

ARTICLE/ESSAY: CHILDREN AND PROCEDURAL JUSTICE

2007-2008

Reporter

44 Court Review 36

Length: 7141 words

Author: Victoria Weisz, Twila Wingrove, and April Faith-Slaker

Vicky Weisz is a research professor of psychology at the University of Nebraska-Lincoln Center on Children, Families, and the Law. She received her Ph.D. in clinical psychology from Washington University in St. Louis and her Master of Legal Studies from the University of Nebraska College of Law. Dr. Weisz is Director of the Nebraska Court Improvement Project, a federally funded program focused on improving the state judicial and legal system for abused and neglected children, and serves as the main staff support for the Nebraska Supreme Court Commission on Children in the Courts. Her research projects include assessments of court and legal processes, evaluations of innovative legal or quasi-legal programs, and children's participation in court. She can be reached at vweiszl@unl.edu.

Twila Wingrove is a doctoral student in the Law-Psychology Program at the University of Nebraska-Lincoln. Her primary research interests include youth's participation in the legal system, and legal decision making regarding youth and families. Her dissertation explores the influence of procedural justice on parental compliance with the child protection system. She earned a J.D. with high distinction from the University of Nebraska College of Law in 2007, and is scheduled to receive her Ph.D. in 2009.

April Faith-Slaker is a doctoral student in the Human Development and Social Policy Program at Northwestern University. She received her law degree from the University of Wisconsin School of Law in 2007. After law school, she participated in research on children in the court process at the University of Nebraska-Lincoln Center on Children, Families, and the Law. She is also the managing editor of the Political and Legal Anthropology Review.

Text

[*36] The American Judges Association's White Paper that forms the centerpiece of this issue begins with the recognition that even first graders have an understanding of procedural fairness.¹ Developmental research has indeed established that young children are able to evaluate the fairness of activities and that they have a more positive perception of activities they deem to be more fair.² Until recently, however, there has been little concern in the U.S. regarding children's experiences of legal processes and procedures. In fact, children were not generally expected or encouraged to directly participate in most legal processes, even those where they were a main party to the proceedings, such as cases involving abuse/neglect and foster care. In the last several years in the U.S.,³ there have been arguments made to increase children's participation in legal processes that affect them and to

¹ Kevin Burke & Steve Leben, *Procedural Fairness: A Key Ingredient in Public Satisfaction*, 44 CT. REV. 4, 4 (this issue) (White Paper originally delivered at the annual conference of the American Judges Association, Sept. 2007, Vancouver, B.C.), available at <http://aja.ncsc.dni.us/htdocs/AJAWhitePaper9-26-07.pdf>.

² See P. S. Fry & Vera K. Corfield, *Children's Judgments of Authority Figures with Respect to Outcome and Procedural Fairness*, 143 J. GENET. PSYCHOL. 241 (1983); Anthony J. Hicks & Jeanette A. Lawrence, *Children's Criteria for Procedural Justice: Developing a Young People's Procedural Justice Scale*, 6 SOC. JUST. RES. 163 (1993).

³ The U.K. has been involving children in legal and quasi-legal processes since the early 1990s. See generally Eileen Munro, *Empowering Looked-After Children*, 6 CHILD & FAM. SOC. WORK 129 (2001).

increase children's knowledge of legal processes. ⁴ These arguments for increased participation are generally couched in the language of procedural justice—children desire and deserve a voice in legal proceedings that affect them. For example, a recent publication for and by foster youth, provided by the nonpartisan Pew Commission on Children in Foster Care, is titled *My Voice, My Life, My Future*. ⁵ Similarly, efforts at increasing children's knowledge of legal processes are attempts to empower them in their dealings with the legal system by increasing their understanding of the players and the process.

Despite recent trends in expanding children's participation in legal and quasi-legal proceedings, there is little empirical data that can provide guidance to courts. Many questions are unanswered. Do factors that contribute to perceptions of procedural fairness for adults also contribute to perceptions of procedural fairness for children and youth? Are children and youth similar to adults in valuing procedural fairness more than distributive justice in their general satisfaction regarding decision outcomes? Does knowledge about the legal system impact children's perceptions of fairness? Do children's experiences with the legal system impact their perceptions of and respect for the legal system? Are there judicial practices that might increase children's sense of judicial fairness and perhaps increase the development of general trust and confidence in the judiciary?

In this article, we describe recent national trends in enhancing children's experience of justice in the court and provide an overview of the relevant empirical research regarding children and procedural justice. The article focuses on children's participation in legal proceedings and children's legal knowledge drawing upon the literature in the predominate types of cases that involve or impact children: civil abuse/neglect and foster care, delinquency and status offenses, custody disputes in divorce proceedings, and victim-witnesses in criminal proceedings of child sexual abuse. We conclude with a summary of the current state of knowledge regarding children and procedural justice and with implications for court practice.

