
DEVELOPMENTAL JURISPRUDENCE

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In the past decade, the Supreme Court decided a series of criminal cases involving minor offenders that expressly took account of their immaturity. The Court's decisions in *Roper v. Simmons*,¹ *Graham v. Florida*,² *J.D.B. v. North Carolina*,³ *Miller v. Alabama*,⁴ and *Montgomery v. Louisiana*⁵ have been heralded as endorsing a new "developmental approach," which in turn has generated arguments for the application of this approach to additional legal issues involving minors in briefs, articles, and advocacy presentations. The approach, put simply, is to consider the developmental differences between minors and adults and how such differences should be accounted for in doctrine. The Court's decisions are, indeed, grounds for celebration, and the arguments for extension compelling. But here I focus on the limitations of this approach and take the cases as an invitation to be even more ambitious in our application of developmental understandings.

I suggest we acknowledge the relational aspect of development and its relevance to law. Children are not simply changing as they grow up. They are being raised, and laws, and legal actors, and all of us as participants in a democracy, play a role, for good or for ill, in that childrearing. Attention to this role suggests some changes to our approach to the law affecting children, from the terms we use, to the justifications we offer, to the roles and procedures assigned to those legal actors who interact most directly and powerfully with children. Taking inspiration from the "therapeutic jurisprudence" movement, I call for a "developmental jurisprudence" that recognizes law as a developmental agent.

In Section I, I briefly discuss the recent Supreme Court cases, noting the contributions they each made to the emergence of the developmental approach and identifying aspects of their analysis better understood within my developmental jurisprudence frame. I then go on, in Section II, to introduce therapeutic jurisprudence, defining its contribution generally, and then as applied to children. In Section III, I describe my vision of developmental jurisprudence, which builds upon the insights of therapeutic jurisprudence, but

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1. 543 U.S. 551 (2005).
2. 560 U.S. 48 (2010).
3. 131 S. Ct. 2394 (2011).
4. 132 S. Ct. 2455 (2012).
5. 135 S. Ct. 1546 (2015).

shifts from the conception of law as a therapeutic agent to that of law as a developmental agent. Where therapeutic jurisprudence sees law as a treatment provider, developmental jurisprudence sees law as a childrearer. Section IV considers some of the changes in law and legal procedure that might follow from this shift in focus from children as special subjects of the law to law as special rearer of children.

I. THE SUPREME COURT'S EMBRACE OF DEVELOPMENTAL SCIENCE

In 2005, the Supreme Court, reversing its own fairly recent decision,⁶ ruled in *Roper v. Simmons*⁷ that executing individuals who committed murder before they turned eighteen was cruel and unusual punishment prohibited by the Eighth Amendment of the United States Constitution. While the Court found a national trend away from states' imposition of the death penalty on minors, and support in international human rights law and international practice for the abolition of the juvenile death penalty, the core of the opinion rested on an account of adolescent development that suggested that adolescents were categorically less culpable than adults for their crimes. And while this account invoked what "any parent knows" about teenagers and cited to several Supreme Court precedents acknowledging the significance of immaturity, the Court in *Roper* gave a prominent place in its analysis to the research of developmental psychologists. I set out this analysis in considerable detail because the three differences between adolescents and adults outlined in *Roper* form the core of the analysis on which the developmental approach is based:

Three general differences between juveniles under 18 and adults demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders. First, as any parent knows and as the scientific and sociological studies respondent and his *amici* cite tend to confirm, "[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions." Johnson, *supra* at 367; see also *Eddings, supra*, at 115–16. . . . It has been noted that "adolescents are overrepresented statistically in virtually every category of reckless behavior." Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 *Developmental Rev.* 339 (1992). . . .

The second area of difference is that juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure. *Eddings, supra* at 115. . . . This is explained in part by the prevailing circumstance that juveniles have less control, or less experience with control, over their own environment. See Steinberg & Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 *Am. Psychologist* 1009, 1014 (2003)

6. See *Stanford v. Kentucky*, 492 U.S. 361 (1989).

7. 543 U.S. 551 (2005).

The third broad difference is that the character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed. *See generally* E. Erikson, *Identity: Youth and Crisis* (1968).⁸

It was hardly the first time the Court had noted that children were different, or reached a decision in a case based on that fact.⁹ But the extent of the Court's embrace of developmental science as set out in the cited articles and the amicus briefs was new and noteworthy.

Advocates cheered the decision and its developmental grounding, though some wondered whether the *Roper* analysis was limited to the death penalty context in which the Court had been uniquely willing to intervene and assess the proportionality of a sentence to the offense and the offender.¹⁰ Five years later, however, the Court in *Graham v. Florida*¹¹ extended its logic beyond the capital context, ruling that imposing a life without parole sentence on a juvenile offender who committed an offense other than murder also violated the Eighth Amendment's ban on cruel and unusual punishment.

Graham also pushed further into child development territory in two respects. First, it added "brain science" to its sources of support for its conclusion that adolescents were materially different in ways that affected culpability:

No recent data provide reason to reconsider the Court's observations in *Roper* about the nature of juveniles. As petitioner's *amici* point out, developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds. For example, parts of the brain involved in behavior control continue to mature through late adolescence.¹²

Second, *Graham* began to conceive of adolescents' amenability to change as a feature distinct from, if also related to, the culpability assessment. The thrust of the *Graham* holding was that, because young people had a "capacity for change and limited moral culpability,"¹³ it was cruel and unusual to impose a sentence of life in prison that "denie[d] the juvenile offender a chance to demonstrate

8. *Roper*, 543 U.S. at 569–70.

9. *See, e.g.*, *Thompson v. Oklahoma*, 487 U.S. 815, 837–38 (1988) (holding that the execution of individuals who were fifteen or younger when they committed murder was cruel and unusual punishment); *Eddings*, 455 U.S. at 116 (noting that "[e]ven the normal [sixteen]-year-old customarily lacks the maturity of an adult," and vacating and remanding a death sentence where the sentence did not consider defendant's history of brutal treatment by his father in mitigation); *Parham v. J.R.*, 442 U.S. 584, 619–20 (1979) (holding that minors' due process rights were not violated by a commitment procedure that allowed parents to consent to their institutionalization against their wishes, noting that parents routinely act in their children's best interest in making medical decisions their children are not mature enough to make).

10. *See* Mary Berkheiser, *Death Is Not So Different After All: Graham v. Florida and the Court's "Kids Are Different" Eighth Amendment Jurisprudence*, 36 VT. L. REV. 1, 15–28 (2011) (describing the Supreme Court's "death is different" jurisprudence that *Roper* appeared to be a part of).

11. 560 U.S. 48 (2010).

12. *Id.* at 68.

13. *Id.* at 74.

growth and maturity.”¹⁴

There is a certain paradoxical quality to the Court’s connection of minors’ special amenability to change in adolescence and a legal requirement focused on opportunities to demonstrate change in adulthood, even potentially very late in adulthood.¹⁵ Minor offenders’ special right to demonstrate that change, long into adulthood, can only partly be based on their developmental difference in the brief remaining period of minority immediately following the offense, a period that has often ended before the offender is even sentenced.¹⁶ Indeed, the Court’s analysis in *Graham* depends on an acknowledgement that an individual’s growth and maturity might emerge over the course of many years of imprisonment. If we afford minor offenders an opportunity to demonstrate reform in adulthood that we do not afford to adult offenders, it is not because minor offenders are uniquely able to benefit from this opportunity, but because we are willing to bestow the opportunity only on them.

The line drawn in *Graham* is thus based less on differences in capacities at the time of sentencing—the framing of the developmental approach—than it is on differences in the level of protection we afford to minor offenders. *Graham* tells us that the Constitution requires us to provide minors with special protection from the worst consequences of their offending, a protection that switches off at eighteen. The fact that the period in which special treatment is justified and the period in which the special treatment is realized can be decades apart becomes less problematic if we shift our focus from minors’ special capacities to the law’s special responsibility to minors, a shift in focus consistent with the developmental jurisprudence I set out below.

In two subsequent life without parole cases, *Miller v. Alabama* and *Montgomery v. Louisiana*, the Court continued to focus its analysis on the differences between minors and adults, and, in these cases, adolescents’ special ability to change was clearly described as a second factor, distinct from adolescents’ lesser culpability: “*Roper* and *Graham* establish that children are constitutionally different from adults for purposes of sentencing. Because juveniles have diminished culpability and greater prospects for reform . . . ‘they are less deserving of the most severe punishments.’”¹⁷ In *Miller*, the Court concluded that the imposition of life without parole on minor homicide offenders violated the Eighth Amendment unless the sentence was based on an individualized assessment of the offender and the offense. Underscoring the importance of the developmental distinctions at issue, the Court referred to the offenders in question as “children,” rather than “juveniles,” at several points in

14. *Id.* at 73.

15. *Id.* (“*Graham* deserved to be separated from society for some time in order to prevent . . . an ‘escalating pattern of criminal conduct,’ but it does not follow that he would be a risk to society for the rest of his life.” (quoting app. at 394)).

16. Terrance Graham was nineteen by the time he was sentenced to life without parole. *See id.* at 53–56.

17. *Miller v. Alabama*, 132 S. Ct. 2455, 2464 (2012) (quoting *Graham*, 560 U.S. at 68).

its opinion.¹⁸ This shift in terminology between *Graham* and *Miller* is striking, and I consider its impact as part of my discussion of terminology in Part IV.A below.

