

The Restatement of Law on Juveniles' Adjudicative Competence and Rights in Interrogation: Evidence of Progress

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INTRODUCTION

Part 3 of the Restatement of Children and the Law,¹ “Children in the Justice System,” reflects recent dramatic reform in juvenile law and practice.² The reform recognizes that kids are different, requiring special attention to protecting due process when the justice system must make decisions in delinquency cases.³ The Restatement’s analyses use neuroscientific and psychosocial developmental research that has improved our understanding of children’s and adolescents’ immature decision-making capacities and psychosocial vulnerability compared to adults.⁴ This developmental perspective has led to extensive reform of laws and practices that seek to better protect juveniles’ due process rights when in custody of the juvenile justice system. Analyzing established law and progressive trends, the Restatement offers guidance for the legal system and process, highlighting the need for continued changes in courts and legislatures not yet in step with prevailing trends in juvenile law.

This commentary examines two topics in Part 3 of the Restatement: Chapter 15, § 15.30 on “Adjudicative Competence in Delinquency Proceedings,” and Chapter 14, § 14-2 on “Interrogations and the Admissibility of Statements.” For both areas, the

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¹ Note that this Essay cites prior drafts of the Restatement of Children and the Law. The section numbers of the Restatement have been updated since the time of publication.

² RESTATEMENT OF THE LAW, CHILDREN AND THE LAW pt. 3 (AM. L. INST., Tentative Draft No. 2, 2019) [hereinafter RESTATEMENT Draft No. 2].

³ See, e.g., RESTATEMENT Draft No. 2 § 15.30 cmt. b.

⁴ See, e.g., RESTATEMENT OF THE LAW, CHILDREN AND THE LAW § 14.21 reporters’ note, cmt. c (AM. L. INST., Tentative Draft No. 1, 2018) [hereinafter RESTATEMENT Draft No. 1] (“Substantial social-science research supports the proposition that many juveniles, particularly younger juveniles, are less capable than older juveniles and adults of executing a knowing and intelligent waiver of their *Miranda* rights.”).

commentary examines the present state of law, policy, and practice trends identified by the Restatement, with special attention to needs for further reform. What evidence do we have that states are adopting, or are slow to adopt, important trends in juvenile law identified in the Restatement's approach to juvenile adjudicative competence and pretrial custodial interrogations? Where is there still work to be done to promote changes in law highlighted by the Restatement, and what factors challenge that work?

Part I of the commentary examines recent reviews and social science reports of state laws, legal systems, and practice related to adjudicative competence in juvenile court. Part II offers cautionary comments on the potential of various procedural protections for juveniles in pretrial interrogations and their judicial review. Finally, Part III reflects generally on why it has been, and will continue to be, so challenging to create developmentally informed due process protections in these two areas of juvenile law.

I. ADJUDICATIVE COMPETENCE IN JUVENILE COURT

A defendant's adjudicative competence⁵ in criminal proceedings has long been established as a constitutional due process protection,⁶ recognizing its importance for accuracy of evidence, integrity of the legal system, and individual autonomy. The modern standard defining adjudicative competence was provided in *Dusky v. United States*⁷: "whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him."⁸

Laws and practices regarding competence in juvenile proceedings can best be described as emerging, largely because the requirement in juvenile court has been applied only relatively recently.⁹ Due process protections in delinquency proceedings were

⁵ "Adjudicative competence" has traditionally been labeled "competence to proceed" or "competency to stand trial." The Restatement uses all these identifiers interchangeably.

⁶ See, e.g., *Pate v. Robinson*, 383 U.S. 375, 386–87 (1966); *Drope v. Missouri*, 420 U.S. 162, 173 (1975).

⁷ 362 U.S. 402 (1960).

⁸ *Id.* at 402 (citations omitted). The standard provides the test applied by the court when competence questions are raised, as well as the proper focus of forensic mental health evaluations to assist the court in competence determinations. In *Godinez v. Moran*, 509 U.S. 389 (1993), the Court further defined competence as requiring attention to a defendant's ability to make "important decisions" during the adjudicative process. *Id.* at 398–99.

⁹ NAT'L RSCH. COUNCIL OF THE NAT'L ACADS., REFORMING JUVENILE JUSTICE: A DEVELOPMENTAL APPROACH 37 (2013).

considered of little importance in the *parens patriae* juvenile court during the first half of the twentieth century.¹⁰ In 1967, *In re Gault*¹¹ extended to delinquency defendants many of the same due process protections afforded adults in criminal court. *Gault* did not specifically address juveniles' competence, yet within twenty years after the decision, one-third of the states had formally recognized that competence applied in delinquency proceedings, although it was rarely invoked.¹² All but one of those states used the definition of competence that had been established for criminal court in *Dusky*, and juvenile courts often presumed that mental illness or intellectual disability were the only legal predicates for incompetence in juveniles, as was the case in criminal court precedent.¹³

Not until the 1990s did juvenile defense attorneys and advocates begin raising the question of competence more frequently, largely in response to a punitive reform in delinquency laws during that decade.¹⁴ By 2000, youths' capacities as defendants had become a focus of legal scholarship and empirical research,¹⁵ and by 2010 all but one of the states recognized that competence applied in juvenile proceedings.¹⁶ During that time, substantial behavioral and neuroscience research demonstrated the importance of youths' developmental immaturity, not only their mental disorders and disabilities, when considering their abilities related to

¹⁰ See, e.g., Elizabeth S. Scott & Thomas Grisso, *Developmental Incompetence, Due Process, and Juvenile Justice Policy*, 83 N.C. L. REV. 793, 803 (2005); Richard J. Bonnie & Thomas Grisso, *Adjudicative Competence and Youthful Offenders*, in YOUTH ON TRIAL 73, 76 (Thomas Grisso & Robert G. Schwartz eds., 2000).

¹¹ 387 U.S. 1 (1967).

¹² Thomas Grisso, Michael O. Miller & Bruce Sales, *Competency to Stand Trial in Juvenile Court*, 10 INT'L J. L. & PSYCHIATRY 1, 2 (1987); NAT'L RSCH. COUNCIL OF THE NAT'L ACADS., *supra* note 9, at 37.

¹³ See, e.g., *State ex rel. Causey*, 363 So.2d 472, 476 (La. 1978) (identifying juveniles' mental disorders as a rationale for adjudicative incompetence, but speculating that their immaturity did not provide a basis for judging adjudicative competence in juvenile court).

¹⁴ Bonnie & Grisso, *supra* note 10, at 95.

¹⁵ See generally YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE pt. 2 (Thomas Grisso & Robert G. Schwartz eds., 2000).

¹⁶ KIMBERLEY LARSON & THOMAS GRISSO, NAT'L YOUTH SCREENING & ASSESSMENT PROJECT, DEVELOPING STATUTES FOR COMPETENCE TO STAND TRIAL IN JUVENILE DELINQUENCY PROCEEDINGS: A GUIDE FOR LAWMAKERS 21 (2011) [hereinafter LARSON & GRISSO, THE GUIDE]. The remaining state, Oklahoma, adopted a requirement of adjudicative competence in juvenile court in 2015. See OKLA. STAT. § 10A-2-2-401.3 (2015); see also Kathryn A. LaFortune, *Oklahoma Leads the Way on Juvenile Competency*, 47 AM. PSYCH. ASS'N 32 (2016).

their decision-making as defendants.¹⁷ The ensuing developmental reform in juvenile justice stimulated state legislatures to begin fashioning statutes specific to competence in juvenile court. By 2020, thirty-six states and the District of Columbia had juvenile-specific competence statutes.¹⁸

The Restatement's approach to competence in delinquency proceedings focuses on the legal definition of competence, the relevance of developmental immaturity when applying the definition, and youths' remediation if found incompetent. The Restatement's definition of competence is consistent with (though not identical to) the definition in *Dusky*.¹⁹ It further identifies not only mental illness or intellectual disability but also developmental immaturity as potential reasons for a juvenile's lack of legal competence.²⁰ The Restatement then identifies the need for remediation of incompetence before adjudication can resume, requiring that this be accomplished in "a reasonable period of time" and within the "least restrictive means consistent with the juvenile's welfare and public safety."²¹

What do we know about the degree to which current competence statutes and practices in juvenile court reflect or fall short of the trends in law described in the Restatement? The following comments examine this question in four areas discussed in the Restatement's comments explaining its approach: (a) adjudicative competence standards; (b) systemic and quality issues regarding forensic mental health evaluations of juveniles' competence; (c) laws and procedures for the remediation of incompetence in juvenile cases; and (d) consequences for attorneys representing juveniles in delinquency cases.

¹⁷ ELIZABETH S. SCOTT & LAURENCE STEINBERG, RETHINKING JUVENILE JUSTICE 14 (2010).

¹⁸ Nancy Ryba Panza, Emily Deutsch & Kelsey Hamann, *Statutes Governing Juvenile Competency to Stand Trial Proceedings: An Analysis of Consistency with Best Practice Recommendations*, 26 PSYCH., PUB. POLY & L. 274, 276 (2020). How juvenile-specific competence statutes differ from criminal competence statutes is the focus of the remainder of Part I. The District of Columbia and the thirteen states without juvenile-specific competence statutes typically apply their criminal competence laws to juvenile proceedings, sometimes significantly reframed for juvenile court by their state's case law. *Id.* at 281.

