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Cover Page Footnote

Wallace J. Mlyniec, Professor of Law, Associate Dean, and Director of the Juvenile Justice Clinic, Georgetown University Law School. The author wishes to thank Jennifer Matthews, Carol Benjamin, and Chris Longmore for their research assistance, Wanda Duarte for her technical assistance, and Judge Stephen Milliken of the District of Columbia Superior Court for his helpful comments during the preparation of this Article.

A JUDGE'S ETHICAL DILEMMA: ASSESSING A CHILD'S CAPACITY TO CHOOSE

Wallace J. Mlyniec*

INTRODUCTION

CASES involving children's lives differ from other cases coming before a judge. When adjudicating disputes between adults, judges apply legal principles to past events in an effort to resolve disagreements or assess responsibility. While resolving the dispute may affect litigants' futures financially, it seldom involves the very nature of the litigants' lives.¹

When making decisions concerning a child, judges consider prior events and legal principles in order to make predictions about a child's future. Judges determine where children will live, with whom they will live, how they will live, and what will be done to, by, or for them. The legal principles judges use to decide cases about children are often vague. Commentators view the "best interest of the child" standard, which purports to guide decision making in all children's cases, as imprecise at best, and have criticized it for years.² "Proper care and rehabilitation," the standard used in delinquency cases, also presents similar uncertainties, and has historically lent itself to political or cultural choices that correlate weakly with a child's well-being.³ Moreover, research concerning child development suggests that concepts like "knowing, intelligent, and voluntary"—while somewhat immutable when applied to the adult reasoning process—is fluid prior to

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1. Even in criminal cases, where the impact on defendants' lives is greater than those on the lives of civil litigants, the results do not affect defendants in the same way that court proceedings affect children. While conditions of probation and periods of confinement may drastically affect how a person lives his or her life, criminal proceedings aim primarily to punish violators for past deeds, not, as is in children's cases, to create an environment where growth is to be fostered.

2. See generally David L. Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 Mich. L. Rev. 477, 480-86 (1984) (criticizing the standard); Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 Law & Contemp. Probs. 226, 262-72 (Summer 1975) (same).

3. See David J. Rothman, *Conscience and Convenience: The Asylum and its Alternatives in Progressive America* 268-89 (1980) (reviewing the poor treatment children received in the early juvenile court); Paul Holland & Wallace J. Mlyniec, *Whatever Happened to the Right to Treatment?: The Modern Quest for an Historical Promise*, 69 Temp. L.Q. (forthcoming 1996) (manuscript at 5, on file with the *Fordham Law Review*) (reviewing the poor treatment children have received in more modern times).

adulthood. Such malleability makes these concepts difficult to apply uniformly in all cases concerning children. Similarly, the "mature minor" concept and the doctrine of "informed consent," standards used in cases involving medical decisions, involve equally fluid determinations.

Nonetheless, judges use these concepts daily when making placement and treatment decisions concerning children, and when assessing the validity of waivers and assertions of rights by children. They rely on these concepts in a variety of cases including divorce and custody, adoption, neglect and abuse, medical and mental health treatment, abortion, delinquency, and status offenses. When judges make decisions, we as a society expect the judges to do so ethically. Ethical decision making, in this context, means deciding cases not on the basis of personal experience, societal beliefs, or personal assessments about "how things should be," but on the facts presented in court, the law as it has developed, and on scientific rather than conventional wisdom regarding life around us.⁴ The complexity of children's cases, the imprecision of the available standards, the process by which cases are adjudicated, and the unpredictability of future events make decision making by judges very difficult. The accumulated and ever changing knowledge of science and the impact of societal changes on childhood and adolescence compound the difficulty, as does the simple need for efficiency in modern court systems. Notwithstanding this complexity, judges must strive in each case to provide justice.

Children affected in these cases often express strong preferences for a course of action, and possess equally strong opinions about the correctness of a judge's rejection of their choice. Such preferences and opinions may undermine the enforceability of the court order. Children may "know" the parent with whom they wish to live or whether or not they want to leave their parents' home and establish new ties with foster or adoptive parents. They may "know" whether or not they want mental health treatment or to be placed in a residential facility. They may "know" whether they want to be an organ donor or cease painful but life preserving medical treatment. They may "know" whether they want an abortion. They may "know" their rights in the delinquency context. Many biological, psychosocial, experiential, and contextual factors influence their preferences and actions in these cases. In a given case, the existence of such "knowledge" and the strength of the preference are seldom matters of the child's credibility as lawyers and judges usually understand the term credibility during the litigation process. Judges who reject the child's preference do so because they conclude, validly or invalidly, that the child's biological, psychosocial, and educational development

4. See Byron F. Lindsley, *Ruling Without Bias*, 24 Judge's J. 19 (Winter 1985) (providing a judge's perspective on judicial biases that may be present in custody cases).

renders him incapable of truly rational thought or subject to influences that render his rational judgment unsound. Other social concerns, like proper law enforcement and public safety in delinquency cases, or child protection in health cases or cases of abuse or neglect, may also provide a judge with countervailing reasons to discount the child's assessment of his needs.

Judges assume their decisions are rational, and want their orders obeyed. They know, however, that enforcing orders that conflict with a child's desires is difficult. For example, older children may just run away from the home or hospital in which the judge places them. When judges refuse to permit abortions without parental consent or notification, children may simply travel to another state or lie about their ages. Children may physically resist treatment efforts. Knowing that an order may be ignored also affects the judge's decision.

Judges also consider the tension that exists between Western cultural beliefs concerning personal and political autonomy and Western cultural traditions regarding the immaturity and incapacity of children. Judges may also generally be aware of the growing body of knowledge concerning child development that calls into question several societal assumptions about children. Unlike policymakers or medical researchers, however, judges need not consider a child's political autonomy. If the case is in court, the legislature has already resolved the political autonomy issues against children, and has decided that children may not control their own lives. Despite the tangential focus given to political autonomy in judicial proceedings, judges nonetheless must weigh valid scientific information concerning child development in relation to cultural beliefs. In addition, to render ethical decisions concerning the mental capacity and intellectual development of the individual child for whom justice is sought in their courtrooms, judges must necessarily respect that child's personal autonomy.

This Article will explore what child development research offers to judges who seek to make ethical decisions concerning children's lives. Part I surveys some of the child development literature. Part II seeks to determine how judges actually apply the law in relation to children's preferences and choices in various legal contexts. Part III suggests a guide for ethical decision making that reflects the research of child development theorists and incorporates the personal autonomy of children—while recognizing some cultural norms regarding children's incapacity.

I. CHILD DEVELOPMENT THEORY AND CHILDREN'S DECISION-MAKING CAPACITY

This part reviews child development theory and, in particular, how research in this area has viewed children's decision-making capacity. The first subpart offers a brief survey of how societies have historically distinguished between childhood and adulthood. The second subpart

summarizes Piaget's Cognitive Development Theory, and examines some of the schools of thought that have adapted as well as rejected the Piagetian framework. This part concludes with an exploration of current perspectives on children's decision-making capacity in the child development literature, adolescent behavioral traits, and learning.

A. *Survey of Historical Demarcations Between Childhood and Adulthood*

The laws and cultural mores of most societies generally have recognized distinctions between children and adults.⁵ In eras when communities seldom kept birth records, members marked distinctions between children and adults most often by changes in physical features or in physical ability.⁶ Various societies have signified the onset of puberty as the attainment of a status different from that of childhood.⁷ Spiritual awakening or a change in obligations to the society often occurred at that time. Some early civilizations relied on age as a point of demarcation between childhood and adulthood. The Romans, for example, presumed that a person understood the law as of age fourteen.⁸ Christian and Jewish traditions, as well as those of other societies, accorded a child responsibilities to the community around age thirteen.⁹ At least since the sixteenth century, the English have accepted age as a useful, albeit imprecise, indicator of those demarcations. Anglo-Saxon law did not hold children responsible for their criminal acts before the age of seven, but held children totally responsible after the age of fourteen.¹⁰ For children between the ages of seven and fourteen, courts adopted a rebuttable presumption that they possess an adult capacity to do evil. In the United States today, juvenile delinquency codes retain this respite from the harshness of the criminal code. While the criminal law made such variable distinc-

5. Cultural historians disagree about the emergence of childhood as a distinct period in human development and about whether childhood was a grim period in a person's life or a period of affectionate attachment, prior to the twentieth century. See Roger J.R. Levesque, *The Internationalization of Children's Human Rights: Too Radical for American Adolescents?*, 9 Conn. J. Int'l L. 237, 243-52 (1994) (citing sources such as E. McCoy, *Childhood Through the Ages*, 88/89 *Sociology* 44-47 (Kurt Finsterbusch ed., 1988) and Lloyd de Mause, *The History of Childhood* 51-54 (1974)).

6. A person's ability to carry the weight of armor has been suggested as a reason why the age of majority moved from 15 to 21 between the 11th and 13th century. See Comm. on Child Psychiatry, Group for the Advancement of Psychiatry, *How Old Is Old Enough?: The Ages of Rights & Responsibilities* 7-8 (1989) [hereinafter Group for the Advancement of Psychiatry].

7. *Id.* at 9, 10.

8. *Id.* at 7.

9. *Id.* at 10.

10. 1 Blackstone's Commentaries on the Laws of England 463-64 (George Sharwood ed., 1871) (stating that "[i]n criminal cases an infant of the age of fourteen years may be capital punished for any capital offence . . . but under the age of seven he cannot" (emphasis omitted)).

tions, the civil law in England and in early America established the age of legal adulthood at twenty-one.¹¹

To say that adolescence¹² and even childhood¹³ constitute rather new concepts, or that children in prior centuries performed many adult tasks at an early age, does not refute the fact that, for the last five hundred years, Anglo-American societies have held children legally subject to the authority of parent or master until the age of twenty-one.¹⁴ In most situations today, the law recognizes rigid demarcations between adulthood and childhood based on age. The age at which a child legally becomes an adult may vary from fourteen to twenty-one for a particular event. Thus, state laws permit drinking, driving, marrying, voting, and working at different ages. Legislatures base these laws on the assumption that those persons on the childhood side of the demarcation cannot understand or perform these particular tasks.¹⁵

11. While the law vested some decision making in a child at an earlier age, full power vested at 21. *Id.* at 452 (stating that "[t]he legal power of a father . . . over the persons of his children ceases at the age of twenty-one").

12. Most commentators credit G. Stanley Hall as the first scholar to establish adolescence as a field of study. See G. Stanley Hall, *Adolescence* (Lawrence A. Cremin ed., Arno Press and The New York Times 1969) (1905).

13. Many societies did not consider children a special class of people until the eighteenth century. See Levesque, *supra* note 5, at 246.

14. Historians debate the degree of freedom possessed by "adolescents" in prior eras. Some scholars like Janet Ainsworth, relying in part on the work of Phillipe Ariès, believe that the life-styles of young people prior to the twentieth century demonstrate that they participated as fully integrated members of the community. See Janet E. Ainsworth, *Re-Imagining Childhood and Reconstructing the Legal Order: The Case for Abolishing the Juvenile Court*, 69 N.C. L. Rev. 1083, 1093 (1991). Others look at the data of preindustrialized societies and see that, as a matter of law, parents or other adults (to whom children were bound out as apprentices or common laborers) regulated the activities of young people. Laurence Steinberg, *Developmental Considerations in Youth Advocacy*, in *Who Speaks for the Children?: The Handbook for Individual and Class Child Advocacy* 23, 25-29 (Jack C. Westman ed., 1991); see also Blackstone, *supra* note 10, at 463-66 (discussing the rights of persons under the age of 21).

15. Supreme Court jurisprudence concerning children makes this clear. In *Ginsberg v. New York*, 390 U.S. 629 (1968), Justice Stewart explained that "a child . . . is not possessed of that full capacity for individual choice . . . It is only upon such a premise . . . that a State may deprive children of . . . rights." *Id.* at 649-50 (Stewart, J., concurring); see also *Thompson v. Oklahoma*, 487 U.S. 815, 836 n.43 (1988) ("The difference that separates children from adults for most purposes of the law is children's immature, undeveloped ability to reason in an adultlike manner." (quoting Victor L. Streib, *Death Penalty for Juveniles* 3-20, 184-89 (1987))). This notion of immaturity can be perceived in most if not all Supreme Court cases concerning children's rights. See Katherine Hunt Federle, *On The Road to Reconceiving Rights for Children: A Postfeminist Analysis of the Capacity Principle*, 42 DePaul L. Rev. 983, 987-1011 (1993) (discussing the philosophical underpinnings of legal immaturity in Western political thought).

B. Overview of Child Development Theory

In the past, societies deduced distinctions between adults and children from human experience and observation. In modern times, the research of child development theorists has validated such distinctions, despite the fact that many theories of child development have gained and lost prominence over the years. Stage theory, social learning theory, Freudian psychology, behavioralism, humanism, and ecological theory all have added to a modern understanding of the differences and similarities between the cognitive abilities of adults and children. Researchers subscribing to these theories have added to our understanding of how children learn and how their capabilities develop.¹⁶ R. Murray Thomas has synthesized the various theories and offers four principles that guide modern thinking about children's development. According to Thomas:

(1) genetic endowment defines a range of potential intellectual ability within which environmental influences can operate to produce the actual intellectual skills people display in their lives, (2) such genetic endowment can differ from one person to another, so that one individual's potential will differ from another's, (3) the flowering of genetic potential evolves gradually over the first two decades of life, and (4) the maturation of this flowering can differ from one person to another.¹⁷

Modern thinking about child development has evolved over time. The following subpart reviews the development theory of Piaget and considers, in particular, how he viewed children's decision-making capacity in light of cognitive function, behavior, and learning.