While *Miller* left room for an individualized determination that life without parole was an appropriate sentence for a particular juvenile murderer, *Montgomery* all but eliminated that possibility. In ruling that *Miller* was to be applied retroactively, the Court in *Montgomery* directed that only juvenile murderers “who exhibit[] such irretrievable depravity that rehabilitation is impossible” could be sentenced to life without parole,¹⁹ and suggested that all other murders committed by minors reflected “unfortunate yet transient immaturity.”²⁰ This dichotomy surely omits a substantial third category of juveniles who commit murder, whose criminality would continue into adulthood, but who are not so “irretrievably depraved” as to make “rehabilitation impossible.” *Montgomery*’s bipolar division protects a sort of legal fiction: Until you turn eighteen, we will treat all your offending as a product of your “unfortunate but transient” immaturity unless a court concludes that rehabilitation is “impossible.” This categorical approach works well in defining a period for special protection justified in general developmental terms, but it becomes problematic when the Court suggests that it represents an accurate assessment of the role an individual minor’s development played in his crime.

Between *Graham* and *Miller*, the Supreme Court decided *J.D.B. v. North Carolina*,²¹ a case that extended the Court’s developmental analysis to criminal procedure. In *J.D.B.*, the Court held that a minor’s age was a relevant factor in determining whether he was “in custody” and therefore entitled to *Miranda* warnings. Unlike in *Roper*, *Graham*, and *Miller*, the Court in *J.D.B.* expressly declined to rely on developmental science, resting its analysis, instead, on “common sense.” That said, the Court noted, in a footnote, that the “social science and cognitive science . . . literature confirms what experience bears out.”²² The Court no doubt avoided reliance on developmental science at least in part because it was fashioning a rule that police officers would be required to apply. However sophisticated the Supreme Court might have become, it was unrealistic to expect every police officer in every district to master the fine points of developmental science in assessing what a reasonable person of a defendant’s age might understand when interrogated.

18. In the body of the majority opinion in *Miller*, Justice Kagan refers to minor offenders as children twenty-one times. See, e.g., *id.* at 2463 (“Thus, *Roper* held that the Eighth Amendment bars capital punishment for children . . .”). In *Roper* and *Graham* combined, there are only two references to minor offenders as children, and those references quoted other sources. See *Graham*, 560 U.S. at 81 (citing Connie de la Vega & Michelle Leighton, *Sentencing Our Children to Die in Prison: Global Law and Practice*, 42 U.S.F. L. REV. 983, 1002 (2008)); *Roper v. Simmons*, 543 U.S. 551, 565 (2005) (noting that in commuting the death sentence of Kevin Stanford, the Governor of Kentucky stated that “[w]e ought not be executing people who, legally, were children” (alteration in original)).

19. *Montgomery v. Louisiana*, 136 S. Ct. 718, 733 (2016).

20. *Id.* at 734 (quoting *Miller*, 132 S. Ct. at 2465 (quoting *Roper*, 543 U.S. at 573)).

21. 131 S. Ct. 2394 (2011).

22. *J.D.B.*, 131 U.S. at 2403 n.5.

The message of *J.D.B.* is, despite its less interdisciplinary approach, entirely consistent with that of the Supreme Court's Eighth Amendment decisions, and in extending the relevance of a minor's immaturity to a new legal context, the Court supported its relevance in all legal contexts. While the applications of *J.D.B.* in briefs and in scholarship have focused on criminal procedural questions related to interrogation,²³ search and seizure,²⁴ and trial competence,²⁵ the decision has also added support to arguments grounded in developmental differences in other legal contexts.²⁶

Since these cases were decided, we have seen an explosion of scholarship, litigation, and other advocacy efforts pressing for the developmental approach. These efforts, and the changes in law that they are beginning to engender, represent an important advancement in the law affecting children and portend further progress in coming years. But that progress is cabined by the limits of the developmental approach, an approach that focuses near exclusively on the minor as a special legal subject and disregards the special role played by law, lawmakers, and legal actors in shaping that development. Before considering some of the limitations imposed by the approach, I suggest an alternative, a "developmental jurisprudence," modeled after therapeutic jurisprudence, to which I now turn.

II. THE MODEL: THERAPEUTIC JURISPRUDENCE

In the last decade of the twentieth century, two legal scholars, David Wexler and Bruce Winick, introduced "therapeutic jurisprudence" and started a movement. Within a few years, there were scores of articles applying therapeutic jurisprudence to an increasing range of legal subjects,²⁷ and the approach was taken up around the world.²⁸ What began as an interdisciplinary, theoretical discussion soon began to generate practical applications, changing the practices of lawyers, judges, and mental health professionals, and with them, the

23. E.g., Kristi North, *Recess is Over: Granting Miranda Rights to Students Interrogated Inside School Walls*, 62 EMORY L.J. 441 (2012).

24. E.g., Sarah Jane Forman, *Countering Criminalization: Toward a Youth Development Approach to School Searches*, 14 SCHOLAR 301, 356–57 (2011).

25. *Id.* at 341.

26. See, e.g., *D.V. v. State ex rel. D.V.*, 265 P.3d 803, 808 (Utah Ct. App. 2011) (citing *J.D.B.* in support of a conclusion that a written statement, while adequate for adults, might not have been sufficient to put minors on notice of the rules concerning their foster care placement).

27. See generally *Bibliography of Therapeutic Jurisprudence*, 10 N.Y.L. SCH. J. HUM. RTS. 915 (1993) (listing roughly thirty authors who adopted Wexler and Winick's terminology and concept since 1990).

28. David B. Wexler, *Introduction to the Therapeutic Jurisprudence Symposium*, 41 ARIZ. L. REV. 263, 263 (1999) (describing the convening of the first International Conference on Therapeutic Jurisprudence in Winchester, England, in 1998, which was attended by scholars and judges from the United States, the United Kingdom, Puerto Rico, Canada, Australia, Israel, Ireland, Sweden, and the Netherlands). This conference was followed by a second international conference held in Cincinnati, Ohio, United States in 2001, and a third in Perth, Australia in 2006. See David B. Wexler, *Two Decades of Therapeutic Jurisprudence*, 24 TOURO L. REV. 17, 19 (2008) [hereinafter Wexler, *Two Decades*].

experience of individuals subject to a range of legal actions.

Its founders defined therapeutic jurisprudence as “the study of the role of the law as a therapeutic agent.”²⁹ This focus on the law as actor offered a valuable shift in perspective, a shift initially inspired by Wexler and Winick’s observation that the impact of many substantive rules and procedures in mental health proceedings were affirmatively antitherapeutic.³⁰ Out of this concern for law’s potential to impose psychological harm grew an optimistic prescription that the law could and should be designed and implemented to bestow therapeutic benefits.

Therapeutic jurisprudence was originally developed in the context of mental health law and civil commitment proceedings, and its first applications were in those contexts.³¹ Before long, however, scholars were applying the therapeutic jurisprudence lens to other legal areas—most frequently criminal law, and, relatedly, the juvenile justice system, but also family law,³² and even tort³³ and contract³⁴ law. This led to some reflections on the scope and focus of the theory, which aimed to ensure that its distinctive contribution was preserved through the period of rapid proliferation. Here I explore the founders’ definitions of their terms, the objects they pursue, and their means of achieving those objects to establish a backdrop against which to describe my related, but distinct, developmental jurisprudence.

Wexler and Winick define “jurisprudence” as the “study” of law, but the emphasis in their writing is on the examination of the law, through a special lens, that is, from a distinct perspective. They offer the special lens of therapeutic jurisprudence to promote not only insight but also reflection and reform. They are clear that therapeutic jurisprudence has a normative point of view: It is good when laws and legal actors produce therapeutic effects, and bad when they produce antitherapeutic effects. But they do not claim the paramountcy of therapeutic ends over other important ends protected by law, including “due process”³⁵ and more generally “justice”³⁶ embodied in constitutional rights, as

29. David B. Wexler, *Reflections on the Scope of Therapeutic Jurisprudence*, 1 PSYCHOL. PUB. POL’Y & L. 220, 220 (1995) [hereinafter Wexler, *Reflections*].

30. *Id.* at 231–32.

31. Christopher Slobogin, *Therapeutic Jurisprudence: Five Dilemmas to Ponder*, 1 PSYCHOL. PUB. POL’Y & L. 193, 193 (1995); Bruce J. Winick, *The Jurisprudence of Therapeutic Jurisprudence*, 3 PSYCHOL. PUB. POL’Y & L. 184, 201 (1997).

32. See generally Stephen J. Anderer & David J. Glass, *A Therapeutic Jurisprudence and Preventive Law Approach to Family Law*, in PRACTICING THERAPEUTIC JURISPRUDENCE: LAW AS A HELPING PROFESSION (Dennis P. Stolle et al. eds., 2000); Marsha Kline Pruett & Tamara D. Jackson, *The Lawyer’s Role During the Divorce Process: Perceptions of Parents, Their Young Children, and Their Attorneys*, 33 FAM L.Q. 283 (1999); Janet Weinstein, *And Never the Twain Shall Meet: The Best Interests of Children and the Adversary System*, 52 U. MIAMI L. REV. 79 (1997).

33. See generally Daniel W. Shuman, *Making the World a Better Place Through Tort Law?: Through the Therapeutic Looking Glass*, 10 N.Y.L. SCH. J. HUM. RTS. 739 (1993).

34. See generally Jeffrey L. Harrison, *Class, Personality, Contract, and Unconscionability*, 35 WM. & MARY L. REV. 445 (1994).

