

Commentary: Children's Minds and Adult Statutes

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"What will the prosecutor say about you in court?" The forensic psychiatrist asked the seven-year-old accused of setting a fire.

"He'll say that I am a good boy," the child answered.

"Then what will your lawyer say about you?"

"He'll say I am a very, very good boy!"—From a competency evaluation in a Connecticut juvenile court case

In "Competency to Stand Trial in Preadjudicated and Petitioned Juvenile Defendants," Baerger *et al.*¹ report the results of their investigation of competency to stand trial of juveniles charged with various offenses. The findings support the expected positive correlations between age and competency and cognitive ability and competency. The importance of the paper, however, lies in its contribution to the sparsely investigated area of juvenile competency. As the authors conclude, their finding that the significant frequency of cognitive impairment in juvenile offenders, particularly in those involved in sexual offenses, suggests that criminal justice involvement itself may suffice as a reason to evaluate juveniles.

The concept of juvenile competency to stand trial is a challenging concept. Although the legal standard for competency is *Dusky*,² the question when applied to children or adolescents takes on dimensions beyond those encountered in dealing with adults. What is the legal assumption underlying competency in children? Why is the issue raised, particularly when the case remains in juvenile court? What are the difficulties in assessing child competency? And finally, what are the competing interests in determining the competency of juveniles?

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The Peculiar Assumption of Competency

The underlying assumption for all adult competency requests is that until the question is raised, a defendant is presumed competent to participate in the various legal proceedings, from providing a statement to police through to sentencing.² Once the competency question rears its head, the process of evaluating and deciding proceeds according to state statutes, and the court rules by the standard of preponderance of the evidence in favor of incompetency.³ While the conclusion is being formulated, the defendant is granted the benefit of the doubt. He need show merely that it is more likely than not that he is incompetent and hence should be afforded additional protection and assistance before moving his case forward.

When the adult standard and proceedings for determining competency are applied to juveniles, the initial assumption that all defendants are competent until the question is raised is suspect. Children and adolescents are in most contexts identified as legally disabled. In most cases, they lack the right to enter into contracts, to make binding decisions, to engage in financial matters, to vote, to purchase cigarettes or alcohol, or to own real estate. These restrictions are based not on individual assessments but on the socially accepted and legally sanctioned convention that below a certain age, a person does not have all the rights and privileges of citizenship. A supporter of this decision is likely to note that children have not yet developed the cognitive, emotional, and judgmental capacities to engage in adult decisions.

However, when arrested, a juvenile is considered to be competent until the question is raised. The criminal justice system reverses the general assumption and takes a person who is assumed incompetent in all other legal realms to be competent in criminal adjudication, unless the question is raised.

The dramatic contrast is apparent even in court. In Connecticut, the minimum age for adult court is 16, but children as young as 14 can be adjudicated as adults for serious crimes (based on the state's prerogative). However, when a child under 18 appears in court, an adult guardian is required to stand by. The child is caught in a legal gray zone: incompetent to stand before the court without an adult presence but (unless the issue of competency is formally raised) competent to proceed with the case.

Because competency to stand trial is statutorily linked in some states (and implied in others) to an underlying mental disorder,⁴⁻⁶ developmental incompetency—incompetency of childhood—does not afford protection or even trigger an automatic evaluation. The inconsistency stands; the legal question of competency to stand trial ignores the legal status of childhood.

The second assumption in adult competency to stand trial is that the finding of incompetency is based on an underlying dysfunction, an abnormal condition that impairs the capacity to understand or assist. It is further assumed that most of the time the underlying dysfunction (e.g., psychosis, depression) will respond to treatment and the person will be restored to competency. In some cases, the underlying conditions are not amenable to treatment, such as mental retardation, traumatic brain injury. Therefore, restoration will not be accomplished, thus prohibiting the usual trial process. The course of action when someone is found incompetent is to treat the fixable problem or close the cases of those who are nonrestorable.

