

**AMERICAN BAR ASSOCIATION****ADOPTED BY THE HOUSE OF DELEGATES****AUGUST 9-10, 2021****REPORT TO THE HOUSE OF DELEGATES****RESOLUTION**

RESOLVED, That the American Bar Association urges all federal, state, local, territorial and tribal legislative bodies to enact laws which raise the minimum age for prosecution of children as alleged juvenile delinquents to age 14; and

FURTHER RESOLVED, That the American Bar Association replaces the minimum age for a juvenile court to have exclusive original jurisdiction, in the Juvenile Justice Standards, Standards Relating to Juvenile Delinquency and Sanctions, Standard 2.1, to age 14.



## REPORT

### **1. Children are currently treated in a legal system without an appropriate developmental lens and no uniformity.**

Although there have been robust conversations about raising the age of juvenile court jurisdiction to incorporate research and science regarding the realities of adolescent development to address late adolescents and emerging adults many states have failed to set a minimum age. Some states have set very low minimum ages. Each state sets the parameters of its juvenile system. While California and Massachusetts have set the minimum age at twelve,<sup>1</sup> and Nebraska has set a minimum age of eleven,<sup>2</sup> North Carolina has set a minimum age of six.<sup>3</sup> In over half of the states it is legal to prosecute a five year-old, because there is no minimum age of juvenile court jurisdiction and in twenty-one states children who are twelve and older can be transferred to criminal courts.<sup>4</sup> The failure to set a meaningful standard of juvenile court jurisdiction results in the criminalization of childhood.

The wide variability regarding the minimum age in this country is contrasted by international models which are generally more consistent with the U.N. Convention on the Rights of the Child (CRC)'s recommendation that that nations set an age of criminal responsibility no lower than fourteen.<sup>5</sup> Countries that set the minimum age of criminal responsibility at fourteen or higher include Argentina, China, Congo, Germany, Italy, Poland, Spain, Somalia, Sweden, Russia, and Ukraine.<sup>6</sup> Current ABA policy in the Juvenile Justice Standards (Standard 2.1) sets the minimum age at 10.<sup>7</sup> This resolution would raise the minimum age to 14. A number of prominent youth serving organizations and advocacy groups also support raising the age to 14.<sup>8</sup>

Raising the recommended standard to fourteen by adopting this Resolution and urging states to follow suit will promote consistency in addressing this critically important issue. This standard will better align with research and science on child development and the reality that children below the age of fourteen have diminished culpability and many are not competent to stand trial or to have any real sense of the legal system. Raising the minimum age to fourteen will reduce the number of youth who experience traumatizing detention and will not adversely affect public safety. For the relatively small numbers of serious crimes alleged to have been committed by children below the age of fourteen referrals can be made to community-based programs or the child welfare system if there

<sup>1</sup> CAL. WELF. & INST. Code § 602 (West 2019); MASS. Gen. LAWS ANN. Ch. 119 § 52 (West 2018).

<sup>2</sup> NEB. REV. STAT. ANN § 43-247 (1) (West 2016).

<sup>3</sup> N.C. GEN. STAT. ANN. § 7B-1501 (West 2017).

<sup>4</sup> NAT'L JUVENILE DEFENDER CTR, *THE CRIMINALIZATION OF CHILDHOOD* (July 2019).

<sup>5</sup> *Id.* (citing U.N. General Assembly, *Global Study on Children Deprived of Liberty* 10 (2019), <https://undocs.org/en/A/74/136>).

<sup>6</sup> *Id.* (citing Child Rights Int'l Network, *The Age of Criminal Responsibility*, <https://home.crin.org/issues/deprivation-of-liberty/minimum-age-of-criminal-responsibility> (last visited Mar. 31, 2021)).

<sup>7</sup> IJA-ABA Juvenile Justice Standards, 1996.

<sup>8</sup> E.g. National Juvenile Defender Center, Juvenile Law Center (Philadelphia), Massachusetts Citizens for Juvenile Justice (CfJJ).

are appropriate supportive services. Most juvenile offenders are between the ages of 14-18 and the 18-24 year-old cohort group are by far most likely to accused of violent crimes.<sup>9</sup> Approximately 84% of juvenile arrests are for non-violent conduct.<sup>10</sup> Although juvenile arraignment and detention rates have continued to decline, racial and ethnic disparities have continued to increase. In 2017 the Sentencing Project reported that African-American youth are five times more likely to be detained than whites, Latino youth are sixty-five percent more likely to be detained than whites, and Native American youth are three times more likely to be detained.<sup>11</sup> L.G.B.T.Q+ youth constitute 5% of the juvenile population but represent 20% of those held in detention, and 85% of that number are children of color.<sup>12</sup>