35. Wexler, *Two Decades*, *supra* note 28, at 20.

36. Wexler, *Reflections*, *supra* note 29, at 232 n.78 (quoting William E. Wilkinson, *Therapeutic*

well as the protection of other societal interests.³⁷ Applying the lens ensures that an often overlooked impact is taken into consideration, not that that consideration will necessarily trump other, more conventionally recognized, considerations. That said, they also conclude that a proper understanding of therapeutic effects is consistent with the core constitutional values of personal liberty and individual autonomy.³⁸

“Law” means not only substantive rules and legal procedures set out in cases and legislation, but also the application of law through the behaviors and practices of various legal actors.³⁹ Indeed, the application of existing law has become an increasingly important aspect of the work as therapeutic jurisprudence develops, a point to which I return below. In essence, the term “law” is tied up with the definition of “agent.”

The definition of “therapeutic” is central, but not narrowly defined. While Wexler and Winick have insisted on preserving some flexibility to allow an “intuitive and common sense” use of the term,⁴⁰ they and others have recognized the importance of giving the term some focus to avoid its being applied to any legal impact that is viewed as good.⁴¹ At its core, therapeutic jurisprudence sounds in mental health. Wexler speaks of “law as therapy,”⁴² and Winick describes law “as a kind of therapist or therapeutic agent.”⁴³ At one point Wexler defines therapeutic as “relating to mental health and psychological aspects of health” and lists the primary areas of focus to include “mental illness and health, illness, injury, disability, treatment, rehabilitation, and habilitation.”⁴⁴ Winick suggests that “[i]f a problem or goal is one for which an individual might consult a mental health therapist or counselor, it would qualify as a proper subject of therapeutic jurisprudence work.”⁴⁵ More expansively, Wexler embraces a definition offered by a commentator, which includes the promotion of both “psychological or physical well-being,”⁴⁶ although there is little evidence that therapeutic jurisprudence has been applied to issues of physical well-being not closely connected to psychological well-being. Of course,

Jurisprudence and Workers' Compensation, ARIZ. ATT'Y, Apr. 1994, at 28, 32–33).

37. David Finkelman & Thomas Grisso, *Therapeutic Jurisprudence: From Idea to Application*, 20 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 243, 252 (1994); Winick, *supra* note 31, at 191.

38. See, e.g., Winick, *supra* note 31, at 191.

39. Wexler, *Reflections*, *supra* note 29, at 225.

40. *Id.* at 221; see also David B. Wexler, *New Directions in Therapeutic Jurisprudence: Breaking the Bounds of Conventional Mental Health Law Scholarship*, 10 N.Y.L. SCH. J. HUM. RTS. 759, 764–65 (1993) [hereinafter Wexler, *New Directions*].

41. See Slobogin, *supra* note 31, at 196 (noting that, if therapeutic simply means beneficial, and antitherapeutic harmful, “the concept is indistinguishable from any other analytical process [as] all reform of the law and the legal system is meant to redress some type of harm or confer some type of benefit”).

42. David B. Wexler, *The Development of Therapeutic Jurisprudence: From Theory to Practice*, 68 REV. JUR. U.P.R. 691, 693 (1999) [hereinafter Wexler, *Development*].

43. Winick, *supra* note 31, at 185.

44. Wexler, *Reflections*, *supra* note 29, at 223.

45. Winick, *supra* note 31, at 194.

46. Wexler, *Reflections*, *supra* note 29, at 224 (quoting Slobogin, *supra* note 31, at 196).

defining psychological well-being is itself an elusive task, one necessarily left, at least in part, to democratic policymaking⁴⁷ and informed by empirical study.

The therapeutic focus also captures the nature and scope of the approach's interdisciplinarity. The primary fields that therapeutic jurisprudence brings together with law are psychology, social work, criminology, and psychiatry,⁴⁸ and the social scientists called upon to test the theory against lived experiences also come from these fields.

Finally, the concept of law as "agent" focuses the jurisprudential lens on law's impact—on consequences. The scope of law as agent is intended to be broad, applying to law in all its guises. The concept applies to substantive rules and procedures (and the legislators and rule makers behind them), and it applies to the legal actors who implement those rules and procedures, including primarily judges and lawyers, but also others such as probation officers, social workers, and police, and even employers and therapists.⁴⁹ Wexler notes the increasing focus, over the course of the therapeutic jurisprudence movement, on these legal actors and the therapeutic or antitherapeutic impact they can have as they apply established law. Connected with this incremental, as-applied focus is a special interest among therapeutic jurisprudence scholars in "ferreting out subtle, nuanced, hidden, and unintentional antitherapeutic impacts"⁵⁰—harms imposed inadvertently in the course of the everyday application of the law. It is important to stress the power of the negative as well as the positive insights the jurisprudence provides.

To date, therapeutic jurisprudence has had its greatest practical impact on "problem-solving" or "treatment" courts, specialized courts with highly specialized processes designed to address the underlying problems, including drug addiction and untreated mental illness, that lead many to commit crimes. Although the first drug court began to operate in 1989 independent of the therapeutic jurisprudence movement,⁵¹ the proliferation of drug courts, followed by mental health courts and other problem-solving courts in the 1990s and 2000s, was heavily influenced, in justification and design, by the insights of therapeutic jurisprudence.⁵² Problem-solving courts are now offered as a prime example of therapeutic jurisprudence's adoption by legislators, courts, and mainstream legal professionals.⁵³

47. *Id.*

48. Wexler, *Two Decades*, *supra* note 28, at 25 (noting that contributions have also been made to therapeutic jurisprudence from the fields of public health and anthropology).

49. Wexler, *Reflections*, *supra* note 29, at 225.

50. *Id.* at 231.

51. Peggy Fulton Hora et al., *Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionizing the Criminal Justice System's Response to Drug Abuse and Crime in America*, 74 NOTRE DAME L. REV. 439, 454–55 (1999).

52. *Id.* at 448–49; Teresa W. Carns et al., *Therapeutic Justice in Alaska's Courts*, 19 ALASKA L. REV. 1, 5–8 (2002).

53. Patrick Geary, Note, *Juvenile Mental Health Courts and Therapeutic Jurisprudence: Facing the Challenges Posed by Youth with Mental Disabilities in the Juvenile Justice System*, 5 YALE J. HEALTH POL'Y L. & ETHICS 671, 681–82 (2005).

These problem-solving courts are clearly therapeutic in their aims. By definition, they aim to eschew punishment in favor of treatment. As an aspect of this aim, considerable attention is given to process: how often individuals should come to court, and how the court process should be conducted to maximize support, motivation, and progress. Moreover, all the relevant legal actors—judges, lawyers, other court personnel, and treatment providers—are marshaled to support the treatment effort. Judges, studies suggest, play a particularly important role in the process, and treatment courts that provide the most time and attention from the judges have been shown to be more successful.⁵⁴ Highlighted by many participants is the special relationship they developed with the judge and the significance of that relationship to their ongoing commitment to recovery.⁵⁵

Treatment courts have their critics. The critics object that courts are the wrong place to deliver treatment, both because judges lack the competence to oversee a program of treatment and because the consequence of failed participation leads participants further into the criminal justice system. In many circumstances, access to the court's therapeutic support requires participants to relinquish procedural rights, a trade-off that may disserve their interests and undermine our systemic commitments.⁵⁶ These criticisms serve as a useful reminder that any shift in power to the state, however benign the purpose, comes with considerable risk. As I will discuss further below, the law also has a role to play in limiting state exercises of power, and such limits, too, can be justified in therapeutic and developmental terms.

The application of therapeutic jurisprudence principles to the law and procedures affecting children has been of considerable interest to scholars and practitioners. These applications focus largely on children's mental health, addressing the therapeutic impact of various procedures in commitment⁵⁷ and juvenile justice proceedings,⁵⁸ and the need for effective coordination between

54. E.g., Shelli B. Rossman & Janine M. Zweig, *What Have We Learned from the Multi-Site Adult Drug Court Evaluation? Implications for Policy, Practice, and Future Research*, in 4 THE MULTI-SITE ADULT DRUG COURT EVALUATION: THE IMPACT OF DRUG COURTS 251, 259–260 (Shelli B. Rossman et al. eds., 2013), http://www.courtinnovation.org/sites/default/files/documents/MADCE_4.pdf; Peggy Fulton Hora & Theodore Stalcup, *Drug Treatment Courts in the Twenty-First Century: The Evolution of the Revolution in Problem-Solving Courts*, 42 GA. L. REV. 717, 763–64 (2008).

55. SHELLI B. ROSSMAN ET AL., THE MULTI-SITE ADULT DRUG COURT EVALUATION: EXECUTIVE SUMMARY 7–8 (2011), <https://www.ncjrs.gov/pdffiles1/nij/grants/237108.pdf>.

56. See, e.g., Trent Oram & Kara Gleckler, *An Analysis of the Constitutional Issues Implicated in Drug Courts*, 42 IDAHO L. REV. 443, 467 (2006); Leslie Eaton & Leslie Kaufman, *In Problem-Solving Court, Judges Turn Therapist*, N.Y. TIMES (Apr. 26, 2005), http://www.nytimes.com/2005/04/26/nyregion/in-problemsolving-court-judges-turn-therapist.html?_r=0.