NATIONAL TRENDS

The U.S. has come relatively late to the idea that children should be allowed and encouraged to participate in legal proceedings that affect them. A number of other countries had earlier endorsed this principle influenced in part by Article 12 of the UN Convention on the Rights of the Child ⁶ that establishes the right of capable children to directly express their views and to be provided the opportunity to be heard in judicial and administrative proceedings either directly or indirectly.

Still, considerable support has grown over the past several years in the U.S. for directly involving children in their abuse/neglect/foster-care court proceedings and giving them voice in the proceedings. ⁷ The prestigious nonpartisan Pew [37] Commission on Children in Foster Care made a number of recommendations to Congress to strengthen the Court's effectiveness in child welfare cases, including that, "Courts should be organized to enable

⁴ See Annette R. Appell, *Children's Voice and Justice: Lawyering for Children in the Twenty-First Century*, 6 NEV. L.J. 692 (2006); Erik S. Pitchal, *Where Are All the Children? Increasing Youth Participation in Dependency Proceedings*, 12 J. JUV. L. & POL'Y 233 (2008).

⁵ Home At Last and the Children's Law Center of Los Angeles, *My Voice, My Life, My Future* (2006) (brochure sponsored by The Pew Commission on Children in Foster Care), available at http://www.pewtrusts.org/our_work_report_detail.aspx?id=19876.

⁶ U.N. Convention on the Rights of the Child, G.A. Res. 44/25, U.N. Doc. A/RES/44/25 (Nov. 20, 1989), available at <http://www.unhcr.ch/html/menu3/b/k2crc.htm>. The U.N. Convention on the Rights of the Child is the most widely and rapidly ratified human-rights treaty in history with 192 countries ratified by 2005 (exceptions are U.S. and Somalia). See Office of the United Nations High Commissioner For Human Rights, Status of Ratifications of the Principal International Human Rights Treaties (June 9, 2004), available at <http://www.unhcr.ch/pdf/report.pdf>.

⁷ See Andrea Khoury, *Seen and Heard: Involving Children in Dependency Court*, 25 CHILD L. PRAC. 149 (2006); Miriam Aroni Krinsky, *The Effect of Youth Presence in Dependency Court Proceedings*, JUV. & FAM. JUST. TODAY, Fall 2006, at 16; Pitchal, *supra* note 4; *Recommendations of the UNLV Conference on Representing Children in Families: Child Advocacy and Justice Ten Years After Fordham*, 6 NEV. L. REV. 592 (2006).

children and parents to participate in a meaningful way in their own court proceedings." ⁸ Advocates have begun providing practical advice for including children in proceedings including specific suggestions to prepare children for their court involvement, to make the courtroom process more comfortable for children, and to assist attorneys and judges in their ability to ask age-appropriate questions. ⁹

A recent review of state statutes shows that children have a right to be present at abuse/neglect proceedings in 18 out of 51 states (including the District of Columbia), they are considered a party in 38 out of 51 states, and they are required to be given notice in 14 out of 51 states (with age requirements in most with this requirement). ¹⁰ Additionally, recent federal legislation sets forth a requirement that "the court or administrative body conducting the hearing consults, in an age-appropriate manner, with the child regarding the proposed permanency or transition plan for the child." ¹¹

Along with the growing impetus for children's increased participation has been a growth in efforts to increase children's knowledge of the judicial process and their rights in the legal system. Many states have developed guidebooks or other materials to inform about and prepare them for a court experience. ¹² A number of jurisdictions provide child-victim-witness-preparation programs. The most formal of these programs include educational interventions to improve children's knowledge of courtroom actors and procedures and typically include pretrial tours and role-playing exercises. ¹³ These interventions are all intended to increase children's understanding of the legal system so that they can best benefit from or be most effective in their participation.

RESEARCH ON CHILDREN'S PARTICIPATION

General Background

Adults who have the opportunity to participate in decision-making proceedings and express their perspectives perceive the process and outcome as more fair. ¹⁴ The reasons for the relationship between participation and

⁸ THE PEW COMMISSION ON CHILDREN IN FOSTER CARE, *FOSTERING THE FUTURE: SAFETY, PERMANENCE AND WELL-BEING FOR CHILDREN IN FOSTER CARE* 18 (May 18, 2004), available at <http://pewfostercare.org/research/docs/FinalReport.pdf>.

