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Message from the Chair

Can you believe the summer is almost over? Or are you asking if we ever had summer this year? Our children are getting ready for school and apples are almost ready for picking. I love the autumn season. But it is also that time of the year for business— when we vote in our new section leaders.

Our annual meeting will be held in conjunction with the State Bar of Michigan Annual Meeting, on Friday, September 18, 2009 at the Hyatt in Dearborn. But before I get to the business of our next election, I would like to tell you about the program we will be hosting during our annual meeting. From 10:30 a.m. – noon we will be having two speakers. We are proud to have Court of Appeals Judge Donald Owens presenting on issues before the Court of Appeals. Judge Owens is open to questions (not specific case related of course) from the audience. I have participated in several of his trainings in the past and not only does he has wonderful information to share, but he is an engaging speaker everyone will enjoy listening to. Even the most experienced attorney can learn something from him. Additionally, William Schooley, from the Office of the Children's Ombudsman, will be giving us a brief legal update on the state of affairs in child welfare and delinquency. Bill always does a great job and is ready for your questions.

Now, back to business. We will be having our business meeting at 10:00 a.m. and will be voting in our next chair, chair-elect, treasurer, secretary, and new board members. You do need to be present to vote. Please watch the list serv for information regarding the election. We are very proud of the accomplishments of the section this year and encourage you to get involved. Several members have stepped forward over the past year and worked on committees, given presentations to other sections, and participated in many significant ways. We greatly appreciate everyone's dedication and hard work! I am especially thankful to everyone for helping make this year so successful. I am looking forward to seeing what next year will bring us.

It has truly been an honor to serve as chair of the section this past year. I have had the opportunity to speak with several of our members over this past year and your dedication to the children and families in Michigan is overwhelming. You should be proud of not only the work you do every day in the trenches, but the work you do on a local and state level to improve the legal system for the benefit of true justice and fairness for the families of Michigan. I am proud of you and proud to have been given the opportunity to serve you.

Sincerely, *Jenifer L. Pettibone*

Editorial and Review Board

Editor's Note—Summer 2009

Editors Note

This special issue of the *Michigan Child Welfare Law Journal* presents a number of papers stemming from the University of Michigan Law School's 2009 interdisciplinary workshop. The workshop was led by Professor's Don Duquette and Vivek Sankaran. Professor Duquette describes the workshop and the articles in his introduction to this issue. Thanks to Professors Duquette and Sankaran, as well as all the student authors who contributed to this issue.

Affecting Their Welfare

In the Winter of 2009, the University of Michigan Law School's Program on Children and the Law sponsored a special interdisciplinary workshop on the capacity of children to participate in legal decisions affecting their welfare. My colleague Vivek Sankaran and I led the Workshop. Many of the current debates in the law regarding children and youth turn on a children's capacity to understand their environment, make knowing judgments about important matters affecting their welfare, control their impulses and instruct counsel.

Courts and legislatures are understandably confused about how to evaluate and apply the latest and best scientific information on such questions. We were challenged by Justice Antonin Scalia's dissent in *Roper v Simmons*, the case that declared the death penalty unconstitutional for crimes committed by juveniles. Justice Scalia soundly criticized the American Psychological Association for inconsistency and laid down what amounts to an interdisciplinary challenge for all of us devoted to children's justice. Justice Scalia wrote:

> We need not look far to find studies contradicting the Court's conclusions. As petitioner points out, the American Psychological Association (APA), which claims in this case that scientific evidence shows persons under 18 lack the ability to take moral responsibility for their decisions, has previously taken precisely the opposite position before this very Court. In its brief in *Hodgson v Minnesota*, 497 U.S. 417 (1990), the APA found a "rich body of research" showing that juveniles are mature enough to decide whether to obtain an abortion without parental involvement. (Brief for APA as Amicus Curiae, O.T. 1989, No. 88805 etc., p. 18.) The APA brief, citing psychology treatises and studies too numerous to list here, asserted: "[B]y middle adolescence (age 14-15) young people develop abilities similar to adults in reasoning about moral dilemmas, understanding social rules and laws, [and] reasoning about interpersonal relationships and interpersonal problems." Id., at 1920 (citations omitted).
>
> Given the nuances of scientific methodology and conflicting views, courts which can only consider the limited evidence on the record before them are ill equipped to determine which view of science is the right one. [cite]

So what view of the science is the "right" one? Our workshop asked whether current scientific developments from psychology, medicine, psychiatry and neuroscience are able to enrich and inform discussion, provide some insight, and perhaps help chart a direction for future law reform. We identified "hot topics" in children and the law and challenged the students to bring themselves to the cutting edge of available research on their topic and develop policy recommendations consistent with the latest scientific knowledge. The Workshop was interdisciplinary with law students and graduate students from developmental psychology, public policy, and social work. In the first seven weeks of the semester guest speakers from various academic disciplines lectured on background topics, including brain development, adolescent impulse control, child development research, designing a court process that takes account of children and youth development, and capacity of foster children to participate in legal proceedings. You can access the list of speakers and background readings and find the lectures streaming on the web at http://www.law.umich.edu/centersandprograms/ccl/ljjohnsonworkshop/Pages/guestseries.aspx

The students, in multidisciplinary teams, then were tasked with drafting papers on a variety of topics. Their final products are included in this issue. Here's a short summary of the different papers.

1. The first article attacks the most intractable and elusive issue in child welfare law today: should children in child protection cases be represented by an attorney advocating for best interests, or by an attorney with whom the child has a traditional attorney-client relationship? In the form of a memo to the American Bar Association, which is considering a model law on the representation of children in child protection cases, law graduates John Anzelc and Melissa Cohen and public policy graduate Sarah Taylor Navarro analyze how the child development scientific literature informs the question. After review of the literature they recommend that states adopt two distinct roles for children's lawyers – a best interests role for the youngest children and a traditional attorney role for children older than 10 or 11.

2. The law often asks that the child's wishes be given weight according to their competence and maturity. Consequently, one of the challenges for judges and lawyers is to determine just how competent and capable of considered judgment the child may be. Yet attorneys are provided with no guidelines on how to assess a child's decision making ability, relying instead on age cutoffs and intuition to form an assessment of competence. Law students Samuel Zun and William Wall with social work graduate student Sheba Rogers propose a framework to assist an attorney in determining the decision-making competence of a child between the ages of seven and fourteen in a best interests, child protective context. This Essay encourages practitioners to use objective tools to assess competence and also hopes to spark additional scholarly work in this area, either by crafting new tools or by assessing the reliability of the framework presented here.

3. In the third article, law student Erica Turcios takes on the difficult issue of confusing poverty with neglect. She discusses the risk to the child of unwarranted removal and the research done on child poverty. Since poverty necessarily puts children at some level of risk, premature removals may be inevitable if neglect is not clearly defined or is given an overly broad definition that does not account for these problems. Can the law control the decision-making process by more carefully defining "child neglect" for purposes of court jurisdiction and removal? Pennsylvania and New York statutes provide excellent models of statutory language that head off both the poverty-neglect confusion problem and thus the premature removal problem. She urges Michigan to follow suit and by amending its Juvenile Code.

4. John Calvin, Manouchka Colon, and Kacey Houston ask a question considered by many: "Why do we afford minors the same right as adults to assume parental authority, when we routinely refuse to grant minors co-extensive rights in other areas of the law?" Youth as young as 12 or 13 have children over whom they have full legal authority even though they do not have that authority over themselves. This essay considers the developmental psychology of both the young parent and the child, the incidence of child maltreatment within this population and the parents' fundamental Constitutional rights. They suggest alternative custody arrangements for the teen parent including a statutory shifting of legal custody to an adult for the children of the youngest parent or a requirement of having a co-parent during the critical youngest years of the child and the parent. They urge that policymakers consider limiting the parental authority of immature minors but also identify varying degrees of intervention which may promote the welfare of both minor parents and their children.

5. Finally, addressing an issue now before the Michigan legislature, law graduates Elizabeth Reynolds and Jessica Stoll team up with developmental psychology graduate student Daniel Choe in a memorandum to the Michigan legislature on the question of whether it is appropriate to sentence juveniles to life without parole. They attempt to

provide an impartial review of the relevant psychological findings, penological theories, and policy interests implicated by juvenile life without parole. Whether the differences between adult and child offenders warrant a total ban on the sentence of juvenile life without parole is arguable, but they conclude that policymakers must consider the serious discrepancies in neurological and psychosocial development, and the underlying purposes of criminal punishment, when considering juvenile life without parole.

I am proud to share these products of our students" careful work. I hope your find their thoughts interesting and, even better, that it aids in your thinking on these very difficult issues. Please visit our web site for more material on this and other topics relevant to children and the law.

Don Duquette, Clinical Professor of Law and Director

Child Advocacy Law Clinic
University of Michigan Law School

Comment on the Committee's Model Act Governing Representation of Children in Abuse and Neglect Proceedings

by John Anzelc, Melissa Cohen, and Sarah Taylor

Introduction

The Lance J. Johnson Children and the Law Workshop at the University of Michigan Law School is an interdisciplinary workshop devoted to advancing the jurisprudence of children and the law. The workshop is currently in its inaugural year, and has devoted this past semester to applying developmental psychology and neuroscience to questions regarding children's capacity to understand and make important decisions about their welfare. Research on child and adolescent brain development is a hot topic in child welfare at the moment, as experts struggle to determine how this research can, and should, inform policy decisions. This struggle has been most prominent in the juvenile justice arena, as new knowledge about delayed development brings up questions about adolescents' culpability and competency to stand trial. Similar questions come up in the dependency arena, particularly as to whether children and adolescents are psychologically capable of understanding the proceedings they are involved in, making decisions about their futures, and directing counsel. As such, the Johnson Workshop has proceeded on the premise that this new psychological and brain science research ought to be considered as policy-makers determine what a child's relationship with counsel in dependency court will look like.

Recently the Children's Rights Litigation Committee of the ABA published the ABA Model Act Governing the Representation of Children in Abuse, Neglect, and Dependency Proceedings and requested comments to this model act. This article explores how the emerging developmental science literature informs the question of whether children in dependency court ought to be represented by an attorney advocating for her best interests, or by an attorney with whom the child has a traditional attorney-client relationship. We begin with a brief review of the relevant science, and then discuss the legal and ethical concerns that also inform policy in this area. Finally, our conclusions are applied in the form of recommended changes to the ABA Model Act.

The Science

In determining what sort of attorney a child ought to have in dependency court, the pertinent scientific literature is that addressing a child's ability to make decisions affecting her welfare and to direct her representation. At the outset, it is important to note that the science is imprecise and subject to multiple interpretations. Researchers provide age ranges during which important developmental changes typically take place, but many factors contribute to an individual child's development, so it is impossible to make blanket judgments. Nevertheless, even if the science is inexact, we can still use it to inform a best practice model for child representation in the dependency context.

A Basic Review of the Science

In applying developmental science to the question of child representation in dependency court, we looked to four areas of research. We began with the classic scientific discussion of children's decision-making capacity by theorists Jean Piaget, Lawrence Kohlberg and Eric Erickson; the developmental stages identified by these theorists set the stage for further study. The second area we examined was more contemporary research, which focuses on youths in the juvenile delinquency context, and how age affects decision-making there. The third area we examined is research involving children's decision-making in the context of divorce proceedings. The final area of

research addresses children's competency to stand trial in the delinquency context.

Classic Developmental Theories

Jean Piaget, Lawrence Kohlberg and Eric Erickson have produced some of the most influential literature on child development. According to Piaget's theory, children roughly aged seven to eleven are in the "concrete operational stage". This is when they begin to use logic to solve problems and are no longer egocentric.[1]

Lawrence Kohlberg expanded on Piaget's work. He identified six stages of moral development that fall under three main levels. Within these stages, Kohlberg documented an important series of changes that occur between the ages of ten and twelve. While younger children tend to base their moral judgments on consequences, during this age range, children begin to understand the concept of intentionality.[2]

Eric Erickson identifies eight stages of development that start in infancy and progress into late adulthood. His fourth stage is most relevant to our discussion. During this period, roughly between the ages of seven to twelve years old, children begin to develop a sense of their own capabilities rather than feeling helpless. They begin to understand the importance of following through with tasks, and become more aware of the broader social sphere.[3]

The field of developmental psychology is constantly evolving, and psychologists and sociologists have criticized each of these classical theorists over the years for various reasons. Still, they provide a nice framework to begin assessing how children develop and understand their surroundings. These classical theories provide evidence that, between the ages of seven and twelve, important changes that influence a child's decision-making ability take place.

Children's Competence in the Juvenile Justice Context

Another important body of research on children's decision-making focuses on adolescents' ability to act in their best interest in the heat of the moment. Most of these studies have determined that children do not develop the ability to make fully reasoned choices until late adolescence. For example, studies show that adolescents tend to consider the future consequences of their actions less than adults do.[4] The brain continues to mature into the early twenties, and large-scale structural changes take place in the prefrontal cortex during this time.[5] Another study demonstrated that the ability to think hypothetically develops by mid-adolescence, but the ability to consider future consequences continues to develop through late adolescence.[6]

Overall, this research assesses impulsivity and susceptibility to peer pressure. This is the body of work that has been garnering the most attention among child welfare experts and policymakers, since it is likely to have important consequences in the delinquency context. While we should consider the implications of this research, it is not perfectly applicable to our discussion. This cutting-edge research focuses primarily on impulsivity. However, children do not make courtroom decisions in this impulsive manner. In court, children are more sheltered from peer pressure, and they have the opportunity to reason through their decision with their attorney. This implies that younger adolescents may in fact be more likely to commit delinquent acts because their brains have not fully developed, but these same adolescents could be fully competent to make sound decisions in the dependency context. So, while it is dangerous and improper to use harsh sentences on juvenile offenders, such as life without parole (site article: Criminal Culpability of Juvenile Offenders), it is also misguided to assume that these young people are incapable of speaking out for their own best interest in custody matters.

Children's Competence in the Divorce Context

A third area of research is from the divorce custody context. Currently it is common for judges to consider the opinions of children fourteen years old and beyond, and rare for them to give any weight to the preferences of children under seven years old.[7] A study by Ellen G. Garrison assessing children's ability to make competent decisions about their custody found that they are able to do this at a rather young age. The experiment showed fourteen year olds to be as competent as 18 year olds in both rationality of reasons and reasonableness of preferences in custody decisions; moreover, children as young as nine years old were able to render reasonable preferences.[8]

One might be concerned about the applicability of this research, because children involved in divorce proceedings potentially have a less traumatic history than children involved in dependency cases. Since the traumas associated with abuse and neglect have

been shown to slow child development,[9] one might argue that the divorce context is an inappropriate comparison. However, there are several indicators that this is not a major concern. First, children involved in dependency court may not have actually been abused and neglected, and the amount and types of trauma that may have been experienced by these children vary widely. Second, children involved in divorce court may also experience significant distress. Finally, the research on how this distress affects children's decision-making is inconclusive. If children have lived in neglectful situations, they may gain certain survival skills that actually make them more apt to execute reasonable custody decisions.[10]

Juvenile Competence to Stand Trial

A final relevant area of research deals with children's capacity to stand trial. Analysts in this realm have identified three specific abilities that the law deems central to determine competence. These include: (1) a basic understanding of the nature and purpose of the trial process, (2) the aptitude to provide counsel with pertinent information and use reasonable judgment, and (3) the capacity to understand how information applies to one's own situation in a realistic manner.[11]

A study by Grisso et al. compared the competencies of juvenile offenders to similarity situated young adults using two tools: MacArthur Competence Assessment Tool for Criminal Adjudication (a standardized measure of abilities relevant for competence to stand trial), and the MacArthur Judgment Evaluation (a procedure for assessing psychosocial influences on legal decisions). The results indicated that youths aged 15 and younger manifested signs of incompetence to stand trail, and they were more likely to make decisions that reflected compliance with authority and a lack of psychosocial maturity.[12]

While this research is most directly applicable in the juvenile delinquency cases, we can transport some lessons learned into the dependency context because child's ability to understand proceedings and assist counsel squarely affect whether a child is capable of maintaining a traditional attorney-client relationship. This research indicates that children under age 15 might have trouble with this. However, this is not a reason to avoid client-directed representation for these youth, but rather a cautionary note for all children's attorneys. Due to youths' particular susceptibility to comply with authority, children's attorneys must be careful not to abuse their influence.

Gaps in the Research

We can learn a lot from the science on child development and decision-making, but there is a sizable gap in the research regarding what the best model is for child representation in dependency court. No large scale outcome-based study has examined the satisfaction children experience when they have had the power to express their interests in court. Further, no study has examined how the attorney-client model affects objective outcomes, such as frequency of placement disruptions, whether and how quickly permanency was ultimately achieved for a child, and what happened to a child when she aged out of the system. The Federal Administration for Children and Families passed a rule in 2008 requiring states to collect data on a sample of youth in their child welfare systems on an ongoing basis.[13] This data will be collected in the National Youth Transition Database (NYTD). The NYTD "Plus" Team is a group of child welfare professionals who are drafting questions to add to these surveys on a state-by-state basis in order to glean additional outcome data. We have written a memorandum to that team suggesting additional questions that we feel ought to be included in that survey, so that we can get some better outcome data with which to examine and determine the child attorney's role. That memorandum is attached to this comment.

Anecdotal evidence supports the idea that if a child participates in court and has his/her voice heard, the child might feel more satisfied with the experience regardless of the custody outcome.[14] This has important implications. If children feel that the court process legitimately engaged them, they might have more investment in their placement, which could lead to better outcomes.

Applying the Science to the Draft Model Act

Given the wide age range at which key developmental milestones are reached, and the variance among individual children in reaching these milestones, developmental science cannot tell us when every individual child will be competent to direct their own representation. This fact, along with other considerations discussed below, compels a bright-line age above which children are presumed competent

to direct counsel, and so should be represented in a traditional attorney-client relationship, and below which a child should have an attorney who advocates for her best interests. The Model Act should incorporate a challenge procedure, so that particularly immature youths who are older than the bright-line age will be represented under the best-interests model.

Why a Bright-Line Rule?

A bright-line rule is preferable because it would provide clear guidance to attorneys in their representation of children, reduce the ethical concerns that arise in a best-interests only model, get competent children involved in the process to the maximum extent possible, and facilitate a fact-finder's full development of the case before her.

The various scientific theories discussed above state age ranges of 7-12, 10-12, and 7-14 years-old when children may be developmentally competent to direct their representation. A bright-line age within these ranges would capture the developmental capabilities of most children. While any age that is selected will be both under- and over-inclusive, a bright-line age best fits the science and the challenge procedure discussed below addresses the problems of over and under-inclusiveness.

Clear Guidance to Attorneys

The current Model Act relies only on the child's attorney in determining whether her clients are capable of directing counsel. This is problematic for two main reasons: first, attorneys tend to be paternalistic toward children, and children who are capable of directing their representation would not have the opportunity to do so under the current Model Act; second, children's attorneys vary widely in the criteria they employ to determine whether a child is competent and when a competency assessments ought to be made, leading to inconsistent treatment of child clients under the current Model Act.