Many states either do not have a statutory minimum age of juvenile adjudication or set their statutory minimum age below twelve. Thirteen states set a statutory minimum age of juvenile adjudication below twelve years old.<sup>13</sup> The minimum age within these states ranges from six years old<sup>14</sup> to eleven years old,<sup>15</sup> with an average minimum age of ten years old.<sup>16</sup> Even with a statutory minimum age which limits the age at which a child could be adjudicated, states with a statutory minimum below twelve years old accounted for 16.63% of juveniles who were detained in a juvenile residential facility for court-involved offenders on the one day census reference date in 2017.<sup>17</sup>

Five states also set a statutory minimum age of juvenile adjudication at twelve years or younger but reserve some exceptions for when a child under the minimum age could still be adjudicated.<sup>18</sup> This structure may still limit when young children under the age of twelve could be adjudicated. However, these five states still collectively accounted for 4.5% of juveniles under twelve years old who were detained in a juvenile residential facility for court-involved offenders on the one- day census reference date in 2017.<sup>19</sup> The number of children under twelve who are adjudicated is likely even greater as these

<sup>9</sup> Statistical Briefing Book, Office of Juvenile Justice Delinquency and Prevention (OJJDP 2019).

<sup>10</sup> Sarah Hockenberry & Charles Puzzanchera, *Juvenile Court Statistics 2013*, NAT'L CTR for JUVENILE JUSTICE & OJJDP (2015) available at <https://www.ojjdp.gov/ojstats/njcda/pdf>.

<sup>11</sup> *Black Disparities in Youth Incarceration; Latino Disparities in Youth Incarceration; Native American Disparities in Youth Incarceration*, THE SENTENCING PROJECT (2017) available at <https://www.sentencingproject.org>.

<sup>12</sup> Angela Irvine & Aisha Caufield, *The Overrepresentation of Lesbian, Gay, Bisexual, Questioning, Gender Non-Conforming & Transgender Youth Within the Child Welfare to Juvenile Crossover*.

<sup>13</sup> NAT'L JUVENILE DEFENDER CTR. *Id.*

<sup>14</sup> National Juvenile Defender Center, *supra* note 2. Of states that have a minimum age of juvenile adjudication, North Carolina has the lowest minimum age and sets the minimum age of juvenile adjudication at six years old. *Id.*

<sup>15</sup> *Id.* Nebraska is the only state with a statutory minimum age of eleven years old. *Id.*

<sup>16</sup> *Id.* Eight states of the thirteen states with statutory minimum ages below twelve years old set the minimum age at ten years old. *Id.*

<sup>17</sup> Office of Juvenile Justice and Delinquency Prevention, *US & State Profiles*, OJJDP (October 31, 2019), [https://www.ojjdp.gov/ojstatbb/ezacjrp/asp/Selection\\_cjrp.asp?state=6&topic=Age\\_Sex&year=2017](https://www.ojjdp.gov/ojstatbb/ezacjrp/asp/Selection_cjrp.asp?state=6&topic=Age_Sex&year=2017). This percentage was calculated manually by the author of this policy paper based on the 2017 "Age on census date by sex" numbers for each state. *Id.*

<sup>18</sup> National Juvenile Defender Center, *supra* note 2.

<sup>19</sup> Office of Juvenile Justice and Delinquency Prevention, *supra* note 7.

statistics do not account for adjudicated youth under twelve years old who are not detained in a residential facility. Even with statutory minimum ages limiting adjudication of young children, a significant number of youth under the age of twelve are still being adjudicated as delinquent.

Currently, over half of the states have no minimum age of juvenile adjudication.<sup>20</sup> This means that in states without a minimum age statute any child, no matter how young, can be formally processed through the juvenile justice system and adjudicated as delinquent. For instance, in Indiana, one of the many states without a minimum juvenile adjudication statute, a nine year old Indiana boy with autism was arrested after he tried to defend himself against a bully at an elementary school.<sup>21</sup> He was subsequently brought to the police station, “charged with battery and criminal mischief, and detained briefly in the juvenile detention facility”.<sup>22</sup> In North Carolina, a nine year old child with autism was found guilty of assault on a government official, his teacher, and a six year-old child was charged with felony vandalism for picking a tulip.<sup>23</sup>

It is imperative that children be treated through an appropriate developmental lens. Nationally, in 2018, there were 27,524 delinquency cases for children under twelve years old.<sup>24</sup> Of these children, 3,733 were adjudicated as delinquent<sup>25</sup> and 3,129 of the children were detained.<sup>26</sup> Banning delinquency prosecutions below the age of fourteen will

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<sup>20</sup> National Juvenile Defender Center, *supra* note 2. Twenty-eight states and the federal government do not have any statutory minimum age for juvenile adjudication. *Id.* The preceding source provides an illustrative map and its accuracy was confirmed through independent statutory research where two errors were found. Contrary to the National Juvenile Defender Center finding, Minnesota and Nevada have no statutory minimum age of juvenile adjudication. Minn. Stat. Ann. § 260B.007 (West 2020); Nev. Rev. Stat. Ann. § 62A.030 (West 2020).