⁹ See Andrea Khoury, *With Me, Not Without Me: How to Involve Children in Court*, 26 CHILD L. PRAC. 129 (2007).

¹⁰ Theresa Hughes, *State-by-State Summary of a Child's Right to be Present/Participate in Child Protective Proceedings* (2007), http://www.abanet.org/child/empowerment/involving_youth.html. As of Spring 2007, children have a right to be present in hearings in Alabama, Arkansas, California, Connecticut, Florida, Illinois, Kansas, Louisiana, Maryland, Minnesota, Missouri, Montana, Ohio, Oregon, Texas, Utah, Virginia, and West Virginia.

¹¹ Adoption and Safe Families Act, [42 U.S.C. 675\(5\)\(C\)](#).

¹² See, e.g., Phil Ladew, *Fight for Your Rights: A Guidebook for California Foster Youth, Former Foster Youth and Those Who Care About Them* (The National Center for Youth Law 2007), available at http://www.youthlaw.org/fileadmin/ncyl/youthlaw/publications/fight_for_rights/Fight_for_your_Rights_Handbook_2007.pdf; Nebraska Court Improvement Project, *Know Your Rights: A Guide for Youth in Nebraska's Foster Care System* (University of Nebraska-Lincoln Center on Children, Families and the Law 2008), available at <http://www.throughtheeyes.org/files/Know%7020Your%20Rights.pdf>; Victims Services Section, Virginia Department of Criminal Justice Services, *Going to Court: An Activity Book for Children* (2005), available at <http://wwwdcjs.virginia.gov/victims/documents/goingToCourtColoringBook.pdf>.

¹³ See Julie Lipovsky & Paul Stern, *Preparing Children for Court: An Interdisciplinary View*, 2 CHILD MALTREATMENT 150 (1997).

¹⁴ E.g., E. Allan Lind, Ruth Kanfer, & P Christopher Earley, *Voice Control, and Procedural Justice: Instrumental and Noninstrumental Concerns in Fairness Judgments*, 59 J. PERSONALITY & SOC. PSYCHOL. 952 (1990); E. Allan Lind, Tom R.

fairness judgments are not clear. Some researchers have argued people value participation in the legal process because it provides opportunity to influence the decision.¹⁵ Others argue participation indicates the person's value in the process and this recognition of individual standing is the main contribution to the person's assessment of fairness.¹⁶

A few studies have applied procedural justice theories to children or youth and demonstrated that children and youth also value fairness in procedures. The earliest studies explored procedural justice as a specific aspect of moral development in children.¹⁷ More recently, Hicks and Lawrence assessed adolescents' judgments of procedural justice in hypothetical scenarios involving a young thief.¹⁸ They found that, like adults, teens consider procedural justice factors in assessments of overall satisfaction with case outcomes and processes.

Procedural justice has also been explored within the family context. Fondacaro and his colleagues asked 240 college students to recall a recent family dispute and rate how their parents handled it along various dimensions.¹⁹ Overall judgments [*38] of procedural fairness were positively related with family cohesion and psychological well-being. Disrespectful treatment was the best predictor of deviant behavior.

In Fagan and Tyler's study exploring connections between procedural justice attributions and legal socialization, adolescent judgments of procedural fairness in their interactions with legal actors, including police, school security officers, and store security staff, were assessed along with a variety of measures of attitudes toward the legal system and with self-reported legal compliance.²⁰ The researchers found that children's interactions with legal actors shaped their views about the legitimacy of the law and its institutions. Further, more positive perceptions about the legitimacy of the legal system were associated with lower rates of self-reported delinquency behaviors. Thus, Fagan and Tyler's research suggests a link between children's judgments about the procedural fairness of legal activities they experience, their developing conceptions of the legitimacy of our legal system, and their delinquent behaviors.

PARTICIPATION IN CHILD-PROTECTION/ FOSTER-CARE PROCEEDINGS

As discussed earlier, there has been considerable recent attention placed on increasing children's participation in their foster-care court hearings by national legal advocacy groups. Foster youth and former foster youth who are active in support and advocacy organizations have strongly voiced their desires for participation.²¹ The trend for

Tyler, & Yuen J. Huo. *Procedural Context and Culture: Variation in the Antecedents of Procedural Justice Judgments*, 73 J. PERSONALITY & SOC. PSYCHOL. 767 (1997).

¹⁵ See generally Lind, Kanfer, & Earley, *supra* note 14; Tina L. Robbins et al., *Using the Group-Value Model to Explain the Role of Noninstrumental Justice in Distinguishing the Effects of Distributive and Procedural Justice*, 73 J. OCCUP. & ORG. PSYCHOL. 511 (2000); John Thibaut & Laurens Walker, *A Theory of Procedure* 66 CAL. L. REV. 54 (1978); Tom R. Tyler & E. Allan Lind, *A Relational Model of Authority in Groups*, in 25 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 115 (Mark P Zanna, ed., 1992).