1. Piagetian Cognitive Development Theory

Jean Piaget has emerged as perhaps the most influential researcher in the area of child development. Working over a period of many years, Piaget observed children and developed the theory that knowledge develops continually from a state of lesser knowledge to one that is more complete and effective.¹⁸ Calling his system stage theory or cognitive theory, Piaget believed that all people possess certain internal motivation points (the stages) at which learning occurs.¹⁹ Piaget further theorized that physically experiencing an object (self learning)

16. See generally R. Murray Thomas, *Comparing Theories of Child Development* (3d ed. 1992) (providing a comparative analysis of various child development theories).

17. *Id.* at 519.

18. Jean Piaget, *Psychology and Epistemology* 5-7 (Arnold Rosin trans., 1971). Piaget wrote many books in his lifetime. Throughout this section, this Article will be drawing on the synthesis of Piaget's work found in Thomas. See Thomas, *supra* note 16, at 273-318.

19. Piaget, *supra* note 18, at 44-51.

and social transmission (education) influence these motivation points.²⁰

Piaget posited four basic levels of development. Level One, called the sensory motor period, occurs from birth to two years old. During this period, children move from reflexive and adaptive actions through experimentation, and begin to demonstrate some mentally inventive acts of intelligence. At the end of this stage, children can mentally plan simple physical tasks using objects in view.²¹ David Elkind describes the main task of children at this level as the "conquest of the object."²² Level Two, called the preoperational thought period, occurs between two and seven years of age. Passing through two substages, at this level children gain a facility for language and move from simple problem solving, based on what they hear and see directly, to incipient logical thought. Nonetheless, direct perception, rather than logical thought and governing principles, primarily influence this intuitive thinking. Thus, according to Piaget, children under the age of seven cannot engage in truly intellectual activity.²³ Elkind describes the main task of children at this level as the "conquest of the symbol."²⁴ Level Three, called the concrete operations period, occurs between seven and eleven years of age. During this period, children begin to understand causation, gain a more objective view of the universe, and attain a better understanding of others' perceptions. During this period, children begin to understand why physical events occur.²⁵ Elkind describes the main task of children at this level as the "mastering [of] classes, relations, and quantities."²⁶ Level Four, the formal operations period, occurs between eleven and fifteen years of age. During this period, children can imagine the past, present, and future conditions of a problem and create hypotheses about what might logically occur under different conditions. They can engage in pure thought independent of actions they see or perform. They can hypothesize and draw deductions, understand theories, and combine them to solve problems. Elkind describes the main task of children at this level as "the conquest of thought."²⁷ In Piagetian theory, by the age of fifteen, a child's thinking has evolved into a mature state and adult thought exists within the child's repertoire of mental functions.²⁸

20. See Thomas, *supra* note 16, at 284-85.

21. *Id.* at 286-90.

22. David Elkind, *Egocentrism in Adolescence*, 38 *Child Dev.* 1025, 1026 (1967).

23. Thomas, *supra* note 16, at 290-95.

24. Elkind, *supra* note 22, at 1026-27.

25. Thomas, *supra* note 16, at 295-98.

26. Elkind, *supra* note 22, at 1027.

27. *Id.* at 1029.

28. Thomas, *supra* note 16, at 298-99.

2. Piaget's Successors: Followers and Detractors, Recent Child Development Theorists

Piaget's influence on child development theory cannot be overstated. Subsequent theorists have often reworked, as well as reacted to, stage theory. The following subpart describes recent developments in the field and the varied perspectives on children's competence for decision making.

Theorists have criticized Piagetian Cognitive Development Theory for a number of reasons.²⁹ For example, Piaget studied only the average child and paid little attention to the effect the behavior of other people might have on an individual.³⁰ Further, he studied concepts like space, number, and time that are not likely to be "contextually dynamic."³¹ Moreover, Piaget's stages present somewhat inflexible conceptual categories, and do not account for the interaction between each child's unique environmental experiences and a person's particular genetic structure.³² Thus, his theory does not easily account for differences among children in terms of acquired skills or in terms of when the skills could be acquired.³³ Some theorists have discounted stage theory altogether. Gardner, Scherer, and Tester, for example, believe that adolescent development does not occur in stages, and that skills in different task domains develop at different times.³⁴

On the other hand, some researchers have developed theories compatible with those of Piaget. For example, the ecological theory, as developed by Urie Bronfenbrenner, explains to some extent an individual child's deviance from Piaget's predictions and has elucidated how social and physical settings affect development.³⁵ Notwithstanding these and other criticisms and refinements, Piaget's theories re-

29. See, e.g., *Recent Advances in Cognitive-Developmental Theory: Progress in Cognitive Development Research* (Charles J. Brainerd ed., 1983) (surveying events in the area of cognitive development theory, including broad empirical and theoretical advances); Elizabeth S. Scott et al., *Evaluating Adolescent Decision Making in Legal Contexts*, 19 Law & Hum. Behav. 221, 224-26 (1995) [hereinafter Scott, *Evaluating Adolescent Decision Making*] (criticizing Piaget's theory of cognitive development, offering alternative theories, and referring to the works of Gardner as well as of Fischer and Silvern).

30. Barry J. Zimmerman, *Social Learning Theory: A Contextualist Account of Cognitive Functioning*, in *Recent Advances in Cognitive-Developmental Theory: Progress in Cognitive Development Research* 1, 4 (Charles J. Brainerd ed., 1983); see also Thomas, *supra* note 16, at 316 (stating that Piaget "did not offer any careful analysis of how different factors or agents in the social setting influence the attainment of the wide variety of differences in cognitive functions that children exhibit").

31. Zimmerman, *supra* note 30, at 4.

32. See *id.* at 4-5.

33. See Laura M. Purdy, *In Their Best Interest?: The Case Against Equal Rights For Children* 204-08 (1992).

34. William Gardner et al., *Asserting Scientific Authority: Cognitive Development and Adolescent Legal Rights*, 44 Am. Psychologist 895, 898 (1989).

35. Urie Bronfenbrenner, *The Ecology of Human Development: Experiments by Nature and Design* 9-10, 16-42 (1979).

main an important guide to children's thinking processes and, when modified by the conclusions of later cognitive theorists, provide a framework to understand how children think.³⁶ Perhaps, as Gary Melton says, "if research contradicts the Piagetian hypotheses at all, it generally is in the direction of competence of even younger minors to make personal decisions."³⁷

Many experiments, aside from those conducted by Piaget himself, have confirmed his theories. In general, research suggests significant differences between the cognitive abilities of children and adolescents and little or no difference between the cognitive abilities of later adolescents and adults. For example, Weithorn and Campbell studied developmental differences between children and adults when making medical and psychiatric treatment decisions.³⁸ In considering evidence of choice, reasonable outcome, rational reasons, and understanding as measures of competency, this research team found that the decision making of fourteen-year-olds did not differ from that of adults, but that nine-year-olds demonstrated less competent decision making.³⁹ Another group of researchers, Nakajima and Hotta, studied how individuals searched for information in decision making.⁴⁰ They found that children age twelve and under did not consider more information than adults, but that children age fifteen and older pursued more systematic methods of selection strategies.⁴¹ Yet another researcher, Catherine Lewis, studied five areas of adolescents' decision making: "risk awareness; future orientation; sources of advice for decisions; recognition of 'vested interests'; and revisions of attitudes about adults in light of new information."⁴² She found that older ado-

36. See Group for the Advancement of Psychiatry, *supra* note 6, at 20-21; see also Leslie Smith, *Age, Ability, and Intellectual Development in Piagetian Theory*, in *Criteria for Competence: Controversies in the Conceptualization and Assessment of Children's Abilities* 69, 87-88 (Michael Chandler & Michael Chapman eds., 1991) (assessing the weaknesses in Piaget's theory but asserting its continued importance); Thomas, *supra* note 16, at 306, 313-17 (stating that "over the past three decades Piaget's writings have exerted a growing influence on the conduct of education," and suggesting that most child development experts agree with the major features of Piaget's structure-base stage model, but liberate it from certain constraints to make it fit the current state of art).

37. Gary B. Melton, *Taking Gault Seriously: Toward a New Juvenile Court*, 68 Neb. L. Rev. 146, 153 (1989).

38. Lois A. Weithorn & Susan B. Campbell, *The Competency of Children and Adolescents to Make Informed Treatment Decisions*, 53 Child Dev. 1589, 1590-91 (1982).

39. *Id.* at 1595-96.

40. Yoshiaki Nakajima & Miho Hotta, *A Developmental Study of Cognitive Processes in Decision Making: Information Searching as a Function of Task Complexity*, 64 Psychol. Rep. 67 (1989). Denise Davidson also studied information searching techniques and found that preschool children used incomplete and unsystematic strategies. Denise Davidson, *Children's Decision-Making Examined with an Information-Board Procedure*, 6 Cognitive Dev. 77, 79 (1991).

41. Nakajima & Hotta, *supra* note 40, at 77.

42. Catherine C. Lewis, *How Adolescents Approach Decisions: Changes over Grades Seven to Twelve and Policy Implications*, 52 Child Dev. 538 (1981).

lescents considered risk and future consequences more frequently than younger adolescents; better recognized vested interest on the part of information providers; and more frequently consulted outside experts.⁴³ Denise Davidson, studying developmental differences in decision making, found that the ability to focus selectively on relevant information and to systematically compare information about alternatives improves between the ages of ten and thirteen.⁴⁴ Grisso and Belter concluded that nine-year-olds had difficulty recognizing or protecting their rights, while youths between the ages of fifteen and twenty-one fared better than the nine-year olds, but performed equally with each other in this regard.⁴⁵ Catherine Lewis compared decisions by adults and minors concerning pregnancy,⁴⁶ and found little difference between adults' and children's knowledge of the law or in their reasoning processes.⁴⁷ Finally, Ambuel and Rappaport also studied adolescents' competency in relation to pregnancy decisions.⁴⁸ They found that, by middle adolescence, minors can "reason abstractly about hypothetical situations, reason about multiple alternatives and consequences, consider multiple variables, combine variables in more complex ways, and use information systematically."⁴⁹ Further they found no difference in legal competency between older minors and adults.⁵⁰

These and other studies consistently demonstrate the general validity of Piagetian theory as reinterpreted by modern stage theorists. The research indicates that children who have yet to enter early adolescence and Piaget's formal operations stage process information differently from both adults and older adolescents.⁵¹ These studies further show that, as a matter of cognitive functioning, adolescents possess a capacity equal to adults for making decisions about significant life events.⁵² Piaget believed that adolescents acquired such skills

43. *Id.* at 541-42.

44. Denise Davidson, *Developmental Differences in Children's Search of Predecisional Information*, 52 J. Experimental Child Psychol. 239, 241 (1991).

45. Ronald W. Belter & Thomas Grisso, *Children's Recognition of Rights Violations in Counseling*, 15 Prof. Psychol.: Res. & Prac. 899, 907-08 (1984); see also Thomas Grisso, *Juveniles' Capacities to Waive Miranda Rights: An Empirical Analysis*, 68 Cal. L. Rev. 1134, 1143 (1980) (stating that juveniles under fifteen years of age do not "understand the rights of silence and of counsel").

46. Catherine C. Lewis, *A Comparison of Minors' and Adults' Pregnancy Decisions*, 50 Am. J. Orthopsychiatry 446 (1980).

47. *Id.* at 541-52.

48. Bruce Ambuel & Julian Rappaport, *Developmental Trends in Adolescents' Psychological and Legal Competence to Consent to Abortion*, 16 Law & Hum. Behav. 129 (1992).

49. *Id.* at 147-48.

50. See *id.* at 145. Interestingly, they found that social support was the most consistent psychosocial predictor of competence. *Id.* at 146.

51. See *supra* notes 38-50 and accompanying text.

52. See *supra* notes 40-50 and accompanying text.

around age fifteen.⁵³ The research has also revealed that most children (who are not subject to neurological or environmental deficiencies) probably acquire such skills even earlier.⁵⁴

Some critics have questioned the conclusions drawn from these studies. Elizabeth Scott correctly points out that only limited and perhaps tentative empirical data supports the capability of adolescents to make decisions as well as adults.⁵⁵ She also questions whether the research findings can be generalized across persons, settings, and times.⁵⁶ Notwithstanding these valid observations, observers cannot ignore the consistency reported to date in the research on decision making as it relates to cognitive functioning. Similarly, as the next subpart describes, the research examining adolescent behavior has also added to the debate regarding children's decision-making competence.

3. Adolescent Behavior and Decision-Making Competence

Scott, and her colleagues Reppucci and Woolard, pose another challenge to those who would alter paternalistic policies that deprive children of personal and legal autonomy.⁵⁷ They believe that focusing on cognitive functioning directs attention away from other historical bases for paternalistic policies.⁵⁸ Using what they term the judgment model,⁵⁹ they propose to add adolescent behaviors, which appear to be stage related (i.e., exist in adolescents but disappear as a person grows older), to cognitive functioning in the decision-making equation. These behaviors include: (1) susceptibility to peer influence; (2) a tendency to focus on immediate rather than long term consequences; and (3) an inclination to make riskier choices than adults.⁶⁰

Although all adults "intuitively" recognize these adolescent traits, some research suggests that this intuition may be verifiable. Research has demonstrated the effects of peer and parental influence on social comparison and conformity.⁶¹ Berndt's work, however, shows that peer conformity in antisocial and neutral behaviors peaks around the ninth grade.⁶² Other research also demonstrates that such influence depends on the context and perhaps on the quality of the relation-

53. Piaget, *supra* note 18, at 61-62.

54. See *supra* notes 38-41, 44-45 and accompanying text.

55. Elizabeth S. Scott, *Judgment and Reasoning in Adolescent Decisionmaking*, 37 Vill. L. Rev. 1607, 1632 (1992).

56. See *id.* at 1633 & n.98.

57. Scott, *Evaluating Adolescent Decision Making*, *supra* note 29, at 222-23.

58. *Id.* at 226-35.

59. *Id.* at 222.

