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## Filling the Cracks: Why Problem-Solving Courts Are Needed to Address Fetal Alcohol Spectrum Disorders in the Criminal Justice System

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## NOTE

### FILLING THE CRACKS: WHY PROBLEM-SOLVING COURTS ARE NEEDED TO ADDRESS FETAL ALCOHOL SPECTRUM DISORDERS IN THE CRIMINAL JUSTICE SYSTEM

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## I. INTRODUCTION

Francis was born with intellectual and developmental disabilities because his mother consumed alcohol while she was pregnant.<sup>1</sup> A loving family adopted Francis when he was three, at a time when medical professionals knew little about Fetal Alcohol Spectrum Disorder (FASD).<sup>2</sup> School was very difficult for Francis because he was hyperactive and had a difficult time interacting with others.<sup>3</sup> At one point, Francis's school built a three-sided box to block Francis off from the rest of the class because he distracted other students.<sup>4</sup> During his teenage years, Francis engaged in criminal behavior until he was arrested and sentenced for robbery and arson.<sup>5</sup> However, after Francis was released from jail, he found a mental health community center where medical professionals diagnosed Francis with FASD and provided him with treatment and supervision.<sup>6</sup> Currently, Francis lives in his own apartment and maintains a steady job.<sup>7</sup> Being diagnosed with FASD enabled Francis to receive the proper care and treatment necessary to allow him to move past his criminal behavior and become an independent adult.<sup>8</sup>

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1. Francis Perry, *My Life with FASD*, in 2 VISIONS 27, 27 (Christina Martens ed., 2006).

2. *Id.*

3. *Id.*

4. *Id.*

5. *See generally id.* at 28 (illustrating Francis's various encounters with law enforcement when he was a teenager).

6. *See id.* (describing Francis's first steps towards recovery after being released from prison).

7. *Id.*

8. *See id.* (explaining how learning about his problem encouraged positive changes in his life since he was finally able to understand himself).

Francis's story represents the everyday difficulties that people with FASD deal with throughout their lives.<sup>9</sup> Like Francis, FASD sufferers often have a normal IQ but struggle to successfully function within society.<sup>10</sup> In particular, FASD sufferers find themselves in legal trouble at a much higher rate than the normal population and are much more likely to recommit their crimes.<sup>11</sup> However, since many FASD sufferers test at a normal IQ level, they do not qualify as intellectually disabled and do not receive treatment.<sup>12</sup> To remedy this problem, states should create problem-solving courts specifically designed to address and adjudicate offenders with FASD. Counties all over the country have established successful problem-solving courts for offenders with drug addictions, mental illness, and Post-Traumatic Stress Disorder (PTSD).<sup>13</sup> In fact, every state in the United States has at least one problem-solving court for drug-related problems,<sup>14</sup> and the implementation of a problem-

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9. See generally *id.* (recognizing Francis is dedicated to helping others who have been disadvantaged by FASD).

10. See RESOLUTION 112B at 5, AM. BAR ASS'N. (2012), [http://www.americanbar.org/content/dam/aba/administrative/mental\\_physical\\_disability/Resolution\\_112B.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/mental_physical_disability/Resolution_112B.authcheckdam.pdf) (asserting individuals with FASD find it difficult to "function at an age-appropriate level").

11. *Id.* at 6–7.

12. See *id.* at 8 (indicating an IQ score of 70 or below qualifies an individual as intellectually disabled). In *Atkins v. Virginia*, the U.S. Supreme Court held that it was unconstitutional to execute an individual with an intellectual disability. *Id.* Yet, since individuals with FASD have IQs higher than 70, they do not benefit from *Atkins*. *Id.*

13. See generally *Problem-Solving Courts Resource Guide*, NAT'L CTR. FOR STATE CTS., <http://www.ncsc.org/Topics/Problem-Solving-Courts/Problem-Solving-Courts/Resource-Guide.aspx> (last visited Oct. 6, 2015) (describing different problem-solving courts and how they work while featuring various articles in support of problem-solving courts).

14. E.g., COLO. REV. STAT. § 13-3-101(9) (2014) (authorizing the Colorado state court administrator to seek federal funding to aid and expand veteran treatment courts); FLA. STAT. § 394.47891 (2012) (allowing the chief judge in Florida to implement Military Veterans and Servicemembers Court Program); 730 ILL. COMP. STAT. 167/15 (2012) (permitting the chief judge of each judicial circuit in Illinois to create Veterans and Servicemembers Court Programs); ME. REV. STAT. tit. 4, § 433 (2011) (regulating veteran treatment courts in Maine); MICH. COMP. LAWS § 600.1201 (2015) (implementing regulations for veteran treatment courts in Michigan); MO. REV. STAT. § 478.008 (2015) (authorizing veteran treatment courts in Missouri); TEX. GOV'T ANN. CODE § 434.017 (West 2012 & Supp. 2014) (funding veteran assistance programs in Texas); see John A. Bozza, *Benevolent Behavior Modification: Understanding the Nature and Limitations of Problem-Solving Courts*, 17 WIDENER L.J. 97, 102 (2007) (noting, since 2007, there are more than 1,500 drug and specialty courts in the United States); Kevin S. Burke, *Just What Made Drug Courts Successful?*, 36 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 39, 40 (2010) (illustrating the success of the first drug courts encouraged state officials all across the country to implement them in their state); Jerome Eckrich & Roland Loudenburg, *Answering the Call: Drug Courts in South Dakota*, 57 S.D. L. REV. 171, 171 (2012) (describing a historical background of American drug courts and their purpose).

solving court would remedy many of the issues facing offenders with FASD.<sup>15</sup>

States and legal professionals are starting to acknowledge that criminal offenders with FASD are a significant problem within the U.S. justice system.<sup>16</sup> In 2012, the Alaska State Legislature passed legislation making FASD a mitigating factor in criminal sentencing.<sup>17</sup> The legislature stated that, because people with FASD lack the necessary brain functioning to learn from past consequences, criminal offenders with FASD are less culpable and need treatment.<sup>18</sup> Also in 2012, the American Bar Association (ABA) authored a resolution urging legal professionals to educate themselves about the issues facing offenders with FASD, and asked “law and policy makers to implement laws and policies that reflect the serious effects of prenatal alcohol exposure.”<sup>19</sup> More law and policy makers now realize that criminal offenders with FASD are a prominent issue,<sup>20</sup> and a problem-solving court designed to treat FASD sufferers is a practical solution. Therefore, state legislatures should create courts modeled after drug courts because an FASD court would appropriately punish offenders for their crimes, give offenders with FASD the treatment they need to become productive members of society, and stop the “revolving door” of FASD offenders in the criminal justice system.<sup>21</sup>

Part I of this article provides background about the symptoms of FASD, the diagnostic procedure used to identify individuals with FASD, and how both relate to crime and recidivism rates amongst FASD sufferers. Part II discusses the traditional purposes behind punishment, precedent, and legislation that mitigate sentences because of a lack of culpability, and the recent movement towards utilizing problem-solving courts to better fulfill the purposes of punishment for less culpable offenders. Part III of this article finds that traditionally sentencing FASD offenders is inconsistent with the traditional purposes of punishment and Supreme Court precedent, and it concludes that adopting a problem-solving court to deal with FASD offenders is the best solution to the problem.

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15. See Burke, *supra* note 14, at 40 (asserting the reason for drug courts’ success is due to the fact that these courts treat drug addiction through “monitored treatment rather than mere incarceration or probation”).

16. See RESOLUTION 112B, *supra* note 10, at 5 (reporting that recently, there are many death penalty cases which suggest the defendants suffered from FASD).

17. ALASKA STAT. § 12.55.155(d)(20(A)) (2014).

18. ALASKA FASD P’SHIP, SENATE BILL 151 at 2 (2012), [http://dhss.alaska.gov/abada/Documents/pdf/SB151position\\_overview.pdf](http://dhss.alaska.gov/abada/Documents/pdf/SB151position_overview.pdf).

19. RESOLUTION 112B, *supra* note 10, at 2.

20. See *generally id.* at 6 (noting 50 % of individuals with FASD have a history of confinement).

21. See *id.* at 8 (stating FASD should be a mitigating factor in sentencing).

## II. DIAGNOSIS, SYMPTOMS, AND CRIMINALITY OF FASD

Diagnosing a person with FASD is not always a straightforward process, but medical personnel do follow certain guidelines when making a diagnosis.<sup>22</sup> The symptoms of FASD can vary from person to person, but generally people with FASD have low impulse control, low executive functioning, and a tendency towards explosive episodes.<sup>23</sup> These characteristics make it difficult for sufferers to interact with law enforcement.<sup>24</sup> The statistical correlation between FASD sufferers and criminal behavior suggests a strong link between the two and many experts tend to agree.<sup>25</sup>

### A. *Diagnosis of FASD*

FASD is a complicated syndrome that is difficult to pinpoint because the common symptoms vary in frequency and severity from person to person.<sup>26</sup> FASD is a group of conditions called Fetal Alcohol Syndrome (FAS), partial Fetal Alcohol Syndrome (pFAS), Alcohol-Related Neurodevelopmental Disorder (ARND), and Alcohol-Related Birth Defect.<sup>27</sup> It occurs in a person whose mother consumed alcohol during pregnancy.<sup>28</sup> Further, it is difficult for medical professionals to diagnose FASD because there are no specific or medically accepted diagnostic criteria available.<sup>29</sup> However, medical personnel have developed four broad areas of clinical features they consider part of the diagnostic crite-

22. See CTR. FOR DISEASE CONTROL, FETAL ALCOHOL SYNDROME: GUIDELINES FOR REFERRAL AND DIAGNOSIS 2 (2004), [http://www.cdc.gov/ncbddd/fasd/documents/FAS\\_guidelines\\_accessible.pdf](http://www.cdc.gov/ncbddd/fasd/documents/FAS_guidelines_accessible.pdf) (listing four broad factors which have helped diagnose fetal alcohol syndrome).

23. Kathryn Page, *The Invisible Havoc of Prenatal Alcohol Damage*, 4 J. CTR. FAM. CHILD. & CTS. 67, 76 (2003) (explaining individuals with FASD share similar behavioral traits with those who are diagnosed with AD/HD).

24. See JOHN HOWARD SOC'Y OF B.C., FACT SHEET, FETAL ALCOHOL SPECTRUM DISORDER AND THE CRIMINAL JUSTICE SYSTEM: A POOR FIT 2 (2013), <http://www.johnhowardbc.ca/images/jhsbc-factsheet-fasd.pdf> (stating individuals suffering from FASD lack the ability to think abstractly which places them at risk at all stages of the criminal justice system).

25. See *id.* at 1, 3 (stating FASD experts recognize a need to establish programs to assist FASD people who are involved in, or at risk of involvement in, the criminal justice system, given the increasing data of FASD sufferers in conflict with the law).

26. See CTR. FOR DISEASE CONTROL, *supra* note 22, at 2 (explaining physicians may not know the specific timing and severity of retardation needed to accurately diagnose FASD because the four areas of diagnostic criteria are too broad).

27. See *Fetal Alcohol Spectrum Disorders*, AM. ACAD. OF PEDIATRICS, <https://www.healthychildren.org/English/health-issues/conditions/chronic/Pages/Fetal-Alcohol-Spectrum-Disorders.aspx> (last updated Aug. 20, 2015) (discussing the different conditions on the FASD spectrum and listing their respective symptoms).

28. *Id.*

29. CTR. FOR DISEASE CONTROL, *supra* note 22, at 2.

ria.<sup>30</sup> The categories are selected facial malformations, growth retardation, Central Nervous System (CNS) abnormalities, and maternal alcohol consumption during pregnancy.<sup>31</sup> Doctors base the diagnosis on an overall examination of these broad categories.<sup>32</sup> Despite these obstacles, physicians are able and willing to diagnose a person with FASD.<sup>33</sup>

### B. *FASD Symptoms*

FASD sufferers exhibit several common behavioral characteristics, which often lead to criminal activity.<sup>34</sup> FASD sufferers lack impulse control, have difficulty connecting consequences with future actions, and have a “tendency towards explosive episodes.”<sup>35</sup> As a result, they are more likely to steal or react angrily to small disturbances.<sup>36</sup> Oftentimes, FASD sufferers struggle with empathizing with others and are particularly vulnerable to social influences, peer pressure, and authority figures.<sup>37</sup> People with FASD also have a low level of adaptive behavior, severely impaired executive functioning, and secondary disabilities.<sup>38</sup> A low level of adaptive behavior impairs the ability to act appropriately in social situations, utilize common sense, and solve problems.<sup>39</sup> Executive functioning includes the “ability to plan, make good judgments, put off gratification, connect cause and effect, empathize with others, take responsibility, imagine a future, remember the past, and connect the past with the present.”<sup>40</sup> Secondary disabilities, such as a disrupted school experience or a chemical dependence, can also develop.<sup>41</sup> Many of these

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30. *Id.*

31. *Id.*

32. *Id.* at 3.

33. *See id.* at 1–3 (explaining although the method to diagnose FASD is difficult, physicians have found that FAS is prevalent in “0.2 to 1.5 cases per 1,000 births across various populations”).

34. SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., U.S. DEP’T OF HEALTH & HUMAN SERVS., FETAL ALCOHOL SPECTRUM DISORDERS AND THE CRIMINAL JUSTICE SYSTEM 1 (2006), [http://fasdcenter.samhsa.gov/documents/WYNK\\_Criminal\\_Justice5.pdf](http://fasdcenter.samhsa.gov/documents/WYNK_Criminal_Justice5.pdf).

35. *Id.*

36. *See id.* (“Persons with an FASD may break the law without intending to do so. For example, they may touch people when it is unwanted and think they are just being friendly. They may take things that do not belong to them because they like them.”).

37. *Id.* For example, women with FASD may get “involved with destructive men for food, shelter, attention, or drugs.” *Id.*

38. Page, *supra* note 23, at 76.

39. *Id.*

40. *Id.* “People with FAS/E tend to see only what is right in front of their noses at any given time. This tendency is independent of IQ, upbringing, other talents, or even intention.” *Id.*

41. *Id.* at 71.

symptoms significantly contribute to high rates of criminal behavior and recidivism among people with FASD.<sup>42</sup>

### C. *How FASD Interacts with the Criminal Justice System*

Many medical and legal professionals, who have a general understanding of FASD, see a connection between FASD symptoms and criminal activity.<sup>43</sup> For example, because of their low-adaptive behavior, people with FASD often repeat crimes of opportunity, such as shoplifting, but generally, their crimes do not increase in severity.<sup>44</sup> As a result of their impaired executive functioning, FASD sufferers struggle to learn from prior misconduct and set future goals.<sup>45</sup> In addition, since people with FASD are susceptible to peer pressure, they are particularly vulnerable to manipulation by other criminals and to giving false confessions to police.<sup>46</sup>

Empirical data demonstrates a strong connection between FASD and criminal behavior.<sup>47</sup> One study found that 14% of individuals between the ages of six and eleven, 61% of adolescents, and 58% of adults with FAS or FAE (subsets of FASD) had been in trouble with the law at least once, and overall, 60% of FAS/FAE sufferers over the age of twelve “had been in trouble with authorities, charged with a crime, or convicted of a

42. SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., *supra* note 34, at 2; see JOHN HOWARD SOC'Y OF B.C., *supra* note 24, at 2 (explaining how punishment for crimes rarely deters people with FASD from committing future crimes); Judith A. Jones, Comment, *Fetal Alcohol Syndrome—Contrary Issues of Criminal Liability for the Child and His Mother*, 24 J. JUV. L. 165, 172, (2003–2004) (stating 60% of FAS/FAE individuals age twelve or older have been charged with, or convicted of, a crime); Page, *supra* note 23, at 78 (asserting people suffering from FASD are more susceptible to explosive episodes which in turn makes it more likely for these people to engage in criminal activity).