<sup>21</sup> Travis Watson, *From the Playhouse to the Courthouse: Indiana’s Need for a Statutory Minimum Age for Juvenile Delinquency Adjudication*, IND. L. REV., 2020 at 433, 434.

<sup>22</sup> *Id.* The 2017 one day census of juveniles detained in a juvenile residential facility for court-involved offenders, details the type of offenses of children under the age of twelve. Office of Juvenile Justice and Delinquency Prevention, *US & State Profiles*, OJJDP (October 31, 2019), <https://www.ojjdp.gov/ojstatbb/ezacjrp/asp/selection.asp>. 9.3% were of children under twelve were charged with status offenses, offenses that are only a violation because of the child’s age; 12.98% were charged with technical violations, violations of probation or parole that are not crimes; 10% were charged with a public order offense other than a weapons offense; 2.3% were charge with drug offenses; 5.64% were charged with theft; 17.89% were charged with a different property offense, including auto theft, burglary, arson, or “other”; 13.72% were charged with simple assault; .55% were charged with criminal homicide; and 25.29% were charged with another person offense such as simple assault, robbery, or aggravated assault. *Id.*

<sup>23</sup> Ciaramella, *Outrage Over Handcuffed Children Leads States To Consider Raising Minimum Age of Arrest*, REASON (Mar. 26, 2021), <https://reason.com/2021/03/26/outrage-over-handcuffed-children-leads-states-to-consider-raising-minimum-age-of-arrest/>.

<sup>24</sup> Office of Juvenile Justice and Delinquency Prevention, *EZAJCS: Analyze Delinquency Cases*, OJJDP (Oct. 31, 2019), <https://www.ojjdp.gov/ojstatbb/ezajcs/asp/selection.asp>. To recreate the statistics, select “Disposition” for “Row Variable”, select “Adjudication” for Column Variable, select “2018” under “Year of Disposition”, and select “<12” under “Age at Referral”.

<sup>25</sup> *Id.*

<sup>26</sup> Office of Juvenile Justice and Delinquency Prevention, *EZAJCS: Analyze Delinquency Cases*, OJJDP (Oct. 31, 2019), <https://www.ojjdp.gov/ojstatbb/ezajcs/asp/selection.asp>. To recreate the statistics, select

eliminate formal court processing, the possibilities of adjudication and the collateral consequences of court records and the trauma of court involvement and detention, For example, in 2018 about 42%, 11,440, of delinquency cases for children under twelve years of age were dismissed.<sup>27</sup> This reduction in formal processing will decrease the harm to young children that contact with the juvenile legal system causes.<sup>28</sup>

Consequence from formal juvenile justice involvement include the traumatic effects on child development for children who are detained.<sup>29</sup> Trauma informed care once a child is detained is not enough; avoiding unnecessary detention is more appropriate.<sup>30</sup> Detention of any duration adversely affects a child or youth.<sup>31</sup> About 93% of youth in detention currently have been exposed to adverse child experiences previously, 75% have experienced traumatic victimization, and 6% have witnessed traumatic events.<sup>32</sup> Collateral consequences of juvenile court involvement include negative impacts on a student's financial aid eligibility, familial debts from court costs,<sup>33</sup> and interruptions in educational continuity.<sup>34</sup> The juvenile justice system disproportionately impacts impoverished children, children of color, and children who have experienced trauma.<sup>35</sup>

## **2. Children under fourteen years old are not mature enough in their emotional, behavioral, and intellectual development to be held responsible for their delinquent behavior.<sup>36</sup>**

The Supreme Court of the United States has used the developmental characteristics of youth to make categorical determinations of how children should and must be treated under the Constitution.<sup>37</sup> In *Roper v. Simmons*, 543 U.S. 551, 569-570 (2005), the Court found that young people who committed crimes when they were under

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"Detention" for "Row Variable", select "Adjudication" for Column Variable, select "2018" under "Year of Disposition", and select "<12" under "Age at Referral".

<sup>27</sup> Office of Juvenile Justice and Delinquency Prevention, *supra* note 14.

<sup>28</sup> One of these mechanisms is post arrest or pretrial detention. Jay Blitzman, *The State of Juvenile Justice*, in THE STATE OF CRIMINAL JUSTICE 2020 162 (Am. Bar Ass'n 2020). Detention, even just one night, has been shown to be harmful to a child. *Id.*

<sup>29</sup> Elizabeth S. Barnert et al., *Setting a Minimum Age for Juvenile Justice Jurisdiction in California*, 13 INT'L. J. OF PRISONER HEALTH 49, 51-52 (2017).