¹⁹ *Compare Dusky*, 362 U.S. at 402 ("[T]he test must be whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him." (internal quotations omitted)), with RESTATEMENT Draft No. 2 § 15.30(a) ("[T]he juvenile has both a rational and factual understanding of the proceedings, and is able to consult with and assist counsel in preparing a defense.").

²⁰ RESTATEMENT Draft No. 2 § 15.30(a).

²¹ *Id.* § 15.30(b).

Parts of the following analysis use a 2011 publication (the Guide) that offered state legislatures a set of developmentally informed issues to guide drafting of statutes for juveniles' competence.²² The Guide's discussions of developmental immaturity, cited frequently in the Restatement, generally align with the due process protections discussed in the Restatement. The following analysis also uses the results of a study that examined the thirty-seven state statutes in effect by 2020 regulating competence in juvenile court, identifying whether and how their provisions attended to the developmental issues raised in the Guide.²³

A. Developmental Immaturity in Juvenile Competence Standards

The fact that juveniles have less mature cognitive and decision-making capacities on average than adults has required fundamental differences in the application of legal competence in juvenile court compared to criminal court. Studies find that age and degree of maturity are generally accepted by judges and attorneys as important factors when considering a youth's adjudicative competence.²⁴ Yet the application of developmental immaturity to fashion formal age-related legal standards for competence in juvenile court is still evolving in three areas: (1) developmental immaturity as a sole basis for incompetence; (2) age-related presumptions of incompetence; and (3) whether the degree of competence required in juvenile court should meet the same rather than a relaxed standard compared to criminal court.

²² See generally LARSON & GRISSO, THE GUIDE, *supra* note 16. The Guide describes sixteen essential issues to address when constructing juvenile competence statutes, the alternative ways the issues could be addressed, and the alternatives most consistent with developmental research and evolving legal precedent. It was developed with extensive consultation and review by experts representing national organizations for juvenile court judges, prosecutors, juvenile defense attorneys, state legislatures, and state courts. (Their participation as consultants should not be construed to imply any approval or endorsement of the principles in the Guide.) The Guide's production was funded by the John D. and Catherine T. MacArthur Foundation's project, "Models for Change: Systems Reform in Juvenile Justice."

²³ Panza et al., *supra* note 18, at 275.

²⁴ Jennifer Mayer Cox, Naomi E. S. Goldstein, John Dolores, Amanda D. Zelechowski & Sharon Messenheimer, *The Impact of Juveniles' Ages and Levels of Psychosocial Maturity on Judges' Opinions about Adjudicative Competence*, 36 L. & HUM. BEHAV. 21, 25 (2012); Jodi L. Viljoen & Twila Wingrove, *Adjudicative Competence in Adolescent Defendants: Judges' and Defense Attorneys' Views of Legal Standards for Adolescents in Juvenile and Criminal Court*, 13 PSYCH., PUB. POL'Y & L. 204, 221–22 (2007).

1. Incompetence due to developmental immaturity alone.

Based on developmental research, the Restatement identifies developmental immaturity, as well as mental illness and intellectual disability, as potential causes of incompetence in juvenile cases.²⁵ There has been little controversy regarding a youth's incompetence when deficits in *Dusky*-related abilities are shown to be due to mental illness or intellectual disability.²⁶ The presumption that developmental immaturity could be recognized in law as a potential cause of legal incompetence without mental illness or intellectual disability was not widely accepted earlier in the evolution of juvenile competence laws. For example, in a 2007 nationwide survey of judges, only about one-quarter agreed that adolescents adjudicated in juvenile court should be able to be found incompetent based on *Dusky*-related deficits due solely to developmental immaturity.²⁷

Today, developmental immaturity appears to be widely accepted as a potential predicate for incompetence in juvenile court. As of 2011, the Guide recommends formal adoption of this policy.²⁸ Currently, fifteen states (40.5% of those with juvenile competency statutes) include this provision,²⁹ and as noted in the Restatement, it has been accepted in many other states by state court decisions.³⁰ Adolescents found incompetent due to deficits attributable to immaturity alone constitute a minority of juvenile incompetence cases. In Virginia, for example, among all youths found incompetent during nearly two decades, about one-quarter

²⁵ See RESTATEMENT Draft No. 2 § 15.30, reporters' note, cmt. b; see also *Miller v. Alabama*, 567 U.S. 460, 477 (2012) (holding that mandatory life sentences for minors are unconstitutional because they ignore the "immaturity, impetuosity, and failure to appreciate risks and consequences" that are "hallmark features" of youth).

²⁶ RESTATEMENT Draft No. 2 § 17.20 reporters' note, cmt. c.

²⁷ Viljoen & Wingrove, *supra* note 24, at 219. In the same year as that study, a state appellate court decision on the matter clearly stated the logic for developmental incompetence:

[F]or purposes of determining competency to stand trial, we see no significant difference between an incompetent adult who functions mentally at the level of a ten- or 11-year-old due to a developmental disability and that of a normal 11-year-old whose mental development and capacity is likewise not equal to that of a normal adult.

Timothy J. v. Superior Court., 150 Cal. App. 4th 847, 861 (2007).

²⁸ LARSON & GRISSO, THE GUIDE, *supra* note 16, at 26.

²⁹ Panza et al., *supra* note 18, at 276.

³⁰ RESTATEMENT Draft No. 2 § 15.30 reporters' note, cmt. b.

had no mental disorder or intellectual disability.³¹ Although current evidence does not account for every state, incompetence related to developmental immaturity alone seems to have taken root in existing juvenile law and practice nationwide.

2. Age-related presumptions of incompetence.

Should the law consider children below a certain age as presumptively incompetent? The Restatement's approach does not formally suggest that it should.³² The Guide offers for consideration, based on research findings, a nonrebuttable presumption of incompetence for youth 10 and younger, and a rebuttable presumption for ages 11–13.³³ More sweeping suggestions have been offered, such as creating a presumption of incompetence for youth below 14³⁴ or requiring competency evaluations for all youth below 16.³⁵ Nevertheless, only seven states' statutes have created age-related incompetence presumptions.³⁶ Examples of such rules in various statutes include presumptive (nonrebuttable) incompetence (for example, below 10), presumptive but rebuttable incompetence below a certain age, and automatically requiring a competence evaluation for youth committing serious offenses below 14.

The infrequency of age-presumptive incompetence laws suggests that lawmakers have not had an appetite for such age-based limits on prosecutorial and judicial discretion. Lawmakers' reluctance and the Restatement's avoidance of extensive rules about presumptive incompetence reflect wise caution. As discussed

³¹ Janet I. Warren, Shelly L. Jackson, Benjamin E. Skowysz, Shelby E. Kiefner, James Reed, April Celeste R. Leviton, Maria Francesca Nacu, Chantee G. Jiggetts & Gerald G. Walls, *The Competency Attainment Outcomes of 1,913 Juveniles Found Incompetent to Stand Trial*, 6 J. APPLIED JUV. JUST. SERVS. 47, 61 (2019) (indicating that only 24% or 458 of the 1913 youth found incompetent in the state of Virginia during the past two decades had no significant mental disorder or intellectual disability, the remaining 76% having a mental illness, intellectual disability, borderline intellectual functioning, or a combination of these; however, the degree to which this would generalize to juvenile incompetence decisions in other states is not known).

³² In its comments, the Restatement does note that research evidence strongly suggests that competence below the age of 10 is highly unlikely. RESTATEMENT Draft No. 2 § 15.30 cmt. b.

³³ LARSON & GRISSO, THE GUIDE, *supra* note 16, at 31.

³⁴ David R. Katner, *Eliminating the Competency Presumption in Juvenile Delinquency Cases*, 24 CORNELL J. L. & PUB. POL'Y 403, 427 (2015).

³⁵ Amanda C. Ferguson, Megan M. Jimenez & Rebecca L. Jackson, *Juvenile False Confessions and Competency to Stand Trial: Implications for Policy Reformation and Research*, 7 NEW SCH. PSYCH. BULL. 62, 70 (2010).

³⁶ Panza et al., *supra* note 18, at 276.

later,³⁷ age presumption laws may increase the number of otherwise unnecessary evaluations. This could have collateral negative consequences for some youths when considered in the broader context of defense strategy, trial delays, and duration of pre-adjudication detention.

3. Level of ability required for competence.

A third age-related standard pertains to the level or degree of ability required for competence in juvenile court compared to criminal court. As the Restatement documents, appellate courts in many states have affirmed that the competence of defendants in juvenile court should be judged by “juvenile norms.”³⁸ Thus, although the same types of abilities defined in *Dusky* apply in both juvenile and criminal courts, the degree to which the youth in a delinquency proceeding manifests the abilities in *Dusky* need not be as great as that of an adult. Perhaps because this question has been addressed in many states by court decisions, only a few states’ statutes provide specific guidance on the matter.³⁹

Commentators, however, have identified two issues in the application of juvenile norms in competence proceedings in juvenile court.⁴⁰ First, it is unclear whether a juvenile defendant’s abilities should be judged against all other children seen in juvenile court, or only those of the defendant’s specific age. Youths ages 10–13 would be far more likely to be found incompetent by the former standard than the latter. Case law and social science research provide little to clarify this issue.