60. *Id.*

61. *Id.* at 230. The article cites various studies that analyze the influence of peers and parents in certain contexts.

62. Thomas J. Berndt, *Developmental Changes in Conformity to Peers And Parents*, 15 Developmental Psychol. 608, 615 (1979). Berndt also found that the quality of the parent-child relationship influenced conformity. See *id.* at 615-16.

ship.⁶³ Some research also reveals that adolescents have different perceptions of risk than do adults,⁶⁴ but whether attitudes towards risk remain constant across different decision-making contexts is unclear.⁶⁵ Other researchers, however, found little difference in the assessment of risk by adults and adolescents since both believe that accidents happen to other people.⁶⁶ Research also indicates differences between adolescents and adults regarding temporal perspective.⁶⁷ These studies demonstrate that adolescents generally place greater value on short-term consequences while adults place a greater value on longer term consequences.⁶⁸ On the other hand, Nurmi found that older adolescents do orient towards the future when they consider issues such as education, occupation, and family.⁶⁹ As Scott and her colleagues note, research concerning these concepts require further investigation.⁷⁰ Nonetheless, this research brings to the debate on competency a recognition of the environmental and psychosocial influences that affect youths as they pass through adolescence. Piaget's cool calculating fifteen-year-old appears to be subject to some very hot influences during adolescence. Such experiences must be taken into account in a judge's assessment.

4. Learning and Decision-Making Competence

Cognitive functioning and influence of common adolescent behavioral traits upon it, however, do not present the only issues to consider when assessing decision-making competency. Decision making and judgment, like most other activities in life, constitute learned skills.⁷¹ As Piaget and others have noted, learning involves a dynamic process.⁷² Human beings process information by adding new information to their cognitive structures and then reformulating the cognitive structures to account for new, different, and more complex information.⁷³ Knowledge develops through contextual interactions and in-

63. Scott, *Evaluating Adolescent Decision Making*, *supra* note 29, at 230.

64. *Id.* at 230-31 (citing various research studies).

65. *Id.*

66. Marilyn Jacobs Quadrel et al., *Adolescent (In)vulnerability*, 48 *Am. Psychologist* 102, 104-05 (1993). They also found that adults and teens rely on similar psychological processes when estimating risk. *Id.* at 112.

67. Scott, *Evaluating Adolescent Decision Making*, *supra* note 29, at 231.

68. *Id.*

69. Jari-Erik Nurmi, *How Do Adolescents See Their Future?: A Review of the Development of Future Orientation and Planning*, 11 *Developmental Rev.* 1, 28 (1991).

70. Scott, *Evaluating Adolescent Decision Making*, *supra* note 29, at 232.

71. See Franklin E. Zimring, *The Changing Legal World of Adolescence* 91 (1982) (maintaining that young people acquire maturity and judgment through learning).

72. See Piaget, *supra* note 18, at 28 (stating that "[a]ll knowledge doubtless supposes an intervention of experience"); see also *id.* at 46-51 (outlining, for example, biological, equilibration, social, educational, and cultural factors as contributive elements to cognitive function).

73. See Richard L. Roe, *Valuing Student Speech: The Work of the Schools as Conceptual Development*, 79 *Cal. L. Rev.* 1269, 1293 (1991) (citing the work of researchers

creases when an individual tests it against a set of circumstances, reformulates it in relation to the current experience, and stores it for further use.⁷⁴ Each iteration of the testing process refines the knowledge or skill and serves to improve performance if it is used again. Not surprisingly, most people, subject to hereditary limits, improve a skill each time they use it. Improvement of skills upon repeated use applies to making judgments or decisions as well.⁷⁵ Decision making involves, after all, a process of making choices among competing courses of action.⁷⁶ The decision maker identifies possible options, considers the possible consequences that follow from each option, evaluates the desirability of each, ascertains the likelihood of each consequence, and assesses all of these considerations against some decisional rule, such as maximizing well-being or enjoyment.⁷⁷ One would expect that people who have increased their knowledge base through multiple reformulations and refinements acquired through repeated encounters with the information should make better decisions. Early attempts at decision making may produce errors in judgment and bad decisions; but improvement occurs over time and with repeated efforts. Thus, as the sages remind us, experience is a good teacher. Professor Frank Zimring has viewed adolescence as a learner's permit for adulthood,⁷⁸ stating that: "If the exercise of independent choice is an essential element of maturity, part of the process of becoming mature is learning to make independent decisions."⁷⁹ Improving one's ability to make good decisions requires practice. Thus, the experience of making judgments in context presents as important a factor as cognitive development and the influence of normal adolescent behavior traits in developing good decision-making skills.

This part provided a backdrop to development theory and how these theories explain children's decision-making capabilities. The following part explores how judges accept and discount children's preferences and choices in a number of legal contexts, including adoption and custody, abortion, medical and mental health treatment, and delinquency cases.

and commentators focusing on social cognition, political cognition, and critical thinking).

74. Cf. Zimring, *supra* note 71, at 89-91 (positing that "[b]eing mature takes practice").

75. Cf. Lita Furby & Ruth Beyth-Marom, *Risk Taking In Adolescence: A Decision-Making Perspective*, 12 *Developmental Rev.* 1, 29 (1992) (asserting that acquisition of decision-making skills "may depend *both* on cognitive structural characteristics at a given point in time and on the opportunities which experience has provided for acquiring given skills").

76. *Id.* at 3 ("Decision theorists define decision making as the process of making choices among competing courses of actions.").

77. *Id.* at 3-4.

78. Zimring, *supra* note 71, at 89-96.

79. *Id.* at 91.

II. JUDICIAL DETERMINATIONS OF CHILDREN'S DECISION-MAKING CAPACITY

When a child states a preference or chooses a course of action in a courtroom, all of the factors discussed in part I influence that decision. One would suspect that a rich literature exists concerning judicial decision making in the context of children's choices about their lives. Unfortunately, little has been written about how judges evaluate children's decisions that are made in a legal context. Trial judges are seldom the authors of those articles that do exist. Most of the published articles seek to advise judges about the proper method for asking questions and obtaining information, to analyze the law, or to discuss the practical effects of the setting in which the judge obtains the information from the child. When they do write, judges usually do so in the form of opinions, more often at the appellate rather than the trial level. These opinions seldom offer more than generalizations about a child's legal competency to state a preference, or make a choice. They contain little guidance concerning how trial judges should evaluate the preferences children state, or how research into child development actually informs a judge's decision. The subsections that follow explore, as well as is possible, how judges actually use child development theory; and, if they do not, how they evaluate capacity when children state a preference for a particular course of action.

A. *Custody and Adoption Cases*

Although only a few state statutes or cases command a court to follow the expressed wishes of a child in custody and adoption cases, many require that the judge consider the child's wishes.⁸⁰ "The variables that should affect the weight to be given to the child's preference [however] are seldom defined by law [and] little is known about how the child's wishes affect the calculations judges make in different cases and under different statutes."⁸¹ Aside from judicial opinions, few judges have written about how they evaluate expressions of preference made by a child. Reporting on the efforts of a Massachusetts committee of lawyers and judges created to improve court proceedings in custody cases, family court judge Edward Ginsberg stated that children's expressed preferences should not be taken at face value since children improperly assess their own long-term interests, rely on unrealistic expectations and promises, and may manipulate or be

80. States have long experimented with the proper age at which to accord control of custody decisions to children. See Lawrence A. Moskowitz, *Divorce-Custody Dispositions: The Child's Wishes in Perspective*, 18 Santa Clara L. Rev. 427, 431-34 (1978).

81. Elizabeth S. Scott et al., *Children's Preference in Adjudicated Custody Decisions*, 22 Ga. L. Rev. 1035, 1042 (1988) [hereinafter Scott, *Children's Preference in Custody Decisions*].

manipulated by parents.⁸² Significantly, neither the guidelines of the Massachusetts committee nor the judge discussed child development theory or even "common sense" distinctions between older or younger children. Judge J. Peter Ault of Illinois wrote that a judge acting as questioner "can get a sense of the maturity of the minor and the voluntariness of the minor's statements . . . the reasoning behind the child's statement of preference . . . [and] the strength or depth of his or her preference."⁸³ While he and the Illinois courts believe that the preference should be given "most serious consideration,"⁸⁴ Judge Ault offers no insight into how he or other judges should evaluate a child's social maturity or cognitive competency to make choices.

Judges have discussed how they evaluate children's expressed preferences with researchers who have studied judicial attitudes or judicial interviewing techniques. Frederica Lombard surveyed and questioned twenty-six judges regarding their decision making in contested custody cases in several counties surrounding Detroit, Michigan.⁸⁵ She found that judges spent an average of eighteen minutes with children who were the subjects of custody battles.⁸⁶ She concluded that, while judges claimed to inquire into the underlying reasons for the child's preference in order to evaluate it, a judge could obtain little of the information needed for such an evaluation in a span of eighteen minutes.⁸⁷

Scott, Reppucci, and Aber conducted a similar study in Virginia.⁸⁸ This group found that a correlation existed between the age of the child and the weight accorded to children's preferences by the judge.⁸⁹ They further found that judges relied on the social norms that supported the participation by adolescents in significant decisions that affect their lives.⁹⁰ With respect to children below the age of six, most judges considered the child's wishes to be irrelevant.⁹¹ By contrast,

82. Edward M. Ginsburg, *Guidelines For Child Custody Cases*, 26 Boston B.J. 23, 24 (Oct. 1982).

83. J. Peter Ault, *Out of the Mouths of Babes: Determinations of Child Custodial Preference in Illinois*, 23 Loy. U. Chi. L.J. 383, 395 (1992).

84. *Id.* at 385 (quoting *Rosenberger v. Rosenberger*, 316 N.E.2d 1, 3 (Ill. App. Ct. 1974)).

85. Frederica K. Lombard, *Judicial Interviewing of Children in Custody Cases: An Empirical and Analytical Study*, 17 U.C. Davis L. Rev. 807, 809 (1984).

86. *Id.* at 826. In Colorado, 15 minutes seems to be the norm. See Jessica Pearson & Maria A. Luchesi Ring, *Judicial Decision-Making in Contested Custody Cases*, 21 J. Fam. L. 703, 720 (1983).

87. Lombard, *supra* note 85, at 829; see also Judith S. Wallerstein & Joan Berlin Kelly, *Surviving the Break Up: How Children and Parents Cope with Divorce* 161-78 (1980) (describing the contextual complexity of divorce cases and its effects on children's thinking).

88. Scott, *Children's Preference in Custody Decisions*, *supra* note 81, at 1037.

89. *Id.*

90. *Id.*

91. *Id.* at 1046. Children under six were involved in 50% of the cases, and few judges even interviewed such children. *Id.* at 1046-47.

ninety percent of the judges deemed children's wishes to be either dispositive or extremely important when they were fourteen years old and older.⁹² Reidy, Silver, and Carlson found similar inclinations expressed by judges interviewed in California,⁹³ as did Lowery in interviews with judges in Kentucky.⁹⁴ The Scott, Reppucci, and Aber study reported that none of the judges interviewed in Virginia relied specifically on child development theory for acceding to the children's desires. Rather, the intensity with which the children expressed their preferences, their practical ability to defy the order, and their "right" to a significant voice in the decision by virtue of their proximity to adulthood provided the basis for such judicial accession.⁹⁵

Appellate judges write generally about evaluating a child's preference in contested custody cases when reviewing trial court decisions. In a 1977 analysis of appellate opinions concerning the role of the child's preference in custody cases, Siegel and Hurley found that the most widely accepted test was "that the child must be of 'sufficient mental capacity to make an informed and intelligent choice' " before his or her choice would be accorded any weight.⁹⁶ This pair concluded that, while appellate courts encouraged trial judges to actually examine the child's mental capacity, some appellate courts presume the incapacity of young children and most appellate courts presume the capacity of older adolescents.⁹⁷ An analysis of more recent cases concerning adoption and custody reached similar results.⁹⁸

Relying on appellate cases for guidance presents a problem because the opinions discuss generalized legal rules regarding the mental capacity of children, but do not explain the mental calculations used by the trial judge to ascertain that capacity. Those calculations seldom, if ever, become part of the appellate record. Moreover, few cases even reach the appellate court, and trial judges rarely publish their reasoning in individual cases. Thus, the legal community working with children has a dim understanding about how judges make those decisions.

92. *Id.* at 1050.

93. Thomas J. Reidy et al., *Child Custody Decisions: A Survey of Judges*, 23 Fam. L.Q. 75, 79, 84 (1989).

94. Carol R. Lowery, *Child Custody Decisions in Divorce Proceedings: A Survey of Judges*, 12 Prof. Psychol. 492, 495 (1981).

95. Scott, *Children's Preference in Custody Decisions*, *supra* note 81, at 1050-51.

96. David M. Siegel & Suzanne Hurley, *The Role of the Child's Preference in Custody Proceedings*, 11 Fam. L.Q. 1, 2 (1977) (citation omitted).

97. *Id.* at 4.

98. Searches for both custody and adoption were conducted on Westlaw and Lexis. Various combinations of the following key words were used to locate cases: custody, adoption, child, preference, choice, age, mental capacity, maturity, and West's key number 211k19.2(4). *See, e.g.,* Massengale v. Massengale, No. 03A01-9503-CV-00086, 1995 WL 579261, at *1-2 (Tenn. Ct. App. Oct. 2, 1995) (admitting testimony of nine-year-old regarding his preferences in custody dispute, but ultimately discounting his viewpoint); *Sargent v. Sargent*, 460 S.E.2d 596, 599-600 (Va. Ct. App. 1995) (affirming trial court's decision to refuse to find determinative the uncontroverted evidence regarding nine-year-old's preferences in custody dispute).

Conversations with judges and litigants seem to indicate that judges typically observe the child's demeanor, and consider the child's significant accomplishments and IQ test results when making the decisions. Ample anecdotal evidence supports the view that judges base decisions on intuition and a common understanding of social norms. Little evidence, however, indicates any systematic use of child development research and theory to inform such decisions.