43. See SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., *supra* note 34, at 1 (stating researchers estimate that more than half of people with FASD have been in trouble with the law); Page, *supra* note 23, at 75–76 (noting AD/HD's correlation with delinquency is well documented, and inferring that since AD/HD is similar to FASD, FASD can be correlated with delinquency). See generally JOHN HOWARD SOC'Y OF B.C., *supra* note 24, at 3 (discussing experts' recommendations to assist FASD individuals who are in the criminal justice system).

44. SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., *supra* note 34, at 2.

45. See Page, *supra* note 23, at 77 (explaining people with FASD have an inability to think ahead or to see anything if it is not in front of them).

46. SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., *supra* note 34, at 1–2.

47. See *id.* at 1 (citing ANN P. STREISSGUTH ET AL., CTR. FOR DISEASE CONTROL AND PREVENTION, UNDERSTANDING THE OCCURRENCE OF SECONDARY DISABILITIES IN CLIENTS WITH FETAL ALCOHOL SYNDROME (FAS) AND FETAL ALCOHOL EFFECTS (FAE) (1996), <http://lib.adai.uw.edu/pubs/bk2698.pdf> (summarizing statistical correlations between FASD suffers and crime); Jones, *supra* note 42, at 172 (discussing a study comprised of 415 individuals with FAS that established a link between the syndrome, criminality and delinquency).



crime.”<sup>48</sup> Another study estimated that, at some point in their lives, 35% of individuals with FASD have been in jail or prison.<sup>49</sup> In addition, a Canadian study estimated that 1 out of every 100 Canadians are affected by FASD, and that 60% of people with FASD over the age of twelve have been charged with, or convicted of, a crime.<sup>50</sup> The results of these studies indicate that a large percentage of criminals suffer from FASD-related brain dysfunctions.<sup>51</sup> A person with a brain dysfunction that directly contributes to criminal behavior needs treatment for the dysfunction, not a prison sentence.<sup>52</sup>

Medical experts have identified ways to mitigate the symptoms of FASD so that people with FASD can lead productive lives.<sup>53</sup> First, experts recommend that treatment administrators provide sufferers with an external brain.<sup>54</sup> The external brain is a person or a group of people who are familiar with the FASD sufferer and the symptoms of FASD.<sup>55</sup> An external brain supervises the person’s decision-making, treatment, and employment.<sup>56</sup> Second, experts recommend introducing a positive au-

48. Jones, *supra* note 42, at 172.

49. SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., *supra* note 34, at 1.

50. JOHN HOWARD SOC’Y OF B.C., *supra* note 24, at 1.

51. *Cf.* Jones, *supra* note 42, at 173 (reporting “ninety-four percent of the subjects involved in the study exhibited mental health problems”); *Fetal Alcohol Spectrum Disorders*, ACBR.COM, <http://www.acbr.com/fas/fasmain.htm> (last visited Nov. 12, 2015) (“Of FAE individuals between the ages of 12 and 51 . . . 60% will experience trouble with the law.”).

52. *See* Jones, *supra* note 42, at 173 (arguing that imprisoning individuals who cannot learn from their experience and who consequently repeat crimes after their release is costly and ineffective); *see also* *Fetal Alcohol Spectrum Disorders*, *supra* note 51 (“Punishment does not cure neurological damage.”).

53. *See id.* (“Early diagnosis can help prevent secondary disabilities such as mental health problems, dropping out of school, trouble with the law and substance abuse.”); *see also* JOHN HOWARD SOC’Y OF B.C., *supra* note 24, at 3 (discussing ways in which society can accommodate people with FASD, such as assisting with their decision-making, reframing their behaviors, and providing them with a proper diagnosis); SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., *supra* note 34, at 2 (stating a strong support system from family and others, as well as medication, may be more appropriate for people with FASD than rehabilitation).

54. JOHN HOWARD SOC’Y OF B.C., *supra* note 24, at 3; *see* Page, *supra* note 23, at 87 (noting drug courts are a good example of an external brain).

55. *See* Page, *supra* note 23, at 80–81, 87 (stating caregivers, such as social workers, counselors, and nurses, and the defense attorney can compose the external brain).

56. *See id.* at 80, 87 (discussing how the external brain ensures “that the affected person’s life stays on course” and monitors “educational, physical health, medical, family, and mental health needs”). *See generally* JOHN HOWARD SOC’Y OF B.C., *supra* note 24, at 3 (recommending several resources in British Columbia and Okanagan).

thority figure into the FASD sufferer's life.<sup>57</sup> People with FASD often emulate people with strong personalities, so a single authority figure can heavily influence the sufferer's behavior.<sup>58</sup> Third, experts recommend immersing FASD criminal offenders in a process that helps them learn from past experiences because they often struggle to connect cause and effect.<sup>59</sup> A process that repetitively connects bad conduct with bad consequences and good conduct with good consequences is especially beneficial, so a program designed around consistently monitoring and rewarding positive conduct would be an effective treatment for FASD offenders.<sup>60</sup> Finally, experts recommend a consistent routine that assists in staying focused on small, achievable goals.<sup>61</sup> A routine also helps people with FASD maintain their anxiety levels because they have a better understanding of what to expect, and therefore, they feel more in control of their daily lives.<sup>62</sup> Finally, medical professionals can also prescribe medication to help with the symptoms.<sup>63</sup> With structure, support, and supervision, people with FASD can mitigate their symptoms and avoid criminal behavior, hold a job, and maintain a household.<sup>64</sup>

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57. See Page, *supra* note 23, at 87 (noting the Parent-Child Assistance Program (p-CAP) in Washington State is an excellent program that uses mentors who serve as the "external brain" of people with FASD).

58. Cf. JOHN HOWARD SOC'Y OF B.C., *supra* note 24, at 2 ("[Individuals with FASD] want to please those they perceive to be in positions of authority.").

59. See *id.* ("[I]f a person with FASD commits a crime and is later convicted, they may not be able to draw a connection between the two events.").

60. Cf. Page, *supra* note 23, at 87 (stating drug treatment court programs emphasize celebrating individual success while providing immediate consequences for infractions).

61. See JOHN HOWARD SOC'Y OF B.C., *supra* note 24, at 4 ("It is important for people with FASD to have a set routine that rarely changes.").

62. *Id.*

63. See *Fetal Alcohol Spectrum Disorders (FASDs): Treatment*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/ncbddd/fasd/treatments.html#Medication> (last updated Sept. 5, 2014) (listing examples of medication used to treat FASD symptoms); *Fetal alcohol syndrome*, MAYO CLINIC, <http://www.mayoclinic.org/diseases-conditions/fetal-alcohol-syndrome/basics/treatment/con-20021015> (last visited Oct. 7, 2015) ("Intervention services may involve . . . [m]edications to help with some symptoms.").

64. See, e.g., CMTY. LIVING B.C., SUPPORTING SUCCESS FOR ADULTS WITH FETAL ALCOHOL SPECTRUM DISORDER 15 (2011), <http://www.communitylivingbc.ca/wp-content/uploads/Supporting-Success-for-Adults-with-FASD.pdf> (discussing how structure is vital for individuals with FASD to achieve the goal of independence); SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., U.S. DEP'T OF HEALTH & HUMAN SERVS., INDEPENDENT LIVING FOR PEOPLE WITH FETAL ALCOHOL SPECTRUM DISORDER 2 (2005) [hereinafter INDEPENDENT LIVING], [http://www.fasdcenter.samhsa.gov/documents/WYNKIndLiving\\_6\\_colorJA\\_new.pdf](http://www.fasdcenter.samhsa.gov/documents/WYNKIndLiving_6_colorJA_new.pdf) (discussing supportive housing programs and appropriate training that can help people with FASD hold jobs); *Fetal Alcohol Spectrum Disorders (FASDs): Treatment*, *supra* note 63 (discussing protective factors and types of treatment that help reduce the effects of FASD); *Fetal alcohol syndrome*, *supra* note 63 (recommending families whose children have FASD to seek professional and community support); see also

FASD is a difficult condition to identify, but experts estimate that the syndrome is widely prevalent.<sup>65</sup> Although the symptoms of FASD vary in degree, FASD commonly affects a person's executive brain functioning and level of adaptive behavior.<sup>66</sup> These types of symptoms make it difficult for a sufferer to plan for the future, to learn from his or her mistakes, and to navigate the legal system.<sup>67</sup> As a result, many medical and legal professionals acknowledge a strong connection between FASD and criminal propensity.<sup>68</sup> Treatment and structure, however, can mitigate the negative symptoms of FASD.<sup>69</sup>

### III. OFFENDERS WITH BRAIN DYSFUNCTIONS ARE LESS CULPABLE

When determining whether a particular criminal sentence meets the traditional purposes of punishment, courts consider the culpability of the offender.<sup>70</sup> In general, if a particular group of persons is less culpable than an average offender, or less able to understand their actions than an average offender, the justifications for a particular punishment are not

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SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., *supra* note 34, at 2 ("Many clients with an FASD can remain crime free with intense supervision.").

65. *Cf.* JOHN HOWARD SOC'Y OF ONTARIO, FACT SHEET, FETAL ALCOHOL SPECTRUM DISORDER AND THE CRIMINAL JUSTICE SYSTEM: A POOR FIT 1 (2010), <http://www.hscc.on.ca/Resource%20Library/Developmental%20Disability%20and%20Dual%20Diagnosis/Fetal%20Alcohol%20Spectrum%20Disorder%20and%20the%20Criminal%20Justice%20System%20-%20A%20Poor%20Fit%20-%202010.pdf> (articulating FASD is probably more common than estimated due to low diagnosis frequency).

66. *See* INDEPENDENT LIVING, *supra* note 64, at 1 (explaining individuals with FASD have cognitive problems which stunt social development as well as making it difficult to live independently).

67. JOHN HOWARD SOC'Y OF B.C., *supra* note 24, at 2.

68. Jones, *supra* note 42, at 172.

69. *See Fetal Alcohol Spectrum Disorders (FASDs): Treatment*, *supra* note 63 (listing the types of treatments available to individuals with FASD); *see also* CMTY. LIVING B.C., *supra* note 64, at 15 (stating structure is a vital component in coping with FASD symptoms); *cf.* INDEPENDENT LIVING, *supra* note 64, at 1 (stressing a supportive community as essential for individuals with FASD). *See generally Fetal alcohol syndrome*, *supra* note 63 (discussing FASD diagnosis requires a physician to make a thorough assessment).

70. *Atkins v. Virginia*, 536 U.S. 304, 305, 319 (2002); *Penry v. Lynaugh*, 492 U.S. 302, 304 (1989); *see Roper v. Simmons*, 543 U.S. 551, 571–72 (2005) (holding juvenile offenders are less likely to weigh the costs and benefits of the possibility of execution, and that they are less susceptible to deterrence); *see also Lockett v. Ohio*, 438 U.S. 586, 626 (1978) (explaining the history of criminal law is deeply rooted in considering the culpability of a defendant prior to any judgment); *cf. Ford v. Wainwright*, 477 U.S. 399, 410 (1986) (holding the Eighth Amendment requires courts to consider the mental capacity of prisoners before sentencing them to death).

met.<sup>71</sup> For instance, the Supreme Court found in *Ford v. Wainwright*,<sup>72</sup> *Atkins v. Virginia*,<sup>73</sup> and *Roper v. Simmons*<sup>74</sup> that it was against public policy and unconstitutional to execute an insane inmate, an intellectually disabled inmate, and a child, respectively.<sup>75</sup> Therefore, when a group of persons is less culpable, society creates a different type of punishment to meet the goals of rehabilitation, incapacitation, deterrence, and retribution.<sup>76</sup> One of the more popular ways many states have chosen to approach changes in sentencing is through the use of problem-solving courts.<sup>77</sup> Problem-solving courts provide a variety of offenders the opportunity to receive the proper treatment necessary to permanently end their criminal behavior and become productive members of society.<sup>78</sup>

### A. *Purposes of Punishment*

The traditional goals of retribution, rehabilitation, incapacitation, and deterrence guide the formation of sentencing guidelines in the United States.<sup>79</sup> Punishment purposes are generally categorized into utilitarian

71. *Atkins*, 536 U.S. at 305; see *Ford*, 477 U.S. at 422 (determining whether the offender is aware of the punishment and why they are receiving the punishment is necessary to justify such a severe sentence).

72. 477 U.S. 399.

73. 536 U.S. 304.

74. 543 U.S. 551.

75. See *Simmons*, 543 U.S. at 572 (holding death penalty sentencing is not an appropriate sentence for juvenile offenders); *Atkins*, 536 U.S. at 314 (stating Congress enacted legislation expressly prohibiting death penalty sentences for mentally disabled defendants); *Ford*, 477 U.S. at 410 (stating the Eighth Amendment prevents a death penalty sentence to insane prisoners).

76. See, e.g., Stephen Hunter et al., *New Jersey's Drug Courts: A Fundamental Shift from the War on Drugs to a Public Health Approach for Drug Addiction and Drug-Related Crime*, 64 RUTGERS L. REV. 795, 809–10 (2012) (stating defendants were given the opportunity of a rehabilitative drug treatment through judge supervision in a drug treatment program).

77. See Eckrich & Loudenburg, *supra* note 14, at 171 (asserting that as of December 31, 2009, there were 2,459 drug courts in the United States, and communities establish the drug courts that address the problems in their community); Hunter et al., *supra* note 76, at 806–07 (pointing out that drug courts were created to address and focus on the drug offender to monitor and treat the offender's addiction).

78. See Burke, *supra* note 14, at 40, 42 (discussing how the procedural fairness of drug courts positively affects a participant's mindset); 4 SHELLI B. ROSSMAN ET AL., *THE MULTI-SITE ADULT DRUG COURT EVALUATION: THE IMPACT OF DRUG COURTS* 71–72 (2011), <https://www.ncjrs.gov/pdffiles1/nij/grants/237112.pdf> (illustrating offenders enrolled in drug courts, compared to those in the comparison group, engage in fewer criminal acts).

79. See Richard S. Frase, *Punishment Purposes*, 58 STAN. L. REV. 67, 70 (2005) (describing the purpose of retribution, rehabilitation, incapacitation, and deterrence is to lessen or prevent future criminal acts).

and non-utilitarian.<sup>80</sup> Utilitarian purposes include rehabilitation, incapacitation, and deterrence.<sup>81</sup> In general, these purposes seek to reduce recidivism<sup>82</sup> in an offender and other would-be offenders.<sup>83</sup> Rehabilitation assumes that offenders have identifiable problems that, if treated, would decrease the likelihood of further criminal conduct.<sup>84</sup> Incapacitation seeks to remove high-risk offenders from the community with the assumption that prison will not intensify their behavior.<sup>85</sup> Finally, deterrence seeks to prevent future crimes by instilling fear of punishment in offenders on the basis that the offender will connect the cause with the effect or, more specifically, the crime with the punishment.<sup>86</sup>

Retribution is the primary non-utilitarian sentencing principle.<sup>87</sup> Generally, it assumes that offenders' punishments should coincide with the offenders' blameworthiness.<sup>88</sup> Blameworthiness is defined by the nature and seriousness of the crime and the defendant's culpability.<sup>89</sup> Therefore, retribution is essentially the principle that, in the name of fairness and justice, a defendant deserves to be punished for the criminal acts he commits.<sup>90</sup> These traditional goals of punishment—rehabilitation, incapacitation, deterrence, and retribution—serve as guidance for the judiciary and legislators when evaluating sentencing in the criminal justice system.<sup>91</sup>

80. *Id.* at 69.