<sup>30</sup> See e.g. Sarah Howell, *Trauma-Informed Care In Juvenile Detention Is Not Enough*, JUVENILE JUSTICE INFORMATION EXCHANGE (Nov.25, 2019).

<sup>31</sup> Robert Kinscherff et al., *Promoting Positive Outcomes for Justice Involved Youth: Trauma and Adverse Child Experiences*, JUDGE BAKER GUIDANCE CENTER (Boston, Feb. 2019) at 10.

<sup>32</sup> *Id.*

<sup>33</sup> Watson, *supra* note 11, at 454, 449.

<sup>34</sup> Blitzman, *supra* note 18, at 163.

<sup>35</sup> Watson, *supra* note 11, at 447; Blitzman, *supra* note 18, at 156, 163.

<sup>36</sup> JESUIT SOCIAL SERVICES, *Too Much Too Young: Raise the Age of Criminal Responsibility to 12* 5 (2015) (stating that "children under the age of 12 years have not yet reached the necessary developmental stages in 'emotional, mental and intellectual maturity' to be held responsible for criminal behavior", quoting CONVENTION ON THE RIGHTS OF THE CHILD, *General Comment No. 10 (2007) Children's Rights in Juvenile Justice*, 11, U.N. Doc. CRC/C/GC/10 (April 27, 2007)).

<sup>37</sup> *Roper v. Simmons*, 543 U.S. 551, 569-570 (2005).

eighteen years old cannot receive the death penalty.<sup>38</sup> The Court so held partly because young people under eighteen are less mature than adults, have an underdeveloped sense of responsibility, are more vulnerable to negative influence, have more transient personality traits, and have less control over their environment.<sup>39</sup> Following *Roper*, the Court has continued to rely on developmental factors to determine culpability for children under eighteen years old.<sup>40</sup> The subsequent opinions have further clarified that the law rests on the psychology and brain science that shows the fundamental differences between juvenile and adult minds.<sup>41</sup> Thus, developmental science and characteristics of children should guide when it is categorically appropriate to adjudicate youth.

The proposed policy of a minimum age of juvenile adjudication of fourteen aligns with the Court's reliance on children's reduced culpability based on their development. Research shows that children's "psychosocial" developmental characteristics, which include future orientation, reward sensitivity, and sensation seeking, are not equally developed in both adults and children under twelve years old.<sup>42</sup>

Children should not be adjudicated before puberty because puberty is when the most rapid growth and development occurs.<sup>43</sup> Part of this pubescent development includes the ability to make sounder judgments and understand the consequences of actions.<sup>44</sup> For males, puberty usually begins between ages eleven and fourteen, and for females puberty usually begins between nine and twelve years old.<sup>45</sup>

Another developmental characteristic is a child's capacity to implement right and wrong. Although even young children may understand the difference between right and wrong,<sup>46</sup> it is not developmentally appropriate to use juvenile adjudication to hold young children under 14 years old accountable for harm they cause. Children's psychosocial capacities are their ability to control impulse and resist peer pressure.<sup>47</sup> These abilities mature slower than their cognitive capacity, which is their capacity for logical reasoning, moral, social, and interpersonal matters, under unhurried situations.<sup>48</sup> These differing timelines in development may explain why young children would be able to confirm what

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<sup>38</sup> *Id.* at 569-570.

<sup>39</sup> *Id.*

<sup>40</sup> *Graham v. Florida*, 560 U.S. 48, 67 (2010) (holding that life without parole unconstitutional for a person who committed a non-homicide crime as a juvenile).

<sup>41</sup> *Graham*, 560 U.S. at 68. *Miller v. Alabama*, 567 U.S. 460, 471 (2012) (holding that mandatory life without parole for a person who committed a crime as a juvenile is unconstitutional).

<sup>42</sup> Laurence Steinberg et al., *Are Adolescents Less Mature than Adults? Minors' Access to Abortion, the Juvenile Death Penalty, and the Alleged APA "Flip-Flop"*, 64 AM.PSYCHOL. 583, 591, 585 (2009).

<sup>43</sup> Watson, *supra* note 11, at 448.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *In re Joseph H.*, 188 Cal. Rptr. 3d 171, 182 (Cal. App. 4th Dist. 2015) (describing the use of the Gladys R. questionnaire on a ten year old boy to determine if the boy understood the wrongfulness of his actions).

<sup>47</sup> Steinberg et al., *supra* note 29, at 586; see also see Sara B. Johnson et al., *Adolescent Maturity and the Brain: The Promise and Pitfalls of Neuroscience Research in Adolescent Health Policy*, 45 J. Adolescent Health 216, 218 (2009) (describing similar processes as "hot cognition" and "cold cognition").