Applied to children, the assumption of an underlying disorder is often unfounded, except in those jurisdictions for which appellate courts have included immaturity as a basis for the conclusion of incompetency as in *In re Causey*.⁷ To the extent that the child is incompetent because of his developmental stage, the definition of disorder does not apply and the likelihood that restoration will be successful is slight, especially in a reasonable time frame. The appropriate restoration is to allow the child to grow into competency. Reaching the Piagetian stage of abstract reasoning is not augmented by treatment. What is the court to do? Suspend adjudication until the defendant reaches adolescence and can address the charge created by childhood behavior? In most cases in Connecticut, the case ends with treatment

recommendations rather than further adjudication, despite the findings of competency.

The constructs that underpin the question of competency and restoration for adults are often stretched beyond recognition when applied to children—the younger the child, the greater the stretch. So why are competency assessments ordered? In many ways they provide the court with practical information, beyond the statutory objective.

The Judicial Context of Juvenile Competency

Where the law may ignore the status of children, the courts do not. In Connecticut, the adjudication of children, especially for serious crimes, poses pragmatic difficulties that have become more complex since the criminalization of the juvenile justice system in 1995.⁸ Prior to this change, the juvenile justice system was constructed to address the rehabilitative needs of children without the adversarial and prosecutorial methods requiring due process protection.⁹ The question of competency, therefore, was moot: the court was there to assist the child; the loss of freedom was not for punishment but for the child's own good. As Grisso *et al.*⁶ have described, states vary in their views of the relevancy of competency in juvenile court. For example, in Oklahoma, the appellate court¹⁰ ruled that because the juvenile court is not a criminal court, the defendant does not have the right to be competent to stand trial. The Georgia appellate court came to a different conclusion,¹¹ ruling that because delinquency proceedings have delineated the rights of juveniles, competency is necessary to proceed.

In jurisdictions that emphasize the rehabilitative function of courts, the proceedings are considered nonadversarial and the well-being of the child defendant is the objective on both sides, although the method of achieving rehabilitation may be contested. In addition, in those jurisdictions, the juvenile system has established limits on confinement and mechanisms of confidentiality designed to protect the later adult from the consequences of the actions of the child.

The criminalization of the juvenile system in Connecticut created the need for due process protections. The advocates were renamed juvenile prosecutors, and the adversarial contention between state and in-

dividual was established in much the same way as in the adult court. The issue of competency increased in relevance with this change in the nature of the proceedings.

Although the criminalization of the juvenile justice system has increased the number of competency-to-stand-trial requests, it did not create the courts' interest in psychiatric evaluations of juveniles. It did change, however, the aegis under which the evaluations are done. Prior to criminalization, courts ordered psychiatric evaluations at the behest of the defense attorney or the state's attorney (with permission of the defense) to inform the court how to proceed. Was any treatment indicated? If so, did the child need inpatient treatment? Was the child ill, immature, undersupervised, poorly socialized, or delinquent? The court asked for help in understanding the child, in particular, and childhood, in general, to make an informed, just, and effective disposition relating to the goal of rehabilitation.

The evaluations were often used as a tool for accessing services, for evaluating parental capability, and assessing compliance. Under the aegis of a system structured for rehabilitation, the results of such evaluations rarely threatened the civil rights of the child or parents; disagreements centered on least restrictive settings, frequency of contact, and review of compliance. In a criminalized system, concerns about prejudicial information increase and preadjudication evaluations are more problematic.

With criminalization of the juvenile system in Connecticut, the competency-to-stand-trial evaluation has become an assessment mechanism available to both sides for preadjudication evaluations. The questions raised by the prosecution and defense often go beyond the *Dusky* standard of capacity to understand and capacity to assist. Although Connecticut, like most states, does not have a juvenile competency statute, the judicial practice book defines the context for a competency evaluation as one that addresses both traditional competency and capacity to form intent. An evaluation will be conducted:

. . . when the judicial authority finds that there is a question of the child's competency to understand the nature of the proceedings or to participate in the defense, or a question of the child having been mentally capable of unlawful intent at the time of the commission of the alleged act. . . [Ref. 12, p 262].

In addition, the court expects treatment recommendations not only for restoration to competency

but also for the successful reduction of criminal recidivism. The burden of the request far surpasses the scope of the usual competency evaluation and creates a juvenile procedure that is distinct from that for an adult, and this without statutory direction. The court's pleasure or displeasure with results of the competency evaluation often depends on how flexible the evaluators are in addressing the unstated questions: how do we understand this child's behavior, and what do we do about it?