57. See generally Jan C. Costello, *Why Have Hearings for Kids If You're Not Going to Listen?: A Therapeutic Jurisprudence Approach to Mental Disability Proceedings for Minors*, 71 U. CIN. L. REV. 19 (2002) (calling on all court participants in commitment hearings, including judges and testifying psychiatrists, to clearly explain their positions to encourage youth engagement); Bruce J. Winick & Ginger Lerner-Wren, *Do Juveniles Facing Civil Commitment Have a Right to Counsel?: A Therapeutic Jurisprudence Brief*, 71 U. CIN. L. REV. 115 (2002) (promoting an attorney model of representation for commitment hearings, based on therapeutic jurisprudence analysis).

58. See generally Janet Gilbert et al., *Applying Therapeutic Principles to a Family-Focused*

juvenile justice and mental health systems to ensure that juvenile offenders' substantial mental health needs are met.⁵⁹ Problem-solving courts have also proliferated in the juvenile justice context, again commonly framed in therapeutic jurisprudence terms.⁶⁰

Some of this analysis, however, blurs the concepts of therapy and development. Indeed, the discussions in the juvenile justice context that get the closest to embracing my suggested developmental jurisprudence do so while moving back and forth between therapeutic and developmental concepts.⁶¹ Of course, there is a great deal of overlap between treatment (aimed at securing individuals' psychological well-being) and childrearing (aimed at securing individuals' growth into successful adults), particularly in contexts focused on the court-involved children from the child welfare and juvenile justice systems. That said, a treatment-focused model cannot account for the full reach and significance of law as an agent of development.

III. DEVELOPMENTAL JURISPRUDENCE

I propose a developmental jurisprudence, an examination of the role of law as a developmental agent—an agent that shapes how children grow up—built in the likeness of therapeutic jurisprudence, but drawing important distinctions based on the salient differences between development and therapy. I begin with the important commonalities between the two, before exploring the distinctions.

A. *Building on the Therapeutic Jurisprudence Model*

Like therapeutic jurisprudence, developmental jurisprudence applies a special lens to the law. It looks at law, in all its guises, as an agent that acts upon children and it takes account of the developmental impact of the law's actions, both beneficial and harmful. Law includes substantive rules and procedures, and the lawmakers that create them, including all of us as citizens of a democracy. Law also includes all of the actors who interact with children pursuant to law,

Juvenile Justice Model (Delinquency), 52 ALA. L. REV. 1153 (2001) (analyzing the various effects of therapeutic jurisprudence principles to children's commitment procedures).

59. See generally Gene Griffin & Michael J. Jenuwine, *Using Therapeutic Jurisprudence to Bridge the Juvenile Justice and Mental Health Systems*, 71 U. CIN. L. REV. 65 (2002) (advocating that bridging the divide between juvenile justice and mental health systems will make a substantial positive contribution to juveniles' resulting mental health).

60. Geary, *supra* note 53, at 686–91.

61. See Amy D. Ronner, *Songs of Validation, Voice, and Voluntary Participation: Therapeutic Jurisprudence, Miranda and Juveniles*, 71 U. CIN. L. REV. 89, 94–95 (2002) (suggesting that treating youth in the juvenile justice system with respect and dignity will inspire them to be “more inclined to accept responsibility for their own conduct”—a general developmental aim—and will also “initiate healing”—a therapeutic aim); see also Kristin Henning, *Defining the Lawyer-Self: Using Therapeutic Jurisprudence to Define the Lawyer's Role and Build Alliances that Aid the Child Client*, in REHABILITATING LAWYERS: PRINCIPLES OF THERAPEUTIC JURISPRUDENCE FOR CRIMINAL LAW PRACTICE 327, 327 (David B. Wexler ed., 2008) (writing that “[t]he child's interactions with key players in the juvenile justice system will inevitably shape the child's perceptions of justice, authority, and morality”).

most obviously judges, lawyers, police officers, probation officers, and child welfare workers, but also others including both teachers and parents. Like its therapeutic counterpart, developmental jurisprudence is necessarily interdisciplinary, drawing primarily on developmental psychology to define and assess the relevant developmental effects, but also being informed by education and social psychology, among other fields.

Developmental jurisprudence also shares with its therapeutic model a clear normative vision: The law should aim to minimize the developmental harm it imposes and maximize the developmental benefits it provides. That said, defining these developmental benefits and harms will be no easier than defining what is therapeutic and antitherapeutic; indeed, it will probably be harder, as our commitment to pluralism rejects narrow conceptions of a single right way to raise children.⁶² And as with therapeutic jurisprudence, those definitions will draw on a combination of empirical evaluation, sociopolitical decision making, and common sense (here, “what any parent knows”).

As *Roper*, *Graham*, and *Miller* demonstrate, empirical research can advance our understanding of child and adolescent development in a manner that usefully informs and improves law. But the usefulness of this research is constrained in two ways, one internal and one external to the research. The internal constraints go to the limits of research design, and the difficulty of capturing all legally relevant factors and excluding the irrelevant from the research. Laboratory experiments offer considerable control but are necessarily artificial.⁶³ Natural experiments come with all the “noise” of nature, confounding efforts to isolate what is salient, as framed by the law. We can be optimistic that lawyers and social scientists, collaborating in increasingly sophisticated ways, will produce increasingly subtle and useful empirical findings. The shift in attention to psychosocial development that began as interdisciplinary scholarship⁶⁴ and ended in *Roper*’s groundbreaking ruling is a strong example of this potential. It would be naïve, however, to expect to find unambiguous and complete answers to our developmental questions in social scientific research, and causal questions—the sort framed by both therapeutic jurisprudence and developmental jurisprudence—have proved, and will continue to prove, most elusive of empirical evaluation.⁶⁵

The other limitation on empirical inquiry, highlighted by Wexler in the therapeutic jurisprudence context, comes from outside the research: In the end,

62. See, e.g., *Development in the Law—The Constitution and the Family, The Parent-Child Relationship*, 93 HARV. L. REV. 1350, 1379 (1980) (describing “the interest in diversity and pluralism,” as “one of the pillars supporting the constitutional status of parental rights”).

63. See, e.g., Elizabeth S. Scott, *Judgment and Reasoning in Adolescent Decisionmaking*, 37 VILL. L. REV. 1607, 1634 (1992) (noting the artificiality of laboratory experiments on children’s decision-making ability).

64. See *id.* at 1644 n.131; Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOLOGIST 1009, 1012 (2003).

65. See DANIEL F. CHAMBLISS & RUSSELL K. SCHUTT, *MAKING SENSE OF THE SOCIAL WORLD* ch. 6 (5th ed. 2016).

what qualifies as beneficial or harmful to development (or therapeutic or antitherapeutic), let alone how various benefits and harms should be weighed against one another, must be defined socially and politically, not scientifically.⁶⁶ To take the well-studied case of *Wisconsin v. Yoder*,⁶⁷ for example, even if we could isolate the causal effect of Amish parents' removal of their children from school (or not) at fourteen on their ability to pursue a range of careers, on the one hand, and on their effective and happy integration into the Amish community, on the other, that research would tell us nothing about which developmental endpoint we should prefer. We will continue to need to look to the messy and complicated guidance of our substantive law to answer these questions, and, in turn, our answers to these questions will further develop our substantive law. At a minimum, our developmental goals for our children must include preparation for the exercise of rights and responsibilities we assign to adults. While hardly affording easy answers, looking at our laws through the lens of developmental jurisprudence can encourage an enlightening reciprocal analysis between what we expect of and for all adults, and how we prepare our children to realize those expectations.⁶⁸

To some extent, the developmental jurist, like her therapeutic counterpart, will need to draw on her own understanding of healthy development in defining and assessing law's developmental impact. Wexler and Winick defend their insistence that the definition of "therapeutic" remain loose and "intuitive," arguing that this will encourage more flexible and creative applications of the approach, thereby enhancing its contribution.⁶⁹ This defense is easier to accept when paired with their clear disclaimer of paramourcy: However "therapeutic" is understood, achieving therapeutic ends is only one aim to be balanced against the many other laudable aims of law. And the very framing of the question—How will the operation of this law affect people's psychological well-being?—has value to the processes of lawmaking and implementation, however incomplete or uncertain our answer. A similar value can surely be gained by asking the parallel question about law's impact on children's development. And while the stronger case for the paramourcy of developmental considerations⁷⁰ could make the difficulty of answering the definitional questions more problematic in this context, our strong commitment to pluralism, coupled with that very definitional uncertainty, counsels for a legal regime that shifts much of that definitional work, for most children, away from the state to the individuals who are raising them.⁷¹

66. See Wexler, *Reflections*, *supra* note 29, at 221; see Slobogin, *supra* note 31, at 196–200.

67. 406 U.S. 205 (1972).

68. See generally Emily Buss, *The Gap in Law Between Developmental Expectations and Educational Obligations*, 79 U. CHI. L. REV. 59 (2012).

69. Wexler, *Reflections*, *supra* note 29, at 221.

70. See Rosalind Dixon & Martha C. Nussbaum, *Children's Rights and a Capabilities Approach: The Question of Special Priority*, 97 CORNELL L. REV. 549 (2012).

71. Emily Buss, *Allocating Developmental Control Among Parent, Child and the State*, 2004 U. CHI. LEGAL F. 27, 31–34 (arguing that affording parents strong protection for their childrearing decisions serves children's developmental interests and society's interest in pluralism).