B. *Abortion Cases*

In a line of cases beginning with *Bellotti v. Baird*,⁹⁹ the Supreme Court decided that a minor who is mature enough and sufficiently well informed may make abortion decisions independent of parental consent or notification or judicial interference.¹⁰⁰ The Supreme Court has noted the difficulty of defining maturity and determining its existence.¹⁰¹ Although the Court requires case-by-case determinations of a child's maturity, it has given no guidance about how maturity is to be ascertained.

Furthermore, trial judges have revealed little about how they ascertain maturity. It appears that no judges have written any articles on the topic. Trial courts keep proceedings confidential and seal records, thus rendering direct insight into a judge's rationale inaccessible. Few cases reach the appellate courts.¹⁰² Those cases that have received appellate review suggest that trial judges intuit maturity from their perceptions of the children's demeanor while testifying.¹⁰³ Such cases also indicate that judges evaluate the coherence of the child's response to questions concerning child rearing, abortion procedures and risks, adoption, and the child's postoperative plans.¹⁰⁴ The Supreme

99. 443 U.S. 622 (1979).

100. *Id.* at 643. The Court in *Bellotti* held that even if the trial court believed that an abortion is not in the child's best interest, it should not interfere in the decision of a mature minor. *Id.* at 650. Prior to *Bellotti*, the Supreme Court, in *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976), ruled that a state could not confer upon a parent absolute veto power over a child's desire to have an abortion. *Id.* at 74.

101. *Bellotti*, 443 U.S. at 643-44 n.23.

102. A survey by Mnookin and Cartoof found that every pregnant minor who sought judicial authorization in Massachusetts between 1981 and 1983 received it. Robert H. Mnookin, *Bellotti v. Baird, A Hard Case, in In the Interest of Children: Advocacy, Law Reform, and Public Policy* 149, 239 (Robert H. Mnookin ed., 1985). Out of 477 judicial assessments for authorization in Massachusetts between December 1981 and June 1985, only nine children were found to be immature. Susanne Yates & Anita J. Pliner, *Judging Maturity in the Courts: The Massachusetts Consent Statute*, 78 Am. J. Pub. Health 646, 647 (1988).

103. A sample of cases was selected from a Westlaw search using 4K.50 (Abortion and Birth Control) and examined to ascertain the judges' reasoning. See, e.g., *In re T.P.*, 475 N.E.2d 312, 314-15 (Ind. 1985) (holding that the trial judge did not abuse his discretion in making a determination based on facts presented as well as the attitudes and judgments of the child).

104. See, e.g., *In re Moe*, 423 N.E.2d 1038, 1042-43 (Mass. App. Ct. 1981) (focusing on lack of life experience and understanding of the responsibilities of motherhood in light of abortion decision); *In re Anonymous*, 650 So. 2d 919, 920 (Ala. Civ. App.

Court of Alabama has recognized that trial judges sometimes rely on a more negative rationale. In the Alabama Supreme Court's view, a minor's maturity may not be evaluated through the prism of a judge's personal feelings towards abortion or towards adolescence.¹⁰⁵ Nonetheless, trial courts not following the Alabama admonition often focus on the child's general behavior in determining maturity.¹⁰⁶ For example, some courts consider unwed pregnancy itself to be a sign of immaturity.¹⁰⁷

The Supreme Court of Kansas has attempted to define the concept of mature minor. It has instructed trial courts to determine whether a child possesses "the intellectual capacity, experience, and knowledge necessary to substantially understand the situation at hand and the consequences of the choices that can be made."¹⁰⁸ In determining whether to grant or deny permission to obtain the abortion without parental notification, other courts also seem to concentrate on the knowledge possessed by the petitioner.¹⁰⁹ This reliance on the concepts of maturity and knowledge reflects, in part, a use of the doctrine of informed consent. Researchers and doctors employ the informed consent doctrine to insure that human subjects used in medical research and patients subject to risky medical procedures understand the procedures in question. Knowledge, voluntariness, and capacity comprise the elements of informed consent.¹¹⁰ The knowledge prong requires that the person have a fair understanding of the nature of the activity and its procedure, and the attendant risks, discomforts, benefits, and alternatives to the procedure.¹¹¹ Voluntariness suggests a vo-

1994) (discussing lack of medical consultation, inadequate postoperative plans, and failure to consider the emotional aspects of abortion).

105. *Ex parte Anonymous*, 618 So. 2d 722, 725 (Ala. 1993).

106. *See, e.g., In re Doe I*, 566 N.E.2d 1181, 1184 (Ohio 1990) (upholding trial court's finding that pregnant minor did not prove necessary maturity, where she had had prior abortion less than a year ago, second child was fathered by a different man, and minor had stopped using birth control); *H.B. v. Wilkinson*, 639 F. Supp. 952, 957-58 (D. Utah 1986) (finding that minor demonstrated unrealistic judgment given her reliance upon advice of fellow teenagers, her expectation of keeping the pregnancy secret from her parents if medical complications arose, and her cavalier attitude about the ease of abortion).

107. *See* Steven F. Stuhlberg, Note, *When is a Pregnant Minor Mature? When is an Abortion in Her Best Interest? The Ohio Supreme Court Applies Ohio's Abortion Parental Notification Law: In re Jane Doe I*, 60 U. Cin. L. Rev. 907, 932 (1991).

108. *In re Doe*, 866 P.2d 1069, 1074 (Kan. Ct. App. 1994).

109. The Supreme Court has suggested a mature minor is one who can appreciate the nature and consequences of an abortion. *See Planned Parenthood v. Danforth*, 428 U.S. 52, 73-74 (1976).

110. According to Grisso and Vierling, they are also the traits used to judge the legal competence of a mature minor. Thomas Grisso & Linda Vierling, *Minors' Consent to Treatment: A Developmental Perspective*, 1978 Prof. Psychol. 412, 412-16.

111. *See* Patricia Keith-Spiegel, *Children and Consent to Participate in Research*, in *Children's Competence to Consent* 179, 186 (Gary B. Melton et al. eds., 1983) (citing 1971 H.E.W. guidelines concerning research on humans); *see also* Ambuel & Rappaport, *supra* note 48, at 132 (listing cognitive and volitional qualities as characteristics of informed consent).

litional act devoid of undue influence.¹¹² Capacity means the mental ability to use the information and to make a rational choice. The courts that use an informed consent analysis to permit an abortion without parental notification or consent inquire into the quantity of information the child possesses about the abortion process, the birth process, child rearing, and the risks and benefits arising from the various options. Such courts also examine the child's sources of information. Based upon the child's recitation of this information¹¹³ as well as the child's age, education, and behavior, the court rules on the child's maturity.

Ostensibly, courts utilizing this construct analyze the child's capacity to understand the semantic content of the information provided by others, and the child's ability to arrive at the decision through a rational process by attempting to ascertain the knowledge the child possesses and voluntariness of the choice.¹¹⁴ To determine decision-making capacity, a judge must have some sense of the general cognitive functioning of children of the same developmental stage as the petitioner, and more importantly, a good sense of the cognitive functioning of the petitioner herself. Because these cases move quickly through the courts, however, neither type of evidence regularly becomes part of the proceedings. For example, a 1988 study in Massachusetts concerning the impact of parental consent laws found that the average hearing lasted twelve minutes.¹¹⁵ Ninety-two percent of the hearings took less than twenty minutes and some lasted as little as five minutes.¹¹⁶ Often, the petitioner is the only witness, and no cross-examination occurs. In such an arena, a decision concerning capacity can be made only with reference to an individual judge's personal knowledge and beliefs regarding child development, general social norms, and the child's general demeanor on the witness stand. Thus, the judge's own idiosyncratic beliefs about children, adolescents, or abortion will play a significant role in the determination of capacity. Because such a scenario does not involve judges' employing normal rules concerning proof in the litigation process, the result of these hearings is practically preordained: no opposing party challenges the evidence and the court, thus, bases its finding regarding the minor's

112. Keith-Spiegel, *supra* note 111, at 194; Ambuel & Rappaport, *supra* note 48, at 132.

113. The appellate cases seem to suggest that often the child is the only witness and no cross-examination takes place unless pursued by the trial judge. See, e.g., *In re Anonymous*, 655 So. 2d 1052, 1053-54 (Ala. Civ. App. 1995) (basing decision on minor's testimony despite the absence of cross-examination); *In re Anonymous*, 549 So. 2d 1347, 1347 (Ala. Civ. App. 1989) (noting that child was the only witness); *In re Moe*, 423 N.E.2d 1038, 1040 (Mass. App. Ct. 1981) (referring only to the petitioner's responses in making determination of maturity).

114. See Grisso & Vierling, *supra* note 110, at 418-19.

115. Yates & Pliner, *supra* note 102, at 647-48.

116. See *id.*

maturity either on the one-sided evidence presented, or on idiosyncratic biases.

C. Cases Involving Medical or Mental Health Treatment

Judges may become involved in several health decisions other than those relating to pregnancy and abortion. Hospitals and social service agencies often petition the court for authority to perform surgical or other medical procedures on a child when parents or children refuse to consent to these procedures. Similarly, mental health personnel may seek court orders permitting them to administer psychotropic drugs when children refuse to take these drugs. Additionally, parents and hospitals may seek permission to perform medical procedures such as marrow or kidney removal on willing or nonprotesting children when the procedure will benefit a third person but cause some risk to the donor. Neglected or delinquent children may also object to being placed in a private residential treatment center as part of their disposition.¹¹⁷ Finally, parents and hospitals often seek authority to remove life sustaining therapies when no amount of treatment will save a child's life, or to compel such therapies against the child's will. In each of these cases, courts must consider the child's capacity to consent or refuse to participate in the procedure.

As with other situations, judges have not written law journal articles about how they make these decisions. Although a substantial number of appellate cases exist, trial judges seldom publish their opinions. Older appellate opinions usually involve the liability of doctors who performed surgical procedures on children without the consent of the parents¹¹⁸ or the administration of blood transfusions to children whose parents objected because of religious beliefs.¹¹⁹ In the former, the cases split between those that recognized a mature minor excep-

117. These cases are slightly different from mental health commitments governed procedurally by *Parham v. J. R.*, 442 U.S. 584, 606 (1979). In mental health commitment cases, the child's need for treatment rather than his or her capacity to consent to treatment is at issue. In the neglect and delinquency cases, the placement is more likely to be one of several factors that can aid in the child's rehabilitation or upbringing rather than being one that is absolutely necessary. See D.C. Code Ann. § 16-2320 (1981 & Supp. 1995) (setting out procedures for placement of neglected or delinquent children).

118. See Danny R. Veilleux, Annotation, *Medical Practitioner's Liability For Treatment Given Child Without Parent's Consent*, 67 A.L.R.4th 511 (1989).

119. See, e.g., *In re Sampson*, 317 N.Y.S.2d 641, 652 (Fam. Ct. 1970), *aff'd*, *Sampson v. Taylor*, 278 N.E.2d 918 (N.Y. 1972) (involving neglect case brought by government against the parent, a Jehovah's Witness, because of her refusal to consent to blood transfusion for the child); *In re Gregory S.*, 380 N.Y.S.2d 620, 621 (Fam. Ct. 1976) (involving neglect case brought by government against the parent, a member of the Church of God and Christ, because of her refusal to consent to medical and dental treatment for her three children); see also *In re Seiferth*, 127 N.E.2d 820, 821 (N.Y. 1955) (involving a child in need of surgery for a cleft palate and harelip whose parent withheld consent because of his belief in "mental healing").

tion and those that did not.¹²⁰ The common law mature minor rule called for an analysis of the nature of the medical procedure, its likely benefit, and the capacity of the minor to understand what the medical procedure involved.¹²¹ In the latter, the courts routinely ordered that the transfusions be given. Neither type of case paid much attention to how the courts were to determine maturity. The liability cases only discussed the existence of the doctrine, whereas other health-related cases discussed the rights of the parents as opposed to the rights of mature minors.¹²²

As painful but potentially successful treatment regimens become increasingly common, courts will consider greater numbers of health-related cases. In California, police armed with a court order dragged a fifteen-year-old girl out of her home and forced her to undergo chemotherapy. She and her family, members of the Hmong culture, had objected to the therapy. The doctors who sought the court order later relented and the judge lifted the order.¹²³ In Massachusetts, a sixteen-year-old boy fled his home rather than continue chemotherapy. His parents and doctors relented and he began an alternative therapy.¹²⁴ In Florida, a boy who had received two liver transplants stopped taking his anti-rejection medicine because he could no longer bear the painful side effects. A court ruled that he had the right to refuse treatment, and he later died.¹²⁵

Some trial and appellate court opinions have begun to discuss the mature minor concept with respect to treatment decisions. In 1986, Judge Leonard Edwards II of the Santa Clara County Superior Court in California considered the maturity of a fourteen-year-old cancer patient who, with her parent's consent, refused blood transfusions for religious reasons, and threatened to leave the hospital if the court ruled against her.¹²⁶ In upholding the girl's choice, the judge noted her

120. Tennessee, for example, has long recognized the mature minor doctrine in medical liability cases, although none of the Tennessee cases involve a child's choice to die rather than accept treatment. See *Cardwell v. Bechtol*, 724 S.W.2d 739, 745-46 (Tenn. 1987).

121. See *Baird v. Attorney General*, 360 N.E.2d 288, 294 (Mass. 1977) (citing *Wadlington, Minors and Health Care: The Age of Consent*, 11 Osgoode Hall L.J. 115, 117-19 (1973)).

122. See, e.g., *In re Gregory S.*, 380 N.Y.S.2d at 621-22 (describing circumstances under which the state may restrict parents' control over their children for public policy reasons); *In re Sampson*, 317 N.Y.S.2d at 652 (same).