In juvenile court, the results of such an evaluation are often used to determine whether the criminal proceedings continue or are resolved in favor of treatment options. In one notable case, two seven-year-old, first-time arsonists were evaluated for competency to stand trial. They had first burned a shed after a match-lighting lesson went awry. They quickly reported the fire, but not the cause, and became town heroes with a ride on the fire engine. A week later, they burned an abandoned barn where they believed a rabid raccoon was living. Their intent was to frighten the raccoon, but when the fire got out of hand, they tried to put it out by adding dried leaves. They reported the fire immediately, but this time, instead of praise for their watchfulness, they were arrested. The opinion of the competency evaluators was that the children were not competent to understand the proceedings nor to assist in their defense. The children were incompetent because of their ages and the corresponding impulsivity and limited judgment and not because of an underlying disorder. Their reasoning was adequate, their fine motor control even advanced, for seven-year-olds. However, because the justice system was not designed for the seven-year-old mind, they were not able to appreciate the proceedings or assist in their defense.

This finding was anticipated, but the judge had a different question. Did they set the fires on purpose? Did they form intent? The court interpreted the lack of capacity to appreciate the proceedings to mean that the children also lacked capacity to understand their actions and their consequences. The court ruled that the fires resulted from a mixture of undersupervision and unwitting positive reinforcement. The charges were dismissed, and the families were referred to family services for parenting classes.

Such cases demonstrate that, although there is no statutory distinction between adult and child competency, there is judicial and court recognition that

child cases are different. The competency evaluation is reframed to meet the court's need for a reasonable disposition.

Assessing Competency in Children

As Baerger *et al.*¹ point out, standardized assessment tools have been developed for assessing adult competency. However, even if the objective and the standard for deciding competency in juveniles is the same as that for adults, the method of assessment must accommodate the developmental and cognitive abilities of the child. Grisso and others^{5,6} have identified critical dimensions that can affect a child's capacity to reason, decide, and participate. The child's stage of cognitive development is a major factor in determining his or her ability to learn and manipulate information, to form a rational understanding of and participate in a decisional process. Theories of cognitive and emotional development inform the assessment process.

Developmental stages progress sequentially and have guidelines represented by chronological age. The age guidelines are not reliable enough as indicators to establish specific cutoffs for suggesting that children below a certain age without assessment be considered incompetent. Indeed, states define the lowest age at which a child can be introduced into the juvenile or criminal justice system. These lower age limits often represent a simplistic acknowledgment of the "age of reason" or minimal age at which a child can tell right from wrong. More conventional than empirical, the cutoff provides a minimal gatekeeping function to select children who are at least in the concrete operational stage (in Piagetian theory) and have usually been exposed to social systems with rules (school, social groups).

Assessment of competency in juveniles requires sensitivity to child characteristics of learning, relating, and applying information. One of the more interesting challenges in assessing children is determining whether what the child knows reflects what he or she is able to apply to a situation. For example, in one competency evaluation of a 12-year-old charged with assault, the child's television viewing experience made him astute in understanding the roles of courtroom personnel. He particularly identified the role of his attorney as a helper and advisor whose advice should be taken. When asked what the attorney had told him, he answered, "Don't talk about my case to anyone unless he is with me." In response to the next

question about what the police had accused him of, he responded without pause, "They said I hit a kid but I didn't start it. He tried to hit me first, but he missed. I knew he would hit me again and I just defended myself." Through two questions he demonstrated both his memory for information and his inability to apply that information to his case. He learned facts without appreciating their relevance.

Studies of children's decisional capacities emphasize that concrete thinking may prohibit a child's ability to generalize the concept being taught. Although children can repeat the data, they do not understand their application. One interesting study showed that children who could repeat the rule of not accepting rides from strangers were still likely to go with strangers if the incentive changed. Another example was that of a child who was an expert at demonstrating the "stop, drop, and roll!" technique when clothes are afire. Later at a cookout, the same child's clothes were ignited when an adult added accelerant to a lighted charcoal burner. The child ran about wildly in pain. When asked later about his behavior, he related that he did not use the technique he had practiced because, "I was really on fire this time." The capacity to apply knowledge is harder to assess accurately prior to actual performance.