<sup>48</sup> Steinberg et al., *supra* note 29, at 586; see also see Johnson et al., *supra* note 37, at 218 (describing similar processes as "hot cognition" and "cold cognition").

is “right” and “wrong” when asked about actions in the abstract or hypothetical, but are still not be developmentally mature enough for juvenile adjudication.<sup>49</sup>

As a result of these differing developmental characteristics, the question becomes at what point on the continuum of maturity is the minimum age at which juvenile adjudication developmentally appropriate? In deciding youths are less culpable than adults, the Court has also considered that children are less in control of their environment and their ability to remove themselves from situations is diminished due to their youth.<sup>50</sup> Given Supreme Court jurisprudence, children under fourteen years old are less culpable than children over twelve years old.<sup>51</sup> At the same time, however, a fourteen-year-old child has less experience than an older adolescent with control over his or her environment.

A minimum age of fourteen is also the proper categorical approach because it accounts for over inclusive and under inclusive individual characteristics while still protecting young children against harmful and premature juvenile adjudication.<sup>52</sup>

### **3. Children under fourteen years old are unlikely to understand and be able to meaningfully participate in the complex procedures of juvenile adjudication proceedings.<sup>53</sup>**

Developmental, behavioral, and brain science should also be used to inform when children can understand and participate in juvenile adjudication proceedings.<sup>54</sup> Understanding and meaningful participation are part of the pivotal constitutional principle of due process. For due process to be honored, an accused must be competent to stand trial. A juvenile must be informed of and at least understand his or her *Miranda* rights,

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<sup>49</sup> See Steinberg et al., *supra* note 29, at 586 (comparing a child’s ability to make decisions regarding abortion, cognitive capacity, versus their psychosocial development at the same age).

<sup>50</sup> *Roper*, 543 U.S. at 569.

<sup>51</sup> *Id.*

<sup>52</sup> See Johnson et al., *supra* note 37, at 217; See JESUIT SOCIAL SERVICES, *supra* note 23, at 5.

<sup>53</sup> “Kids aren’t mini adults. We don’t expect our little leaguers to play baseball with the same capability as adult players. We don’t expect a third grader to read or solve math problems as well as a high schooler. Why, then, should we expect a young child who has engaged in bad behavior – even very bad behavior – to have the same reasoning skills, same intent, and same ability to understand complex court processes and legal consequences as a teenager or adult? And the stakes are high; how we choose to respond to childish misbehavior can have lifelong impacts.” *Data Snapshot: Kindergarten Court*, Voices for Children in Nebraska (Jan. 2016), <https://voicesforchildren.com/wp-content/uploads/2016/06/Kindergarten-Court.pdf>.

<sup>54</sup> See generally Thomas Grisso et al., *Juveniles’ Competence to Stand Trial: A Comparison of Adolescents’ and Adults’ Capacities as Trial Defendants*, 27 L. & Hum. Behav. 333 (2003); see generally Jodi L. Viljoen et al., *Adjudicative Competence and Comprehension of Miranda Rights in Adolescent Defendants: A Comparison of Legal Standards*, 25 Behav. Sci. & the L. 1 (2007); see generally Emily Haney-Caron et al., *Self-Perceived Likelihood of False Confession A Comparison of Justice-Involved Juveniles and Adults*, 45 Crim. Just. & Behav. 1955 (2018).



and a child's unique vulnerability to providing false confession must be considered.<sup>55</sup> The Supreme Court's *Roper* factors, used to treat juvenile offenders differently than adult offenders, also suggest that psychosocial and cognitive maturity should be taken into account when determining adjudicative competence.<sup>56</sup> Research on a child's developmental ability to understand and participate should inform the recommended minimum age of juvenile adjudication.

The due process right to be competent to stand trial means that an adult defendant has the ability to consult with his or her lawyer, and has a factual and rational understanding of the proceedings.<sup>57</sup> Although this adult standard for competency to stand trial has not been constitutionally extended to children in juvenile proceedings,<sup>58</sup> *In re Gault*, 387 U.S. 1 (1967) established the importance of due process rights for juveniles and in juvenile proceedings.<sup>59</sup> Even without a constitutional competency to stand trial requirement for juveniles, some states have recognized the need of special protections for children and have adopted statutory competency to stand trial requirements for juveniles.<sup>60</sup> Fourteen of these states additionally include developmental immaturity as a criteria for juvenile competency.<sup>61</sup> Given the importance of a defendant's ability to understand the proceedings and meaningfully participate in them, a minimum age of juvenile adjudication should be set based on an age under which it is too categorically unlikely for children to be competent to warrant adjudication. It is also important to note the common law infancy presumption which protected most children under the age of fourteen from prosecution and conviction or adjudication. While this construct might appear archaic and is not commonly mentioned or employed, California and a few other states still apply the presumption.

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<sup>55</sup> Viljoen et al., *supra* note 44, at 2-3; see Lindsay Malloy et al., *Interrogations, Confessions, and Guilty Pleas Among Serious Adolescent Offenders*, 38 L. & Hum. Behav. 181, 181-82 (2014); see Haney-Caron et al., *supra* note 44, at 1966.