81. *Id.* at 70.

82. *Recidivism*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2006) (defining recidivism as a "tendency to relapse into criminal behavior").

83. *See* Frase, *supra* note 79, at 70 ("[U]tilitarian sentencing principles focus on using criminal penalties to prevent or lesson the seriousness of future criminal acts by the offender and/or by other, would-be offenders.").

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.* at 73.

88. *Id.*

89. *Id.* Culpability depends on several factors such as the offender's intent, his capacity, his motives, and his role in the crime. *Id.*

90. *Id.* Fairness and justice is afforded to the victim, the victim's family, society, and to the defendant. *Id.*

91. *See, e.g.,* *Graham v. Florida*, 560 U.S. 48, 71 (2010) (citing to *Ewing v. California*, 538 U.S. 11, 25 (2008)) (explaining a sentence of life imprisonment without parole for juvenile non-homicide offenders cannot be justified by any of the goals of penal sanctions); *Roper v. Simmons*, 543 U.S. 551, 572 (2005) (conceding juvenile offenders are capable of committing brutal crimes, but finding that imposition of the death penalty does not support the goals of retribution and deterrence); *Atkins v. Virginia*, 536 U.S. 304, 305 (2002) (concluding retribution and deterrence of capital crimes create the foundational support for the death penalty, yet it needs to be determined whether it applies to mentally disabled offenders); *Penry v. Lynaugh*, 492 U.S. 302, 304, 336 (1989) (providing the main focus of retribution is that the punishment must be directly related to the defendant's personal culpability); *Ford v. Wainwright*, 477 U.S. 399, 408–10 (1986) (explaining the underlying

### B. Case Law Supporting Leniency for Less Culpable Offenders

The American judicial system seeks to match an offender's level of culpability to the punishment the offender receives.<sup>92</sup> Accordingly, the United States Supreme Court has developed a body of case law that demonstrates society's recognition that the traditional pedagogical goals of punishment are not met by punishing people with low levels of culpability.<sup>93</sup> When a punishment, as applied to a particular offender, does not further any goal, then it violates public policy and should be reevaluated.<sup>94</sup>

Beginning in 1978, the Supreme Court held that the trier of fact should have discretion when considering mitigating factors and should not be limited to a specific list.<sup>95</sup> The Court in *Lockett v. Ohio* held that Ohio's death penalty statute violated public policy because it did not allow the trier of fact to consider all relevant mitigating factors.<sup>96</sup> The decision in *Lockett* was limited to death penalty cases, but the Court discussed the country's established practice of individualized sentencing based on public policy considerations.<sup>97</sup> In addition, the Ninth Circuit Court of Ap-

theory of criminal punishment, retribution, is not served by executing an insane person); *Lockett v. Ohio*, 438 U.S. 586, 586, 620 (1978) (describing rehabilitation as a mitigating factor to be considered before imposing the death penalty).

92. *Penry*, 492 U.S. at 304; see *Atkins*, 536 U.S. at 305 (stating the severity of criminal punishment depends on the offender's level of culpability); see, e.g., *Simmons*, 543 U.S. at 571 (discussing juveniles differ from adults in that they lack extreme culpability, therefore they do not merit the death penalty); see also *Ford*, 477 U.S. at 406 (recognizing evidence of contemporary values must be taken into account before determining whether a particular punishment comports with humanity); *Lockett*, 438 U.S. at 626 (White, J., concurring) (explaining culpability for imposition of the death penalty differs based on intent to destroy human life).

93. See, e.g., *Simmons*, 543 U.S. at 571 (discussing juveniles differ from adults in that they lack extreme culpability and therefore, do not merit the death penalty); *Atkins*, 536 U.S. at 321 (Rehnquist, J., dissenting) (finding the execution of "mentally retarded" offenders do not advance the penal goals of punishment); *Penry*, 492 U.S. at 304 (recognizing mental problems as a mitigating factor for culpability of a crime); *Ford*, 477 U.S. at 409 (describing society's abhorrence towards implementing the death penalty against people who cannot comprehend their actions); *Lockett*, 438 U.S. at 626 (White, J., concurring) (recognizing a distinction between imposition of the death penalty based on the culpability of individuals who intended to take human life and those who did not).

94. See *Ford*, 477 U.S. at 409 (concluding the Eighth Amendment prohibition of executing the mentally insane stems from societal abhorrence towards imposing the death penalty on one who has no mental capacity).

95. See *Lockett*, 438 U.S. at 597, 608 (reversing and remanding defendant's death sentence because the sentencing judge was not able to take into account all mitigating factors such as the defendant's character, prior record, and small role in the crime).

96. *Id.* at 608.

97. *Id.* at 602.

peals has also held that “organic brain damage”<sup>98</sup> and other situations that render an offender less culpable should be considered during sentencing and that punishment should match the culpability of the offender.<sup>99</sup> In general, the Supreme Court and other lower courts have consistently held that situations, which render an offender less culpable, should be considered during sentencing.

Moreover, the Supreme Court has previously struck down sentencing statutes that did not meet the traditional purposes of punishment.<sup>100</sup> In *Ford v. Wainwright*, the Court determined that the insane could not be executed.<sup>101</sup> Analyzing the common law, the Court found that executing people who do not fully understand the consequences of their actions is against public policy because there is no retributive value in such a punishment.<sup>102</sup>

In *Atkins v. Virginia*, the Supreme Court held that it is unconstitutional and against public policy to execute people with a mental retardation.<sup>103</sup> The Court in *Atkins* focused on whether executing intellectually disabled

98. See *Stankewitz v. Woodford*, 365 F.3d 706, 723 (9th Cir. 2004). The Ninth Circuit Court of Appeals has specifically identified “organic brain damage,” such as FASD, as a type of condition that courts should consider in criminal sentencing. *Id.*

99. See *Graham v. Florida*, 560 U.S. 48, 71 (2010) (recognizing a lack of penal justification cannot support severe punishment for an accused with diminished culpability, such as a juvenile); *Roper v. Simmons*, 543 U.S. 551, 571 (2005) (discussing juveniles differ from adults in that they lack extreme culpability; therefore, they do not merit the death penalty); *Atkins v. Virginia*, 536 U.S. 304, 305 (2002) (discussing an offender’s mental deficiencies diminish his personal culpability, which in turn lessens the level of punishment); *Penry v. Lynaugh*, 492 U.S. 302, 304, 306 (1989) (reversing the judgment because the jury was not allowed to fully consider defendant’s mitigating evidence, such as his diagnosis of organic brain damage, to diminish his level of culpability); *Ford v. Wainwright*, 477 U.S. 399, 406 (1986) (recognizing evidence of contemporary values must be taken into account before determining whether a particular punishment comports with humanity); *Lockett*, 438 U.S. at 606 (holding the Eighth and Fourteenth Amendments require a court to consider mitigating factors in capital cases).

100. *Simmons*, 543 U.S. at 572, 578–79; *Lockett*, 438 U.S. at 606; see *Atkins*, 536 U.S. at 305 (concluding the execution of mentally disabled offenders under Virginia’s law did not meet the goals of punishment); *Penry*, 492 U.S. at 304 (stating the Texas law did not adequately allow the jury to consider defendant’s mental incapacity as a mitigating factor); *Ford*, 477 U.S. at 413 (finding Florida’s procedure for determining competency of an inmate does not comport with due process).

101. 477 U.S. at 410. Alvin Ford was convicted of murder and sentenced to death, but while in prison went insane. *Id.* at 399.

102. See *id.* at 409–10 (citing common law doctrines and overall public policy against executing someone who does not understand why his fundamental rights have been stripped).

103. 536 U.S. at 321. Daryl Atkins was convicted of murdering, abducting, and robbing Eric Nesbitt. *Id.* at 307. During sentencing, a psychologist determined that Atkins had an IQ of 59 and was mildly intellectually disabled, but Atkins was still sentenced to death. *Id.* at 308–09.

individuals met the traditional purposes of punishment.<sup>104</sup> It reasoned that executing an intellectually disabled person did not accomplish deterrence or retribution because, while intellectually disabled people frequently know the difference between right and wrong, they do not have the capacity to control their impulses, learn from their mistakes, and understand social cues.<sup>105</sup> The Court in *Atkins* also noted society's aversion to executing the intellectually disabled, and it felt that the number of states that prohibited executions for the intellectually disabled provided compelling evidence that society believed that intellectually disabled offenders are less culpable than an average offender.<sup>106</sup> The Court's analysis and decision in *Atkins* represents the importance of balancing an offender's culpability with the punishment administered by the U.S. justice system.<sup>107</sup>

In *Graham v. Florida*, the Supreme Court held that juveniles could not be sentenced to life without parole for non-homicide offenses because the traditional purposes of punishment—retribution, deterrence, incapacitation, and rehabilitation—were not met.<sup>108</sup> The Court again analyzed juvenile offenders' lower level of culpability because of their impulsive behavior and impaired ability to connect criminal behavior with punishment.<sup>109</sup> Sentencing juveniles to life did not meet the goal of rehabilitation because the offender was not given the ability to re-enter society at all, derailing any motivation to change.<sup>110</sup> Due to juvenile offenders' "lack of maturity and an underdeveloped sense of responsibility," the Court found that a sentence for life without parole was inconsistent with public policy because it did not further retribution, deterrence, or rehabilitation.<sup>111</sup>

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104. Compare *Ford*, 477 U.S. at 410 (reasoning the Eighth Amendment, in light of the common law and the evolving standards of decency, bars the execution of the insane), with *Atkins*, 536 U.S. at 317–21 (concluding the penological goal of execution is not served by executing the mentally disabled).

105. *Atkins*, 536 U.S. at 317–21. "Because of [mentally retarded persons'] impairment, however, by definition they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others." *Id.* at 318.

106. *Id.* at 316.

107. See generally *Graham v. Florida*, 560 U.S. 48, 71 (2010) (explaining the penological justifications for punishment must be weighed against an individual's culpability before punishment is delivered).

108. *Id.*

109. See *id.* at 78 (discussing factors which lead to juvenile offenders having lower culpability as compared to adult criminal offenders).

110. *Id.* at 74.

111. *Id.* at 72.



In *Roper v. Simmons*, the Court held that capital punishment for juveniles conflicted with public policy and was unconstitutional.<sup>112</sup> The analysis in *Roper* focused on whether the execution of juveniles accomplished the traditional purposes of punishment.<sup>113</sup> The Court noted that juveniles lack maturity and are more vulnerable to outside pressures.<sup>114</sup> As a result, the punishment did not accomplish retribution because the juvenile offenders were less culpable than the average offender.<sup>115</sup> Executing juveniles did not accomplish deterrence because juvenile offenders lack the ability to connect the cause and effect of their actions and are not able to appropriately conduct a cost-benefit analysis that appreciates the significance of execution.<sup>116</sup> Once again, the Supreme Court held that when a form of punishment does not fulfill the traditional purposes of punishment and is disproportionate to an offender's culpability, the punishment violates public policy.<sup>117</sup> Without considering any constitutional implications, the U.S. justice system has an extensive history of furthering its own intentions by matching the level of punishment with the offender's degree of culpability.<sup>118</sup>

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112. *See* 543 U.S. 551, 572–73 (2005) (holding the “differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive the death penalty”).

113. *See id.* (concluding, after thorough analysis, that deterrence and retribution as penological goals are not satisfied by imposition of the death penalty on juveniles). Christopher Simmons was convicted of murdering Shirley Crook by breaking into her home, tying her up, and throwing her over a bridge. *Id.* at 556. He was seventeen at the time of the murder and bragged about the crime afterwards. *Id.* at 556–57.

114. *Id.* at 569.

115. *Id.* at 571. “Retribution is not proportional if the law’s most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity.” *Id.*

116. *See id.* at 571–72 (acknowledging there is a lack of evidence as to whether the death penalty has a deterrent effect on juveniles, but the fact that juveniles lack overall executive functioning suggests they are less susceptible to deterrence than adults).

117. *See id.* at 572–73 (concluding juveniles possess insufficient culpability to justify the imposition of the death penalty).

118. *See, e.g.,* *Graham v. Florida*, 560 U.S. 48, 74 (2010) (holding the Eighth Amendment forbids a life sentence without parole for a juvenile offender who did not commit homicide); *see also Simmons*, 543 U.S. at 572 (“A central feature of death penalty sentencing is a particular assessment of the circumstances of the crime and the characteristics of the offender. The system is designed to consider both aggravating and mitigating circumstances . . . .”); *Atkins v. Virginia*, 536 U.S. 304, 304 (2002) (citing the principle that a punishment is contrary to the Eighth Amendment when it is not “graduated and proportional to the offense”); *Penry v. Lynaugh*, 492 U.S. 302, 304 (1989) (reinforcing the maxim that “decisions are based on the principle that punishment must be directly related to the defendant’s personal culpability”); *Ford v. Wainwright*, 477 U.S. 399, 410 (1986) (explaining the protection under the Eighth Amendment is justified by protecting the criminal defendant from fear or pain and protecting society from barbaric vengeance); *Lockett v. Ohio*, 438 U.S. 586, 606 (1978) (rejecting the Ohio statute that prohibited consideration of

### C. Statutes Supporting Leniency for Less Culpable Offenders

In addition to federal case law, the federal government and several states have passed sentencing statutes that take into account an offender's culpability.<sup>119</sup> The federal government includes "impaired capacity" as a mitigating factor in sentencing because an offender with an impaired mental capacity may not be adequately treated in a prison setting.<sup>120</sup> The District of Columbia, for example, promotes treatment rather than punishment because treatment furthers the goals of rehabilitation and deterrence.<sup>121</sup> Several state statutes classify mental defects as mitigating factors and acknowledge that, though a mental defect does not constitute a defense, it does not necessarily mean that the offender is as culpable as an average person.<sup>122</sup> In other words, just because a defendant may not be able to use FASD as a defense, such as an insanity defense, this does not mean that the offender has the same level of

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mitigating factors); *Stankewitz v. Woodford*, 365 F.3d 706, 723 (9th Cir. 2004) (asserting criminal defendants may have committed acts due to their disadvantaged background, making them less culpable).

119. *E.g.*, 18 U.S.C. § 3592(a)(1) (2000); ALASKA STAT. § 12.55.155 (2014); California Rules of Court, rule 4.423(b)(2); IND. CODE § 35-38-1-7.1(b) (2015); KAN. STAT. ANN. § 21-6815(c)(1) (2011); N.J. STAT. ANN. § 2C:44-1(b)(4) (2005); N.C. GEN. STAT. § 15A-1340.16 (2013); N.D. CENT. CODE § 12.1-32-04 (2012).