¹⁶ See, e.g., Tyler & Lind, *supra* note 15; Tom R. Tyler, *Psychological Models of the Justice Motive: Antecedents of Distributive and Procedural Justices*, 67 J. PERSONALITY & SOC. PSYCHOL. 850 (1994).

¹⁷ See, e.g., Laura J. Gold et al., *Children's Perceptions of Procedural Justice*, 55 CHILD DEV. 1752 (1984).

¹⁸ Hicks & Lawrence, *supra* note 2.

¹⁹ Mark R. Fondacaro, Michael E. Dunkle, & Maithilee K. Pathak, *Procedural Justice in Resolving Family Disputes: A Psychosocial Analysis of Individual and Family Functioning in Late Adolescence*, 27 J. YOUTH & ADOLES. 101 (1998).

²⁰ Jeffrey Fagan & Tom R. Tyler, *Legal Socialization of Children and Adolescents*, 18 SOC. JUST. RES. 217 (2005).

²¹ One must be cautious, however, in assuming that this means that all children in foster care desire participation. Foster-youth spokespersons are not representative of all children in foster care. These youth, as evidenced by their voluntary membership in these advocacy groups, are more likely to want and be comfortable with voicing their perspectives than the foster youth who do

more participation by children has been met with considerable resistance in some quarters, primarily because of concerns that court participation may be harmful to children by exposing them to painful information or forcing them to talk about sensitive matters in a public or quasi-public setting.

A current study by the authors is designed to investigate these matters in a general population of children in foster care. We are assessing the perceptions of children who participate in their foster-care hearings as compared to children in foster care who do not attend their hearings. We are specifically exploring the children's interests in participating, their stress regarding participation, and their perceptions of the fairness of the legal process and players. Children under eight are not included in this study.

Preliminary findings²² suggest that children who attended their hearings strongly felt that they were given a chance to tell their side of things, the judge listened to them when they talked in court, they were treated fairly during the hearings, and their attorney guardian ad litem and their case worker did a good job telling the judge about their situation. Children who did not attend their hearings reported comparatively lower ratings about whether they were given a chance to tell their attorney guardian ad litem about their situation. Children who had never attended a hearing had less positive perceptions, when compared to children who had attended their hearings, about whether the judge knew enough to make a fair decision for them. Of particular interest is the perception of the children who had never attended a hearing who disagreed with the statement that "Someone at the hearing told the judge what I think." Finally, children who attended their hearings had very high agreement (and slightly higher than the non-attenders) with the statement "I trust the judge to do what is best for me." These preliminary findings are strongly suggestive that children who attended their court hearings have more positive feelings about the fairness and benevolence of their legal proceedings than do children who did not attend their hearings. Children who attended their hearings believe they had an opportunity to provide their perspective and the judge listened to them. Children who never attended court believe that no one tells the judge what they think.

Because of concerns that court attendance would be stressful for children, we asked children about some emotional aspects of the experience. Children who attended court reported some agreement with being nervous before going to court but reported they did not feel upset while in court, they felt comfortable answering the judge's questions, and it was not hard to talk to the judge in front of everyone. Children who attended court reported strong feelings they were glad they went to court and thought kids should be able to go to court. Children who had never attended a hearing also reported they thought kids should be able to go to court.

When the children were asked open-ended questions about whether they thought going to court was a good idea, the children who had been to court had much more to say than the children who had never been. Most of the children who had been to court indicated their preference to go to court both to articulate their opinions to the judge as well as to obtain information about their situation. One child, age 15, indicated it was a good idea for kids to go to court because "if I hear things from other people, they might not be the truth." Another child said she wanted to go because she "wanted to know what happened." Some children reported concerns their guardian ad litem or caseworker might not effectively advocate for their best interest. A foster parent reported two young adolescents in her care had recently attended a hearing and had both been quite eloquent in discussing their placement desires and concerns with the judge.

[*39] Several of the court attenders expressed concerns about how to appropriately integrate children into hearings. One child, age 14, reported difficulty understanding what was happening during the hearing. She said "they should simplify it for kids because a lot of the words were very technical." That same child also expressed concerns about being upset by having to see other members of her family at court. In fact, she had not attended the hearing in question because she had heard her mother was going to be there, though she had attended previous hearings. Similarly, another child expressed concerns she was not able to tell the judge what she really thought

not choose to join such groups. Still, although one cannot assume a general desire for participation by foster youth, one also cannot dismiss it.

