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## INTRODUCTION

*Theresa Glennon\* and Emily C. Keller+*

On October 2 and 3, 2015, the *Temple Law Review* and Juvenile Law Center hosted a Symposium titled, “Court-Involved Youth in the 21st Century: Empowerment vs. Protection.” At that Symposium, and in the articles that follow, the panelists and authors advanced innovative approaches to society’s treatment of court-involved youth. They draw on key advances in research on adolescent development. The key themes of balancing the empowerment of youth with their protection emerge in varied contexts, including the juvenile justice, criminal justice, child welfare, education, and immigration systems in the United States. The authors add perspectives from Europe, South Africa, and international human rights law for children. The articles are both reflective and forward-looking, introducing readers to new ways of looking at current approaches and excavating the rich, yet still untapped, opportunities they provide to benefit court-involved youth and the broader society.

Ursula Kilkelly, in her article, “Advancing the Rights of Young People in Juvenile Justice: The Impact of Juvenile Law Center,”<sup>1</sup> assesses the influence of Juvenile Law Center’s forty years of advocacy for the rights of children. She focuses on Juvenile Law Center’s victories in ending the use of the death penalty and gaining other restrictions on the sentencing of minors.<sup>2</sup> The work of Juvenile Law Center and other committed advocacy organizations led to three major victories in the U.S. Supreme Court that rendered unconstitutional the execution of juveniles and their receipt of life sentences without the possibility of parole (LWOP). Juvenile Law Center’s strategy in these cases included an assessment of juveniles’ developing brains that argued that they should be considered less culpable and more capable of change than adults. Kilkelly points out that Juvenile Law Center continues to advance the rights of juveniles in areas such as transfers to the adult criminal justice system and adult prisons, criminal records (especially of children convicted of sex offenses), the need for quality legal representation, and training for police officers to respond appropriately to children and youth. These measures seek to empower youth while at the same

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1. Ursula Kilkelly, *Advancing the Rights of Young People in Juvenile Justice: The Impact of Juvenile Law Center*, 88 TEMP. L. REV. 629 (2016).

2. Juvenile Law Center participated in all of the major Supreme Court cases involving juvenile sentencing, including *Roper v. Simmons*, 543 U.S. 551 (2005) (holding that the execution of juveniles was unconstitutional); *Graham v. Florida*, 560 U.S. 48 (2010) (finding that the imposition of life without parole on juveniles who committed nonhomicide offenses violated the Eighth Amendment); and *Miller v. Alabama*, 132 S. Ct. 2455 (2012) (2012) (holding that mandatory life without parole sentences for juveniles convicted of homicide were unconstitutional).

time providing important protections to them when they misstep. Kilkelly notes the international importance of Juvenile Law Center's strategy of challenging punitive state practices regarding juveniles through findings of interdisciplinary research on adolescent and young adult development. While in some areas other countries have pursued less punitive measures, in the "hard-end" cases that have been at the heart of Juvenile Law Center's advocacy, harsh treatment remains the norm, and Juvenile Law Center's work has the potential to shift the debate not only in the United States, but around the world.

Martin Guggenheim and Randy Hertz center their article, "Selling Kids Short: How 'Rights for Kids' Turned into 'Kids for Cash,'"<sup>3</sup> on the shocking case in which two Pennsylvania judges made millions by illegally imprisoning close to two thousand youth through kickbacks from the private jailers who benefited from their detention. Juvenile Law Center challenged this corrupt practice in the Pennsylvania Supreme Court and in federal district court. The Center's advocacy ensured that effected juveniles were not forgotten and led the way to establish the Pennsylvania Interbranch Commission on Juvenile Justice to investigate how such a massive failure of the system and its many participants occurred. Many of the Commission's findings, including its shocking conclusion that zero-tolerance school policies helped fuel the "culture of complicity" in Luzerne County by shifting students accused of petty school offenses into the juvenile system, have implications far beyond the borders of Luzerne County.