Adolescents have often attained the capacity for abstract reasoning and application of knowledge. The difficulty in adolescence may be in the capacity of judgment and weighing options. Egocentrism, lack of experience, peer loyalty, and a sense of entitled justice may influence adolescent decision making about the merits of a case and the chance for success. Because adolescents are more likely than younger children to be moved to adult court in all jurisdictions, the stakes are higher. Competency becomes more critical, and the distinctions between competency and incompetency based on maturity far more subtle.

In a case in our clinic, a 14-year-old was one of four accused of sexual assault on a 16-year-old. He was the youngest defendant; because of the seriousness of the charge, he was transferred to adult court. The three other defendants were between the ages of 16 and 17 and peers of the victim; each maintained that the 14-year-old had initiated the attack, even though he did not know the victim, who had dated one of the other defendants. The 14-year-old did not dispute the claim, although he had difficulty providing a consistent account of what he had done. On the

competency examination, he had no difficulty understanding the proceedings or his charges. His loyalty to his friends, the importance of their friendship, and his fear of rejection, however, interfered with his establishing a constructive relationship with his attorney. Although one could argue that the boy was willfully choosing to take the blame for his friends, developmental theory suggests that he had less free will than an adult in these circumstances. Social attachments and behavior are as much a part of development as physical growth and cognitive change. The ability to participate in one's defense is a complicated process that requires trust in a role rather than a person, the appreciation of long-term consequences, and the understanding of an abstract process.

It is in this latter domain that many cognitively able children and adolescents have difficulty appreciating that the legal process is about truth determined, not discovered. The household variety of justice in which a guilty party is discovered and punished is easy to understand and is mastered by most children by school age. The legal maneuvers that accompany court cases that include a prolonged process in which the emphasis is on fairness of process more than on discreet outcome can create an additional burden of guilt or an expectation that deceit can win a case.

As Grisso *et al.*⁶ have reported, previous experience in the juvenile system may interfere with the understanding of adult court proceedings. One difficult concept is the adversarial system. An example was a 16-year-old who had his first case in adult court after several juvenile cases for which he had received probation. He insisted that he needed to tell his side of an assault case to the prosecutor, whom he viewed as more powerful and approachable than his soft-spoken public defender. He understood that the prosecutor initiated the "deals" and from his experience in juvenile court, viewed the court "as trying to help, except for my lawyer who doesn't get it." The adolescent grandiosity supported by past experience muted his cognitive capacity to learn and understand. He learned what he had experienced and, consistent with adolescent development, had limited flexibility in shifting his thinking to trust an adult stranger's perspective over his own. Although he was assessed as competent, his ability to assist, compared with that of an adult, was compromised.

Assessment of children requires expertise; it is a subspecialty in psychiatry and medicine in general. However, forensic assessments of juveniles is further complicated because the adult court rarely understands or accommodates children as uniquely different from adults.

The Community Interest in Competency Evaluations

In *State v. Griffin*,¹³ the court of appeals upheld the trial court's decision to include the confession of a 14-year-old accused of killing an 18-year-old woman. The defense had moved to suppress the defendant's confession to the police on grounds that he did not appreciate his *Miranda* rights. The main evidence against the adolescent was his confession; the state had been unable to locate the weapon. The 14-year-old had been with older adolescents and had been using drugs. After an evaluation to assess his competency to waive his *Miranda* rights, an expert testified that the adolescent did not understand that his rights were not limited to the courtroom but extended to the police interrogation as well. Although he demonstrated the capacity to understand the courtroom procedures and assist his attorney with his case, he believed that questioning by the police was separate from the court and that the police had absolute authority until the court case began.

Child cases in particular spark passion on both sides: one side holds the child accountable ("He was adult enough to shoot the gun; he's adult enough to pay for his crime."). The other side views children as developmentally vulnerable and in need of special protection. The polarized positions often cloud the principles of competency: the capacity to understand and assist.

Baerger *et al.*¹ indicate that as the rates of juvenile crime and competencies increase, so does the pressure to identify effective treatment. Systematic investigation both of child capacity and of techniques to assess and enhance understanding of and participation in courtroom proceedings can provide the foundation for informing legal decisions and forensic expertise. The criminalization of the juvenile justice system requires appropriate protections for juveniles, including juvenile competency statutes that come in line with developmental theory.

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