<sup>56</sup> See *Roper v. Simmons*, 543 U.S. at 569-570 (listing relevant developmental factors for abolishing the death penalty for people who commit crimes under the age of 18 as: people under eighteen are less mature than adults, have an underdeveloped sense of responsibility, are more vulnerable to negative influence, have more transient personality traits, and have less control over their environment); Grisso et al., *supra* note 44, at 334, 361 (finding psychosocial maturity factors such as risk appraisal, future orientation, and resistance to peer pressure may affect the performance of youth as defendants beyond the elements of understanding and reasoning required of the adult standard for competency to stand trial).

<sup>57</sup> Eraka Bath & Joan Gerring, *National Trends in Juvenile Competency to Stand Trial*, 33 J. of the Am. Acad. of Child & Adolescent Psychiatry 265, 265 (2014) (discussing due process requirement of competency to stand trial from *Dusky v. U.S.*, 362 U.S. 402 (1960)); Viljoen et al., *supra* note 44, at 3.

<sup>58</sup> See Bath & Gerring, *supra* note 48, at 265.

<sup>59</sup> See Bath & Gerring, *supra* note 48, at 265 (discussing that *Gault* established due process rights but did not confer the right to a jury trial); see Haney-Caron et al., *supra* note 44, at 1958 (discussing *In re Gault*'s extension of *Miranda* rights to juveniles and special cautioning around admissions and confession by juveniles).

<sup>60</sup> Bath & Gerring, *supra* note 48, at 266 (finding that at the time of the article there were 21 states currently with juvenile competency laws); for an updated map as of January 29, 2020, where it appears 22 states now have juvenile competency to stand trial statutes, see *Juvenile Justice: States with Juvenile Competency Laws*, National Conference of State Legislatures (January 29, 2021), <https://www.ncsl.org/research/civil-and-criminal-justice/states-with-juvenile-competency-laws.aspx>.

<sup>61</sup> Bath & Gerring, *supra* note 48, at 266.

Research suggests that children under the age of fifteen are more likely than older adolescents and young adults to exhibit levels of impairment in the requirements for the adult competency to stand trial standard.<sup>62</sup> Although fifteen-year-olds exhibit significant levels of impairment, children eleven to thirteen-years-old perform even worse on metrics associated with competency to stand trial than fifteen-year-olds.<sup>63</sup> Although the research has compared children between the age of eleven and seventeen to young adults aged eighteen to twenty-four,<sup>64</sup> additional research has shown young adults are maturing until the age of twenty-five.<sup>65</sup>

In addition, age remains a consistent predictor of performance on the competency to stand trial impairment metrics.<sup>66</sup> This relationship is true even when prior juvenile justice system involvement and intelligence were taken into account.<sup>67</sup> This relationship suggests that age could be a consistent predictor for appropriate developmental maturity for children to stand trial and be adjudicated as delinquent.

Based on this child development research, one in three children age eleven to thirteen-years-old potentially may not be competent to stand trial.<sup>68</sup> Therefore, the risk of premature juvenile adjudication in violation of due process rights is too great to allow children under the age of fourteen to be adjudicated as delinquent.

This categorical approach also aims to ensure competency to stand trial does not unnecessarily become an issue in every case for young children.<sup>69</sup> Even if there is a competency to stand trial statute for juveniles, if there is not a minimum age, or the minimum age is set too low, defense attorneys are likely to seek individual competency to stand trial determinations for every juvenile.<sup>70</sup> As many children under the age of fourteen will be incompetent to stand trial, this individual determination for each case is unnecessary and inefficient. Given this analysis, a bar on juvenile adjudication below fourteen years old is both efficient and developmentally appropriate.<sup>71</sup>

Impairment metrics on competency to stand trial and age are correlated to children's ability to understand and appreciate additional adjudication and law enforcement procedures. Children's competency to understand *Miranda* rights,<sup>72</sup>

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<sup>62</sup> Grisso et al., *supra* note 44, at 333.

<sup>63</sup> Grisso et al., *supra* note 44, at 333-334. The study found that 30% of eleven to thirteen-year-olds show significantly impaired Understanding or Reasoning, compared to 19% of fourteen to fifteen-year-olds and 12% for both sixteen to seventeen-year-olds and young adults aged eighteen to twenty-four. *Id.* This means that children eleven to thirteen years old performed significantly worse than fourteen to fifteen years old on Understanding, Reasoning, and Appreciation subscales, and moderately worse than young adults. *Id.*

<sup>64</sup> Grisso et al., *supra* note 44, at 336.

<sup>65</sup> COALITION FOR JUV. JUST., *supra* note 31, at 3.

<sup>66</sup> Grisso et al., *supra* note 44, at 348.

<sup>67</sup> Grisso et al., *supra* note 44, at 348.