Many commentators have pointed out that attorneys are poorly suited to determine whether a child is competent,[15] and we believe that our proposal largely avoids this problem. Instead of a difficult and often unguided inquiry into the developmental capacity of an individual child, attorneys can proceed representing a child based on their age, unless the child's competence falls so far outside perceived norms as to require challenging the child's competence.[16]

Ethical problems

Our bright-line age proposal also reduces the ethical concerns attendant with a best-interests only model. While a best-interests model seems to comply with the letter of MRPC 1.14,[17] since under such a model children are often presumed incompetent and the representation proceeds accordingly, a best-interests only model does not actually comply with the spirit of MRPC 1.14. In the adult context, there is a presumption of competence, and attorneys rarely need to invoke rule 1.14. In the child context, however, there is a defacto presumption of incompetence for all but the oldest children, and the determination of competence by the LGAL is rarely questioned by either the client or the court. As a result, a best-interests model will typically fail to meet MRPC 1.14's requirement that an attorney treat a client with diminished capacity as much like a normal client as possible.

Moreover, the commentary to rule 1.14 places heavy reliance on discussion with family members to determine the best course of action in representing a person with diminished capacity, and in dependency court this would not be useful as family members are often absent, have competing interests, or their care and parenting is at issue in the case. In effect, a bright-line age creates a presumption of competence that may only be overcome in unusual circumstances – which is more compatible with the spirit, if not the letter, of Rule 1.14.

Empowerment and Child Development

Additionally, children's participation in court proceedings affects their development.[18] Children who feel that they have meaningful participation in court proceedings, where their views are made known and considered, even where the outcome is different from the child's wishes, have a healthier view of themselves and the process in general.[19] While on a practical level the court's task is to place the child in an environment where the child is adequately protected and cared for, the child's experience in the proceeding should be taken into account with the court's larger objective of protecting the positive development of the child. This is best accomplished by allowing children to direct their representation when at all capable, and, as discussed above, a bright line rule would ensure that more children have their views heard in court than would a rule that leaves that determination up to attorneys.

Fact-Finding

Finally, a bright-line age rule would ensure that judges in family court will be informed of a child's wishes in all cases in which the child is competent to express those wishes. Even if a court does not ultimately agree with a child, a fully informed court will always reach a better decision than one that has less information.

The Mechanics of Our Proposal

Balancing the scientific research with child empowerment, ethical, and other practical issues, our group recommends that the bright-line age be set at ten years old. We recognize that this age is at the lower end of the range suggested by the science, but we feel that this is appropriate in order to achieve the other important goals of clarity for child attorneys, reduced ethical problems, and improved child development through meaningful involvement in court proceedings. Further, age 10 does make sense developmentally, since it is right at the cusp of some major developmental changes according to Piaget's research. Finally, we feel that it is better to set the age low, as over-inclusiveness on presumed competence is preferable given our other concerns, and since there would be a challenge procedure in place.

Other commentators have suggested a lower bright line age,[20] but given the age ranges suggested by the science, and given that legislators are likely to be uncomfortable with a younger age, we feel that ten is appropriate. Of course, states would be free to set the bright-line age wherever they wish. The mechanics of our proposal remain essentially the same regardless of where in the ranges the age is actually set.

Thus, if a child-client has reached her tenth birthday, she will be presumed competent to direct her representation, and will have a traditional attorney-client relationship with her counsel. Below the age of ten we recommend that attorneys operate under a best interests model where the child's wishes are always considered as a factor in the best interests analysis. The relative weight to be given to those wishes would be determined by the child's age and her attorney's assessment of her relative ability to make decisions regarding her welfare. This model of best-interests representation has been referred to as a "dimmer switch" model.[21]

To account for the fact that any bright-line rule will be over-inclusive, we propose that a challenge procedure be put in place so that particularly immature children above age ten could be represented under the best interests model. We feel that such a challenge procedure would be an improvement upon the current Model Act because it would remove some of the discretion that children's attorneys have under the current proposal. Rather than those attorneys having sole discretion to determine whether their clients had diminished capacity, as the Model Act currently allows, the attorneys would have to go through a relatively rigorous challenge procedure. This would protect children older than ten from losing their right to direct their counsel simply because their counsel did not agree with them. We propose a procedure under which a child's attorney, or the court sua sponte, could challenge the presumption of competence based on age. A relatively high burden of proof should be required in a challenge procedure (we recommend clear and convincing evidence), to protect the child's presumption of competence. Individual competency assessments by social workers and psychologists would be appropriate in a challenge procedure setting, and test results and testimony from those individuals would serve as the evidence on which a judge would determine whether the challenging party had met her burden under the procedure. And, of course, other evidence that the court determines is relevant, such as testimony from teachers, school transcripts, etc. would inform the courts decision regarding competence. States should have detailed evidentiary requirements for a court to make a finding that the burden has been met to prevent too much judicial discretion in this area.

Under our proposal there is no need for a procedure with which to challenge the presumed incompetence of children under ten, since we recommend that the best-interests attorneys provided to those younger children be charged with employing the "dimmer-switch" model. Under that model, a particularly mature 9 year-old's views should already be given significant weight when her attorney makes a recommendation to the court. The child's attorney could also choose to represent a particularly mature child under the client-directed model.

Drafting Changes

We propose the following changes to Section 7. Duties of Child's Lawyer and Scope of Representation.

Parts (c) – (d) of Section 7 should read:

(c) For a child over the age of ten, the lawyer shall maintain a normal client-lawyer relationship with the child in accordance with the rules of professional conduct.

(1) The lawyer for the child shall explain the proceedings to permit the client to make informed decisions regarding the representation and abide by the child's decisions concerning the child's objectives. This includes advising the child as to options and eliciting the child's wishes in a developmentally appropriate manner. [22]

(2) If the lawyer for a child over the age of ten thinks that the child is particularly immature, and so does not have the ability to direct her representation, the lawyer may initiate a challenge procedure to have the child declared incompetent, in which case the child would then be provided with a best-interests lawyer according to section (d) below. The lawyer must prove to the court by clear and convincing evidence that the child is not developmentally capable of directing her representation. Individual child assessments by social workers and psychologists should be employed at this stage, and should be relied on by the court as evidence as to whether the challenging party has met her evidentiary burden. [We would recommend that the Model Act also include detailed requirements as to how that burden might be met, in order to reduce judicial discretion. This would require further research into the sorts of evaluations psychologists might do to assess competence, and what sorts of outcomes would warrant stripping a child over ten of their right to direct their representation.]

(d) For children under the age of ten, a best-interests attorney should be provided. That attorney should take into account the wishes of her child-client according to the age and maturity of the child, and those wishes should be a factor in the attorney's best interests recommendation. As a child's age and maturity increase, her expressed wishes should be given relatively more weight. [The Model Act should also clearly list the other factors to be taken into consideration when a best-interests attorney makes a determination, as well as the relative weight to be given each factor.] ◎

Endnotes

1 Shu-Wan Lin, *Piaget's Developmental Stages, in* Encyclopedia of Educational Technology (B. Hoffman ed., 2002).

2 William C. Crain, *Theories of Development* 118-136 (Prentice Hall, 1985).

3 C. George Boeree, *Erik Erikson* http://webspace.ship.edu/cgboer/erikson.html

4 Jari-Erik Nurmi, *How do Adolescents see the Future? A Review of the Development of Future-Orientation and Planning* 11 Dev. Rev. 1, 1-59 (1992).

5 Elizabeth Sowell, et al.,, *Development of Cortical and Subcortical Brain Structures in Childhood and Adolescence: A Structural MRI Study* 44 Dev. Med. Child Neurology 1, 4-16 (2002).

6 Elizabeth S. Scott, et al., *Evaluating Adolescent Decision Making in Legal Contexts* 19 L. & Human Behavior 221-244 (1995).

7 Ellen G. Garrison,.*Children's Competence to Participate in Divorce Custody Decisionmaking* 20(1) Journal of Clinical Child Psychology 78-87 (1991).

8 *Id.*

9 Emily Buss, *Confronting Developmental Barriers to the Empowerment of Child Clients*, 84 Cornell L. Rev. 895 (1999) (citing Martha Rodeheffer & Harold P. Martin, *Special Problems in Developmental Assessment of Abused Children*, *in* The Abused Child 113 (Harold P. Martin ed., 1976).

10 Kathleen A. Platzman, *Maternal Substance Abuse and Child Development* MSA Newsline Volume 2, Number 4 (2002).

11 Thomas Grisso, et al., *Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants* 27(4) L. & Human Behavior, 333-336 (2003).

12 *Id.*

13 U.S. Dep't of Health & Human Serv., About NYTD http://www.acf.hhs.gov/programs/cb/systems/nytd/about_nytd.htm.

14 *See* Emily Buss, *Confronting Developmental Barriers to the Empowerment of Child Clients*, 84 Cornell L. Rev. 895, 898 (1999).

15 E.g. Donald N. Duquette, *Two Distinct Roles/Bright Line Test* 6 Nev. L.J. 1240, 1246 (2006) (stating that determining the best interest of a child is "among the

least developed part of our jurisprudence and should be a central focus of our discussion as a field.").

16 *See, e.g., Id.*

17 "When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority . . . the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship[.]"

18 *See generally*, Emily Buss, *Confronting Developmental Barriers to the Empowerment of Child Clients*, 84 Cornell L. Rev. 895 (1999).

19 See *Id.* at 898.

20 Donald N. Duquette, *Two Distinct Roles/Bright Line Test* 6 Nev. L.J. 1240 (2006).

21 For a discussion of the representing a child's wishes, *see* Jean Koh Peters, *The Roles and Content of Best Interests In Client-Directed Lawyering For Children In Child Protective Proceedings*, 64 Fordham. L. Rev. 1505, 1564 (1996). In the case of the particularly precocious 9 year-old, the attorney should give great weight to the child's wishes in representing the child.

22 Note that this section remains the same as that in the current Draft Model Act.

Evaluating a Child's Decision-making Competence in a Best Interests World:

Infusing an Attorney's Intuition with Developmental Science

by Sheba Rogers, William Wall, and Samuel Zun

Introduction

In child protective proceedings, attorneys responsible for determining a child's best interests are required to elicit the wishes of a child and, at the same time, evaluate the child's ability to come to reasoned decisions. Unfortunately, attorneys are provided with no guidelines on how to assess a child's decision making ability, relying instead on age cutoffs and intuition to form an assessment of competence. This problem becomes especially pronounced with children between the ages of seven and fourteen. In this age range, a child's ability to come to reasoned decisions is variable and gradated. Indeed, some children in this range are capable of making informed, reasoned decisions, while others have serious deficits in decision making competence.

This article proposes a framework to assist an attorney in determining the decision making competence of a child between the ages of seven and fourteen in a best interests, child protective context. Part I will provide an overview on the state of the law on this matter, using Michigan as an example of a best interests state which highlights this problem. Part II will discuss the state of the science relevant to a child's decision making ability, drawing attention to those areas of development that most impact child competence. Part III will provide a framework, using structured vignettes, to assist an attorney in assessing child competence. In sum, this Article seeks to achieve two goals: to spark supplemental research by the social sciences into the feasibility of this assessment and to encourage the applied use of this assessment by the legal community.

The Legal Approach to Eliciting and Evaluating a Child's Wishes

Federal Law

The Child Abuse Prevention and Treatment Act (CAPTA) requires participating states to provide a child with representation, either by an attorney or guardian ad litem, in child welfare proceedings.[1] CAPTA requires the attorney to serve in a "best interests" role, meaning that "the child's lawyer determines the child's best interests and represents those through advocacy and testimony before the court."[2] The alternate model, which states can use to supplement best interests representation, calls for client-directed representation.[3]

Although best interests representation generally requires some consideration of a child's decision making competence, CAPTA is silent as to how an attorney should assess competence. CAPTA also fails to indicate how an attorney's competence evaluation should be factored into a best interests assessment and how, if at all, a competence evaluation should be communicated to the court.

Michigan Child Protection Law as an Example of Best Interests Representation

In Michigan, the child participates in court proceedings through a Lawyer-Guardian Ad Litem (L-GAL), whose role is defined by statute.[4] The Michigan Juvenile Code provides that the L-GAL's duty is "to the child, and not to the court."[5] In preparing for any child welfare hearing, the L-GAL is required to meet with and interview[6] the child to assess the child's needs and wishes.[7] Throughout the course of represen-

tation, the L-GAL is required to explain his or her role to the child, taking into account the child's capacity to comprehend the proceedings.[8]

When determining the child's position with respect to the proceedings, the L-GAL is required to take the child's wishes into account.[9] However, these wishes are subsequently weighed against the L-GAL's assessment of the child's ability to engage in proper decision making.[10] Ultimately, the L-GAL makes the determination of the child's best interests and presents that determination to the court, regardless of whether this position reflects the child's wishes.[11]

The Michigan Juvenile Code does provide two safety valves for occasions where the child's interests are contrary to the position taken by the L-GAL. First, the L-GAL is still obligated to inform the court as to the child's wishes, ensuring that the child's position is heard in court.[12] Second, if the child's position is inconsistent with the L-GAL's position, the court *may* appoint an attorney to represent the child's wishes, if the court believes such an appointment to be appropriate given the child's age and maturity and the nature of the discrepancy between the child's and L-GAL's positions.[13] Nevertheless, there is a crucial safety valve missing from the statute—it provides no guidelines on how the L-GAL is to evaluate a child's decision making ability.

Parallel Areas of the Law

It should be noted that children's competence is taken into account in different ways, depending on the legal context. An examination of Michigan custody law and the "mature minor" doctrine may better inform any discussion of a determination of child competence.

Michigan divorce and custody law *requires* courts to take a child's custody preference into account if the court deems the child to be of sufficient age to express a preference.[14] A child's age is only one of twelve factors that the court must consider in assessing best interests.[15] Appointment of an L-GAL to assist the child in asserting his wishes is in the court's discretion and is permitted where the court "determines that the child's best interests are inadequately represented."[16] Regardless of the difference in structure and entitlement to counsel, the most notable aspect of Michigan custody law is that a determination of capacity must be made before taking a child's wishes into account. Therefore, an instrument designed to assist in the making of such capacity determinations could prove valuable in the divorce context.

With respect to medical decision making, the United States Supreme Court has held that a pregnant minor is entitled to procedural safeguards which allow her to show that she is mature enough to have an abortion independent of her parents' wishes.[17] Consistent with this holding, Michigan law generally requires parental consent to obtain an abortion, but allows for a waiver of parental consent upon a court's finding that the minor is "sufficiently mature and well-enough informed" to make the abortion decision independently.[18] Notably, the same statute requires the court to appoint an attorney or guardian ad litem within twenty-four hours to represent the minor.[19] There is little guidance as to how the court is to evaluate the maturity of a child and, consequently, this is another area where a tool for measuring a child's decision-making abilities would be valuable. Any such tool must take into account how children develop, focusing on what factors most affect their decision making ability.

Developmental Research Regarding a Child's Decision Making Ability

Psychological theories have shed some light on the factors that most impact a child's decision making ability. For children between the ages of seven and fourteen, these theories suggest that a child's decision making ability is in a period of active development.[20] A number of factors, including impulsivity, peer and parental influence, and the ability to engage in future oriented thinking, all broadly affect decision making ability within this age range.[21] Nevertheless, while these theories offer a general picture of development, research suggests that there are individual differences among children that can have an effect on their ability to come to a reasoned decision.[22]

Developmental Theory

Three primary theories of child development have emerged, each of which help to flesh out those factors that influence decision making ability at a given time. The first of these theories, put forth by Jean Piaget, posits that children between the ages of seven and fourteen progress through two stages of development.[23] During the first stage, occurring between the

ages of seven and eleven, children can engage in some high level reasoning, but have difficulty with abstract concepts and future oriented thought.[24] Additionally, children enter this stage with close ties to their parents and, as peer relationships develop, external influences are more likely to overpower a child's decision making within this age range.[25]

As children progress to the second stage, occurring between age eleven and late adolescence, they begin to develop the ability to engage in abstract thought.[26] Consequently, they may be better able to weigh options, anticipate sources of harm and engage in future oriented thought.[27] Still, a great deal of brain development and hormonal changes continue throughout this period, often leading to impulsive, sensation seeking behavior.[28] Additionally, children in this stage may tend to overvalue peer suggestions, leaving them increasingly prone to peer influence.[29]

The second theory, put forth by Lawrence Kohlberg, claims that children between the ages of seven and fourteen go through at least two levels of moral development, each having an effect on decision making ability.[30] At the premoral level, starting at age seven, Kohlberg suggests that young children have no sense of morality as adults understand it and make judgments solely to obtain rewards from others, particularly parents, and to avoid punishment.[31] At the conventional level, occurring around age eleven, children begin to develop their own sense of morality, first based on their estimation of what others think of them.[32] Because their understanding of the world is shaped in large part by their interactions with others, children in both of these stages are susceptible to a great deal of peer and parental influence.

Finally, Erik Erikson's theory claims that, as children age, they go through stages where they must balance two competing interests before their reasoning abilities evolve and they move to the next stage.[33] At the first stage, occurring between six and twelve years old, children will begin to formulate a basic sense of autonomy and self by learning how the world around them works, but only if they can begin to develop a relationship with that world by interacting with their environment.[34] Peers play an extremely important role during this stage and affect the child's development of self esteem.[35] During the second stage, occurring between the onset of puberty through late adolescence, children begin to acquire a sense of their own role and identity.[36] If this development is hindered, however, their sense of self becomes fragmented. A period of "repudiation" may set in, wherein a child may develop negative peer relationships, defer to inappropriate peer influence and begin to engage in sensation-seeking, destructive behavior.[37] Under Erikson's theory, a child's environment will have a distinct effect on decision making ability; if the child meets certain milestones, those abilities improve and develop.