123. Kathryn Dore Perkins, *Kids Asserting Rights in Health Care; Support Grows For Choice in Treatment*, S.F. Examiner, May 1, 1995, at *1, available in LEXIS, Nexis Library, Papers File.

124. *Id.*

125. *Id.*

126. Mike McKee, *Blood Feud; When Jehovah's Witnesses Refuse Transfusions Based on Their Beliefs, The Legal and Medical Guidelines Are Far From Clear*, The Recorder, Aug. 15, 1995, at *1, available in LEXIS, Nexis Library, Papers File.

intelligence, poise, dignity and forcefulness She appeared to have focused clearly on the difficult task facing her She had attended all counseling sessions, agreed to a plan of therapy, developed a coherent philosophy on how she as a human being would face this medical challenge, and she came to the court with the poignant request—"respect my decision."¹²⁷

Appellate courts have diverged in their determination concerning a mature minor's choice in life-threatening situations. On the one hand, a Georgia federal court found no such right.¹²⁸ Similarly, in *In re Long Island Jewish Medical Center*,¹²⁹ the New York courts recognized the merit of the mature minor concept, but refused to permit a seventeen-year-old adherent of the Jehovah's Witness faith to reject a life-saving blood transfusion.¹³⁰ The court simply found the child to be lacking in maturity.¹³¹ In *O.G., P.G., and M.G. v. Baum*,¹³² the court rejected the wishes of a sixteen-year-old who refused to accept a blood transfusion because the legal representative presented no evidence of his client's maturity, and the child himself did not testify.¹³³

On the other hand, some courts have endorsed the mature minor concept in life-threatening situations. In *In re Swan*,¹³⁴ the court ruled that prior statements by a seventeen-year-old minor who was a "normally mature high school senior" were sufficient to show his desire not to be kept alive by heroic measures.¹³⁵ The court permitted his parents to effectuate his wishes,¹³⁶ thus permitting the child to die.¹³⁷ Likewise, Illinois has fully embraced the doctrine even when its invocation may result in death. In *In re E.G.*,¹³⁸ doctors, lawyers, and psychiatrists testified to the seventeen-year-old child's maturity to reject a blood transfusion.¹³⁹ The child testified as well.¹⁴⁰ In reaching its decision, the Illinois Supreme Court noted both the "sliding scale of maturity" that existed within the Illinois Code, and the existence of the

127. *Id.* at *3-4.

128. *Novak v. Cobb County-Kennestone Hosp. Auth.*, 849 F.Supp. 1559, 1575-76 (N.D. Ga. 1994).

129. 557 N.Y.S.2d 239 (Sup. Ct. 1990).

130. *Id.* at 243.

131. *Id.*

132. 790 S.W.2d 839 (Tx. Ct. App. 1990).

133. *Id.* at 842.

134. 569 A.2d 1202 (Me. 1990).

135. *Id.* at 1206; see also *In re L.H.R.*, 321 S.E.2d 716, 723 (Ga. 1984) (indicating, in a case involving withdrawing life support procedures from an infant, that the adult right to withhold or withdraw life sustaining procedures was available despite the person's youth).

136. *In re Swan*, 569 A.2d 1202, 1206 (Me. 1990).

137. *Id.*

138. *In re E.G.*, 549 N.E.2d 322 (Ill. 1989).

139. *Id.* at 323-24.

140. *Id.* at 324.

mature minor doctrine, which emanates from abortion cases.¹⁴¹ In ruling that a mature minor could choose death, the Illinois court, however, did not enunciate a standard for maturity.¹⁴² It simply accepted the trial judge's factual determination that the child was mature.¹⁴³

In cases where the court accepts the mature minor concept in life-threatening situations, the courts have looked for some evidence of informed consent to demonstrate maturity. Both the Illinois and the Santa Clara county judges attempted to satisfy themselves that the children knew what they were doing. Both held lengthy hearings and considered evidence, which showed that the child in each case had been fully informed. These courts also heard testimony concerning each child's ability to understand the information. Further, the courts' perceptions, gained from the children's testimony, supported the finding of maturity.

D. *Cases Involving Assertions or Waivers of Right in the Delinquency Context*

Judges are called upon to make several decisions in juvenile delinquency cases that require assessment of a child's competency or maturity. For example, judges must decide whether a child is validly waiving his right to trial when he pleads guilty.¹⁴⁴ Judges also routinely determine whether a child's waiver of the right to counsel is valid.¹⁴⁵ In both situations, the court must ascertain whether the children have knowingly, intelligently, and voluntarily relinquished the constitutional rights involved.¹⁴⁶ Additionally, a police officer must advise a child of the Fifth Amendment right to remain silent before questioning him about criminal activities.¹⁴⁷ Questioning should not proceed unless the child knowingly, intelligently, and voluntarily waives that right.¹⁴⁸ Thus, before a prosecutor may use the child's statements to the police against him in a trial, a judge must determine if a valid waiver of the right to silence took place before the questioning began.

141. *Id.* at 326-27. One of the dissenting judges noted the difference between cases recognizing the doctrine when the preservation of life and health is at stake in contrast to recognizing it when life and health are destroyed. *Id.* at 328-29 (Ward, J., dissenting).

142. *See id.* at 328.

143. *Id.* By the time the case was finally decided, the minor had legally become an adult. *Id.* at 324.

144. The Constitution requires that children receive notice of the charges against them and a hearing to determine their guilt. *In re Gault*, 387 U.S. 1, 33 (1967).

145. The Constitution guarantees children the right to counsel. *Id.* at 36-37; *see generally* Barry C. Feld, *Justice For Children: The Right To Counsel and the Juvenile Courts 19-24* (1993) (noting that juvenile delinquency proceedings afford essentially the same procedural protections as criminal prosecutions).

146. *Fare v. Michael C.*, 442 U.S. 707, 724-28 (1979).

147. *See Miranda v. Arizona*, 384 U.S. 436, 444 (1966).

148. *Id.*

In all these instances, the court must assess a child's cognitive ability to determine: (1) whether the child processed the information received about the rights involved; (2) whether the child engaged in rational decision making; and (3) whether the child waived the right volitionally. When a child decides to plead guilty or defend himself without a lawyer, a judge evaluates a decision that occurs at the time of the hearing.¹⁴⁹ In this instance, the judge exerts some control over the quality and the quantity of the information the child receives concerning that right before the child decides, and can probe to determine whether the child needs more information. By contrast, when a child decides to waive rights in the context of police interrogation, he does so in the police station—long before the court hearing to assess the voluntariness of the waiver occurs. Thus, these sorts of judicial assessments of the child's capacity offer qualitatively different determinations from those concerning guilty pleas or waivers of trial counsel.

As with cases concerning custody, abortion, and health matters, trial judges seldom write about their thought processes. Some trial court opinions exist but no legal commentaries have been found. Again, as with the other kinds of cases, appellate opinions offer the major source of information concerning trial judges' reasoning. Unfortunately, they provide little guidance because they seldom indicate how the trial court judge evaluated cognitive processes.

Appellate decisions regarding these matters require that the trial judge evaluate the "totality of the circumstances" each time a child waives a right. This approach mandates that the court inquire into and evaluate the child's age, experience, education, background, and intelligence to determine whether the child has the capacity to understand the nature of the right relinquished and the consequences of doing so.¹⁵⁰ Courts apply this standard regardless of the child's age. When appellate courts review trial court decisions, they determine whether such factors were considered but not how the trial court judge considered them.

Many consequences result from a plea of guilty. Not only do children admit guilt and subject themselves to sanctions, they also give up many legal rights associated with trial and appeal. When judges conduct hearings at which a plea of guilty is entered, they must insure that a child understands the consequences of pleading guilty and that the plea is entered without coercion.¹⁵¹ Nonetheless, physical or mental

149. Although the child may have arrived at the decision to plead or waive counsel prior to the hearing, the decision is made, as a matter of law, in court.

150. See *Fare v. Michael C.*, 442 U.S. at 725.

151. See *Boykin v. Alabama*, 395 U.S. 238, 240 (1969); *McCarthy v. United States*, 394 U.S. 459, 463-65 (1969). Many juvenile courts follow *Boykin*. See *In re Maricopa County Juvenile Action No. J-86715*, 594 P.2d 554, 556-57 (Ariz. Ct. App. 1979) (citing *In re Beasley*, 362 N.E.2d 1024 (Ill. 1977), *cert. denied*, 434 U.S. 1016 (1978), *In re*

deficiencies will not necessarily render a plea of guilty involuntary or unintelligent.¹⁵² Nor will an inability to understand part of the offense for which a person is charged render the plea invalid.¹⁵³ When alleged delinquents possess such infirmities, the judge must consider the information available to help the child, the degree of his confusion or incapacity, and the effect of his lack of comprehension on the decision.¹⁵⁴

Sophisticated courts require that a judge conduct an informed consent dialogue with the child before a plea of guilty is taken.¹⁵⁵ The District of Columbia, for example, requires judges to advise the child of the following:

- (1) The nature of the charge to which the plea is offered and the maximum period of supervision permissible;
- (2) That the respondent has the right to plead not guilty or to persist in that plea if it has already been made, the right to be tried by a judicial officer and at that factfinding hearing the right to the assistance of counsel, the right to confront and cross-examine adverse witnesses, and the right against compelled self-incrimination;
- (3) That if a plea of guilty is accepted by the Court there will not be a further factfinding hearing, so that by pleading guilty the respondent waives the right to a factfinding hearing; [and]
- (4) That if the respondent pleads guilty, the judicial officer may ask the respondent questions about the offense to which the respondent has pleaded, and if the respondent answers these questions under oath, on the record, and in the presence of counsel, the respondent's answers may later be used against the respondent in a criminal or juvenile proceeding for perjury or false statement.¹⁵⁶

Further, the court must examine whether the child's willingness to plead guilty results from prior discussions between the prosecutor and

Ronald E., 562 P.2d 684 (Cal. 1977), and *In re Michael M.*, 96 Cal. Repr. 887 (Ct. App. 1970)).

152. See, e.g., *Roy v. Perrin*, 441 A.2d 1151, 1156 (N.H. 1982) ("[D]eficiencies in a criminal defendant's physical and mental make-up do not necessarily compel a finding that [the defendant's] plea was involuntary and unintelligent."); *In re C.L.W.*, 467 A.2d 706, 709 (D.C. 1983) (finding that defendant "knowingly and intelligently" waived his *Miranda* rights despite his mental deficiencies).

153. See, e.g., *Allard v. Helgemoe*, 572 F.2d 1, 6 (1st Cir.) ("[W]e hold that incapacity to understand part of the elements of the offense with which one is charged does not without more, make a guilty plea involuntary in constitutional terms."), *cert. denied*, 439 U.S. 858 (1978).

154. *Id.* at 3; see also *State v. Thompson*, 545 P.2d 925, 927 (Ariz. 1976) (holding that a 17-year-old having a schizoid personality could still enter a knowing, intelligent, and voluntary plea).

155. See *supra* notes 144-51 and accompanying text.

156. D.C. Super. Ct. R. 11(b)(1)-(4) (Juv.); see also Institute of Judicial Administration & American Bar Association, *Juvenile Justice Standards: Standards Relating to Adjudication* 3.2 (1980) [hereinafter *IJA-ABA Juvenile Justice Standards*] (listing "admonitions" judge should make before accepting a guilty plea from a juvenile defendant).

the child or the attorney for the child; and must insure that the child enters the plea voluntarily—without force, threats, or promises apart from the plea agreement.¹⁵⁷

Most judges, however, do not replicate the kind of informed consent dialogue expected by the doctrine. Like most other hearings involving children's preferences, plea of guilty hearings seldom last more than fifteen to thirty minutes.¹⁵⁸ Moreover, courts sometimes engage in perfunctory dialogues.¹⁵⁹ Even if the court conducts a thorough hearing, such a proceeding seldom involves more than a well-rehearsed, ritualized litany. For example, judges merely ask the question: "Do you understand that if you plead guilty, X will happen?" The child typically responds: "Yes." Arguably, judges probably expect the child's lawyer to provide the information that the child needs to make a knowing, intelligent, and voluntary decision, and view the hearing as merely a check on the lawyer's work.¹⁶⁰ Such reliance is misplaced. The quality of lawyering in juvenile and criminal courts does not prove to be uniformly high.¹⁶¹ Moreover, the courts of appeal have recognized that the duty to verify that the plea is valid resides primarily with the judge and that duty is particularly stringent when the alleged delinquent exhibits signs of immaturity.¹⁶²

Nonetheless, courts accept pleas of guilty in the vast majority of juvenile delinquency cases. Courts seldom deny children the opportunity to plead guilty when they seek to do so. Many reasons account for this practice.¹⁶³ Few reasons, unfortunately, correspond to a solicitous and scrupulous assessment of a child's capacity to waive the rights associated with trial.

Judges' reasoning concerning the waiver of the right to counsel during juvenile delinquency proceedings presents an even more mysteri-

157. D.C. Super. Ct. R. 11(c) (Juv.).

158. I have represented children accused of crimes for over 25 years. I rarely have seen a hearing last longer than 30 minutes. Most hearings take much less time.

159. See, e.g., *In re John R.*, 419 N.Y.S.2d 625, 627 (App. Div. 1979). In that case, the juvenile judge merely advised the child that he could "waive the right to a trial and make an admission" and asked whether the child "want[ed] to make an admission or . . . want[ed] to have a trial." *Id.*; see also *People v. Stewart*, 356 N.E.2d 991, 992-93 (Ill. App. Ct. 1976) (showing that the court conducted an inquiry of a 14-year-old that consisted of five questions).

160. Some courts have explicitly stated that the defense lawyer as well as the judge has a duty to provide the information. See, e.g., *Rinehart v. Brewer*, 561 F.2d 126, 131 (8th Cir. 1977) (discussing counsel's role with a 15-year-old "immature" first offender). Indeed, a lawyer would be remiss if he did not do so. See Model Rules of Professional Conduct Rule 1.4 (1992); IJA-ABA Standards, *supra* note 156, at 3.6.