Along with therapeutic jurisprudence's basic framing and insights, I also seek to duplicate its ambition. Therapeutic jurisprudence offers an overarching vision that can be applied to all law and, at least theoretically, achieve coherence along an important dimension. This framing has inspired the application of therapeutic jurisprudence to a broad range of legal issues across the world, and that range continues to grow. The current developmental approach, for all its increasing subtlety and interdisciplinary sophistication, is largely incremental and fragmented. Our growing understanding of how minors of various ages differ from adults is inserted into various legal doctrines in their current, adult-focused form.⁷² Considering the role of law as childrearer across these contexts and in many others might increase the coherence of the law's approach to children and better achieve its developmental aims.

B. Distinguishing Developmental from Therapeutic Jurisprudence

While the basic frame and ambition of developmental jurisprudence closely track those of therapeutic jurisprudence, many differences flow from the difference between "development" and "therapy," and from the difference in aims between raising children and treating conditions. I begin with some basic distinctions in our legal and social conceptions of these two aims, and consider the implications of these distinctions for developmental jurisprudence.

The law's role in raising children has a doctrinal basis with no parallel in the therapeutic context.⁷³ As *parens patriae*, translated as parent of the country, the state has a special obligation to safeguard children's interests, both current and future. As the Supreme Court noted in *Prince v. Massachusetts*, "The state's authority over children's activities is broader than over like actions of adults. . . . A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies."⁷⁴

In this sense, developmental jurisprudence fits more readily with current law than does therapeutic jurisprudence. That being said, the law's invocation of the *parens patriae* doctrine tends to be narrow and episodic. It is relied upon, in cases such as *Prince*, to justify curtailing parental authority in specific contexts, rather than infused through the process of lawmaking, interpretation, and implementation. Developmental jurisprudence could be understood as a call to give more coherent and widespread effect to the *parens patriae* role. This is not to say that the state should take a larger portion of childrearing responsibility away from parents and other caregivers. Interpreting the Constitution to afford parents strong protection against state intervention in their childrearing can be

72. Cf. Emily Buss, *Constitutional Fidelity Through Children's Rights*, 2004 SUP. CT. REV. 355, 363-78 (describing the "adult-minus" approach to the Supreme Court's analysis of children's constitutional rights).

73. In fact, a subset of what might be encompassed in the notion of "therapeutic," namely the care for adults whose mental illness renders them unable to take care of themselves, is included within the same *parens patriae* doctrine that encompasses the state's childrearing obligations. The broader interest in ensuring psychological well-being, however, is not a role broadly assigned to the state.

74. 321 U.S. 158, 168 (1944).

understood to be a core feature of developmental jurisprudence. Rather, it is to suggest that, in all the domains in which law is already operating, it should be more universally attuned to its childrearing impact.

To consider what greater attunement might yield, we look to the parenting model, just as therapeutic jurisprudence looks to the treatment model. “Law as therapy”⁷⁵ and “law as parenting” are both somewhat awkward frames, but that awkwardness may serve to underline the distinctiveness of the lens applied. A central aspect of childrearing is its broadly recognized special importance. We expect parents to give priority to their childrearing responsibilities, to put their children’s interests first, with a special focus on children’s long-term interests. Parents are motivated to do so in part by their appreciation of the importance of a successful developmental outcome for their children and the investment that prioritization inspires. Social pressures that reflect society’s parallel assessment of the importance of successful childrearing reinforce parents’ commitment. Moreover, private sector policies reinforce the special value placed on the childrearing role by providing benefits to employees with children to support their children’s health, education, and nurturance. And while these special benefits are subject to criticism by those who note the many other expensive and time-consuming care obligations employees undertake, with no similar support,⁷⁶ the preferential treatment of childrearing is broadly supported by social convention.

Law, as a childrearer, might be expected to give a parent-like priority to children’s successful development, an ambition for paramouncy that exceeds the parallel vision in therapeutic jurisprudence. In fact, we see many special protections and supports afforded to children and the people who raise them by law. Our Constitution affords unique and extensive authority to parents to control the upbringing of their children, an authority justified in large part by the tremendous responsibility that comes with raising children.⁷⁷ The special value the state places on the childrearing function is manifest in countless laws that bestow special benefits, including tax deductions, cash, food, and medical supports on the children of the most impoverished, and free education on all children. The law is by no means, however, consistent in its support across children and across developmental needs, an inconsistency we would not tolerate in any parent. This disparity is especially troubling because the children whose needs are least well met include court-involved children for whom the state has assumed a greater childrearing role.

Closely connected to the priority parents give, and are expected to give, to childrearing is the special nature of the relationship between parent and child.

75. Wexler, *Development*, *supra* note 42, at 693.

76. *E.g.*, Mary Anne Case, *How High the Apple Pie? A Few Troubling Questions About Where, Why, and How the Burden of Care for Children Should Be Shifted*, 76 CHI.-KENT. L. REV. 1753, 1753–60 (2001).

77. *See* *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 535 (1925) (“[T]hose who nurture [a child] and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.”).

Referring to parental duties at English common law in the eighteenth century, William Blackstone explained:

The municipal laws of all well-regulated states have taken care to enforce this duty: though providence has done it more effectually than any laws, by implanting in the breast of every parent that natural *ζοργη*, or insuperable degree of affection, which not even the deformity of person or mind, not even the wickedness, ingratitude, and rebellion of children, can totally suppress or extinguish.⁷⁸

This affection, so valuable for maintaining parental commitment to childrearing, even in the face of “wickedness, ingratitude, and rebellion,” grows out of the special relationship that develops between parent and child. It is a relationship that conventionally (and, in Blackstone’s time, closer to exclusively) has a biological origin, but that has been demonstrated, with an expansion of parental relationships to those who have no biological connection with their children, to be engendered by the childrearing role itself.

It is the aspiration of developmental jurisprudence not only to view law as an agent, but also to view law as an agent in a particular relationship with children. The law as developmental agent is the law as childrearer, and part of the aim of that vision is to capture a version of the special connection of affection that comes with and motivates that role. It is easiest to conceive of that relationship when law takes the form of legal actors who interact directly with individual children, such as judges, lawyers, and the police, and it is law in these guises on which developmental jurisprudence imposes the heaviest obligations. But developmental jurisprudence has the same relational ambitions for broader lawmaking: When we enact laws and procedures that will have some impact on minors, we should always conceive of them as children we are raising, as “our children.”

This invocation of “our children” has a sentimental ring, but I offer it here to stretch our affectionate concern for sweet-faced and innocent young children, a concern we readily extend to other sweet-faced innocent children, to our least easy-to-love (wicked, ungrateful, and rebellious?) teens. Raising adolescents is anything but sentimental, and interacting with teens in legal contexts will only be developmentally beneficial if they are treated as the adolescents they are. We manage this unsentimental devotion to childrearing adolescents as parents because, while they are no longer children in age, they are still our children in terms of our childrearing role. Developmental jurisprudence simply asks the law, in all its guises, to harness the same mindset and commitment in shaping the lives of minors all the way through the period the law has provided for their upbringing, that is, the full period of their minority.

Before turning to some of the changes in law that developmental jurisprudence invites, I consider important ancestors and fellow travelers. I happily concede that much that I advocate here has been advocated by others and, in some instances, embraced in law. A version of the procedural aspects of

78. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 435, 447 (4th ed. 1770).

the vision was set out by the reformers who established the original juvenile courts at the turn of the twentieth century,⁷⁹ and the special role that legal processes and substantive law can play in facilitating development was noted by Gary Melton⁸⁰ and Frank Zimring in the 1980s,⁸¹ and further explored by Anne Dailey in recent years.⁸² I have also explored some of these themes in earlier articles.⁸³ To the extent I am building upon therapeutic jurisprudence, it bears noting that some of what I advocate has already been advocated within that literature, though, as already noted, in my view, the “therapeutic” label has sometimes been misapplied.⁸⁴ And to the extent this proposal of a developmental jurisprudence is inspired in part by my sense of the limitations of the developmental approach, it is especially important for me to acknowledge that the developmental analysis that fostered and in turn was supported by *Roper*, *Graham, J.D.B.*, and *Miller*, has inspired a call for many reforms in line with what I associate with developmental jurisprudence here.⁸⁵ Most promisingly, legal reforms are being implemented here and in other parts of the world aimed at improving disadvantaged youth’s prospects of growing into healthy adults.⁸⁶

That said, my aim in coining a new term is to stress the shift in perspective from minor subject to legal agent, and to move from fragmented, individual adjustments in law to accommodate children as special legal subjects to a universal, coherent approach that recognizes the law as a special childrearer. This shift suggests changes in legal terminology, analysis, and outcomes,

79. See, e.g., Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 120 (1909) (“Seated at a desk, with the child at his side, where he can on occasion put his arm around his shoulder and draw the lad to him, the judge, while losing none of his judicial dignity, will gain immensely in the effectiveness of his work.”).

80. Gary B. Melton, *Taking Gault Seriously: Toward a New Juvenile Court*, 68 NEB. L. REV. 146, 168 (1989) (noting the potential developmental value of affording young people due process in their juvenile justice proceedings).

81. FRANKLIN E. ZIMRING, *THE CHANGING LEGAL WORLD OF ADOLESCENCE* 89–95 (1982) (suggesting that rights afforded to adolescents should operate as a sort of learner’s permit for the ultimate full exercise of adult rights).

82. Anne C. Dailey, *Children’s Constitutional Rights*, 95 MINN. L. REV. 2099 (2011); Anne C. Dailey, *Developing Citizens*, 91 IOWA L. REV. 431 (2006).

83. See generally Emily Buss, *What the Law Should (and Should Not) Learn from Child Development Research*, 38 HOFSTRA L. REV. 13 (2009); Emily Buss, *The Missed Opportunity in Gault*, 70 U. CHI. L. REV. 39 (2003) [hereinafter Buss, *Missed Opportunity*].