Guggenheim and Hertz undertake to examine this case through a wider lens to ask how the promise of fair process for juveniles first made in *In re Gault*,<sup>4</sup> and further developed through Supreme Court case law, has failed juveniles nationwide. They find that from 1977 to 2005, the rights of children and youth were significantly curtailed by the Supreme Court, a trend only recently reversed in part by more recent victories against overly harsh punishment. More importantly, hostility to these rights has led to the systematic denial of the right to counsel at the local level. A "get tough on crime" philosophy fueled juvenile transfers to the adult criminal justice system, zero-tolerance policies and expanded use of police in schools, and the privatization of the prison industry. These forces combined to give the United States the ignominious status as a world leader in juvenile incarceration. During these dark times for children and youth, Juvenile Law Center's advocacy role has been especially crucial, Guggenheim and Hertz note, for while those lawyers in Luzerne County's juvenile courts largely saw their corrupt proceedings as normal, Juvenile Law Center provided the independent voice and dedicated advocacy needed to speak for the silenced children and families whose lives were being shattered.

In "Juvenile Sentencing Reform in a Constitutional Framework,"<sup>5</sup> Elizabeth Scott, Thomas Grisso, Marsha Levick, and Laurence Steinberg return

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3. Martin Guggenheim & Randy Hertz, *Selling Kids Short: How "Rights for Kids" Turned into "Kids for Cash,"* 88 TEMP. L. REV. 653 (2016).

4. 387 U.S. 1 (1967).

5. Elizabeth Scott, Thomas Grisso, Marsha Levick & Laurence Steinberg, *Juvenile Sentencing Reform in a Constitutional Framework*, 88 TEMP. L. REV. 675 (2016).

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to the juvenile sentencing cases examined by Kilkelly and Guggenheim and Hertz. The article looks back at the key cases and argues that the Supreme Court has “provided a coherent framework grounded in conventional criminal law principles and scientific research on adolescence” that can be used to develop a “fair sentencing regime for juveniles.”<sup>6</sup> The authors also look forward, and explain how the Supreme Court’s key principles—reduced culpability, trial competence, and greater opportunity to reform of adolescents—can be applied generally to juvenile offenders in relation to a wide range of criminal offenses. They identify the key attributes of adolescents that support the Supreme Court’s decisions, such as immaturity, impetuosity, vulnerability to peer pressure, and potential for reform, as well as significance of a youth’s family and home environment. With regard to LWOP for juveniles, they believe that the Supreme Court’s principles and recognition of the psychological and neuroscience research on adolescents favor a presumption against LWOP. They provide readers with a practical and expert guide to how mental health experts should evaluate adolescents in the context of LWOP sentencing. These principles and new understandings have already started to reshape state policies regarding juvenile justice, and promise to continue to achieve deep and pervasive reform of the regulation of juvenile crime and sentencing of youth offenders.

Catherine Ross shines light on an important but overlooked aspect of the school-to-prison pipeline that leads so many youth into the juvenile justice system in “‘Bitch,’ Go Directly to Jail: Student Speech and Entry into the School-to-Prison Pipeline.”<sup>7</sup> Students are often excluded from instructional time for petty offenses. This exclusion, with its psychological and academic harms, has been shown to set students on a course toward greater involvement in the criminal justice system. Ross demonstrates the extent to which students subjected to exclusion for petty offenses are in fact punished for speech that should be accorded constitutional protection. Often, students are disciplined not for speech that can be properly prohibited—threats of harm or material disruption—but for language that threatens school hierarchy and school officials’ notions of civility. This harmless speech can even lead to student arrests, and while courts have not always protected students from school discipline for speech, they have been more willing to protect them from prosecution for those same acts. Ross points out that excessive school and juvenile justice system punishment for student speech has been practiced in a racially biased fashion. To highlight this bias, she cites the U.S. Department of Justice’s litigation against the Meridian, Mississippi school district for excessive referrals to the juvenile justice system for acts such as refusal to follow a teacher’s direction and profanity. Finally, Ross examines the troubling phenomenon of school districts referring students for discipline or prosecution for off-campus speech. She argues that the Supreme Court must further clarify speech protections for youth in and outside of their schools. Ross reminds readers that as we rethink punitive school

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6. *Id.* at 667–78.