Researchers have built on and confirmed some aspects of these theories. In a study attempting to assess a child's decision making ability in the divorce context, Ellen Garrison maintained that "it is not until about seven years old that most children attain the stage of concrete operational thought, at which time they begin to display deductive reasoning about concrete and present events."[38] By age fourteen, most children have reached "the stage of formal operational thought, enabling them to reason hypothetically and to make judgments about possible future events."[39] Garrison maintains that, as children progress from late childhood to early adolescence, their reasoning abilities improve.[40]

In sum, these theories suggest that a number of factors influence a child's decision making ability. These factors include peer and parental influence, impulsivity, moodiness, the ability to weigh options and the capacity to engage in future oriented thinking.[41] Nevertheless, while these factors generally affect all children's decision making in some way, the magnitude of their impact depends a great deal on individual differences in biology and environment.[42]

Individual Differences in Decision Making Ability

Despite these general trends in decision making ability, one must be careful in assessing youths' capabilities, competencies, and maturity in a universal manner. The ability of a child to engage in appropriate decision making depends on individual factors not directly linked to age.[43] Individual differences, such as biological makeup, environment, and family background all impact how children make decisions.[44] "As a child grows older and enters the wider world outside the family, she encounters peers, schools and other social institutions, and the mass media and other aspects of society, all of which influence her development."[45]

Research has confirmed the presence of individual differences in decision making ability between

children.[46] A study by Emily Garrison presented children between the ages of seven and fourteen with vignettes designed to evaluate their decision making competence in a custody proceeding.[47] Her findings suggest that children vary a great deal in the thought processes that they utilize when coming to conclusions.[48]

> The increased likelihood of the 14- and 18-year olds, as compared to the 9-year-olds, to cite parental stability and parents' relationship, respectively, may be due to the diminished egocentricity of older children confronting divorce. The greater tendency of the 12-year olds to consider the parents' financial situation may reflect the perceived need of preadolescents for the means to conform to group norms.[49]

While children often come to the same conclusions as adults, their proficiency at reasoning through problems varied to a considerable extent between ages and between subjects in the study.[50]

Additional research confirms that individual differences impact children's decision making processes. Studies have shown that children vary in their cognitive abilities,[51] as well as in their ability to reason through problems in other legal contexts.[52] Case studies suggest that children who are exposed to abuse tend to trail behind other children in decision making ability.[53] However, subsequent counseling for children affected by abuse and neglect has been shown to help improve decision making ability.[54] In sum, since it is possible for an eight year old to reason at the same level as an eleven year old depending on their unique life experiences, a more nuanced approach to assessing competence is appropriate.[55]

In addition, the communication abilities of both the child and the party attempting to elicit the child's wishes can have an impact on the perceptions of the child's decision making ability.[56] Scholars claim that "adults may misunderstand children's speech, interject new information into the conversation, use words that children do not understand, present multiple questions without waiting for a response, or use linguistic forms that are hard even for adults to comprehend."[57] Ineffective communication between the lawyer and child may lead to inaccurate perceptions about whether or not a child can participate in serious decisions concerning the child's welfare.

Given these individual differences, it is clear why lawyers must take into consideration a child's personal decision making ability. While the research suggests that five basic spheres of influence globally affect a child's decision making ability, a child's biological makeup, family environment, peer group, and life experiences can all impact how his or her decision making abilities personally develop. Therefore, a lawyer should not evaluate two nine year olds in the same manner without first learning about their unique background and life experiences when assessing their ability to make competent decisions.

Providing Attorneys with a Tool to Assess Competence

At present, an attorney practicing in a best interests state must elicit the child's wishes, evaluate the child's competence and, taking all of this information into account, inform the court as to what course of action is in the child's best interests.[58] While attorneys are required to inform the court of the child's wishes, they are not provided with a guide on how to evaluate the child's ability to come to reasoned decisions. This section will provide such a guide through the use of structured vignettes. After describing this guide as well as other possible options for assessing competence, this section will discuss administrative concerns and lay out possible content for such a guide.

Using Vignettes to Evaluate Child Decision Making

This assessment consists of vignettes designed to evaluate competence by targeting those areas of influence that affect the decision making ability of a child between the ages of seven and fourteen. Indeed, research reflects the presence of individual disparities in decision making ability within this age range.[59] Children and adolescents in this range fluctuate in their ability to weigh options, in their capacity to engage in future oriented thinking, in moodiness and impulsivity, and in their ability to screen out improper parental or peer influence.[60] Vignettes are beneficial in assessing these areas because they can be evaluated intuitively by attorneys, they match up well with a child's limited attention span, and they can be designed to target those areas which influence a child's decision making ability the most.[61]

Vignettes are potentially more useful in this context than traditional psychological inventories for a number of reasons. While inventories provide a clear, objective score, they are generally long, complex

measures, designed to be administered and scored by a trained psychologist, not by an attorney with no formal training in mental health testing.[62] In addition, these measures, in their current form, largely target mental impairment alone and do not address the unique developmental disparities which affect a child's decision making.[63] Moreover, because the legal community has long utilized intuition to assess a child's capacity, an inventory test that removes this intuitive judgment would likely face resistance from the legal community.[64] Finally, and most importantly, vignettes have been used in the past to assess children's decision making abilities.[65]

Still, we must be careful to not completely discount the use of objective measures to assess child competence. Objective measures are extremely useful for psychologists, social workers and other mental health professionals formally trained in their use. Indeed, several researchers have utilized objective measures in addition to more open-ended tools when attempting to assess a child's ability to come to a reasoned decision within a legal framework.[66] While vignettes may work well for an attorney who lacks formal training in psychological testing, quantitative measures, properly administered by a trained professional, are indispensable in evaluating a child's decision making ability.

Vignettes may also have advantages over and above open-ended interviewing techniques alone.[67] Vignettes, tailored to those areas of influence that affect children's decision making, will provide a clear scenario that a child can reason through. This kind of assessment permits an attorney to evaluate a child's reasoning process in real time and within a specific context. It also permits an attorney to communicate with a child in an age appropriate manner, which can reduce the likelihood that language barriers will skew the child's responses. While structured interviewing techniques are helpful in assessing child competence, a vignette approach provides several benefits that open-ended interviewing techniques alone fail to achieve.

Administering the Vignettes

There are a number of preliminary considerations in the administration of an assessment in this context. The timing of the evaluation's administration as well as the collaborative steps taken can affect the overall accuracy and usefulness of this assessment in supplementing the attorney's understanding of a child's competence. In addition, because the vignettes are designed to support the attorney's evaluation of competence, it benefits all parties for the attorney's results to be communicated, perhaps by statutory requirement, to the court.

Timing of the Administration

As a threshold matter, there must be genuine, informed communication between a child and an attorney to effectively assess a child's decision making process.[68] Language barriers can often inhibit a child's understanding of the child welfare system and, consequently, affect their willingness to discuss their own wishes.[69] Studies suggest that children, when faced with situations they do not understand, are inclined to blindly agree with adults, especially those in positions of authority.[70] To ensure that these language barriers have been surmounted, any assessment of competence should not be administered until an attorney has fully explained his or her role and the need for open communication between parties.

In addition, a child's willingness to participate actively in an evaluation by discussing his or her underlying thought process is dependent on the attorney's ability to elicit these thoughts from the child.[71] Practitioners claim that a child will not engage in this process until a rapport has developed between the child and the attorney. Undoubtedly, such a rapport will help to foster a trusting relationship between both parties and result in more candid disclosure.[72] Because these vignettes are designed to probe the child's general reasoning process, an attorney should not administer this evaluation prior to such a rapport being established.

Collaborative Involvement

This assessment is designed to provide the attorney with questions which will assist them in making intuitive judgments of the child's decision making abilities. It is ***not*** designed to provide an estimation of the child's cognitive ability, nor can it serve as a proxy for feedback from mental health professionals involved with the child. Indeed, child health care professionals will likely have a stronger background in applied psychology and, consequently, a better understanding of the child's reasoning abilities. To properly assess the capacity of a child to assert his or her wishes, an attorney must also garner feedback from all

professionals involved with the child and incorporate those opinions into an evaluation of the child's capacity.[73] In the abuse and neglect setting, a number of social workers, therapists and psychologists may be involved with the child – their feedback regarding the child's wishes will be invaluable and should factor heavily into the attorney's opinions regarding the child's competence.[74]

In addition, a child's decision making ability could change over the life span of legal proceedings, with the passage of time. For instance, a child at the beginning of a child welfare case may have been exposed to neglect and abuse which could have an effect on his or her general well-being and decision making abilities.[75] However, as the child is exposed to support services, his or her ability to weigh options and express appropriate wishes could improve.[76] Indeed, child welfare proceedings can take a great deal of time to conclude and, consequently, a child's ability to come to a reasoned decision could fluctuate rapidly throughout representation. The best way to take account for these shifts in capacity is to involve all service providers and integrate their opinions into the attorney's estimation of the child's capacity.

Communication to the Court

This tool is designed to assist an attorney in evaluating a child's competence by focusing the attorney's attention on the developmental factors that most affect a child's decision making ability. Not only does such an assessment provide an attorney with a tool for assessing competence, but it also helps to organize and compartmentalize that evaluation. This evaluation can then be factored into the attorney's overall best interests determination in a more organized fashion. Because it provides a formal way of explaining competence to the court, this assessment could also be used as a check to insure that the attorney keeps true to their mandate to elicit the child's wishes. Moreover, if a statute were to require such an assessment, it would provide a record that would permit a judge to independently evaluate a child's competence to make reasoned decisions.

The Vignettes

Each of the sample vignettes below is designed to evaluate areas of influence which can have a significant effect on a child's decision making ability. After presenting these vignettes to the child, the attorney should encourage discussion of the question presented, probing the child's underlying reasoning process. After discussing these vignettes, the attorney should work to elicit the child's wishes with respect to the present situation and evaluate the child's reasoning process in light of the assessed factors. The first vignette below is designed to narrowly evaluate one area that typically affects decision making competence, while the second takes a broader, less compartmentalized approach. After each section, the advantages and disadvantages to each approach are discussed.

Isolated Decision-Making Sphere: Improper Peer Influence

Vignette. *Sandy and her best friend, Jennifer, went to see a movie one night. After the movie, Jennifer runs into a couple of older boys that she knows. Sandy doesn't know them. They are invited to a get together at a nearby park. Sandy promised her parents that she would be home by 8 PM that night and knows that if she goes with Jennifer, she will be very late. Her parents also made her promise that she would not stay out late with strangers. Sandy turns to go home and Jennifer gets angry, telling her that the boys will be mad if they don't both go. Jennifer tells her "If you don't come, consider our friendship over." If you were Sandy, what would you do?*

Analysis. Crafting each vignette to focus on an individual sphere of influence creates a higher likelihood that the child's answer will in fact be influenced by that sphere, rather than by multiple factors. However, such an approach may oversimplify the decision-making process in a way that does not accurately reflect the way children normally think. Further, a child's response to this particular vignette may be difficult to evaluate because it requires a "right" answer, which may be biased based on the values of the vignette's author. However, there may not be an accurate way to craft vignettes that assess proper decision making capacity without first assigning more value to one decision over another.

Multiple Possible Spheres: Improper Peer Influence, Ability to Engage in Future Oriented Thinking, and Ability to Weigh Options

Vignette. *Steven is in the fifth grade. At the end of school on Monday, his teacher announces that there will be a math test on Tuesday. On the bus ride home, his friends invite him over to play some video games. What should Steven do? If you were Steven, what would you do? Why?*

Analysis. This vignette incorporates several spheres of influence at once—the way that the child responds may reveal how he or she values each sphere of influence. In addition, the question, "Why?" allows for a more open-ended response, which is necessary in order to evaluate reasoning about all three spheres. The action that the child chooses (go home and study versus go play video games) matters less for the purposes of this evaluation than the reasons the child cites for making that decision. However, children's ability to verbalize decision-making processes varies significantly within age groups, which could impact the effectiveness of more open-ended questions such as those used here.

Conclusion

In a best interests state, an attorney representing a child in a protective proceeding is typically required to elicit a child's preferences and concurrently evaluate the child's decision making ability. After doing so, an attorney is then required to come to an overall best interests determination for the child. This task is difficult enough without specific guidelines on how to evaluate competence and, consequently, attorneys rely only on their intuitive judgments of a child's decision making ability, often based on strict age markers.

Developmental psychology, however, suggests that reasoned decision making matures slowly and in a variable manner for children between the ages of seven and fourteen. Between these ages, a number of factors can affect decision making depending on the individual make up of the child in question. The proposed assessment seeks to provide a framework for assessing a child's decision making by drawing an attorney's attention to each of these factors through structured vignettes.

While this tool may be helpful to practitioners as drafted, the dearth of empirical research for crafting such a tool impacted the ability to create a solid, ready-to-use assessment for measuring children's decision making ability in a child protection proceeding. This Article not only hopes to encourage practitioners to begin using objective tools to assess competence, but also to spark additional scholarly work in this area, either by crafting new tools or by assessing the reliability of the vignette framework presented here. ◎

Endnotes

1 42 U.S.C. § 5106a(b)(2)(A)(xiii).

2 Jean Koh Peters, *The Roles and Content of Best Interests in Client-Directed Lawyering for Children in Child Protective Proceedings*, 64 Fordham L. Rev. 1505, 1507 (1996). Even though CAPTA requires an attorney to serve in a best interests role, many states supplement that role by the optional or mandatory appointment of an attorney who represents the child's stated wishes in addition to the guardian ad litem. *See, e.g.,* Mich. Comp. Laws Ann. § 712A.17d(2) (West 2002).

3 *See* Peters, *supra* note 2, at 1507. It has been argued that even client-directed representation requires a consideration of best interests. *Id.* at 1518 ("Even a lawyer utterly committed to representing the stated wishes of his client must be able to couch his client's position in terms of best interests in dealing effectively with other professionals serving the same client.").

4 *See* Mich. Comp. Laws Ann. § 712A.17d (West 2002).

5 Mich. Comp. Laws Ann. § 712A.17d(1) (West 2002).

6 Mich. Comp. Laws Ann. § 712A.17d(1)(c) (West 2002).

7 Mich. Comp. Laws Ann. § 712A.17d(1)(d) (West 2002).

8 Mich. Comp. Laws Ann. § 712A.17d(1)(f) (West 2002).

9 Mich. Comp. Laws Ann. § 712A.17d(1)(i) (West 2002).

10 *Id.*

11 *Id.*

12 *Id.*

13 Mich. Comp. Laws Ann. § 712A.17d(2) (West 2002).

14 *See* Treutle v. Treutle, 495 N.W.2d 836, 838 (Mich. Ct. App. 1992); *see also* Mich. Comp. Laws Ann. § 722.23(i) (West 2002). A child's age is only one of twelve factors that the court must consider in assessing best interests.

15 Mich. Comp. Laws Ann. § 722.23(i) (West 2002). A child's age is not dispositive with respect to capacity – one court held that a six year old had the requisite capacity to have their wishes taken into account. *See* Bowers v. Bowers, 497 N.W.2d 602 (Mich. Ct. App. 1993).

16 Mich. Comp. Laws Ann. § 722.24 (West 2002).

17 *Bellotti v.Baird*, 443 U.S. 622, 643 (1979).

18 Mich. Comp. Laws Ann. § 722.904(3)(a) (West 1991).

19 Mich. Comp. Laws Ann. § 722.904(2)(e) (West 1991).

20 *See infra* Part III.A.

21 *See* Laura Cohen & Randi Mendelbaum, *Kids will be Kids: Creating a Framework for Interviewing and Counseling Adolescent Client*s, 79 Temp. L. Rev. 357, 362-63 (2006) (identifying several factors which can effect a child's decision making); *see also* Larry Cunningham, *A Question of Capacity: Towards a Comprehensive and Consistent Vision of Children and Their Status under Law*, 10 U.C. Davis J. Juv. L. & Pol'y 276, 284 (2006) (noting that a number of factors, including peer influence and risk perception, can "influence decision making outcomes in a negative way"); Elizabeth S. Scott, et. al., *Evaluating Adolescent Decision Making in Legal Contexts*, 19 L. & Human Behavior 221, 222 (1995) (peer influence, risk perception and temporal perspective all affect decision making ability).

22 *See* Scott, *supra* note 21, at 232 ("Several studies have suggested that factors such as socioeconomic status, race/ethnicity, and IQ tend to affect a variety of decision-making components . . .").

23 *See* Walter J. Mlyniec, *A Judge's Ethical Dilemma: Assessing a Child's Capacity to Choose*, 64 Fordham L. Rev. 1873, 1879 (1996) (citing R. Murray Thomas, Comparing Theories of Child Development (3d ed. 1992)).

24 *Id.*

25 *See* David M. Shumaker & Robert V. Heckel, Kids of Character 66 (discussing Piaget's claim that peers have a "major influence" on this period of development).

26 *See* Mlyniec, *supra* note 23, at 1879.

27 *Id.*

28 *See* Cunningham, *supra* note 21, at 284 (observing that "adolescents engage in more risky behaviors than adults") (citing Jeffrey Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 Dev. Rev. 339, 339-43 (1992)).

29 *See* Cohen & Mendelbaum, *supra* note 21, at 363 ("Susceptibility to peer influence appears to increase between childhood and early adolescence, peaks at about age fourteen, and then (interestingly) decreases into early adulthood.")

30 *See* D.A. Louw, Human Development 377 (1998).

31 *See* id. ("During this stage, children find it very difficult to view a moral dilemma from different angles; they evaluate behavior only on its consequences.")

32 *See id.* at 378.

33 *See* Tina Abbott, Social and Personality Development 122 (2001) ("Erikson assumes each of us goes through a series of eight developmental stages, each of which involve a crisis that we must negotiate and resolve within an optimal time period.")

34 *See id.* at 124.

35 *Id.*

36 *See id.* at 126 (concluding that, if a "balance is achieved" during this period, a person can "accept and live by the standards set by society" and will go about decisions in "in a way that is acceptable and humane.")

37 *See* id. (A child in this stage may "become involved in destructive activities that could include taking harmful drugs or excesses of alcohol, or they may simply withdraw from society and live in a world of psychotic fantasy.")

38 *See* Ellen G. Garrison, *Children's Competence to Participate in Divorce Custody Decisionmaking*, 20 Journal of Clinical Child Psychology 78 (1991).

39 *Id.*

40 *See id.* at 85.

41 *See supra* note 21.

42 *See infra* Part III.B.

43 *See* Emily Buss, *Confronting Developmental Barriers to the Empowerment of Child Clients*, 84 Cornell L. Rev. 895, 918 (1999)

44 Scott, *supra* note 21, at 232 ("Several studies have suggested that factors such as socioeconomic status, race/ethnicity, and IQ tend to affect a variety of decision-making components . . .").

45 Douglas Davies, Child Development: A Practitioner's Guide 6 (1999).

46 *See* Scott, *supra* note 21, at 225 (noting that "social and cultural contexts that shape adolescent experience may join with other developmental factors to affect decision making").

47 *See* Garrison, *supra* note 38, at 85.

48 *Id.* (noting that the "few developmental differences" that emerged between children were related to the reasons given for making a choice between two custody dispositions).

49 *Id.* (internal citations omitted).

50 *See id.* at 81.

51 *See* Douglas Davies, Child Development: A Practitioner's Guide 40 (2d ed. 2004) (observing that the prefrontal cortex, which is associated with logical thought, begins a period of rapid development starting at around age seven); Cohen, *supra* note 21, at 366-67.

52 *See* Thomas Grisso, et. al., *Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants*, 27 Law and Human Behavior 333 (2003) (noting differences in understanding and decision making ability in juvenile delinquency proceedings).

53 *See* Buss, *supra* note 43, at 918-19 (citing Martha

Rodeheffer & Harold P. Martin, *Special Problems in Developmental Assessment of Abused Children*, *in* The Abused Child 113, 113 (Harold P. Martin ed., 1976)).

54 *See* Phillip A. Fisher, et. al., *Effects of a therapeutic intervention for foster preschoolers on diurnal cortisol activity*, 32 Psychoneuroendocrinology 892, 894 (2007).

55 *See* Buss, *supra* note 43, at 918-19.

56 *See* Debra A. Poole & Michael E. Lamb, Investigative Interviews of Children 153 (2003).

57 *Id.*

58 *See supra* Part II.

59 *See supra* Part III.

60 *See* Cohen & Mendelbaum, *supra* note 21, at 361-69.