84. See *supra* note 61 and accompanying text.

85. See, e.g., NAT’L RESEARCH COUNCIL OF THE NAT’L ACADEMIES, *REFORMING JUVENILE JUSTICE, A DEVELOPMENTAL APPROACH* 185 (Richard J. Bonnie et al. eds., 2013) (“A key message of this chapter is that accountability practices in juvenile justice should be designed . . . to promote healthy social learning, moral development, and legal socialization during adolescence.”).

86. See, e.g., REDEPLOY ILL., <http://www.redeployillinois.org/redeploy-illinois> (last visited June 1, 2016) (state program designed to “decrease juvenile incarceration through the creation of evidence-based community programs that maintain public safety and promote positive outcomes for youth); *Overview of Youth Justice Principles and Processes*, N.Z. MINISTRY JUST., <http://www.justice.govt.nz/courts/youth/about-the-youth-court/overview-of-principles-and-process> (last visited June 1, 2016) (providing an overview of New Zealand’s Youth Justice Principles and Practices which reflect a strong commitment to restorative justice principles).

particularly in areas of law, such as juvenile justice and child welfare, where law's role in raising children is most substantial.

IV. APPLYING THE LENS OF DEVELOPMENTAL JURISPRUDENCE

Although the ambition of developmental jurisprudence is to consider the impact of law in all its guises, for children growing up without court involvement, the law's most important contribution to their upbringing is its protection, against state intervention, of their caregiver's authority to exercise control over that upbringing. As noted, some combination of the value we give to pluralism, our uncertainty about ideal developmental ends, and our confidence that those who know and care most for children will be most fiercely committed to their successful upbringing, all argue for the strong constitutional protection of parental rights against state intervention.⁸⁷ For children who are not court involved, the remaining opportunities for the law to shape young people's upbringing tend to be concentrated in public schools, where the law defines the scope of the curriculum and the extent of students' autonomy rights. We can expect the law to make a positive contribution to children's development in the school setting, if it provides them, as parents are counseled to do, with increasing opportunities for independence and decision-making control within a community of attentive and supportive adults. The developmental value of strong parental rights and increasing autonomy rights for minors are considered by me and others elsewhere,⁸⁸ but are not my focus here.

Here I focus on minors who fall within the jurisdiction, and often the custody, of juvenile court, whether because their parents have been accused of abuse and neglect or because the minors themselves have been accused of committing a crime. For these children, the state plays a far more central role in raising them, with special opportunities to provide developmental value or impose developmental harm. I begin with terminology, because the language we use shapes our understanding of the role played by the law and law's relationship to children.

A. *Adjusting Our Terms to Fit the Law's Childrearing Role*

1. When Our Children Are No Longer Children

Justice Kagan's use of the word "children" in *Miller* to refer to juveniles who have committed murder makes a point, but it makes it at a certain cost in authenticity. On the one hand, the focus of the analysis is that adolescents, even sixteen- and seventeen-year-olds, are still maturing, and their immaturity, like that of younger children, renders them less culpable. They are, in addition, children under the law, the law that, for most purposes, draws a bright line

87. Buss, *Allocating Developmental Control*, *supra* note 71, at 31–32.

88. See, e.g., ZIMRING, *supra* note 81, at 89–95; Buss, *Allocating Developmental Control*, *supra* note 71, at 31–32, 34–35; Elizabeth S. Scott & Robert E. Scott, *Parents as Fiduciaries*, 81 VA. L. REV. 2401, 2415 (1995).

between childhood and adulthood at eighteen. But on the other hand, calling sixteen- and seventeen-year-olds children is not true to ordinary usage, and, in the context of considering the rights of those convicted of homicide, calling them “children” rings false and strategic.⁸⁹

Again, as parents, we continue to identify “our children” in so many words, while we would describe them as “teenagers,” or “adolescents,” if called upon to describe them in terms not tied to our relationship with them. In this way, “my children are no longer children” is an entirely coherent statement if made by a parent of a teenager. The challenge, for law, is to distinguish between the use of the term “child” to describe the subject in a childrearing relationship (a meaning we want to preserve, and even highlight) and the use of the same term as a more precise description of that subject’s current age and developmental stage. If we want to underline the law’s childrearing role, we should proliferate the use of “our children” to capture the subjects of the relationship and extinguish the use of “children” to describe individuals who have unambiguously grown into adolescents. This use of “our children” would capture and reinforce the special relationship we have as a society and as democratic lawmakers with all individuals until they age into adulthood, and the recognition of their adolescence would reinforce the fact that the special relationship extends past the sweet and innocent younger years.

2. Rehabilitation Is for Grown Ups

Rehabilitation, celebrated by youth advocates as the proper goal of a developmental approach to juvenile justice, is not a developmentally appropriate term to apply to adolescents, who, by the Supreme Court’s own analysis, have characters that are “not as well formed as that of an adult.”⁹⁰ Rehabilitation connotes the restoration of some former characteristic that has been lost. It is well applied to adults who have committed crimes, because, unlike our conception of crimes committed by juveniles, we treat adults’ criminal acts as

89. A similar awkwardness in the use of the term “children,” can be found in the child welfare context. Inspired by outcome data that suggest that foster youth do better if they stay in foster care into young adulthood, see MARK E. COURTNEY ET AL., CHAPIN HALL CTR. FOR CHILDREN AT THE UNIV. OF CHI., MIDWEST EVALUATION OF THE ADULT FUNCTIONING OF FORMER FOSTER YOUTH: OUTCOMES AT AGE 21, at 87 (2007), http://www.chapinhall.org/sites/default/files/ChapinHallDocument_2.pdf, and by the conventional experience of parents of young adults in recent years who continue to provide support for their children, see Frank F. Furstenberg Jr., *On a New Schedule: Transitions to Adulthood and Family Change*, 20 FUTURE CHILD. 67, 74 (2010), many states, with the support of federal funding, have extended foster care supports to eighteen- to twenty-one-year-olds. While some states define this cohort as young adults, or “non-minor dependents,” see, e.g., CAL. WELFARE & INST. CODE § 11400 (West 2016) (defining “non-minor dependent” individuals who qualify for continuing foster care support), other states have simply extended their definition of the term “children,” to these young adults, sending a mixed legal message about these foster youth’s legal status, see, e.g., 42 PA. STAT. AND CONS. STAT. ANN. § 6302 (West 2016) (defining “child” for purposes of foster care support to include someone who is “under the age of 21 years and was adjudicated dependent before reaching the age of 18 years, who has requested the court to retain jurisdiction and who remains under the jurisdiction of the court as a dependent child”).

90. *Roper v. Simmons*, 543 U.S. 551, 598 (2005) (O’Connor, J., dissenting).

indications of their bad character.⁹¹

Applying the childrearing lens helps again here: We do not rehabilitate our children, we raise them. And even when they behave especially badly, the term does not apply. Indeed, the concern we feel, in the face of the worst actions of our children, is that our childrearing responsibilities have become more urgent and more difficult, not that we have failed and must start again. And in responding, we will certainly try to exercise influence to change their life course, but, in doing so, we will focus on that developmental trajectory, rather than on some assessment of their current character. In German, the word used in place of our “rehabilitation” is “*erziehung*,”⁹² commonly translated as “education,” but also meaning “upbringing.” Either way, the word is more positive, forward looking, and normalizing than “rehabilitation.” The childrearing role requires us to assume that nothing is set, yet, that we are still bringing up our children, and that the state still plays a role in that upbringing until the law assigns them responsibility for themselves in adulthood. The majority-minority line thus should demarcate when “rehabilitation” can coherently be sought.

3. Punishment Is a Central Developmental Tool

Juxtaposed to the broadly embraced goal of rehabilitation is the much-reviled goal of punishment, and punishment is often cast as a goal that conflicts directly with the goal of helping young people grow up successfully. But, of course, punishment can be an important aspect of a parent’s efforts to positively shape her child’s development. It is hard to imagine an appropriate response to a severe infraction that didn’t contain some element of punishment, to make clear to the young person the significance of his acts and his parents’ disapproval. “Holding youth accountable” is a more developmentally attuned way of capturing this idea, though this phrasing, too, often gets swept up in the same critical analysis.

To be fair, what are generally criticized are “punitive policies,” which should be criticized, not because punishment itself is a developmentally unworthy goal, but because the harsh, incarceration-focused punishments imposed are developmentally destructive. Shifting the emphasis from a general antagonism to punishment to the developmental harms imposed by these sentences will more accurately capture the real problem with these sentencing policies and increase the political opportunities to forge common ground.

B. Adjusting Legal Analysis to Stay True to Our Childrearing Role

Developmental jurisprudence also offers alternative justifications for legal rules affecting children, justifications that may be more coherent across legal

91. Steinberg & Scott, *supra* note 64, at 1014 (explaining that “criminal law implicitly assumes that harmful conduct reflects the actor’s bad character,” but that this assumption can be shown to be inaccurate, as it is for adolescents).

92. Frieder Dünkel, *Juvenile Justice in Germany: Between Welfare and Justice*, in INTERNATIONAL HANDBOOK OF JUVENILE JUSTICE 225, 226 (Josine Junger-Tas & Scott H. Decker eds., 2008).

contexts and, related to this, more true to our real reasons for supporting various rules than those offered under the conventional developmental approach.