Second, a lower standard in juvenile court is based substantially on the premise that adjudication in juvenile court leads to lesser penalties than for adults, as well as a rehabilitative objective that may benefit the youth.⁴¹ Yet for youth adjudicated on serious charges, juvenile court dispositions can lead to lengthy sentences, especially for a youth adjudicated at 16 or 17 in a state

³⁷ See *infra* Parts I.C and I.D.

³⁸ See RESTATEMENT Draft No. 2 § 15.30 reporters’ note, cmt. c.

³⁹ Panza et al., *supra* note 18, at 278. Only four states’ statutes (New Hampshire, South Dakota, Colorado, Arkansas) address the issue of degree of ability in juvenile court, all recognizing a relaxed requirement in juvenile court.

⁴⁰ See, e.g., LARSON & GRISSE, THE GUIDE, *supra* note 16, at 36; see also Elizabeth Scott & Thomas Grisso, *Developmental Incompetence, Due Process, and Juvenile Justice Policy*, 83 N.C. L. REV. 793, 803–04 (2005).

⁴¹ Scott & Grisso, *supra* note 40, at 840–43.

allowing extension of custody to 21 for certain offenses.⁴² Alternatively, they may be transferred to criminal court for trial and adult sanctions.⁴³ The logic for a relaxed standard for competence in juvenile court fails in these circumstances on constitutional grounds.⁴⁴ Yet juvenile competence statutes and court decisions endorsing juvenile norms rarely make this distinction. Only Arkansas's juvenile competence statute specifically requires a greater level of ability in cases involving more serious charges, similar to an "adult standard" in criminal court.⁴⁵ Some research suggests that judges might often use their discretion to raise the bar for competence in delinquency cases involving more serious offenses.⁴⁶ Nevertheless, the question of how to apply juvenile norms when deciding competence in juvenile court has not been resolved and needs clarification to provide adequate due process protection in juvenile competence cases.⁴⁷

B. Forensic Mental Health Assessments of Juveniles' Competence

Aside from the formal statements of law in the Restatement, it is worthwhile to consider matters that affect the quality of forensic evaluations of juveniles' competence, the importance of which is recognized in the Restatement's comments.⁴⁸ Courts typically order a forensic mental health evaluation when the question of competence is raised to provide information to the court about the youth's abilities related to the *Dusky* standard.⁴⁹ The quality of these evaluations is important for accuracy and fairness; juvenile court judges place great weight on the results of competence evaluations and examiners' recommendations.

⁴² *Id.* at 808.

⁴³ *Id.* at 807.

⁴⁴ *Id.* at 841 ("At a minimum, youths who do not meet adult competence standards cannot be subject to sanctions that approximate adult punishment or carry consequences into adulthood. To justify a relaxed competence standard, the juvenile court dispositions imposed on these youths should also be briefer in duration than adult sentences.").

⁴⁵ Panza et al., *supra* note 18, at 278.

⁴⁶ Michael Ryan Jones, *The Varying Threshold of Competence to Proceed in Juvenile Court: Opinions of Judges, Attorneys, and Forensic Examiners* 29 (2003) (Ph.D dissertation, University of Missouri-Columbia) (on file with author).

⁴⁷ See Scott & Grisso, *supra* note 40, at 842–43 (discussing a proposal for a "two-tiered system" in juvenile court allowing a relaxed standard when adjudicating lesser offenses but applying a criminal court standard for more serious charges with potential punitive consequences).

⁴⁸ RESTATEMENT Draft No. 2 § 15.30 reporters' note, cmt. b.

⁴⁹ Jones, *supra* note 46, at 7.

The need for efficiency and quality of juvenile competence evaluations has increased in the past two decades as the volume of referrals for competence evaluations has increased. Though there have been estimates of the *total* numbers of competency evaluations,⁵⁰ no one has tried to estimate the annual number of *juvenile* competence evaluations nationwide. Some states' forensic mental health systems (for example, Tennessee, Maryland) have reported about two hundred to three hundred juvenile competence evaluations annually,⁵¹ others around one hundred (for example, Utah, Colorado),⁵² and some appear to have a far greater number annually (for example, Florida).⁵³ It would not be surprising if there were ten thousand to fifteen thousand juvenile competence evaluations annually nationwide.⁵⁴

What is needed to ensure the availability and quality of those evaluations? Two matters are relevant: (1) examiners' qualifications and their evaluation methods, and (2) systemic and state administrative agencies that influence the provision of juvenile forensic evaluations.

⁵⁰ See, e.g., Nathaniel P. Morris, Dale E. McNeil & Renée L. Binder, *Estimating Annual Numbers of Competency to Stand Trial Evaluations Across the United States*, 49 J. AM. ACAD. PSYCHIATRY & L. 530, 535 (2021); Elizabeth A. Owen, Alan Perry & Devora Panish Scher, *Trauma in Competency to Stand Trial Evaluations*, in TRAUMA IN COMPETENCY TO STAND TRIAL EVALUATIONS 65 (Rafael Art. Javier, Elizabeth A. Owen & Jemour A. Maddux eds., 2020); W. Neil Gowensmith, *Resolution or Resignation: The Role of Forensic Mental Health Professionals Amidst the Competency Services Crisis*, 25 PSYCH., PUB. POL'Y & L. 1, 2 (2019).

⁵¹ TENN. DEP'T OF HEALTH & SUBSTANCE ABUSE SERVS., FORENSIC AND JUVENILE COURT SERVICES ANNUAL REPORT FOR THE PERIOD JULY 1, 2018-JUNE 30, 2019 (FY 19) 47 (2019); Michael T. Guilbault, Md. Dep't of Health, MDH Juvenile Forensics: Pretrial Services (Oct. 20, 2020) (presentation to the State Advisory Board for Juvenile Services).

⁵² Ivan Kruh, Neil Gowensmith, Amanda Alkema, Kristin Swenson & Derrick Platt, *Community-Based Remediation of Juvenile Competence to Stand Trial: A National Survey*, 21 INT. J. FORENSIC MENTAL HEALTH 321, 325 (2022) (reporting 293 juvenile competence evaluations between 2017–19 in Utah); Patricia C. McCormick, Benjamin Thomas, Stephanie Van Horn, Rose Manguso & Susan Oehler, *Five-Year Trends in Juvenile Adjudicative Competency Evaluations: One State's Consideration of Developmental Immaturity, Age, and Psychopathology*, 21 J. FORENSIC PSYCH. RSCH. & PRAC. 18, 29 (2021) (reporting 650 juvenile competence evaluations in five years in Colorado).

⁵³ FLA. LEGISLATURE, OFF. OF PROGRAM POL'Y ANALYSIS & GOV'T ACCOUNTABILITY, JUVENILE AND ADULT INCOMPETENCE TO PROCEED CASES AND COSTS 2–3 (2013) (showing that, in recent years, Florida juvenile courts have annually found about four hundred juveniles incompetent to stand trial, indicating by inferences that Florida's number of juvenile competence evaluations annually was considerably greater than four hundred).

⁵⁴ The number of juvenile competence evaluations annually seems not to be decreasing in recent years despite the decrease in delinquency arrests in the past decade. *Id.* at 3.

1. Examiner qualifications and assessment methods.

The Restatement, as well as consensus within the forensic mental health professions,⁵⁵ provides ample reason to limit performance of juveniles' competence evaluations to professionals with experience and training in *both* of two areas of specialization: forensic expertise and clinical expertise in adolescent development. Currently, all states with juvenile competence statutes require that the examiner be "qualified;" but only one-third of them define "qualified" as requiring both types of expertise, approximately one-quarter require one or the other, and the remainder do not define "qualified."⁵⁶ Some states without juvenile competence statutes (for example, Massachusetts) require both types of expertise for juvenile court mental health examiners.⁵⁷ Nevertheless, a requirement for both adolescent clinical and forensic expertise seems not yet to be codified nationwide, presenting the need for continued improvement.

Forensic psychology and psychiatry have developed authoritative guidelines for juvenile competence assessments, consistent with applicable law.⁵⁸ The field, however, is still in the process of developing evaluation methods to fulfill the ideal. Two examples can be provided.

First, a developmentally sensitive, standardized competence interview tool has been developed specifically to assess what a juvenile can and cannot do regarding *Dusky*-related abilities.⁵⁹ While the tool is considered to represent best practice for assessing juveniles' competence,⁶⁰ it does not have the sophisticated

⁵⁵ See, e.g., LARSON & GRISSO, *supra* note 16, at 52–55.

⁵⁶ Panza et al., *supra* note 18, at 279–80.

⁵⁷ 104 C.M.R. § 33.03(14)–(16) (Mass. 2021).

⁵⁸ See generally THOMAS GRISSO, *EVALUATING JUVENILES' ADJUDICATIVE COMPETENCE: A GUIDE FOR CLINICAL PRACTICE* (2005). See IVAN KRUEH & THOMAS GRISSO, *EVALUATIONS OF JUVENILES' COMPETENCE TO STAND TRIAL* 3, 10 (2009); Douglas Mossman, Stephen G. Noffsinger, Peter Ash, Richard L. Frierson, Joan Gerbasi, Maureen Hackett, Catherine F. Lewis, Debra A. Pinals, Charles L. Scott, Karl G. Sieg, Barry W. Wall & Howard V. Zonana, *AAPL Practice Guideline for the Forensic Psychiatric Evaluation of Competence to Stand Trial*, 35 J. AM. ACAD. PSYCHIATRY & L. S. 3, S35, 37–41 (2007); Janet I. Warren, Shelly L. Jackson & Jessica Jones Coburn, *Evaluation and Restoration of Competency to Stand Trial*, in *APA HANDBOOK OF PSYCHOLOGY AND JUVENILE JUSTICE* 489, 496–97 (Kirk Heilbrun, David DeMatteo & Naomi E. S. Goldstein, eds., 2016).