<sup>68</sup> Grisso et al., *supra* note 44, at 359.

<sup>69</sup> Grisso et al., *supra* note 44, at 359.

<sup>70</sup> Grisso et al., *supra* note 44, at 359.

<sup>71</sup> Grisso et al., *supra* note 44, at 359.

<sup>72</sup> Viljoen et al., *supra* note 44, at 2.

increased likelihood to provide false confessions,<sup>73</sup> and psychosocial development<sup>74</sup> may compromise a child under fourteen's ability to be provided the appropriate level of procedural fairness. Juveniles have the right to remain silent and have counsel appointed.<sup>75</sup> In order to protect these rights, juveniles must at least understand their *Miranda* rights.<sup>76</sup> However, research has found 58% of defendants aged eleven to thirteen are impaired in their ability to understand their *Miranda* rights, 78% are impaired in their ability to appreciate the rights, and 80% are either impaired in their ability to understand their rights or communicate rationally with counsel.<sup>77</sup> This means that conservatively, one in two children between the ages eleven and thirteen may be at risk of not understanding their *Miranda* rights.<sup>78</sup> This deficit cannot be rectified reliably with an attorney or parent present.<sup>79</sup>

The reason for children's decreased ability to understand their *Miranda* rights may be children's developmental characteristics of heightened suggestibility, and greater susceptibility and compliance with authority figures.<sup>80</sup> This may explain why youth are more susceptible to providing false confessions.<sup>81</sup> In addition, research has demonstrated that given the effect of peer influence on youth, the high rate of false confessions by juveniles has been associated with their motivation to protect someone else.<sup>82</sup> False confessions obviously compromise the juvenile justice system's ability to adjudicate juveniles accurately and fairly. Increased susceptibility to false confessions is likely a combination of interrogation techniques and personal characteristics, rather than developmental maturity alone.<sup>83</sup> Nevertheless, age remains a predictive factor for false confessions, and should thus inform a categorical policy decision on the minimum age of juvenile adjudication.<sup>84</sup>

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<sup>73</sup> Haney-Caron et al., *supra* note, at 1955.

<sup>74</sup> Grisso et al., *supra* note 45, at 340.

<sup>75</sup> Viljoen et al., *supra* note 45, at 2.

<sup>76</sup> *Id.*

<sup>77</sup> Viljoen et al., *supra* note 45, at 9, 12.; See also Haney-Caron et al., *supra* note 44, at 1963 in which a study examined *Miranda* comprehension in juveniles. The study grouped youth 15 years old and younger as one group, and compared the group to older adolescents, because research had previously shown that youth younger than fifteen are categorically less likely to understand their *Miranda* rights. *Id.* at 1959. The study found a significant relationship between age and "leaning towards falsely confessing", with the younger group of juveniles more likely to lean towards falsely confessing. *Id.* at 1966. Children age fifteen to sixteen did not differ from young people aged seventeen to nineteen years old. *Id.*

<sup>78</sup> [add citation]

<sup>79</sup> Haney-Caron et al., *supra* note 44, at 1972; Malloy et al., *supra* note 46, at 190.

<sup>80</sup> see Haney-Caron et al., *supra* note 44, at 1955.

<sup>81</sup> Haney-Caron et al., *supra* note 44, at 1956; see also Malloy et al., *supra* 46, at 181 (finding 17.1% of the fourteen to seventeen-years-olds studied claimed to have made a false confession and 18.1% claimed to have made a false guilty plea).

<sup>82</sup> Malloy et al., *supra* note 65, at 181 (studying young people age fourteen to seventeen and finding false confessions were 3.92 times more likely when a friend was present).

<sup>83</sup> Haney-Caron et al., *supra* note 44, at 1969; see also Malloy et al., *supra* 45, at 181 (finding false confessions of young people fourteen to seventeen years old were associated with long interrogations and being questioned in the presence of a friend).

<sup>84</sup> Viljoen et al., *supra* note 44, at 14.; Jodi L. Viljoen & Ronald Roesch, *Competence to Waiver Interrogation Rights and Adjudicative Competence in Adolescent Defendants: Cognitive Development, Attorney Contact, Psychosocial Symptoms*, 29 L. & Hum. Behav. 723 (2003); Haney-Caron et al., *supra* note 44, at 1955.

Children's lack of risk perception, increased susceptibility to peer influence, and diminished capacity for future orientation, also affect competency to participate generally in adjudicative proceedings.<sup>85</sup> Children ages eleven to thirteen were more likely to be impaired in their ability to voluntarily respond to police interrogation as authority figures, disclose information during consultations with defense attorneys, and respond to plea agreements.<sup>86</sup> Based on these impairments children under the age of 14 are unlikely to have the developmental capacity to meaningfully and voluntarily participate in the law enforcement process in the way that adults can.