7. Catherine Ross, “‘Bitch,’ Go Directly to Jail: Student Speech and Entry into the School-to-Prison Pipeline,” 88 *TEMP. L. REV.* 717 (2016).

policies toward students to protect them from the school-to-prison pipeline, we should focus not only on the harshness of the penalties imposed, but also the constitutionality of punishment for protected speech.

While Ross pushes back against the overuse of the public schools' *parens patriae* role in order to protect the speech rights of students, Emily Buss argues in "Developmental Jurisprudence" that we should embrace and broaden our view of the role of law and legal institutions in "childrearing."<sup>8</sup> Buss draws on the recent Supreme Court juvenile sentencing cases examined by other Symposium authors, highlighting the Court's reliance on growing scientific understandings of child and adolescent development. She fears, however, that the Court's recognition of the developmental approach misses an important implication of this conceptual reframing. Buss advances the innovative concept that the law, lawmakers, and legal actors do not simply respond to, but actually *shape*, the development of children and youth.

To support this reconceptualization, Buss advocates for a "developmental jurisprudence," which finds its roots in the therapeutic jurisprudence movement. Founders of the therapeutic jurisprudence movement brought a normative perspective to the study of law by asking whether the legal system creates therapeutic or antitherapeutic effects. Buss encourages us to ask whether the law is "minimiz[ing] the developmental harm it imposes and maximiz[ing] the developmental benefit it provides."<sup>9</sup> Buss demonstrates how the developmental jurisprudence approach can inform our thinking about areas, such as abortion rights and juvenile sentencing, which may otherwise seem inconsistent. Buss's developmental approach wisely shifts our focus toward the special relationship, with its resulting responsibilities, that the law and legal actors have with our children.

Most authors in the Symposium issue focus on children and youth up to the age of eighteen. Alexandra Cohen, Richard Bonnie, Kim Taylor-Thompson, and BJ Casey, however, focus on the developmental characteristics of young adults ages eighteen to twenty-one in "When Does a Juvenile Become an Adult? Implications for Law and Policy."<sup>10</sup> They argue that the treatment of adolescents and young adults has long been based on each era's conventional wisdom or political climate. They note that the federal and state governments use various ages as markers of adulthood, such as allowing youth fourteen and older (and occasionally younger) to be tried as adults, according the right to vote at the age of eighteen, withholding permission to drink until the age of twenty-one, and requiring employers to cover health insurance for their employees' children up to the age of twenty-six. The authors embark on research to determine the extent to which young adults ages eighteen to twenty-one are more similar to adolescents or more similar to slightly older adult peers. They find that young adults' "cognitive capacity is still vulnerable to negative emotional influences" in

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8. Emily Buss, *Developmental Jurisprudence*, 88 TEMP. L. REV. 741 (2016).

9. *Id.* at 752.

10. Alexandra O. Cohen, Richard J. Bonnie, Kim Taylor-Thompson & BJ Casey, *When Does a Juvenile Become an Adult? Implications for Law and Policy*, 88 TEMP. L. REV. 769 (2016).

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ways very similar to the findings regarding youth up to age eighteen. The authors suggest that policymakers who consider raising the age of eligibility for juvenile court up to age twenty-one due to decreased culpability would have empirical support from their research.