⁵⁹ For the Juvenile Adjudicative Competence Interview, see GRISSO, *supra* note 58, at 157–67.

⁶⁰ Kathryn A. Cunningham, *Advances in Juvenile Adjudicative Competence: A 10-Year Update*, 38 BEHAV. SCI. & L. 406, 409 (2020).

psychometric properties, norms, and validation of competence assessment tools that have been designed for adults.⁶¹

Second, when forensic examiners identify serious deficits in a juvenile's *Dusky*-related abilities, they must determine the reasons for those deficits, one possibility being developmental immaturity.⁶² The field has created a widely accepted structure for conceptualizing youths' relatively immature reasoning and judgment when making decisions in legal contexts, including three features: their tendency to take greater risks (impulsiveness), their temporal perspective (more often focused on immediate rather than future consequences), and the greater influence on their decisions by peers and adults (lesser autonomy).⁶³ Psychometric tools have been developed for research on these concepts.⁶⁴ But they have not been adapted, normed, or validated to make them amenable for assessing an individual youth's degree of immaturity in forensic evaluation contexts. Thus, the forensic evaluation field needs to develop validated tools for evidence-based assessment of a youth's mature or immature judgment and reasoning relative to other youths.

⁶¹ For brief reviews of tools designed for assessing adjudicative competence in adults, see PATRICIA ZAPP & RONALD ROESCH, EVALUATION OF COMPETENCE TO STAND TRIAL 60–74 (2009).

⁶² Deficits in *Dusky*'s "rational and factual understanding" or "ability to assist counsel" requirements can arise for various reasons noted in the Restatement Draft No. 2 § 15.30(a): "mental illness, intellectual disability, or developmental immaturity." See Kruh & Grisso, *supra* note 58, at 44–56, 103, for the need to identify the "causal component" in juvenile competence evaluations.

⁶³ See Elizabeth S. Scott, *Judgment and Reasoning in Adolescent Decisionmaking*, 37 VILL. L. REV. 1607, 1610, 1663 (1992); Elizabeth S. Scott, N. Dickon Reppucci & Jennifer L. Woolard, *Evaluating Adolescent Decision Making in Legal Contexts*, 19 LAW & HUM. BEHAV. 221, 230, 240 (1995); see also Elizabeth Cauffman & Laurence Steinberg, *(Im)maturity of Judgment in Adolescence: Why Adolescents May Be Less Culpable than Adults*, 18 BEHAV. SCIS. & L. 741, 752 (2000); Laurence Steinberg & Elizabeth Cauffman, *Maturity of Judgment in Adolescence: Psychosocial Factors in Adolescent Decision Making*, 20 LAW & HUM. BEHAV. 249, 267 (1996). These three concepts are prominent in the U.S. Supreme Court's explanations for its decisions in *Roper v. Simmons*, 543 U.S. 551, 559 (2005) and *Miller v. Alabama*, 567 U.S. 460, 471 (2012).

⁶⁴ See, e.g., Kathryn C. Monahan, Laurence Steinberg, Elizabeth Cauffman & Edward P. Mulvey, *Psychosocial (Im)maturity from Adolescence to Early Adulthood: Distinguishing Between Adolescence-Limited and Persisting Antisocial Behavior*, 25 DEV. & PSYCHOPATHOLOGY 1093, 1096–97 (2013). For a description of these tools and their shortcomings for clinical forensic evaluations, see ANTOINETTE KAVANAUGH & THOMAS GRISSO, EVALUATIONS FOR SENTENCING OF JUVENILES IN CRIMINAL COURT 90–91 (2020).

2. Systemic support for forensic evaluations.

Statutes typically describe the required objective, but how the objective is achieved depends on effective systemic strategies for implementation. How will the statute's requirement for qualified examiners be ensured and how will an adequate workforce be developed? How and who will pay them, and how will quality be enhanced and sustained across time? Whether statewide or local, jurisdictions must develop service delivery systems for assuring adequate juvenile competence evaluations.⁶⁵

Before competence began to be applied to juvenile courts, most juvenile jurisdictions already had court clinic services that provided forensic assessments to assist juvenile courts (for example: disposition evaluations; risk assessments).⁶⁶ These juvenile court clinics began to provide juvenile competence evaluations as requests increased in the late 1990s.⁶⁷ A survey of clinicians working in juvenile court clinical services in eighty-seven of the one hundred largest jurisdictions across the United States, conducted from September 2002 to December 2003, indicated that these jurisdictions employed three different systemic models for delivering forensic evaluations for juvenile courts.⁶⁸ About 40% of the surveyed jurisdictions rely on clinicians employed by clinical divisions (court clinics) within juvenile courts, while 36% of the surveyed jurisdictions refer to private practitioners registered with the juvenile court; the remainder use clinicians in local public mental health clinics.⁶⁹

Both within and between these models, one finds significant differences in their cost, operations, and capacity to control and monitor the quality of competence evaluations.⁷⁰ For example, some states' forensic evaluation systems have created certification programs required of all clinicians performing juvenile forensic

⁶⁵ For a description of the process for creating jurisdictional systems for delivering juvenile competence evaluation services, see generally IVAN KRUH & THOMAS GRISSO, *DEVELOPING SERVICE DELIVERY SYSTEMS FOR EVALUATIONS OF JUVENILES' COMPETENCE TO STAND TRIAL: A GUIDE FOR STATES AND COUNTIES* (2017).

⁶⁶ *Id.* at 11.

⁶⁷ *Id.*

⁶⁸ Thomas Grisso & Judith Quinlan, *Juvenile Court Clinical Services: A National Description*, 56 *JUV. & FAM. CT. J.* 9, 10–13 (2005).

⁶⁹ *Id.* at 12–13.

⁷⁰ For a comparative analysis of these models, see KRUH & GRISSO, *supra* note 65, at 12–14.

evaluations for the courts, including juvenile competence evaluations.⁷¹ Typically, they provide periodic seminar-type training offered by experienced examiners, as well as a brief examination, sometimes requiring annual renewal of certification.⁷² This is encouraging for quality assurance, but only a minority of states have been willing to invest in examiner quality control in this way.

C. Incompetence and Remediation

Studies have found that, among youth evaluated for competence in juvenile court, about 25% to 40% are found incompetent, although a few have reported numbers over 50% and others as low as 14%.⁷³ When a juvenile is found incompetent, all states (by statute or case law) provide for a period of time (discussed later) for remediation services aimed at developing the youth's abilities sufficiently to be competent to proceed to adjudication of the charges.⁷⁴ The court first must determine whether remediation of the youth's *Dusky*-related deficits is likely to be possible within that statutory time limit. If it is considered not possible, typically charges must be dismissed.⁷⁵ If remediation is considered possible, remediation within the allowable time period results in resumption of the trial process, but typically charges must be dismissed if remediation has not been accomplished within that time.⁷⁶ Estimates of the proportion of incompetent juveniles who are eventually found competent after remediation services vary from 57% to 91%, reflecting differences across states and different causes of youths' incompetence requiring remediation.⁷⁷

⁷¹ See generally, e.g., MASS. DEP'T OF PUB. HEALTH, DESIGNATED FORENSIC PROFESSIONAL PROCEDURES MANUAL (2018); *Trainings FAQs*, INST. OF L. & PUB. POL'Y, UNIV. OF VA., <https://perma.cc/MHM2-2XMP>.

⁷² See, e.g., *Forensic & Juvenile Court Services*, TENN. DEP'T OF MENTAL HEALTH & SUBSTANCE ABUSE SERVS., <https://perma.cc/5DZF-NGU3>; *Forensic Psychiatry*, AM. BD. OF PSYCHIATRY & NEUROLOGY, <https://perma.cc/A6PD-UZEM>.

⁷³ See, e.g., Kruh et al., *supra* note 52, at 4; Christina L. Riggs Romaine, Shannon Williamson, Ahmar Zaman & Kathleen Kemp, *Remediation of Deficits in Juvenile Adjudicative Competence: Factors Associated with Change and Implications for Evaluators* 5 (Wheaton Coll. unpublished manuscript) (on file with author); Warren et al., *supra* note 58, at 499.

⁷⁴ Panza et al., *supra* note 18, at 280.

⁷⁵ Warren et al., *supra* note 58, at 500.

⁷⁶ *Id.* at 499.

⁷⁷ See, e.g., Kirk Heilbrun, Christy Giallella, H. Jean Wright, David DeMatteo, Patricia Griffin, Benjamin Locklair & Alisha Desai, *Treatment for Restoration of Competence to Stand Trial: Critical Analysis and Policy Recommendations*, 25 PSYCH., PUB. POL'Y & L. 266, 274–75 (2019). Note, however, that data on the proportion of youth remediated are not available for most states.