Although it is difficult to determine the minimum age of competency for each stage of court proceedings, most research suggests that most children are not competent in the legal context of being able to have a factual or rational understanding of court process and to meaningfully communicate with their attorneys and participate in their defense until fourteen or fifteen.<sup>87</sup> As discussed previously, the U.N. Charter on The Rights of The Child sets the minimum age of juvenile prosecution at 14.

The Supreme Court has established that children are not little adults. It is time to connect this important principle to practice.

Respectfully submitted,

April Frazier-Camara, Chair  
Criminal Justice Section

August 2021

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<sup>85</sup> Grisso et al., *supra* note 44, at 340.

<sup>86</sup> Grisso et al., *supra* note 44, at 340, 351, 355.

<sup>87</sup> Grisso et al., *supra* note 44, at 356; Bath & Gerring, *supra* note 48, at 265; Viljoen et al. *supra* note 44, at 1; see Haney-Caron et al., *supra* note 44, at 1966. See also, *Dusky v. U.S.* 362 U.S. 402 (1960).

## GENERAL INFORMATION FORM

Submitting Entity: Criminal Justice Section  
Civil Rights and Social Justice Section

Submitted By: April Frazier-Camara, Chair

### 1. Summary of the Resolution

This resolution urges all jurisdictions in the United States to set a minimum age of juvenile court jurisdiction at age 14, consistent with the UN Declaration on the Rights of the Child.

### 2. Indicate which of the ABA's Four goals the resolution seeks to advance (1-Serve our Members; 2-Improve our Profession; 3-Eliminate Bias and Enhance Diversity; 4-Advance the Rule of Law) and provide an explanation on how it accomplishes this.

This resolution advances goal 4: to set a uniform minimum age of juvenile court jurisdiction in keeping with global standards and child development.

### 3. Approval by Submitting Entity

The Criminal Justice Council approved this resolution on April 10, 2021.

### 4. Has this Has this or a similar resolution been submitted to the House or Board previously?

The ABA Standards on Juvenile Justice, passed by the House of Delegates and published in 1986, set a minimum age at 10 years of age. Research on child and adolescent brain science demonstrates that this age is too low.

### 5. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?

The current ABA policy sets the minimum age at ten (ABA Juvenile Justice Standards, Juvenile Delinquency and Sanctions, Standard 2.1 (1986). This would raise the minimum age to 14.

### 6. If this is a late report, what urgency exists which requires action at this meeting of the House?

Not applicable.

### 7. Status of Legislation

There are state statutes pending to both raise the minimum age of jurisdiction and the maximum age of jurisdiction.

8. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.

Implementation will include both publication as well as programming.

9. Cost to the Association. (Both direct and indirect costs)

Cost to the Association is the indirect cost of staff time. The Standards project is part of the ABA and Section budget.

10. Disclosure of Interest. (If applicable)

Not applicable

11. Referrals

Center on Children and the Law  
 Government and Public Sector Division  
 Health Law Section  
 Section of International Law Government and Public Sector  
 Judicial Division  
 Section of Litigation  
 Section of Science & Technology Law  
 Law Practice Division  
     Solo, Small Firm and General Practice Division  
 Commission on Hispanic Legal Rights and Responsibilities  
 Commission on Homelessness & Poverty  
 Commission on Immigration  
 Commission on Racial & Ethnic Diversity in the Profession  
 Commission on Youth at Risk  
 Center for Human Rights  
 Coalition on Racial & Ethnic Justice  
 Standing Committee on Legal Aid and Indigent Defense  
 Standing Committee on Federal Judiciary  
 Young Lawyers Division

12. Name and Contact Information (Prior to the Meeting. Please include name, telephone number and e-mail address). *Be aware that this information will be available to anyone who views the House of Delegates agenda online.*

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13. Name and Contact Information. (Who will present the Resolution with Report to the House?) Please include best contact information to use when on-site at the meeting. *Be aware that this information will be available to anyone who views the House of Delegates agenda online.*

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**EXECUTIVE SUMMARY**1. Summary of the Resolution

This resolution urges all jurisdictions in the United States to set a minimum age of juvenile court jurisdiction at age 14, consistent with the UN Declaration on the Rights of the Child.

2. Summary of the issue that the resolution addresses

There is no uniformity among states as to the minimum age of juvenile court jurisdiction, and this resolution places an age that is consistent with global standards and child development.

3. Please explain how the proposed policy position will address the issue.

The resolution sets an age of 14 and the report explains that 14 is an age where children are mentally competent to be subject to a court of law. The proposed policy encourages states to set a uniform age.

4. Summary of any minority views or opposition internal and/or external to the ABA which have been identified.

The section is not aware of any opposition to this Resolution within the ABA. Opposition to the resolution most probably is external to the ABA by organizations and state offices who believe that children and youth, no matter how young, should be held legally accountable for offenses committed by them.