INCOMPETENT YOUTH IN CALIFORNIA JUVENILE JUSTICE

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INTRODUCTION

With increasing frequency, juvenile justice professionals express concern over the difficulties of serving youth who "do not belong" in the juvenile justice system. They lament the influx of youth who properly should be served in the mental health, child welfare, or education systems. They offer troubling accounts of what happens to these young people, who often wind up incarcerated in secure facilities that are not designed for and are ill-equipped to provide appropriate care for them—resulting in further deterioration of mental and physical conditions, over-reliance on isolation and control measures, and severe stress on staff and resources in the facilities.

Among these young people are some with cognitive impairments so severe that they are unable to fully participate in their court cases. Competence to stand trial requires that they be able to understand the nature of the proceedings against them, and to assist their lawyers. And while the presence of a mental disorder, developmental disability, and/or immaturity does not automatically render a juvenile incompetent, the presence of these factors triggers the need for further inquiry. At the very least, these youth present serious challenges for the system in case processing and provision of services; at the most, the system must recognize their incompetence and prevent their cases from going forward.

Despite this, there has been little analysis of the extent of juvenile incompetence in California, or of the ability of the system to meet the needs of incompetent youth. Nor has there been any comprehensive effort to determine what could be done to improve state law or practice with respect to this population.

This Article offers a vehicle for discussion of California juvenile incompe-

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tence to stand trial. It begins with an overview of the California juvenile justice system and a profile of youth in juvenile justice, briefly reviews the incompetency laws applying to adults, and then describes existing legal provisions to address juvenile incompetence. It also describes the context in which this work was undertaken. The Article then presents the findings of the first-ever statewide survey[1] of California probation departments on youth who are incompetent or potentially incompetent to stand trial in juvenile delinquency proceedings.[2] It includes the information we set out to collect—responses on incidence of incompetence, what happens on the way to a determination of incompetence, and what happens to youth who are judicially adjudged incompetent. The Article also presents what county probation officers said about issues they face in serving youth who are not judicially adjudged incompetent but who have developmental disabilities or serious mental health issues. Finally, the Article closes with suggested policy actions to address the issues encountered in serving this population, with examples of currently existing "best practices."

I. BACKGROUND ON JUVENILE COURT PROCEEDINGS AND DISPOSITIONAL PLACEMENTS

Juvenile competence must be considered in the context of a complex system for handling juvenile crime. A brief overview of the California juvenile justice system and a profile of the young people in the system may be helpful.

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1. The authors are grateful to the Chief Probation Officers of California for facilitating the work of this survey, and to the many probation officers whose candid contributions will advance our understanding of how to better serve juvenile incompetents and high-needs youth. We also appreciate the input of regional center staff and clients' rights advocates from Protection & Advocacy, Inc., juvenile defenders, and mental health advocates in dozens of interviews and meetings in counties around the state. We are thankful to the JEHT Foundation and The California Endowment, whose ongoing support has made it possible for us to engage in this strategic investigation and analysis. However, the findings and policy suggestions are those of the authors, as are any errors in interpretation.

2. Delinquency proceedings are those in which the youth is alleged to have committed a crime. They proceed under California Welfare and Institutions Code sections 602 through 800. *See infra* Part I.A-B.

A. *California Juvenile Court Process*[3]

"Juvenile justice" refers to juvenile court proceedings in which a minor is alleged or found to have committed an act that would be a crime if committed by an adult. In California, juvenile justice proceedings are also referred to as "delinquency" cases, or "602" cases, in reference to the jurisdictional statutes beginning at California Welfare and Institutions Code section 602.

A California juvenile justice case begins with an arrest based on alleged commission of a crime, after which the youth may be released, delivered to a shelter or diversion program and cited to appear before the probation officer, or held and transported to the probation officer.[4] The probation officer, in turn, may release the youth on a promise to appear, release the youth on home supervision, place the youth in a non-secure facility, or order detention in the juvenile hall.[5] In California, juvenile halls are county-operated, locked facilities.[6] For detained youth, a formal juvenile court petition must be filed within forty-eight hours of being taken into custody, and the youth taken before the juvenile court before the expiration of the next judicial day after the petition is filed.[7]

At the juvenile court detention hearing, counsel may be appointed if the minor is unable to afford a lawyer, the petition is read, and the minor admits or denies the allegations.[8] The judge may order the youth released, placed on home supervision, placed in a non-secure facility, or detained in the juvenile hall pending adjudication of the case at a jurisdictional hearing (court trial).[9] Where there is a concern about the minor's competence, it would typically be raised at this point, though if the case is one where the parties agree to "divert"

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3. Because of its purported differences from adult proceedings, juvenile court employs a great many terms for roughly equivalent procedures. Here are a few of the most prevalent terms used in California:

Adult Court	**Juvenile Court**
Complaint	Petition
Charges	Allegations
Court Trial	Adjudication
Guilty Plea	Admission
Finding of Guilt	Sustained Allegation
Sentencing	Disposition
Incarceration	Detention

4. CAL. WELF. & INST. CODE §§ 626, 626.5 (2008).

5. *Id.* §§ 628, 628.1, 629, 629.1, 636.2.

6. *Id.* § 850.

7. *Id.* §§ 631-632 (forty-eight hours excluding non-judicial days). Delinquency petitions are filed by the district attorney. *Id.* § 650(c). There are also provisions for direct filing or petitioning for cases to be handled in the adult criminal justice system based on the alleged offense, age of the minor, and history of past adjudications. *Id.* § 602(b).

8. *Id.* §§ 633, 634, 657.

9. *Id.* §§ 636, 636.2.

the case out of the system, it might be handled at an even earlier point in the process.[10]

For youth detained in juvenile hall, the jurisdictional hearing must take place within fifteen judicial days of the court's initial detention order.[11] At the hearing, the court hears the evidence and decides whether or not the minor comes within the jurisdiction of the court based on proof beyond a reasonable doubt that the minor committed a crime.[12] The rules of evidence applicable in adult criminal court are used,[13] and the minor's lawyer may file motions to suppress evidence, to exclude admissions or confessions, or to dismiss the case.[14] In many cases, before or at the time of the jurisdictional hearing the minor admits some or all of the allegations in the petition, in a process roughly equivalent to a guilty plea in adult court.[15] In cases where the youth is detained, the court may then set the case for disposition up to ten judicial days after the jurisdictional hearing, and if the youth is not detained, for up to thirty days from the date the petition was filed.[16]

At the disposition hearing, the court decides whether the youth will be released on probation or placed in some form of institutional custody.[17] State law permits the detention of youth pending execution of the disposition order, subject to court approval at periodic reviews to be held every fifteen days.[18]

The statutory timelines for detained juvenile justice cases envision that the adjudication and disposition of the case will occur in five to six weeks, depending on holidays and the day of the week the arrest occurred.[19] In practice, it may take much longer for cases to reach disposition because of continuances[20] or post-disposition delays in placement.[21] This is particularly so in cases where competence issues are involved.

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10. CAL. R. CT. 5.645(d) (2007).
11. CAL. WELF. & INST. CODE § 657(a)(1) (2008).
12. *Id.* §§ 701, 702.
13. *Id.* § 701.
14. *Id.* §§ 700.1, 701, 701.1.
15. CAL. R. CT. 5.778(c) (2007).
16. CAL. WELF. & INST. CODE § 702 (2008).
17. *Id.* §§ 727, 731.
18. *Id.* § 737.
19. For example, adding together the statutory timelines for the filing of a petition, initial court appearance, jurisdictional hearing, and disposition hearing, and assuming no holidays or continuances, the case of a detained youth arrested on a Monday would be processed through disposition in thirty-eight calendar days, and a detained youth arrested on a Wednesday would be processed through disposition in forty calendar days. *Id.* §§ 631, 632, 657(a)(1), 702.
20. *Id.* § 682.
21. *Id.* § 737.

B. *Dispositional Options (California)*[22]

The court's dispositional choices are very broad. It may declare the minor a ward of the court and place the minor on probation, subject to specified conditions.[23] Or, it may place the minor in a non-secure out-of-home placement. Youth placed through the juvenile justice system may be placed in foster care, licensed group homes, or community treatment facilities, just like children in the child welfare system.[24] The court may order that youth be incarcerated in juvenile hall for a specific amount of time, or send them to a county-operated juvenile home, ranch, camp, or forestry camp.[25] And finally, the court may commit youth to the Division of Juvenile Justice (formerly called the California Youth Authority),[26] a state-operated system of institutions and camps. All of the Division of Juvenile Justice institutions are secure.

California law also provides two kinds of facilities specifically for delinquency wards with serious emotional disturbance. First, state law allows for the establishment of secure regional facilities for "seriously emotionally disturbed" wards.[27] And second, state law establishes community treatment facilities to serve "seriously emotionally disturbed" youth.[28] Juvenile courts may not directly commit youth to involuntary treatment in the mental health system,[29] though it may refer them for evaluation under the authority of statutes that will be discussed in greater detail with respect to juvenile competence.

Throughout the case, the court has the power to dismiss the petition in the

22. The programs discussed in this Part assume that the young person is made a ward of the court. Proceedings involving a potentially incompetent youth would be suspended unless and until the youth becomes competent, so none of these dispositional options would come into play unless the proceedings were resumed.

23. *Id.* § 726. The court may also place the minor on non-wardship probation or dismiss the case in the interest of justice. *Id.* §§ 725(a), 780.

24. *Id.* § 727(a).

25. *Id.* §§ 628, 636(a), 730(a), 880.

26. *Id.* §§ 731(a)(4), 734, 1700, 1710. Although technically the correct name for the system is the Division of Juvenile Facilities, *id.* § 1710, the system is commonly referred to as the "Division of Juvenile Justice," "DJJ," or its old nickname, "CYA."

27. *Id.* §§ 5695-5697.5. The admission criteria exclude youth with a primary substance abuse problem, a primary developmental disability, an acute care need, a need for a level of treatment not provided at the facility, or a medical condition needing ongoing care, or youth who are subject to a conservatorship. *Id.* § 5696.2. At the present time, Humboldt County operates the only regional facility, serving several northern California counties.

28. *Id.* §§ 4094-4096.5. Community treatment facilities are designed for children determined to be "seriously emotionally disturbed" for whom less restrictive mental health interventions have been tried, or children in other mental health facilities who may require periods of containment to benefit from treatment. *Id.* § 4094.5(a).

29. Involuntary commitment of a minor to a mental hospital may occur only in compliance with the stringent standards set forth in the Lanterman-Petris-Short Act, California's involuntary commitment statute. *See In re* L.L., 39 Cal. App. 3d 205, 209 (Ct. App. 1974); *In re* Michael E., 15 Cal. 3d 183, 191-192 (1975).

interest of justice.[30] At the dispositional phase, the court also has the power to join other agencies to the proceedings who have not met their legal obligation to provide services to the youth.[31]

Juvenile court jurisdiction extends to twenty-one years of age, but goes up to twenty-five years for Division of Juvenile Justice wards.[32] Youth may be held in secure physical confinement for up to the maximum amount of time that could be imposed on an adult for the same offense.[33]

C. *Other Agencies Relevant to Juvenile Incompetence Issues*

While the processing of juvenile incompetence occurs in the juvenile court process outlined above, several other agencies can come into play depending on the case. The county department of mental health sometimes becomes involved if the minor suffers from a mental disorder.[34] The local regional center may become involved if the minor has a developmental disability or other qualifying condition.[35] The local education agency might become involved either through joinder motions seeking to enforce legal obligations to the youth, or as part of case planning. The role of these agencies and relevant legal authorities are discussed at pertinent points in the Article.

II. PROFILE OF YOUTH IN THE CALIFORNIA JUVENILE JUSTICE SYSTEM

In 2005, there were 222,512 juvenile arrests in California, resulting in 178,767 referrals to probation and 98,919 formal juvenile court petitions being filed.[36] Of the petitions filed, fully 62,824 youth were placed under juvenile court wardship.[37] Dispositions in wardship cases included 36,859 placed at

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30. CAL. WELF. & INST. CODE § 780 (2008).

31. *Id.* § 727(a).

32. *Id.* § 607.

33. *Id.* §§ 726(c), 731(4)(c).

34. *Id.* §§ 705, 6550-6552.

35. Regional centers are private, non-profit community organizations with which the state of California contracts to serve as service coordinators for eligible people. *Id.* §§ 4501, 4620-4639.75. There are twenty-one regional centers, serving all fifty-eight counties in California. *Id.* § 4501. "Developmental disability" means:

> [A] disability which originates before an individual attains age 18, continues, or can be expected to continue, indefinitely, and constitutes a substantial disability for that individual. It includes mental retardation, cerebral palsy, epilepsy, and autism. It also includes disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation, but does not include "handicapping conditions" that are solely physical in nature.

Id. § 4512(a); CAL. CODE REGS. tit. 17, §§ 54000(a), 54010(b) (2008).

36. CRIMINAL JUSTICE STATISTICS CTR., CAL. DEP'T OF JUSTICE, JUVENILE JUSTICE IN CALIFORNIA, 2005, at 6 fig.1 (2005), *available at* http://ag.ca.gov/cjsc/pubs.php#juvenile Justice.

37. *Id*. at 7.

home or with a relative; 16,538 in a secure county facility (e.g., a juvenile hall or camp); 2383 in a non-secure county facility; 6408 to another public or private agency; and 636 to the Division of Juvenile Justice (California Youth Authority).[38]

In the latter part of 2006, an average of 6865 youth lived in juvenile halls, and of those, an average of 4168 were in pre-disposition status, and 2697 were post-disposition youth awaiting placement in a group home or other non-secure setting.[39] For the same time period, 4203 youth lived in secure camps or ranches.[40] For the August 2007 reporting period, there were 8252 youth in foster care/group home placements through the probation system.[41] At the end of August 2007, there were 2653 youth in Division of Juvenile Justice facilities.[42]

The prevalence of mental health disorders and cognitive disabilities is much greater for young people in the juvenile justice system than in the general youth population. In 2001, the Little Hoover Commission estimated that the prevalence of mental illness for California youth in the juvenile justice system ranges from fifty to ninety percent, as compared with ten percent for youth in the general population. Similarly, a 2003 survey of thirty-five California juvenile probation departments found that forty-two percent of youth in detention, fifty-nine percent of youth in placement, and thirty-three percent of youth under field supervision had a mental health condition serious enough to require treatment or services.[43] A one-day snapshot of youth in California county juvenile facilities in late 2006 revealed that 3147 youth had open mental health cases and 1225 were receiving psychotropic medications.[44] National studies confirm the high rate of mental disorders among juvenile justice youth.[45]

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38. *Id.*

39. CORR. STANDARDS AUTH., CAL. DEP'T OF CORR. & REHAB., JUVENILE DETENTION PROFILE SURVEY—3RD QUARTER REPORT 2006, OVERALL CAPACITY, POPULATION AND ADP (2006), *available at* http://www.cdcr.ca.gov/Divisions_Boards/CSA/FSO/Surveys/Juvenile_Profile/JDSRdocs/2006_3rd_qtr_cap_pop_adp.pdf.

40. *Id.*

41. RESEARCH & DEV. DIV., CAL. DEP'T OF SOC. SERV., CHILD WELFARE SERVICES/CASE MANAGEMENT SYSTEM, CHILD. IN OUT OF HOME PLACEMENTS, PROBATION SUPERVISED DURING AUGUST 2007 (2007), *available at* http://www.dss.cahwnet.gov/research/res/pdf/CWS/2007/cws1baug07.htm.

42. WARD INFO. & PAROLE RESEARCH BUREAU, CAL. DEP'T OF THE YOUTH AUTH., POPULATION MOVEMENT SUMMARY 1 (2007).

43. CHRISTOPHER HARTNEY, THERESA MCKINNEY, LAURA EIDLITZ & JESSIE CRAINE, NAT'L COUNCIL ON CRIME & DELINQUENCY, A SURVEY OF MENTAL HEALTH CARE DELIVERY TO YOUTH IN THE CALIFORNIA JUVENILE JUSTICE SYSTEM 2 (2003), *available at* http://www.nccd-crc.org/nccd/pubs/calif_jj_survey_2003.pdf.

44. CORR. STANDARDS AUTH., CAL. DEP'T OF CORR. & REHAB., JUVENILE DETENTION PROFILE SURVEY—3RD QUARTER REPORT 2006 (2006), *available at* http://www.cdcr.ca.gov/Divisions_Boards/CSA/FSO/Surveys/Juvenile_Profile/JDSRdocs/2006_3rd_qtr_summary_results.pdf.