As the Restatement explains,⁷⁸ and as forensic clinical authorities support,⁷⁹ competence remediation focuses on two types of intervention. *Psychoeducational* services are needed to teach youths what they must know (trial-related knowledge) and be able to do (working with counsel; making decisions) associated with the *Dusky* standard. In addition, *clinical* services are needed to reduce the effects of mental disorder if it is impairing a youth's decisional capacities. Clinical services, however, are not always necessary. For example, in a study in Virginia, about one-fourth of juveniles found incompetent had no significant mental disorder or intellectual disability; their incompetence was due to their young age and therefore immature psychosocial development.⁸⁰

Section 15.30(b) of the Restatement focuses on two key due process concerns during the remediation process: that it should require using “the least restrictive means consistent with the juvenile's welfare and public safety,” and the time allowed for remediation (beyond which charges must be dismissed) should be no longer than “a reasonable period of time following the finding of incompetence.”⁸¹ What is the current status of juvenile incompetence remediation in law and practice with regard to these two due process requirements?

1. Least restrictive means.

This requirement raises two questions. First, what is known about the degree to which states are using community-based (least restrictive) alternatives for remediation of adjudicative incompetence? Second, what is known more generally about the states' systems for providing remediation services when a youth is found incompetent?

Regarding the first question, most states with juvenile competence statutes require that community-based or outpatient remediation services be used whenever possible.⁸² According to a recent survey, at least one quarter of the states are known to rely largely on community-based services for juveniles' incompetence

⁷⁸ RESTATEMENT Draft No. 2 § 15.30 reporters' note, cmt. d.

⁷⁹ See, e.g., Giallella et al., *supra* note 77, at 275; Kruh & Grisso, *supra* note 58, at 39; Kruh et al., *supra* note 52, at 3; Warren et al., *supra* note 58, at 502.

⁸⁰ Warren et al., *supra* note 31, at 61. This 2019 study described youth found incompetent during a twenty-year period.

⁸¹ RESTATEMENT Draft No. 2 § 15.30(b).

⁸² Panza et al., *supra* note 18, at 280.

remediation, very rarely using forensic inpatient hospitalization.⁸³ Accurate information is not available for most of the remaining states. But some are using inpatient remediation services frequently or exclusively,⁸⁴ despite evidence from the aforementioned survey that many states find such restrictions of liberty unnecessary in most juvenile incompetence cases.

Second, some administrative process is needed to carry out the functions associated with remediation of juveniles' incompetence.⁸⁵ A few states offer model juvenile incompetence remediation programs.⁸⁶ The nationwide survey noted earlier, however, was able to find identifiable, organized, community-based, administrative systems for juveniles' incompetence remediation in only a minority of U.S. jurisdictions.⁸⁷ The remainder apparently employ more restrictive hospitalization or have no systematic program that offers clinical resources, competence-related curricula, and monitoring of the remediation process.⁸⁸

That many states have no remediation program at all is alarming because of the potential consequences for youth found incompetent. Without services aimed at remediation, periodic re-evaluation, and case-by-case monitoring of the process, jurisdictions risk placing youth found incompetent in limbo. They expose these youth to trial delays, unnecessarily prolonged pretrial custody, and other procedural uncertainties. The risk is especially

⁸³ Kruh et al., *supra* note 52, at 5. In Utah, for example, less than 5% of youth were in psychiatric hospitals during incompetence remediation. See Warren et al., *supra* note 31, at 62 (reporting that in Virginia, 4–6% were in hospitals during remediation); see also Kruh et al., *supra* note 52, at 3.

⁸⁴ Kruh et al., *supra* note 52, at 2 (noting that Washington state relies on a juvenile forensic inpatient center for remediation of juveniles found incompetent).

⁸⁵ Among the functions of an appropriate system for managing community-based incompetence remediation are case-by-case determination of necessary clinical services, managing referrals to those services, assuring delivery of the psychoeducational component, monitoring the remediation process for each youth, and providing periodic review of progress by scheduling re-evaluations of competence abilities as required by law. Kruh et al., *supra* note 52, at 10; LARSON & GRISSO, *THE GUIDE*, *supra* note 16, at 73.

⁸⁶ For a review of four model states, see Warren et al., *supra* note 58, at 504–08.

⁸⁷ Kruh et al., *supra* note 52, at 3.

⁸⁸ For example, Massachusetts, while long recognizing adjudicative competence in juvenile court and requiring remediation by statute, has no discernible program or administrative process for juveniles' remediation of adjudicative incompetence. Mark Rapisarda & Wendy J. Kaplan, *Juvenile Competency and Pretrial Due Process: A Call for Greater Protections in Massachusetts for Juveniles Residing in Procedural Purgatory*, 67 *JUV. & FAM. CT. J.* 5, 18 (2016).

great for juveniles held in pretrial detention centers during the remediation period.⁸⁹

2. Reasonable period of time.

In *Jackson v. Indiana*,⁹⁰ the U.S. Supreme Court held that when defendants were being treated for adjudicative incompetence, their progress must be reviewed periodically and, if they were not able to be adjudicated competent within a “reasonable period of time,” their charges must be dismissed.⁹¹ The decision arose in the context of adult incompetent defendants who were committed to forensic psychiatric facilities for treatment to restore competence but too often remained there for years without any resolution of their incompetence.⁹² *Jackson*, however, did not articulate a specific time that was “reasonable,” and the states subsequently developed their own definitions, which varied considerably in length and in their special provisions for seriousness of charges.

Juvenile competence statutes typically have drawn those “reasonable time” requirements from states’ criminal laws. The most common period between reevaluations during remediation is ninety days (but ranging from thirty to 180 days), and their time limits for accomplishing remediation (which, if not accomplished, require dismissal of charges)⁹³ range from two months to a few years, with the most common length being one year.⁹⁴ Research in some states, however, has found that the average time between a finding of a juvenile’s incompetence and conclusion of remediation was twelve to eighteen months.⁹⁵

When considered from a developmental and clinical perspective, are those states’ time limits appropriate for juveniles? One can argue that longer time periods could be allowed for youths who are undergoing remediation in community-based settings,

⁸⁹ *Id.* at 19–20 (describing how Massachusetts’s lack of any administrative system for juvenile incompetence remediation has raised serious due process concerns requiring appellate court intervention).

⁹⁰ 406 U.S. 715 (1972).

⁹¹ *Id.* at 738.

⁹² *Id.* at 727.

⁹³ Panza et al., *supra* note 18, at 280.

⁹⁴ *Id.*

⁹⁵ See Romaine et al., *supra* note 73, at 10 (identifying that in a sample of youths’ found incompetent and undergoing remediation in Massachusetts, the time between evaluation determining incompetence and last evaluation to determine progress of remediation averaged seventy-two weeks—about 1.4 years—ranging from several months to 4.3 years).

because *Jackson's* primary concern was loss of liberty associated with indefinite commitment to secure facilities during treatment for incompetence. In addition, remediating juveniles' incompetence may require longer periods of time than for adults, given the need to overcome juveniles' immature cognitive and decisional abilities.⁹⁶

Alternatively, one can argue that a shorter time limit is consistent with the benefit of moving juveniles' cases through the justice system expediently. From a developmental perspective, twelve to eighteen months for remediation is a long time for youth to be in limbo during the crucial formative years of adolescence.⁹⁷ Moreover, two reliable studies in states with model remediation programs provide evidence that juveniles found incompetent whose remediation was not successful within six months were much less likely to ever be found competent later.⁹⁸ Unfortunately, we have inadequate empirical information about youths undergoing incompetence remediation to assist in weighing the application of "reasonable period of time" in juvenile cases.

In summary, incompetence remediation may be the murkiest area of law and practice pertaining to juveniles' adjudicative competence. Except within a few states, we have little information on who administers remediation services, those services' nature and quality, and implications for youth development and due process protections. Promising models for remediation programs exist in some states, but only recently have other states developed systematic remediation programs, and most seem not yet to have taken on the challenge. This might represent one of the most important areas for furthering due process in the application of adjudicative incompetence laws to juveniles.

D. Implications for Attorneys

Previous discussions have noted that standards and remediation consequences for juveniles' competence are still evolving in this relatively new area of law. One of the consequences of this,

⁹⁶ Jodi L. Viljoen & Thomas Grisso, *Prospects for Remediating Juveniles' Adjudicative Incompetence*, 13 PSYCH., PUB. POL'Y & L. 87, 94 (2007).

⁹⁷ LARSON & GRISSO, THE GUIDE, *supra* note 16, at 58.

⁹⁸ Annette McGaha, Randy Otto, Mary Dell McClaren & John Petrila, *Juveniles Adjudicated Incompetent to Proceed: A Descriptive Study of Florida's Competence Restoration Program*, 29 J. AM. ACAD. OF PSYCHIATRY & L. 427, 433 (2001); Janet I. Warren, Jeanette DuVal, Irena Komarovskaya, Preeti Chauhan, Jacqueline Buffington-Vollum & Eileen Ryan, *Developing a Forensic Service Delivery System for Juveniles Adjudicated Incompetent to Stand Trial*, 8 INT'L J. FORENSIC MENTAL HEALTH 245, 253 (2009).

as documented in social science literature, is uncertainty for defense attorneys about whether to raise the question of competence in individual cases. For example, one study found that although juvenile defense attorneys had concerns about their juvenile clients' competence in about 10% of their cases, they raised the question in only about one-half of those cases.⁹⁹ Various studies have identified reasons for attorneys' hesitance to raise the competence question because of strategic concerns:¹⁰⁰ for example, the potential consequences of trial delays during competence evaluations, beliefs that the standard threshold for competency is so low in juvenile court that the effort would outweigh the cost, and uncertainties about the consequences of lengthy remediation both in community-based and detention-based circumstances.¹⁰¹ Until standards, procedures, and remediation services mature, it seems likely that defense attorneys will continue to be in conflict about whether to raise the question of incompetence, despite their concerns about their juvenile clients' capacities.