²² These preliminary findings include data from 30 children (16 attenders, 14 non-attenders). The study will eventually include 100 children.

because she did not want to upset her mother, who was also present at the hearing. It is interesting to note that the same children who expressed these concerns also expressed positive attitudes about the value of attending court and their perceptions of fairness of the court procedure. The children who felt concerns about family members actively made decisions to protect themselves from situations they found stressful or painful (not attending a hearing; not being forthcoming in front of the mother). These comments suggest that if children are to benefit from the court participation, including feeling their perspective is important and the process is fair, it may be important to give children the option to choose not to attend their hearing. The comments also suggest attorneys or guardians ad litem have a role to play in "translating" the technical language of the courtroom.

This project builds on a small, but growing body of research about children's perceptions regarding their participation in legal and quasi-legal proceedings. Surveys of children who are in or who were in the foster-care system have generally found these children want more participation in the decision making about their lives.²³ Foster children have reported they wished they were asked their opinions about decisions that affected them, and a major concern of theirs was their perception that they lacked control over decisions being made about them.²⁴

In England and Wales, The Children's Act of 1989 requires courts and local authorities to obtain "looked after" (i.e., foster) children's views and to take those views into consideration when making decisions regarding their care. Several studies have explored children's perceptions of their required participation in review meetings, which are formal reviews that include representatives of various agencies, parents, and foster parents. The studies typically involve self-reports of small numbers of children that are convenience samples. The largest study involved interviews with 47 children between the age of 8 and 12.²⁵ Most of the children wanted more preparation before the meetings to learn what the meeting would be like, who would be there, and what would be discussed. Most of the children felt satisfied with the amount of support they received at the meetings. A quarter of the children felt that they spoke "a lot" at the meetings, the rest felt they spoke "some" or "a little." Most of the children who spoke felt they were listened to "a lot" by the adults. In contrast, few of the children felt they had "a lot" of influence over decisions that were made. Surprisingly, half the children reported they liked the meetings only "a little," describing them as boring, scary, upsetting, or embarrassing. Some children expressed the views that they didn't like being put on the spot or having their lives discussed by strangers.

PARTICIPATION AS VICTIM-WITNESSES

Another focus of research regarding children's participation in legal proceedings involves child witnesses testifying about their allegations of sex-abuse victimization in criminal court. The seminal work in this area was a study by Goodman and her associates that followed children through the criminal-court process, including the experience of testifying for those children whose cases went to trial. Sixty children who went on to testify were compared to 75 control children whose cases did not go to trial.²⁶ The study's main findings were that the "testifiers" exhibited more behavioral disturbance than the "non-testifiers" seven months following their testimony, especially if they had to take the stand numerous times, did not have maternal support, and did not have their statements corroborated. The adverse effects diminished after the prosecution was complete. A long-term follow up of these children (average elapsed time of over 12 years from trial) by Quas and her colleagues found victim-witnesses who had testified

²³ E.g., Mary C. Curran & Peter Pecora, *Incorporating the Perspectives of Youth Placed in Family Foster Care*, in *THE FOSTER CARE CRISIS: TRANSLATING RESEARCH INTO POLICY AND PRACTICE* 99 (Patrick A. Curtis, eds., 1999); Krinsky, *supra* note 7.

²⁴ E.g., TRUDY FESTINGER, *No ONE EVER ASKED US: A POSTSCRIPT TO FOSTER CARE* (1983); Judy Cashmore, *Promoting the Participation of Children and Young People in Care*, 26 *CHILD ABUSE & NEGLECT* 837 (2002).

²⁵ Nigel Thomas & Claire O'Kane, *Children's Participation in Reviews and Planning Meetings When They Are "Looked After" in Middle Childhood*, 4 *CHILD & FAM. SOC. WORK* 221 (1999).

²⁶ Gail S. Goodman et al., *Testifying in Criminal Court: Emotional Effects on Child Sexual Assault Victims*, 57 *MONOGRAPHS OF THE SOCIETY FOR RESEARCH IN CHILD DEVELOPMENT* (1992).

perceived the legal system as fairer than those victim-witnesses who had not had their day in court.²⁷ The researchers surmised those children who more fully participated were more satisfied with the legal system, but they also could not rule out the possibility that the children who did not end up testifying had their cases resolved through plea bargains and that there may have been less severe sentences for the alleged perpetrators in those cases.

PARTICIPATION IN CHILD-CUSTODY DECISION MAKING

Another major trend in increasing children's participation in legal proceedings involves custody determinations in divorces. [*40] Again, there has been a push by legal advocacy groups for more participation by children and a push-back from some professionals about potential harms to children in being drawn into loyalty conflicts between their parents. Again, there is little empirical research that has addressed the impact on children regarding participation in custody determinations.