61 Vignettes have been used with increasing frequency to assess a child's decision making abilities, both in the juvenile justice and divorce contexts. *See, e.g.,* Grisso, *supra* note 52, at 336 (using the MacArthur Judgment Evaluation, consisting of vignettes and accompanying questions, to measure a child's understanding of the juvenile justice system); Garrison, *supra* note 38, at 78 (using vignettes to assess a child's ability to express their wishes in the divorce context).

62 *See, e.g.,* Richard J. Bonnie, et. al., *The MacArthur Adjudicative Competence Study: A comparison of criteria for assessing the competence of criminal defendants*, 25 J. Am. Acad. Psychiatry & Law 249 (1997) (discussing the complicated analyses required to interpret that test); Grisso, *supra* note 52 at 338.

63 *See* Grisso, *supra* note 52 at 338 (noting that the MacArthur Competence Assessment Tool was not designed for use on youth and that an additional instrument, consisting of vignettes, would be necessary to assess development issues in the juvenile law setting); *see also* Aaron Levin, *Assessing Youth Competence Requires Multistage Process*, 43 Psychiatric News 10 (2008) ("Merely applying to young people the methods used to decide competency for adults isn't enough.") (quoting Dr. Christopher Thomas, M.D.).

64 *See* Mlyniec, *supra* note 23, at 1889 (noting that judges routinely base their decisions regarding a child's decision making capabilities on intuitive judgments).

65 *See supra* note 61.

66 *See, e.g.,* Grisso, *supra* note 52, at 336.

67 *See* Cohen & Mendelbaum, *supra* note 21, at 380 (stressing the importance of effective client interviewing in the child protective context, which often necessitates the use of "drawing or role playing" and other creative efforts to elicit feedback).

68 *See* Buss, *supra* note 43, at 926-27 (noting that candid, open communication between the child and the attorney is always a concern in the child welfare arena).

69 *Id.* at 927 ("Lawyers tend to talk over the heads of their child clients both because the legal issues in question are often difficult to reduce to simple, familiar language and because lawyers frequently are unaware of the difficulties their politely nodding clients are having following what they are saying.")

70 *See* Debra A. Poole & Michael E. Lamb, Investigative Interviews of Children 153 (2003) (noting that adults interviewing children tend to "dominate" the conversation and that children often "say whatever they think adults want to hear"); *see also* Buss, *supra* note 43, at 932 (discussing the tendency of a child to show "considerable deference" to authority figures like judges and lawyers, especially if the child has suffered abuse or neglect).

71 Buss, *supra* note 43, at 957 ("Lawyers should devote time and attention to the development of rapport with child clients, and they should discuss with these clients the nature and outcome of each court proceeding.").

72 *Id.*

73 *See,* Mary Kay Kisthardt, *Working in the Best Interest of Children: Facilitating the Collaboration of Lawyers and Social Workers in Abuse and Neglect Cases*, 30 Rutgers L. Rec. 1 (2006) (highlighting the need for attorney collaboration with providers across several contexts).

74 *See* Cohen, *supra* note 21, at 360 (highlighting the need for an attorney to take an interdisciplinary approach and involve other treatment providers as needed).

75 *See* Lawrence J. Aber, et. al., *Effects of Maltreatment on Young Children's Socioemotional Development: An Attachment Theory Perspective*, 23 Developmental Psychology 406 (1987) (noting that abuse and neglect have a pervasive effect on all areas of development and can negatively impact global functioning); *see also* Seth D. Pollak & Stephanie A. Tolley-Schell, *Selective Attention to Facial Emotion in Physically Abused Children*, 112 J. of Abnormal Psychology 323, 325 (2003) (noting that abuse and neglect can have a pervasive effect on emotional health).

76 *See* Fisher, *supra* note 54, at 894 (noting that therapeutic intervention with abused and neglected foster children reduced levels of cortisol, which in turn improve judgment and decision making).

Remaining vs. Removal:

Preventing Premature Removal when Poverty is Confused with Neglect

by Erica Turcios

The public is well aware of the terrible consequences of child neglect[1] but is relatively uninformed when it comes to the consequences of premature removal from the home. The public frequently hears of the failure of Child Protective Services (CPS) to prevent the tragic deaths of neglected children.[2] As a result, the public puts pressure on the State to remove children from neglectful environments before it's too late.[3] However, with so much attention paid to heartbreaking stories and so many fingers pointed at CPS for failing to take adequate action, the rate of premature removal from the home and the psychological harm that premature removal can cause a child is often overlooked. Unfortunately, this harm may be every bit as damaging to a child's psyche as harm caused by neglect.[4] In fact, many child protection experts have criticized states for being too quick to remove, especially when removal is based on the parent's inability to properly care for the child due to dire financial circumstances, rather than a culpable intent to harm the child.[5] Michigan in particular has come under fire for its "take the child and run" policy and its tendency to label poverty as neglect.[6]

In Part I of this paper, I will discuss how researchers define neglect, and discuss and compare the harm caused to children by neglect with the harm caused to children by removal from the home. In Part II, I will discuss the relationship between poverty and neglect and address the argument that states too often remove children from their homes based on poverty rather than neglect. In Part III, I will discuss current state statutes that provide good models for addressing these problems, and propose that Michigan adopt similar legislative language that may help avoid the neglect-poverty confusion and achieve a better balance between the risk of harm caused by neglect and the risk of harm caused by removal.

Consequences of Neglect and Removal

What is Neglect?

Scientific researchers vary in how they define and measure neglect, making it difficult to achieve

Behavior	Sedlack & Broadhurst, 1996 NIS-3 Classification	Barnett, Manly & Cicchetti 1993 MCS Classification
Inadequate education	Educational Neglect	Moral-Legal/Educational Maltreatment
Exposure to domestic violence	Emotional Neglect	Emotional Maltreatment
Exposure to drugs in utero	Other Maltreatment	Physical Neglect–Failure to Provide
Exposure to or allowing child to engage in illegal activities	Emotional Neglect	Moral-Legal/Educational Maltreatment
Shelter-related neglect such as homelessness or inadequate sanitation or utilities in the child's home	Not addressed	Physical Neglect–Failure to Provide
Inadequate nutrition/affection	Emotional Neglect	Emotional Maltreatment

consensus, compare studies, and apply findings to real cases.[7] However, researchers primarily use one of two classification systems to categorize behaviors indicative of neglect. These are the Third National Incidence Study of Child Abuse and Neglect (NIS-3),[8] and the Maltreatment Classification System (MCS).[9] The table at left illustrates these systems.[10]

Methods of measurement of neglect vary, and can include in-home observation, behavior analysis, medical history, self-reporting, interviewing, case records, and CPS findings.[11] Most researchers, however, almost unanimously find that particular behaviors and conditions are "neglectful." These include inadequate nutrition, clothing, hygiene, and healthcare, unsafe environment, inadequate supervision, and abandonment or expulsion from the home.[12]

In addition to considering the behaviors identified in the NIS-3 and MCS systems when designing an accurate definition of neglect, scientists may take certain other considerations into account. These include whether "neglect" should require evidence of harm, or if the risk to the child's health or welfare suffices.[13] The caregiver's intent to harm the child may also be considered.[14] Thus it appears that some researchers divide neglect into active and passive subcategories. Active neglect occurs when the caregiver purposely withholds basic care to the child or otherwise puts his or her own needs above the needs of the child in such a way as to create a dangerous situation for the child.[15] Passive neglect occurs when the caregiver unintentionally fails to provide for the child's basic needs because it is out of the caregiver's current means of doing so.[16]

Researchers are divided as to whether "neglect" should encompass both passive and active neglect, or only active neglect. One researcher has stated that

> [i]n effect, neglect is a residual category composed of all instances of child maltreatment other than those explicitly defined as sexual, physical, and emotional abuse. The limit of the concept is delineated by the presence of a real or implied choice on the part of the caregiver. If the harm to the child occurs because of circumstances which are external to the caregiver's control it is not a situation of neglect although it may well be a situation which results in harm to the child.[17]

Other researchers propose that the risk to the child should be included in the definition of "neglect" and that the caregiver's intent to harm should not.[18] "Neglect," therefore, would not require a showing of actual harm nor would it take the caregiver's culpability into account. Under this definition, both active and passive neglect would fall under the definition of "neglect."

Since scientific definitions are frequently used as models for legislative definitions, whether passive neglect is included in the definition of neglect can have serious consequences for families. A definition of "neglect" that requires the caregiver's intent to harm may prove too narrow and fail to protect a child who is at real risk of harm, though the harm is unintentional. On the other hand, a definition of "neglect" that does not require the caregiver's intent to harm may cause suspected at-risk children to be removed from the home, though the child has not been harmed, and the caregiver is not at fault.

Harm Caused by Neglect

"Neglect is a complex, multifaceted problem that can have profound effects on children."[19] Neglected children often suffer developmental setbacks, physical pain, behavioral problems, emotional anguish, and academic struggles.[20] Often, these problems are interrelated; delayed development may lead to psychological problems which then manifest as behavioral problems.[21] The effects of neglect may vary based on a number of factors including the age of the child, the presence and strength of protective factors, the frequency, duration and severity of the neglect, and the relationship between the child and caregiver.[22]

The age of the child can be a crucial element that dictates the effects of neglect. Because the first few years of a child's life are sensitive developmental periods, neglect occurring in very young children may be more likely to cause developmental disabilities than in older children.[23] For example, disturbances in attachment caused by neglect may predict developmental problems and may cause children to have difficulty forming health relationships throughout life.[24]

Another common condition occurring in neglected infants and young children is known as Failure to Thrive (FTT).[25] Caused by inadequate nutrition and

disturbed social interactions, FTT is a "significantly prolonged cessation of appropriate weight gain compared with recognized norms for age and gender after having achieved a stable pattern."[26] It is typically diagnosed when an infant's height and weight fails to exceed the fifth percentile for no apparent medical reason, though it has previously done so.[27] FTT can result in a number of serious problems. Malnourished children may have physical deformities and life-long poor health.[28] FTT can also result in continued growth problems, academic failure, and sometimes retardation.[29] It has also been known to result in chronic pain and even death.[30] Like attachment problems, there are certain risk factors, frequently in the form of patterns of social interactions, that attend FTT. An FTT infant's parents or guardians may exhibit inadequate adaptive social interactional behavior and less positive affective behavior.[31] An infant with FTT may have been born prematurely or with a low birth weight and been separated from caregivers due to prolonged hospitalization following birth.[32] FTT often coincides with a lack of extended family to assist in caregiving, social isolation of family, single parenthood, and frequent or long periods of parental absence.[33] These factors may lead to inconsistent feeding patterns, decreased nutrition, decreased growth, and additional family stress.[34]

Neglect can also cause intellectual, cognitive and academic problems. Malnutrition has been shown to lead to impaired brain growth and slower passage of electrical signals within the brain.[35] Certain mineral deficiencies can result in cognitive and motor delays, anxiety, depression, social problems, and attention disorders.[36]

Neglected children may also suffer emotional, psychosocial, and behavioral problems. These include irrational fears, inability to trust, feelings of isolation, low self-esteem, increased dependency, and anger.[37] Attachment is an important component of emotional and psychosocial development,[38] and studies have demonstrated that 70 to 100 percent of maltreated infants form insecure attachments with their caregivers.[39] As they grow older, they tend to be more mistrustful of others and have difficulty understanding others' emotions or regulating their own emotions and impulses.[40] They also have difficulty forming and maintaining relationships, and tend to provoke fights or solicit sexual interactions, as well as display helplessness, dependency, and self-abusive behavior.[41]

Despite the potential for severe harm caused by childhood neglect, some studies have shown that there are certain "protective factors" that promote resilience among neglected children.[42] These factors mediate the effects of neglect, allowing the child to function normally despite the adverse consequences of neglect.[43] Such factors include individual characteristics such as intelligence, creativity, initiative, humor, and independence,[44] as well as certain external factors such as access to care, family support, and alternate caregivers.[45]

Harm Caused by Removal from Family

Because the harm to a child caused by neglect can be severe, CPS officials are expected to take note of certain warning signs and to remove children from neglectful caregivers before they are seriously harmed. However, research has shown that premature removal from the home can result in trauma for the child.[46] CPS officials thus may face a serious dilemma in borderline cases when neglect is suspected but not apparent: preserve the family and risk maltreatment, or remove the child and risk psychological trauma.

Like neglected children, children separated from their families may also experience attachment problems.[47] Families serve as a secure base from which children are able to explore the world and provide the model from which children govern their own behavior.[48] When removed from this secure base, children are likely to exhibit symptoms of stress including FTT, disrupted eating and sleeping, hypervigilance, inability to focus, and provoking fights.[49] However, if intervention in implemented and emotional security and stability is provided, the detrimental effects of attachment problems can be overridden.[50] This sentiment applies equally to situations in which a child may be removed from the home due to suspected neglect; the child who remains at home but receives services is likely to have a significantly smaller risk of suffering attachment problems than a child who is removed.

Research also shows that children removed from their homes and placed in foster care have higher delinquency rates, higher teen birth rates, and lower earnings than children who remained in the home.[51] Studies have shown that maltreated children left in their homes with little or no help fared better as they grew up than comparably maltreated children in foster

care.[52] One study showed that they were less likely to be arrested and less likely to become pregnant at a young age.[53] They were also less likely to become unemployed.[54]

These findings indicate that removal from the home may have the same psychologically damaging consequences as neglect.[55] In questionable cases, children may be better off remaining with their families than being removed to foster homes.[56] CPS workers thus have the difficult task of identifying when a home environment poses a true risk of harm for a child and when it would be less harmful to keep the child in the home. Although it may seem impossible to predict when a child is truly at risk, it is in the child's best interest to prevent premature removal.

Poverty and Neglect

Researchers have long recognized a correlation between low income levels and increased risk of child neglect.[57] In a federal study comparing families with an annual income of under $15,000 to families with an annual income of over $30,000, neglect was 44 times more prevalent in poor families.[58] In 2005, 47% of children with demonstrable harm from abuse or neglect and 95.5% of endangered children came from families whose income was less than $15,000 per year.[59] In fact, a poor child is 22 to 27 times more likely to be identified as harmed by abuse or neglect.[60]

However, studies have also found that most poor caregivers do not neglect their children.[61] These studies identify certain stressors associated with poverty that may contribute to the incidence of neglect. These stressors include unemployment,[62] single parenthood,[63] housing instability,[64] household crowding,[65] limited access to health care,[66] and exposure to environmental hazards.[67] One researcher acknowledges that

> [f]or people living in poverty, the probability of child abuse and neglect is largely dependent on the extent of one's ability to cope with poverty and its stressors…impoverished parents have little leeway for lapses in responsibility, whereas in middle-class families, there is some leeway for irresponsibility, a luxury that poverty does not afford.[68]

Although many states have been criticized for confusing poverty with neglect and prematurely removing children from their homes, the pattern appears to continue in some states, including Michigan.[69] "Many [CPS officials] believe that children are permanently damaged at least to some degree by the mere fact of growing up in a home of abject poverty."[70] For example, an impoverished single mother who cannot afford childcare and thus leaves her young children at home while she works a night shift may have her children removed for failing to adequately supervise them.[71] A disabled grandmother who can no longer afford to pay a housekeeper may have her granddaughter removed because she cannot keep her home clean.[72] Parents who cannot afford repairs necessary to remove lead paint in their home may have their children removed because the paint poses a health risk.[73] In each of these circumstances, there is no culpability on the part of the caregiver, but merely a financial inability to provide an environment that meets a certain level of safety. Services and financial assistance are likely to solve the problem without requiring removal, and indeed, a fair amount of research suggests in-home services cost the state less than foster care placement.[74] The problem is that a broad definition of neglect permits removal whether or not it is premature.

Avoiding Confusion and Balancing Harms

Federal Parameters and Statutory Language

Federal law attempts to balance the interests of the family in remaining together with the interests of the state in protecting children who are at risk of harm. The Supreme Court has held that the Fourteenth Amendment of the Constitution protects the liberty interests of parents in the "care, custody and management of their child."[75] However, the Court has also held that the interests of the State in protecting children who are at risk of harm outweigh the constitutional rights of the parents.[76] Nevertheless, due process arguably requires that state officials reasonably believe that the child is in "imminent danger of harm" before they remove the child from the home.[77] Additionally, courts have acknowledged that removal is not always in the best interest of the child,[78] and have required states to balance the risk to the child of remaining in the home with the harm posed by removing the child from the home.[79]

Despite constitutional guidelines, states vary as much as researchers in defining "neglect." The federal Child Abuse Prevention and Treatment Act (CAPTA) attempts to provide a broad definition by incorporating both abuse and neglect in one definition. CAPTA defines "child abuse and neglect" to mean, at a minimum, "any recent act or failure to act on the part of a parent or caretaker, which results in death, serious physical or emotional harm, sexual abuse or exploitation, or an act or failure to act which presents an imminent risk of serious harm."[80]

State Statutes and a Proposal for Change

In determining when neglected children may be temporarily removed from the home, most states define neglect as deprivation of adequate food, clothing, shelter, or medical care,[81] though there can be great variation with regard to specifics. Some states also specify certain issues or circumstances to be taken into account, such as the parent's incapacity, the type of living environment, religious or cultural influences, or the financial status of the family.[82] Approximately one-third of States provide for consideration of a family's financial means in their definitions of neglect.[83] Others require that the risk of harm be imminent.[84]

The Michigan Juvenile Code, however, does not define neglect.[85] It also does not specifically provide for consideration of caregivers' financial means or culpability, nor does it require that the child be at imminent risk of harm. An officer or agent may take any child into custody "whose surroundings endanger his or her health, morals, or welfare" without a court order.[86] The court may also issue a written order authorizing removal of the child if the court has "reasonable grounds to believe that conditions or surroundings under which the child is found are such as would endanger the health, safety or welfare of the child and that remaining in the home would be contrary to the welfare of the child."[87] The court must, however, determine that reasonable efforts were made to prevent the removal of the child.[88]

Michigan's statute conferring court jurisdiction over custody of minors affords consideration for parents' ability to provide for their children, but also fails to refer specifically to the parents' financial circumstances or culpability, or to a risk of imminent harm. Although Michigan courts have acknowledged a state policy of keeping children in their homes whenever possible,[89] courts may determine the custody arrangements of children whose parents are neglectful, abusive, or fail to provide a fit home, without regard to incomes levels or intent to harm.[90] Michigan gives courts authority and jurisdiction over any juvenile under 18 years of age

> (1) [w]hose parents or other person legally responsible for the care and maintenance of the juvenile, when able to do so, neglects or refuses to provide proper or necessary support, education, medical, surgical, or other care necessary for his or her health or morals, who is subject to a substantial risk of harm to his or her mental well-being, who is abandoned by his or her parents, guardian, or other custodian, or who is without proper custody or guardianship.…
>
> (2) Whose home or environment, by reason of neglect, cruelty, drunkenness, criminality, or depravity on the part of the parent, guardian, nonparent adult, or other custodian, is an unfit place for the juvenile to live in.[91]

By failing to specifically define neglect for purposes of emergency and temporary removal, to provide consideration for caregivers' financial circumstances or culpability, or to require a showing of harm or immediate risk of harm, Michigan makes it very easy for officials to prematurely remove children from their homes. To remedy this problem, Michigan should define neglect for purposes of the Juvenile Code and specifically provide consideration for caregivers' financial circumstances or culpability.