120. *See* 18 U.S.C. § 3592(a)(1) (defining impaired capacity as "[t]he defendant's capacity to appreciate the wrongfulness of the defendant's conduct or to conform conduct to the requirements of law was significantly impaired, regardless of whether the capacity was so impaired as to constitute a defense to the charge"); *see also* D.C. SENTENCING & CRIMINAL CODE REVISION COMM'N, VOLUNTARY SENTENCING GUIDELINES MANUAL § 5.2.3(8) (2011) (recommending as a mitigating factor the fact that a defendant cannot be adequately treated in a prison facility due to mental capacity).

121. *See* D.C. SENTENCING & CRIMINAL CODE REVISION COMM'N, *supra* note 120, § 5.2.3(8) ("The Guidelines sentence calls for incarceration but, after consultation with corrections authorities, the court determines that the defendant, by reason of obvious and substantial mental or physical impairment or infirmity, cannot be adequately protected or treated in any available prison facility.").

122. *See, e.g.*, ALASKA STAT. § 12.55.155(d)(18) (mitigating a sentence when the defendant has a mental defect that is insufficient for a defense but reduces culpability); California Rules of Court, rule 4.423(b)(2) (allowing for a mitigated sentence when a defendant suffers from a mental defect that reduces culpability); IND. CODE § 35-38-1-7.1(b)(4) (considering "substantial grounds" that may excuse a crime even though it does not establish a defense); KAN. STAT. ANN. § 21-6815(c)(1)(C) (recognizing a lesser culpability due to mental capacity); N.J. STAT. ANN. § 2C:44-1(b)(4) (emphasizing a court may consider "substantial grounds" to excuse or justify defendant's behavior although such substantial ground does not constitute a defense); N.C. GEN. STAT. § 15A-1340.16(e)(3) (approving as a factor a mental condition that was insufficient for a defense but reduces the defendant's culpability); N.D. CENT. CODE § 12.1-32-04(4) (supporting "substantial grounds" as a mitigating factor for sentencing decisions).

culpability as other offenders.<sup>123</sup> Although many codified mitigating factors apply to intellectually impaired offenders, many legal professionals believe that offenders with FASD warrant more specific attention.<sup>124</sup>

In 2012, the ABA released a resolution urging judges, legislators, and attorneys to recognize and address FASD disorders in juvenile and adult offenders.<sup>125</sup> The resolution specifically highlights the abundance of people with FASD in the justice system and the special characteristics of offenders with FASD.<sup>126</sup> It encourages considering FASD as a mitigating factor and utilizing “therapy, community-based programs, and other non-custodial measures in order to rehabilitate the individual and reduce recidivism.”<sup>127</sup> The resolution also urges action by legislatures and government agencies to develop laws and policies to better address the issue.<sup>128</sup>

Alaska is the only state that has specifically identified FASD as a mitigating factor in sentencing.<sup>129</sup> Alaska’s state legislature passed Senate Bill 151 because it realized that incarcerating people with FASD would not lead to rehabilitation or deterrence of future offenses because offenders with FASD have an organic brain dysfunction that affects their ability to comprehend their actions.<sup>130</sup> When debating the legislation, legislators relied on letters of support written by social-service centers in Alaska that expressed concern for offenders with FASD because of their lessened cul-

123. See generally IND. CODE § 35-38-1-7.1(b)(4) (considering “substantial grounds” that may excuse a crime even though it does not establish a defense); N.J. STAT. ANN. § 2C:44-1(b)(4) (emphasizing a court may consider “substantial grounds” to excuse or justify defendant’s behavior although such substantial ground does not constitute a defense); N.C. GEN. STAT. § 15A-1340.16(e)(3) (2013) (approving as a factor a mental condition that is insufficient for a defense but reduces the defendant’s culpability); N.D. CENT. CODE § 12.1-32-04(4) (supporting “substantial grounds” as a mitigating factor for sentencing decisions).

124. Cf. Burke, *supra* note 15, at 40 (discussing the need for treatment and drug courts that deal with offenders through individualized treatment and monitoring programs).

125. See RESOLUTION 112B, *supra* note 10 (calling on “attorneys and judges, state, local, and specialty bar associations, and law school clinical programs to help identify and respond effectively to FASD in children and adults, through training to enhance awareness of Fetal Alcohol Spectrum Disorders (FASD)”).

126. *Id.* at 6.

127. *Id.* at 8.

128. *Id.* at 11. The ABA “urges the passage of law and adoption of policies . . . that acknowledge and treat the effects of prenatal alcohol exposure and better assist individuals with FASD.” *Id.*

129. ALASKA STAT. § 12.55.155(d)(20)(A) (2014).

130. *Sponsor Statement for SB 151: Hearing on SB 151 Before the Judiciary Comm.*, 27th Alaska Leg. Sess. (2012) [hereinafter *Sponsor Statement for SB 151*] (statement of Sen. Kevin Meyer), [http://www.legis.state.ak.us/basis/get\\_documents.asp?session=27&docid=9747](http://www.legis.state.ak.us/basis/get_documents.asp?session=27&docid=9747); see also *Fetal Alcohol Spectrum Disorder and Mitigating Factors: Hearing on SB 151 Before the H. Judiciary Standing Comm.*, 2012 Leg., 27th Sess. 7 (Alaska 2012) [hereinafter *Hearing on SB 151*], <http://www.legis.state.ak.us/pdf/27/M/HJUD2012-04-061304.pdf>.

pability and lack of access to adequate treatment for their mental disorders.<sup>131</sup> The legislators also relied on evidence submitted in committee hearings that showed how support services reduce recidivism by identifying the offender's individual problems and providing treatment specifically for those problems.<sup>132</sup> In contrast, if an offender is not offered treatment, the root cause of his or her criminal behavior is never identified or addressed.<sup>133</sup> Codifying FASD as a mitigating factor illustrates Alaska's attempt to address and resolve many of the issues stemming from the prevalence of FASD sufferers in the criminal justice system.<sup>134</sup>

#### D. *Implementation of Problem-Solving Courts*

Since 1989, all fifty states have implemented at least one drug court to rehabilitate and treat criminal offenders with drug addictions.<sup>135</sup> Drug courts have been widely successful at rehabilitating criminal drug offenders and thereby reducing recidivism.<sup>136</sup> Ten main components guide drug courts and other problem-solving courts, but four central policies are relevant to implementing an FASD court.<sup>137</sup> First, drug courts have an external brain or a team usually composed of police officers, a judge,

131. *See, e.g.*, Letter from David C. Fleurant, Exec. Dir., Disability Law Ctr., to House Fin. Comm., (Apr. 10, 2012) [hereinafter Letter from David C. Fleurant] [http://www.legis.state.ak.us/basis/get\\_documents.asp?session=27&docid=12445](http://www.legis.state.ak.us/basis/get_documents.asp?session=27&docid=12445) (expressing concern for individuals with FSAD and the freedom they lose due to their disability); Letter from J. Kate Burkhart, Exec. Dir., Alaska Mental Health Bd., to Senator Kevin Meyer (Mar. 2, 2012) [hereinafter Letter from J. Kate Burkhart] [http://www.legis.state.ak.us/basis/get\\_documents.asp?session=27&docid=12449](http://www.legis.state.ak.us/basis/get_documents.asp?session=27&docid=12449) (supporting SB 151 since 60 % of inmates experience FASD or similar cognitive impairments); Letter from Jeff Jessee, Chief Exec. Officer, Alaska Mental Health Trust Auth., to Senator Kevin Meyer (Mar. 2, 2012) [hereinafter Letter from Jeff Jessee], [http://www.legis.state.ak.us/basis/get\\_documents.asp?session=27&docid=12450](http://www.legis.state.ak.us/basis/get_documents.asp?session=27&docid=12450) (acknowledging SB 151 recognizes "people with disabilities are better served with supports and services, rather than incarceration without supports").

132. *Sponsor Statement for SB 151, supra* note 130; *see Hearing on SB 151, supra* note 130 (stating offenders with FASD have lower self-control and currently make up a disproportionate amount of inmates).

133. *See Sponsor Statement for SB 151, supra* note 130 (explaining those with FAS are more likely to stop committing crimes if they are given the same support system that is given to individuals with mental illness and other disabilities); *Hearing on SB 151, supra* note 130, at 6 (noting longer prison sentences are not helpful to those with FASD).

134. *See S. JOURNAL*, 27th Leg., 2d Sess. 2489–90 (Alaska 2012) (noting reasons the governor of Alaska approved SB 151). Governor Sean Parnell stated "because the legislation creates more consistent application of the law to all defendants . . . I have allowed CSSD 151 (JUD) to become law." *Id.*

135. Eckrich & Loudenburg, *supra* note 14, at 171.

136. *Id.* at 177.

137. BUREAU OF JUST. ASSISTANCE, U.S. DEP'T OF JUST., *DEFINING DRUG COURTS: THE KEY COMPONENTS* iii (1997), [https://www.unodc.org/documents/ungass2016/Contributions/Civil/Drug\\_Court\\_Professionals/Key\\_Components.pdf](https://www.unodc.org/documents/ungass2016/Contributions/Civil/Drug_Court_Professionals/Key_Components.pdf). The other components of

probation officers, attorneys, and mental-health counselors.<sup>138</sup> This group works together to help guide members of the program to make better decisions and to prevent them from reverting to destructive old habits.<sup>139</sup> Second, the judge is the distinct authority figure within this team.<sup>140</sup> All of the members of the team bring varied experiences and expertise to create an individualized plan, but the judge is the leader and ultimate decision-maker.<sup>141</sup> Third, drug courts focus on providing the participant with a productive, daily routine.<sup>142</sup> Drug courts generally meet every week, require the participant to have a job or volunteer, and punish or reward participants based on their behavior each week.<sup>143</sup> Drug courts make rehabilitation, rather than retribution, the main goal of the program, thereby reducing recidivism rates while accomplishing the other traditional goals of punishment.<sup>144</sup> Finally, the drug-court process requires the prosecutor and defense counsel to discard their adversarial relationship and work together by focusing on the offender's treatment.<sup>145</sup> In this non-adversarial relationship, the prosecutor protects public safety by analyzing the offender's continued participation in the program based on performance.<sup>146</sup> Similarly, the defense counsel protects the offender's due process rights by ensuring the participant fully understands the expectations of the program and the possible ramifications of joining the program.<sup>147</sup>

The qualifications necessary for entry into a drug court ensures that chosen offenders are committed to the program.<sup>148</sup> States vary on their

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a drug court include integrating alcohol and drug treatment, providing drug rehabilitation services, monitoring abstinence, and identifying participants early. *Id.*

138. Eckrich & Loudenburg, *supra* note 14, at 172; BUREAU OF JUST. ASSISTANCE, *supra* note 137, at 1.

139. *See* BUREAU OF JUST. ASSISTANCE, *supra* note 137, at 7 (explaining the therapeutic support participants receive to ensure compliance with the program). *See generally* Eckrich & Loudenburg, *supra* note 14, at 172 (emphasizing the role the team plays in helping the drug-court participants).

140. BUREAU OF JUST. ASSISTANCE, *supra* note 137, at 15.

141. *See id.* (describing the importance of the judge's role on the drug court team).

142. *See id.* at 13 (explaining how the drug court experience is measured by the participant's compliance with the treatment regimen).

143. Eckrich & Loudenburg, *supra* note 14, at 173; *see also* BUREAU OF JUST. ASSISTANCE, *supra* note 137, at 11 (explaining drug testing must be done no less than twice a week during the first several months of a person's enrollment).

144. *See* BUREAU OF JUST. ASSISTANCE, *supra* note 137, at 13, 17 (highlighting two of the goals of the drug courts are abstinence and public safety).

145. *Id.* at 3.

146. *Id.* The prosecutor and defense council are part of the external brain and work together with the other members of the team. *Id.*

147. *Id.* at 3, 4.

148. *See generally id.* at 5 (recognizing the strict eligibility requirements for entry into a drug court rehabilitation program).

qualification requirements for entrance into a drug court, but, for most programs, an offender is only eligible if he or she is classified as a non-violent offender.<sup>149</sup> In problem-solving courts focused on treating mental health, the court personnel usually require participants to receive an official diagnosis from a health professional.<sup>150</sup> Oftentimes, the offender must also plead guilty and voluntarily agree to become part of the program.<sup>151</sup> The four components of problem-solving courts and the qualifications for entrance into the program can be applied to criminal offenders with FASD.

### 1. Success of Drug Courts

There is a large amount of data that supports the implementation of drug and other problem-solving courts because they are successful at reducing recidivism.<sup>152</sup> For example, one adult drug-court survey evaluated the improvement of recidivism rates among drug-court offenders and traditionally sentenced offenders who reported committing one crime six months preceding the survey.<sup>153</sup> At the baseline-testing period, 75% of both groups reported committing a crime within the previous six months.<sup>154</sup> However, according to the evaluation, at the six-month follow-up, 71% of the drug-court participants were not involved in criminal activity, compared to 59% of the traditionally sentenced offenders.<sup>155</sup> At the eighteen-month follow-up, 69% of the drug-court participants had not been involved in criminal activity in the previous six months, compared to 57% of the traditionally sentenced offenders.<sup>156</sup> The study demonstrates a noticeable improvement in drug-court offenders compared to traditionally sentenced offenders.<sup>157</sup>

A study by the Department of Justice indicated even more successful rates,<sup>158</sup> resulting in an endorsement for drug courts from the White

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149. WHAT ARE DRUG COURTS?, Nat'l Ass'n of Drug Ct. Prof'ls, <http://www.nadcp.org/learn/what-are-drug-courts> (last visited Nov. 15, 2015).

150. See, e.g., *VETERANS' COURT*, LAW FOR VETERANS, <http://www.lawforveterans.org/veterans-courts> (last visited Oct. 7, 2015) (requiring veterans to receive a "more in-depth" assessment of their mental health prior to being admitted to the veterans court).

151. Eckrich & Loudenburg, *supra* note 14, at 174.

152. See generally ROSSMAN ET AL., *supra* note 78, at 70 (analyzing statistics of recidivism rates for drug court participants and the court's effectiveness).

153. *Id.* at 70–71.

154. *Id.* at 71.

155. *Id.*

156. *Id.*

157. *Id.*

158. See JOHN ROMAN ET AL., *RECIDIVISM RATES FOR DRUG COURT GRADUATES: NATIONALLY BASED ESTIMATES* 23 (2003), <https://www.ncjrs.gov/pdffiles1/201229.pdf> (ex-

House.<sup>159</sup> The Department of Justice found that one year after drug-court graduation, 84% of graduates had not been re-arrested for a serious crime,<sup>160</sup> and two years after graduation, 72% of graduates had not been re-arrested.<sup>161</sup> The White House Office of National Drug Control Policy endorses drug courts and reports that drug courts reduce crime between 8% and 26%.<sup>162</sup> In fact, President Obama signed a letter in honor of National Drug Court Month that supported the use of drug courts for non-violent offenders.<sup>163</sup>

As a result of the success of drug courts, many states have adopted the drug-court model to form veteran courts.<sup>164</sup> Prior to the use of veteran courts, veterans suffering from PTSD and other mental health issues were given a traditional sentence for the crimes they committed.<sup>165</sup> Many veterans became repeat offenders because the traditional sentence did not

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plaining the positive results of drug-court participants across ninety-five sample drug courts as compared to traditionally sentenced offenders).

159. *Drug Courts: A Smart Approach to Criminal Justice*, OFF. OF NAT'L DRUG CONTROL POLICY, <https://www.whitehouse.gov/ondcp/ondcp-fact-sheets/drug-courts-smart-approach-to-criminal-justice> (last visited Feb. 3, 2016).

