults—may be effective for those juveniles who exhibit serious clinical problems such as violent behaviors, substance abuse, and severe emotional disturbance.<sup>208</sup> For juveniles that have addictions, being incarcerated without treatment will unlikely help them rehabilitate.<sup>209</sup> Unfortunately, juveniles have been shown to be the heaviest drinkers due to their mental deficiencies and many juveniles have been sexually assaulted or otherwise victimized.<sup>210</sup> For those juveniles, incarceration without treatment leads to recidivism since they will return to the environment that created the addiction and/or continue to be subjected to the abuse.<sup>211</sup> Finally, the issue of incompetence due to maturity—usually combined with many of the other issues discussed—should influence courts to consider alternatives rather than prosecution based on the age of the juvenile. The fact that they lack immaturity should not make them a target for life.

#### CONCLUSION

The United States made “a thoughtful and deliberate choice in 1899 to accommodate developmental differences between adolescents and adults with the establishment of juvenile courts.”<sup>212</sup> Modernly, objective psychological research is undisputable—juvenile offenders are adolescents, not adults. Yet still today, courts rely on adult standards and prior precedent to determine the future of juveniles who have crossed the line into criminal behavior. Current systems promote finding juveniles competent to stand trial based on age and the heinous nature of crimes, thereby placing juveniles in adult facilities that promote punishment versus rehabilitation—a recipe for

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206. See SARAH HAMMOND, NAT’L CONFERENCE OF STATE LEGISLATURES, MENTAL HEALTH NEEDS OF JUVENILE OFFENDERS 4 (2007), [http://www.ncsl.org/print/health/Mental\\_health\\_needsojuvenileoffendres.pdf](http://www.ncsl.org/print/health/Mental_health_needsojuvenileoffendres.pdf).

207. *Id.* at 5.

208. *Id.* at 6-8.

209. *Id.* at 4.

210. See U.S. DEP’T OF HEALTH & HUMAN SERVICES, ALCOHOL ALERT: YOUNG ADULT DRINKING (2006), <https://pubs.niaaa.nih.gov/publications/aa68/AA68.pdf>.

211. See HAMMOND, *supra* note 206, at 7-8.

212. See NELLIS, *supra* note 18, at 5.

recidivism.<sup>213</sup> This is in spite of other research that shows that juveniles are malleable and with rehabilitation could become productive adults, which supports the original intent of the juvenile justice system. Based on this research, it is time for states to create statutes specific to juvenile competency standards, provide greater protections necessary in the juvenile justice system, and expand the options to courts for incompetent juveniles. It is time to get back to the basics, to the original intent and purpose for the existence of the juvenile justice system—rehabilitation. And we know from juvenile lifers that this is possible. As one juvenile lifer stated, “I was adopted by my grandparents at the age of two. My real parents both died due to drug related deaths. This is the first and only time I’ve been in trouble with the law; *it was a big mistake that I dread every day of my life.*”<sup>214</sup>

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213. *Id.* at 5-6.

214. *See* HAMMOND, *supra* note 206, at 7-8 (emphasis added).

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