A recent study by the authors explored young adults' perceptions of their experiences going through parental divorce when they were children.²⁸ Approximately half of the study participants reported that they had participated in the custody decision making. In general, all respondents perceived the custody decision making process as fair and their treatment as benevolent and respectful. They generally felt they had some influence over the custody decision, and they were generally satisfied with the decision. Respondents who directly participated in the custody decision, either informally with their parents or more formally in mediation or with a judge, perceived the *process* as fairer than those who had not participated. However, participation did not influence whether they thought the outcome was fairer or whether they were more satisfied with the decision.

The study revealed an interesting pattern regarding the age of the child during the divorce. For the respondents who were younger when their parents divorced, if they thought they were treated fairly, they were more satisfied with the decision. In contrast, for those who were older, their perceptions of the fairness of the custody decision itself, not the fairness of their treatment, was related to their satisfaction with the decision.

Participants in the study were asked an open-ended question about whether they thought it was beneficial or harmful to have been asked about their custody preferences. There were more responses that expressed a benefit for participation, but there were some mixed responses and a few that suggested more harm than benefit. Examples of positive assessments include: "It was beneficial that my parents talked to me because it showed that they cared about my feelings in the divorce, not solely their own," and "It was beneficial because I was caught in the middle of a dispute and making a preference helped me through the situation better." Mixed comments included, "I think that it was a little of both. It was beneficial in the fact that I was allowed input, but harmful that I had to tell my dad I would rather live with my mom," and "Beneficial, I feel that it gave me a voice, but it also may have given me too much freedom." One individual expressed a largely negative experience: "Harmful. It put me under a lot of stress, and I always felt guilty. I felt I shouldn't have to choose between parents. That is unfair for a child to do." Despite some reports of negative consequences, there was almost universal opinion by these young adults who had experienced parental divorce as children that children should be involved in custody decisions.

There have been relatively few other studies on children's desires to participate in decision making regarding custody decisions or on the impact of their participation. It should be noted there has been more international policy focus on including children in legal decision making than there has been in the U.S. Also, none of the following studies looked at children's feelings about participating in the legal hearings themselves.

²⁷ Jodi A. Quas et al., *Childhood Sexual Assault Victims: Long-Term Outcomes After Testifying in Criminal Court*, 70 MONOGRAPHS OF THE SOCIETY FOR RESEARCH IN CHILD DEVELOPMENT (2005).

²⁸ Twila Wingrove et al., *Young Adults' Perceptions of Their Participation in the Child Custody Decision: An Extension of Procedural Justice Theory* (2007) (unpublished manuscript, on file with the author).

New Zealand researchers Smith and Gollop asked 107 children whose parents had divorced several years earlier about what advice they would give to parents who were separating.²⁹ The children recommended parents should keep children informed, should listen to them, should respect their views, and take their views into account in decision making. Kaltenborn interviewed 62 children who had custody evaluations at the time of their parent's divorce where the children's custody preferences had been explored.³⁰ Children who did not have their wishes followed were less likely to comply with the court-ordered custody arrangement (by running away or living with the non-custodial parent) than were the children (the vast majority) whose wishes were followed. Kaltenborn attributed this to children's general ability to know what they needed and desire to create their own paths.

Thus, the few studies on children's participation in custody decision making provide mixed results about children's general desires to be involved and the impact of involvement. However, there appears to be stronger support for giving children the opportunity for involvement.

RESEARCH ON CHILDREN'S LEGAL KNOWLEDGE

Children's perceptions of the fairness of their experiences with the legal system would seem to require a basic understanding of the roles of the legal actors and of the processes that transpire. The primary research focused on the legal knowledge of children and youth has centered on law violators because having "a rational as well as factual understanding of the proceedings against him"³¹ is a key component of a youth's competence to assist in his or her defense.³² There have been relatively consistent findings that children under the age of 13 or 14 appear to have substantially less basic knowledge about the trial process and players than do older adolescents and adults.³³ Studies have provided mixed results as to whether [*41] prior experience with the legal system is associated with more knowledgeable youth, but there appears to be more support for the conclusion that prior experience does *not* relate to better understanding of the system.³⁴

Given the poor knowledge performance of many youth in the juvenile justice system, researchers have explored whether educational interventions can improve youth's knowledge and understanding. Teaching of legal information improved legal understanding, especially for older adolescents (over age 13), ethnic minorities, and youth with higher IQs.³⁵ However, efforts at increasing youth's understanding and competencies have not proved to be very successful with younger children and children or youth with developmental or other cognitive deficits.³⁶

Unlike children facing delinquency charges, children participating in foster-care hearings are not legally required to meet competency standards. Nonetheless, it does seem that greater understanding of the process might allow

²⁹ Anne B. Smith & Megan M. Gollop, *What Children Think Separating Parents Should Know*, 30 NEW ZEAL. J. PSYCHOL. 23 (2001).