160. ROMAN ET AL., *supra* note 158, at 27.

161. *Id.*

162. OFF. OF NAT'L DRUG CONTROL POLICY, FACT SHEET, DRUG COURTS: A SMART APPROACH TO CRIMINAL JUSTICE 2 (2011), [https://www.whitehouse.gov/sites/default/files/ondcp/Fact\\_Sheets/drug\\_courts\\_fact\\_sheet\\_5-31-11.pdf](https://www.whitehouse.gov/sites/default/files/ondcp/Fact_Sheets/drug_courts_fact_sheet_5-31-11.pdf).

163. Letter from President Barack Obama 1 (May 23, 2012), [https://www.whitehouse.gov/sites/default/files/email-files/national\\_drug\\_court\\_month.pdf](https://www.whitehouse.gov/sites/default/files/email-files/national_drug_court_month.pdf).

164. *See, e.g.*, COLO. REV. STAT. § 13-3-101 (2014) (delegating authority to the state court administrator to implement veteran courts which follow the drug-court model); FLA. STAT. § 394.47891 (2012) (granting permission for the Chief Judge of each judicial circuit to establish veteran courts in Florida); 730 ILL. COMP. STAT. 167/15 (2012) (establishing veteran courts in Illinois); ME. REV. STAT. tit. 4, § 433 (2011) (granting power to the judiciary to create veteran courts in Maine); MICH. COMP. LAWS § 600.1201 (2015) (instituting veteran courts in Michigan); MO. REV. STAT. § 478.008 (2015) (authorizing implementation of veteran courts in Missouri); TEX. GOV'T ANN. CODE § 434.017 (West 2012 & Supp. 2014) (establishing funding for veteran courts in Texas); *see also* ROBERT T. RUSSELL, *Veterans Treatment Courts Developing Throughout the Nation*, in 2009 FUTURE TRENDS IN STATE COURTS 130 (Carol R. Flango et al. eds.) ("Either because of, or in addition to, these untreated diseases and compounded social issues, more and more veterans are processed through the criminal justice system. Conservative estimates are that veterans currently make up about twelve percent of individuals in prisons and jails."); John Schwartz, *Defendants Fresh from War Find Service Courts in Court*, N.Y. TIMES (Mar. 15, 2010), <http://www.nytimes.com/2010/03/16/us/16soldiers.html> (explaining many veterans have returned from Afghanistan and Iraq burdened by post-traumatic stress, drug dependency, and other problems).

165. *See generally Veterans with PTSD in the Justice System*, Nat'l Ctr. for PTSD, <http://www.ptsd.va.gov/professional/provider-type/community/veterans-PTSD-Justice-System.asp> (last updated Aug. 17, 2015) (explaining the goal of the veteran courts is to divert veterans with mental health problems from traditional sentences).

adequately address or treat the mental health issues causing the criminal behavior.<sup>166</sup> Since 2012, the number of veteran courts in Michigan has increased from six to twenty.<sup>167</sup> Michigan has implemented more veteran courts than any other state;<sup>168</sup> the early numbers show that 70% of veterans complete the program and 75% of the veterans that graduate are not re-arrested at the two-year mark.<sup>169</sup> Similar to veteran courts across the country, veteran courts in Michigan are structured after the drug-court model and utilize treatment and structure to help the veterans re-enter society.<sup>170</sup> The implementation of veteran courts has resulted in lower recidivism rates<sup>171</sup> and demonstrates the feasibility of the drug-court model across a variety of offender populations.<sup>172</sup>

## 2. Economic Feasibility

From an economic standpoint, drug courts are more cost-effective than a traditional sentence.<sup>173</sup> The upfront administrative costs of a drug court are about the same as a traditional court, but jurisdictions see their greatest cost savings in reduced recidivism and re-incarceration rates.<sup>174</sup> The Department of Justice found every dollar spent on drug courts saves two dollars for the criminal justice system.<sup>175</sup> A study conducted in the State of Virginia determined that drug courts saved \$19,234 per person com-

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166. See RUSSELL, *supra* note 164, at 130 (“It became apparent that these traditional treatment courts were limited in fully serving the veteran population.”).

167. John Nevin, *Michigan Leads Nation in Veterans Treatment Courts*, MICH. CTS. NEWS RELEASE (Nov. 10, 2014), [http://courts.mi.gov/News-Events/press\\_releases/Documents/VTC%20Forum%20Media%20Release.pdf](http://courts.mi.gov/News-Events/press_releases/Documents/VTC%20Forum%20Media%20Release.pdf).

168. *Id.* Chief Justice Young of the Michigan Supreme Court said, “Veterans treatment courts are growing because they are working. Today, we are seeing firsthand that this initiative is saving lives and strengthening communities by helping veterans rebuild productive lives with their families.” *Id.*

169. William H. McMichael, *The Battle on the Home Front: Special Courts Turn to Vets to Help Other Vets*, ABA J. (Nov. 1, 2001, 10:10 AM), [http://www.abajournal.com/magazine/article/the\\_battle\\_on\\_the\\_home\\_front\\_special\\_courts\\_turn\\_to\\_vets\\_to\\_help\\_other\\_vets](http://www.abajournal.com/magazine/article/the_battle_on_the_home_front_special_courts_turn_to_vets_to_help_other_vets).

170. Nevin, *supra* note 167; see McMichael, *supra* note 169 (noting veteran courts, like drug courts, specialize in getting veterans counseling).

171. See McMichael, *supra* note 169 (connecting the type of treatment veterans receive in veteran courts to lower recidivism rates).

172. See RUSSELL, *supra* note 164, at 136 (acknowledging the efficiency of problem-solving courts and the types of offenders that this type of court could help).

173. See BUREAU OF JUST. ASSISTANCE, *supra* note 137, at 7–8 (explaining there is a \$7 return for every \$1 spent on Alcohol and Other Drug abuse (AOD) treatment).

174. See *id.* (identifying the cost-saving value of lower recidivism rates for drug-court participants).

175. OFF. OF NAT’L DRUG CONTROL POLICY, *supra* note 162, at 2.



pared to a traditional sentence.<sup>176</sup> The Virginia study concluded that—as a result of reducing recidivism and re-incarceration of offenders—the majority of savings came from improved—outcome costs.<sup>177</sup> Even though the infrastructure for a problem-solving court and a traditional court are comparable, the problem-solving court provides the long-term benefits of rehabilitated offenders, which saves the justice system money.<sup>178</sup>

### 3. Constitutional and Other Concerns

Critics of the problem-solving courts express a general concern over how extensive problem-solving courts could get in the future as well as concerns about possible constitutional violations.<sup>179</sup> Members of the American Civil Liberties Union (ACLU) have criticized the over-extension of problem-solving courts because doing so raises issues related to determining which subgroups deserve special courts.<sup>180</sup> In addition, the public may oppose utilizing these courts for serious, violent offenders, such as serial killers and rapists, who may fall into these subgroups. For example, even amongst problem-solving courts there is a split of opinion as to whether violent offenders should be admitted, despite the fact that such offenders may benefit from treatment.<sup>181</sup> Additionally, the drug court system raises equal protection and due process issues.<sup>182</sup> An equal protection claim arises under the Fourteenth Amendment when a government action results in a classification of people.<sup>183</sup> An issue of equal protection arises because drug courts are not offered in every jurisdiction.<sup>184</sup>

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176. NAT'L CTR. FOR STATE CTS., VIRGINIA ADULT DRUG TREATMENT COURTS 59 (2012), <http://www.courts.state.va.us/courtadmin/aoc/djs/programs/dtc/resources/virginiadtccostbenefit.pdf>.

177. *Id.*

178. *See id.* (“The greatest cost savings are in outcome costs. This is based on the lower recidivism rates of drug court participants versus comparison group persons as well as the associated costs of incarceration.”).

179. *See* McMichael, *supra* note 169 (examining arguments by critics that problem-solving courts could foster constitutional violations in the plea requirement).

180. *Id.* Although counsel for the ACLU expressed concern for the limit of alternative-sentencing programs, the ACLU has backed the implementation of veteran courts stating, “[w]e are always on the lookout for making sure that problem-solving courts comply with procedural fairness and are not more punitive than the normal criminal justice system.” *Id.*

181. *See, e.g., id.* (stating some veteran courts do admit violent offenders while others do not).

182. *See* Trent Oram & Kara Glecker, Comment, *An Analysis of the Constitutional Issues Implicated in Drug Courts*, 42 IDAHO L. REV. 471, 480–87 (2006) (discussing various ways in which equal protection and due process issues arise in the drug-court system).

183. *See* U.S. CONST. amend XIV § 1 (“[N]or [shall any state] deny to any person within its jurisdiction the equal protection of the laws.”).

184. Oram & Glecker, *supra* note 182, at 480.

Therefore, similarly situated defendants may receive very different sentencing treatment simply because they live in different counties.<sup>185</sup>

There are also procedural due process concerns of whether, in the context of a problem-solving court, a defendant knowingly and intelligently enters a guilty plea.<sup>186</sup> Procedural due process arises under the Fourteenth Amendment and states that the government may not take away a person's "life, liberty, or property without the due process of law."<sup>187</sup> When an offender is incarcerated, the government has deprived that offender of his or her liberty,<sup>188</sup> and the *Mathews v. Eldridge*<sup>189</sup> test determines whether the government's procedures provided the offender with the proper due process of law.<sup>190</sup> In many states, the defendant must first enter a guilty plea to qualify for the drug court program,<sup>191</sup> and many

185. *Id.* Defendants in these situations have asserted that drug courts either need to be in every county or no county. *Id.* But see *Jim v. State*, 911 So. 2d 658, 660 (Miss. Ct. App. 2005) (denying defendant's request to transfer his case to a drug court because the Mississippi legislature explicitly refused to create a statutory right to drug courts, which undermined defendant's equal protection claim); *State v. Little*, 66 P.3d 1099, 1102 (Wash. Ct. App. 2003) (striking down defendant's claim that Washington's county-by-county implementation of drug courts violated his equal protection rights).

186. Oram & Glecker, *supra* note 182, at 486–87.

These [due process] issues include whether the defendant fully understands the process so as to knowingly and intelligently accept the drug court program with all of its parameter; whether certain rights are waived knowingly, intelligently, and voluntarily; whether the defendant voluntarily consents to the drug court program without duress or coercion; whether there are sufficient facts to sustain a guilty plea in a particular drug court plea bargain; whether the judge, prosecutor, and defense counsel can remain unbiased and avoid conflicts of interest that interfere with the process; and whether a stigma occurs with a defendant who does or does not accept drug court. *Id.*; see *Brady v. United States*, 397 U.S. 742, 748 (1970) (maintaining that waiving the constitutional right to a trial by jury must be done voluntary, knowingly, and with sufficient awareness); see also ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW* 1142–44 (4th ed. 2013) (outlining the proper procedures courts must follow when analyzing a due process claim). There are three issues to take into consideration when analyzing whether procedural due process has been violated. *Id.* at 1143. The first question is has there been a deprivation? *Id.* Second, is the deprivation of life, liberty, or property? *Id.* Third, is it without due process of law, or in other words, what procedures are required? *Id.* Proper due process is defined as proper notice and hearing. *Id.* In a drug-court situation, the deprivation would be of liberty or possibly property. Oram & Glecker, *supra* note 182, at 485–87.

187. U.S. CONST. amend. XIV § 1.

188. *Deshaney v. Winnebago Co. Dep't of Soc. Serv.*, 489 U.S. 189, 200 (1989).

189. 424 U.S. 319 (1976).

190. *Mathews*, 424 U.S. at 334–35. The test requires a balancing of three distinct factors: (1) the private interest the governmental action will affect; (2) the risk of an erroneous deprivation of such interest by the procedures used, and the probable value, if any, of additional or substitute procedures; and (3) the governmental interest. *Id.*

191. Oram & Glecker, *supra* note 182, at 477; see WILLIAM G. MEYER, NAT'L ASS'N. OF DRUG COURT PROF'LS, *CONSTITUTIONAL AND OTHER LEGAL ISSUES IN DRUG COURT* 13 (2007), <http://legisweb.state.wy.us/2007/interim/drugcourt/legalissues.pdf> (claiming some

experts are concerned that a defendant may opt for the drug court to avoid a long prison sentence by pleading guilty without fully understanding his rights.<sup>192</sup> Some scholars believe that this type of enticement to enter a guilty plea is coercion and violates due process because defendants will not completely understand the repercussions of their decision to plead guilty.<sup>193</sup>

Legal scholars have debated the constitutionality of plea-bargaining in the past and continue to do so,<sup>194</sup> but the Supreme Court has repeatedly upheld plea-bargaining as constitutional.<sup>195</sup> In *Brady v. United States*,<sup>196</sup> the Court ruled that a defendant's fear of a harsher sentence, if found guilty, did not render the defendant's guilty plea involuntary.<sup>197</sup> In *Tollett v. Henderson*,<sup>198</sup> the Court held that a defendant does not need to be advised of "every conceivable constitutional plea" to be considered intelligently informed.<sup>199</sup> However, opponents believe a guilty plea in a problem-solving court is more coercive because the defendant is offered the chance to enter a treatment program and avoid the court process altogether,<sup>200</sup> whereas a traditional plea will usually result in a reduced sen-

jurisdictions require defendants to contractually waive substantive due process rights to enter a drug court).

192. See, e.g., Oram & Glecker, *supra* note 182, at 485–86 (describing a situation in which a defendant might plead guilty as a prerequisite to enter drug court without being informed of his rights).

193. *Id.* at 486; see MEYER, *supra* note 191, at 10 (arguing some drug court offenders may not receive adequate due process rights because drug courts use non-adversarial procedures).

194. See Thomas R. McCoy & Michael J. Mirra, *Plea Bargaining as Due Process in Determining Guilt*, 32 STAN. L. REV. 887, 888–89 (1980) (arguing plea bargaining is unconstitutional under the "unconstitutional conditions" doctrine); Robert Schehr, *The Emperor's New Clothes: Intellectual Dishonesty and the Unconstitutionality of Plea-Bargaining*, 2 TEX. A&M L. REV. 385, 388–89 (2015) (criticizing plea bargaining as unconstitutional because it preempts substantive and procedural rights). See generally Stephen J. Schulhofer, *Is Plea Bargaining Inevitable?* 97 HARV. L. REV. 1037 (1984) (providing an overview of the debate surrounding plea bargaining).

195. See *Corbit v. New Jersey*, 439 U.S. 212, 222 (1978) (maintaining a State has a legitimate interest in facilitating plea bargaining and encouraging guilty pleas); *Brady v. United States*, 397 U.S. 742, 747 (1970) (holding a guilty plea is valid when made voluntarily and intelligently); see also *Tollett v. Henderson*, 411 U.S. 258, 267 (1973) (reaffirming the plea bargaining principles laid out in *Brady*).

196. 397 U.S. 742.

197. *Id.* at 750.

198. 411 U.S. 258 (1973).

199. *Id.* at 267.