There are a number of states whose statutes provide good models. For example, before officers are allowed to make an emergency removal of a child in Pennsylvania, they must have reasonable grounds to believe that the child is suffering from illness or injury or is in imminent danger from his surroundings, and that his removal is necessary.[92] Furthermore, Pennsylvania defines "child abuse" as

> (i) Any recent act or failure to act by a perpetrator which causes *nonaccidental* serious physical injury to a child under 18 years of age.
>
> (ii) An act or failure to act by a perpetrator which causes *nonaccidental* serious mental injury to or sexual abuse or sexual exploitation of a child under 18 years of age.

(iii) Any recent act, failure to act or series of such acts or failures to act by a perpetrator which creates an *imminent risk of serious physical injury* to or sexual abuse or sexual exploitation of a child under 18 years of age.

(iv) *Serious physical neglect* by a perpetrator constituting prolonged or repeated lack of supervision or the failure to provide essentials of life, including adequate medical care, which *endangers a child's life or development or impairs the child's functioning.*

(2) No child shall be deemed to be physically or mentally abused based on injuries that result solely from environmental factors that are beyond the control of the parent or person responsible for the child's welfare, such as inadequate housing, furnishings, income, clothing and medical care.[93]

By requiring that injury be nonaccidental, that there exists imminent risk of physical injury, that neglect be physical and serious enough to endanger a child's life or impair a child's functioning, and that the parent to have control over environmental factors, Pennsylvania's statute contains safeguards to prevent the confusion of poverty and neglect and premature removal of children from their homes. New York has similar legislation requiring a child to be in imminent danger before an officer may make an emergency removal.[94] New York's definition of a neglected child also contains an imminent danger requirement and specifically provides consideration for parents' financial circumstances:

"Neglected child" means a child less than eighteen years of age

(i) whose physical, mental or emotional condition has been impaired or is in *imminent danger* of becoming impaired as a result of the failure of his parent or other person legally responsible for his care to exercise a minimum degree of care

(A) in supplying the child with adequate food, clothing, shelter, education, medical or surgical care, though *financially able to do so or offered financial or other reasonable means to do so*; or

(B) in providing the child with proper supervision or guardianship, by unreasonably inflicting or allowing to be inflicted harm, or a substantial risk thereof, including the infliction of excessive corporal punishment; or by misusing a drug or drugs; or by misusing alcoholic beverages to the extent that he loses self-control of his actions; or by any other acts of a similarly serious nature requiring the aid of the court; provided, however, that where the respondent is voluntarily and regularly participating in a rehabilitative program, evidence that the respondent has repeatedly misused a drug or drugs or alcoholic beverages to the extent that he loses self-control of his actions shall not establish that the child is a neglected child in the absence of evidence establishing that the child's physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired as set forth in paragraph (i) of this subdivision; or

(ii) who has been abandoned by his parents or other person legally responsible for his care."[95]

The Pennsylvania and New York statutes provide excellent models of statutory language that head off both the poverty-neglect confusion problem and thus the premature removal problem. By using specific statutory language requiring a showing of imminent risk, a degree of culpability, or a caveat for impoverished parents, it is less likely that children will be prematurely removed from their homes and thus suffer unnecessary trauma caused by removal.

Conclusion

It is important that the public acknowledge that removal from the home may be just as psychologically damaging to children as neglect, and that premature removals should be avoided. Since poverty necessarily puts children at some level of risk, premature removals may be inevitable if neglect is not clearly defined or is given an overly broad definition that does not account for these problems. Michigan should follow the example of other states in defining "neglect" and amend its Juvenile Code to incorporate specific language requiring a showing of imminent risk, a degree of culpability, or a caveat for impoverished parents. In doing so, Michigan would address the criticism levied at it from both sides, and be able to protect neglected children who are most at risk of immediate harm while ensuring that many more children remain with their families. ◎

Endnotes

1 Definitions of "neglect" are discussed *infra* Parts I and III.

2 *See, e.g.*, Shannon Murphy & Bryn Mickle, *Shylae Thomas Weighed 33 Pounds When She Died; Family Blames DHS*, The Flint Journal, April 24, 2009, *available at* http://www.mlive.com/news/flint/index.ssf/2009/04/ shylae_thomas_weighed_33_pound.html; Rex Hall Jr., *Changes Needed After Springer Death*, Kalamazoo News, October 14, 2008, *available at* http://www.mlive.com/news/kalamazoo/index.ssf/2008/10/report_changes_needed_ after_sp.html; Ron Fonger, *State Records Hint at Rose Kelley's Story*, The Flint Journal; March 17, 2007, *available at* http://blog.mlive.com/flintjournal/special/2007/03/coming_sunday.html.

3 *See, e.g.,* Hall, *supra* note 2.

4 *See* Joseph J. Doyle, Jr., *Child Protection and Child Outcomes: Measuring the Effect of Foster Care*, American Economic Review, 3 (2007), *available at* http://www.mitl.edu/~jdoyle/doyle_fosterlt_march07_aer. pdf, ("Despite the large number of children at high risk of poor life outcomes served by child protective services, it is unclear whether removing children from home and placing them in foster care is beneficial or harmful for child development, especially for children at the margin of placement").

5 *See* NCCPR Issue Paper 1, *How a War Against Child Abuse Became a War Against Children*, *available at* www.nccpr.org /issues/1.html.

6 *See* Richard Wexler, *Cycle of Failure: How Michigan Keeps 'Throwing the Fight' for Children—and How to Make the State a Contender Again* (February 18, 2009), *available at* http://www.nccpr.org/reports/michigan1976.pdf.

7 M.M. Black & H. Dubowitz, *Child Neglect: Research Recommendations and Future Directions*, Neglected Children: Research, Practice and Policy, at 261-277 (1999).

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10 *Acts of Omission: An Overview of Child Neglect*, Child Welfare Information Gateway, www.childwelfare.gov/pubs/focus/acts/index.cfm (2001, updated April 2009).

11 Black & Dubowitz, *supra* note 7.

12 Barnett, Manly & Cicchetti, *supra* note 9; Sedlack & Broadhurst, *supra* note 8.

13 Child Information Gateway, *supra* note 10.

14 *Id.*

15 *See id*.

16 *See id*.

17 Child Information Gateway, *supra*, (citing Reid et al., at 12 (1994)).

18 S.J. Zuravin, *Research definitions of child physical abuse and neglect: Current problems*, The Effects of Child Abuse and Neglect (1991).

19 Black & Dubowitz, *supra* note 7, at 274.

20 Diana DePanfilis, *Child Neglect: A Guide for Prevention, Assessment and Intervention*, U.S. Department of Health and Human Services User Manual (2006), at 21, www.childwelfare.gov/pubs/usermanuals/neglect/neglect .pdf, ("[T]he effects of neglect are harmful and possibly long-lasting for the victims. Its impact can become more severe as a child grows older and can encompass multiple areas, including health and physical development, intellectual and cognitive development, emotional and psychological development, social and behavioral development.")

21 *Id*.

22 *Id*.

23 H. Dubowitz, *Child neglect: Short-term and long-term outcomes*, Neglected Children: Research, Practice, and Policy, 89-108 (1989).

24 M.T. Greenberg, *Attachment and Psychopathology in Childhood*, in Handbook of Attachment: Theory, Research, and Clinical Applications, 469-496 (J. Cassidy & P.R. Shaver, eds., 2002); DePanfilis, *supra* note 20, at 21.

25 Robert W. Block & Nancy F. Krebs, *Failure to Thrive as a Manifestation of Child Neglect*, in 116 Pediatrics 5, 1234 (Nov. 2005).

26 *Id*.

27 Child Information Gateway, *supra* note 10, (citing Wallace (1996)).

28 Child Information Gateway, *supra* note 10, (citing Munkel, (1996))

29 *Id*.

30 *Id*., at 115.

31 Block & Krebs, *supra* note 25, at 1234.

32 *Id*.

33 *Id*.

34 D. Drotar, J. Pallotta, & D. Eckerle, *A Prospective Study of Family Environments of Children Hospitalized for Nonorganic Failure-to-Thrive*, Journal of Developmental and Behavioral Pediatrics 15, 78-85 (1994).

35 DePanfilis, *supra* note 20, at 24.

36 *Id*.; *see also* Child Information Gateway, *supra* note 10, (citing J. Weinstein & R. Weinstein (2000), B.

Egelend (1988), J.M. Gaudin (1999)); C.M. Perez & C.S. Wisdom *Childhood Victimization and Long-term Intellectual and Academic Outcomes,* Child Abuse and Neglect, 18(8), 617-633 (1994) (finding that adults who suffered from childhood neglect scored lower on IQ and reading ability tests than those who were not neglected as children).

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38 DePanfilis, *supra* at 25.

39 D.A. Wolfe, *Prevention of Child Neglect: Emerging Issues*, Criminal Justice and Behaviors, at 90-111 (1999).

40 *Id.*

41 *Id.*

42 *See* Child Information Gateway, *supra* note 10.

43 I. Prilleltensky & L. Pierson, *Context, Contributing Factors and Consequences. Promoting Family Wellness and Preventing Child Maltreatment: Fundamentals for Thinking and Action*. Wilfrid Laurier University, Ontario, Canada (1999).

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46 K. MacFarlane & J. Bulkley, *Treating Child Sexual Abuse: An Overview of Current Program Models*, Journal of Social Work and Human Sexuality 1, 1-2 (1982).

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48 *Id.*

49 DePanfilis, *supra*, note 20.

50 Child Information Gateway, *supra* note 10 (citing Clarke & Clarke (1999)).

51 Doyle, *supra* note 4, at 41.

52 Byron Egeland, et al., *The Impact of Foster Care on Development,* 18 Development and Psychopathology, at 57-76 (2006).

53 See Doyle, *supra* note 4.

54 *Id.*

55 The term "neglect," as used here, refers to borderline cases of neglect, rather than severe cases of neglect.

56 The National Coalition for Child Protection Reform argues that no child should ever be removed from his or her family for neglect alone, unless the child is suffering, or is at imminent risk of suffering, identifiable, serious harm that cannot be remediated by services. NCCPR Issue Paper 6, *Child Abuse and Poverty, available at* www.nccpr.org/ newissues/6.html#1a.html.

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59 Judith Warner, *The Family-Friendly Congress?,* N.Y. Times, Nov. 10, 2006; *see also* Judith Warner, Perfect Madness: Motherhood in the Age of Anxiety (2005).

60 Warner, Perfect Madness, *supra* note 59.

61 Dubowitz, *supra* note 23.

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63 Nelson et al., *supra* note 57.

64 Child Information Gateway, *supra* note 10, (citing Gaudin, Polansky, Kilpatrick, Shiltron, (1993)).

65 Zuravin, *supra* note 18.

66 Dubowitz, *supra* note 23.

67 Zuravin, *supra* note 18; L. Pelton, *The Role of Material Factors in Child Abuse and Neglect*, Protecting children from abuse and neglect, at 153 (1994) (environmental hazards include neighborhoods with high crime rates, exposed wiring, lead paint, and insecure windows).

68 Pelton, *supra*, at 153, 155.

69 *See* Wexler, *supra* note 6.

70 Child Information Gateway, *supra* note 10 (citing Cohen, at 217 (1992)).

71 Laura Saari, *Checking Up on the Children*, Orange County Register, Jan.17, 1999, at E1.

72 Donna J. Robb, *Child Abuse Charge Unfair, Group Says*, The Plain Dealer, March 11, 1998, at 1B.

73 Jack Kresnak, *Hints of trouble: As his Behavior Worsens, his Foster Mother is on Edge*, Detroit Free Press, December 3, 2007.

74 *See* Shanti George & Nico van Oudenhoven, Stake Holders in Foster Care: An International Comparative Study 83 (2002) ("Perhaps the following mantra should be chanted by those responsible for social policy: Family preservation is cheaper than foster care."); NCCPR Issue Paper 12, *Financial Incentives*, *available at* http://www.nccpr.org/newissues/1.html ("family preservation is less expensive [than foster care] in total dollars").

75 Santosky v. Kramer, 455 U.S. 745, 753; *see also* Quillon v. Wilcott, 434 US 246, 255 (1978) ("Family members have an interest in being together. Members of families have a constitutional interest in familial integrity, or put more plainly, a right not to be forcibly separated.").

76 Lassiter v. Department of Social Services, 452 U.S. 18, 27 (1981); Newton v Burgin, 363 F.Supp. 782, (W.D.N.C. 1973), aff'd 414 U.S. 1139; Stanley v. Illinois, 405 U.S. 645, 649 (1971) (a state's right to protect minor children rises to the level of a duty).

77 Smith v. Organization of Foster Families, 431 U.S. 816, 862 (1977) ("We have little doubt that the Due Process Clause would be offended [if] a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness for the sole reason that to do so was thought to be in the child's best interest.").

78 Duchesne v. Sugarman, 566 F.2d 817, 825 (2d Cir.1977) ("The interest in not being forcibly separated by the state is shared by parents and children…It is in the interest…of the children in not being dislocated from the emotional attachments that can derive from intimacy of daily association with the parent.").

79 Nicholson v. Scoppetta, 3 N.Y.3d 357, 378 (2004) ("A blanket presumption favoring removal was never intended. The court must do more than identify the existence of a risk of serious harm…It must balance that risk against the harm removal might bring, and it must determine factually which course is in the child's best interest.").

80 42 U.S.C. § 5106(g)(2).

81 *Definitions of Child Abuse and Neglect: State Statutes Series*, Child Welfare Information Gateway, (2007), available at http://www.childwelfare.gov/systemwide/laws_policies/statutes/define.cfm.

82 *Id.*

83 U.S. Department of Health and Human Services (2000); however, these definitions often have caveats addressing the family's access and response to available services that help to alleviate neglectful conditions.

84 See, e.g., Fla. Stat. § 39.401; Rev. Code Wash. 13.34.050.

85 Michigan law does, however, define child neglect for purposes of reporting as "harm or threatened harm to a child's health or welfare by a parent, legal guardian, or any other person responsible for the child's health or welfare that occurs through either of the following: (i) Negligent treatment, including the failure to provide adequate food, clothing, shelter, or medical care; (ii) Placing a child at an unreasonable risk to the child's health or welfare by failure of the parent, legal guardian, or other person responsible for the child's health or welfare to intervene to eliminate that risk when that person is able to do so and has, or should have, knowledge of the risk." M.C.L. 722.622(j). Note that section (i) does not provide for a consideration of the caregiver's financial circumstances or culpability, or require that the child be in imminent risk of harm.

86 M.C.L. 712A.14; *see also* M.C.R. 3.963(A).

87 M.C.R. 3.963(B)(1).

88 *Id.*

89 *In re Miller*, 445 N.W.2d 161 (1989); *Reist v. Bay County Circuit Judge*, 241 N.W.2d 55 (1976); *In re McCullough*, 366 N.W.2d 90 (1985); *In re Brown*, 360 N.W.2d 327 (1984); *Paige v. Bing Constr. Co.*, 233 N.W.2d 46 (1975) (law will not step into private relationship between parent and child until child's well-being is seriously affected).

90 See *In re Jacobs*, 444 N.W.2d 789, 790, 796 (1989) ("culpable neglect need not be shown to support an exercise of jurisdiction by a probate court. . . The purpose of the juvenile code…is to protect children from an unfit home, 'not to punish bad parents.' Were we to require a showing of culpable neglect before a probate court may exercise jurisdiction, an entire class of children, i.e., those neglected by blameless parents, would remain neglected").

91 M.C.L. 712A.2.

92 42 Pa.C.S.A. § 6324 (2009).

93 23 Pa.C.S.A. § 6303 (2009) (emphasis added).

94 N.Y. C.L.S. Soc. Serv. § 417 (2009).

95 N.Y. C.L.S. Soc. Serv. § 371 (2009) (emphasis added).

Decision-making Rights of Teen Parents

by John Calvin, Manouchka Colon, and Kacey Houston

Although teen birth rates have dropped in recent years,[1] teen parenting continues to exact a toll on teen parents and their children, as well as on their families and society as a whole. A substantial proportion of teen mothers are ages seventeen and younger[2] and are therefore children themselves in the eyes of the law. States limit the rights of these young mothers in myriad ways on the basis of their minority, but when it comes to raising their children, minors are afforded full and unrestricted parental rights.

The unfettered decision-making authority of teen parents raises the question posed by Emily Buss in *The Parental Rights of Minors*: "Why do we afford minors the same right as adults to assume parental authority, when we routinely refuse to grant minors co-extensive rights in other areas of the law?"[3] Indeed, while states have taken an array of steps to either prevent or manage the effects of teen pregnancy, they have generally declined to intervene in the relationships between minor parents and their children except in instances of clear parental unfitness. In this regard, states' approaches fall short of averting some of the most profound consequences of teen parenting for minors and their children. To effectively address these issues, state legislatures should consider varying degrees of intervention and the extent to which they promote the welfare of both minor parents and their children.

The hard question for policymakers, as Professor Buss notes, is "whether the law can be structured to facilitate both [the minor parent's and her child's] development simultaneously, and whether the gains to minor and child would outweigh losses associated with compromising a minor's parental rights."[4] This paper addresses that challenge and considers two forms of alternative custody arrangements—custody shifting and custody sharing—that might protect the children of minor parents while enabling minor parents to develop their parenting skills. It will suggest that limitations on the parental rights of minors may be justified by the psychology research on teens' maturity and parenting capacities, and may also be constitutionally permissible given the current state of Supreme Court jurisprudence on related issues. While this paper does not advance any specific policy prescriptions and we stress that further study is necessary before any such reforms should be implemented, we offer this discussion of the forms that permissible state interventions might take in hopes of encouraging policymakers to consider these and other possible approaches to the problems arising from teen parenthood.

The Problem

Psychology Research on the Maturity and Parenting Capacities of Minor Parents

The basis for limiting the rights of minors in this and other contexts is the notion that minors' lack of development impacts their capacities in certain legally relevant ways. Psychology research is therefore critical to ascertaining the developmental differences between adolescents and adults and determining whether these differences justify affording them differing degrees of parental rights. The inherent differences in intellectual, social, and psychological capacities discussed below suggest that the developmental deficits that adolescents exhibit compared to adults provide a basis for limiting the ways in which teens' parental rights are understood and exercised. Our discussion thus proceeds from research finding that teen mothers are developmentally ill-prepared to parent and designating adulthood as the optimal position for accepting the responsibilities of motherhood.[5]

The psychology research on parenting suggests that to be effective parents, mothers should be attitudinally predisposed to parenting, should know how children develop, and should understand what constitutes suitable parenting practices.[6] The research that has specifically examined these factors with respect to teen parents concentrates on six dimensions of maternal parenting quality: the mother's parenting attitude; perceived parenting confidence; perceived parenting stress; parenting knowledge; commitments to

the parenting role; and grandmother involvement in caretaking.[7] These dimensions illuminate the ways in which adolescent parents differ developmentally from adult parents and tend to reveal suboptimal parenting attributes in teen mothers. This paper discusses each dimension in turn.