45. *See, e.g.*, JENNIE L. SHUFELT & JOSEPH J. COCOZZA, NAT'L CTR. FOR MENTAL HEALTH AND JUV. JUSTICE, YOUTH WITH MENTAL HEALTH DISORDERS IN THE JUVENILE JUSTICE SYSTEM: RESULTS FROM A MULTI-STATE PREVALENCE STUDY (2006), *available at*

There is increasing evidence that the high prevalence of mental health disorders in juvenile justice is related to inadequate access to treatment services in the community. Congressional research has found that hundreds of California youth are detained in county juvenile halls awaiting community mental health treatment.[46] Unfortunately, the juvenile justice system itself is sorely lacking in treatment services. A 2005 Division of Juvenile Justice analysis of "gaps" in the continuum of juvenile justice services identified mental health services as the greatest issue of concern to California counties.[47] In the past, some counties routinely committed youth with mental health needs to the Division of Juvenile Justice because of inadequate local treatment options. There is growing recognition, however, that the state system must not serve as a repository for youth with serious mental health needs. As part of the remedial action in *Farrell v. Hickman*, the Division of Juvenile Justice is seeking to reduce the number of youth with serious mental health needs in its facilities and has pledged to work with state and local stakeholders to find appropriate mental health placements for these youth.[48]

Two additional sub-populations should be mentioned with respect to juvenile competence. First, there is a significantly higher prevalence of youth with cognitive disabilities in juvenile justice than in the general population. Thus, while the prevalence of mental retardation in the general school-age population is 1.61%, an analysis of research on juvenile offenders found that approximately 12.6% have mental retardation.[49]

Juvenile offenders also have a higher prevalence than the general school-age population of specific learning disabilities that may affect, among other things, cognitive tasks such as the "ability to listen, think, speak, read, write,

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http://www.ncmhjj.com/pdfs/publications/PrevalenceRPB.pdf.

46. *See, e.g.*, U.S. H.R. COMM. ON GOV'T REFORM—MINORITY STAFF, SPEC. INVESTIGATIONS DIV., 105TH CONG., INCARCERATION OF YOUTH WHO ARE WAITING FOR COMMUNITY MENTAL HEALTH SERVICES IN CALIFORNIA 4-5 (2005), *available at* http://www.democrats.reform.house.gov/Documents/20050124112914-80845.pdf; *see also* SUE BURRELL & ALICE BUSSIERE, "DIFFICULT TO PLACE": YOUTH WITH MENTAL HEALTH NEEDS IN CALIFORNIA JUVENILE JUSTICE 4-5 (2005), *available at* http://ylc.org/viewDetails.php?id=85.

47. DIV. OF JUVENILE JUSTICE, CAL. DEP'T OF CORR. & REHAB., STATUS REPORT ON JUVENILE JUSTICE REFORM, DECEMBER 1, 2005, at 3-6 (2005), *available at* http://www.cdcr.ca.gov/Divisions_Boards/DJJ/About_DJJ/dec1report/1_exec_summary.pdf.

48. DIV. OF JUVENILE JUSTICE, CAL. DEP'T OF CORR. & REHAB., MENTAL HEALTH REMEDIAL PLAN (2006), *available at* http://www.cdcr.ca.gov/Divisions_Boards/DJJ/docs/MentalHealthPlan.pdf [hereinafter MENTAL HEALTH REMEDIAL PLAN]; *see also* HANS STEINER, KEITH HUMPHREYS & ALLISON REDLICK, THE ASSESSMENT OF THE MENTAL HEALTH SYSTEM OF THE CALIFORNIA YOUTH AUTHORITY: REPORT TO GOVERNOR DAVIS (2001) (reporting the prevalence of mental health disorders compiled by the Division of Juvenile Justice).

49. ROBERT B. RUTHERFORD, JR., MICHAEL BULLIS, CINDY WHEELER ANDERSON & HEATHER M. GRILLER-CLARK, YOUTH WITH DISABILITIES IN THE CORRECTIONAL SYSTEM: PREVALENCE RATES AND IDENTIFICATION ISSUES (2002), *available at* http://cecp.air.org/juvenilejustice/docs/Youth%20with%20Disabilities.pdf.

spell or do mathematical calculations."[50] Researchers have found that anywhere from seven percent to fifteen percent of students in the general population have specific learning disabilities. An analysis of twenty-two studies of juvenile offenders found a prevalence rate of 35.6%.[51] Moreover, the percentage of young people in juvenile correctional facilities who were previously identified as having learning disabilities and served in special education programs before their incarceration is at least three to five times the percentage of the public school population identified as disabled.[52] The data on prevalence of cognitive disabilities in California juvenile justice is quite limited (an issue that will be discussed at greater length), but there is no reason to believe that prevalence would vary from the national research.

The other sub-population to consider in juvenile competence is children who are very young. Statewide data for 2005 indicate that there were 465 referrals to probation for children younger than ten years of age; 538 for children ten years of age; 1407 for children eleven years of age; 4145 for children twelve years of age; 10,421 for children thirteen years of age; and 18,519 for children fourteen years of age.[53] Petitions were filed in 63 cases involving children younger than ten years of age; 95 cases involving children ten years of age; 387 cases involving children eleven years of age; 1447 cases involving children twelve years of age; 4927 cases involving children thirteen years of age; and 11,311 cases involving children fourteen years of age.[54] Of the petitions filed, wardship was declared in 22 cases of children younger than ten years of age; 26 cases of children ten years of age; 157 cases of children eleven years of age; 732 cases of children twelve years of age; 2864 cases of children thirteen years of age; and 6956 cases of children fourteen years of age.[55]

While not every young person who is of tender age or who has a developmental disability, mental disorder, or other cognitive disability is incompetent, the prevalence of these characteristics among juvenile justice youth underlines the need to make sure particular youth are capable of meaningfully participating in their case. We will turn now to a consideration of what the law requires.

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50. This is the pertinent part of the definition in the Individuals with Disabilities Education Act, 20 U.S.C. § 1401(26)(A) (2006).

51. RUTHERFORD, JR. ET AL., *supra* note 49, at 10; JOAN PETERSILIA, CAL. POLICY & RESEARCH CTR., DOING JUSTICE? CRIMINAL OFFENDERS WITH DEVELOPMENTAL DISABILITIES 24 (2000), *available at* http://www.ucop.edu/cprc/documents/dojustrpt.pdf. Researchers believe that the actual number of youth in juvenile justice with disabilities is even higher than is suggested by existing research because of systemic under-identification. Mary Magee Quinn et al., *Youth with Disabilities in Juvenile Corrections: A National Survey*, 71 EXCEPTIONAL CHILD 339, 342-43 (2005), *available at* http://www.neglected-delinquent.org/nd/docs/mquinn0305.pdf.

52. National Center on Education, Disability, and Juvenile Justice, Juvenile Correctional Education Programs, http://www.edjj.org/focus/education (last visited Apr.10, 2008).

53. CRIMINAL JUSTICE STATISTICS CTR., *supra* note 36, at 6.

54. *Id.* at 93.

55. *Id*. at 96-97 tbl.4. These ages—under ten years of age up through age fourteen—roughly translate to children in middle school grades or below.

III. LEGAL BACKGROUND

The prohibition on trying an incompetent person is fundamental to our system of justice.[56] Since common law times, it has been established that a person who lacks the requisite mental capacity may not be subjected to a trial. The principle is that a mentally incompetent defendant is physically present in the courtroom but has no meaningful opportunity to defend himself or herself.[57] Requiring competence helps to protect the integrity of the court process, reduces the risk of erroneous convictions, and protects the decision-making autonomy of the accused.[58] Accordingly, the failure to observe procedures adequate to protect a defendant's right not to be tried or convicted while incompetent to stand trial deprives him of his due process right to a fair trial.[59]

A. *The Constitutional Competency Standard*

In *Dusky v. United States*, the United States Supreme Court set forth the constitutionally required test for competence to stand trial.[60] Under the two-pronged test, competence requires that the defendant (1) has sufficient ability to consult with his lawyer with a reasonable degree of rational understanding, and (2) has a rational as well as factual understanding of the proceedings against him.[61] In *Drope v. Missouri*, the United States Supreme Court clarified the first *Dusky* prong to specify that the defendant be able to "assist in preparing his defense."[62] This means that unless and until the person becomes competent, the

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56. Drope v. Missouri, 420 U.S. 162, 171-72 (1975).

57. *Id.* at 171.

58. AM. BAR ASS'N JUVENILE JUSTICE CTR., JUVENILE LAW CTR. & YOUTH LAW CTR., EVALUATING YOUTH COMPETENCE IN THE JUSTICE SYSTEM 15 (Robert G. Schwartz & Lourdes M. Rosado eds., 2000), *available at* http://www.njdc.info/pdf/maca6.pdf.

59. *Id.* at 172; *see also* Pate v. Robinson, 383 U.S. 375, 385 (1966).

60. Dusky v. United States, 362 U.S. 402 (1960).

61. *See id.* at 402.

62. Drope v. Missouri, 420 U.S. 162, 171 (1975). In evaluating whether the constitutional standard is met, experts consider a much broader range of issues. One of the frequently used sets of functional abilities used to evaluate competence is:

Understanding of Charges and Potential Consequence

1. Ability to understand and appreciate the charges and their seriousness.
2. Ability to understand possible dispositional consequences of guilty, not guilty and not guilty by reason of insanity.
3. Ability to realistically appraise the likely outcomes.

Understanding of the trial process

4. Ability to understand, without significant distortion, the roles of the participants in the trial process (e.g., judge, defense attorney, prosecutor, witnesses, jury).
5. Ability to understand the process and potential consequences of pleading and plea bargaining.
6. Ability to grasp the general sequence of pretrial events.

Capacity to Participate with Attorney in a Defense

7. Ability to adequately trust or work collaboratively with attorney.
8. Ability to disclose to attorney reasonably coherent description of facts pertaining to

proceedings may not go forward. If the person will never become competent, the case must be dismissed.

The Supreme Court also recognized in *Jackson v. Indiana* that due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the incompetent individual is committed.[63] Thus, a person "cannot be held more than the reasonable period of time necessary to determine whether there is a substantial probability that he will attain that [competent] capacity in the foreseeable future."[64] In *Youngberg v. Romeo*, the Supreme Court specified that people confined as a result of mental disabilities may not be punished, and, as in *Jackson*, that the conditions of confinement must be related to the purpose of confinement.[65] In *Olmstead v. L.C.*, interpreting the Americans with Disabilities Act,[66] the Court recognized that a person with disabilities may not be held in an institutional setting if treatment professionals determine that community-based placement is appropriate, the affected person does not oppose such treatment, and the placement can be reasonably accommodated, taking into account the resources available and the needs of others with mental disabilities.[67]

B. *Adult Competence in California*

The adult incompetence procedures set forth in California Penal Code sections 1367 through 1376 outline separate processes depending on whether the person is believed to have a mental disorder or a developmental disability. A person who is believed to have both is handled under the procedures for incompetent people who are developmentally disabled.[68] There are separate pro-

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charges, as perceived by defendant.

9. Ability to reason about available options by weighing their consequences, without significant distortion.

10. Ability to realistically challenge prosecution witnesses and monitor trial events.

Potential for Courtroom Participation

11. Ability to testify coherently, if testimony is needed.

12. Ability to control own behavior during trial proceedings.

13. Ability to manage the stress of trial.

THOMAS GRISSO, EVALUATIONS FOR JUVENILES' COMPETENCE TO STAND TRIAL: A GUIDE FOR LEGAL PROFESSIONALS 91-92 (2005). Evaluation of competence also involves an examination of the causes for deficits in abilities, the interaction of abilities and situational demands in the particular case, and the likelihood of remediating deficits. *Id*. at 93-96.

63. Jackson v. Indiana, 406 U.S. 715, 738 (1972).

64. *Id*. at 738. The California Supreme Court embraced *Jackson* in *In re Davis*, 8 Cal.3d 798, 801 (1973). More recently, the Ninth Circuit Court of Appeals has also held that forcing incompetent inmates to wait for "weeks and months" to be transferred to a state hospital for treatment similarly violates their due process rights. Oregon Advocacy Ctr. v. Mink, 322 F.3d 1101, 1120 (9th Cir. 2000).

65. Youngberg v. Romeo, 457 U.S. 307, 324 (1982).

66. 42 U.S.C. § 12132 (2008).

67. Olmstead v. L.C., 527 U.S. 581, 607 (1999).

68. CAL. PENAL CODE § 1367 (2008).

visions for people accused of committing misdemeanors and a diversion program for alleged misdemeanants with developmental disabilities.[69]

The condition addressed by these statutes—incompetence to stand trial—is not the same as the condition that permits involuntary treatment under the Lanterman-Petris-Short Act, which governs civil commitments in California.[70] While incompetence to stand trial is indicated by the person's inability to understand the nature of the proceedings or to assist counsel,[71] involuntary treatment is based on the person's "grave disability" or "dangerousness."[72]

The California adult incompetence statutes are lengthy and complex. They set forth the processes for raising doubt as to a person's competence, referring a person for treatment and evaluation, having an expert evaluate a person, investigating when a person is suspected to have a developmental disability, and reinstituting the proceedings if the person is found competent. They also specify the suspension of proceedings pending evaluation, the rules for a hearing on competence, the right of a defendant to demur or move to dismiss for lack of probable cause that a crime was committed, and the requirement that incompetence be shown by a preponderance of the evidence.[73]

The adult statutes for persons accused of felonies specify that, upon a finding of incompetence for mental disorder, the trial or judgment shall be suspended until the person becomes mentally competent and the person shall be delivered to a state hospital or other public or private treatment facility that will "promote the defendant's speedy restoration to mental competence."[74] The person may also be placed in outpatient treatment.[75] There are extensive provisions on the administration of anti-psychotic medication to incompetent persons.[76]

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69. The competence procedures for adults accused of misdemeanors are set forth in CAL. PENAL CODE §§ 1367.1, 1370.01 (2008), and the diversion process for people with developmental disabilities accused of misdemeanors is set forth in CAL. PENAL CODE §§ 1001.21-.34 (2008).

70. The standards for involuntary treatment and civil commitment are set forth in the California Welfare and Institutions Code. CAL. WELF. & INST. CODE §§ 5008(h), 5150 (2008).

71. Drope v. Missouri, 420 U.S. 162, 171 (1975); Dusky v. United States, 362 U.S. 402, 402 (1960).

72. *See, e.g.*, CAL. WELF. & INST. CODE § 5008(h) (2008) (grave disability for mental disorder); *id.* § 5150 (danger to self or others or gravely disabled as a result of mental disorder); *id.* § 6500 (dangerousness due to developmental disability); Hale v. Superior Court, 15 Cal. 3d 224-29 (1975); Conservatorship of Moore, 185 Cal. App. 3d 718, 732-33 (1986). There is a separate statutory definition of "grave disability" for juveniles. CAL. WELF. & INST. CODE § 5585.25 (2008).

73. CAL. WELF. & INST. CODE §§ 1367.1, 1368, 1368.1, 1369 (2008).

74. *Id.* § 1370(a)(1)(B)(i). There are separate provisions in section 1370 for people accused of committing certain sex offenses and violent felonies. The provisions for people alleged to have committed misdemeanors are set forth in section 1370.01. *Id.* § 1370.01.

75. *Id.* §§ 1370(a)(1)(B)(i), 1600.

76. *Id.* §§ 1370(a)(2)(B), 1370.01(a)(2)(B) (misdemeanors).

Within ninety days of the commitment, and at six-month intervals after that, the medical director of the treatment facility must make a report to the court on the person's progress toward recovery of mental competence.[77] If there is no substantial likelihood that the person will "regain mental competence in the foreseeable future," or if the person remains hospitalized or on outpatient status after eighteen months, or if it is determined that no treatment for the defendant's mental impairment is being conducted, then the person must be returned to the committing court.[78]

In felony cases, after three years, calculated from the date of commitment, or the maximum term of imprisonment for the alleged offense (whichever is shorter), the person must be returned to court.[79] In misdemeanor cases the person must be returned to court at the end of one year from the date of commitment.[80] If the person appears to be "gravely disabled," the case is then referred for evaluation for civil commitment under the Lanterman-Petris-Short Act.[81] The case remains subject to dismissal in the interest of justice under Penal Code section 1385 at any point in the proceedings.[82]

The procedures for adults who are believed to be incompetent because of developmental disabilities are parallel to the ones for people with mental disorders, except for the agency in charge and the duration of confinement. Upon a finding of incompetence, the court must order the regional center director to make a recommendation as to whether the person should be committed to a state hospital, developmental center, other residential facility, or be placed on outpatient status.[83] The person may be delivered to a state hospital, or developmental center, or other residential facility for the "speedy attainment of mental competence"[84] or placed in outpatient treatment.[85] A report on the person's progress toward attaining competency must be submitted to the court within ninety days of the commitment, and the court may order that the person remain committed if the report indicates a substantial likelihood that the person may become competent within the next ninety days.[86] A subsequent report must be made after 150 days of commitment or if the person attains competence. The person must be returned to court if there is "no substantial likelihood that the defendant has become mentally competent."[87] The person must be returned to

77. *Id.* §§ 1370(b)(1), 1370.01(b) (misdemeanors).