³⁰ Karl-Franz Kaltenborn, *Individualization, Family Transitions and Children's Agency*, 8 CHILDHOOD 463 (2001).

³¹ [Dusky v. U.S., 362 U.S. 402, 402 \(1960\)](#).

³² Richard J. Bonnie & Thomas Grisso, *Adjudicative Competence and Youthful Offenders*, in YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE 67, 76 (Thomas Grisso & Robert G. Schwartz eds., 2000).

³³ Michele Peterson-Badali et al., *Young Children's Legal Knowledge and Reasoning Ability*, 39 CAN. J. CRIMINOLOGY 145 (1997).

³⁴ Thomas Grisso, *What We Know about Youths' Capacities as Trial Defendants*, in YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE 139, 151 (Thomas Grisso & Robert G. Schwartz eds., 2000).

³⁵ Jodi L. Viljoen et al., *Teaching Adolescents and Adults about Adjudicative Proceedings: A Comparison of Pre-and Post-Teaching Scores on the MacCAT-CA*, 31 L. & HUM. BEHAV. 419 (2007).

³⁶ Jodi L. Viljoen & Thomas Grisso, *Prospects for Remediating Juveniles' Adjudicative Incompetence*, [13 PSYCHOL. PUB. POL'Y & L 87 \(2007\)](#).

children to better place their participation in context and draw conclusions about fairness. A recent study by Quas and her colleagues explored the relationship between maltreated children's understanding of their dependency-court involvement and their emotional reactions to that involvement.³⁷ While not assessing children's perceptions of fairness, the study's focus on the relationship between children's knowledge and their comfort in the proceedings is instructive. As would be expected, the study found that as children got older (the sample included children age 4-15), they were able to demonstrate more general legal knowledge and more knowledge about the dependency-court system. Even many older children, however, lacked a full understanding of the outcome of their hearing, leading the authors to conclude "[b]oth older and younger children need assistance understanding the legal system generally and interpreting what is happening in their own case, particularly the decisions made in court on their behalf."³⁸ The findings suggested that children with more general legal knowledge were less distressed about their hearings, leading the authors to conclude that greater general legal understanding was useful for children in both helping them feel less distress and also helping them better make sense of their own participation experience.

It should be noted that despite the relationship between children's knowledge and distress, Quas et al.'s study found low levels of distress among most children who participated in their hearings. Children, on average, reported positive general feelings and positive feelings about the court process both before and after their hearings. Their feelings about the judge's decision were also both on average positive, and they improved from before the hearing (anticipating the decision) to after the hearing (recalling the decision). Thus, this research suggests that most children do not experience negative emotional reactions to court participation and prior knowledge about the court process may make the experience even more positive.

CONCLUSIONS

Research regarding children and procedural justice in the courts is in its infancy and is consequently far from conclusive. Nonetheless there are some findings that suggest that, like adults, children view their participation in legal proceedings that affect them as an important component of their judgment of procedural fairness. Children and adolescents appear to desire participation in legal proceedings that affect them both because they want to have a voice in decisions and because they want to have accurate information about the proceedings and their outcomes. It is not clear, however, whether children are similar to adults in valuing fairness in procedures more than they value fairness in outcomes. The study examining young adults looking back on to custody decisions that were made when their parents divorced suggests that there may be an important developmental component to these judgments, with younger children placing a greater value on procedural justice and adolescents placing a greater value on distributive justice.³⁹ Although there has not been sufficient research to know whether particular theoretical models of procedural justice that predict adult judgments also apply to children's experiences, the fundamental value of participation as a component of procedural justice determinations appears to reflect children's experiences as well as adults.

It seems as if children would need to have a basic understanding of the legal system to be able to place their participation in context and make judgments about the fairness of proceedings. They need to know the basic roles of the professionals. They also may need to know the sources of information the judge relies on to make decisions (e.g., written reports as well as courtroom testimony and argument). There is no research that explores the relationship between children's knowledge about the legal system and assessments of procedural justice. The recent study of children in dependency court did find a positive relationship between children's knowledge of the

³⁷ Jodi A. Quas et al., *Maltreated Children's Understanding of and Emotional Reactions to Dependency Court Involvement*, BEHAV. SCI. & L. (forthcoming, manuscript date April 1, 2008), manuscript available at <http://works.bepress.com/cgi/viewcontent.cgi?article=1055&context=thomaslyon>.