161. See Feld, *supra* note 145, at 249-52 (citing studies and examples of poor lawyering); see also *Rinehart*, 561 F.2d at 129-31 (citing appellee's counsel as an example of the poor quality of lawyering in juvenile delinquency proceedings).

162. See *Rinehart*, 561 F.2d at 131.

163. It is no secret that children who admit their guilt gain more favorable dispositions than those who go to trial. Further, urban courts would grind to a halt if all children chose to go to trial.

ous process.¹⁶⁴ In a recent study of the right to counsel in Minnesota, Barry Feld found that over one-half of the children alleged to be delinquent waived their right to counsel.¹⁶⁵ In some counties, more than eighty percent of twelve- and thirteen-year-old children waived that right.¹⁶⁶ The waiver of the right to counsel, like the entry of a plea of guilty, must be knowing, intelligent, and voluntary. The trial court makes this determination by looking at the "totality of the circumstances."¹⁶⁷

When a child who is represented by counsel enters a plea of guilty, presumably he or she has received some assistance in making the decision. When the child waives the right to counsel, only the judge monitors the informed consent dialogue between the judge and the child, which precedes that waiver. Since these proceedings remain confidential, little information exists about how trial judges assess a child's capacity to understand and waive this right. Appellate cases reveal little about the way trial judges evaluate the information they receive.¹⁶⁸ Because these hearings involve no lawyers in the first place, appeals seldom occur. When they do, some appellate courts seem wary of accepting a waiver of the right to counsel.¹⁶⁹ Appellate courts appear to require a more specific informed consent dialogue than usually occurs when other rights are waived.¹⁷⁰ Children, like adults, may waive the right to counsel only if they do so knowingly, intelligently, and voluntarily¹⁷¹ with a "rational as well as factual understanding of the proceedings against [them]."¹⁷² Despite this seemingly rigorous standard, trial and appellate courts have accepted waivers of the right to counsel from children as young as eleven, if they are not physically or mentally impaired and if a parent is present.¹⁷³ Such acceptances have occurred even when the full scope of a

164. The right to counsel in juvenile proceedings is guaranteed by the Due Process Clause of the United States Constitution. *In re Gault*, 387 U.S. 1, 41 (1967).

165. See Feld, *supra* note 145, at 46.

166. See *id.* at 244. Feld studied the rates of representation in New York, South Dakota, Pennsylvania, California, and Minnesota. In urban areas, representation reached as high as 95.9%. In the Midwest, it reached a low of 37.5%. See *id.* at 54-55.

167. *Fare v. Michael C.*, 442 U.S. 707, 724-25 (1979); see *supra* notes 145-50 and accompanying text.

168. A broad based Westlaw search was conducted.

169. See, e.g., *People v. Shawnn F.*, 40 Cal. Rptr. 2d 263, 268 (Ct. App. 1995) (recognizing the differences in the potential inquiries a judge may make to a 15-year-old and a 17-year-old).

170. See, e.g., *K.M. v. State*, 448 So. 2d 1124, 1125 (Fla. Dist. Ct. App. 1984) (requiring a thorough inquiry as to whether the juvenile waiver of counsel was made voluntarily and intelligently, and that it "be at least equal to that accorded an adult"); *State ex rel. Jones*, 372 So. 2d 779, 780 (La. Ct. App. 1979) (finding that retarded 15-year-old "lacked capacity to intelligently waive his right to counsel").

171. *Faretta v. California*, 422 U.S. 806, 835 (1975).

172. *People v. Poplawski*, 30 Cal. Rptr. 2d 760, 766 (Ct. App. 1994) (quoting *Dusky v. United States*, 362 U.S. 402, 402 (1960)).

173. *Huff v. K.P.*, 302 N.W.2d 779, 282-83 (N.D. 1981).

lawyer's duty and ability has not been explained to the child.¹⁷⁴ Moreover, prior experience with the court may overcome educational deficiencies and validate the waiver as long as a child is not retarded.¹⁷⁵

Cases do exist where judges have brought to bear the full force of cognitive development on the waiver decision. In upholding a child's legal right to waive counsel, the Connecticut Supreme Court, for example, noted the special problems that arise when assessing such waivers:

[T]he validity of a child's waiver of counsel depends upon furnishing the child full information not only about the child's own legal rights but also about the overall nature of the proceeding against him or her. The need for broad-gauged advice is underscored by recent empirical studies demonstrating that significant numbers of children erroneously believe that lawyers are responsible for deciding issues of guilt and punishment, that defense lawyers will not advocate the interests of a juvenile who admits to the violation and that defense lawyers have a duty to report to the court any evidence of the juvenile client's culpability. Only a full colloquy between the court and the child can avoid such misperceptions and provide a solid basis for the intelligent exercise or waiver of the right to counsel. Only a full colloquy will permit the court to make an accurate determination of whether a child who professes to wish to proceed pro se, without counsel, has the developmental and cognitive ability to undertake a realistic assessment of the consequences of such an action.¹⁷⁶

In directing the trial court to conduct an informed consent dialogue prior to accepting the waiver of counsel, the Connecticut Supreme Court cited the work of Grisso, Piaget, and other cognitive development researchers.¹⁷⁷ The court also noted the powerful influences that parents exert on their children, and how those influences affect waiver decisions.¹⁷⁸ The court went on to reject the waiver in *In re Manuel R.* because of undue parental influence, lack of inquiry into capacity, the child's incomplete understanding of the charges, and an absence of any discussion of the role of counsel.¹⁷⁹ The appellate court seemed to suggest that trial judges engage in an informed consent dialogue in order to determine the validity of the waiver. The court, however, did not discuss how the trial court should assess the child's capacity during that inquiry.

The discussions between the judge and the child that precede a waiver of counsel usually do not last longer than hearings to accept a plea of guilty. Like all other hearings involving decision making by children, they seldom last long enough for a judge to acquire the infor-

174. *See id.*

175. *In re R.M.*, 252 A.2d 237, 240 (N.J. 1969).

176. *In re Manuel R.*, 543 A.2d 719, 725 (Conn. 1988) (citation omitted).

177. *Id.*

178. *Id.* at 725-26.

179. *Id.* at 726-27.

mation necessary to render an honest and informed decision concerning a child's cognitive ability to make the choice at hand.¹⁸⁰

From a cognitive development standpoint, judicial decisions concerning the validity of police interrogation present the most perplexing cases. The judge exerts no control over the amount of information the child possesses when that child makes the decision to knowingly, intelligently, and voluntarily waive the right to silence. That decision takes place weeks or months before the court hearing, and in a police station with no independent witnesses in attendance. The law requires scant information be given to the child before she makes the decision to waive rights. *Miranda v. Arizona* and subsequent cases state that the police must do little more than repeat to the accused the now familiar litany that—"he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires."¹⁸¹ The waiver may be shown by nothing more than simple assent.¹⁸² The knowledge the judge gains comes through the testimony of arguably biased witnesses; the child may not even testify. If the child does testify, his testimony more likely reflects his later conversations with his lawyer rather than his knowledge at the time of the event. As a result, children who testify often demonstrate more knowledge about their rights, and more understanding of the consequences of waiving them, than they possessed at the time the rights were waived.

To evaluate the validity of the waiver, regardless of the child's age, courts rely on the "totality of the circumstances" standard.¹⁸³ Although some courts have rejected a simple balancing of factors as leading to only "a cursory appraisal of the juvenile's position,"¹⁸⁴ most courts focus on the objective circumstances surrounding the interrogation and attempt to balance their relative impacts. Courts consider:

- (1) age of the accused;
- (2) education of the accused;

180. See Feld, *supra* note 145, at 241-48 (criticizing the "totality of the circumstances" approach in cases concerning waivers of rights by minors).

181. *Miranda v. Arizona*, 384 U.S. 436, 479 (1966); see also *Patterson v. Illinois*, 487 U.S. 285, 292-93 (1988) (finding that *Miranda* warning was sufficient to inform petitioner of his right to counsel).

182. See *North Carolina v. Butler*, 441 U.S. 369, 372-73 (1979).

183. See *In re Lucas F.*, 510 A.2d 270, 273-74 (Md. Ct. Spec. App. 1986) (suggesting that, albeit unlikely, even a waiver of rights by a 10-year-old may meet the criteria); see also *Commonwealth v. Philip S.*, 611 N.E.2d 226, 233 (Mass. 1993) (finding a knowing and intelligent waiver of rights by a 12-year-old).

184. See, e.g., *State v. Nicholas S.*, 444 A.2d 373, 377 (Me. 1982) (stating that "[t]he simple balancing of factors can only lead to a cursory appraisal of the juvenile's position thereby threatening the protection of his fundamental constitutional rights").

- (3) knowledge of the accused as to both the substance of the charge, if any has been filed, and the nature of his rights to consult with an attorney and remain silent;
- (4) whether the accused is held incommunicado or allowed to consult with relatives, friends or an attorney;
- (5) whether the accused was interrogated before or after formal charges had been filed;
- (6) methods used in interrogation;
- (7) length of interrogations;
- (8) whether or not the accused refused to voluntarily give statements on prior occasions; and
- (9) whether the accused has repudiated an extra judicial statement at a later date.¹⁸⁵

As the Supreme Court of Maine noted in *State v. Nicholas S.*,¹⁸⁶ when dealing with children, to focus on the above factors is inadequate to determine whether a child has the capacity to waive his rights, or has done so knowingly and intelligently. This case and others like it seem to be calling upon the police to engage in an informed consent dialogue. Few police officers conduct such a dialogue, and few courts require it.¹⁸⁷ The Connecticut Supreme Court, for example, while calling for such a dialogue in cases involving waiver of the right to counsel,¹⁸⁸ rejects such an approach in cases involving *Miranda* issues.¹⁸⁹ The United States Supreme Court stated in *Patterson v. Illinois*¹⁹⁰ that the police need only inform an arrestee of his right to an attorney, his right to remain silent, and the right of the government to use his statements in order to fully inform him of his rights and their consequences.¹⁹¹ Police seldom do more. Waivers of the right to silence often involve little more than the child's answer "yes" to the police officer's question "do you understand these rights."¹⁹² At the subsequent court hearing to assess the validity of that waiver, police officers frequently relate that they read the *Miranda* warnings and that the child agreed to talk. As previously noted, the child probably will not testify at the hearing. The court receives no evidence of the child's intellectual functioning. In the absence of such evidence, courts apply a *Miranda/Patterson/Fare* analysis and find that the child

185. *West v. United States*, 399 F.2d 467, 469 (5th Cir. 1968), cert. denied, 393 U.S. 1102 (1969).

186. See *Nicholas S.*, 444 A.2d at 378 (stating that "[s]uch a focus is not inappropriate; it is, in most instances, however, inadequate").

187. See *State v. Perez*, 591 A.2d 119, 125 (Conn. 1991) (citing cases such as *State v. Mattox*, 550 P.2d 630, 633 (Ariz. 1976); *People v. Prude*, 363 N.E.2d 371, 373-74 (Ill.), cert. denied, 434 U.S. 930 (1977); *State v. O'Connor*, 346 N.W.2d 8, 10 (Iowa 1984); *Edwards v. State*, 608 P.2d 1006, 1011 (Kan. 1980); and *State v. Manns*, 329 S.E.2d 865, 870 (W. Va. 1985)).

188. *In re Manuel R.*, 543 A.2d 719, 724-25 & n.6 (Conn. 1988).

189. *State v. Perez*, 591 A.2d at 124-25 & n.14.

190. 487 U.S. 285 (1988).

191. *Id.* at 292-93.

192. See *In re Robert O.*, 439 N.Y.S.2d 994, 995-96 (Fam. Ct. 1981).

knowingly, intelligently, and voluntarily waived the right to silence. Although defense attorneys sometimes call school counselors and psychologists to testify at these hearings, their testimony often confuses intellectual capacity with genuine understanding.¹⁹³ Further these witnesses are never present when the waivers of rights actually occur. Thus, a finding that the child exhibited cognitive competence at the time of the waiver will not always guarantee that the child gave informed consent. Moreover, since the evaluation of the child's knowledge that is conducted by the counselors usually takes place between the time of the confession and the time of the court hearing, previous conversations between counsel and the child may likely affect the outcome of the evaluation. Further, children who are capable of giving informed consent at the time of the evaluation may not have been competent at the time they waived their right. Nonetheless, properly presented testimony by a psychologist may on occasion demonstrate that a child does not have the capacity to waive the right to silence.¹⁹⁴

While hearings concerning *Miranda* violations will last longer than most other kinds of hearings concerning children's capacity, a conscientious judge will most likely know little more about the child than he will know about children in other hearings. No informed consent dialogue takes place in the courtroom, the judge knows little about the child, and he seldom speaks to the child himself. What the judge does know, in most cases, relates to surface facts such as age, experience with the judicial system, and grade in school. He may know the child's IQ, but will probably not know what such a score means in the context of the issues presented by the case. He will probably not receive information about the cognitive development of the child, or the child's competence to waive the rights in question. Indeed, for the most part, little that occurs at the hearing places a judge in a position to accurately assess the existence of a knowing, intelligent, and voluntary waiver of the right to silence.

III. RECOMMENDATIONS FOR ETHICAL JUDICIAL DETERMINATIONS OF CHILDREN'S DECISION-MAKING CAPACITY

It seems clear that, despite a legal recognition of the importance and relevance of social maturity and cognitive capacity in many different kinds of cases involving children, trial judges gain very little information about those concepts during a hearing, and spend very little time considering them. Further, when judges determine that a child is mature or intellectually capable of making decisions, the factors con-

193. See *In re Owen F.*, 523 A.2d 627, 632-33 (Md. Ct. Spec. App. 1987); *In re Welfare of M.D.S.*, 345 N.W.2d 723, 733 (Minn. 1984).