78. *Id*. §§ 1370(b)(2)-(3), 1370(c).

79. *Id*. § 1370(c)(1).

80. *Id.* § 1370.01(c)(1).

81. *Id.* §§ 1370(c)(2), 1370.01(c)(2) (misdemeanors).

82. *Id.* §§ 1370(d), 1385(a); *see also id.* § 1370.01(d) (misdemeanors).

83. *Id.* § 1370.1(a)(2). The incompetence process for people with developmental disabilities applies both to those charged with felonies and misdemeanors.

84. *Id.* § 1370.1(a)(1)(B)(i)-(ii). As with mental disorders, there are special provisions for persons alleged to have committed certain sex offenses and violent felonies.

85. *Id.* § 1370.4.

86. *Id.* § 1370.1(b)(1).

87. *Id*.

the committing court if they remain hospitalized or on outpatient status after six months or if no treatment is being conducted for the defendant's impairment.[88] As in the cases involving incompetence for mental disorder, those involving incompetence resulting from developmental disabilities must be returned to court at the end of three years from the date of commitment or the maximum term of imprisonment for the alleged offense (whichever is shorter).[89] The case remains subject to dismissal in the interest of justice under Penal Code section 1385 at any point.[90] If the case is dismissed before the person becomes competent, the statutes provide for handling under the Lanterman-Petris-Short Act or the provisions for dangerous persons with mental retardation.[91]

Adults with developmental disabilities who are accused of a misdemeanor may qualify for diversion from the justice system if they have been determined eligible for regional center services.[92] When the court suspects that the person may have a developmental disability, it may order that the regional center, probation department, and prosecutor prepare concurrent reports on specified aspects of the case. The regional center must submit a report to the probation department that addresses the person's regional center eligibility and offers an individually tailored plan for diversion services. In addition, the prosecutor must submit a report to the court, and if diversion is recommended, the prosecutor must also include the recommended terms of diversion and agency supervision. The probation officer must also submit a report to the court on the defendant's background and factors indicating whether the person would benefit from diversion.[93] If the person is found to have a developmental disability, and the proposed diversion program is acceptable to the court, it may order diversion, subject to the defendant's consent.[94] The responsible agency or agencies must file progress reports at least every six months, and the defendant may be brought back to court and the criminal proceedings reinstituted for failure to meet the terms of diversion.[95] The period of diversion may not exceed two years, and if the person has performed satisfactorily, then the criminal charges must be dismissed.[96]

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88. *Id.* § 1370.1(b)(2)-(3).
89. *Id.* § 1370.1(c)(1)(A).
90. *Id.* § 1370.1(d).
91. *Id.* § 1370.1(c)(2).
92. *Id.* § 1001.21.
93. *Id.* § 1001.22(a)-(c).
94. *Id.* § 1001.23.
95. *Id.* §§ 1001.28, 1001.29. Under the statutory scheme, if the proceedings are reinstituted because of failure on diversion, the defendant may still pursue formal incompetence proceedings.
96. *Id.* § 1001.23.

C. *Juvenile Competence and the Constitution*

The United States Supreme Court has not specifically considered whether juveniles must be competent to stand trial. In the early days of juvenile court, this would not have been a pertinent issue since the purpose of state intervention was more clearly directed at protection and treatment. Court proceedings were informal, and the focus was on the child more than the offense.[97] By the early 1960s things had changed. There was increased concern that the informality of juvenile court proceedings had resulted in unfairness and that the consequences of delinquency cases were far from benign.

The Supreme Court addressed these issues in a series of far-reaching opinions beginning in 1966. In *Kent v. United States*, it held that waiver into adult court is a "critical" stage of the proceedings, and Justice Fortas observed, "[T]here may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children."[98] In 1967, the Court issued its landmark ruling *In re Gault*, establishing that juveniles have the rights to formal notice, appointed counsel, confrontation and cross-examination, and the privilege against self-incrimination.[99] Several years later, *In re Winship* clarified that every element in a juvenile delinquency case must be proved beyond a reasonable doubt.[100]

In subsequent cases, the Supreme Court has stopped short of extending to juveniles all of the rights enjoyed by adult defendants.[101] Nonetheless, two recent decisions in capital cases suggest that the Supreme Court takes quite seriously the very mental conditions involved in juvenile competence: developmental disabilities and immaturity. In *Atkins v. Virginia*, the Court held that the execution of a person with mental retardation violates the Eighth and Fourteenth Amendments.[102] The Court specifically noted that defendants with mental retardation "may be less able to give meaningful assistance to their counsel, are typically poor witnesses and their demeanor may create an unwarranted impression of lack of remorse for their crimes."[103]

Most recently, in *Roper v. Simmons*, the Court held that the execution of

97. The problem for determination by the judge was not whether the boy or girl had committed a specific wrong, but "[w]hat is he, how has he become what he is, and what had best be done in his interest and the interest of the state to save him from a downward career." *In re* Gault, 387 U.S. 1, 15 (1967) (quoting Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 119-20 (1909)).

98. Kent v. United States, 383 U.S. 541, 556 (1966) (citations omitted).

99. *In re Gault*, 387 U.S. at 31-57 & n.94.

100. *In re* Winship, 397 U.S. 358, 368 (1970).

101. *See* Schall v. Martin, 467 U.S. 253, 281 (1984) (upholding the pre-adjudication detention of juveniles); McKeiver v. Pennsylvania, 403 U.S. 528, 553 (1971) (refusing to find a constitutional right to jury trials for juveniles).

102. Atkins v. Virginia, 536 U.S. 309, 321 (2002).

103. *Id.* at 320-21.

persons who were younger than eighteen years of age at the time of the offense violates the Eighth and Fourteenth Amendments.[104] In finding that juveniles should not be held to the full adult criminal standards of punishment, the Court considered extensive evidence of youthful immaturity and irresponsibility, and the fact that almost every state prohibits juveniles from a range of activities such as voting, marrying, and serving on juries.[105] The Court concluded that, because of diminished culpability due to immaturity, the social purposes of the death penalty—retribution and deterrence—are not served by imposition of the death penalty on juveniles.[106] So while the Court has not yet specifically ruled on juvenile competence, the Court's long record of concern for juvenile capacity points to a constitutional right to be tried only if a young person's level of competence meets the *Dusky* standard.

Without specific Supreme Court guidance on juvenile competence to stand trial, states have developed very different approaches to juvenile competency. At least twenty states have separate statutes for juvenile competency, and the remainder have a single statutory scheme. In the states with a single statutory scheme either the statute specifies that the adult process applies to juveniles or case law interprets it as applying to juveniles.[107] Only one state does not require that juveniles be competent to stand trial. Oklahoma case law holds that juveniles do not have the right to argue competency, based on the notion that "the nature of juvenile proceedings themselves, being specifically not criminal proceedings and directed towards the rehabilitation of a juvenile, indicates . . . the intent of the legislature to deal with juveniles regardless of mental state."[108]

D. *California Law on Juvenile Competence*

California appellate courts have confirmed that the two-pronged *Dusky* constitutional standard applies in juvenile cases. In *James H. v. Superior Court*, the California Court of Appeals held that incompetent juveniles may not be subjected to juvenile court proceedings for alleged criminal behavior, and that the court has the inherent power to suspend the proceedings to consider the issue of competence.[109]

But while almost every state provides statutory guidance for the implementation of the *Dusky* standard as applied to juveniles, California's provisions apply only to adults. California Penal Code sections 1367 through 1376 codify the standards and processes for adults with a mental disorder or developmental disabilities. There is no corresponding juvenile statute.

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104. Roper v. Simmons, 543 U.S. 551, 578 (2005).

105. *Id*. at 569.

106. *Id*. at 571.

107. Youth Law Center, Juvenile Competence to Stand Trial (June 2007) (unpublished report, on file with authors).

108. G.J.I. v. State, 778 P.2d 485, 487 (Okla. Crim. App. 1989).

109. James H. v. Superior Court, 77 Cal. App. 3d 169, 175-76 (Ct. App. 1978).

The court in *James H.* specifically found that the adult statutory procedure does not apply in juvenile cases[110] but suggested that it may be used as a yardstick for the definition of incompetence, along with the *Dusky* constitutional standard.[111] In *James H.*, the youth had mental retardation and had experienced long-term substance abuse.[112] The case was remanded so the court could weigh conflicting evidence on whether these conditions rendered him incompetent.[113]

More recently, in *Timothy J. v. Superior Court*, the Court of Appeals clarified that juvenile incompetence may be based on immaturity as well as a mental disorder or developmental disability.[114] In *Timothy J.*, an eleven-year-old and a twelve-year-old based their claim of incompetence on age-related developmental immaturity.[115] The Court stated that "for 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 eleven-year-old due to a developmental disability and that of a normal eleven-year-old whose mental development and capacity is likewise not equal to that of a normal adult."[116] Accordingly, a juvenile is incompetent if he fails to meet one or both prongs of the *Dusky* test, irrespective of whether the cause for incompetence fits into one of the traditional adult categories.

But while *Timothy J.* has provided much needed guidance on the constitutional standard for juvenile competence, practitioners still face a bewildering set of tasks if the young person is found incompetent. The *James H.* opinion noted only that "resort should then be made to existing juvenile court proceedings under Welfare and Institutions Code section 705."[117] Unfortunately, section 705 is a "catch all" statute that applies not just to competence issues but to any situation in which the juvenile court "is in doubt concerning the mental health" of a young person or believes the person to be "mentally disordered."[118] Section 705 invokes Welfare and Institutions Code section 6550 and Penal Code section 4011.6, both of which concern proceedings for involuntary treatment for mental disorders or mental retardation.[119]

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110. *Id.* at 175.

111. *Id*. at 176-77.

112. *Id.* at 172.

113. *Id.* at 176-77. *James H*. involved a doubt as to competence raised at the "fitness" stage, before the court ruled on a petition to find the minor unfit for juvenile court treatment. The right to a competency hearing at the fitness stage was recently upheld in *Tyrone B. v. Superior Court*, 164 Cal. App. 4th 227, 231 (Ct. App. 2008).

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

115. *Id.* at 852-54.

116. *Id.* at 861.

117. *James H.*, 77 Cal. App. 3d at 177.

118. CAL. WELF. & INST. CODE § 705 (2008).

119. Section 6551 of the California Welfare and Institutions Code specifically addresses referral for involuntary treatment for children involved in juvenile court cases into the Lanterman-Petris-Short provisions (sections 5150 *et seq.*). It provides for a seventy-two hour treatment and evaluation period, followed by certification for an additional fourteen

Neither the *James H.* opinion nor section 705 offer guidance on what to do if the young person is incompetent but does not meet the eligibility criteria for involuntary services for a mental disorder (Lanterman-Petris-Short). Those criteria require that as a result of mental disorder, the person is a danger to self or others, or is "gravely disabled."[120] Nor is there guidance on the handling of cases in which the young person is incompetent but does not meet the criteria for placement in a state hospital as a "mentally retarded person."[121] And whereas the adult section 1367 scheme provides a full array of actions to be taken in connection with evaluation and handling of incompetence, with considerable attention to dismissing the case, diverting cases for people with developmental disabilities or handling the person in less restrictive settings, neither *James H.* nor section 705 addresses these issues. Other juvenile cases have left practitioners with an even more muddled view of what should happen.[122]

The more recent *Timothy J.* opinion directs practitioners to California Rule of Court 5.645(d),[123] which specifically mentions competence, but similarly

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days of involuntary treatment for persons with developmental disabilities or mental disorders. If, during the initial seventy-two hour period, there is a finding that a person has mental retardation, the court may direct the filing of a petition to commit such person to the State Department of Developmental Services for placement in a state hospital. Section 4011.6 of the Penal Code contains similar provisions for cases in which it appears that the person may have a mental disorder, but it only applies to people in jails or juvenile detention facilities. Section 705 of the Welfare and Institutions Code does not reference the specific statutory provisions for determining "grave disability" for juveniles set forth in sections 5885 *et seq.* of the Welfare and Institutions Code.

120. Section 5150 of the Welfare and Institutions Code (Lanterman-Petris-Short Act) permits an initial seventy-two hour treatment evaluation period only if a person, "as a result of mental disorder, is a danger to others, or to himself or herself, or gravely disabled." Section 5250 provides for an additional fourteen days of involuntary treatment if as a result of mental disorder or impairment by chronic alcoholism, the person is a danger to others, or to himself or herself, or gravely disabled and in need of intensive treatment. At that point, the fourteen day hold may be renewed under section 5260, the person may be referred for certification for 180 days as an imminently dangerous person under section 5300, or referred for conservatorship proceedings under section 5350. Under existing law, youth who are wards of the court may be referred into this system pursuant to section 6550 or rule 5.645 of the California Rules of Court, and youth who are not wards may be referred into it through section 705 of the Welfare and Institutions Code or section 4011.6 of the Penal Code.

121. In any event, the provisions for involuntary commitment to a state hospital harken back to an era that is winding down in California's system for developmental disabilities. The State Department of Developmental Services has closed almost all of its Developmental Centers in favor of serving clients in less restrictive settings, and any remaining beds for juveniles are limited. Irrespective of the broader issues discussed herein, section 6550 and rule 5.645 of the California Rules of Court, which references it, need to be updated to reflect currently available service options. As with many other areas of California law, these provisions also need to be updated to replace archaic, offensive terminology for people with disabilities.

122. *See, e.g.*, *In re* Patrick H., 54 Cal. App. 4th 1346 (Ct. App. 1997); *In re* Mary T., 176 Cal. App. 3d 38 (Ct. App. 1985).

123. Rule 5.645 of the California Rules of Court ("Mental health or condition of child") provides:

> (a) Doubt concerning the mental health of a child (§§ 357, 705, 6550, 6551)
>
> Whenever the court believes that the child who is the subject of a petition filed under

invokes the involuntary treatment statutes.[124] Rule 5.645 calls for the appoint-

section 300, 601, or 602 is mentally disabled or may be mentally ill, the court may stay the proceedings and order the child taken to a facility designated by the court and approved by the State Department of Mental Health as a facility for 72-hour treatment and evaluation. The professional in charge of the facility must submit a written evaluation of the child to the court.

(b) Findings regarding a mental disorder (§ 6551)

Article 1 of chapter 2 of part 1 of division 5 (commencing with section 5150) applies.

(1) If the professional reports that the child is not in need of intensive treatment, the child must be returned to the juvenile court on or before the expiration of the 72-hour period, and the court must proceed with the case under section 300, 601, or 602.

(2) If the professional in charge of the facility finds that the child is in need of intensive treatment for a mental disorder, the child may be certified for not more than 14 days of involuntary intensive treatment according to the conditions of sections 5250(c) and 5260(b). The stay of the juvenile court proceedings must remain in effect during this time.

(A) During or at the end of the 14 days of involuntary intensive treatment, a certification may be sought for additional treatment under sections commencing with 5270.10 or for the initiation of proceedings to have a conservator appointed for the child under sections commencing with 5350. The juvenile court may retain jurisdiction over the child during proceedings under sections 5270.10 et seq. and 5350 et seq.

(B) For a child subject to a petition under section 602, if the child is found to be gravely disabled under sections 5300 et seq., a conservator is appointed under those sections, and the professional in charge of the child's treatment or of the treatment facility determines that proceedings under section 602 would be detrimental to the child, the juvenile court must suspend jurisdiction while the conservatorship remains in effect. The suspension of jurisdiction may end when the conservatorship is terminated, and the original 602 matter may be calendared for further proceedings.

(c) Findings regarding mental retardation (§ 6551)

Article I of chapter 2 of part 1 of division 5 (commencing with section 5150) applies.

(1) If the professional finds that the child is mentally retarded and recommends commitment to a state hospital, the court may direct the filing in the appropriate court of a petition for commitment of a child as a mentally retarded person to the State Department of Developmental Services for placement in a state hospital.

(2) If the professional finds that the child is not mentally retarded, the child must be returned to the juvenile court on or before the expiration of the 72-hour period, and the court must proceed with the case under section 300, 601, or 602.