Mother's parenting attitude

Mother's parenting attitude encompasses inappropriate expectations of the child, lack of empathy toward the child's needs, a high value on physical punishment, and a belief in parent-child role reversal. The first aspect involves the difficulty teens have in understanding the particular stages of their child's development.[8] They tend to both overestimate and underestimate their children's abilities, thus resulting in unrealistically high or low expectations for their children's behavior.[9] The expectation for children in language development is especially low.[10] In other areas of development, a teen mother may expect her child to behave in an adult-like manner; for example, a teen mother may expect her child not to cry when the child has been hurt.[11] As a result, teen mothers are less attuned to their infants' distress and therefore less able to calm them during periods of agitation.[12] Research suggests that the correlative reasons for these deficits are the lack of familiarity with children and the resulting lack of comprehension in how children develop.[13]

The second aspect of parenting attitude is the lack of empathy toward the child's needs. Adolescents lack understanding of and sensitivity to their children's needs and wants.[14] According to Garcia-Coll et al.,[15] adolescent mothers tend to be less empathetic and responsible with their infants. This behavior is likely to result from teens' cognitive and psychosocial immaturity and egocentric thinking.[16] An important issue arising from teen mothers' lack of empathy is their inability to separate their own feelings and needs from the needs of their child. This unresolved conflict stems from adolescent individuation issues.[17] Bierman and Streett offer a classic example in which a teen mother who takes her child to a pediatric visit abandons her child on the examining table during the shot. In this example, the teen mother mentally transforms into the child and feels as if she is receiving a shot herself. This identification prevents the teen from functioning in her proper role as mother, which leaves her child without maternal comfort or relief from his anxieties. The failure to separate herself from the child interferes with teen mother's ability to address her child's needs, feelings, and fears.[18]

The third aspect of parenting attitude is the value placed on physical punishment. Teens rely more heavily on physical disciplinary measures than do adults.[19] They are more prone to engage in aggressive and inappropriate behaviors seldom used by adult mothers such as poking and pinching.[20] Teen parents also report that physical punishment is an acceptable and important means of child control and discipline.[21] Furthermore, teen mothers are less likely to use verbal exchanges, make eye contact and smile less often, and behave less cooperatively and accessibly to their children. As a result, adolescent infant-mother dyads show that a large proportion of infants have insecure attachments[22] and are at an increased risk for developmental delay.[23] Research suggests that teen mothers' dependence on punitive measures originates from their self-centered attitude and immaturity.[24]

The fourth and final aspect of parenting attitude is a belief in parent child role reversal. Often teen mothers hold tight to the notion that their children should nurture and comfort them and expect their children to fulfill that role.[25] As a parent, a teen may believe that she is helpless and in need of nurturing.[26] Such beliefs typically result from self-centeredness, narcissism, and incongruous resolution of teens' dependence-independence issues.[27] These results are cause for concern because they highlight the difficulties teens face in identifying their appropriate roles as parents.

Perceived parenting confidence

Perceived parenting confidence refers to the mother's feeling of self-confidence in her maternal ability and parenting effectiveness. These factors are meaningful in determining a mother's self-esteem because low self-esteem can hinder adaptation to motherhood. Importantly, maternal self-esteem is dependent on the mother's success in interacting with and caring for her infant.[28] The main factors addressed in this category are the mother's confidence in her care-taking ability and mothering role; acceptance of her child; and the expected relationship with her child.[29] Although there has been little research in this area, it has been acknowledged that optimum parenting is most often seen among teen mothers with high self-esteem, effective coping skills, and a sense of maturity.[30]

Perceived parenting stress

Perceived parenting stress is defined by "the irritating, frustrating, annoying, and distressing demands that occur in the interactive parent-child dyad."[31] Parenting stress is hypothesized as a central variable in several models of child abuse and neglect.[32] Among adult mothers, it correlates with children's behavioral problems and social incompetence, greater maternal distress, and less satisfied parenting.[33] Because less is known about adolescent parenting stress, much of the data is drawn from adult mother samples so the application to teen mothers is consequently speculative. Garcia-Coll et al. apply these findings and suggests that parenting stress among adolescents would be high given the developmental and ecological sources of stress associated with early parenthood. Generally, researchers identify high parenting stress among teens because they have less effective coping mechanisms, are less mature, and have less permanent social support networks.[34]

Parenting knowledge

Parenting knowledge is an important attribute because most pregnancy and parenting programs are geared toward educating teens about child development. The basic assumption is that accurate parenting knowledge helps the teen to become a skilled and sensitive parent.[35] Adolescents tend to be less knowledgeable in three major areas, including the developmental milestones in children[36]; typical infant behavior like the "normal" amount of time infants cry, sleep, and are alert; and desirable care-giving techniques.[37] While they lack knowledge in those areas, teen parents are still very aware of how parenting behavior influences their child's current and future well-being.[38] This is alarming because it suggests that teens understand the influential role played by the behaviors they exhibit to their children but do not necessarily monitor those behaviors as a result.

Commitment to the parenting role

Parenting commitment refers to the psychological significance that an individual adolescent attaches to the parenting role.[39] Researchers consider the centrality of parenting to the self, the salience of parenting in relation to other activities, and the drive and aspirations to perform wells as a parent.[40] High parental commitment is correlated with parenting satisfaction and is advantageous to parenting.[41] Again, research on adolescent mothers is limited, but it is conceivable that teens would be less highly committed to the parenting role than their adult counterparts because of teens' emerging and evolving identities. Moreover, teens experience competing demands like school and the pressure to socialize with their peers, which make dedicating extensive time to their children more difficult.[42]

Grandmother involvement in caretaking

The final category that researchers examine is grandmother involvement in caretaking. This is especially important because the adolescent's mother is often a critical source of support for a teen parent. Studies suggest that outcomes for children born to teenage mothers might be improved when grandmothers are involved in their grandchildren's care.[43] There are several reasons for this improvement. The age and experience of the grandmother are significant factors because the grandmother is older and presumably has already raised at least one child. Additionally, the grandmother can act as a positive modeling influence and role model.[44] Because parenting is a difficult task, direct hands-on childcare offers social support that buffers the teen and her child from the stresses of early parenting.[45] Such support can enhance the teen mother's parenting sensitivity, child acceptance, and child stimulation.[46] Moreover, teens who receive more parenting support have been found to engage in more positive parenting behaviors than teens who receive less parenting support. For example, they tend to smile and look more at their children and engage in fewer punitive behaviors.[47]

It should be noted that these findings are tempered by criticism of grandmother involvement in some instances. There is some evidence that the positive effects of involvement are diminished, and other problems might be raised, when the grandmother exhibits an authoritarian disciplinary style. Extensive and prolonged grandmother involvement can then lead to confusion about roles and lines of authority and may even prevent the teen from developing adequate parenting skills or a secure relationship with her child.[48] Accordingly, prolonged grandmother involvement may undercut the teen's parenting confidence and ability to assume the maternal role.[49] Before concluding that grandmother involvement is beneficial or detrimental, the strength and prevalence of the grandmother's presence should be examined. In general, the effects vary depending on age, with younger mothers

benefiting more from grandmother co-residence and child care involvement than older teen mothers.[50]

Negative Outcomes of Teen Parenting for Minors and Their Children

Perhaps because of the developmental handicaps faced by minor parents outlined above, children of teen parents are more likely than the children of adult parents to face a number of negative outcomes. Of particular concern in this paper, the children of teen mothers are at greater risk of abuse and neglect[51] and are more likely to be placed in foster care.[52] One study showed that, while 4.75 percent percent of all children were abused or neglected during the relevant time period, the rate of abuse or neglect was more than two and a half times higher for children born to mothers ages seventeen and younger.[53] In fact, those children were notably more likely to suffer abuse and neglect than even the children of older teen mothers (ages eighteen or nineteen years old).[54] Similarly, the children of minor mothers were found to be more than two and a half times more likely to be placed in foster care than are children generally,[55] and are likely to spend longer in foster care than children born to parents ages eighteen and older.[56]

Although the models discussed in this paper are especially targeted to reduce the risk of neglect or abuse by encouraging adult oversight of teen parents, children born to teen mothers also face other difficulties both as children and later in life. They tend to perform worse on cognitive and emotional measures than their peers.[57] They are generally in poorer health than are the children of non-teen mothers and they utilize medical providers at lower rates.[58] Sons of teen mothers are also 13 percent more likely to end up in prison, while daughters of teen mothers are 22 percent more likely to become teen mothers themselves.[59]

Minor parents themselves also face possible consequences from having and raising children at a young age. Teen mothers are less likely to receive a high school diploma, which places them at a great risk for poverty.[60] Adolescent mothers are less likely to work than are mothers who have their first child as adults.[61] Perhaps relatedly, the high rate of poverty among adolescent mothers persists at both seven and twelve years after childbirth.[62]

This paper does not posit a clear causal relationship between these outcomes and the maturity of minor parents. Indeed, it is entirely possible that some of these consequences can be explained by or in conjunction with other biological or situational factors tending to bear on teen parents in particular. At least one study posits that having a mother who first gave birth as a teen may have negative consequences for her children that are linked more to early fertility than to the environment in which the children are raised.[63] Other studies have challenged the causal role of teen childbearing itself in bringing about some of the aforementioned consequences.[64] Moreover, it has also been observed that the younger the teen mother, the more disadvantaged her background is likely to be.[65] Some data suggest that the disparities between the children of teen parents and the children of adult parents may disappear or become less salient when studies control for background characteristics.[66] Further study would be necessary to determine whether certain of these outcomes can be impacted by greater adult involvement in raising the children of minor parents. However, the considerable costs that minor parenting imposes on teens and their children—as well as on their families and society as a whole—suggest that it is worth at least considering strategies for mitigating these ill effects. This position provides a basis for considering the forms of limited state intervention through alternative custody models explored in this paper.

The Law

The psychology research discussed in Part I might provide adequate justification for limiting the parental rights of minors, as is the case in other areas in which legislatures have determined that minors' immaturity justifies such curtailment. In order to implement any of the reforms discussed in Part III of this paper, a legislature would first need to address the constitutional challenges that would be certain to arise. Each of these possible reforms invites challenge because each would to a degree curtail the rights of the teen parent. But states, traditionally the laboratories for novel legal approaches to solving problems, have so far been reluctant to make any forays into this area; to date, "[e]ven with the growing number of minor parents, no state has ever limited a minor's parental rights."[67] Consequently, no such law limiting the parental rights of minors has ever been tested before a court.

After a discussion of the traditional liberal rights theories and their relation to the constitutional rights of minors in America, this section will examine those areas in which minors have been afforded constitu-

tional protection, what limits have been placed on their enjoyment of those protections, and the various justifications for not granting them rights coextensive to adults' rights. It analyzes Supreme Court case law regarding parental rights and attempts to predict how the conflict between adult parental rights and those of minors might be resolved. Ultimately, we conclude that while it is not certain that a court would uphold a law restricting the parental rights of minors, Supreme Court jurisprudence does not foreclose the possibility of such legislation. Policymakers therefore have the opportunity to address some of the consequences of teen parenting by limited state intervention in the rights of minor parents.

The Constitutional Rights of Parents

The right of parents to exercise care and control over their children has long been sacrosanct in America. The Supreme Court has held that the liberty guarantee of the due process clause of the Fourteenth Amendment includes "the right of the individual to . . . establish a home and bring up children . . . ."[68] It has noted that "the interest of parents in the care, custody, and control of their children[] is perhaps the oldest of the fundamental liberty interests recognized by this Court."[69] The Court's opinions "historically [have] reflected Western civilization concepts of the family as a unit with broad parental authority over minor children,"[70] and are generally couched in terms of an adult parent and a minor child, with the adult parent being responsible for nurturing the child. Indeed, "[l]egal restrictions on minors, especially those supportive of the parental role, may be important to the child's chances for the full growth and maturity that make eventual participation in a free society meaningful and rewarding. Under the Constitution, the State can 'properly conclude that parents and others . . . who have [the] primary responsibility for children's well-being are entitled to the support of laws designed to aid discharge of that responsibility.'"[71]

Parental rights are not absolute, however. The state may curtail parental rights in certain instances by asserting its interest in protecting the safety and welfare of children. Where the two conflict, the state's interest in this regard may trump even a parent's weighty constitutional interest in familial integrity.[72] In cases of abuse and neglect, parental rights may be limited if the decisions or actions of the parent jeopardize the state's interest in child welfare.[73] This compelling interest entitles the state to investigate instances of abuse and/or neglect and take to the necessary action to ensure children's safety.[74] In certain circumstances of parental unfitness, the state may go so far as to terminate the parent-child relationship as a constitutionally permissible exercise of its power, so long as the procedural and substantive liberties of the parent under the due process clause of the Fourteenth Amendment are appropriately safeguarded.[75] When the state exercises this authority, it is acting as parens patriae to protect the best interests of the children within its jurisdiction.[76] Although we have not identified any instances in which courts have found a legally cognizable right on the part of a child to be free from abuse or neglect by non-state actors when outside of state custody, a child's interest his own safety and wellbeing is in many cases most effectively vindicated by the state.

The Constitutional Rights of Minor Parents

The Court's treatment of parental rights makes clear that it is generally predicated upon the assumption that the parent is mature and not, in fact, a child herself. As the Court noted in *Parham v. J.R.*, "[t]he law's concept of a family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult choices."[77] In the case of teen parents, however, this assumption may be undermined, thus casting doubt on the entire basis for acknowledging the parental rights of teen parents.

To liberal rights theorists, rights, and arguably constitutional rights, are "a reflection of a basic human right to equal respect in making decisions about one's life," and are based on "the assumption that human beings have a special capacity to reason and engage in deliberative decision-making,"[78] which capacity adolescents, as shown above, do not share in full measure with adults. According to rights theorists such as John Stuart Mill, the only valid reason for interfering with the rights of another is self-protection.[79] But Mill believed that "this doctrine is meant to apply only to human beings in the maturity of their faculties," which Mill presumed excluded children.[80] John Locke, another rights theorist, also excepted children from his assertion that "all men by nature are equal,"[81] the sentiment later expressed by Thomas Jefferson in the Declaration of Independence and espoused by such philosophers as Hart, Ackerman, and Gutmann.[82]

The Supreme Court has declared that "[a]

child, merely on account of his minority, is not beyond the protection of the Constitution"[83]; indeed, "constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights."[84] In case after case, the Court has demonstrated that "whatever may be their precise impact, neither the Fourteenth Amendment nor the Bill of Rights is for adults alone."[85] The Court has even gone so far as to say that "parenthood, like attainment of the age of majority, is one of the traditional criteria for the termination of the legal disabilities of minority."[86]

At the same time, the Court has made clear that "[t]he unique role in our society of the family, the institution by which 'we inculcate and pass down many of our most cherished values, moral and cultural' . . . requires that constitutional principles be applied with sensitivity and flexibility to the special needs of parents and children."[87] In working toward that end, "[t]he Court . . . long has accepted that the State has somewhat broader authority to regulate the activities of children than of adults."[88] In *Bellotti v. Baird*, the Court "recognized three reasons justifying the conclusion that the constitutional rights of children cannot be equated with those of adults: the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing."[89] According to the Court, states have not only the power but perhaps the responsibility to act in the furtherance of healthy child development: "A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies. It may secure this against impeding restraints and dangers, within a broad range of selection."[90]

However the rights theorists might have it, the government has readily granted rights—especially such welfare rights as food, shelter, and education—to children, and has done so "in virtually every domain where such rights have been recognized for adults."[91] Even so, it is clear that the rights of children are not coextensive with those of adults. For example, welfare rights can be refused by adults, but for children they are compulsory.[92] And many of the rights granted to children or young adults are only available for the older (presumably more mature) among them; for example, one must be twenty-one to purchase alcohol,[93] eighteen to vote[94] or be put to death,[95] sixteen to marry,[96] sixteen (or even fourteen or fifteen) to drive a car,[97] and, in some states, eighteen to have an abortion without parental notification or consent (absent judicial bypass).[98] Even several of these rights are subject to the authority of another; for instance, a parent must consent for a sixteen-year-old to marry or drive, and either a parent or a court must sanction a teen's decision to terminate a pregnancy.[99] While recognizing the need to respect the rights of minors, courts and legislatures alike have done so against the backdrop of societal efforts to nurture children along to adulthood at a pace which accurately reflects their abilities.

The Supreme Court, while extending constitutional protection to minors in several contexts, has yet been cautiously mindful of the need for parents and the state to protect children. In a case placing limits on minors' free speech protection, the Court recognized "the obvious concern on the part of parents, and school authorities acting *in loco parentis*, to protect children-especially in a captive audience-from exposure to sexually explicit, indecent, or lewd speech."[100] In a case discussing and limiting a child's religious freedom, the Court recognized the "state's authority over children's activities is broader than over like actions of adults."[101] And in reviewing prior case law regarding children, the Court in *Bellotti v. Baird* emphasized that "[t]hese rulings have not been made on the uncritical assumption that the constitutional rights of children are indistinguishable from those of adults."[102]

The Conflict Between Minor and Adult Parents

The *Bellotti* Court stressed the requirement that "constitutional principles be applied with sensitivity and flexibility to the special needs of parents and children."[103] That position identifies an important conflict: that between the parental rights of an adult parent with respect to her minor child, and the parental rights of the minor child with her own child. The Court has indicated that the responsibility of parents to raise their children should be supported by the state:

> The guiding role of parents in the upbringing of their children justifies limitations on the freedoms of minors. The State commonly protects its youth from adverse governmental action and from their own immaturity by

> requiring parental consent to or involvement in important decisions by minors. But an additional and more important justification for state deference to parental control over children is that the child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations. This affirmative process of teaching, guiding, and inspiring by precept and example is essential to the growth of young people into mature, socially responsible citizens.[104]

Where a parent is also a minor child herself, an important question is whether, and to what extent, the parental rights of the adult parent over the minor parent are superior to the parental rights of the minor.

The Court has repeatedly expressed its respect for parental rights, though it has also on many occasions expressed a willingness to circumscribe minors' rights in areas in which it would not do so for adults. In the context of parenthood, where the rights of an adult to parent her child conflict with the adolescent's right to parent her own child, and where the adult parent wishes to act in the best interests of the infant, our analysis suggests that the rights of the adult and the interests of the infant should prevail. While it would be unacceptable for the state to subvert an adult's rights in the same way without a showing of parental unfitness, here—where separate parental rights are in conflict, and to the extent that the adult parent's rights may be presumed to align with the infant's best interests—lawmakers can justify giving the adult parent some discretion to act in the infant's best interests.