194. *In re Welfare of S.W.T.*, 277 N.W.2d 507, 512 (Minn. 1979); *Robert O.*, 439 N.Y.S.2d at 1004. But see *W.M. v. State*, 585 So. 2d 979, 983 (Fla. Dist. Ct. App. 1991) (finding a waiver by a 10-year-old learning disabled child).

sidered in reaching those decisions frequently do not reflect the accumulated research about child development.¹⁹⁵

Arguably, if ethical decision making by judges means making decisions based on the facts before them, on the developing law, and on valid scientific principles (rather than on personal experiences, personal assessments about how things should be, or societal beliefs and conventional wisdom), many observers could easily conclude that ethical decision making in children's cases does not regularly occur. But of course, nothing is quite so simple. As noted throughout part II of this Article, judges must depend on lawyers to develop evidence in these cases. If a lawyer fails to introduce evidence to show that the child does or does not possess the intellectual capacity or psychosocial stability to make decisions, a judge must rely simply on his or her estimations of the social maturity and cognitive capacity gleaned from the witness's demeanor or assessed from the child's answers to the questions posed by the lawyers or the judge. The absence of testimony by the child, or cross-examination of the child, further hampers a judge's ability to make these assessments. When someone outside the presence of the court assesses the child's maturity, understanding, and capacity to make decisions, the judge's assessment of those concepts will be accurate only if the testimony of the witnesses correctly portray the circumstances of the assessment. The process is further complicated if the witnesses conducting the assessment have a substantial interest in the outcome of the case. Moreover, replicating the child's mental condition at the time an event occurred presents a greater challenge than simply replicating the circumstances of the event itself.

Even if courts began to demand that better evidence be presented at the hearings, the process might not change and the results might not differ. The law places the burden of persuasion in civil cases on the plaintiff. If plaintiffs produce insufficient evidence to prove their case, they lose. In children's cases, however, the law does not clearly assign the burden of persuasion to the plaintiff. For example, in various kinds of child custody cases—where courts make determinations by applying the best interest of the child standard—both claimants have the burden of persuasion. In addition, when a child seeks an abortion, a demand for more proof than the petitioner presents often proves counter-productive if doing so would only reinforce an otherwise obvious determination. This result is especially true if no other party in the proceeding demands better proof. Furthermore, in disputes concerning *Miranda* issues, the government has the burden of persuasion, but the child possesses the information that the court needs. If the child does not present such information, and if evidentiary and constitutional privileges prevent the government from obtaining it, the pros-

195. *In re* Manual R. 543 A.2d 719, 725 (Conn. 1988).

ecutor would have great difficulty in ever meeting the burden. Such an outcome exacts a great societal cost.

If courts required litigants to prove capacity, maturity, and understanding, the cost of litigation would substantially increase and justice could be delayed. Ascertaining cognitive competence involves a singularly complex process. Individual testing and assessments would be necessary. Even if the assessments took place, however, the current forum for making these determinations might not be the most suitable. To establish that the child made a choice with informed consent, many potentially long conversations between the child, the interested parties, and perhaps neutral parties might have to occur. While costs should not deprive a litigant of justice, many litigants could not afford these activities. Further, even if these intensified evaluations took place, the final outcomes in some cases might not differ significantly from those occurring now.

Notwithstanding these difficulties, judges need to reach decisions in an ethical manner. Failure to do so may cause harm and result in injustice. Even if the current truncated procedures achieve a sufficient semblance of justice in most cases, errors will occur unless courts implement and follow a coherent system of ethical decision making. For example, rejecting a child's preference in a custody case may not cause a child harm, but may constitute an assault on the personal autonomy of a mature competent adolescent. Moreover, orders that reject a child's preference may prove to be unenforceable. Additionally, an adolescent may not be physically harmed if the court requires parental consent or notification before an abortion is performed. Such parental involvement may, however, cause psychological harm and results in an overwhelming intrusion into a cognitively competent child's personal autonomy, especially if the judge bases the decision on personal beliefs. Moreover, the decision might result in a back room abortion. Other kinds of health care decisions raise similar autonomy and enforceability issues. Finally, the long-term physical, psychological, and social damage that may follow from erroneous determinations of waivers of right in delinquency cases are too great to be calculated.

For judicial decisions to be correct and ethically reached, the procedure in each kind of case discussed in part II requires adjustments. The decision making in all kinds of cases require that judges be aware of scientific research concerning children's development, and rely on this research appropriately in the hearings. To advocate that judges use this information, however, raises questions of evidentiary law and fairness to litigants. If the parties do not introduce the evidence, how does the information become part of the process? Two possible ways exist. First, information may become part of the hearing through the formal process of judicial notice. Courts may take judicial notice of information that is common knowledge or capable of certain verifica-

tion.¹⁹⁶ Although greater agreement exists concerning judicial notice of facts arising out of the physical sciences, courts may also take judicial notice of social science facts.¹⁹⁷ As noted throughout this Article, some general agreement about child development exists. For example, few people believe that very young children think rationally, and most researchers believe the Piagetian stage theory, with some refinement in the case of adolescents, to be generally valid. Thus, a judge who needs to make findings concerning a child's cognitive capacity may formally take judicial notice of some aspects of the scientific research developed by cognitive theorists. Appellate courts have actually done so.

More importantly, however, all legal fact-finders rely on information that is not formally part of the record. Indeed, the analysis of the cases in part II, not surprisingly, suggests that judges currently are relying on some theory of child development when they make decisions. All fact-finders bring to bear life's experiences on the evidence they hear and the decisions they make. That is what drawing inferences from the evidence is all about. As Professor Thayer said about 100 years ago:

In conducting a process of judicial reasoning, as of other reasoning, not a step can be taken without assuming something which has not been proved; and the capacity to do this, with competent judgment and efficiency, is imputed to judges and juries as part of their necessary mental outfit.¹⁹⁸

Unfortunately, much current judicial reasoning with regard to child development too frequently relies on folk tales or the judge's personal experiences, rather than on more verifiable theory.¹⁹⁹ Such decision making constitutes unethical judicial practice.

If statutes or court rules required judges to develop some expertise about children before they begin to decide cases,²⁰⁰ then the decision making in the types of cases discussed in part II might occur differently. Serious initial and in-service training should be required of all judges assigned to hear children's cases. In each case, the judge should be required to give the litigants notice that the weight accorded

196. McCormick's Handbook of the Law of Evidence § 329-30 (Edward W. Cleary et al. eds., 2d ed. 1972); Gail S. Perry & Gary B. Melton, *Precedential Value of Judicial Notice of Social Facts: Parham as An Example*, 22 J. Fam. L. 633, 634 n.7 (1983-84).

197. 1 Jack B. Weinstein et al., *Weinstein's Evidence*, ¶ 200[06] (1995); Perry & Melton, *supra* note 196, at 639-40.

198. Weinstein, *supra* note 197, ¶ 200[01] n.14 (quoting Thayer, *A Preliminary Treatise On Evidence at Common Law* 279-80 (1898)); see also Perry & Melton, *supra* note 196, at 642-43 (discussing evidentiary cases concerning experts).

199. See Perry & Melton, *supra* note 196, at 647-60 (providing a critique of the scientific assumptions used by the Supreme Court in *Parham v. J.R.*, 442 U.S. 584 (1979)).

200. See D.C. Code Ann. § 11-908 (1981) (presupposing special qualifications for judges in the District of Columbia court of general jurisdiction who are assigned to the Family Division). Unfortunately, this presupposition has almost no validity.

to children's preferences and decisions will reflect an understanding of the latest findings of child development researchers. Thus, the court should assume that, in the absence of specific evidence to the contrary, children below the age of ten are incapable of rational thought as that term is understood by child development specialists.²⁰¹ The court should further assume that in the absence of evidence to the contrary, children above the age of fourteen—who possess accurate information and are not subject to undue pressure—have the ability to make decisions as well as adults. In between the ages of ten and fourteen, however, the courts should make no assumptions because of the fluidity of cognitive growth. Those seeking to present evidence of a child's preference or waiver of right should be required to demonstrate cognitive capability when the child is between ten and fourteen years old. In such cases, the parties would be permitted to present evidence to prove or disprove cognitive competency.

With respect to the quality of the decision as opposed to the cognitive capacity to make it, the court should require an informed consent dialogue before accepting the child's preference or waiver as valid. Thus, evidence would have to be presented to show that the child was fully informed of the nature of the activity involved as well as the risks, discomforts, benefits, and alternatives to the choice. Because children may view risk differently from adults and may have different temporal perspectives, the information provided to them should account for these variables. The choice itself would have to be voluntary; a coerced choice should be rejected. A court should not accept an acquiescent or deferent response to authority—be it peer, parental, or official—unless the child received counseling about the right to reject such influence.²⁰² If the child reached such a preference or waiver of right in this fashion, it would prevail in the absence of some serious countervailing societal interest.

In all cases involving child custody, judges should give no weight to preferences stated by children under ten.²⁰³ Because children under ten have not developed to the point where they can likely engage in rational decision making, courts need not give weight to their preference. Although weight should not be given to the preferences of these young children, "Many young children exhibit extraordinary moments

201. Using the age often reflects the studies of Piaget, Ambuel and Rappaport, Lewis, Wertheim and Campbell, Belter and Grisso, and others. See *supra* part I.

202. Grisso & Vierling, *supra* note 110, at 421 (discussing psychological definition of voluntary consent).

203. The *Standards for Attorneys and Guardians ad Litem in Custody and Visitation Proceedings*, published in 1995 by the American Academy of Matrimonial Lawyers presume competence at the age of 12 because judges begin to accord deference to children's choices at that age. See American Academy of Matrimonial Lawyers, *Representing Children: Standards for Attorneys and Guardians ad Litem in Custody or Visitation Proceedings* 2 (1995).

of wisdom."²⁰⁴ Further, everyone's personal autonomy—regardless of their age—should be recognized and respected. Thus, children choosing to state a preference for a custodial parent should be heard. On the other hand, because custody issues may be very disturbing for young children,²⁰⁵ courts should not encourage litigants to present such testimony.

When a child fourteen years of age or older states a preference, courts should accept it as controlling if the preference is expressed after an informed consent dialogue takes place.²⁰⁶ If judges conduct the dialogue themselves, it must take longer than the fifteen minutes that most judicial interviews with a child currently take. Given the nature of child custody hearings, however, judges probably will never know enough about the family's dynamics, or be able to take enough time during the hearing to ensure that the child's choice reflects full knowledge of the risks and benefits of the alternatives, and is not merely an acquiescence to peer or parental influences. For the preference to be determinative, third parties—either professionals or close but neutral friends—should conduct the dialogue insuring that the child understands the risks, benefits, and alternatives, and is not subject to overwhelming outside influences. The judge's role should be to ensure that a complete dialogue occurred.²⁰⁷ The court should disregard the fact that a child chooses the parent that the judge would reject, unless evidence exists showing a clear physical or psychological danger to the child from that parent. Litigants who seek to introduce evidence of the preference of a child between the ages of ten and fourteen, would have to engage a professional to assess the child's cognitive capacity. If the expert determined the child to be cognitively competent to make the choice, then an informed consent dialogue would have to occur. If the evidence showed that a cognitively competent child between the ages of ten and fourteen made the choice with full information and without undue influence, the court would be bound by the decision in the absence of evidence of harm.

Letting cognitively competent, well-informed children choose their custodial parent does not contravene the best interest standard. Let-

204. Len Doyal & Paul Henning, *Stopping Treatment For End-Stage Renal Failure: The Rights of Children and Adolescents*, 8 *Pediatric Nephrology* 768, 769 (1994).

205. See Wallerstein & Kelly, *supra* note 87, at 28-30 (discussing various traumatic situations faced by children in custody disputes).

206. Of course, there is no reason to require children at any age to choose. Divorce is a traumatic event for most children. As a result, they should not be forced to make a choice or even be encouraged to do so.

207. An informed consent dialogue conducted with an adolescent who is familiar with divorce and who can reason about alternatives has been found to produce sound results. Gerald P. Koocher, *Children Under the Law: The Paradigm of Consent, in Reforming The Law: Impact of Child Development Research* 3, 21-23 (Gary B. Melton ed., 1987) (citing E.F. Greenberg & J. Rappaport, *Predictors Of Children's Competence To Participate In Child-Custody Decision Making* (1984) (unpublished manuscript)).

ting children decide does not present a danger. Most parents involved in custody cases are presumably fit parents, who have raised the children for years without official involvement. Further, scant evidence supports the view that the judge's choice is any better. We presume cognitively competent people to be best able to determine their own interests. We make this assumption because a person usually knows more about his own interests than any third party. We also presume that cognitively competent children can make equally or more difficult decisions, such as those associated with pregnancy. Moreover, most divorcing parents decide custody issues on their own, and most courts now encourage them to do so. Anecdotal evidence suggests that an adolescent's preference often controls the custody arrangement. Finally, as most judges realize, a child ordered to live with a parent they reject will consider it an affront to their personal autonomy, which often leads to disobedience of that order. Such disobedience of the order will only spur new rounds of litigation.

The same guidelines should apply in the delinquency context.²⁰⁸ Pleas of guilty, waivers of counsel, and waivers of rights preceding police interrogations by children under ten should not be deemed valid. Such waivers by those fourteen and over should be preceded by an informed consent dialogue. Waivers of rights by children between ten and fourteen should only be deemed valid if the evidence shows that the child is cognitively competent and that an informed consent dialogue has preceded the waiver. Such a standard does not conflict with the totality of the circumstances standard. It merely insures that litigants address the most significant factor in the totality equation.