1. Rights of Autonomy vs. Rights of Protection

A prime example of the challenge to doctrinal coherence that can be created by the developmental approach, which starts with adult rules and modifies those rules to reflect children's developmental differences, is highlighted by the alleged "flip-flop"⁹³ of the American Psychological Association (APA) between two Supreme Court amicus briefs. In its amicus brief in *Hodgson v. Minnesota*⁹⁴ in 1990, the APA relied upon a "rich body of research" that demonstrated that "by middle adolescence (age 14–15) young people develop abilities similar to adults in reasoning about moral dilemmas, understanding social rules and laws, [and] reasoning about interpersonal relationships and interpersonal problems" to support its conclusion that teenagers were mature enough to obtain an abortion without consulting their parents.⁹⁵ In its amicus brief filed in *Roper* roughly a decade later, the APA cited the research ultimately relied on by the *Roper* Court to demonstrate that teenagers' immaturity impaired their decision-making ability, and therefore rendered them less culpable than adults for their crimes.⁹⁶ The potential tension between rights of protection and rights of autonomy is a central focus of this Symposium.⁹⁷ It was also the subject of an attack on the APA by Justice Scalia, who pointed to the apparent conflict to challenge the legitimacy of the Court's reliance on social science in his *Roper* dissent.⁹⁸

In a subsequent article, developmental psychologist Laurence Steinberg and several coauthors distinguished the developmental analysis in the two contexts and argued that the APA's positions were both valid:

[W]hereas adolescents and adults perform comparably on cognitive tests measuring the sorts of cognitive abilities that were referred to in the *Hodgson* brief—abilities that permit logical reasoning about moral, social, and interpersonal matters—adolescents and adults are not of equal maturity with respect to the psychosocial capacities listed by Justice Kennedy in the majority opinion in *Roper*—capacities such as

93. Laurence Steinberg et al., *Are Adolescents Less Mature Than Adults?: Minors' Access to Abortion, the Juvenile Death Penalty, and the Alleged APA "Flip-Flop,"* 64 AM. PSYCHOLOGIST 583, 584 (2009) [hereinafter Steinberg et al., *Are Adolescents Less Mature Than Adults?*] (attributing the characterization to Justice Kennedy's question at oral argument in *Roper v. Simmons*).

94. 497 U.S. 417 (1990).

95. Brief for Amicus Curiae American Psychological Association National Association of Social Workers, Inc., and the American Jewish Committee in Support of Petitioners/Cross-Respondents in Nos. 88-1125, 88-1309 and in Support of Appellees in No. 88-805, *Hodgson v. Minnesota*, 497 U.S. 417 (1990) (Nos. 88-805, 88-1125, 88-1309), 1989 WL 1127529, at *18–19.

96. Brief for the American Psychological Association, and the Missouri Psychological Association as *Amici Curiae* Supporting Respondent at 14–15, *Roper v. Simmons*, 543 U.S. 551 (2005) (No. 03-633).

97. Symposium, *Court-Involved Youth in the 21st Century: Empowerment vs. Protection*, 88 TEMP. L. REV. 615 (2016).

98. *Roper v. Simmons*, 543 U.S. 551, 617–68 (Scalia, J., dissenting).

impulse control and resistance to peer influence.⁹⁹

This distinction between deliberative decision making, with its focus on logical reasoning, and impulsive, action-focused decision making, with its focus on emotional arousal, is often referred to as the difference between “cold” and “hot” decision making.¹⁰⁰

Clearly, a decision to seek an abortion is different (and cooler) than a decision to shoot someone on the street, and the opportunity to engage in logical reasoning about moral, social, and interpersonal matters is far more likely to occur in the abortion context. But, as Steinberg and his coauthors concede, a teen seeking an abortion might well be subject to peer pressure (the second *Roper* factor) in deciding to have an abortion, and there is no reason to expect her character with regard to these moral, social, and interpersonal matters to be any more fixed (the third *Roper* factor) than it is for the youth with the gun on the street.¹⁰¹ Moreover, whether or not to have an abortion is not the only relevant decision the adolescent considered in *Hodgson* is making. Central also is the question whether the teen will discuss her decision with her parents, a decision that could readily be misanalysed by a panicked teen focused on her (mistaken) fears of making her parents angry. On the criminal side of things, we can surely find a range in the extent of deliberation exercised, as Steinberg and his coauthors also concede.¹⁰² Christopher Simmons himself seems to have done a great deal of planning, and the execution of his crime showed considerable calculation, with any exercise of peer pressure flowing from him to his accomplices.

The insight offered by developmental jurisprudence is not that the Court was wrong to protect minors’ abortion rights or, on the other hand, to shield them from the most serious potential consequences of their crimes. Nor, even, that the developmental analysis offered to distinguish the two cases is wrong, though surely it is somewhat oversimplified. The problem is that the developmental account offered does not seem like the real or best reason to treat the cases differently. What matters more than that the two sorts of adolescent decision making manifest different levels of maturity is that deferring to adolescent decision making in the two contexts leads to outcomes that have profoundly different developmental consequences.

In the abortion context, giving teens the right to consent to an abortion ensures that teens who choose not to give birth will not be forced to do so, allowing them to continue to grow up without taking on the massive financial, emotional, and social burdens of teen parenting, particularly unwanted teen parenting. We let minors access abortions, even if they choose unwisely not to

99. Steinberg et al., *Are Adolescents Less Mature Than Adults?*, *supra* note 93, at 586.

100. *E.g.*, BARRY C. FELD & DONNA M. BISHOP, *THE OXFORD HANDBOOK OF JUVENILE CRIME AND JUVENILE JUSTICE* 114 (2012) (noting that “the concepts of hot cognition and cold cognition, referring to decision-making under conditions of high and low arousal, respectively, have gained traction in explanations of adolescent delinquency”).

101. Steinberg et al., *Are Adolescents Less Mature Than Adults?*, *supra* note 93, at 586.

102. *Id.*

consult their parents, for the same reason we let them access treatment for drug addiction or sexually transmitted diseases without parental consent. This access is not based on our assessment of the quality of teens' decision-making ability, but rather on the quality of the particular decisions made.¹⁰³ Indeed, while Steinberg and his coauthors point to the fact that many states impose a waiting period on teens seeking abortions as evidence that the process is set up to assist with deliberations,¹⁰⁴ most abortion supporters oppose such waiting periods for fear that any deliberative value gained in the wait will be more than offset by the risk that the additional condition will prevent the teen from following through. In the criminal context, in contrast, holding teens fully responsible for their actions will lead to criminal consequences that will impose on them serious developmental harm.

The distinction between the developmental approach, with its focus on the difference in the aspects of the minor's maturity implicated in legal decision making, and developmental jurisprudence, with its focus on the different developmental impact of various legal rules, may prove more significant in other contexts. While the United States has not recognized a right of sexual autonomy to match that recognized for adults,¹⁰⁵ it has afforded protection to related procreative rights of adolescents,¹⁰⁶ and many who advocate for adolescent autonomy rights, generally, would favor protection of teen decision making regarding their sexuality.¹⁰⁷ But, with apologies for the raunchy pun, teens' decision to have sex surely qualifies as "hot" decision making, the type of decision making for which they are less qualified than adults, not the "cold" deliberative decision making that Steinberg and his coauthors conclude adolescents are as prepared as adults to make.¹⁰⁸ If rights are tied to teens' level of maturity in making the particular decisions in question, a decision to have sex looks much more like shooting someone on the street than obtaining an abortion.

Children's rights advocates litigating two cases in front of the Constitutional Court of South Africa faced precisely this conflict. In 2009, they challenged the application of a minimum sentences law to sixteen- and seventeen-year-olds.¹⁰⁹

103. Cf. Scott, *supra* note 63, at 1618 (stating generally that medical consent statutes give minors the freedom to make "good" choices by some societal measure).

104. Steinberg et al., *Are Adolescents Less Mature Than Adults?*, *supra* note 93, at 586.

105. *Lawrence v. Texas*, 539 U.S. 558, 578–79 (2003) (holding that criminal convictions of adults for consensual sexual conduct in the home violated liberty and privacy interests protected by the Due Process Clause).

106. *Carey v. Population Servs. Int'l*, 431 U.S. 678, 686–89 (1977) (striking down a regulation that prohibited the distribution of contraceptives to teens by any adult, finding that the law violated the minor's procreative rights).

107. See, e.g., *ADOLESCENCE, SEXUALITY, AND THE CRIMINAL LAW: MULTIDISCIPLINARY PERSPECTIVES* (Helmut Graupner & Vern L. Bullough eds., 2004).

108. Cf. *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 75 (1976) (expressing the famously discordant observation that competent minors are "mature enough to have become pregnant").

109. See *Centre for Child Law v. Minister for Justice & Constitutional Dev.* 2009 (6) SA 632 (CC) at para. 2 (S. Afr.).

In doing so, they intentionally avoided invoking the language of *Roper* offering social scientific support for a finding of lesser culpability, because they already anticipated filing a second action asserting children's sexual autonomy rights to challenge provisions of the Sexual Offenses Act that criminalized consensual sex between two adolescents.¹¹⁰ They chose not to rely on the *Roper* analysis, the central analysis of the developmental approach, in the first case, for fear that it would undermine their position in the second case. Developmental jurisprudence, in contrast, would suggest that legal rulings addressing children's rights of sexual autonomy should be driven by an assessment of the positive and negative developmental consequences that might flow from upholding the statute, on the one hand, and from recognizing adolescent sexual autonomy rights, on the other. Whatever the outcome, none of this analysis would conflict with a ruling shielding teens from the destructive consequences of the harsh minimum sentences imposed by the first law.