200. See Oram & Glecker, *supra* note 182, at 486–87 (contending that giving defendants the option to forgo a regular trial and possible jail time simply by entering a guilty plea amounts to coercion); see also MEYER, *supra* note 191, at 11 (pointing out that the same standards governing the knowing, intelligent waiver of a constitutional right in regular courts apply to drug court participants).

tence or probation.<sup>201</sup> Opponents also argue that drug-court participants are not properly informed that their failure to successfully complete the drug-court program is treated as a probation violation.<sup>202</sup> Given the initial attractive incentive to enter drug court, and the possible repercussions in the event of failure, experts argue that a drug-court plea bargain alters the balance of a plea bargain in a different way than a traditional plea.<sup>203</sup>

#### 4. An Alternative Approach to Problem-Solving Courts

Some jurisdictions have implemented similar rehabilitative mechanisms as an alternative approach to problem-solving courts.<sup>204</sup> One such mechanism is circle sentencing, which utilizes a community approach to punishment and rehabilitation.<sup>205</sup> Sentencing circles provide the offender with the opportunity to reintegrate into the community and give offenders a better understanding of the impact of their conduct.<sup>206</sup> Specifically, at a sentencing circle, the victim, the offender, members of the victim's and offender's family, and any other community member with an interest in the crime are invited to participate.<sup>207</sup> The members of the circle speak to the offender about the impact of his or her criminal behavior and discuss an appropriate sentencing plan.<sup>208</sup> Circle sentencing is not widely implemented, but some state legislatures, such as Minnesota,<sup>209</sup>

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201. See Joseph A. Colquitt, *Ad Hoc Plea Bargaining*, 75 TUL. L. REV. 695, 701 (2001) (clarifying typical plea bargaining involves exchanging a plea for a reduced sentence).

202. See MEYER, *supra* note 191, at 12 (claiming punishment for being terminated from drug court is comparable to a probation revocation even though many drug court participants are not on formal probation).

203. See *id.* at 10–11 (examining the effects drug court plea bargains and contracts have on drug court defendants' due process rights).

204. Cf. Charmaine Panko, *R. v. T.D.P.: A Young Offender, His Sentencing Circle, and the YCLA*, 68 SASK. L. REV. 455, 460 (2005) (promoting sentencing circles as alternatives to typical court procedures).

205. *Id.*

206. See *id.* (stating that participating in a sentencing circle allows the community to discover and address any particular issues the offender is facing that contributed to the offense).

207. See *id.* ("A sentencing circle is a way of dealing with an offender that may have a restorative and conciliatory effect on the participants that can help an offender understand the consequences of his or her acts . . .").

208. See *id.* (explaining the goal is that the members of the circle will develop a sentencing plan that addresses the needs of the offender and victim, but still holds the offender accountable).

209. MINN. STAT. § 611A.775 (2015).

A community-based organization, in collaboration with a local governmental unit, may establish a restorative justice program. A restorative justice program is a program that provides forums where certain individuals charged with or petitioned for having committed an offense meet with the victim, if appropriate; the victim's family

believe it could offer an alternative solution for people with FASD because of its focus on rehabilitation and community involvement.<sup>210</sup>

The use of problem-solving courts has successfully reduced recidivism and costs to the prison system by lowering the number of incarcerated individuals.<sup>211</sup> The courts focus on a group of individuals and address the causes of the offender's poor decisions.<sup>212</sup> Problem-solving courts make rehabilitation the primary goal of the program because the participants are non-violent and less culpable.<sup>213</sup> By focusing on rehabilitation, problem-solving courts, including drug courts and veteran courts, have reduced recidivism and created a more efficient criminal justice system.<sup>214</sup> Implementation of the drug-court model for other types of offenders has proven to be successful, it appropriately punishes less culpable offenders

members or other supportive persons, if appropriate; the offender's family members or other supportive persons, if appropriate; a law enforcement official or prosecutor when appropriate; other criminal justice system professionals when appropriate; and members of the community, in order to:

- 1) discuss the impact of the offense on the victim and the community;
- 2) provide support to the victim and methods for reintegrating the victim into community life;
- 3) assign an appropriate sanction to the offender; and
- 4) provide methods for reintegrating the offender into community life.

*Id.* "Bringing victims and offenders together provides an opportunity for offenders to better understand the impact of their conduct, and gives victims a clear voice in the resolution of the offense. . . . [T]he statute explicitly gives restorative justice programs the authority to assign appropriate sanctions to an offender." *State v. Pearson*, 637 N.W.2d 845, 847 (Minn. 2002); see *YELLOW MED. CTY., YELLOW MEDICINE COUNTY CIRCLE SENTENCING PROGRAM HANDBOOK*, [http://www.co.ym.mn.gov/vertical/sites/%7B9E2CF57F-0FF6-475F-BE0E-E5C421454DDB%7D/uploads/Circle\\_Sentencing\\_Handbook.doc](http://www.co.ym.mn.gov/vertical/sites/%7B9E2CF57F-0FF6-475F-BE0E-E5C421454DDB%7D/uploads/Circle_Sentencing_Handbook.doc) (describing the circle sentencing program adopted by a Minnesota county).

210. See Panko, *supra* note 204, at 456–57 (arguing circle sentencing is very effective at addressing issues like FASD, which are often out of the offending party's control).

211. NAT'L CTR. FOR STATE CTS., *supra* note 176, at 59; see OFF. OF NAT'L DRUG CONTROL POLICY, *supra* note 162, at 1 (propounding drug courts as a good idea for cash-strapped state and local governments because they are cost-effective and reduce recidivism rates).

212. Eckrich & Loudenburg, *supra* note 14, at 172–73; see BUREAU OF JUST. ASSISTANCE, *supra* note 137, at 7–12 (detailing key components of drug courts regarding access to individualized drug treatment and effective monitoring programs).

213. See Eckrich & Loudenburg, *supra* note 14, at 172–73 (stressing participants in drug courts are non-violent drug offenders to whom the courts issue individualized rehabilitation plans, including counseling, anger management, and parenting classes).

214. See NAT'L CTR. FOR STATE CTS., *supra* note 176, at 59 (concluding drug courts have reduced recidivism rates and lowered the cost of incarceration, thereby resulting in cost savings); see also OFF. OF NAT'L DRUG CONTROL POLICY, *supra* note 162, at 1 (propounding drug courts assist the community in meeting their public health and safety needs).

for their crimes, and it offers the treatment necessary for less culpable offenders to be productive members of society.<sup>215</sup>

#### IV. PROVIDING THE SOLUTION: FASD COURTS

Currently, a large percentage of individuals who suffer from FASD engage in some kind of criminal activity and end up in the U.S. criminal justice system.<sup>216</sup> Unlike an average criminal offender, an offender with FASD lacks the executive brain functioning and impulse control to alter his behavior after a traditional jail sentence.<sup>217</sup> This disconnect results in high recidivism rates among offenders with FASD.<sup>218</sup> Unlike a traditional jail sentence, problem-solving courts make rehabilitation, rather than retribution, the main goal of the program and offers support and supervision to the participants.<sup>219</sup> When the criminal justice system focuses on rehabilitating non-violent and less culpable offenders, the criminal justice system better serves the public by reducing recidivism rates and government costs.

The current sentencing structure, as it relates to offenders with FASD, fails to meet the traditional purposes of punishment. There is an abundance of case law that supports a change in how the U.S. justice system treats FASD offenders because the offenders are less culpable and can be rehabilitated more effectively with treatment.<sup>220</sup> To remedy these issues, state legislatures should create FASD courts modeled after drug courts; the courts would appropriately punish FASD offenders for their crimes, give offenders with FASD the treatment they need to become productive members of society, and reduce the recidivism rates of FASD offenders in the criminal justice system.

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215. See, e.g., Nevin, *supra* note 167 (touting the success of a treatment court aimed at helping veterans accused of crimes); see ROSSMAN ET AL., *supra* note 78, at 78 (finding participation in drug courts significantly curtails future criminal behavior).

216. See Jones, *supra* note 42, at 172–73 (discussing the correlation between individuals with FASD and such individuals' participation in criminal conduct); see also Page, *supra* note 23, at 79 (claiming individuals with FASD are more likely to engage in dangerous behavior if they are not properly identified and treated); SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., *supra* note 34, at 2 (pointing out that estimates show at least half of people with FASD have been in legal trouble at some point in their lives).

217. Page, *supra* note 23, at 77–78.

218. See SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., *supra* note 34, at 2 (suggesting people with FASD who commit crimes tend to be recidivists because of certain negative effects FASD has on the brain).

219. Eckrich & Loudenburg, *supra* note 14, at 172–73.

220. E.g., Graham v. Florida, 560 U.S. 48 (2010); see also Roper v. Simmons, 543 U.S. 551 (2005); Atkins v. Virginia, 536 U.S. 304 (2002); Penry v. Lynaugh, 492 U.S. 302 (1989); Ford v. Wainwright, 477 U.S. 399 (1986); Lockett v. Ohio, 438 U.S. 586 (1978); Stankewitz v. Woodford, 365 F.3d 706 (9th Cir. 2004).

### A. *Traditional Sentencing is Inadequate for FASD Sufferers*

The traditional goals of punishment, in many ways, act as the foundation upon which the U.S. justice system is built.<sup>221</sup> As a result, many of the Supreme Court's analyses begin with or include discussions of whether a sentencing system meets those traditional goals.<sup>222</sup> After an analysis of the goals of punishment, the Court has held that in cases of a less culpable defendant, life imprisonment and the death penalty are not the most effective approaches.<sup>223</sup> The current disregard for the attainable and available treatment of offenders with FASD violates public policy, wastes government resources, and fails to meet the goals of punishment.

The first purpose of punishment is retribution, which does not fully serve the needs of offenders with FASD.<sup>224</sup> Retribution is the idea that a person should be punished because he or she deserves to be punished, and the severity of the punishment should coincide with the offender's culpability.<sup>225</sup> An offender with FASD may have a normal IQ, but will have the executive functioning of a ten-year old.<sup>226</sup> This means that an offender with FASD is less able to make plans, make good judgments, delay gratification, connect cause and effect, empathize with others, take responsibility, imagine a future, or remember the past.<sup>227</sup> This type of brain dysfunction makes traditional punishment, with a focus on retribution, unproductive.<sup>228</sup> The Supreme Court has previously held that issuing punishments without proper consideration of culpability is against public policy and fails to utilize the U.S. justice system in an efficient

221. *See generally* Frase, *supra* note 79, at 70 (arguing criminal penalties can be used to accomplish rehabilitation, incapacitation, specific deterrence, general deterrence, and denunciation, which in turn prevent or lessen future criminal acts).

222. *See, e.g.,* *Graham*, 560 U.S. at 71–73 (holding none of the goals of penal sanctions provide an adequate justification for juvenile life sentences); *Simmons*, 543 U.S. at 571–72 (explaining a juvenile death penalty does not serve any of the traditional purposes of the criminal justice system); *Atkins*, 536 U.S. at 319–20 (discussing only the most deserving criminals should be put to death).

223. *See, e.g.,* *Graham*, 560 U.S. at 71 (holding the goals of punishment are not achieved by imprisoning juveniles for life since minors and adults are different); *Simmons*, 543 U.S. at 571 (“Retribution is not proportional if the law’s most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity”); *Atkins*, 536 U.S. at 318–19 (holding that imposing the death penalty on a mentally challenged person does not measurably contribute to either retribution or deterrence).

224. *See* Frase, *supra* note 79, at 73 (stating retribution is based on a level of culpability, which can be diminished if the offender has a mental disease).

225. *Id.*

226. Page, *supra* note 23, at 76.

227. *Id.* at 77.

228. *See id.* (discussing how an individual with FASD may not understand that their actions have consequences).

way.<sup>229</sup> Because individuals with FASD have different cognitive levels than adults,<sup>230</sup> they should not receive sentences that are disproportional to their mental capacity. Non-violent offenders with FASD have the ability to be productive members of society, but those offenders need a level of treatment and support that a traditional jail sentence does not provide.<sup>231</sup>

Non-violent offenders with FASD are not served by incapacitation without rehabilitation.<sup>232</sup> Generally, if an offender's likelihood of rehabilitation is low, then an offender is more likely to face a longer sentence in incarceration.<sup>233</sup> Therefore, incapacitation is intended to be reserved for those offenders that truly pose a risk to society.<sup>234</sup> Offenders with FASD generally commit the same crimes repeatedly without an increase in severity,<sup>235</sup> so they are not serious risks to society and respond better to treatment outside of prison.<sup>236</sup> Therefore, incarcerating non-violent offenders with FASD, without a focus on rehabilitation, does not serve an identifiable purpose and wastes government resources.

A traditional jail sentence does not deter an offender with FASD from committing subsequent crimes.<sup>237</sup> Deterrence seeks to discourage future criminal behavior, but the offender must have the ability to connect cause

229. See Jones, *supra* note 42, at 173 (“Locking up individuals who cannot possibly ‘learn from their experience and who repeat their crimes after release’ is costly and ineffective.”). See generally *Graham v. Florida*, 560 U.S. 48, 71–72 (2010) (mandating a sentence must be directly related to the defendant’s culpability, yet a life sentence cannot be imposed on a juvenile who is less culpable than an adult); *Roper v. Simmons*, 543 U.S. 551, 569 (2005) (discussing the culpability of juveniles compared to that of adults); *Atkins v. Virginia*, 536 U.S. 304, 317 (2002) (“This consensus unquestionably reflects widespread judgment about the relative culpability of mentally retarded offenders, and the relationship between mental retardation and the penological purposes served by the death penalty.”).

230. Page, *supra* note 23, at 76.

231. Cf. *CMTY. LIVING B.C.*, *supra* note 64, at 4, 8–9 (explaining individuals with FASD need a lot of support and assistance to thrive in their daily lives).

232. See Frase, *supra* note 79, at 73, 79 (noting low detection, conviction, and incarceration rates limit the effectiveness of rehabilitation or incapacitation).

233. See *id.* at 70–71 (“Judges are given very broad discretion to assess the degree of risk posed by the offender, diagnose the cause of that risk, assess whether those causes can effectively and safely be treated without incarceration, and, if they cannot, decide the maximum and sometimes the minimum term of incarceration.”).

234. *Id.* at 70.

235. *Fetal Alcohol Syndrome Disorder*, RETHINKING CRIME AND PUNISHMENT, <http://www.rethinking.org.nz/Default.aspx?page=4343> (last visited Oct. 25, 2015); *SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN.*, *supra* note 34, at 2.

236. Cf. Jones, *supra* note 42, at 173 (“Punishment does not cure neurological damage.”).

237. See *SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN.*, *supra* note 34, at 2 (stating individuals with FASD tend to repeat the same mistakes).



and effect between crime and punishment.<sup>238</sup> Without that connection, the offender does not have an incentive to alter his criminal behavior because he does not understand that such behavior will result in punishment.<sup>239</sup> Since offenders with FASD have low executive functioning, they struggle to connect cause and effect as well as give correct weight to the severity of a punishment.<sup>240</sup> The Supreme Court has held that the purpose of deterrence is not met by a traditional jail sentence when an offender cannot properly analyze the costs and benefits of a crime.<sup>241</sup> Therefore, the current sentencing system does not deter FASD offenders from reoffending, and a different approach, such as treatment and a structured program, will be more effective in meeting the goal of deterrence.

### B. *Treatment Instead of Imprisonment*

Rehabilitation is the punishment goal that best addresses the needs of less culpable offenders with FASD. Rehabilitation seeks to identify and treat whatever problems contributed to the offender's criminal behavior.<sup>242</sup> Even though medical personnel can diagnose FASD and recommend ways to mitigate the symptoms, there is little or no treatment for offenders with FASD in the current justice system.<sup>243</sup> Similarly, for many years other types of less culpable offenders, such as drug addicts and veterans with PTSD, did not receive treatment while incarcerated.<sup>244</sup> Many states implemented problem-solving courts to rehabilitate addicts and veterans, resulting in a dramatic reduction in recidivism rates within these

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238. See Frase, *supra* note 79, at 71 (stating a person's mental capacity should be taken into consideration when analyzing deterrence factors).