Judges would conduct the dialogue in proceedings to enter a plea of guilty. The inquiry would resemble that used by courts which follow the Boykin-Rule 11 procedure.²⁰⁹ Nonetheless, such a dialogue would have to be more detailed to insure that the child entered the plea with a full understanding of the risks and benefits of not maintaining innocence. Ritual-like conversations would have no place in the courtroom. At a hearing to enter a plea of guilty, the court would have to take the time to insure that the child understood the nature of each right relating to trial and the consequences, risks, and benefits of giving them up. The court would also have to insure that neither parent nor lawyer was controlling the decision.

The dialogue concerning a waiver of the right to counsel would also be conducted by the court, and would resemble the dialogue concerning a plea of guilty. The dialogue, however, would have to be very

208. While the same guidelines would apply, it is likely that there would be more challenges to the children's cognitive capacity since so many children who come before the court charged with crimes have lower IQs and educational and psychosocial deficiencies, all of which correlate to lower levels of cognitive functioning.

209. *See supra* notes 151, 156.

extensive. Explaining all of the benefits and risks,²¹⁰ at every stage of the proceeding, of waiving counsel would take a great deal of time. Further, the judge is, to some extent, an interested party in the decision to waive counsel. Young people often acquiesce in the face of judicial authority. A judge may send subtle but powerful clues about his preferences for the child during this inquiry.²¹¹ Thus, the judge would have to take great care to maintain his neutrality in the decision.

Police officers would have to alter the way they inform children of their rights before questioning begins. As Grisso points out, children who are merely told their rights as prescribed by *Miranda* do not fully understand them even when they have the capacity to do so.²¹² Simply reading the warnings will not give a child enough information about the nature of the rights or about the risks, benefits, and consequences of waiving them. Police officers must necessarily elaborate. Further, the conditions under which the rights are waived constitute inherently coercive circumstances. Police do not engage in an informed consent dialogue. The manner in which police obtain waivers from children would not suffice in a medical situation. Currently, police officers seek to obtain confessions, not to warn people of the reasons why speaking to them may be disadvantageous. Although seeking confessions at all costs may be an acceptable societal goal, courts have rejected this stance.²¹³ The Supreme Court has not overruled *Miranda* even though their enunciated standard can be used to justify a less than ideal inquiry.

Trial judges do not always implement the full scope of the *Miranda* doctrine in children's cases. The impulses of the court in delinquency cases differ from those in custody cases, medical cases, or even abortion cases. The United States shows little sympathy towards law breakers; therefore, courts do not invoke the best interest standard to keep a delinquent out of the court—even if it may be in his best interest.²¹⁴ Not surprisingly, in light of societal outrage about crime, courts

210. It is hard to imagine any benefits of waiving the right to counsel. *But see* Feld, *supra* note 145, at 73, 245 (stating that uncounseled children often receive lesser sanctions from the court than do those that have counsel).

211. *See In re Maricopa County*, 594 P.2d at 556 (discussing of the proper way to conduct hearings concerning waivers of the right to counsel by children and citing *In re Beasley*, 362 N.E.2d 1024 (Ill. 1977), *cert. denied*, 434 U.S. 1016 (1978); *In re Rondald E.*, 562 P.2d 684 (Cal. 1977); *In re Michael M.*, 96 Cal. Rptr. 887 (Ct. App. 1970)).

212. Grisso, *supra* note 45, at 1137, 1143.

213. *Miranda v. Arizona*, 384 U.S. 436 (1966) (finding that a suspect has the right against self-incrimination in an interrogation). The *Miranda* Court also stated that "our accusatory system of criminal justice demands that the government . . . produce the evidence against [the defendant] by its own independent labors, rather than by the cruel, simple expedient of compelling it from his mouth." *Id.* at 460 (citing *Chambers v. Florida*, 309 U.S. 227, 235-38 (1940)).

214. When the child's best interest and crime control clash, crime control usually prevails. *See Holland & Mlyniec, supra* note 3, at 19.

find most confessions to be knowingly, intelligently, and voluntarily made, and use them against children. Surprisingly, however, these results can occur when cognitive research suggests such findings to be insupportable. Grisso's studies have shown that children younger than fifteen years of age seldom understand and protect their rights.²¹⁵ He measured children's ability to comprehend the words and phrases used in waiving statements as well as their ability to comprehend the function and significance of the rights conveyed in the statements.²¹⁶ He found that eighty percent of children under fifteen years of age could not understand either the words of the warnings or the functions of the rights. While sixteen- and seventeen-year-olds can understand individual words of the *Miranda* warning as well as adults, comparable adult levels of understanding of the underlying rights were found lacking.²¹⁷ Additionally, older adolescents with IQs under eighty could not understand their rights at all.

Although the police would resist implementing an informed consent dialogue in a waiver of rights situation, courts should insist upon it in order to make ethical decisions. Indeed, some courts have taken this step.²¹⁸ All courts should take this similar step because to take waivers of rights from children (who are cognitively incapable of understanding what they are doing) and use such waivers to convict children for crimes does not speak well of a society. Our zeal to convict children should not overwhelm our need to treat them as children. On a daily basis, we reject the choices that cognitively incompetent children make concerning all sorts of activities. Yet, with respect to choices of immeasurable and lasting import made in delinquency cases, judges let cognitively incompetent children choose. Such inconsistencies, even in the face of growing societal concerns regarding crime, do not constitute an ethical practice.

Requiring that cognitive competency be proved will require some changes in hearing procedures. Competency assessments by qualified professionals will become more frequent. Prosecutors will have to be given access to children below the age of fourteen and to older children who raise cognitive incapacity because they will have the burden to prove the validity of the waiver. This can be accomplished similarly to the way they gain access to defendants pleading insanity. Profes-

215. Thomas Grisso, *Juveniles' Consent in Delinquency Proceedings*, in *Children's Competence to Consent* 131, 138-40 (Gary B. Melton et al. eds., 1983); see also Belter & Grisso, *supra* note 45, at 907-08; Grisso, *supra* note 45, at 1143, 1151-52, 1164-65.

216. Grisso, *supra* note 45, at 1143-49; see also A. Bruce Furguson & Alan C. Douglas, *A Study of Juvenile Waiver*, 7 San Diego L. Rev. 39, 40-42, 54 (1970) (reaching the same results).

217. See *In re R.W.*, 279 A.2d 709, 713 (N.J. Super. Ct. App. Div. 1971) (acknowledging that even adult lay people are not equipped to understand or waive the rights).

218. See *Maine v. Nicholas S.*, 444 A.2d 373, 378 (Me. 1982) ("The totality-of-the-circumstances approach requires a broader evaluation of the circumstances surrounding a confession than examination of only the words spoken and actions taken by the parties during the actual period of questioning.").

sionals associated either with the prosecutor or with the court itself can provide assessments. Statements concerning the crime itself would be excluded from the trial. Since children over the age of fourteen commit the bulk of juvenile crime, competency would not be an issue in most cases. Nonetheless, police officers would have to conduct an informed consent dialogue to insure that the child truly knew and rationally processed the information. Finally, the police would have to refrain from using the subtle coercive tactics they now use for obtaining waivers of rights.

The same rules should apply in abortion cases. Lawyers for children and pregnancy counseling centers would have to be put on notice that, except for rare cases, a child under ten could not obtain an abortion without parental consent or notification unless it was in her best interest.²¹⁹ Additionally, in all cases involving children under the age of fourteen who come to the court with a petition to dispense with parental notification or consent, evidence of cognitive capacity would have to be established and evidence of an informed consent dialogue would have to be presented unless the petitioner was relying on the best interest test. Despite the presence of time constraints in these cases, the need for additional evidence should not create too great an additional burden. Pregnancy counselors should be providing children with complete information prior to the abortion procedure in any event. These dialogues should spell out the risks and benefits of abortion and the alternatives to it. When properly conducted, the dialogues also provide a check on undue influences from peers, and take into account emotional reactions that might be clouding rational decision making. Providing the additional assessment of cognitive capacity might require counseling centers to have agreements with development specialists to perform such evaluations on an expedited basis. While such requirements do place additional burdens on petitioners, refusing to require them places a judge in the position of making a legally required finding without sufficient evidence to support it. Such decision making is unethical.

Health and treatment decisions should also be subject to the same guidelines. Informed consent dialogues take place now as a matter of course when families contemplate organ donations or surgery, and when doctors propose risky or painful life prolonging therapies. In most cases today, children and parents come to the same conclusions about medical treatment and donation, and doctors accede to these wishes. When the parent and child disagree, or the child and parent disagree with the doctors, adding the burden of proving the cognitive capacity of children under fourteen will not add to the burden of the petitioners.

219. The *Bellotti* test requires courts to find either that the child is mature or that the abortion is in her best interest. *Bellotti v. Baird*, 443 U.S. 622, 643-44 (1979).

The possibility of death that arises when children refuse to accept life saving interventions complicates resolution of health care disputes. Accepting the mature minor standard in health care matters permits cognitively capable children to choose death as well as to choose life saving therapies or procedures. Older reported cases usually involved blood transfusions, a rather benign but religiously objectionable medical procedure incidental to other nonobjectionable medical procedures. Today, modern medicine that may help a child live may also cause intense and unbearable pain and may kill or at least not save the child. Similarly, modern medical science enables children to participate in altruistic medical procedures that may endanger the child's own life.

The American Academy of Pediatrics and the Midwest Bioethics Center of Kansas City, Missouri have published formal statements endorsing the right of all persons except those with diminished decision-making capacity to refuse medical interventions.²²⁰ The principle author of the statements, Dr. William Bartholome, says that under the guidelines "if a person is 15, 16, or 17 and knows what is wrong with them and understand [sic] the options, risks and benefits of treatment, they would have the same right of refusal an adult would have."²²¹ Others disagree. For example, Dr. Keith Ashcraft, a pediatric surgeon in Kansas City, says children "in an acute situation, particularly a teenager . . . very frequently will make the wrong decision. . . . Children can't realize the pain-for-gain concept, and to spend your time trying to convince them . . . seems to be stretching the point to the ridiculous."²²²

The prospect of a judge forcing a child to undergo a medical procedure seems offensive. As Leonard Glantz, a Boston University professor of health law, asks in relation to a sixteen-year-old who refuses chemotherapy: "What would [doctors] be asking the court for? The authority to tie him down?"²²³ George Annas, a colleague of Glantz' adds: "There[] [i]s absolutely no point in going to court on this. . . . What you do is talk to the kid and just keep talking to him. You've got a much better chance of persuading him than persuading a judge."²²⁴ Although such persuasion may work with children who resist treatment because of the pain, such an approach clearly does not have the desired effect when the child resists the treatment because of deeply held religious convictions.

Given the disagreements within the medical profession and given hospitals' needs to avoid liability either for treating without consent or

220. Perkins, *supra* note 123, at *3.

221. *Id.*

222. *Id.*

223. Richard A. Knox, *Billy Best's Case Reveals Gray Area of Patient Rights*, Boston Globe, Nov. 23, 1994, Metro/Region, at 1, 19.

224. *Id.*

for withholding treatment, these cases will continue to come before courts. I believe that ethical decision making also requires that courts understand the limits imposed upon the government in a democracy and to recognize the limits of their own power. Courts exist to resolve disputes between people, but their ultimate enforcement power involves either financial or punitive measures. Money will not solve these problems. Judges can use their punitive power and, with the help of the police, order that people be seized, tied down to a gurney, drugged into unconsciousness, and then treated. Such authoritarian action towards one who seeks no harm to others has no place in a democracy. While mature children may not have the political autonomy that an adult possesses, they still possess the personal autonomy possessed by all human beings. The specter of a judge ordering such a drastic intrusion into the personal autonomy of a cognitively competent, socially mature, informed adolescent, who for religious or personal reasons chooses to reject treatment, ultimately repulses most individuals. Power has its limits. Our society has recognized those limits when adults are concerned. While the result in children's cases is not altogether satisfying, the alternatives are worse. As the Illinois Supreme court has decided, there seems to be no principled reason to reject such limits on state power when cognitively competent, well informed adolescents are concerned.²²⁵ The hearings would resemble those conducted in Illinois and in Santa Clara County. Testimony would have to be introduced to show the cognitive competency of the child as well as the nature of the informed consent dialogue that preceded the decision. Cognitively competent children who were fully informed and reached the decision voluntarily would have their wishes respected.

CONCLUSION

When legislatures do not give children an unfettered right to make a decision that affects their lives, courts are often called upon to make those decisions. Judicial opinions and conversations with trial judges provide some understanding of how judges decide cases involving children's preferences and choices. This information suggests that judges do not make systematic use of child development theory when considering the cognitive capacity and social maturity of children. The information also indicates that when judges do enforce a child's choice with respect to a course of action, they do not insure that the child made the choice with full knowledge of the alternatives, risks, and benefits of their choice, or that the child made the choice without undue peer, parental, or official influence. Their failure to systematically inquire into the nature of the choice and the reason for it calls into question

225. See *supra* notes 123, 138 and accompanying text.

the validity and the ethics of judicial decisions concerning children's choices in a variety of cases.

Research into child development and into children's decision-making capacity suggests that the wishes of most children under ten should be rejected since they do not engage in truly rational thought. It also reveals that the wishes of children above the age of fourteen should control a court's rulings if the child makes the choices after engaging in an informed consent dialogue. Such a dialogue should fully explain the nature of the preferred alternative, including its risks, benefits, and consequences, and the alternatives to it. It also should help the court ascertain whether the child made the choice without undue parental, peer, or official influence. Finally, the research also indicates that children between the ages of ten and fourteen should be treated like those above the age of fourteen if their representatives present evidence of cognitive capacity and informed consent.

While adopting these standards would alter the structure of some court hearings, the changes would not be burdensome and the costs involved would not be prohibitive. Consistency when considering these issues would insure that courts do not compromise the personal autonomy of cognitively competent adolescents. This model would also provide a more principled method of decision making by judges. While this paradigm would give adolescents more power to control decisions than they currently possess, no reason exists to believe that their choices would be less informed or worse than those currently imposed upon them.