II. JUVENILES' WAIVER OF RIGHTS IN PRETRIAL INTERROGATION

The Restatement's approach to law regarding custodial interrogations of juveniles focuses on the rights and standards to be applied when determining the admissibility of confessions as trial evidence. The Restatement in § 14.20 recognizes juveniles' right to silence and legal counsel when questioned in custody, defined as whether "a reasonable juvenile of the suspect's age would feel

⁹⁹ Warren et al., *supra* note 58, at 491.

¹⁰⁰ See, e.g., Angela Bryant, Gregory Matthews & Blessing Wilhelmsen, *Assessing the Legitimacy of Competence to Stand Trial in Juvenile Court: The Practice of CST with and Without Statutory Law*, 26 CRIM. JUST. POL'Y REV. 371, 391 (2015); Amanda NeMoyer, Sharon Kelley, Heather Zelle & Naomi E.S. Goldstein, *Attorney Perspective on Juvenile and Adult Clients' Competence to Plead Guilty*, 24 PSYCH., PUB. POL'Y & L. 171, 177–78 (2018); Ann Tobey, Thomas Grisso & Robert G. Schwartz, *Youths' Trial Participation as Seen by Youths and Their Attorneys: An Exploration of Competence-Based Issues*, in YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE 225, 225 (Thomas Grisso & Robert G. Schwartz eds., 2000); Viljoen & Wingrove, *supra* note 24, at 206.

¹⁰¹ See, e.g., *Abbott A. v. Commonwealth*, 458 MASS. 24, 24–25, 37 (2010) (concluding that, despite a statutory ninety-day limit on the pretrial detention of juveniles, a 14-year-old found incompetent to stand trial could be retained in detention for an indefinite period so long as periodic forensic psychological evaluations indicated that there was a reasonable prospect for remediation). For further discussion of this case, see Rapisarda & Kaplan, *supra* note 88, at 19–20.

that his or her freedom of movement was substantially restricted.”¹⁰² It applies the requirement from *Miranda v. Arizona*¹⁰³ that the waiver be “knowing, intelligent, and voluntary” to be admissible as evidence,¹⁰⁴ to be decided by considering “the totality of the circumstances surrounding the interrogation, in light of the juvenile’s age, education, experience in the justice system, and intelligence. Circumstances surrounding the interrogation include police conduct and conditions of the questioning.”¹⁰⁵

The Restatement further asserts two mandatory procedural protections in the absence of which a juvenile’s statement is per se excluded as evidence at trial. Section 14.22 requires that waiver of rights by juveniles ages 14 or younger are valid only after meaningful consultation with and in the presence of counsel.¹⁰⁶ Section 14.23 requires that all custodial interrogations of juveniles “shall be video recorded, unless it is not feasible to do so.”¹⁰⁷

The following commentary on juveniles’ interrogation focuses selectively on two aspects of the Restatement for which behavioral research and recent statute reviews offer perspective on the Restatement’s approach. It examines (a) social science contributions to application of the totality of circumstances test for knowing, intelligent, and voluntary waiver of rights by juveniles, and (b) the rationale for the Restatement’s approach requiring the presence of legal counsel for children 14 and younger.

A. The Totality of Circumstances Test

The Restatement’s application of the “knowing, intelligent, and voluntary” standard in juveniles’ interrogations has been in place since *In re Gault*.¹⁰⁸ Further, the totality of circumstances test to determine the validity of a juvenile’s waiver of rights to silence and counsel, is employed as a constitutional floor in all

¹⁰² RESTATEMENT Draft No. 1 § 14.20.

¹⁰³ 384 U.S. 436 (1966). *Miranda* also required that suspects must be advised of their rights prior to questioning to meet the knowing, intelligent, and voluntary standard. *Id.* at 444.

¹⁰⁴ RESTATEMENT Draft No. 1 § 14.21(a).

¹⁰⁵ *Id.* § 14.21(b).

¹⁰⁶ *Id.* § 14.22.

¹⁰⁷ *Id.* § 14.23.

¹⁰⁸ 387 U.S. 1 (1967).

states,¹⁰⁹ consistent with the U.S. Supreme Court's *Fare v. Michael C.* decision.¹¹⁰ The totality of circumstances approach requires weighing the capacities of the youth and the manner in which law enforcement officers conducted the interrogation. This approach was intended to be sufficiently flexible to allow judges to consider the many characteristics of youths that might be relevant, when combined with the many conditions surrounding the interrogation event and investigators' behaviors.

Perhaps recognizing that such broad judicial discretion could lead to great differences in how judicial decisions are made, the Court in *Fare* outlined certain (nonexclusive) characteristics of youths that courts should take into account: "[an] evaluation of the juvenile's age, experience, education, background, and intelligence, and into whether he has the capacity to understand the warning given him, the nature of the Fifth Amendment rights, and the consequences of waiving those rights."¹¹¹

Forty years of research on the relation of *Fare*'s factors to juveniles' capacities to understand and consider the consequences of *Miranda* waiver¹¹² offers considerable guidance for the use of "age" and "intelligence" in courts' objective totality-of-circumstances analyses.¹¹³ However, most studies of *Fare*'s "experience"

¹⁰⁹ Michelle Jeffs & Sean Brian, *Parental Presence or Totality of Circumstances? An Assessment of Utah's Juvenile Miranda Law & 50 State Survey*, 24 N.Y.U. J. LEGIS. & PUB. POL'Y 565, 577 (2022). Some states have also developed certain additional procedural protections that create a per se (nonrebuttable) invalidation of juveniles' waiver if they are violated. But in those states, if the mandatory procedural protection has been satisfied, the determination of the waiver's validity continues to require a totality of circumstances scrutiny. *Id.* at 586–87, 594.

¹¹⁰ 442 U.S. 707 (1979).

¹¹¹ *Id.* at 725.

¹¹² See the Restatement's reviews of the research, RESTATEMENT Draft No. 1 § 14.21 reporters' note, cmt. c. For recent reviews of research on juveniles' capacities to waive *Miranda* rights, see generally Hayley M.D. Cleary & Megan D. Crane, *Police Interviewing and Interrogation of Adolescent Suspects*, in THE OXFORD HANDBOOK OF DEVELOPMENTAL PSYCHOLOGY AND THE LAW 257 (Allison Redlich & Jodi Quas eds., 2023). See also Naomi E.S. Goldstein, Sharon Messenheimer Kelley, Lindsey Peterson, Leah Brogan, Heather Zelle & Christina Riggs Romaine, *Evaluation of Miranda Waiver Capacity*, in APA HANDBOOK OF PSYCHOLOGY AND JUVENILE JUSTICE 467, 472 (Kirk Heilbrun, David DeMatteo & Naomi E.S. Goldstein eds., 2016) [hereinafter Goldstein et. al., *Evaluation of Miranda*].

¹¹³ Research consistently identifies inferior capacities for adolescents compared to adults, lesser capacities for youths 14 and younger than for older adolescents, and poorer *Miranda* comprehension for adolescents of lower intelligence. See, e.g., Thomas Grisso, *Juveniles' Capacities to Waive Miranda Rights: An Empirical Analysis*, 68 CALIF. L. REV. 1134, 1155 (1980).

factor have found no systematic relation between *Miranda* understanding and amount of prior experience with the juvenile justice system and prior exposure to the *Miranda* warnings.¹¹⁴

Fare called for not only an application of its objective factors, but also a subjective analysis concerning whether the juvenile “has the capacity to understand the warnings given him . . . and the consequences of waiving those rights.”¹¹⁵ Forensic psychological evaluations of juveniles’ capacities related to waiver of *Miranda* rights provide courts evidence for this subjective, individualized, functional analysis.¹¹⁶ The field has developed well-validated tools to assess a youth’s degree of understanding of *Miranda* warnings and the implications of waiving them,¹¹⁷ as well as assessing a youth’s degree of immature susceptibility to acquiescence and suggestibility in police interrogations.¹¹⁸

Regarding the circumstances of the interrogation, social science researchers have studied law enforcement strategies for inducing confessions when interrogating youth.¹¹⁹ Their findings demonstrate that these strategies often are the same as those used with adults but have more stressful effects due to youths’ greater susceptibility to subtle coercive pressures, increasing the likelihood of waiver of rights and false confessions.¹²⁰ Their findings help identify relevant factors to weigh when examining the totality of circumstances of the interrogation, a process that is facilitated by the Restatement’s requirement of videotaping all interrogations.¹²¹

¹¹⁴ See RESTATEMENT Draft 1 § 14.21 reporters’ note, cmt d. Note that other *Fare* factors have been less often studied, either because they are closely related to age (“education”) or because they are too ambiguous to be defined empirically (“background”).

¹¹⁵ *Fare*, 422 U.S. at 725.

¹¹⁶ For descriptions of evidence-based evaluations of youths’ *Miranda* capacities, see Goldstein et al., *Evaluation of Miranda*, *supra* note 112, at 475.

¹¹⁷ See, e.g., NAOMI E. S. GOLDSTEIN, HEATHER ZELLE & THOMAS GRISSO, *MIRANDA RIGHTS COMPREHENSION INSTRUMENTS 3* (2014).