(3) The jurisdiction of the juvenile court must be suspended while the child is subject to the jurisdiction of the appropriate court under a petition for commitment of a mentally retarded person, or under remand for 90 days for intensive treatment or commitment ordered by that court.

(d) Doubt as to capacity to cooperate with counsel (§§ 601, 602; Pen. Code, § 1367)

If the court finds that there is reason to doubt that a child who is the subject of a petition filed under section 601 or 602 is capable of understanding the proceedings or of cooperating with the child's attorney, the court must stay the proceedings and conduct a hearing regarding the child's competence.

(1) The court may appoint an expert to examine the child to evaluate the child's capacity to understand the proceedings and to cooperate with the attorney.

(2) If the court finds that the child is not capable of understanding the proceedings or of cooperating with the attorney, the court must proceed under section 6550 and (a)-(c) of this rule.

(3) If the court finds that the child is capable of understanding the proceedings and of cooperating with the attorney, the court must proceed with the case.

CAL. R. CT. 5.645 (2007). The language in rule 5.645(d)(1) providing that the court "may" appoint an expert to evaluate competence has been held to require that an expert be appointed when a doubt as to competency is raised. Tyrone B. v. Superior Court, 164 Cal. App. 4th 227, 231 (Ct. App. 2008).

124. Although rule 5.645 was enacted in 1999 to conform to the holding of *James H.*

ment of an expert but provides no timelines or procedural guidance for the determination of competence. And like section 705, the rule invokes section 6550 *et seq.*, and limits services to those available if the youth meets highly restrictive eligibility criteria for involuntary mental health services under Welfare and Institutions Code section 5150 *et seq*. (Lanterman-Petris-Short Act), or placement in a state hospital as a "mentally retarded person" under the auspices of the State Department of Developmental Services.[125] Rule 5.645 offers no guidance for youth who do not meet those criteria, and no other "treatment" options are provided.

E. *Current Legal Landscape for Incompetent Juveniles in California*

So while the California adult criminal system has a prescribed path for evaluating competence, diverting and suspending proceedings, referring incompetent people into the mental health or developmental disabilities system, determining whether competence has been restored, and dismissing cases if competence will not be restored, no statutory procedure exists for California juveniles.[126] Further, the only existing guidance funnels incompetent youth into involuntary treatment systems in which the justification for state intervention is something different, the eligibility threshold is very high, and timelines are directed at general treatment not competence in the context of the juvenile court process.[127] While existing legal authorities may suffice to meet the needs of

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with respect to juvenile competence, *see* Timothy J. v. Superior Court, 150 Cal. App. 4th 847, 858 (Ct. App. 2007)., it inadvertently adds another layer of confusion for those trying to figure out what to do with incompetent youth. Rule 5.645 purports to address the needs of youth who are incompetent and subject to a petition under section 601 or 602 and thus have not been adjudged to be wards of the court, but the statutes actually referred to in the rule, sections 6550 through 6552 of the Welfare and Institutions Code, pertain to youth who are wards of the court. On its face, then, the rule is useless for incompetent youth because, by definition, they have not yet been adjudicated and thus could not come within the statutes to which the rule refers. Unlike the opinion in *James H.*, the rule does not invoke section 705 of the Welfare and Institutions Code, which does apply to youth for whom petitions are pending and which in turn invokes section 4011.6 of the Penal Code, which may apply to youth prior to adjudication. This lack of precision in rule 5.645 only adds to practitioner confusion in attempting to understand applicable law.

125. Like section 705, the rule fails to reference the specific provisions for determining "grave disability" under the Children's Civil Commitment Act of 1988. CAL. WELF. & INST. CODE §§ 5585-5587 (2008).

126. Again, almost every state has a statutory process for juvenile incompetence. While some states simply apply their adult statutory scheme to juveniles, close to half have specific statutes governing juvenile proceedings. *See supra* Part III.C and note 123.

127. In the context of adult misdemeanor proceedings, it has been determined that invoking Lanterman-Petris-Short involuntary proceedings, rather than the competency process, when the person is believed to be incompetent results in an unconstitutional deprivation of equal protection. Pederson v. Superior Court, 105 Cal. App. 4th 931, 940-41 (Ct. App. 2003). Since no statutory incompetence process exists for California juveniles, there may be no such problem in subjecting them to involuntary treatment (since they still need to meet the high threshold for eligibility), but the system badly needs a policy discussion to deter-

some potentially incompetent youth, the inability to fit into prescribed pathways and the dearth of procedural guidance means that others may fall through the cracks.

Past legislative attempts to enact a juvenile incompetence statute for California have failed.[128] Although there has been considerable interest in a legislative fix, it has been difficult for stakeholders to reconcile concerns over forced treatment, fiscal responsibility, and timelines.

The resulting landscape for those dealing with incompetent and potentially incompetent youth is one of uncertainty. As one probation officer put it, "We are doing things, but we still have no idea what we are doing." And not surprisingly, counties throughout the state recognize and respond to potential and actual competence in a variety of ways.

IV. CONTEXTUAL BACKGROUND FOR JUVENILE COMPETENCE SURVEY

The Youth Law Center initially became interested in juvenile incompetence to stand trial in 2004-2005, in the course of research on "placement delay" for youth with serious mental health service needs and disabilities.[129] At that time, the research goal was to determine the extent of and reasons for delay in carrying out court dispositional orders for non-secure placement.

Several counties in the placement delay research reported holding some youth referred to as "incompetent." These youth were held for extensive periods in a sort of "limbo" in which they never reached the disposition phase or reached it only after a very long period of time. While the normal period for adjudication and disposition on a "detained" case is about six weeks, probation staff expressed concern that these youth spend many months and some more than a year in custody.[130] They attributed some of the delay to time spent while system players decided whether to begin formal competence proceedings, and some to the absence of a clear path for action once a determination of incompetence was made.

The Youth Law Center had also received calls from lawyers and advocates concerned that their clients do not fit neatly into the Lanterman-Petris-Short mental health[131] or regional center[132] eligibility criteria. Some of the calls in-

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mine what constitutes appropriate services for incompetent juveniles. This will be discussed further with respect to the survey findings on "restoration" of competence.

128. A.B. 2019 (Steinberg) was introduced in the 2004 legislative session, and when its champion, Darrell Steinberg, "termed out" of the state assembly (before successfully running for state senate), the cause was taken up in the 2005 session by State Senator Carole Migden. As S.B. 570 (Migden), the bill eventually morphed into an "opt in" mental health assessment law. CAL. WELF. & INST. CODE §§ 710-713 (2008).

129. *See* BURRELL & BUSSIERE, *supra* note 46.

130. *See, e.g.*, Henry K. Lee, *Girl Who Slashed Woman To Get Help at Locked Facility*, S.F. CHRON., June 20, 2006, at B3.

131. CAL. WELF. & INST. CODE § 5150 (2008); *see supra* note 121.

132. *See supra* note 35.

volved youth with low IQs (but still not meeting regional center eligibility) and youth with co-existing mental illness (but not sufficient impairment for Lanterman-Petris-Short involuntary treatment). In most of these cases, court proceedings were repeatedly delayed because no one could figure out what to do with the young person. The juvenile defender pursued a judicial finding of incompetence in some cases but not in others. Defenders and advocates, like the probation officers in this survey, told us they felt overwhelmed and frustrated in trying to help these young people.

Another set of issues was emerging in the adult system. While California juvenile practitioners struggled with the absence of a coherent system for addressing incompetence, the adult system struggled with the one it has. There were reports of significant delays in evaluating and treating incompetent adults along with inadequate numbers of hospital beds—often resulting in the "warehousing" of severely disturbed inmates in county jails.[133] In an effort to reduce the delay, adult inmates, including those with mental retardation, often went through "training" on legal terminology and legal concepts in order to be "restored" to competence in order to be able to resolve their case. Otherwise, many faced serving more time as incompetent than if they had been tried and convicted of the alleged criminal offense. The adult system for dealing with incompetence did not appear to be one that juvenile practitioners would wish to emulate.

The juvenile competency survey was also prompted by discussions at the national policy level. A number of studies had considered the criminalization of behavior by youth with mental health issues.[134] Several had specifically focused on juvenile competence and its impact on various aspects of juvenile de-

133. A number of states, including Florida, Colorado, and Washington, have faced lawsuits on behalf of inmates languishing in jail while they wait for hospital beds. Henry Steadman, National Gains Center Teleconference: Some Quick Fixes for Backlogged Incompetency To Stand Trial Systems (June 7, 2007) (audio recording available at http://www.gainscenter.samhsa.gov/html/resources/presentations.asp). In California, delays in moving incompetent adult inmates to hospitals led to the introduction of legislation, which would require incompetent adult inmates to be delivered to state hospitals within fourteen days of the court order. A.B. 1121, 2007-08 Reg. Sess. (Cal. 2007). In a Committee analysis of the bill, the author of the legislation stated that this was necessary because many inmates adjudged incompetent to stand trial languish in county jails without treatment while they await beds in mental hospitals. Opponents and supporters of the bill acknowledged that it addresses a real problem and that inmates often deteriorate during periods of delay, but the bill did not move forward, apparently because of costs associated with the proposed changes. ASSEMBLY COMM. ON APPROPRIATIONS, BILL ANALYSIS OF A.B. 1121 (LIEBER)—AS AMENDED, at 2-3 (2007), *available at* http://www.leginfo.ca.gov/pub/07-08/bill/asm/ab_1101-1150/ab_1121_cfa_20070515_162507_asm_comm.html.

134. *See*, *e.g.*, SPEC. INVESTIGATIONS DIV., U.S. H.R. COMM. ON GOV'T REFORM—MINORITY STAFF, 105TH CONG., INCARCERATION OF YOUTH WHO ARE WAITING FOR COMMUNITY MENTAL HEALTH SERVICES IN CALIFORNIA 4-5 (2005), *available at* http://www.democrats.reform.house.gov/Documents/20050124112914-80845.pdf; *see also supra* notes 45-46.

linquency cases.[135] That work confirmed what practitioners had been telling us—that juvenile competence may be a function of multiple factors, including mental illness, brain damage, cultural/language barriers, developmental disabilities, and in some cases, immaturity. This, too, suggested the need to look more closely at differences between juveniles and adults (and the systems that serve them) that might require an approach specifically adapted to the needs of juveniles.

All of these factors led us to believe that juvenile incompetence was an issue worth exploring. As a first step, we wanted more information about the extent of incompetence in delinquency cases and its impact on juvenile systems. We soon learned, however, that incompetence is not tracked by the juvenile court system, defender offices, or prosecutors. Nor is it tracked by state agencies serving youth with mental illness or disabilities. We sent a series of Public Records Act request letters in 2006 to the State Department of Developmental Services (DDS) and nineteen regional centers. Neither the State DDS nor the regional centers were able to provide reliable data on the number of juvenile clients who are involved with the juvenile justice system.

The Youth Law Center also sent Public Records Act requests to a sample of ten county probation departments specifically on the issue of developmental disabilities. The responses indicated that probation departments do not routinely track developmental disabilities or other indicators of possible incompetence in the youth who come under their jurisdiction. Nonetheless, the inquiry prompted the county probation chief in San Diego County to direct his research staff to review a statistically significant number of case files for notes indicating a developmental disability.[136] The resulting survey determined that 17.5%

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135. *See*, *e.g.*, MARTY BEYER, THOMAS GRISSO & MALCOLM YOUNG, AM. BAR ASS'N JUVENILE JUSTICE CTR., MORE THAN MEETS THE EYE: RETHINKING ASSESSMENT, COMPETENCY AND SENTENCING FOR A HARSHER ERA OF JUVENILE JUSTICE (Patricia Puritz, Alycia Capozello & Wendy Chang eds., 2002); THOMAS GRISSO, EVALUATIONS FOR JUVENILES' COMPETENCE TO STAND TRIAL: A GUIDE FOR LEGAL PROFESSIONALS (2005); *Symposium of Juvenile Competency and Culpability*, 8 T.M. COOLEY J. PRAC. & CLINICAL L. 1, 1-39 (2006); Marty Beyer, *Immaturity, Culpability & Competency in Juveniles: A Study of 17 Cases*, 15 A.B.A. CRIM. JUST. MAG. 26 (2000); Laurence Steinberg, *Juvenile Competence To Stand Trial* (Joint Ctr. Policy Research, Policy Brief No. 5.1, 2003); Laurence Steinberg, *Juveniles on Trial: MacArthur Foundation Study Calls Competency into Question*, 18 CRIM. JUST. MAG. 20 (2003), *available at* http://www.abanet.org/crimjust/juvjus/cjmag/18-3ls.html; MacArthur Foundation Research Network on Adolescent Development, http://www.adjj.org/content/index.php (last visited Apr. 10, 2008).

136. Letter from Vincent J. Iaria, Chief Probation Officer, San Diego County, to Corene Kendrick, Staff Attorney, Youth Law Center (June 26, 2006) (on file with authors). Dr. Natalie Pearl, Director of Research for the San Diego Probation Department, developed a data collection instrument and trained probation staff on how to use the instrument. At the time of the survey in 2006, there were approximately four thousand youth in San Diego County with a designation under section 602 of the California Welfare and Institutions Code, and it was determined that, in order to have ninety percent confidence in the finding, approximately 550 files would need to be reviewed. Fully 558 surveys were completed. Dr. Pearl and San Diego probation staff also collected information from a random sampling of

of the wards under probation supervision in that county had been diagnosed with developmental disabilities.[137]

The San Diego data was helpful in understanding the prevalence of potential incompetence, but there was little hope of having that level of research replicated on a statewide basis because it would require staff-intensive efforts. Nonetheless, probation emerged as the most promising locus of information, and we decided to embark upon a series of open-ended telephone interviews with probation staff in other counties. This appeared to be the best way to obtain information on the prevalence of problems with juvenile incompetence.

V. SURVEY METHODOLOGY

The survey interviews took place from October 2006 to June 2007 by telephone and e-mail. Chief Probation Officers in each California county were asked to designate the person(s) most knowledgeable about "incompetent" youth, and interviews with those people were conducted. Although the goal had been to ask each person the same series of questions, the enormous variation in experience with and understanding of the issues did not permit comparable or quantifiable answers on many of the questions. In fact, the difficulty in obtaining reliable information based on common terminology quickly emerged as an issue needing further attention.

Interviews were conducted by Brian Blalock, then a third-year student at Stanford Law School, interning with the Youth Law Center. The interviews included thirty-four county probation departments, with a cross-section of urban, suburban, and rural counties across the State.[138] In at least ten counties, two to four staff members were interviewed. Since all but two of the largest counties in the state participated, the interviews covered departments serving roughly seventy-six percent of the state's juvenile justice population.[139]

After the survey was completed, Youth Law Center attorneys met with

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youth who were incarcerated in the county juvenile detention facility in May and June 2006.

137. *Id*. The definition used by San Diego County Probation for "developmental disabilities" included conditions such as severely emotional disturbed and learning disabilities diagnosed on Axis I and Axis III of the Diagnostic and Statistical Manual of Mental Disorders, 4th Ed. While not all of these conditions would result in incompetence, regional center eligibility or involuntary Lanterman-Petris-Short services, the numbers helped to define the class of youth who are potentially incompetent.

138. Interviews were conducted with Alameda, Contra Costa, El Dorado, Fresno, Humboldt, Inyo, Kern, Los Angeles, Madera, Marin, Mariposa, Merced, Monterey, Napa, Orange, Placer, Riverside, Sacramento, San Diego, San Francisco, San Luis Obispo, San Mateo, Santa Barbara, Santa Cruz, Shasta, Sierra, Siskiyou, Solano, Sonoma, Sutter, Tehama, Tuolomne, Ventura, and Yuba counties.

139. This figure is based on juvenile arrests in 2003. CTR. FOR FAMILIES, CHILDREN, AND THE COURTS, CAL. JUDICIAL COUNCIL, CALIFORNIA JUVENILE STATISTICAL ABSTRACT: TABLE 1.8—JUVENILE ARRESTS BY CHARGE, SEVERITY AND COUNTY 2003 (2005), *available at* http://www.courtinfo.ca.gov/programs/cfcc/resources/publications/CAJSAbstract2005.htm#one.

probation chiefs, regional center staff, and clients' rights advocates from Protection & Advocacy, Inc., at the quarterly regional meetings of the Chief Probation Officers of California. We also met with juvenile defenders, regional center staff, and advocates for persons with mental illness and developmental disabilities. We received input, too, from juvenile court judges and a broad range of juvenile system professionals through a workshop on youth with developmental disabilities at a statewide conference for the Judicial Council Center for Families, Children, and the Courts in December 2006. To the extent possible, we have incorporated the comments of this broader group of system professionals into this Article.