Another context ripe for development-sensitive modification, particularly after *J.D.B.*, is interrogation. Is a decision to waive *Miranda* rights hot or cold? On the one hand, it seems closer to a decision of a teen to seek an abortion than to shoot someone on the street, as it is made after information is provided that calls the teen's attention to some of the consequences of the decision. Teens make this decision removed from peers, in the company of one or more adult, who sometimes include their parents. On the other hand, a teen being interrogated is clearly in a stressful environment, and the interrogators are likely taking every advantage of the teen's vulnerability to solicit a waiver and confession. Developmental psychologists can be enlisted to assess adolescents' maturity in making these waiver decisions, but our choices about whether to afford minors special protections in the criminal process ought not to be tied, certainly not exclusively, to this capacity accounting. We should also consider how an application of various versions of the procedures in question will best facilitate their development, as rights exercisers or more generally. We might decide, for example, that denying young people's right to waive counsel, a move that would deprive teens of decision-making authority on that question, will enhance teens' ability to learn how to effectively understand and exercise their criminal procedural rights more generally. Even if teens have roughly adultlike competence to make the waiver decision, developmental jurisprudence might counsel against affording them that right.

2. Responding to the Worst and Oldest Offenders

Another alteration in analysis that could produce differences in outcomes goes to our account of how our response to offending changes with the age of the offender and the frequency and severity of the offending. It is common to suggest that the older minors get, the less deserving of a response within the

110. See *Teddy Bear Clinic for Abused Children v. Minister of Justice & Constitutional Dev.* 2013 (2) SA 168 (CC) (S. Afr.). This perceived conflict, and its effect on litigation strategy, is set out in Ann Skelton, *Freedom in the Making: Juvenile Justice in South Africa*, in *JUVENILE JUSTICE IN GLOBAL PERSPECTIVE* 327, 350–51 (Franklin E. Zimring et al. eds., 2015).

juvenile justice system they become. After all, these are the youth who are the most adultlike, many of whom have already had their crack at the special protections and attention of the juvenile justice system. Their childhood days are numbered, and their conduct increasingly recasts them in the role of adults. This is certainly the common response of the public, manifested most starkly in the increase in transfers to adult court in the 1990s and the lower age of majority set, in many states, for the purposes of adult criminal prosecution.

But it is precisely the opposite response of that of a childrearer: Faced with a seriously failing minor on the brink of adulthood, the childrearer intensifies her efforts. Her role is most crucial because time is short and the need is obviously great. As with conventional responses focused on the adultlike capacities of the severely offending older teen, the childrearer's response will become more forceful, but not because there is any shift away from the focus on successful childrearing, but rather, because a last ditch effort at successful childrearing seems to demand it. This recasting of the end of childhood as the time for the no-holds-barred attempt to achieve childrearing success can help us sort between intensive responses that are justified (for example, state support for an expensive evidence-based program with a high success rate), and those that are not (for example, incarceration in an adult prison).

This shift in our conception of and response to the oldest and worst juvenile offenders is in line with the *Graham* paradox, the constitutional insistence that we do not shut off our commitment to our minor's potential for future success, however far in the future that success might emerge, until the minor crosses the line into adulthood.

C. *Changing Legal Practice to Improve Our Childrearing*

1. *Developmentally Valuable Programs for Youth*

It goes without saying that youth involved in state systems, both the juvenile justice and the child welfare systems, will be raised more successfully if they are provided with supports and services well designed to facilitate their development. There is a growing body of research aimed at identifying effective programming. In the juvenile justice field, not surprisingly, considerable attention is given to programs that reduce recidivism, though this research suggests, also not surprisingly, that the most effective way to reduce recidivism is to equip young people and their families with skills that support a more successful transition to adulthood in other respects as well.¹¹¹ In the child welfare field, developments in law and policy increasingly emphasize the importance, for older youth, of having normal adolescent experiences, based on a concern that the protective, cautious orientation of the child welfare system deprives teens of opportunities to gain important experiences acting independently and taking

111. See, e.g., Peter Greenwood, *Prevention and Intervention Programs for Juvenile Offenders*, 18 FUTURE CHILD. 185, 198 (2008) (describing research evaluating the effectiveness of a range of programs and identifying programs shown to be most effective at reducing recidivism).

control of their own lives.¹¹² An appreciation of the value to young people, and society as a whole, of quality programming aimed at helping court-involved young people grow up is an application of developmental jurisprudence that is already well understood.

2. Developmentally Valuable Procedures for Youth

Less appreciated is the developmental impact of practice and procedure. Therapeutic jurisprudence has increasingly shifted attention to law as applied, and particularly to the behavior of legal actors. This focus creates opportunities not only to bestow therapeutic benefits (through, for example, the treatment courts), but also to detect hidden, inadvertent developmental harms. Applying the lens of developmental jurisprudence, I am particularly concerned about developmental harms imposed by the legal system and legal actors on court-involved youth, where a significant portion of decision making concerning their present and future unfolds. These youth, of course, depend far more heavily on legal processes for their development than the average child. It is in these court proceedings that we convey a message to court-involved youth about their place in our society, and, based on my experiences and observations in juvenile court, we should be very concerned about the message conveyed.

I have written elsewhere, in the spirit of developmental jurisprudence, about the serious, inadvertent harms likely imposed on young people by the current operation of the juvenile courts, even when operated by enlightened and committed lawyers, judges, and other court personnel.¹¹³ My experiences and observations in juvenile court suggest to me that the developmental impact of juvenile court is commonly very negative. In the course of their hearings, young people are conditioned to assume the status of outsider: They are not a part of the social and professional community to which all the court personnel, their own lawyers included, belong, and they are not included in the hearings in any meaningful way. If they are invited to say something, it is evident that whether they choose to speak (which they do occasionally, mostly in a timid or performative manner) or not (more commonly), their views will have no impact on the important decisions being made. Indeed, if they understand anything about what they observe, they will realize that most decisions were made by a community of professional adults before the case was called. The behavior of that community is a very visible performance of the operation of the law, and what they learn is that they are not a part of that legal community.

The impact of that performance is somewhat different in child welfare and

112. See, e.g., Preventing Sex Trafficking and Strengthening Families Act, Pub. L. No. 113-183, § 111(a)(1), 128 Stat. 1919, 1923 (2015) (requiring states to put in place a “reasonable and prudent parent standard” for decisions made by a foster parent to increase the chance for foster youth to have a normal adolescent experience).

113. See, e.g., Emily Buss, *The Developmental Stakes of Youth Participation in American Juvenile Court*, in INTERNATIONAL PERSPECTIVES AND EMPIRICAL FINDINGS ON CHILD PARTICIPATION 303, 310–15 (Tali Gal & Benedetta Faedi Duramy, eds., 2015) [hereinafter Buss, *The Developmental Stakes of Youth Participation in American Juvenile Court*].

juvenile justice proceedings. In juvenile justice proceedings, a performance that casts the youth as an outsider reinforces the youth's self-understanding as someone who is not a part of the community that makes and enforces the law. In child welfare proceedings, a performance that casts the youth as an outsider perpetuates the youth's dependent status in the system. In both sorts of proceedings, the failure to meaningfully engage young people deprives them of an important opportunity to begin, in a highly structured and supported environment, to exercise decision-making authority over their own lives.

Reforms driven by developmental jurisprudence would place especially high priority on the developmental impact of a court-involved young person's interaction with legal actors and would call on all these legal actors to bear some childrearing responsibility in the exercise of their roles. To be clear, assuming childrearing responsibility does not mean abandoning their roles in the process. A lawyer representing a young person should not disregard the young person's preferences, or not bother to seek them, out of a parental concern for the young person's well-being. Rather, the lawyer needs to add to the zealous representation of the child client a commitment both to do everything in her power to improve the young person's ability to understand the proceeding and exercise his constitutional rights and also to manifest the caring of a childrearer.¹¹⁴

I have called for a significant shift in the role played by judges in particular, because the judge is in the best position to truly shift the overall tone and content of the proceedings.¹¹⁵ The judge is also charged most directly with the childrearing responsibilities under law. At and after disposition in both child welfare and juvenile justice proceedings, a judge oversees a young person's progress and has the power to direct (or, in some jurisdictions, to forcefully encourage) others to help the young person. Procedural justice theory supports the conjecture that a judge who alters her procedure in an attempt to engage young people more effectively in court can hope to have a positive impact on their perception of the law's legitimacy and their commitment to obeying the law.¹¹⁶ While such an end point would clearly have social value, it could also have tremendous developmental value to the young person: Our aim in juvenile court should be to instill in young people a sense of self as part of, rather than outside of, the community that makes and enforces the laws.

CONCLUSION

It is a good time for children's rights advocates. The Supreme Court has forcefully embraced the "logic" of the developmental research and its application to law. The application to other substantive and procedural contexts, particularly within criminal law, is obvious and already underway. But in its

114. Cf. Henning, *supra* note 61, at 327–28 (stating that attorney-client relationships should “educate, empower, and validate the client”).

115. See Buss, *The Developmental Stakes of Youth Participation in American Juvenile Court*, *supra* note 113, at 325.

116. TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (1990).

focus on children as special legal subjects, the logic of the cases is incomplete. Also critical is the role law plays in raising children. Applying the lens of developmental jurisprudence highlights the special relationship between law and legal subject throughout childhood, and the special responsibility that relationship imposes on law.