¹¹⁸ GISLI H. GUDJONSSON, *THE PSYCHOLOGY OF INTERROGATIONS AND CONFESSIONS* 361–62 (2016).

¹¹⁹ See generally, e.g., Barry C. Feld, *Police Interrogation of Juveniles: An Empirical Study of Policy and Practice*, 97 J. CRIM. L. & CRIMINOLOGY 219 (2006); Allison D. Redlich & Steven Drizin, *Police Interrogation of Youth*, in *THE MENTAL HEALTH NEEDS OF YOUNG OFFENDERS: FORGING PATHS TOWARD REINTEGRATION AND REHABILITATION* (Carol L. Kessler & Louis James Kraus eds., 2007).

¹²⁰ Feld, *supra* note 119, at 242.

¹²¹ *Id.* at 242; RESTATEMENT Draft No. 1 § 14.23 (requiring video recording of the interrogation).

B. Required Presence of Legal Counsel

The Restatement includes a remarkable procedural protection for juveniles, ages 14 and under, in interrogations: the provision of mandatory legal counsel prior to waiver of rights and interrogation.¹²² Mandatory counsel might be considered the ultimate assurance that children would be adequately educated and advised prior to waiver of their rights. In choosing this approach, however, the Restatement follows a trend in law that is barely evident, such laws having been adopted in only three states.¹²³ Moreover, the Restatement omits other procedural protections that are far more prevalent in states' laws applied to juveniles' interrogations. It is worthwhile, therefore, to examine the Restatement's rationale for adopting this specific approach rather than others.

1. Simplified *Miranda* warnings.

Among the factors to be considered in the totality of circumstances analysis is how the youth was informed of the rights to silence and counsel,¹²⁴ which has led many jurisdictions nationwide to consider the most effective way of informing youth about their *Miranda* rights.¹²⁵ For example, the International Association of Chiefs of Police recommends a juvenile *Miranda* warning statement that translates the language as “you do not have to say anything,” “anything you say can be used against you in court,”

¹²² RESTATEMENT Draft No. 1 § 14.22.

¹²³ Those states are California, Illinois, and West Virginia. See Jeffs & Brian, *supra* note 109, at 591–94. These states use various ages, ranging from 13 and younger to 16 and younger, sometimes differing within states for various offenses. Two other states have unique protections with similar intent. New Mexico makes inadmissible any statement of a minor under age 13 made during interrogation and, for minors 13 or 14, establishes a rebuttable presumption of inadmissibility. *Id.* at 593; N.M. STAT. § 32A-2-14(F) (2009). Texas requires that a juvenile be taken to a magistrate for *Miranda* warnings, for those warnings to be recorded and for the magistrate to certify that the waiver was made knowingly and voluntarily. Jeffs & Brian, *supra* note 109, at 594; TEX. FAM. CODE ANN. §§ 51.09 (1993); *id.* § 51.095(a)(1) (2011). A fourth state, Kansas, provides that a juvenile must consult with an attorney prior to waiver of rights if the juvenile's parent is an alleged victim, alleged codefendant, or a “non-involved parent.” Jeffs & Brian, *supra* note 109, at 592; KAN. STAT. ANN. § 38-2333(b) (2006).

¹²⁴ See RESTATEMENT Draft No. 1 § 14.21 reporters' note, cmt. e.

¹²⁵ See Richard Rogers, Lisa L. Hazelwood, Kenneth W. Sewell, Kimberly S. Harrison & Daniel W. Shuman, *The Language of Miranda Warnings in American Jurisdictions: A Replication and Vocabulary Analysis*, 32 LAW & HUM. BEHAV. 124 (2008); see also *Interviewing and Interrogating Juvenile Suspects*, AM. ACAD. OF CHILD & ADOLESCENT PSYCHIATRY (Mar. 7, 2013), <https://perma.cc/R56R-5RQA> (endorsing simplified warnings).

and “you have the right to get help from a lawyer right now.”¹²⁶ While these warnings are more juvenile-friendly, there are two reasons to question their protective value. First, warnings like those just quoted explain what the youth may choose to do but offer no information about the consequences of one’s choices.¹²⁷ Moreover, even if consequences were explained, this would not compensate for adolescents’ decision-making tendencies to favor choices involving short-term positive consequences (for example, “If I confess, they might let me go home”) despite much more serious long-term negative consequences.¹²⁸ Second, there is no good evidence that simplified warnings improve youth’s understanding. Some evidence suggests that explaining the warnings and their consequences in greater detail would make them more difficult, requiring more lengthy warnings that might challenge youths with shorter attention spans.¹²⁹ For these reasons, while the use of simplified *Miranda* warnings should be encouraged, they do not provide strong procedural protections that would warrant inclusion in the Restatement.

2. Presence of an “interested adult.”

One common mandatory procedural protection included in states’ statutes or case law has been a requirement for the presence of an “interested adult” or attorney prior to in-custody questioning by law enforcement.¹³⁰ According to a recent comprehensive review, twenty states employ this type of requirement for interrogation of juveniles, often specifying certain ages (for example, any age, others under 16, 14 and younger, 13 and younger, or under

¹²⁶ INT’L ASS’N OF CHIEFS OF POLICE, REDUCING RISKS: AN EXECUTIVE’S GUIDE TO EFFECTIVE JUVENILE INTERVIEW AND INTERROGATION 7 (2012).

¹²⁷ For example: What will happen (in the short term) if one does not “say anything”; can the charges lead to trial as an adult; what is an attorney, what can an attorney do, and why might a defendant want one?

¹²⁸ Caitlin N. August & Kelsey S. Henderson, *Juveniles in the Interrogation Room: Defense Attorneys as a Protective Factor*, 27 PSYCH., PUB. POL’Y & L. 268, 278 (2021) (finding that attorneys with experience advising juveniles in the interrogation room have great concerns about youths’ immature consideration of the consequences of waiver even when youth seem to “understand” the warnings).

¹²⁹ See Richard Rogers, Lisa L. Hazelwood, Kenneth W. Sewell, Daniel W. Shuman & Hayley L. Blackwood, *The Comprehensibility and Content of Juvenile Miranda Warnings*, 14 PSYCH., PUB. POL’Y & L. 63, 83 (2008); Samuel Manoogian, *Factors Affecting Juveniles’ Comprehension of Miranda Rights Statements* 58 (1978) (Ph.D. dissertation, Saint Louis University) (on file with author).

¹³⁰ Jeffs & Bryan, *supra* note 109, at 578.

12).¹³¹ An “interested adult” in most of these states includes a parent or guardian and, in some states, an attorney.¹³²

The Restatement, however, does not adopt parental presence as a mandatory procedural protection,¹³³ and several states have considered and explicitly rejected that a confession must be excluded in the absence of parents.¹³⁴ And for good reason. Substantial research has shown that parents’ presence offers no strong protection by way of advice to their children on legal matters.¹³⁵ Some parents may have little interest in their child’s welfare, some may be angry at them, and some may have conflicts of interest regarding their child’s welfare, all of which might contribute more to pressure than protection in the interrogation room.

3. Prospects for mandatory legal counsel.

The Restatement’s approach, requiring legal counsel prior to interrogation, provides more certain protection than the aforementioned trends in law. The Restatement’s choice of age 14 and younger is consistent with the developmental research, well reviewed in the Restatement, on children’s and younger adolescents’ greater vulnerability regarding their poorer understanding of *Miranda* rights, their poor judgment, and their greater susceptibility to interrogation pressures.¹³⁶

Nevertheless, one could argue for a higher age—for example, 16 and younger. Many midadolescents investigated for suspected delinquencies have other vulnerabilities, such as mental disorders and intellectual disabilities, that delay their psychosocial

¹³¹ *Id.* at 586, 594. In the remaining states and District of Columbia, the presence of an interested adult is often a factor to be considered in a totality of circumstances analysis. *Id.* at 578–79.

¹³² *Id.* at 591–94, 596–97.

¹³³ RESTATEMENT Draft No. 1 § 14.22 cmt. b.

¹³⁴ Jeffs & Brian, *supra* note 109, at 579.

¹³⁵ For a review of this research, see Hillary B. Farber, *The Role of the Parent/Guardian in Juvenile Custodial Interrogations: Friend or Foe?*, 41 AM. CRIM. L. REV. 1277 (2004). See also research reviewed in RESTATEMENT Draft No. 1 § 14.22 reporter’s note, cmt. b. For example, one study found that when given the opportunity to offer advice to their child prior to interrogation, more than two-thirds of parents gave no advice to their child concerning waiver of rights. THOMAS GRISSO, *JUVENILES’ WAIVER OF RIGHTS: LEGAL AND PSYCHOLOGICAL COMPETENCE* 182–86 (1981); see also Todd C. Warner & Hayley M. D. Cleary, *Parents’ Interrogation Knowledge and Situational Decision-Making in Hypothetical Juvenile Interrogations*, 28 PSYCH., PUB. POL’Y & L. 78 (2022); Thomas Grisso & Melissa Ring, *Parents’ Attitudes Toward Juveniles’ Rights in Interrogation*, 6 CRIM. JUST. & BEHAV. 211 (1979) (reporting a study of parents’ perceptions of their children’s rights that conflict with adequate protection in juveniles’ interrogations).