Several authors examined adolescent development research in specific contexts and systems. In “Juveniles Adjudicated for Sexual Offenses: Fallacies, Facts, and Faulty Policy,”<sup>11</sup> authors Amanda M. Fanniff, Alex R. Piquero, Edward P. Mulvey, Carol A. Schubert, and Anne-Marie R. Iselin examine policies related to juveniles adjudicated for sexual offenses. The authors find that many of the programs and sanctions for juveniles adjudicated for sexual offenses are modeled after adult sex offender programs, including lengthy treatment programs and the possibility of civil commitment, sex offender registration, or community notification. These policies are based on the premise that juveniles who commit sex offense are very different from juveniles who commit other nonsexual offenses. The authors debunk this assumption and note that there is very little evidence that juveniles who commit sexual offenses are different from other juvenile offenders, or that they are at high risk to commit future sexual offenses. In fact, these youth are less likely to recidivate than their peers who commit nonsexual offenses. Policies should therefore be aligned with these findings, rather than based on an emotional reaction to sexual offenses.

In “‘You’re on the Right Track!’ Using Graduated Response Systems to Address Immaturity of Judgment and Enhance Youths’ Capacities to Successfully Complete Probation,”<sup>12</sup> Naomi E.S. Goldstein, Amanda NeMoyer, Elizabeth Gale-Bentz, Marsha Levick, and Jessica Feierman examine developmental research that could and should be applied to juvenile probation policies. Typically, juvenile probation policies are structured similarly to those of adult probation—the youth are expected to comply with multiple probation requirements, and failure to comply with these requirements can result in placement in a juvenile justice facility. The authors argue that probation should be better aligned with adolescent development, including taking into account youths’ risk-taking, impulsive, and reward-driven behaviors. These characteristics of normal adolescent development mean that young people, by their nature, will have difficulty fully complying with probation conditions. Therefore, instead of punishing youth for failing to comply with probation conditions, new probation approaches should help youth remember their probation conditions, reward youth for compliant behavior, deliver sanctions for noncompliance that help youth learn from their mistakes, and promote youths’ interactions with positive peers. Properly aligning probation conditions with adolescent development could promote positive development and prevent youth

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11. Amanda M. Fanniff, Alex R. Piquero, Edward P. Mulvey, Carol A. Schubert & Anne-Marie R. Iselin, *Juveniles Adjudicated for Sexual Offenses: Fallacies, Facts, and Faulty Policy*, 88 TEMP. L. REV. 789 (2016).

12. Naomi E.S. Goldstein, Amanda NeMoyer, Elizabeth Gale-Bentz, Marsha Levick & Jessica Feierman, “*You’re on the Right Track!*” *Using Graduated Response Systems to Address Immaturity of Judgment and Enhance Youths’ Capacities to Successfully Complete Probation*, 88 TEMP. L. REV. 803 (2016).

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from deeper involvement with the justice system.

Adolescent development can also help inform child welfare policies. In “Foster-Care Reentry Laws: Mending the Safety Net for Young Adults in the Transition to Independence,”<sup>13</sup> Bruce A. Boyer examines policies allowing youth ages eighteen to twenty-one to reenter foster care after exiting the system. Boyer discusses the transition from adolescence to adulthood as a period of “emerging adulthood,” which extends into the mid to late twenties. This transition can be particularly difficult for youth leaving foster care, who do not have familial support and have been exposed to trauma in their childhood. As a result, many youth exiting the foster care system face poor outcomes, including high rates of homelessness, low rates of high school and college graduation, high unemployment rates, and increased risk of justice system involvement. Youth who leave care at age eighteen tend to have worse outcomes than those who remain until age twenty-one. In spite of these outcomes, many youth opt to leave care at age eighteen even when they have the choice to remain until age twenty-one, sometimes because of youths’ desire for independence and autonomy, unrealistic expectations about their lives outside of foster care, and youths’ impulsivity. These characteristics are consistent with adolescent development and identity formation, and, in light of their development, youth should be allowed to make mistakes in their transition to adulthood without being permanently kicked out of the child welfare system. Boyer argues that thoughtful policies should therefore be implemented to permit youth to reenter care up to age twenty-one.