VI. JUVENILE INCOMPETENCE SURVEY FINDINGS

Responses to survey questions were diverse, making it clear that no uniform practice exists. At the same time, common themes emerged. There was consensus among probation staff that counties need substantially more guidance on the legal standards for incompetence, the determination of incompetence, and what to do upon a finding of incompetence. There was broad recognition that the causes of juvenile incompetence are broader than in the adult system and that systemic responses need to be tailored accordingly. There was agreement that the continuum of services for incompetent and high-needs youth must include additional resources for youth who need a secure or highly structured therapeutic setting. There was consensus, too, that the lower end of the continuum needs to be expanded to provide diversion from the juvenile justice system, linkage to other systems, and additional community-based services, including support for families. There was recognition that these issues need to be more closely tracked on an ongoing basis.

A. *Numbers of Incompetent Youth*

Precise numbers of youth who had been judicially determined to be incompetent were difficult to obtain, in part, because they are not routinely counted. In addition, the estimates given may sometimes have reflected misperceptions about what was being asked. Despite our best efforts, it was not always clear that responses distinguished between youth who are functionally incompetent and those judicially determined to be incompetent.[140] Also, the numbers of youth judicially determined to be incompetent surely understates the issue in some counties where potentially incompetent youth are actively and purposefully diverted out of juvenile court. Nonetheless, the interviews allowed us to gain a much better understanding of the prevalence of incompetence issues than

140. The term "functionally incompetent" is used to describe youth whom the person being interviewed considered to meet the legal definition of incompetence even though no judicial determination of incompetence occurred.

has been possible in the past.

Approximately half of the thirty-four counties reported having had a youth found incompetent through a judicial process during the past year or had youth currently being evaluated for competence. Thirteen counties reported having no instances of formal evaluations or judicial findings in the past year. The remaining counties reported having had youth found incompetent in some more nebulous period. Officials of eight counties could not remember ever having a youth found incompetent.

At the same time, probation staff in a substantial number of counties suggested that the numbers of incompetent youth are higher, but some severely incapacitated youth never make it to a judicial determination of incompetence. Nine of the counties that reported no incompetent youth or very low numbers made a point of saying that they actively seek to keep potentially incompetent youth out of the juvenile justice system. One county reported operating under the motto "divert, divert, divert" to other systems.

These front-end efforts occur both before and after a juvenile court petition is filed, depending on when information about potential incompetence comes to light. A number of counties work with their district attorneys to avoid filing such cases or to obtain quick dismissals except in cases involving serious violence. Other counties use their interdisciplinary teams to reach consensus on which youth should be handled in other systems.[141] The counties that engage in this active gate-keeping typically also work to ensure that these youth are provided with social services, often in concert with county mental health and the local regional center. Several counties also mentioned efforts to keep potentially incompetent youth out of juvenile justice by engaging the school system, particularly through Assembly Bill 3632.[142]

A second reason some potentially incompetent youth do not get to a judicial determination of competence is that the issue is not raised. Sometimes this happens because practitioners think it may be best to just walk the youth through the process when the immediate consequences appear benign. One probation staff observed, "[W]e do have very troubled high-needs kids whose

141. Counties have interagency teams to determine placement in high-level group homes, but many counties use them for broader purposes. CAL. WELF. & INST. CODE §§ 4096, 11462.01 (2008); CAL. HEALTH & SAFETY CODE § 1502.4 (2008).

142. A.B. 3632, codified as sections 7570 through 7588 of the California Government Code, was enacted in 1984 to address the special education needs of youth requiring certain kinds of "related services" to benefit from their education by having the services provided by agencies other than the education agency. A.B. 2726 amended the earlier enactment in 1996 to more fully define the referral of children with disabilities to county mental health departments and to define responsibilities. These provisions provide a way to access mental health services, so long as the services are needed for the youth to benefit from their education. They may also be used for youth who meet the definition of "seriously emotionally disturbed" and whose service needs are substantial enough to require residential placement. CAL. GOV'T CODE § 7572.5 (2008); CAL. CODE REGS. tit. 2, §§ 60000-60610 (2008) (providing regulations for this program).

participation [in the adjudication process] is inauthentic." Probation staff also believe the issue is not raised because the dearth of clear statutory guidance means that the process for establishing incompetence is not well-established. Further, there is little clarity over the respective roles the courts, public defenders, district attorneys, and probation officers are expected to play in the process, and this, too, leads to underutilization of competence proceedings. A couple of probation staff members told us that because of recent attention to the issue of juvenile incompetence, public defenders, and in one instance, a new district attorney, are beginning to raise these issues.

Responses from a few of the counties that claimed never to have incompetent youth suggest a more serious misunderstanding of the law. These counties were much more interested in talking about placement possibilities, glossing over the legal issues involved in adjudicating and placing potentially incompetent youth. This was especially true with developmentally disabled youth, with one probation officer saying, "[T]his is not a competency issue; this is a placement issue. If we had more placement options, we could serve these youth and they would not sit in the hall." Incompetence, in these counties, is simply not on the radar screen.

A few counties had much higher rates of incompetence proceedings and youth judicially found incompetent. Sacramento County had sixty-four evaluations ordered in the last year to determine competency, and of those, approximately ten juveniles were found incompetent. Kern County also had high rates of incompetence findings, with twenty-five to thirty youth found incompetent in the previous year. In Los Angeles County, with the highest caseload in the state, probation staff estimated that approximately fifty juveniles were found incompetent in the previous year. Probation staff also believed that an additional ten out of seventy youth in the juvenile mental health court may have been incompetent, based on anecdotal accounts from court staff. Some of these were adjudged incompetent and others had their cases diverted into other systems because of potential incompetence. Thus, in Los Angeles, as in other counties, the number of incompetent youth (i.e., youth who would meet the constitutional standard) is actually higher than the number of judicial findings. Several other counties have seen an increase in the issue being raised in the past few years, linking it with increased drug use, especially methamphetamine abuse and "huffing" solvents, both of which can result in brain damage and impaired cognitive ability. One county blamed the upswing on increased utilization of the proceeding by public defenders as a tactic in serious cases to avoid having a client tried as an adult or sent to state-level facilities.

While these numbers lack scientific rigor, they suggest that the number of truly incompetent youth in the system is fairly small. Extrapolating from the survey responses, judicial determinations of incompetence would number fewer than two hundred per year statewide.[143] Again, that number needs to be ad-

143. This estimate is corroborated by an informal survey of public defenders, con-

justed upward to reflect the cases in which the issue is not raised but could or should have been. Also, if we include the youth who meet the legal definition of incompetence but are handled without a judicial determination, through dismissal or diversion, the number would go up again. But even doubling or tripling the reported numbers would leave us with a tiny number of youth relative to the juvenile justice population as a whole.[144] Practically speaking, this means that legislative or policy change may be accomplished without undue strain on county workload and budgetary resources, and could ultimately result in redirecting county resources spent on locking up these youth for long periods of time. This is a high-needs population that (when incarcerated) consumes an enormous amount of the juvenile system's resources and time, but at least it is small. One juvenile hall director said, "These kids are less than five percent of our population in the hall, but they take up ninety percent of our staff's time."

B. *Basis for Incompetence or Potential Incompetence*

Probation staff described a variety of underlying causes for incompetence or potential incompetence that went far beyond the "mental disorder or developmental disability" standards used in adult incompetence proceedings under Penal Code section 1367. Staff often attributed the cause to a combination of developmental disabilities and mental illness. Many spoke of brain damage due to drug use, sometimes in combination with mental illness. Other factors specifically mentioned in the context of competence included cultural/language barriers, early brain trauma, cognitive delays, low IQ, alcoholism, severe emotional disturbance, post traumatic stress, and neurological brain damage.[145]

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ducted by the Office of the Los Angeles County Public Defender. Maureen Pacheco, Juvenile Incompetency Survey (Apr. 11, 2007) (unpublished survey, on file with authors). Responses from twenty-eight counties suggested that fewer than one hundred youth per year are judicially found incompetent. If this rate of incompetence were spread across the state, the numbers would be similar to those reported by probation staff.

144. As a point of reference, when Maryland recently considered the potential impact of enacting a juvenile competency statute, a "Fiscal and Policy Note" by legislative analysts considered data from the Office of the Public Defender, which represents ninety percent of the juveniles in Maryland. That data found that competence was raised only fifty-three times in 2003 and 2004 (there were 14,663 petitions prosecuted in 2004). Based on this experience, the Office estimated that competence would be raised in less than one percent of its cases (0.23%). H.B. 1007, 2005 Md. Gen. Assem., 422nd Sess. (Md. 2005). The Department of Health and Mental Hygiene estimated that two percent of the juvenile cases prosecuted in the state would be referred for evaluation of competence, based on the idea that if juvenile incompetence became an option for defense attorneys it would be raised more often. The legislative analysts rejected that projection and adopted the one percent estimate (147 evaluations based on 2004 prosecutions) for its estimated costs. *Id*. at 5. Similar analysis appeared in a companion bill on competence, along with data from Virginia suggesting that competence is raised in only one percent of its cases. H.B. 802, 2005 Md. Gen. Assem., 422nd Sess. (Md. 2005).

145. The causes of incompetence offered by California probation staff were remarkably similar to those recognized by clinicians researching juvenile competence. In delving further

Several counties recognized the interplay between these factors and immaturity in producing incompetence.[146]

Staff reported that they often encounter incompetent youth who are both cognitively low functioning and suffering from mental illness, but where neither impairment, standing alone, is sufficient to meet the mental health system or regional center eligibility criteria. This means that probation is left with substantially impaired youth but, under current law, no clear path for serving them.

C. *Challenges Experienced by Counties with Respect to Juvenile Competence*

Every county that reported handling incompetent youth voiced frustration with delay and custodial issues. One county expressed concern that youth undergoing incompetence proceedings usually stay in juvenile hall for six months, and sometimes as much as a year.[147] This was sometimes a function of the system not knowing how to proceed in the case, and other times because no one could figure out what to do after a finding of incompetence. It happened particularly with youth about whom there was a public safety concern.

Counties reported a variety of problems arising from the presence of high-needs youth in detention—youth injuring themselves or others and the concomitant use of isolation, chemical agents, and restraints to deal with such behavior. They spoke of many youth who have complicated and unfortunate his-

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into the basic categories of psychopathology, mental retardation, and/or immaturity, researchers have identified the following conditions as potential causes of incompetence: psychotic disorders, Attention-Deficit/Hyperactivity Disorder, depression, anxiety disorder, a history of trauma, mental retardation, cognitive impairments (e.g., low IQ, learning disabilities, and/or neuropsychological deficits in verbal abilities, abstract reasoning, memory, attention, and executive abilities), and developmental immaturity. Jodi L. Viljoen & Thomas Grisso, *Prospects for Remediating Juveniles' Adjudicative Competence*, 13 PSYCHOL. PUB. POL'Y & L. 87, 90-92 (2007), *available at* http://psycnet.apa.org/index.cfm?fa=main.showContent&id=2007-11178-001&view=fulltext&format=pdf.

146. Developmental immaturity as a cause for incompetence in younger children also surfaced in *Timothy J. v. Superior Court*, 150 Cal. App. 4th 847 (Ct. App. 2007). *See supra* Part III.D. Researchers have found that thirty percent of children eleven to thirteen years of age, nineteen percent of children fourteen to fifteen years of age, and twelve percent of children sixteen to seventeen years of age are significantly impaired in reasoning or understanding of the adjudicative process. MACARTHUR FOUND. RESEARCH NETWORK ON ADOLESCENT DEV. AND JUVENILE JUSTICE, ADOLESCENT LEGAL COMPETENCE IN COURT 2 (2006), *available at* http://www.adjj.org/downloads/9805issue_brief_1.pdf; Elizabeth S. Scott & Thomas Grisso, *Developmental Incompetence, Due Process, and Juvenile Justice Policy* 33 (Univ. of Va. Law Sch. Pub. Law & Legal Theory, Working Paper No. 11, 2004), *available at* http://law.bepress.com/cgi/viewcontent.cgi?article=1017&context=uvalwps. .

147. Section 737(b) of the California Welfare and Institutions Code requires that the court review cases every fifteen days to inquire as to "the action taken by the probation department to carry out its order, the reasons for the delay, and the effect of the delay on the minor"; however, there is no specific provision for review of delay in cases that have not been adjudicated, and probation staff spoke of cases in which the youth remained in juvenile hall for a protracted period with little apparent scrutiny into the reasons for the delay or its impact on the young person.

tories—not just developmental disabilities or mental illness, but also substance abuse, post-traumatic stress, and backgrounds of abuse. Probation staff noted that juvenile halls are ill-equipped to deal with the needs of these youth, and that the youth are often in danger of being taken advantage of, harmed, or pushed into further criminal involvement while being confined.

One county remarked about the impact of such youth on general operations: "They drain every ounce of our resources." Counties also spoke of youth who "decompensate" as they languish in juvenile hall, "becoming sicker and sicker." Without exception, probation staff expressed the view that juvenile hall is not the right place for these youth.[148]

The survey interviews yielded rich findings from the perspective of probation staff on difficulties as well as successes in working with incompetent, potentially incompetent, and high-needs youth. The following Subparts summarizes those findings.

1. Lack of Training on Competence Issues

Many probation staff reported not having a clear understanding of legal standards for assessing juvenile competence or what to do if incompetence is suspected. This was demonstrated in the cases discussed in some of the interviews. In one county, for example, a youth with an IQ of forty-eight was not considered to be potentially incompetent.[149]

Probation staff believe that the judges, district attorneys, public defenders, and service providers are also in need of training. Probation staff from two

148. These sentiments on the "costs" to the juvenile justice system of handling youth with serious mental health needs are confirmed in a forthcoming study by academic researchers. The study finds increased costs for evaluation and screening, transportation, staffing, staff training, discharge planning, and "emotional energy" to deal with these youth. Edward Cohen & Jane Pfeiffer, The Costs of Incarcerating Youth with Mental Illness: Findings and Recommendations from County Surveys and Site Visits (2008) (unpublished manuscript, on file with Chief Probation Officers of California).

149. While a low IQ or the presence of mental retardation alone is not definitive with respect to competence, they suggest the need to look further. The Department of Developmental Services defines "mental retardation" as "characterized by significantly subaverage general intellectual functioning (i.e., an IQ of approximately seventy or below) with concurrent deficits or impairments in adaptive functioning." California Department of Developmental Services, Information About Developmental Disabilities, http://www.dds.cahwnet.gov/general/info_about_dd.cfm (last visited Apr. 10, 2008). Levels of retardation are reported as mild, moderate, severe, profound, or as not present/unknown. California Department of Developmental Services, Quarterly Client Characteristics Report: Glossary of Terms, http://www.dds.ca.gov/FactsStats/docs/qtrlyglossary.pdf (last visited Apr. 10, 2008). The Association of Regional Center Agencies (ARCA) Developmental Disability Fact Sheet defines "mental retardation" as "characterized by less than average intellectual functioning and significant limitations in at least two of the following areas: communication, self-care, home living, social skills, use of community resources, self-direction, academic skills, work, leisure, health and safety." ARCA Developmental Disability Fact Sheet, http://www.arcanet.org/DD%20Fact%20Sheet.pdf (last visited Apr. 10, 2008).

counties reported that their competence determinations consist of the judge's asking a youth whether he or she knows the difference between "right or wrong." Another probation staff said that competence is determined on the basis of Penal Code section 26—which addresses capacity to commit a crime—and competence to stand trial.[150]

In addition, a number of counties expressed the need for training on assessment of youth coming in to the system. Thus, one county said it needed a better way to identify youth with developmental disabilities or mental health needs who have not already been identified through special education (Individualized Education Programs) or regional center participation.

2. Lack of Guidance on Procedural Issues

Of the counties participating in the survey, only a few have written protocols for handling juvenile incompetence. This means that most counties have little specific guidance on timelines and the process for raising the issue of incompetence, getting expert evaluations of competence, holding a hearing on competence, or the process to be followed after the issue is determined.

Many probation staff spoke of the lack of a process for reviewing these cases after a finding of incompetence. The adult statutory scheme has timelines and reviews to assure that competence is reviewed on an ongoing basis. If an adult has attained competence, the court process is resumed, and if the person is not competent within statutory timelines, the case is dismissed. Survey respondents reported that the absence of timelines for juvenile cases often means that youth awaiting competence evaluations, as well as youth found incompetent, simply remain detained in juvenile hall. This situation persists until either the probation officer or the youth's attorney becomes so uncomfortable that the case goes back to court for action. Juvenile hall is the default "placement," and many youth spend much longer in detention than if the case had gone through the normal adjudication process.