Alternative Custody Arrangements for Minor Parents

In her article *The Parental Rights of Minors*, Professor Buss notes with curiosity that we have seen no age-based regulation of parenting and offers brief sketches of what such age-based regulations might look like.[105] The possibilities she outlines include establishing a minimum age for parenting; an approach similar to that followed in the abortion context where the minor's parents must consent to her parenting, absent judicial bypass; considering age in termination proceedings; implementing an education and licensing system for minor parents; and reallocating custodial authority between the minor parent and her parents.[106] Another option suggested by Carolyn Ballard in *Mother May I? Minors As Parents* is the automatic emancipation of minor parents to avoid the conflict of parental rights between them and their adult parents.[107]

These options must be considered in light of the psychology research discussed in Part I and the legal framework outlined in Part II. Given the weight the law places on parental rights, a minimum age for parenting or an arrangement in which the adult parent automatically exercises authority over the minor's parental decision-making are most likely to be constitutionally objectionable. At the other end of the spectrum, such options as licensing teen parents[108] or mandating emancipation may not go far enough to protect the minor's child as the minor develops as a parent. Where an adult assists the teen parent in caring for her child, other arrangements—including informal care-taking, kinship foster care, guardianship,[109] ex-parte temporary custody orders, and adoption[110]—also provide the bases for alternative family structures, but do not specifically address the challenges facing minor parents and the possibility of unique legal approaches to them. This paper therefore focuses on custody shifting and custody sharing as perhaps the most promising and palatable options for state intervention in minor parenting. It discusses the ways in which they do and do not respond to the concerns raised by the relevant psychology research and legal principles.

Assumptions and Goals of Alternative Custody Arrangements

The validity of custody shifting and custody sharing as potential state solutions to the negative outcomes of minor parenting should be evaluated with an eye toward their underlying assumptions and goals. These models proceed from the research outlined in Part I suggesting that minors face several disadvantages as parents due to incomplete development, lack of experience, and various social factors. They are further based on the assumption that teen mothers often rely on the help and support of their own parents or relatives in caring for their children, and that such support and assistance from an adult—particularly a grandparent or other close relative—is often beneficial to both the teen and her child.

A successful alternative custody arrangement is one that would promote safe environments in which teen parents can raise their children and, to the extent pos-

sible, avoid some of the negatives outcomes associated with teen parenting outlined in Part IB. Consistent with the privileged status of natural parents in the U.S. legal tradition, a viable custody model would also preserve the rights of minor parents to the extent possible while protecting their children from the consequences of their immaturity. Lastly, a custody alternative might seek to avoid labeling teen mothers as "unfit" but instead acknowledge their immaturity as a characteristic of adolescence that may be outgrown.

Custody Shifting

One possible means of providing for the safety and well-being of the child of a minor parent while ensuring that the parent herself is able to assume full legal responsibility when she has reached the age of majority or is otherwise sufficiently mature is through a temporary custody shifting arrangement. This model is rooted in the assumption that the adult parents of a minor parent are often involved in—if not primarily responsible for—the care of the minor parent's child, and thus should be afforded legal custody rights that reflect the nature of that arrangement. To the extent that a minor parent is not mature enough to provide properly for the upbringing of her child, the grandparent should be supported by the state; indeed, this arrangement would align the interests of the adult parents with the state's interest in "protect[ing] the welfare of children and [seeing] that they are safeguarded from abuses which might prevent their growth into free and independent well-developed men."[111]

A custody shifting arrangement could be entered into by the minor parent and her adult parents upon the latter's petition to the court to obtain temporary custody. At that stage the presumption of custody rights could favor either the adult parents (based on the psychological and social science data discussed in Part I) or the minor parent (based on the usual constitutional presumption of parental custody discussed in Part II). The legal standard would not be one of unfitness, as in custody proceedings involving adult parents, but rather one of maturity to assume fully the responsibilities of parenthood. If the minor parent is unwilling to consent to shifting temporary custody of her child to her adult parents, then the minor parent could make a showing of maturity to the court in an attempt to retain full custody. Once a minor parent has established her maturity, her adult parents would then have to satisfy the usual removal standard of parental unfitness in order to achieve custody.

A teen parent's option of showing maturity to refute her adult parent's bid for temporary custody could be structured similar to that required for judicial bypass of parental consent or notification laws with respect to abortion.[112] Since the consequences of a custody-shifting model are significant, legislation proposing this model should include several factors by which judges can assess maturity, thereby providing legislative guidance while permitting them to exercise discretion in each instance. Courts could consider a number of factors tending to bear on maturity, including (but not limited to) age; overall intelligence; acceptance of responsibility; assessment of the future impact of present choices; and coherency of plans for the future, especially with respect to education and employment.[113] With respect to age, for instance, the psychology data discussed in Part I establish that minors sixteen years of age and older are generally more mature than younger minors; a minor of fifteen years of age or younger might therefore need to show more to prove her maturity. Additionally, the overall intelligence assessment should require that the minor possess sufficient intelligence to understand her situation and options. Courts could draw from examples and experiences from home, school, and other social contexts in evaluating the minor's ability to accept responsibility. One question with which judges might grapple is whether the very fact of the minor's parenthood should militate against a finding of maturity; this paper takes no position on that issue.

Alternatively, or in conjunction with the aforementioned maturity factors, courts could also consider factors related specifically to parenting. These factors could be informed by psychology research and might include secure attachment style, parenting skills and knowledge, risk-seeking behaviors, mental health (e.g., stress coping abilities, depression), and future-oriented decision-making. Arguably, however, the inclusion of such factors is unnecessary in light of the model's underlying assumptions. Because the custody options discussed here are based on the empirical research suggesting that teen parents should not be entitled to the legal presumption of maturity that the law affords adult parents, it follows that maturity itself should be the focus of the judicial inquiry. If the custody shifting arrangement is premised on the presumed immaturity of the minor parent and its probable effect on her parenting ability, then the basis for limiting the

minor's parental rights should vanish absent immaturity. In other words, a demonstrably mature minor parent would be entitled to the same parental rights as a presumptively mature adult parent.

A custody shifting arrangement would terminate either when the teen parent reaches the age of majority or upon the minor parent's petition and showing of maturity at any point after the initial custody award. Custody would then shift back to the teen parent and would be subject to challenge only as otherwise provided by state law governing adult parents. Although the teen's child may have become attached to his grandparents during the period of the custody shift such that a simple best interests analysis would favor their continued custody, it would be inconsistent with the basis of the custody shifting model to then privilege the grandparents in a custody dispute with the teen parent once she has reached the age of majority. Upon a showing of parental unfitness, however, current state laws regarding custody preference would often favor a grandparent who had had prior temporary custody of the child over other third parties.

The custody shifting model might have several advantages for a minor parent and her child, as well as for the adult parent who assumes custody. First, the arrangement might encourage the minor parent to finish high school by alleviating some of the tension between her parenting responsibilities and her educational goals.[114] This is especially critical given that "[a]voiding school attrition is one of the essential keys to both economic independence and security" for a teen parent later in life.[115] This model might further enable her to develop parenting skills by observing and participating in care-taking while enabling the infant to benefit from meaningful interactions with his mother at lower risk to the child. Temporarily shifting custody from the minor parent to her adult parent would thus give the teen a chance to mature and grow into her role as a parent. These objectives could be achieved while preserving the minor parent's rights once she reaches the age of majority and without affixing a stigmatic label of "unfitness" to a teen who may still be developing the maturity to capably parent her child.

Temporary custody shifting would resolve the conflicting parental rights present in a three-generation home (as discussed in Part II) by acknowledging the adult parent's full authority over her minor child without the limitations imposed by that teen's own role as a parent. The arrangement would enable the adult parent to make important decisions regarding the child's upbringing in such areas as medical care and childcare. Defining the legal relationship among the parties might promote stability and certainty in the family and might provide a clearer path for the resolution of conflicts between minor parent and adult parent with respect to the child. Furthermore, and perhaps most importantly, this model would obviate the need for state intervention if the teen parent were to make decisions that endangered the child, so long as the adult parent is able to provide sufficient protection and support. The adult parent would be free to act in the child's best interest without legal impediment.

Despite the many possible advantages of the custody shifting model, it also presents a number of possible disadvantages. For instance, a teen parent might have difficulty bonding effectively with her child because she does not exercise full parental control, thereby resulting in attachment problems. Additionally, custody shifting might in some instances result in "maternal subversion," where tension arises between the minor parent and the adult parent competing to establish her authority. Such tension within the family structure could have harmful effects on significant familial relationships and lead to confusion for the child.

The custody shifting model also raises some practical concerns. In determining which party bears the burden of demonstrating the necessity (or lack of necessity) of a custody shift, a legislature would need to grapple with the consequences of each possibility. To place the burden on the minor parent to prove her maturity, subject to challenge by her own parents, might do little to promote productive relations between the two generations of parents and might also erode the teen's confidence as a parent. Alternatively, a rebuttable presumption of custody rights in favor of the grandparents upon their petition without an affirmative showing of the teen's immaturity might make for a smoother legal process, but would do so at perhaps greater expense to the minor's due process rights. Those who are uneasy about limiting the rights of minor parents on constitutional or theoretical grounds are likely to be especially uncomfortable with such an allocation of proof. In either case, policymakers should consider how to ensure that the minor's rights are adequately represented and protected in these proceedings, assuming that such proceedings would not ordinarily involve counsel and may be difficult for the minor to navigate herself.

These practical considerations might have real consequences for the minor parent and her child. In order to promote the teen mother's development as a parent and to enable the child to bond with the teen, some degree of cooperation—or, ideally, co-residence—must exist between the teen parent and her adult parent. In some instances this cooperation may be undermined by participation in an adversarial court proceeding in which the grandparent seeks to limit the parental rights of the minor parent, and in doing so implicitly asserts that the minor parent is incapable of successfully parenting the child on her own. Although one can imagine the custody shifting process occurring as a relatively routine transfer of legal rights that does not then undermine the potential for cooperation between the two generations of parents, it is worth considering whether and to what extent this arrangement would promote the goals suggested here if the shift were to become contentious.

Custody Sharing Model

A less extreme alternative to the custody shifting model outlined above might be an arrangement in which a teen parent retains custody rights in conjunction with another adult. In this model, a teen parent could name an adult "co-parent" to receive temporary joint legal custody of her child. As a matter of law, the legislature might adopt a presumption that the named co-parent would be one of several relatives—selected from among adult parents, grandparents, aunts, or uncles[116]—but the teen parent could also apply to name instead a suitable person or agency subject to review by the court should she wish to designate a co-parent outside bounds of consanguinity as determined by the legislature. In the latter instance, localities could address the issue of how private and public resources might provide support and guidance for teens who are not able to name close relatives as co-parents.

A custody sharing model could also be mandated for parents below a certain bright-line age threshold, with a legislature perhaps requiring co-parents for minors ages fifteen and younger but leaving the arrangement optional for minors ages sixteen and older. This possible bright-line rule is based on psychology research suggesting notable differences in average maturity and decision-making capacity between younger teens and older teens.[117] To the extent that these capabilities are linked to developmental maturity, then, it seems that legislatively-mandated intervention in the parent/child relationship is most readily justifiable for younger teenagers.

If co-parents were required for younger teens but not for older ones then the minor parent's attainment of majority could not be considered a reasonable point of termination for the arrangement, as in the custody shifting possibility discussed in Part IIIB. The legislature might instead condition the end of the co-parenting relationship on the age of the minor parent's child. Here again a bright-line rule is likely necessary to ensure judicial manageability, and research suggests that age three might be the appropriate termination point in most instances. The tremendous growth and development that the brain undergoes until age three establishes this as a critical time in the life of a child[118] and suggests that it may be most essential to support a teen parent during that period. By age three, children have experienced a "dramatic burst in linguistic and cognitive growth as well as coordinated motor development"[119] and the ability to form secure attachments. They have also achieved important developmental milestones like object permanence, symbolic reasoning, and increased memory capacity.[120] It thus seems reasonable to terminate a custody sharing arrangement mandated for a minor parent fifteen years of age or younger when her child reaches three years of age.

A custody sharing arrangement could have many of the same benefits of custody shifting in that it would enable the minor parent to grow into her parental role while providing for the protection and security of her child. In particular, it would encourage the teen mother's active participation in the life and care of her child, although it is worth noting that the model could not compel such involvement. Custody sharing has the additional advantage over custody shifting that it would leave the minor's parental rights entirely intact and is therefore fully consistent with current Supreme Court jurisprudence. For policymakers made uncomfortable by the notion of restricting minors' parental rights, custody sharing might provide an appealing alternative to assist especially vulnerable minor mothers in caring for their children.

Despite these advantages, it is not clear that a custody sharing arrangement would effectively resolve possible tensions between co-parents. In practice, of course, it is unlikely that a custody sharing arrangement between a teen and her adult relative would result in an equal division of parenting responsibilities. Especially with respect to younger teens—and even

more so where the designated co-parent is the minor's adult parent—it is to be expected that the co-parent would exercise primary parental authority. This reality need not undermine the goals of custody sharing so long as the interests of the child are protected, but it might be difficult for the teen co-parent to understand the parameters of her own role as a parent despite her co-parent status. When conflict arises, the minor parent might feel that her will is frustrated by that of the dominant co-parent.

This paper takes no position on which of the models discussed here would be preferable (and indeed whether either should be implemented at all), as it is difficult to assess the potential for success these models without further study. Furthermore, policymakers are likely to have different levels of comfort regarding these possibilities, and one model or the other might be more consistent with a particular state's legal culture. In any case, we posit that both models are supportable by the psychology research on teen parenting and are arguably permissible under the Constitution and Supreme Court case law. We hope that these policy outlines might serve as starting points for legislatures looking to take up the complicated issue of how best to protect the children of minor parents while according appropriate legal rights to teens themselves.

Conclusion

To the extent that affording minor parents full decision-making rights may result in negative outcomes for them and their children stemming from the teens' developmental immaturity, policymakers should consider limiting the parental authority of immature minors in ways that are consistent with the needs of minors and their children and with due process rights under the Constitution. A successful policy should take into account the relevant psychology research to inform its conception of teens' parenting ability, as well as the possible play in the joints between the fundamental rights of parents to raise their children and the ability of states to impose certain legal limitations on minors. We hope that the two alternative custody arrangements for minor parents and their children discussed here will promote further discussion regarding possible solutions to the problems raised by teen parenting within these scientific and legal frameworks. ◎

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Endnotes

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75 *See generally* Santosky v. Kramer, 455 U.S. 745 (1982); *see also Hatch*, 274 F.3d at 20; Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 74 (1976). ("Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights.").

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84 *Danforth,* 428 U.S. at 74.

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87 *Id.* at 634 (quoting Moore v. East Cleveland, 431 U.S. 494, 503-04 (1977)).

88 *Danforth*, 428 U.S. at 74 (citing *Prince*, 321 U.S. at 168 and *Ginsberg*, 390 U.S. 629).

89 *Bellotti*, 433 U.S. at 634.

90 *Prince*, 321 U.S. at 168.

91 Teitelbaum, *supra* note 73 at 804.

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93 *See* Legal Rights of Children § 14.09, at 620 (Donald T. Kramer, ed., 2d ed. 1994).

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

96 *See generally* Legal Rights of Children, *supra* note 88 at 592-96 (discussing restrictions on the legal rights of adolescents with regard to marriage). The minimum age for marrying with parental consent is sixteen in most states, and as low as fourteen in some states. *See id.* at 594.

97 *See id.* at §14.06, 601-04.

98 *See, e.g.*, *Danforth*, 428 U.S. at 72-75.

99 Teitelbaum, *supra* note 73 at 808.

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112 *See Danforth*, 428 U.S. at 892-95 (holding that a state which imposes a parental consent requirement on minors seeking abortions must provide for a judicial bypass where the pregnant minor shows either that she is mature enough to make the decision independent of her parents, or where the abortion would be in her best interests); *see also* Ohio v. Akron Ctr. for Reproductive Health, 497 U.S. 502 (1990) (holding similarly with respect to parental notification requirements for minors seeking abortions).

113 *See* In re Jane Doe I, 566 N.E.2d 1181 (Ohio 1991) (listing possible factors for consideration).

114 One study has indicated that, while residential arrangements following childbirth did not generally have a direct affect on outcomes for teen parents later in life, "a brief coresidence with parents could indirectly affect future prospects of success by improving an adolescent mother's chances of remaining in school . . . ." Furstenberg et al., *supra* note 57 at 136.

115 *Id.* at 137.

116 Although several factors militate on behalf of adult parents as alternative custodians in the custody shifting model outlined above, where the adult parent has affirmatively sought temporary custody of the child, it would not make sense to limit participation in a custody sharing arrangement to the child's grandparents. However, a presumption in favor of certain close relatives of the minor parent might be justified by many of the same rationales advanced in support of kinship care generally. *See generally* Miller v. Youakim, 440 U.S. 125 (1974) (discussing the viability of relatives as foster parents).

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Juvenile Life Without Parole:

A Review of Relevant Scientific Evidence, Penological Theories, and Policy Interests

by Daniel E. Choe, Liz Reynolds, and Jessica Stoll

Introduction

Michigan's current policy regarding juvenile life without parole (JLWOP) has been challenged with the introduction and preliminary passage of House Bills 4402-4404. The proposed legislation would modify the Michigan Penal Code (M.C.L. 750.506b), Juvenile Code (M.C.L. 712A.3d and 712A.18), Code of Criminal Procedure (M.C.L. 769.1 and 769.1b), and the Corrections Code (M.C.L. 781.234). The amendments are designed to prohibit the sentence of life imprisonment without parole for juveniles less than 18 years of age, and would grant eligibility for parole to those already sentenced after having served a minimum term of ten years.

This article is designed to provide the Michigan legislature with an impartial review of the relevant psychological findings, penological theories, and policy interests implicated by juvenile life without parole. A thorough analysis of the literature exposes strong scientific and moral arguments against the imposition of such an inflexible sentence.

JLWOP Background Information

There are currently at least 2,225 people in the United States serving a sentence of life imprisonment without parole for crimes committed as a juvenile.[1] In the rest of the world, there are about 12.[2] Three hundred and seven of the juveniles sentenced in the United States are serving their terms in Michigan prisons where they range in age from fourteen to seventeen years old;[3] most were convicted of homicide offenses.[4] Over two-thirds of the Michigan juveniles currently serving LWOP sentences are African-American, and nearly half of the local JLWOP population was 16 years old or younger when they committed their crimes.[5]

The U.S. Constitution forbids the imposition of cruel and unusual punishment[6] and prohibits a state from "deny[ing] any person within its jurisdiction the equal protection of the laws."[7] In the 2005 Supreme Court case, *Roper v. Simmons*, the Court held that the death penalty constituted a cruel and unusual punishment for juveniles.[8] Justice Kennedy's majority opinion stated that "[w]hen a juvenile offender commits a heinous crime, the State can exact forfeiture of some of the most basic liberties, but the State cannot extinguish his life and his potential to attain a mature understanding of his own humanity."[9] The Court cited juveniles' lack of maturity, impromptu decision-making, vulnerability to peer influence, and potential for rehabilitation as factors that distinguish youth offenders from adults in the death penalty context.[10]

In deciding what types of criminal punishment are appropriate for juvenile offenders, it is helpful to consider where on the spectrum of criminal punishment life without parole falls. The sentence is "of a different quality and character from a sentence to a term of years subject to parole,"[11] and is fundamentally harsher and more expensive for youths than adults, as they enter the system at a younger age. The threshold for cruel and unusual punishment is extremely high, however, and the fact that 41 states allow the sentence for at least some juveniles weighs in favor of the punishment's current constitutional legitimacy.[12]

While juvenile life without parole likely does not constitute cruel and unusual punishment, legal proceedings against children are of a different character than those against adults and are often plagued with procedural inadequacies. Under current Michigan law, children over the age of 13 may be tried as adults without any inquiry into their cognitive ability or rehabilitative capacity.[13] The system does not account for the fact that juveniles are significantly

more likely to falsely confess to crimes than their adult counterparts[14] and often exercise poor judgment in their interactions with authorities.[15] Juveniles may also be burdened by their limited understanding of the proceedings, failure to appreciate long-term consequences, and poor communication with lawyers who are unfamiliar with adolescent development.[16]

Twenty-seven states make the sentence of life imprisonment without parole mandatory upon conviction of certain crimes, regardless of age.[17] It is often imposed on children convicted of felony murder, for which no personal involvement in the homicide is required.[18] The Michigan Penal Code requires a sentence of life without parole for those convicted of first-degree murder, which spans from juveniles who deliberately planned vicious murders to those who may have accompanied adult friends on a robbery gone awry.[19] A review of relevant behavioral science and neuroscience research is presented next to illustrate the ongoing developments in cognitive ability, brain maturation, and changes in behavior that occur throughout adolescence.