¹³⁶ RESTATEMENT Draft No. 1 § 14.22 reporters’ note, cmts. a, b (collecting sources).

and cognitive development, and these sources of vulnerability are more prevalent among delinquent youth than among youth in general.¹³⁷

Although mandatory legal counsel offers the best protection for children, its adoption beyond the three states that now employ it may be difficult. In some states, legislative bills proposing mandatory counsel for juveniles in interrogation have either been rejected or have not progressed.¹³⁸ Resistance to policy that would require counsel prior to interrogation understandably includes concerns about inhibiting law enforcement (for example, in cases in which questioning may pertain to ongoing crimes),¹³⁹ feasibility (for example, availability of attorneys at all hours for all juveniles to be questioned),¹⁴⁰ and a presumption that attorneys automatically will advise and convince their juvenile clients simply to “remain silent.”¹⁴¹

Currently there is little research to inform policymakers regarding these concerns. For example, how will youths’ defense attorneys approach the interrogation? Will they simply close it down? One recent exploratory study suggests they may practice a more nuanced approach.¹⁴² Most of the attorney-participants in the study, all of whom had experience providing counsel to juveniles at the time of their interrogation, said they would initially advise their juvenile client not to talk to police until the client had a chance to consult with their attorney.¹⁴³ But a majority said that there are situations in which they advise their young clients to cooperate with law enforcement investigators, after the attorney learned the circumstances of the case, had time to explain them to the youth and ascertained the youth’s wishes, and were able to monitor the questioning.¹⁴⁴

Mandatory presence of counsel also raises questions for defense attorneys about how best to conduct their preinterrogation

¹³⁷ See e.g., Linda A. Teplin, Karen M. Abram, Gary M. McClelland, Mina K. Dulcan & Amy A. Mericle, *Psychiatric Disorders in Youth in Juvenile Detention*, 59 ARCH. GEN. PSYCHIATRY 1133, 1138 (2002).

¹³⁸ See, e.g., H.B. 2718, 2017 Legis. Assemb., Reg. Sess. (Or. 2017); S.B. 90, 192d Leg. (Mass. 2021).

¹³⁹ Benjamin E. Friedman, *Protecting Truth: An Argument for Juvenile Rights and a Return to In re Gault*, 58 UCLA L. REV. DISCOURSE 165, 185 (2011).

¹⁴⁰ August & Henderson, *supra* note 128, at 279.

¹⁴¹ See *Miranda*, 384 U.S. at 517 (Harlan, J., dissenting) (“[T]o suggest or provide counsel for the suspect simply invites the end of the interrogation.”).

¹⁴² See generally August & Henderson, *supra* note 128.

¹⁴³ *Id.* at 278.

¹⁴⁴ *Id.* at 275.

consultations with youths. When *Gault* required attorneys for delinquency proceedings, at first their role was without precedent, often misinterpreted, and required new skills in communicating with young clients.¹⁴⁵ Here, too, is new territory. Under stressful circumstances, how can attorneys best inform their young clients of their rights? How can an attorney best assess whether the youth's choice, especially when it is not in the youth's best legal interest, was not a consequence of the short-sighted perspective typical of adolescents' stage of development? Much of this will require legal and ethical analysis, but developmental researchers eventually may be able to provide guidance to attorneys in fulfilling this new role.

Attorney assistance will certainly improve protections for youth, but even this requirement is not a panacea. For the youth in interrogation (or the youth considering how to plead to a serious charge), the attorney may teach, may explain, and may describe the options and their consequences. But due process in such circumstances presumes the choice of a person equipped with autonomy, foresight, and judgment when considering the attorney's explanation and advice. Attorneys will not always be able to compensate for youths' immature judgment.¹⁴⁶

III. REFLECTIONS ON *GAULT'S* CHALLENGE, PAST AND FUTURE

This commentary has discussed two topics in "Children in the Justice System" in the Restatement of Children and the Law: juveniles' adjudicative competence and juveniles' rights in interrogations. It has examined those aspects of the Restatement's approach that are grounded in the developmental characteristics of youth, whether and how the Restatement's guidance is currently implemented in state laws and practices, and prospects for continued refinement.

This author has observed and contributed to the law's progress in protecting juveniles' rights for nearly a half-century. Preparing this commentary has provided an occasion to reflect on the nature and pace of the evolution of laws protecting children's rights in these two legal contexts. In broad terms, what can be

¹⁴⁵ See W. VAUGHN STAPLETON & LEE E. TEITELBAUM, IN DEFENSE OF YOUTH 32–39 (1972).

¹⁴⁶ There appears not-yet-to-be-systematic evidence concerning the frequency with which youths make waiver decisions contrary to the advice of counsel after preinterrogation consultation.

said about the law's progress in these topics on children in the justice system?

Compared to fifty years ago, the current state of law in these areas is remarkably improved. Throughout that time, legal advocacy for due process in juvenile court has been strong and sustained, advised by basic and applied research on children's immature decisional capacities.¹⁴⁷ The status of due process protections in these areas is far advanced from when we started. In *Gault's* wake, children had no special protections regarding their waiver of *Miranda* rights, and now some states recognize the need for mandatory provision of legal counsel before such decisions are made. Adjudicative competence was not recognized at all until many years after *Gault*, whereas now the great majority of states have charted detailed standards and protections to avoid children's adjudication when they cannot participate meaningfully in it.¹⁴⁸

Yet, reflecting on that half-century, one can reasonably ask, why did it take so long? And why do we still have issues to resolve to provide adequate protection for children in their interrogations and adjudication? There are at least two reasons.

First, the progress of legal reform in these areas has not proceeded at a uniform pace during those five decades. For both areas, little progress was made during the first two to three decades after *Gault*.¹⁴⁹ During that time, the state's interest in securing confessions far outweighed any arguments regarding the need for greater protections for juveniles in interrogation, and the question of adjudicative competence was simply ignored until the 1990s.¹⁵⁰ True progress began only about twenty-five years ago when developmental science and advocacy ushered in a developmentally informed perspective on juvenile justice.¹⁵¹ Therefore, most of what we see in the Restatement's approach to protection for children in these legal contexts is the product of only a little more than two decades of active legislation and litigation. Considered in that light, progress has been remarkable.

¹⁴⁷ See, e.g., LARSON & GRISSO, THE GUIDE, *supra* note 16, at 3.

¹⁴⁸ See, e.g., Panza et al., *supra* note 18, at 276.

¹⁴⁹ LARSON & GRISSO, THE GUIDE, *supra* note 16, at 2. An exception was *Fare v. Michael C.*, 442 U.S. 707 (1979), which provided a totality of circumstances analysis when deciding whether a juvenile's waiver had been made knowingly, intelligently, and voluntarily.

¹⁵⁰ SCOTT & STEINBERG, *supra* note 17, at 10.

¹⁵¹ For a definition and analysis of that perspective, see NAT'L RSCH. COUNCIL OF THE NAT'L ACADS., *supra* note 9, at 3–4. See also Panza, *supra* note 18, at 273 (detailing a "seminal" 2001 study and "the rapid advancement of research and increased attention to the issue" in the 1990s and 2000s).

Second, finding solutions to some of the issues in these two areas of juvenile law has been, and is, doctrinally and practically complex because kids are different. The Restatement and this commentary have described many conundrums encountered along the way as we have struggled to fit the “square peg” of youthful immaturity into the “round hole” of rights and protections originally intended in criminal court only for adults who on average have better decisional capacities. Lawmakers have succeeded in many ways in making some of the most important adaptations. Yet the careful and creative analyses required to do so sometimes inhibited more rapid reform.

Concerning the future, this commentary has identified several unsettled legal questions that require attention, as well as inconsistencies that must be untangled.¹⁵² Resolving those questions will require a sustained application of a developmental approach to shaping juvenile law. The Restatement’s reporters’ notes provide strong evidence that the developmental reform in juvenile justice has taken root and continues to drive law, policy, and practice for children in the juvenile justice system.¹⁵³ Applied scientific studies of juveniles’ capacities related to their decisions in legal contexts continue to be published, offering a prospect for further guidance for law and policy in these areas.¹⁵⁴

The Restatement’s part “Children in the Justice System” offers a valuable history of the law’s development of protections for children and adolescents in interrogations and during their adjudication. It defines where we are at present and what more must be done. As we continue to narrow the gap between our current laws and the ideal, the Restatement stands as a benchmark with which we can measure our progress in the future.

¹⁵² As an example of one such inconsistency, scientific research cited throughout the Restatement on adjudicative competence indicates that virtually all children ages 10 and younger are likely to be incompetent to stand trial in juvenile court, yet about 80% of the states allow children ages 10 and younger to be prosecuted. *Raising the Minimum Age for Prosecuting Children*, NAT’L JUV. JUST. NETWORK (2022), <https://perma.cc/8EFG-CEVR>.

¹⁵³ Although currently robust, the developmental perspective has vulnerabilities that could threaten its potential long-range continued influence in juvenile justice. Caitlin Cavanagh, Jennifer Paruk & Thomas Grisso, *The Developmental Reform in Juvenile Justice: Its Progress and Vulnerability*, 28 PSYCH., PUB. POL’Y & L. 151, 160–64 (2022).

¹⁵⁴ See, e.g., David R. Katner, *Juvenile Competency Restoration*, 27 LEWIS & CLARK L. REV. 657, 669–73 (2023) (discussing factors impacting juvenile competence including mental health disorders, intellectual disability, and trauma).