Not surprisingly, a number of respondents seemed confused about what they may or may not do in relation to a finding of incompetence. One county reported providing probation services to a girl who had been found incompetent and had never been adjudicated. Other counties recognized that cases must be dismissed where youth are unlikely to become competent, but expressed con-

150. As in other parts of the survey, the imprecision of language sometimes made it difficult to understand what was being reported. It may be that these probation staff members were confusing the constitutional standard for competence to stand trial, which prevents the case from going forward, *see supra* Part III.C, with the issue of capacity to commit a crime under section 26 of the California Penal Code, which is an issue to be proved as part of the adjudication or admission, or even with "competence" to serve as a witness under sections 700 and 701 of the California Evidence Code. Alternatively, courts may be using knowledge of "right or wrong" or section 26 of the California Penal Code as the test for competence, which would represent a serious misapprehension of the legal standard.

cern about youth falling through the cracks.

People in several counties felt constrained in trying to fit incompetent youth into the restrictive adult categories for mental disorders or developmental disabilities. If restrictive eligibility criteria are not met the youth may not qualify to get into either of those systems even though declared incompetent by the court. Again, *Timothy J.* may help with the recognition of broader causes for incompetence,[151] but the need for appropriate interventions for incompetent youth remains.

3. Data Is Not Routinely Collected

Probation staff in a number of counties said they needed better data to understand who the youth are in their system and what happens to them in particular placements and programs. A few probation staff admitted reluctance to participate in the survey because they knew their county does not track these issues. Many were embarrassed at the difficulty their county had in answering basic questions about incompetent youth, and suggested the need to keep better track of this population in order to develop services for them.

4. Interagency Relationships Are Sometimes Difficult

In working with potentially incompetent youth, probation officers come into contact with professionals in regional centers, education agencies, and mental health departments. This contact occurs in the context of obtaining information about past eligibility and services, assessing mental disorders or developmental disabilities, developing treatment plans, and providing services. However, it is difficult to write a statewide description of the responses on interagency issues with respect to potentially incompetent youth. Some counties have excellent relationships with other agencies in working with this population, and some do not. Nonetheless, one Chief Probation Officer expressed a view held by many in probation: "They are like hot potatoes—no one wants them."

a. Regional Centers

Almost every county spoke of delay in connection with regional center involvement. Statutory timelines for regional center evaluation and case planning are much longer than juvenile court timelines, so when collaboration is not present from the outset, the case is much less likely to be resolved with needed input from the regional center.[152]

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

152. While the statutory timelines for detained juvenile court cases envision completion of the process in roughly six weeks, *see supra* Part I.A. and note 19, the regional center time-

The degree of cooperation and collaboration with regional centers varies wildly from county to county. Some regional centers work with probation from the very beginning, helping with assessment and placement of eligible youth. Probation staff in other counties described great difficulty in securing regional center involvement while juvenile court jurisdiction is in effect. The juncture at which regional centers recognize their responsibility to serve youth in juvenile justice varied from county to county. There were also logistical complaints. The regional center in one county refuses to assess youth at juvenile hall, which results in potentially incompetent youth being transported in shackles and guarded in regional center office waiting rooms.

Several probation staff reported joining forces with defenders to pursue formal joinder motions[153] to engage their regional centers in delinquency cases. But surprisingly, few probation staff spoke of seeking outside legal assistance to avert these kinds of situations. One respondent observed that this may be because probation professionals are not typically aware of the advocacy services available through agencies such as Protection & Advocacy, Inc.[154]

In almost every county, the narrow regional center eligibility requirements were reported as a barrier to getting services for youth with developmental disabilities.[155] There were perceptions that some regional centers purposely find youth ineligible. Probation staff from one county reported a telephone assessment in which a youth previously diagnosed with an IQ of fifty-five was suddenly found to have an IQ of seventy-eight. Staff from another county said that the local regional center will not give IQ tests to youth after the age of fourteen, so if youth are older, they cannot qualify for services.[156] Other counties agreed that their regional centers prefer to work with younger children.

Regional center staff had their own set of grievances. At joint probation and regional center meetings conducted by the Youth Law Center in 2007, many regional center representatives expressed frustration that some probation

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lines are much longer. Section 4642 of the California Welfare and Institution Code requires a regional center to conduct an intake and make a decision about whether to provide an assessment within fifteen working days following the request for assistance. CAL. WELF. & INST. CODE § 4642 (2008). Effective July 1, 2008, section 4643 requires assessments to be performed within sixty days of intake with a thirty day extension for unusual circumstances. A regional center planning team then creates an Individual Program Plan (IPP) within sixty days of the assessment for any individual found to be eligible for regional center services. CAL. WELF. & INST. CODE § 4646 (2008). In other words, the "normal" regional center process is set up to take four times as long as the juvenile court process for detained cases.

153. CAL. WELF. & INST. CODE § 727(a) (2008).

154. Protection & Advocacy, Inc. provides services to people with a broad range of mental health and developmental disabilities. They are experts in working with people who are regional center or mental health system consumers, and they know a great deal about accessing funding through the SSI, Medi-Cal, and special education systems. *See infra* Part VII.H and notes 180-181.

155. *See supra* note 35 regarding eligibility for regional center services.

156. In fact, section 415(a) of the California Welfare and Institutions Code provides that the developmental disability must originate before the age of eighteen.

staff lack basic knowledge about regional center eligibility and have unrealistic expectations about qualifying some youth. There was some evidence of this in the survey. Several probation responses suggested a belief that the regional center is a treatment center where youth are placed. In fact, regional centers are brokers for a whole continuum of services (which may include placement in a developmental center, but with a focus on community-based services).[157]

Again, few probation staff or defenders seem to know that clients' rights advocates exist, and many survey responses indicated that the long wait for regional center assessment or services generally means that the child sits in juvenile hall for unnecessarily long periods of time. Alternatively, probation is forced to push ahead with case processing and placement without regional center input or involvement. In counties with well-developed regional center relationships the situation is quite different. In one county, for example, the agencies have an expedited assessment process that fits more closely with juvenile court timelines.

b. Mental Health Agencies

County probation staff expressed similarly divergent views on county mental health agencies. Some spoke highly of their county mental health agency's involvement. One respondent said, for example, that county mental health comes into its juvenile halls, works with families, and assists with placements. In one county, the mental health agency actually runs a high-level group home with a "no fail" policy. Several probation staff spoke of the Children's System of Care[158] infrastructure as providing a good way to bring county agencies together to identify resources for high-needs cases and to develop individual case plans.

Others were less fortunate in their relationships with county mental health. Some described turf wars in which the mental health agency fends off youth from juvenile justice. One probation staff reported that in an apparent effort to evade fiscal responsibility, all possible agencies had their legal counsel researching who was responsible for a particular youth, while the youth was shuttled back and forth between juvenile hall and a crisis mental health facility. Several probation staff said that youth stay locked up in juvenile halls "while the agencies fight."

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157. CAL. WELF. & INST. CODE § 4512(b) (2008).

158. The Children's System of Care was created through the Children's Mental Health Services Act in 1992. *Id.* §§ 5850-5873.3. It is designed for the delivery of services to seriously emotionally disturbed and behaviorally disturbed children and their families through a comprehensive interagency system of care. In July 2004, Governor Schwarzenegger drastically cut funding for the program for the 2004-2005 fiscal year. A few months later in November 2004, the voters approved Proposition 63 (the Mental Health Services Act) that requires previous funding levels to be restored. *See id.* § 5891 (requiring previous funding levels to be restored); *see also id.* §§ 5840-5848, 5878.1-5883, 5850-5865 (containing provisions that affect children). These funding increases have not yet occurred.

A number of respondents said that their mental health agency is particularly reluctant to become involved in juvenile justice cases when the youth is perceived to be dangerous or acting out. Moreover, several reported that, even when the mental health agency takes in youth, it often keeps them for only three days (most likely corresponding to the initial seventy-two-hour hold period for involuntary services under the Lanterman-Petris-Short mental health law). Also, at least one county offered the troubling observation that its mental health agency does not like to refer youth to mental hospitals because they think these youth are safer in juvenile hall.

c. Educational Agencies

Probation department relationships with school districts also vary county by county and school district by school district. Problems reported included difficulties in getting local school districts to do Individualized Education Programs (IEPs) or A.B. 3632 services,[159] and resulting delays. Additional issues come up for the counties when youth are so high-needs as to require out-of-home placement. Placing youth through the educational agency results in additional supervision and fiscal responsibilities, so there are sometimes turf battles. One county reported that its system has an ongoing court order governing work with this population, but "the road is still bumpy." Nonetheless, some school districts work collaboratively with probation offices in placing youth out of state when no in-state placement is available.

5. Better Treatment Options Are Needed for Incompetent Youth

Probation staff expressed frustration in trying to identify services for youth who are undergoing competence proceedings or are judicially determined to be incompetent. Because many courts look to the adult statutory process for guidance, it means that efforts are directed at qualifying youth with developmental disabilities for the regional center process[160] and youth with mental illness for the Lanterman-Petris-Short involuntary treatment process. The problem with this is that, if the restrictive eligibility criteria are not met, youth may not qualify for services in those systems even though they have been declared incompetent by the court. This often occurs when a youth is incompetent based on a combination of factors, such as low intellectual functioning plus mental illness.

Respondents also related their experience that, even when threshold eligibility criteria are met, mental hospitals do not want to keep youth who are

159. Again, A.B. 3632 refers to services for emotionally disturbed youth. *See supra* note 142.

160. None of the responses suggested a desire to have youth with developmental disabilities placed in state hospitals as provided in section 6551 of the California Welfare and Institutions Code and rule 5.645 of the California Rules of Court. *See supra* notes 119, 123.

older,[161] refuse to take their medications, or are being held for a violent crime. They noted, too, that the number of secure mental health beds is decreasing.[162] Several counties candidly admitted that, in the past, some very low functioning youth have reluctantly been sent to the Division of Juvenile Justice.[163]

With respect to short term hospital beds, probation staff reported some emergency utilization of hospitals for youth with high mental health needs, some of whom are potentially incompetent. However, the reports fairly consistently noted that these placements are not particularly useful since the youth are typically turned back before the initial seventy-two-hour hold period is up.

And, although most of the comments on programs for incompetent youth focused on the need for residential or institutional care, some counties spoke of the need for more community-based services. There was a consensus that these youth "do not belong" in juvenile hall, and many counties expressed frustration at not having appropriate alternatives quickly available. Probation staff agreed that, to the maximum extent possible, incompetent and potentially incompetent youth should be at home with services during and after the court processing of their case when the youth does not meet the criteria for involuntary treatment. The following Subparts present additional specific areas of discussion on services for incompetent youth.

a. The right residential services are in scarce supply

The dearth of services and beds for incompetent and potentially incompetent youth is a universal problem for the counties. Many probation staff stressed

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161. Probation staff in one county stated frankly that the probation system was circumventing this situation and simply waiting for an incompetent youth to turn eighteen because a broader range of placements would be available to serve him at that point. Until then, the youth is detained at juvenile hall.

162. As this article was being finalized, Metropolitan State Hospital—one of the only mental hospitals with beds for juveniles—announced that it will likely be closing its children's program. Scott Gold & Lee Romney, *Children's Mental Ward May Be Closed*, L.A. TIMES, Aug. 2, 2007, at B1. Aside from the general preference for community-based, less institutional services for children, the program at Metropolitan State Hospital has been plagued by reports of serious deficiencies and was the subject of a scathing United States Department of Justice investigation in 2003. Letter from Alexander Acosta, Assistant Attorney General, to Arnold Schwarzenegger, Governor of California (Feb. 19, 2004), *available at* http://www.usdoj.gov/crt/split/documents/metro_hosp_findlet.pdf.

163. Youth winding up at the Division of Juvenile Justice (DJJ), by definition, did not undergo formal incompetence proceedings, since a finding of incompetence means that there would have been no declaration of wardship. We suspect that some potentially incompetent youth are not identified and that, as in the cases described to us, these youth penetrate further into the system. However, the probation staff we interviewed did not view DJJ as an appropriate setting for serving this population, and DJJ agrees. With respect to youth in need of inpatient care, the *Farrell v. Hickman Mental Health Remedial Plan* states that "To the extent that such youth are discovered in DJJ, they will be returned to the committing court or referred to [Department of Mental Health] or other treatment facilities outside of DJJ for inpatient care." MENTAL HEALTH REMEDIAL PLAN, *supra* note 48, at 35; *see supra* Part II.

that programs should be located nearby so that the family may be involved in case planning, family-based programs, and transition services. Staff from several counties suggested the need for regional locked facilities for the occasional youth perceived to be dangerous or at risk of self harm. Even the counties that actively seek to keep incompetent youth out of the system said that they occasionally have youth who need a secure setting, at least to be able to become stabilized.

In speaking of potentially useful residential services, a number of counties spoke of the need for better "community treatment facilities."[164] These are licensed facilities, and in order to be admitted, youth must be screened as needing this level of confinement by an interagency placement team.[165] Community treatment facilities were designed with the goal of providing short-term containment needed to help young people benefit from mental health treatment in the community.[166] Probation staff believe these facilities fill a much needed niche, but reported bad experiences with some of the ones in operation. Staff at one facility were considered to be inadequately trained and unable to deal with youth who have behavioral issues, despite the fact that these facilities were created specifically to serve emotionally disturbed youth. Other counties did not like the fact that commitment to a community treatment facility is "voluntary," or that, technically, youth may leave at any time. Another spoke of the cost—$200,000 per year per youth—as so high that it can only afford to send "one youth at a time."[167]

Probation staff also spoke of high-level group homes as possibly useful options for incompetent or potentially incompetent youth but were quick to point out current problems with existing programs.[168] By all accounts, waiting lists

164. CAL. WELF. & INST. CODE §§ 4094-4096 (2008). Youth who are not wards of the court may be admitted to community treatment facilities with parental consent, subject to the due process protections afforded children admitted to state mental hospitals. *Id.* §§ 4094(g), (h).

165. *Id.* § 4094.5(e).

166. Only a handful of community treatment facilities in Santa Clara, San Francisco, Contra Costa, and Los Angeles counties, totaling 130 beds statewide, were in operation at the time of a state survey in 2002, and some of those may have closed since that time. Despite their great promise as an alternative for some youth to long-term incarceration or treatment facilities, they have not been widely utilized. BEVERLY K. ABBOTT & PAT JORDAN, CAL. DEP'T OF MENTAL HEALTH, STUDY OF COMMUNITY TREATMENT FACILITIES 6 (2002).

167. We did not look behind this cost estimate. It is worth noting that community treatment facilities are eligible for Medi-Cal reimbursement and foster care funds, and typically, confinement time is less than if the youth were committed to the Division of Juvenile Justice or to a group home. CAL. WELF. & INST. CODE § 4094.2 (2008). So while short-term costs may be high, partial offsetting of costs is built into the statutory scheme, and the length of stay reduces long-term costs. Further, the realignment of state funds through California Senate Bill 81 provides opportunities to expand the availability of community treatment facility beds. S.B. 81, 2007 Leg., Reg. Sess. (Ca. 2007).

168. Group homes are licensed by the California Department of Social Services and assigned rate classification levels. Rate classification level 14 is the highest service level and is reserved for seriously emotionally disturbed children. CAL. WELF. & INST. CODE §§ 11462,

are long and some providers refuse to accept the highest-needs youth. There were also complaints about group homes demanding "patches," which are sums of money providers require over and above the state group home rate before accepting a placement. Probation staff used unflattering terms to describe this practice. Smaller and rural counties also reported that locating high-level group homes often means sending youth out of county and far away from their families and supportive services.

Probation staff expressed a particular need for more group homes or programs for youth with developmental disabilities. One respondent explained that placing such youth in regular group homes subjected them to ridicule and bad treatment by other youth. This person also felt that group home staff are inadequately trained to deal with situations that predictably arise. Several probation staff noted that group homes do not even want to accept "low functioning" youth.

Staff from a few smaller counties reported having no high-level placements nearby, and several expressed difficulty in expediently getting out-of-county facilities to take their youth. Some counties resort to placing the most high-need children in out-of-state facilities, though it was not clear how often this happens with incompetent youth. Even when out-of-state placement is sought, onerous requirements[169] and restrictive funding mechanisms make it difficult. A few counties have begun to work closely with school districts in using A.B. 3632 services to establish out-of-state "educational placements."[170] Probation staff reported concerns about monitoring and supervision in out-of-state placements and the fact that the opportunity for family involvement is limited.