239. See *id.* at 72 (describing how deterrence prevents crime because the offender wants to avoid a sentence and a public denunciation of his actions).

240. Page, *supra* note 23, at 77.

241. See *Graham v. Florida*, 560 U.S. 48, 72 (2010) (“[L]ack of maturity and an underdeveloped sense of responsibility . . . often results in impetuous and ill-considered actions and decisions.”); cf. *Roper v. Simmons*, 543 U.S. 551, 572 (2005) (“[T]he likelihood that the teenage offender has made the kind of cost-benefit analysis that attaches any weight to the possibility of execution is so remote as to be virtually nonexistent.”).

242. Frase, *supra* note 79, at 70.

243. See SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., *supra* note 34, at 1 (“It is difficult to know how many people in the criminal justice system have an FASD. Data are limited, and populations vary by state. In addition, few systems screen for FASD or conduct a full diagnostic assessment.”).

244. Cf. Nat'l Ctr. for PTSD, *supra* note 165 (describing veteran courts as a recent development designed to address the mental health issues of the large number of veteran defendants returning from Afghanistan and Iraq).

groups.<sup>245</sup> To reduce recidivism among offenders with FASD, the courts must rehabilitate the offenders, and problem-solving courts have proven to be the most effective means of rehabilitation for non-violent, mentally impaired offenders.<sup>246</sup> To make a meaningful improvement in the U.S. justice system and to bring sentencing considerations in alignment with overall public policy, rehabilitation must be the focus of the sentence for non-violent offenders with FASD.

### 1. Rehabilitating the Less Culpable Offender

Several Supreme Court decisions support the implementation of a problem-solving court because they require courts to adequately balance the punishment granted with the offender's culpability.<sup>247</sup> The Supreme Court has historically ruled against sentencing systems, as applied to a group, that do not take lessened culpability into account.<sup>248</sup> In *Atkins v. Virginia*, the Supreme Court held that it was against public policy to execute intellectually disabled offenders,<sup>249</sup> and in *Roper v. Simmons*, the Court found that the execution of juveniles does not further the goals of punishment in the U.S. justice system.<sup>250</sup> In both decisions, the Court found that these groups were less culpable for their crimes because they lacked the ability to understand the consequences of their crimes, and their actions were generally impulsive.<sup>251</sup> Similarly, offenders with FASD do not fully understand their actions and act impulsively.<sup>252</sup> Therefore, it is against public policy to only offer offenders with FASD traditional sentences without the opportunity for treatment that problem-solving courts provide by properly addressing the symptoms of FASD.

Past Supreme Court cases indicate that when punishments are ineffective in meeting traditional goals, the punishments are inadequate and

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245. See, e.g., McMichael, *supra* note 169 (applauding the implementation of veterans courts, much like the country's more than 3,000 problem-solving courts, which has cut recidivism among veterans suffering from PTSD).

246. See ROMAN ET AL., *supra* note 158, at 8 (finding lower recidivism rates in five jurisdictions among those who were provided treatment through a drug court than those who did not receive treatment).

247. The Supreme Court has granted petitioners relief in capital punishment cases because of the offender's lower culpability due to either mental retardation or age. *Roper v. Simmons*, 543 U.S. 551, 552 (2005); *Atkins v. Virginia*, 536 U.S. 304, 304 (2002); *Penry v. Lynaugh*, 492 U.S. 302, 302 (1989).

248. *Atkins*, 536 U.S. at 321; *Ford v. Wainwright*, 477 U.S. 399, 410 (1986).

249. 536 U.S. at 321.

250. 543 U.S. at 571.

251. *Id.* at 571-72; *Atkins*, 536 U.S. at 317-18.

252. SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., *supra* note 34, at 1.

against public policy.<sup>253</sup> For example, in *Roper v. Simmons*, the Supreme Court reasoned that adolescents are more responsive to treatment than adults, so the sentences administered to adolescents should consider their higher possibility of rehabilitation.<sup>254</sup> Further, the Supreme Court reasoned in *Atkins v. Virginia*, that it is futile to punish, as opposed to treat, offenders who do not fully understand their actions because those offenders will not be deterred by the punishment.<sup>255</sup> Similarly, people with FASD do not fully understand the consequences of their actions,<sup>256</sup> and therefore, should not be subject to traditional punishment. As a result, the current system conflicts with public policy. Instead, a system that recognizes an offender's potential for rehabilitation and makes rehabilitation the focus of the system would align with the goals of the justice system,<sup>257</sup> Supreme Court precedent, and public policy.<sup>258</sup>

When Alaska passed Senate Bill 151, the legislature engaged in a thorough discussion about the policy reasons behind offering treatment to offenders with FASD.<sup>259</sup> The sponsor of the bill stated that offenders with FASD are more likely to be successful when given the same type of treat-

253. See *Simmons*, 543 U.S. at 571 (citing *Atkins*, 536 U.S. at 319) (emphasizing the penological justifications fail when "the law's most severe penalty is imposed on one whose culpability . . . is diminished"); see also *Penry v. Lynaugh*, 492 U.S. 302, 303–04 (1989) (concluding failure to instruct the jury properly about considering a defendant's lessened personal culpability due to diminished capacity rendered the death sentence unconstitutional).

254. See 543 U.S. at 571–72 (implying the same by way of reasoning that juveniles are less susceptible to the two "social purposes served by the death penalty: retribution and deterrence").

255. See 536 U.S. at 319–20 (detailing the ways that imposing the death penalty on an individual with a cognitive disability fails to meet the penological goals).

256. SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., *supra* note 34, at 1.

257. See generally Frase, *supra* note 79, at 70–71 (analyzing the role of rehabilitation in meeting the goals of the criminal justice system).

258. See *Graham v. Florida*, 560 U.S. 48, 74 (2010) (holding life imprisonment does not justify the goal of rehabilitation as it hampers a juvenile's capacity to rehabilitate). The following cases have recognized that certain individuals are not served by systems focused on retribution. See *Simmons*, 543 U.S. at 569–71 (recognizing youthful offenders are not among the worst offenders deserving of the death penalty); *Atkins*, 536 U.S. at 318–20 (excluding individuals with cognitive disabilities from receiving the death penalty as incompatible with the goals of the justice system); *Penry*, 492 U.S. at 304 (requiring instruction to the jury that they may consider mitigating evidence such as mental problems to establish reduced culpability); *Ford v. Wainwright*, 477 U.S. 399, 410 (1986) (discussing the underlying social values in the Eighth Amendment barring the death penalty for an insane defendant); *Lockett v. Ohio*, 438 U.S. 586, 606 (1978) (comparing a Georgia statute that withstood scrutiny with the one at issue in this case, which precludes or severely limits individualized consideration of mitigating factors).

259. *Hearing on SB 151*, *supra* note 130, at 6.

ment as offenders with other mental illnesses.<sup>260</sup> Other letters of support from private organizations made similar statements that offenders with FASD can and should be treated for their brain dysfunctions and not simply incarcerated without treatment or support.<sup>261</sup> States have implemented problem-solving courts to treat offenders with drug addictions and mental illness with overwhelming success.<sup>262</sup> Implementing an FASD court is not the same type of remedy as Alaska's statute, but it accomplishes the same goals<sup>263</sup> by giving offenders the opportunity for treatment and support services.<sup>264</sup>

The ABA recently addressed the inadequacies of the current sentencing system by explaining how the system fails to meet the special needs of offenders with FASD.<sup>265</sup> The ABA's resolution encouraged judges and attorneys to educate themselves on the symptoms of FASD and persuade lawmakers to introduce legislation that acknowledges the lessened culpability of offenders with FASD.<sup>266</sup> The resolution specifically addresses the sheer number of offenders with FASD and the special needs those offenders require.<sup>267</sup> While many people in the criminal justice system acknowledge the existence of a problem, there does not appear to be a clear direction any one entity is taking to address the issue.<sup>268</sup> Given the

260. *Sponsor Statement for SB 151, supra* note 130. "Evidence shows that directing people with mental illness and other brain disorders to supported services, both inside and outside of Corrections, significantly reduces the high financial and social costs associated with re-incarceration and recidivism." *Id.*

261. Letter from J. Kate Burkhart, *supra* note 131; Letter from David C. Fleurant, *supra* note 131; Letter from Jeff Jessee, *supra* note 131.

262. *See, e.g., ROMAN ET AL., supra* note 158, at 8 (indicating a drop in recidivism among individuals provided with treatment through a drug court).

263. *See ALASKA STAT. § 12.55.155(d)(20)(A) (2014)* (allowing consideration of FASD as a mitigating factor for sentencing purposes).

264. *Sponsor Statement for SB 151, supra* note 130; *see Hearing on S.B. 151, supra* note 130, at 6 (arguing the bill would better assist FASD defendants by providing, for example, intensive case management and assisted living services); Letter from Jeff Jessee, *supra* note 131 (supporting SB 151 because this piece of legislation recognizes that individuals with disabilities "are better served with supports and services, rather than incarceration without supports").

265. RESOLUTION 112B, *supra* note 10.

266. *See id.* ("Attorneys, judges, bar associations, law schools, and other entities . . . should support training and awareness of FASD . . . . Federal, state and local law and policy makers should also enact laws and policies that reflect the serious effects of prenatal alcohol use.").

267. *Id.* at 6.

268. *See generally id.* at 12 (recommending policy makers enact laws aimed at tackling prenatal alcohol use, and that the legal, medical, and court system collaborate to help individuals with FASD). Legal experts have recognized that "Fetal Alcohol Spectrum Disorders (FASD) is a serious problem in the U.S. adversely affecting a very large number of children and families . . . ." *Id.* at 1.

widespread use and acceptance of drug courts and their proven success,<sup>269</sup> implementing an FASD court structured after drug and veteran courts is a clear and feasible goal.

People with FASD face a similar situation that drug addicts and veterans have faced in the past.<sup>270</sup> People with FASD lack the average executive functioning and are less culpable than an average offender.<sup>271</sup> The current system is not rehabilitating or deterring these offenders;<sup>272</sup> therefore, a change must occur. A significant amount of data indicates that problem-solving courts such as drug and veteran courts are successful at identifying the root cause of an offender's criminal activity and treating that cause.<sup>273</sup> The drug-court model is especially effective with less culpable, non-violent, and treatable offenders because it makes rehabilitation and treatment the main goals of the program.<sup>274</sup> Legislatures have successfully implemented veteran courts utilizing the drug-court model,<sup>275</sup> which further demonstrates that the model can be implemented to serve several types of offenders. This same success can carry over to FASD courts because, with structured support services, offenders with FASD can lead productive lives.

### C. *Implementing an FASD Court*

The current system of sentencing less culpable FASD offenders fails to further any of the traditional goals of punishment because it does not

269. OFF. OF NAT'L DRUG CONTROL POLICY, *supra* note 162, at 1–2; ROMAN ET AL., *supra* note 158, at 27; ROSSMAN ET AL., *supra* note 78, at 71; McMichael, *supra* note 169.

270. *Compare* SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., *supra* note 34, at 2 (asserting individuals with FASD tend to repeat their crimes), *and* Burke, *supra* note 14, at 39–40 (discussing the high recidivism rates among drug addicts before states implemented drug courts), *with* McMichael, *supra* note 169 (discussing veteran courts decrease recidivism rates).

271. *See* Page, *supra* note 23, at 77 (discussing the impact of FASD on an individual's ability to plan and make good judgments).

272. *See generally* SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., *supra* note 34, at 1–2 (discussing high recidivism and problems individuals with FASD have with prison and probation).

273. OFF. OF NAT'L DRUG CONTROL POLICY, *supra* note 162, at 1–2; ROMAN ET AL., *supra* note 158, at 27; ROSSMAN ET AL., *supra* note 78, at 71; McMichael, *supra* note 169.

274. *See generally* Eckrich & Loudenburg, *supra* note 14, at 173, 175 (outlining drug court programs that focus on helping non-violent offenders and that incorporate treatment and rehabilitation into their strategies).

275. McMichael, *supra* note 169 (stating the successes of veterans court and that the veterans court concept is rooted in drug courts); *see* Russell, *supra* note 164, at 130, 132 (discussing the evolution of veteran courts from the drug court model and the drastic positive life changes among veterans who participated); Nevin, *supra* note 167 (declaring veteran courts successful).

focus on rehabilitation.<sup>276</sup> Supreme Court precedent dictates that less culpable offenders, including mentally impaired offenders, be given sentences that focus on rehabilitation.<sup>277</sup> The best alternative-sentencing practice is a problem-solving court because the infrastructure already exists, and research demonstrates that problem-solving courts are effective at reducing recidivism and costs.<sup>278</sup>

The structure of problem-solving courts would be cost-effective and successful in treating offenders with FASD for four main reasons. First, drug courts provide a team composed of police officers, probation officers, attorneys, and mental-health counselors that act as the offender's external brain.<sup>279</sup> This type of team formulates the requirements applicants need to meet to be considered for FASD court, and helps offenders make decisions, meet goals, and recognize negative influences by supervising the offenders' personal, work, and treatment schedules.<sup>280</sup> An external brain also helps FASD sufferers refocus on their current decisions and future goals.<sup>281</sup> Experts recommend an external brain,<sup>282</sup> such as the team offered in a drug-court program, to help mitigate the symptoms of FASD, and the team is a main component of the drug-court model.<sup>283</sup>

Within the external brain, the judge acts as the leader and authority figure.<sup>284</sup> Many experts recommend introducing FASD sufferers to a positive authority figure because people with FASD are often eager to comply with authority figures.<sup>285</sup> In the current system, people with

276. See Page, *supra* note 23, at 79 (discussing often the only response to FASD is blame or punishment).

277. See generally *Atkins v. Virginia*, 536 U.S. 304, 317 (2002) (holding imposing the death penalty on mentally impaired offenders does not serve the penological purposes of the criminal justice system); *Penry v. Lynaugh*, 492 U.S. 302, 304 (1989) (expressing defendants with mental problems may be less culpable, and their punishment should be directly related to their culpability); *Ford v. Wainwright*, 477 U.S. 399, 410 (1986) (concluding punishing mentally disabled individuals with the death penalty would violate the Eighth Amendment); *Lockett v. Ohio*, 438 U.S. 586, 607 (1978) (determining an offender's mental deficiency may mitigate death penalty sentencing).

278. See OFF. OF NAT'L DRUG CONTROL POLICY, *supra* note 162, at 1 (declaring support for drug courts due to their effectiveness); see *ROMAN ET AL.*, *supra* note 158, at 5–6 (discussing most drug courts can help maintain low recidivism rates).

279. BUREAU OF JUST. ASSISTANCE, *supra* note 137, at 1.

280. Page, *supra* note 23, at 87; JOHN HOWARD SOC'Y OF B.C., *supra* note 24, at 3.

281. Page, *supra* note 23, at 87.

282. *Id.* 80–81.

283. See BUREAU OF JUST. ASSISTANCE, *supra* note 137, at 1 (stating the realization of drug court goals requires a team approach).

284. *Id.* at 15.

285. See SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., *supra* note 34, at 2 (“Because [individuals with FASD] are eager to please, many unknowingly waive their rights by signing forms that they do not understand.”).