Developmental Neuroscience and Adolescent Development

General Brain Changes in Adolescence

The development of the human brain occurs over a protracted period of time that continues through a child's adolescence.[20] The most prolonged changes occur primarily in two processes: synaptogenesis and myelination. Synaptogenesis describes the emergence of new synapses or connections between neurons (i.e., cells in the nervous system) in the brain.[21] The process also weakens and eliminates neuronal connections that are used infrequently through "synaptic pruning," which allows more active neighboring neurons to communicate with greater strength and ease.[22]

Improvements in neuronal connectivity and organization are also driven by myelination, a process whereby neurons become insulated with fatty tissue leading to faster transmission of electrical signals, faster communication between brain regions, and enhanced timing and synchrony of neuronal activity.[23] The most dramatic changes in myelination and synaptic pruning that occur during adolescence are centered in the frontal lobes,[24] which are responsible for goal-directed cognitive abilities referred to as "executive function."[25] A large portion of adolescent brain development occurs in executive regions of the brain that are critical for regulation of behavior and emotion and perception and evaluation of risks and rewards.[26] Taken together, these general changes in brain circuitry reflect ongoing improvements in a range of cognitive abilities and the coordination among their respective brain areas that continue through adolescence.

Evidence from brain-imaging studies suggests that brain regions develop at different rates and times during adolescence; areas responsible for motivation and emotional arousal and reactivity, for example, mature before areas that regulate emotion, behavior, and other critical executive abilities.[27] Thus, nonparallel changes create disconnects in adolescents' needs and abilities that increase their risk for mental health problems and poor life decisions.[28] The core development of adolescent thinking is the attainment of a more coordinated, self-regulating, and consciously-controlled mind.[29] An adolescent who has not achieved this key milestone in cognition and self-control may be more prone to breaking the law due to disorganized information-processing, impulsive behavior and thinking, poor judgment, and other developmental gaps between emotion, cognition, and behavior.

Executive Function

Executive function refers to conscious control of thinking responsible for goal-directed problem solving; it is required whenever automatic responses are inappropriate or insufficient to meet demands.[30] Many of the cognitive and behavioral changes that occur during adolescence are related to increases in executive function, which includes focusing and sustaining attention, impulse control, emotion regulation, abstract thinking, organization, and long-term planning.[31] The breadth of these abilities demonstrates the critical role executive function plays in all forms of cognitive performance, particularly attention, memory, and comprehension.[32]

The systems responsible for regulating emotion and behavior are brought under the control of executive function during adolescence; however, the acquisition of a fully-coordinated and consciously-controlled executive system is a lengthy process that occurs late in development.[33] There are marked improvements in executive function between the ages of 5 and 11

years, but children do not reach adult levels on tasks that assess these abilities until their early twenties.[34] Large gains in executive function abilities continue to develop between adolescence and young adulthood[35] and emerge from patterns of brain development in the prefrontal cortex located in the frontal area of the brain.[36] The frontal lobes are the last cortical brain areas to mature in young people, corresponding with peaks in executive function abilities during the late teens and early twenties.[37]

Adolescents with immature executive function may have suboptimal decision-making ability, impulse control, long-term thinking, and attention, which are indicative of poor goal-directed behavior and problem-solving. These consequences, in combination, suggest that an adolescent who has not reached full maturity in brain development and executive function may be at increased risk of making impulsive decisions due to the inability to effectively process the consequences of his or her actions and an inadequate control of arousal and urges that are related to risky behaviors and poor judgment.[38]

Prefrontal Cortex and Impulse Control

The prefrontal cortex (pfc) plays a pivotal role in executive function, and its development coincides with marked improvements in executive abilities.[39] The pfc matures over an extended period of time through childhood and adolescence, much like a sculpting process that leads to a fully-functioning and mature brain.[40] Strong evidence shows substantial changes in prefrontal structure and function during adolescence; myelination and synaptic pruning contribute to enhanced connectivity and organization of prefrontal regions that coincide with improvements on executive tasks.[41]

Impulse control is an executive ability linked to the pfc that improves significantly from adolescence to young adulthood.[42] Impulsivity (i.e., the tendency to act on impulse) decreases between the ages of ten and thirty as regions of the pfc mature.[43] This decline in impulsivity, however, overlaps with peaks in risk-taking, sensation-seeking, and emotional reactivity between early and mid-adolescence.[44] Increasing emotional and social forces—peer pressure for example—can elicit impulsiveness from adolescents despite their growing impulse control. Impulsivity is more likely to occur during rapid or extreme mood swings, which are more common in adolescence than in adulthood.[45] Multiple brain-imaging studies show that areas of the pfc that mature through adolescence correspond with improvements in social information processing that can help youths negotiate social pressures.[46] An adolescent with an immature pfc will likely have suboptimal levels of executive abilities, particularly impulse control; this would be problematic in high-risk situations where long-term thinking and self-control are needed to both regulate high emotional arousal and reactivity and resist social coercion.

Amygdala and Emotion

The amygdala is a critical component of the brain's emotional circuitry and is responsible for increasing the processing and memory of emotional reactions.[47] Amygdala volumes increase significantly during adolescence in the male brain,[48] which is linked to an increased duration of aggressive behavior in social interactions and is believed to reflect a predisposition toward sustained experiences of negative emotion.[49] The greater salience of negative emotion in male adolescents may interfere with cognitive and behavioral regulation, which in turn may increase aggressive and impulsive behavior.[50] Changes in the amygdala resulting from the onset of puberty lead to increases in emotional intensity, reactivity, and negative feelings; these in turn contribute to mood swings, sensation-seeking, and reckless behavior during adolescence.[51] Adolescence is a time when children begin engaging in risky behaviors to meet their increasing desire for novel and exciting experiences. These qualities, when coupled with impulsiveness and negativity, can lead adolescents into situations that put their health and future in jeopardy.

Peer Influences

Peers become increasingly salient influences in adolescents' lives as they gradually spend less time with their families[52] and attempt to establish independence, which is viewed as a quintessential task of adolescence.[53] Compared to children, adolescents are more sociable, have more hierarchical peer relationships in which leaders and followers emerge, and are more sensitive to peer rejection and acceptance.[54] Susceptibility to peer pressure increases between childhood and early adolescence, peaks around the age of fourteen, and decreases during the early high school years.[55] Peer

influences can also modify adolescent decision-making, particularly the extent of risk-taking.[56] Previous work shows that adolescents and young adults ranging in age from thirteen to twenty-two years are more susceptible to peer influences when taking risks and making risky decisions than adults twenty-four years and older.[57] The extent to which peers influence an adolescent's behavior and thinking cannot be ignored when considering involvement in criminal offenses. Peer pressure, especially from older youths, can persuade adolescents to engage in reckless and deviant behavior so they can form and maintain social networks, which are high priorities for youths during this formative period.

Decision-Making and Risk-Taking

Pubertal development is linked to an increase in sensation-seeking during adolescence that peaks between the ages of twelve and fifteen years and reflects adolescents' increasing desire to experience novel and highly arousing activities such as reckless driving, substance use, and sexual activity.[58] Sensation-seeking, in this regard, is tied to adolescent risk-taking and risky decision-making. Adolescents are more likely to make risky decisions than adults, and they often do so with full awareness of the risks involved.[59] Adolescents place less weight on risks in relation to immediate rewards in their decision-making.[60] Moreover, their decision-making is more susceptible to social and emotional forces than adults (e.g., stress).[61] Traits like emotionality (i.e., high emotional arousal) and impulsivity, both of which gradually decrease from adolescence to adulthood, can disrupt decision-making by narrowing a youth's attention and sense of urgency to an exclusive goal, thus prompting a youth to jump to the first choice that comes to mind before evaluating it thoroughly.[62]

Previous work shows that adults are more likely than thirteen-year-olds to manage several goals in their decision-making, reflecting more sophisticated, multidimensional thinking in adulthood.[63] Adults also think over a significantly longer time frame than adolescents.[64] For example, adolescents from eleven to thirteen-years-old are less likely to report long-term consequences than sixteen to seventeen-years-olds regarding legal decisions commonly faced in delinquency proceedings.[65] Studies suggest that long-term thinking continues to develop into the early twenties.[66] These improvements in long-term thinking and decision-making may contribute, in part, to the significant decline in both risk-taking and risky decision-making that occurs from adolescence to adulthood.[67]

The development of competent real-world decision-making is dependent on multiple factors such as brain development, experience, knowledge, the content of the decision, and the context in which it is made.[68] Reasoning, information processing, and expertise improve markedly in early adolescence[69] and contribute to significant advances in maturity of judgment that occur between early and mid-adolescence.[70] Fourteen-year-old adolescents, for example, have been shown to actively consider health and social risks/benefits and options regarding sexual activity.[71] But decision-making ability undoubtedly depends on the issues being addressed, and unfamiliar topics to any person can elicit poor judgment. Grisso and his colleagues, for example, report that adolescents age fifteen and younger are more likely than older adolescents and young adults to be impaired in their ability to serve competently as defendants in criminal proceedings.[72] A novel setting like a legal trial may overwhelm the immature cognitive abilities of an adolescent who must overcome these limits to adapt to an "adult" context.

People generally have better judgment for issues that are familiar to them; familiar topics allow them to draw on experience to make informed choices. This may explain why many adolescents take risks: to seek out experiences from which they can learn and develop some frame of reference. Some choices may be safe and insignificant while others may have life-long implications. An adolescent may learn the hard way through trial-and-error what decisions are mistakes; however, similar choices may be made in light of understanding the consequences when a prized reward is at stake (e.g., the respect of peers or an opportunity to engage in sex). Adults have the benefit of having a history of mistakes to reflect on and long-term repercussions to deal with, which provides many advantages when facing an unfamiliar setting or decision. Adolescents do not have this luxury; they are disadvantaged by lack of experience and limited ability to competently weigh multiple options and their respective risks and rewards and competing goals–both in the short and long-term. Adolescents' immature decision-making is reflected in their risk-taking, sensation-seeking, susceptibility to

social coercion and emotionality, and preference for immediate rewards; the attainment of competent real-world decision-making is a lengthy process that is not guaranteed for everyone.

Summary of Scientific Evidence

Adolescence is a formative period of human development marked by increased vulnerability to behavioral and emotional problems resulting from biological, social, and cognitive changes.[73] Advances in cognitive ability, brain development, and both physical and psychosocial maturity emerge independently and at different rates during adolescence, thereby leading to disjunctions between behavioral, emotional, and cognitive systems.[74] During pubertal development, adolescents experience increases in emotional intensity and reactivity due to growth in the amygdala, which precedes the achievement of regulatory competence that results from changes in the prefrontal cortex.[75] Adolescents experience increases in emotional arousal, impulsivity, and risk-taking before their executive functions mature, leaving them with suboptimal levels of long-term thinking, decision-making, emotion regulation, and impulse control at a time when the coordination of emotion and behavior is needed most.[76]

Peers become increasingly influential in shaping adolescents' behavior and thinking, contributing to risk-taking, reckless behavior, and poor decision-making.[77] Peer pressure can be a powerful force in motivating an adolescent to engage in criminal behavior, especially when considering limitations in executive function. In groups, adolescents may engage in criminal activities as a form of sensation-seeking or risk-taking to gain some immediate rewards. The extent to which peers influence an adolescent's illegal behavior and intent to engage such behavior cannot be ignored in any legal context. Taken together, the broad social, behavioral, and neuropsychological changes experienced in adolescence and the malleability of the adolescent brain make this period of development a time of increased risk and opportunity for change.[78] Youth may break the law as a result of any number of psychological limitations that characterize adolescence; however, there is potential for rehabilitation given the opportunity and support to develop into mature, responsible, law-abiding adults.

Theories of Punishment

The conventional justification for imposing a sentence of life without parole is to assure that the wrongdoer will never have the opportunity to commit a crime outside of prison. Penological justification for juvenile life without parole, however, is complicated by the fact that most JLWOP sentences are imposed through a rubric of mandatory sentencing.

A state's sentencing structures "should be consistent with the theories of punishment that are the foundation of that particular jurisdiction's criminal justice system."[79] The Michigan legislature has yet to explicitly adopt a theory of punishment to underscore its sentencing guidelines, but examining JLWOP from different theoretical perspectives may help clarify why Michigan should or should not continue to permit such a punishment.

Utilitarianism

When viewed through the lens of classic utilitarian criminological theory, JLWOP may be difficult to justify. The basic premise of utilitarianism, as espoused by philosophers such as Jeremy Bentham, is that the purpose of laws is to maximize the net happiness of society.[80] "Classical utilitarians reason that the threat or imposition of punishment can reduce crime because, in Bentham's words, 'pain and pleasure are the great springs of human action,' and 'in matters of importance everyone calculates.'"[81] Punishment, for classical utilitarians, is designed solely to deter future conduct, either specifically (that is, deterring future misconduct by the defendant himself) or generally (meaning we implement punishment only severe enough to have a net deterrent effect on the general public).[82]

Given what we know about neurological development and the sensation-seeking tendency of adolescents, JLWOP might not effectively serve to deter criminal behavior. In *Thompson v. Oklahoma*, the U.S. Supreme Court found that children are often incapable of being deterred, even by the harshest of punishments, because they do not engage in "the kind of cost-benefit analysis that attaches any weight to the possibility of execution."[83] In *Roper*, the Court again reasoned that the immaturity of adolescents coupled with their underdeveloped sense of responsibility often leads to "ill-considered actions

and decisions."[84] Children are less likely to weigh the possible outcomes of their actions or recognize the potentially dire consequences.[85] Hence, they are more susceptible to negative peer influences and more likely to act recklessly.[86] Moreover, it is difficult to imagine how JLWOP serves to deter when it is used to punish juveniles convicted under felony-murder statutes, as many, if not most, of those juveniles did not intend to commit cold-blooded murder.

On the other hand, some utilitarians might argue that punishment must be *harsher* to sufficiently deter criminal behavior in the general adolescent population. Because adolescents do not regularly engage in the same kind of cost-benefit analysis adults do, the perceived threat of harsher punishment may compel them to reconsider rash and potentially harmful actions. This argument seemingly cuts in favor of a JLWOP scheme that punishes juveniles who are older or were the initial instigator of illegal activity.

Utilitarian philosophy further directs that punishment be proportional to the crime committed. Because punishment is itself harm inflicted on the offender, punishment is disproportionate if more pain is inflicted than necessary to serve the goals of punishment (that is, specific or general deterrence).[87] One could argue, given that it may be harder to successfully deter potential juvenile offenders, JLWOP is disproportionate because it inflicts an immense amount of harm on an individual without achieving much good for society in general. However, if we accept the premise that punishment must be stricter for juvenile offenders in order to achieve the desired net deterrent effect, JLWOP would be considered proportional, so long as it actually served to deter potential wrongdoers.

Retributivism

At first blush, JLWOP seems easily justifiable from a retributivist perspective. For retributivists, punishment is justified when it is deserved, and it is deserved "when the wrongdoer freely chooses to violate society's rules."[88] Thus, punishment is both backward-looking and intricately linked with a wrongdoer's moral culpability.[89]

For some retributivists, JLWOP is acceptable, if not desirable, because it serves the principle of *lex talionis*, or "an eye for an eye." If a defendant is guilty of murder, then, many retributivists would argue, "he should be sentenced to die in prison accordingly."

However, most retributivists advocate for fashioning punishments to account for a defendant's moral culpability, which may make JLWOP a less desirable sentence.[90] In *Roper*, the Supreme Court reaffirmed its holding in *Thompson* that the "susceptibility of juveniles to immature and irresponsible behavior means 'their irresponsible conduct is not as morally reprehensible as that of an adult.'"[91] If moral culpability is mitigated by age, many retributivists would agree that juveniles should not be subject to extraordinarily harsh punishments such as life without parole. Moreover, *lex talionis* may not be a desirable goal for juveniles convicted of felony-murder because they lack the requisite moral culpability necessary for a conventional murder conviction.

Rehabilitation

If the goal of punishment is to rehabilitate an offender, then JLWOP does not serve a legitimate purpose. The Supreme Court has held that one important difference between adults and juveniles that is sufficient to justify a different sentencing scheme for juveniles is that "the character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed."[92] Accordingly, juveniles have a greater propensity for rehabilitation, and a state's sentencing structure should reflect this. Not only does a sentence of life without parole have the potential to discourage youths from attempting to reform themselves, but the rehabilitation process may be stymied by the hardships of an LWOP sentence.[93]

Constitutional Constraints

The Supreme Court has recognized, in limited cases, a proportionality of punishment rule.[94] Because the Court has failed to espouse a coherent standard, proportionality of punishment continues to be a nebulous principle to which legislatures should, but are not constitutionally required, to adhere. While the Court has recognized that age is a relevant factor when determining whether punishment is proportionate,[95] the Court has yet to hold any punishment–short of the death penalty–constitutionally impermissible on proportionality grounds. Thus, JLWOP is probably not constitutionally disproportionate.

Conclusion

The scientific evidence and theories of punishment examined in this article largely indicate that children who commit crimes are qualitatively different than their adult counterparts. The scientific review above clearly demonstrates the psychological obstacles that hinder the use of good judgment among adolescents, and does not even take into account that juveniles exposed to trauma, abuse, and neglect, which most child-offenders have been, may undergo considerably delayed development, placing them at an even greater disadvantage.[96] The serious discrepancies between adolescents and adults in neurological and psychosocial development, and the underlying purposes of criminal punishment, all support a lesser form of punishment for serious crimes than life without parole, which accounts for the neurological and social maturation that most convicted adolescents have yet to undergo. Certainly, some crimes warrant extremely harsh punishments, and we do not support a weak penological model that allows youths to escape without serving due time. Life without parole, however, is poorly suited for adolescents, who are less culpable and for whom rehabilitation is a reasonable goal. ◎

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