Probation staff from two counties stated that when youth are incompetent they sometimes end up in the child welfare system.[171] This occurs primarily in situations in which the youth fails to meet Lanterman-Petris-Short or regional center eligibility criteria, and the youth does not have family members who can deal with his or her behavior and service needs. One county uses the dependency system in such cases because it prevents placements out-of-state, and enables them to keep youth close to family and community. They work closely with county mental health to provide services in specialized foster homes. Staff from other counties expressed reluctance to use the child welfare system because it imputes fault to the parents and could cause families to lose control of their children when the real issue is lack of services.

11462.01 (2008).

169. After the highly publicized death of a youth in an out-of-state facility, the legislature enacted legislation that places substantial restrictions on the use of out-of-state-facilities. *See id.* § 727.1.

170. *See supra* note 142.

171. The California child welfare system addresses the needs of children who are under court jurisdiction because of abuse, neglect, or abandonment as defined in section 300 of the California Welfare and Institutions Code. This system is often referred to as the "dependency" or "foster care" system. CAL. WELF. & INST. CODE § 300 (2008).

b. Restoration services are limited and of questionable value

While some facilities, including Metropolitan State Hospital, have adult competency training for "restoration" of competence,[172] no similar training programs exist for juveniles. This is not surprising, given that the whole California incompetence system is directed at adults. Since juveniles entering the mental health or developmental disability systems are admitted only upon meeting involuntary treatment criteria, they are provided with the same kinds of treatment other involuntary treatment clients may receive.[173]

Staff from one county reported that it is providing juvenile competency "restoration" for developmentally disabled youth. The provider uses training developed for adults at the Porterville Developmental Center. It involves twice-weekly meetings and activities such as participating in mock trials and observing court proceedings. It also uses a competency assessment instrument that focuses on terminology used in court proceedings, the roles of court officers, what the charges mean and consequences, and working on details of the particular case. At the time of the survey, that staff reported that one juvenile and one adult had undergone competency training. Both have developmental disabilities and were referred by the regional center. The person responding to the survey said that despite claims that seventy percent of people at Porterville are restored to competence, she could not imagine a person with mental retardation ever really "getting" all of this. Her initial interest in this kind of program stemmed from a desire to reduce the length of confinement and to keep people from going to places like Porterville, through diversion and community-based services. While this is the only county we interviewed with a restoration program in operation, two additional counties mentioned this as something they are exploring.

With respect to time for "regaining" competence, there were reports at both ends of the spectrum. Probation staff said that some youth are detained for long periods after a finding of incompetence, sometimes for much longer than they would have been detained through a dispositional order.[174] Others reported mi-

172. California's laws for adults speak of "restoration" of competence. *E.g.*, CAL. PENAL CODE § 1370 (2008). There are serious questions about the applicability of this concept to juveniles. Because of developmental issues, juveniles are much more likely never to have been competent in the first place, so for them the issue is one of "attaining" competence. Mental health professionals have expressed concern that there are significant challenges improving juvenile competence. *See* Viljoen & Grisso, *supra* note 145, at 107-08.

173. Whether to limit involuntary "treatment" to situations where the youth meets existing statutory criteria or to enact a scheme similar to the adult system, which adds an additional layer of involuntary treatment, is one of the issues needing attention in any discussion about future legislation. *See* discussion *infra* Part VII. In the meantime, restoration services appear to be primarily designed to reduce confinement time for incompetent adults.

174. In California's adult system, on felony charges people may be held for up to three years to restore competency, and on misdemeanor charges people may be held for up to one year. CAL. PENAL CODE §§ 1370(c)(1)(A), 1370.1(c)(1)(A) (2008). In the federal court system, by contrast, persons found incompetent to stand trial may be "treated" for only four

raculous recoveries of competence. For example, one county reported that a youth with brain damage due to drug use was restored to competence within four days. Both kinds of reports are cause for concern.

The survey responses suggest that counties need to move forward carefully, if at all, with competency restoration programs for juveniles. While the purpose for suspending proceedings (rather than dismissing) in any competence situation is to allow for attainment of competence, counties need to guard against using this process to incarcerate youth who are unlikely ever to become competent (e.g., those with mental retardation or serious mental illness).[175] They should also be wary of programs that simply "train" incompetent individuals to get them through admissions or court trials.

c. Community-Based Services

Probation staff expressed a clear preference for maintaining incompetent and high-needs youth at home or in the community whenever possible. But while staff from a majority of counties spoke of potentially incompetent youth who "do not belong" in the hall, only a few mentioned specific efforts to get potentially incompetent youth out of secure confinement if the case is not immediately dismissed. Some counties spoke about what *should* be provided (wraparound, one-on-one supports, family-based supports, respite services, individual foster care), but these services had not been fully implemented or were not available in their counties.

Community services for non-detained youth who are found incompetent are more readily available, but they are not present in adequate supply. Many counties place incompetent or potentially incompetent youth with family members through conservatorships or less formal agreements. A few also reported identifying family members who live out of state to actively seek such a placement. Probation staff in a number of counties also reported occasional difficulty in identifying family members who can handle incompetent youth. For those situations, they spoke to the need for increased capacity to place youth in single-family foster care placements where they can receive individual attention.

With respect to service gaps, a number of counties said they need better support services for families. They noted that some of the best services must be accessed through systems such as special education and developmental disabilities that are dependent on parental advocacy. This is a problem in families in

months, which may be extended for a "reasonable period" only if the court finds that there is a substantial probability that they will attain the capacity to permit the trial to proceed. 18 U.S.C. § 4241(d) (2008).

175. Again, experts have questioned the effectiveness of competency training, particularly for persons with developmental disabilities. This is an important point, since many more youths than adults are incompetent because of mental retardation and other cognitive limitations that may be difficult to remediate. *See* PETERSILIA, *supra* note 51, at 16; Viljoen & Grisso, *supra* note 145, at 90-91, 107, 108.

which parents are unable (for whatever reason) to actively push for services. Also, families with very high-needs youth need extra support no matter how good their advocacy skills are. Probation staff in these counties said more must be done to develop family support services through community organizations. They pointed out that there are few parent support groups actively partnered with probation, even though such groups are often partnered with county mental health departments.

VII. ACTION PLAN FOR JUVENILE INCOMPETENCE

While the survey responses reveal confusion and frustration for those trying to serve this population, they also provide some bright lines for future work. Despite the absence of statutory guidance, some counties have already developed practical solutions and effective paths through the system for incompetent or potentially incompetent youth.

A. *Determine Our Goals for Potentially Incompetent Youth*

The interviews with probation and other juvenile professionals suggest the need to take a hard look at our basic goals with respect to incompetent youth. What kinds of services are appropriate for youth judicially found to be incompetent? What are the right kinds of settings for youth perceived to be a danger to the community? Given the research on the challenges in "restoring" competence for juveniles, is there any legitimate place for services that coach incompetent youth to get them through the court system? Should involuntary treatment services be limited to youth meeting existing statutory eligibility criteria, and if so, how should we handle cases in which incompetent youth do not meet the criteria for involuntary treatment? What kinds of time frames are appropriate, and what kinds of reviews and other safeguards need to be built in to the process? Do we want to replicate the extended period for restoration of competence that is causing so many difficulties in the adult system?

B. *Define the Elements of the Process*

The survey supports the need for guidance and procedures in the following areas. This list may be used as a starting place for county protocols or legislation.

- A definition of competence (in a place more accessible than in case law);
- Procedures for raising the issue of competence and timelines;
- A process for evaluation of competence, with qualifications for evaluators;
- A process for evaluating treatment needs and assuring services if the incompetent youth is not eligible for regional center or Lanter-

man-Petris-Short services;
- A set of service options that addresses the full continuum of public safety risks;
- Provisions to engage other public agencies;
- Reviews at prompt intervals for youth pending competence determinations and after a finding of incompetence;
- Requirements that services be provided in the least restrictive setting, with secure confinement only when absolutely needed for the protection of the person or public;
- Provisions to facilitate dismissal in appropriate cases, and to assure that youth and families get needed services even if not in juvenile justice;
- Procedures to prevent further delay in cases in which the youth is determined to be competent; and
- Timelines for attainment of competence and guidelines for determining the point at which dismissal is required.

If California decides to implement comprehensive juvenile competence legislation, our inventory of desired elements should build on the efforts of other states. Several have recently enacted juvenile competence legislation, and a number of law review articles have analyzed the requisite elements for any juvenile competence legislation.[176]

C. *Explore Legislative and Rulemaking Options*

Most probation staff who took part in the survey urged the need for legislation on these issues. At the same time, a smaller but equally compelling group of probation staff pointed out that, without legislation, counties are free to fashion their own solutions on a case-by-case basis. They expressed concern that legislation might impede the ability courts currently have to dismiss, divert to other agencies or services, and set timelines in these cases. And of those who urged the need for legislation, there was no unanimity as to whether efforts should focus on the enactment of a comprehensive process for juvenile incompetence, including the elements above (definitions, evaluation, time limits, limitations on confinement, provisions for dismissal and diversion, processes for development of treatment plans), or on specific elements of the process.

The issues raised by probation staff in this survey are similar to the ones offered by other professionals working with this population. In July 2006, and again in October 2007, the Youth Law Center met with a group of juvenile defenders and mental health advocates to discuss juvenile incompetence and whether a legislative fix should be sought. As was the case with probation staff,

176. *See*, *e.g.*, Kellie M. Johnson, *Juvenile Competency Statutes: A Model for State Legislation*, 81 IND. L.J. 1067 (2006); Penny C. Kahn, *Due Process Rights for Juveniles: Ensuring Competence To Stand Trial in Maryland's Juvenile Courts*, 3 W. MD. L.J. 139 (2003).

some thought it was important that legislative efforts be renewed because that was the best and only way to increase systemic understanding of these issues. For those who urged the need for legislation, there was particular interest in addressing specific procedural mechanisms that could facilitate serving potentially incompetent youth. Defenders and advocates spoke of the need to strengthen laws ensuring the involvement of other agencies, broaden dismissal and diversion options, and shorten timelines for evaluation. Like probation staff, they expressed great concern with the current dearth of residential treatment and community services targeted to these youth. And like some probation staff, defenders and advocates were cautious about the idea of comprehensive legislation out of concern that it might result in a loss of strategies currently available to those who are knowledgeable enough to pursue them.

This discussion will be resolved outside the four corners of this Article. Nonetheless, the following are legislative/rulemaking ideas that were specifically urged by survey respondents or suggested by the responses over all:

- Update involuntary treatment statutes for juveniles to reflect current treatment options, including sections 6550 through 6552 of the Welfare and Institutions Code (which refer only to confinement in state hospitals and developmental centers).
- Revise rule 5.645 of the California Rules of Court to more thoroughly define the juvenile competence process, or simply to provide improved guidance on what to do upon a finding of incompetence. Revisions could also correct inappropriate statutory references, such as references to statutes requiring wardship.
- Strengthen front-end tools to dismiss or informally divert cases involving potentially incompetent youth out of juvenile justice.
- Enact a formal diversion process, similar to the diversion program for incompetent adult misdemeanants under sections 1001.20 *et seq.* of the California Penal Code.
- Enhance the ability to engage other agencies, including mental health, child welfare, and education, to assure services for potentially incompetent youth and their families if the youth will not be handled in juvenile justice.
- Provide guidance on what to do when incompetent youth do not meet eligibility criteria for involuntary treatment (possibly using the interagency structure set up through sections 710 *et seq.* of the Welfare and Institutions Code or the interagency process for placement of seriously emotionally disturbed youth under section 4096 of the Welfare and Institutions Code).
- Shorten timelines for evaluation and development of treatment plans for youth seeking eligibility in regional centers.
- Assure regular and prompt reviews for youth undergoing competence proceedings, possibly by amending section 737 of the Welfare and Institutions Code.

- Permit law enforcement to take potentially incompetent youth to mental health agencies instead of to probation.

Resolving even a few of these issues could make a huge difference in moving cases more quickly and appropriately through the system.

D. *Implement Formalized Court Processes and Protocols*

Unless and until the State of California enacts legislation and/or the Judicial Council issues new court rules on juvenile competence, counties need to develop their own processes for dealing with these cases. Some counties have already established clear court processes for the determination of juvenile competence. San Diego has a protocol developed by the Superior Court, and the Los Angeles Juvenile Mental Health Court is also working on a protocol. In the absence of legislative guidance, such formal procedures help to reduce delay and assure that cases do not lapse into the kind of "competence limbo" experienced in many counties.

Counties with mental health courts or particular judges specializing in competence issues also have an advantage in these matters. In Los Angeles, for example, the Juvenile Mental Health Court hears dozens of juvenile competency matters each year. This has resulted in a more efficient, more focused court process. The placement process in Los Angeles often includes players not considered in adult incompetence proceedings, such as educational agencies.

In Kern County, one of the counties with a high rate of competence proceedings, there is no formal protocol, but an established court process assures timely evaluation and interagency discussions about how to handle difficult cases. Kern County also makes efforts to place a youth with his or her family during the evaluation process unless the severity of the crime or family circumstances prevents it.

E. *Provide Professional Training for Juvenile Justice Professionals*

Probation staff emphasized the need for the training of all juvenile justice professionals—judges, defenders, prosecutors, and probation officers. Everyone in the system needs to understand legal standards, court procedures, and dispositional options for incompetent and potentially incompetent youth. Juvenile justice professionals also need to know where to turn for legal advice and advocacy support, for example Protection & Advocacy, Inc. In Los Angeles, cross-agency training on how to raise and explore juvenile competency issues has occurred in connection with the development of the Los Angeles Juvenile Mental Health Court, but its success suggests that training may provide an accessible first step toward improving services to incompetent and potentially incompetent youth in counties without specialized courts.

The counties reporting the fewest problems collaborating with other de-

partments were the same counties that had the most knowledgeable, long-term staff dedicated to these issues. The presence of such staff members has enabled some counties to develop teams with a unified therapeutic approach to this population. The teams work together to identify, stabilize, and assure appropriate treatment. Counties emphasized that judges, district attorneys, and defense attorneys who are trained in and/or have experience working with this population are important because they can be instrumental in securing interagency collaboration and expeditious placement of youth outside of juvenile hall.

F. *Actively Divert Appropriate Cases Out of Juvenile Justice*

While most counties agreed that many potentially incompetent youth do not belong in juvenile justice, some counties were especially aggressive in disposing of cases before filing. In these counties, probation officers and prosecutors pursue only the most serious cases, in which the youth poses an imminent public safety risk. In one county, this work is enhanced by having probation staff gather information about health insurance to assist in linking the youth and family with community services. Similarly, in counties with juvenile mental health courts, the system is geared to divert youth into regional centers or local mental health or education agencies.

Much more can be done to make sure diversion from the juvenile justice system is successful. Families may need crisis intervention services and ongoing support to work with their children. They may need help getting started with the regional center or with services provided through the Mental Health Services Act or Medi-Cal. They may need help getting a new Individualized Education Plan for the young person that addresses behavioral issues. With these kinds of services in place, many youth can be saved from the protracted detention, case delay, and deterioration so often suffered when cases go through formal competence determinations.

G. *Increase Non-Secure Confinement During Determination of Competence*

One of the biggest complaints from probation staff was that incompetent and potentially incompetent youth who are not diverted out spend an immense amount of time in detention. This is consistent with concerns in the adult system that many inmates who could be diverted into the community instead are institutionalized to receive services.[177] Some of the survey respondents described intensive efforts to get such youth out of their halls. For example, Fresno, Monterey, San Diego, Santa Cruz, and Los Angeles counties strive to keep "non-dangerous" competent high-needs youth at home with wraparound

177. PROTECTION & ADVOCACY, INC., LEGAL BASES FOR OBTAINING COMPETENCY TRAINING OUTSIDE AN INSTITUTIONAL SETTING FOR INDIVIDUALS WITH DEVELOPMENTAL DISABILITIES 1 (2006), *available at* http://www.pai-ca.org/pubs/546501.htm.

services. Merced County has just obtained funding to provide this service as well. And again, for cases in which family-based services are inappropriate, some counties place high-needs youth in foster homes with intensive services. Counties reported this as a good option for youth who are developmentally disabled but not eligible for regional center services.

H. *Enhance Interagency Cooperation*

The survey results recognize and appreciate the critical importance of good relationships with regional centers, mental health agencies, and schools. Some of the best and the worst results reported in the survey had to do with communication and collaboration with sister agencies.