FASD are easily manipulated by other criminals or will give false confessions to cooperate with police officers.<sup>286</sup> However, in an FASD court program, the FASD court participant would be held accountable to a judge on a weekly basis.<sup>287</sup> In this weekly meeting, the judge would either reinforce positive behavior or discourage negative behavior.<sup>288</sup> While the current system and a traditional jail sentence leave an offender with FASD more vulnerable, the FASD court would provide the offender with the tools necessary to engage in positive activities and avoid criminal behavior.

Repetition is important for treatment because FASD sufferers have a difficult time learning from their mistakes.<sup>289</sup> To help mitigate this symptom, experts recommend that programs provide regular and consistent communication about the offender's expected behavior.<sup>290</sup> An FASD court that follows the structure of other problem-solving courts would meet at least once a week.<sup>291</sup> At the weekly meetings, the team and judge would acknowledge when a participant did or did not meet his expectations.<sup>292</sup> This type of repetitive reinforcement on a regular basis would help FASD sufferers learn from their mistakes and maintain a positive lifestyle.<sup>293</sup>

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286. *Id.*

287. *See* BUREAU OF JUST. ASSISTANCE, *supra* note 137, at 15 (explaining drug court participants are subjected to ongoing judicial supervision).

288. *See id.* at 1, 14 (explaining the court will encourage compliance with awards, such as giving tokens for accomplishments in the program and providing support for difficult times, and the court will also discourage noncompliance by admonishing the participant or requiring the participant to do community service or work programs).

289. *See* JOHN HOWARD SOC'Y OF ONTARIO, *supra* note 65, at 4 (recommending the use of repetition with FASD clients because those with FASD suffer memory loss and reminders help their recollection).

290. *See id.* at 4 (expressing people with FASD need consistency and routines in their interactions with other people and in their environment to prevent anxiety).

291. *See* Eckrich & Loudenburg, *supra* note 14, at 172–73 (pointing out the judge and the drug court team must meet once a week prior to meeting with the program participant to discuss and coordinate ideas to fit each particular participant's situation). *See generally* BUREAU OF JUST. ASSISTANCE, *supra* note 137, at 13–14 (demonstrating the drug court and the drug court team meets with the participant and establishes a continuum of positive or negative responses depending on whether the participant did or did not comply with the treatment program in order to reinforce the success of the program).

292. *See generally* BUREAU OF JUST. ASSISTANCE, *supra* note 137, at 1, 14–15 (explaining the judge will inform the participant that he will be closely monitored).

293. *Cf.* Eckrich & Loudenburg, *supra* note 14, at 172–73 (describing the techniques the court and the drug team use to instill a routine for the participants to follow); BUREAU OF JUST. ASSISTANCE, *supra* note 137, at 7–8 (explaining how the drug-court model is designed to help participants maintain a healthy lifestyle).

The drug-court model requires participants to maintain a productive schedule and provides the resources needed to maintain that schedule.<sup>294</sup> Experts stress the importance of routine in a person with FASD's life because routine keeps the sufferer focused and organized, which makes it less likely that the sufferer will make impulsive and destructive decisions.<sup>295</sup> People with FASD can live independently, but they may need guidance in finding housing, applying for jobs, or shopping for groceries.<sup>296</sup> Currently, an offender with FASD is released without any guidance, so he or she is more likely to reoffend.<sup>297</sup> In contrast, an FASD court will provide the offender with guidance by an entire team of people, such as counselors and social workers, which can help the offender locate the necessary resources to live independently.<sup>298</sup> Without guidance, the offender is likely to fall back into bad habits, but an FASD court provides the guidance that experts recommend to prevent an offender with FASD from committing future crimes.<sup>299</sup>

Finally, the implementation of problem-solving courts is a cost-effective method of remedying the current influx of offenders with FASD.<sup>300</sup> Similar to the implementation of veteran courts, jurisdictions could use

294. *See generally* BUREAU OF JUST. ASSISTANCE, *supra* note 137, at 5 (outlining that, once the drug court informs eligible participants about the program, the participant is required to adhere to the program requirements and the drug court team will monitor their progress).

295. *See* JOHN HOWARD SOC'Y OF ONTARIO, *supra* note 65, at 4 (stating it is important for people with FASD to have a routine that rarely changes).

296. INDEPENDENT LIVING, *supra* note 64, at 1.

297. *See* SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., *supra* note 34, at 2 (illustrating offenders are more likely to repeat the same mistakes again and providing a support system for the offender would be more effective).

298. *Cf.* BUREAU OF JUST. ASSISTANCE, *supra* note 137, at 1–2 (showing the drug court and the drug court team plays an active role in the offender's recovery by monitoring the offender's behavior, giving encouragement, and discouraging noncompliance to ensure that the offender reaches his goal of abstinence and law abiding behavior).

299. *Cf.* Page, *supra* note 23, at 87 (indicating the drug court's approach requires the offender to be closely monitored, and the drug court utilizes multiple people from different backgrounds to address the offender's unique issues to make sure that the program is a success for the offender). *See generally* JOHN HOWARD SOC'Y OF ONTARIO, *supra* note 65, at 4 (recommending repetition, structure, routine, and support to people with FASD to provide stable guidance); SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., *supra* note 34, at 2 (“[P]ersons with FASD may repeat the same mistakes many times.”).

300. *See* NAT'L CTR. FOR STATE CTS., *supra* note 176, at 59 (citing a cost analysis comparison between drug courts and traditional incarceration; drug courts revealed an overall savings of \$19,233, with most of the savings coming from outcome costs savings because offenders who go through drug court are less likely to be repeat offenders); *see also* BUREAU OF JUST. ASSISTANCE, *supra* note 137, at 7–8 (revealing a study by the Office of National Drug Policy which found that drug courts were more cost effective than other forms of drug control in the United States).



the infrastructure of drug courts to guide the implementation of FASD courts.<sup>301</sup> The initial cost of an FASD court would not be significantly less than a traditional court process, but several studies have shown that, in the long run, the drug-court model saves money by reducing recidivism and re-incarceration.<sup>302</sup> Therefore, jurisdictions ultimately save money and reduce crime.

The structure of drug and veteran courts addresses the needs of many people with FASD.<sup>303</sup> The ABA's 2012 resolution reflects the concern within the legal community over the growing FASD offender population and requests the legal community to construct a solution.<sup>304</sup> A problem-solving court for FASD offenders is the best solution. Similar to drug addicts and veterans, people with FASD have high rates of criminal activity,<sup>305</sup> but can be treated with the same type of counseling, supervision, and structure that problem-solving courts provide.<sup>306</sup> An FASD court modeled after a drug court would provide FASD offenders the support, guidance, repetition, and routine that experts recommend they need to lead productive, crime-free lives.

301. *Cf.* McMichael, *supra* note 169 (demonstrating drug courts inspired the creation of veteran courts).

302. *See* BUREAU OF JUST. ASSISTANCE, *supra* note 137, at 7–8 (asserting the drug-court treatment plan is more cost effective than other forms of drug prevention plans because the treatments can be done on an outpatient basis, or more specialized to the offender needs, such as sober living houses or residential treatments, and treatment is designed to support the offender to achieve recovery).

303. *See id.* (claiming the focus of treatment and prevention helps discourage offenders from repeating crimes and saves on the overall cost of incarceration); *cf.* ROMAN ET AL., *supra* note 158, at 28–29 (pointing out that recidivism rates were lower than traditional incarceration); ROSSMAN ET AL., *supra* note 78, at 71 (showing a study (based on a survey taken six months and eighteen months after release from the drug court program) revealed the recidivism rate for drug court offenders was much less than the comparison group); McMichael, *supra* note 169 (evaluating the results of veteran courts which show 75% of defendants who finish the program do not repeat their offense for the first two years after the program, and are more cost-effective than normal processing of offenders); Nevin, *supra* note 167 (announcing veteran courts in Michigan have successfully aided veterans in improving their lives in a more cost-effective manner than incarceration).

304. RESOLUTION 112B, *supra* note 10, at 1.

305. *See* SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., *supra* note 34, at 1 (stating researchers at the University of Washington have estimated that at least 35% of people with FASD have been in jail or prison at some point, and that of the three million people in prison in the United States over 28,000 have FASD); *see also* Jones, *supra* note 42, at 172 (asserting 14% of children who have FAS/E get in trouble with the law, and overall, 60% of people with FAS/E ages twelve and over have had trouble with the law).

306. *Cf.* BUREAU OF JUST. ASSISTANCE, *supra* note 137, at 1, 15 (describing the ten components of drug courts, including the structure and support provided to participants); Eckrich & Loudenburg, *supra* note 14, at 172–73 (maintaining the drug-court team coordinates a particular case plan unique to each participant and may include counseling, minimal contact standards, and attending Narcotics or Alcohol Anonymous meetings).

#### D. *FASD Courts are Constitutional and the Most Practical Option*

Some groups have expressed concern with utilizing a problem-solving court<sup>307</sup> and have offered another type of alternative sentencing to address the problems faced by less culpable offenders.<sup>308</sup> The groups' concern is that offenders will not knowingly and intelligently agree to accept entry into a program because they are more concerned with avoiding a prison sentence than understanding their options.<sup>309</sup> However, the Supreme Court has upheld plea-bargaining as constitutional several times as long as the offender fully understands his options.<sup>310</sup> Similar to a traditional plea bargain, officials involved with an FASD court would be held responsible for informing an offender of his rights and providing him the opportunity to have legal counsel.<sup>311</sup> One of the unique features of the drug-court model is that the prosecutor and defense attorney shed their adversarial approach to work as a team in helping offenders successfully complete the program.<sup>312</sup> The defense attorney and prosecutor are part of the external brain that screens candidates for entry into the problem-solving court; the external brain is highly motivated to only accept applicants who fully understand the commitment because the external brain's goal is for the participant to complete the program successfully.<sup>313</sup> If participants do not successfully complete the program, then the program will be deemed a failure and potentially terminated. Therefore, the risk of offenders entering the problem-solving court without a full understanding of their options is drastically reduced. With these appropriate safeguards and procedures in place, offenders will be informed of their options before making any decisions.

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307. Cf. Oram & Glecker, *supra* note 182, at 487 (discussing due process issues that exist in drug-court plea bargaining).

308. Cf. Panko, *supra* note 204, at 460 (suggesting "the sentencing circle" as an alternative to problem-solving courts).

309. Oram & Glecker, *supra* note 182, at 487.

310. See, e.g., *Puckett v. United States*, 556 U.S. 129, 137–38 (2009) (holding since the plea was entered knowingly and voluntarily, the government was obligated to honor the plea); *Corbit v. New Jersey*, 439 U.S. 212, 225–26 (1978) (establishing a guilty plea is not unconstitutional solely because the defendant made a bad assessment of risks from their decision); *Tollett v. Henderson*, 411 U.S. 258, 267 (1973) (concluding a guilty plea may not be vacated because the defendant was not advised of every conceivable plea option available); *Brady v. United States*, 397 U.S. 742, 747 (1970) (proclaiming a guilty plea is valid so long as the defendant entered the plea voluntarily and intelligently).

311. Cf. MEYER, *supra* note 191, at 11–12 (asserting individuals involved in drug courts are advised of their rights when considering a plea bargain).

312. BUREAU OF JUST. ASSISTANCE, *supra* note 137, at 3.

313. See *id.* at 3–4 ("Prosecutors and defense counsel participate in the design of screening, eligibility, and case-processing policies and procedures to guarantee that due process rights and public safety are served.").

The second concern focuses on whether an FASD court is the best type of alternative sentencing for FASD offenders. Circle sentencing is a form of alternative sentencing that focuses on involving the community in the offender's rehabilitation and reintegration into the community.<sup>314</sup> While circle sentencing offers offenders with FASD the community support they need, it does not offer the same type of structure and supervision offered by a problem-solving court.<sup>315</sup> A group in a circle-sentencing program is made up of community members that have an interest in the offender.<sup>316</sup> In comparison, the teams assembled in an FASD court would be made up of experts in FASD who understand the symptoms and methods of treatment.<sup>317</sup> Furthermore, a problem-solving court is an evidence-based solution, as demonstrated by the research on the success of drug courts.<sup>318</sup> Circle-sentencing programs have not been widely implemented,<sup>319</sup> so their ability to be successful is unknown. Implementing an FASD court offers offenders the most structure, treatment, and support they need in a framework proven to work.

## V. CONCLUSION

The current system does not sufficiently meet the purposes of punishment, and—without a change—offenders with FASD will continue to spend their lives in and out of jail without an opportunity to succeed. Historically, the U.S. justice system has attempted to make the punishment of an offender match the culpability of the offender.<sup>320</sup> The current structure does not take into account the lesser culpability of an offender

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314. See generally Panko, *supra* note 204 (proposing alternatives to typical criminal system punishments for young offenders).

315. Compare *id.* at 460 (reasoning the circle gives offenders a forum in which other members of the community can participate), with Eckrich & Loudenburg, *supra* note 14, at 172–73 (illustrating under a drug court system, offenders encounter a lot of structure), and BUREAU OF JUST. ASSISTANCE, *supra* note 137, at 1 (describing the structure of a drug-court model and benefits of such structure applied to FASD offenders).

316. Panko, *supra* note 204, at 460.

317. See BUREAU OF JUST. ASSISTANCE, *supra* note 137, at 1 (listing the various members of a drug-court team, which includes legal and health experts).

318. *Id.*; ROMAN ET AL., *supra* note 158, at 27; ROSSMAN ET AL., *supra* note 78, at 71; McMichael, *supra* note 169; Nevin, *supra* note 167.

319. See MINN. STAT. § 611A.775 (2015) (allowing government entities to establish restorative justice programs); see also *State v. Pearson*, 637 N.W.2d 845, 847 (Minn. 2002) (holding the statute supports the creation of a restorative justice program, but does not require it of the local governments).

320. E.g., *Atkins v. Virginia*, 536 U.S. 304, 317 (2002); *Penry v. Lynaugh*, 492 U.S. 302, 304 (1989); *Ford v. Wainwright*, 477 U.S. 399, 410 (1986); *Lockett v. Ohio*, 438 U.S. 586, 605 (1978).

who has FASD.<sup>321</sup> People with FASD are more impulsive and do not consider potential consequences before they act.<sup>322</sup> Similar to the United States' treatment of children,<sup>323</sup> the intellectually disabled,<sup>324</sup> and drug addicts,<sup>325</sup> people with FASD should be given the opportunity to receive needed structure and treatment. Services that provide treatment to people with FASD will help the justice system better comply with the traditional goals of punishment and save money. To better serve the public, states must take legislative action and create FASD courts to reduce recidivism and crime amongst a large and disabled group in the community.

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321. See JOHN HOWARD SOC'Y OF B.C., *supra* note 24, at 1 (highlighting the overrepresentation of individuals with FASD in prisons); SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., *supra* note 34, at 2 (stressing individuals with FASD sometimes unknowingly waive their rights or sign forms they do not understand); Page, *supra* note 23, at 79 (asserting FASD prevents individuals from receiving societal protection).

322. SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., *supra* note 34, at 1.

323. See *Roper v. Simmons*, 543 U.S. 551, 572 (2005) (excluding juveniles from death penalty eligibility).

324. See *Atkins*, 536 U.S. at 321 (holding individuals with intellectual disabilities cannot receive the death penalty).

325. See generally MEYER, *supra* note 191 (discussing drug courts and how they benefit drug addicts).