³⁸ *Id.* at 21.

³⁹ Wingrove et al., *supra* note 28.

legal system and their comfort with the proceedings.⁴⁰ Further [*42] research exploring a link between knowledge and perceptions of fairness would be useful. Many jurisdictions are utilizing educational materials and interventions to children and youth to improve their knowledge of the legal system. Research from the juvenile justice system has indicated that these efforts may not be as successful as hoped, especially with younger children or youth with developmental or other cognitive deficits.⁴¹ It may be important to clarify the purpose of educational interventions (e.g., to reduce stress, to increase experience of fairness, etc.) and then conduct research to determine if children in the various populations of interest (e.g., foster care) show improvements in knowledge following the interventions, and equally important, if increase in knowledge is associated with the intended purpose (e.g., less stress, increased judgments of fairness).

Research on the legal socialization of children and youth indicates that children's experiences with the legal system impacts their perceptions of and respect for the system, although the part of the legal system thus far explored has focused on law-enforcement experiences, not court experiences.⁴² Nonetheless, this research produced important research findings suggesting a link between children's assessments of how fairly and respectfully they were treated by legal actors and their judgments of the legitimacy of legal authority and, finally, to reductions in their illegal behavior. If children's interactions with police and security personnel contribute to their sense of the legitimacy of the legal system, one might expect their interactions with judges and attorneys would do so as well.

Child maltreatment is a risk factor for later delinquency and a return to court as a law violator.⁴³ Consequently, the court system has an opportunity with maltreated children and youth to provide them with experiences through their participation that seem, from the little research that is available, to increase their perceptions of the responsiveness, fairness and benevolence of the system and that may also increase their sense of the legitimacy of the authority of the system and their trust and confidence in the courts. Alternately, some of the early findings reported previously in this article from our children-in-court study suggest children who do not participate in their hearings might presume that their perspectives are not valued and that the judge may not have adequate information to make a fair decision. Thus, court procedures not allowing or discouraging children's participation may contribute to children having negative perceptions about the legitimacy of the system and less trust and confidence in it. Further research is needed to both confirm the findings of these small early studies and also to explore whether increases in perceptions of procedural justice for children relate to better compliance with court orders and with reduced risk for later delinquency.

There does not appear to be a basis for concerns about undue stress for children who attend their hearings and or speak in front of others in a courtroom setting. Children who attended hearings reported fairly low base rates of stress or discomfort.⁴⁴ The possibility was raised in the comments of some children that coerced participation may not have positive benefits for children; however there is no research that has directly addressed the issue. Also, some of the findings from the studies on custody decision making in divorce suggest some children may be negatively affected by being drawn into the dispute.

Some children indicated they found some of their hearings confusing, and they would like to understand more of what was happening. This would suggest a value in some intervention directed at improving knowledge and understanding of the process. Research from the juvenile justice field suggests educational interventions may not always be effective, so the impact of such efforts should be evaluated. Furthermore, even with increased general

⁴⁰ Quas et al., *supra* note 37.

⁴¹ Viljoen & Grisso, *supra* note 36.

⁴² Fagan & Tyler, *supra* note 20.

⁴³ Thomas Grisso, *Using What We Know about Child Maltreatment and Delinquency*, 5 CHILDREN'S SERVICES: SOC. POL'Y, RES., & PRAC. 299, 300 (2002).

⁴⁴ Quas et al., *supra* note 37. The preliminary findings from the children-in-court study reported in this article also found low levels of overall stress.

knowledge children may still not understand the particulars of their own case.⁴⁵ The child's attorney or guardian ad litem should take some responsibility to prepare children ahead of time and provide explanations after hearings. Nonetheless, even in imperfect situations where preparation and debriefing does not occur, children's stress levels appeared quite low, and their belief that children should be able to attend their hearings appeared quite high.

There is a clear need for more social scientific research in this area. Nonetheless, the little research that exists suggests three conclusions. First, children's participation in legal proceedings increases their perception of procedural justice in the court system. Second, most children do not appear to experience significant stress through participation. Third, many children desire to participate so they can have a voice in the proceedings that affect them and so that they can know about what happens in those proceedings. In this general sense, children appear to be similar to adults. Judges have an opportunity to positively affect the development of children's trust and confidence in the legal system by giving them the opportunity, but not coercing them, to participate in the legal proceedings that affect their lives.

Court Review

Copyright (c) 2007 American Judges Association

Court Review

End of Document

⁴⁵ Quas et al., *supra* note 37.