Several counties have instituted collaborative strategy meetings involving probation offices, county mental health centers, regional centers, and school districts. In some counties these meetings occur through the Children's System of Care[178] and in others through the interagency groups convened for placement of seriously emotionally disturbed youth.[179] These meetings involve representatives from all the agencies sitting down together, reviewing a youth's file, strategizing appropriate placements and services, and, when appropriate, making recommendations to the district attorney regarding adjudication of the case. Not surprisingly, this process has been most successful in smaller counties, where many of the agency personnel know each other and have built collaborative relationships over many years.

In Kern County, this process has been the result of a probation and public defender initiative and a close working relationship between the court, the probation department, and the regional center. The public defender usually requests a thirty-day stay of the proceedings to permit the regional center to determine competency. If the regional center determines it is not the correct agency to perform the assessment (this happens roughly ten percent of the time), then assessment is referred to county mental health. Most of the time, the juvenile is found incompetent to stand trial and is referred to either county mental health or the regional center, which must come up with a treatment plan.

Youth Law Center's joint meetings with regional center and probation staff revealed that clients' rights advocates from Protection & Advocacy, Inc. are sorely underutilized.[180] These are experts in the very areas that juvenile professionals need help with for youth with developmental disabilities. Moreover, staff at regular Protection & Advocacy, Inc. offices can help youth with a much

178. *See supra* note 158.

179. CAL. HEALTH & SAFETY CODE § 1502.4 (2008); CAL. WELF. & INST. CODE § 4096 (2008).

180. Clients' rights advocates are physically stationed in regional centers to be independent advocates for individuals who are current or potential regional center clients. *See* Protection & Advocacy, Inc., Office of Clients Rights Advocacy, http://www.pai-ca.org/about/OCRA.htm (last visited Apr. 10, 2008).

broader range of mental health service needs or educational disabilities to obtain services.[181] They have the ability to do work related to government benefits, special education, eligibility for Supplemental Security Income (SSI), and advocacy to help clients with regional center or mental health system services. Because they know how the regional center, mental health, special education, and public benefits systems work, they can also help to reduce bureaucratic barriers and delays in case processing. One very simple improvement juvenile system professionals could make in serving potentially incompetent youth is to establish working relationships with their local Protection & Advocacy, Inc. advocates.

I. *Develop Targeted Services and Beds for Incompetent and High-Needs Youth*

Finally, the survey results underline the need to develop targeted services that meet the needs of youth with developmental disabilities and/or serious mental health service needs. While many of the comments were expressed in terms of needing more slots or beds in existing service categories, it is clear that those categories need to be adapted to the needs of youth with cognitive deficits, mental retardation, serious behavioral issues, and mental illnesses. Services are needed at both ends of the spectrum.

1. "Secure" Residential Programs

Counties need a small number of secure beds located close to youths' home communities. These beds are needed for youth determined to be incompetent and for high-needs youth whose cases will proceed because they are technically competent. These beds should be flexible enough to provide short-term stabilization and longer-term care for youth with serious mental health needs. Some are needed for youth with developmental disabilities.

Counties reported success with specific residential programs. The Dorothy Kirby Center in Los Angeles has a longstanding, good reputation for serving high-needs youth. Probation staff informed us that it is operated by county mental health, with an eight-month average length of stay. It receives Medi-Cal reimbursement.

Humboldt County operates its own six-month secure treatment program, New Horizons. Because it is operated by probation and is on the grounds of the juvenile hall, it cannot receive Medi-Cal reimbursement, but the county has cobbled together an impressive interagency strategy to staff and fund the program.[182] The interagency sharing enables the program to provide intensive

181. PROTECTION & ADVOCACY, INC., ADVOCACY PLAN 2008-2012 (2007), *available at* http://www.pai-ca.org/pubs/540201.htm.

182. Alice Bussiere & Sue Burrell, *Humboldt County: New Horizons*, *in* IMPROVING ACCESS TO MEDI-CAL FOR YOUTH IN THE JUVENILE JUSTICE SYSTEM 99-100 (Youth Law Ctr.

therapy and family counseling, a strong educational component, and an aftercare program with clinicians that follow youth into the community. The program has enabled Humboldt to stop sending high-needs youth out of county.

In thinking about developing needed residential programs, counties should quantify their specific needs and approach the licensing authorities. Regional center staff told Youth Law Center that their resource departments look at unmet needs and then send out requests for proposals to the vendor community. While there is some reluctance to serve clients perceived as violent or difficult, the ability to bring additional funding to what regional centers can provide may create new opportunities. Thus, if probation and regional centers can pool resources, more vendors might be attracted to the idea of developing small group homes for high-level cases. The realignment of state funding to counties through California Senate Bill 81 in the 2007-08 budget will provide funding that may be used to develop of these much needed kinds of services both for youth developmental disabilities and mental health service needs.[183]

Counties also need to revisit some kinds of high-level programs. Community treatment facilities offer a shorter term, more effective treatment alternative to state hospital or Division of Juvenile Justice beds for youth who are perceived as needing a high level of structure.[184] Community treatment facilities enable incompetent or potentially incompetent youth to be treated close to home and provide supportive services to assist youth in their transition to the community. Problems with particular community treatment facilities providers should be resolved. For example, it may be possible to build support systems that reduce problems with runaway youth. Also, to the extent that counties have considered community treatment facilities too expensive in the past, the influx of new state dollars through the budget realignment may make it possible to provide community treatment facilities programs.

2. Community-Based Services

At the lower, but equally essential end of the spectrum, services must be made available to keep youth out of secure confinement during the period the case is suspended because they are found incompetent. For youth who cannot be placed with parents or relatives, the continuum of services needs to be expanded to include more individualized placements, such as therapeutic foster care.[185]

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ed., 2006).

183. *See* discussion *infra* Part VII.K. Senate Bill 81 is a budget realignment bill for the 2007-08 budget that shifts $117,000 per youth per year from the Division of Juvenile Justice to counties for youth involved in specified categories of offenses who otherwise would have been committed to the state system. S.B. 81, 2007 Leg. (Ca. 2007), *available at* http://info.sen.ca.gov/pub/07-08/bill/sen/sb_0051-0100/sb_81_bill_20070824_chaptered.html.

184. *See supra* Part VI.C.5.a and notes 164-167.

185. The California Institute for Mental Health has obtained funding to provide training

Community-based services for incompetent youth should also include family support and respite, and advocacy support to help them access needed funding streams. Services should include one-on-one support for the youth, including therapeutic behavioral services and services that will enable them to maximize their potential to live independently. Our juvenile justice system can do a much better job with this part of the service continuum. A recent analysis by Fight Crime, Invest in Kids California, reports that only a fraction of juvenile offenders who would benefit from intensive family-based services are receiving them.[186]

J. *Improve Juvenile Hall Resources for Detained Youth*

The consensus among counties was that juvenile hall detention for incompetent or potentially incompetent youth should be a last resort. Even then, some high-needs youth need to be detained, and counties report that this often results in severe stress for the youth and for the staff caring for them. Youth with serious mental health disorders often deteriorate further in detention, and juvenile hall staff resort to using isolation and restraints in an effort to keep youth safe.

In Orange County, the creation of a special unit with a dedicated staff for this population (high-needs youth, some of whom are incompetent or suspected to be incompetent) has made huge changes in juvenile confinement experiences. The unit houses youth in pre- and post-disposition status. One probation staff member said that soft leather restraints, which were a constant when he arrived, have not been used at all in almost four years. The entire unit has moved to a therapeutic and conflict resolution philosophy. According to this probation officer, "Staffing is the key issue [for this success] . . . . If you sit down and spend some time with them, you get results. They want to feel normal, and by sitting down with them, you can help them get there." There are fifteen youth and three staff members in the unit. Because there seems to be an increasing need for services for high-needs youth, the probation department is applying for funding to move the program into its own facility and expand it while maintaining the current staff ratio.

Similarly, Los Angeles has an enhanced supervision unit for the most critically mentally ill youth. The unit has the capacity to provide one-on-one supervision and offers targeted work with families, community support systems, and recreational therapy. Los Angeles also has a pilot program in its juvenile halls for youth with neurological damage. Alameda County, too, has just opened an on-site mental health treatment unit for high-needs youth.

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on how to implement multidimensional treatment foster care. California Institute for Mental Health, http://www.cimh.org/policy/child_cimh_fostertreatment.cfm (last visited Apr. 10, 2008).

186. FIGHT CRIME: INVEST IN KIDS CALIFORNIA, ON THE RIGHT TRACK TO SAFER COMMUNITIES: STEERING CALIFORNIA'S JUVENILE OFFENDERS AWAY FROM LIVES OF CRIME 19-20 (2007), *available at* http://www.fightcrime.org/ca/cajjreport.pdf.

K. *Take Advantage of New Funding Opportunities*

Almost all of the survey respondents complained about funding as a barrier to serving high-needs youth. While some of the concerns are real, other responses suggested a lack of knowledge about funding streams. For example, probation staff in some of the counties did not seem to have a grasp of how Medi-Cal or Title IV-E funding works.[187]

At the same time, some counties have explored new ways to fund services. One county, which serves some middle class families, uses sections 900 through 914 of the Welfare and Institutions Code, which allows parents to be assessed for costs based on ability to pay and allows parents' health insurance to help secure needed services. Other counties have made it a priority to identify funding options for individual youth. Thus, one county has eligibility specialists who pursue SSI, Medi-Cal, and S.B. 163 wraparound.[188] Another county probation chief told us that in particularly difficult cases, representatives from Probation, Mental Health, and the Regional Center sit down together and figure out a way for each agency to contribute some money to collectively pay for the services the youth needs.

Five counties—Santa Clara, Santa Cruz, Ventura, Humboldt, and Los Angeles—are engaged in the Healthy Returns Initiative, a multi-year project supported by The California Endowment. The goals of the initiative are to strengthen the capacity of probation departments, improve access to mental health and health services for adolescents in detention facilities, and ensure continuity of care upon their release. A primary focus of the initiative is the identification of funding mechanisms to enhance access to services.

As juvenile justice professionals develop and deepen their relationships with other agencies, even more funding opportunities may emerge. At one of the Probation-Regional Center meetings convened by the Youth Law Center, a

187. Many poor children in California have health care coverage through Medi-Cal, California's Medicaid program. Children in juvenile justice who are placed in group homes or foster care that are eligible for federal Title IV-E foster care benefits are automatically eligible for Medi-Cal. 42 U.S.C. § 1396a(a)(10)(A)(i)(I) (2008). California has also opted to cover foster children who do not meet the requirements of Title IV-E. *Id.* §§ 1396a(a)(10)(A)(ii), 1396d(a)(i); CAL. WELF. & INST. CODE § 11401 (2008).

188. Supplemental Security Income (SSI) is a federal income support program for people with disabilities. It also provides automatic eligibility for health care coverage under Medicaid. *See* 42 U.S.C. §§ 1381-1383f (2008); CAL. WELF. & INST. CODE § 14050.1 (2008). "S.B. 163" is the commonly used name for California's wraparound service program, which was enacted by Senate Bill 163 in 1997. It allows counties to use state foster care dollars to provide community-based services that emphasize the strengths of the child and family and provides delivery of coordinated, highly individualized services to address needs and achieve positive outcomes in their lives. The purpose is to keep children out of group home care, in cases where the child is in or at risk of being placed in a high-level group home (levels 10 to 14). CAL. WELF. & INST. CODE § 18250 (2008). See note 187, *supra*, for a discussion of Medi-Cal. Access to these programs can be pivotal in enabling youth to be served at home or in the community.

representative from the Central Valley Regional Center said that the California Department of Developmental Services can provide what is known as "deflection money" to encourage the depopulation of the developmental centers. Regional Centers have to submit a "community placement plan" on how they will keep more people with developmental disabilities in the community. The Central Valley Regional Center used some of this money to develop two four-bed facilities in Tulare County for juvenile clients who are involved with the juvenile justice system. The money gives an incentive to service providers to come to the area and develop the necessary services for youth.

As this Article is being written, applications for funding under the Mental Health Services Act (Proposition 63) are being developed.[189] The Guidelines for Prevention and Early Intervention and Community Services and Supports (Children's System of Care services) make it clear that juvenile justice programs can be funded, and counties will be able to develop new services (but not supplant existing services) with those funds. These funds could be particularly useful for front-end services or liaison work that could keep some youth out of the juvenile justice system altogether.

Finally, the Governor's budget realignment for 2007-2008 (Senate Bill 81) redirected significant funds to the counties for some youth who previously would have been sent to the Division of Juvenile Justice.[190] As this redistribution of funding occurs, counties may finally have a sufficient chunk of money to develop small programs for incompetent and high-needs youth individually or with sister counties.

L. *Collect Better Data*

The survey described in this Article represents the first comprehensive effort in California to obtain numbers of incompetent and potentially incompetent youth. Unfortunately, the "data" presented are less than precise, as almost every county was forced to rely on institutional memory or anecdotes to come up with any numbers at all. And again, unintended imprecision in language (e.g., youth who are incompetent but not identified as such versus youth actually adjudged incompetent by the court) makes it hard to understand with any certainty the numbers of youth judicially declared incompetent, the number who

189. The Mental Health Services Act (MHSA) contains prevention and early intervention provisions and provisions on system of care services for children with severe mental illness. CAL. WELF. & INST. CODE §§ 5840-5840.2 (2008) (prevention and early intervention; *id.* §§ 5850-5865, 5878.1-5883 (system of care services). The Department of Mental Health maintains a web site with extensive materials about the Act and current status of implementation. California Department of Mental Health, Mental Health Services Act (Proposition 63), http://www.dmh.ca.gov/Prop_63/MHSA/ (last visited Apr. 10, 2008). The stated goals of the MHSA include strategies to reduce incarceration and removal of children from their homes because of untreated mental illness and to provide funding when it is not otherwise available. *See* CAL. WELF. & INST. CODE §§ 5840(d), 5878.3 (2008).

190. *See supra* notes 167, 183.

met the definition but were diverted out, and the number who should have undergone incompetence proceedings.

As the survey was being conducted, the California Juvenile Justice Data Project was finishing up work in its initial phase.[191] The Data Project was conducted by criminologists at the University of Southern California, under the auspices of the California Division of Juvenile Justice, Department of Corrections and Rehabilitation, in conjunction with the Chief Probation Officers of California, and with financial support obtained by Youth Law Center. Counties voluntarily participated. The initial phase was directed at learning what data counties collect and what data is currently possible to obtain given existing technology and resources. While the Data Project did not specifically collect data on juvenile incompetence or high-needs youth, some of the data it collected could be used to explore these issues. For example, data on placement delay or pre-adjudication delay could be examined to give counties a better idea of just how long high-needs youth are actually spending in detention. Continuation and expansion of the Data Project is surely an essential part of broader juvenile justice reform, and future phases could include research questions formulated to more specifically focus on these youth.

Data is also collected by the Center for Families, Children, and the Courts.[192] Future work could include adding incompetence to the categories of case processing collected for juvenile courts. Similarly, data on juvenile incompetence and more specific data on length of stay for high-needs youth could be added to the data on county juvenile facilities collected by the Corrections Standards Authority.[193]

AFTERWORD

California's process for addressing juvenile incompetence is in need of attention. While this Article has surely raised as many questions as it has answered, we hope it will provoke discussion and action among juvenile system professionals and policymakers. It is being written at a historic time for California's juvenile justice system. As the state shifts resources from the deep end at the Division of Juvenile Justice to local jurisdictions and as the Mental

191. KAREN HENNIGAN & KATHY KOLNICK, JUVENILE JUSTICE DATA PROJECT: A PARTNERSHIP TO IMPROVE STATE AND LOCAL OUTCOMES, SUMMARY REPORT—PHASE I: SURVEY OF INTERVENTIONS AND PROGRAMS (2007).

192. *E.g.*, CTR. FOR FAMILIES, CHILDREN, AND THE COURTS, ADMIN. OFFICE OF THE COURTS, CALIFORNIA JUVENILE STATISTICAL ABSTRACT (2005), *available at* http://www.courtinfo.ca.gov/programs/cfcc/resources/publications/CAJSAbstractFeb2005.htm; *California Juvenile Delinquency Data*, CFCC RESEARCH UPDATE (Ctr. for Families, Children & the Courts, San Francisco, Cal.), Apr. 2006, *available at* http://www.courtinfo.ca.gov/programs/cfcc/pdffiles/CJSADeliiquResUp2006.pdf.

193. *See* California Department of Corrections & Rehabilitation, Juvenile Detention Surveys, http://www.cdcr.ca.gov/Divisions%5FBoards/CSA/FSO/Surveys/Juvenile_Profile/Juvenile_Detention_Survey.html (last visited Apr. 10, 2008).

Health Services Act swings into full implementation, the opportunities are unprecedented for local systems to address long-existing needs for our most vulnerable youth.