In “Adverse Consequences and Constructive Opportunities for Immigrant Youth in Delinquency Proceedings,”<sup>14</sup> Theo Liebmann explores the complex intersection of immigration law and juvenile delinquency proceedings. On the one hand, a juvenile adjudication may impose adverse consequences on immigrant youth, including deportability. At the same time, however, youth may be able to obtain special immigration status based on their involvement in family or juvenile court, such as Special Immigrant Juvenile Status. Liebmann argues that attorneys who represent these young people must be competent to adequately advise their clients and advocate for their clients. Attorneys have not only an ethical duty, but a constitutional duty to provide this competent advice and counsel. Liebmann’s article helps illustrate the bridge between “empowerment” and “protection” of youth. With competent and trained attorneys, youth are both more empowered to make decisions in their delinquency cases and better protected from the adverse outcomes of this involvement.

The next two articles provide an international perspective on children’s rights, autonomy, and protection. Ann Skelton’s article, “Balancing Autonomy

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13. Bruce A. Boyer, *Foster-Care Reentry Laws: Mending the Safety Net for Emerging Adults in the Transition to Independence*, 88 TEMP. L. REV. 837 (2016).

14. Theo Liebmann, *Adverse Consequences and Constructive Opportunities for Immigrant Youth in Delinquency Proceedings*, 88 TEMP. L. REV. 869 (2016).

and Protection in Children's Rights: A South African Account,"<sup>15</sup> discusses two South African Constitutional Court cases to examine and explain how lawyers and the South African Constitutional Court have incorporated adolescent behavioral and brain development into their advocacy and jurisprudence. In the first case, an attack on mandatory minimum sentences for sixteen- and seventeen-year-olds, the legal team decided not to rely on the neuroscientific evidence underlying the U.S. Supreme Court's decision in *Roper v. Simmons*,<sup>16</sup> described in detail by Elizabeth Scott, Thomas Grisso, Marsha Levick, and Laurence Steinberg in their article, "Juvenile Sentencing Reform in a Constitutional Framework."<sup>17</sup> The legal team was concerned that an emphasis on how "kids are different" and have diminished decision-making capacity could be harmful in other litigation the team was pursuing, in which it sought to emphasize youth's autonomy, specifically a case involving the decriminalization of consensual sexual activity between teens. The legal team ultimately prevailed in both cases, thereby "protecting" children from harsh mandatory sentences, while also ensuring young people's "autonomy" to make decisions about consensual sexual relationships.

In "Child-Friendly Justice: Protection and Participation of Children in the Justice System,"<sup>18</sup> Ton Liefwaard provides a new model for a child's protection and empowerment in the justice system. Liefwaard describes the Committee of Ministers of the Council of Europe's 2010 Guidelines on Child-Friendly Justice. These Guidelines, rooted in a child's right to be heard and participation rights outlined in the U.N. Convention on the Rights of the Child and European Court of Human Rights case law, create a new paradigm that focuses on children's rights and participation in legal cases in which they are involved. International human rights law requires both the promotion and protection of a child's best interests and a child's right to participate in all matters affecting the child.

In the context of police interrogations, for example, the Guidelines recognize the particular vulnerabilities of children and require that a child's lawyer or parent must be present during any interrogation of the child. In juvenile court proceedings, the Guidelines also emphasize the importance of counsel and conducting proceedings in a child-friendly environment and using child-friendly language. The Guidelines emphasize the importance of specialized juvenile courts, not only for the purpose of protecting a child, but also in order to enable the child to participate meaningfully in the proceedings. Liefwaard argues that these Guidelines represent an important step forward in protecting and empowering court-involved youth, yet he worries that the Guidelines are not sufficient to fully protect children. For example, the Guidelines allow youth to be interrogated without a lawyer so long as a parent is present and fail to require

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15. Ann Skelton, *Balancing Autonomy and Protection in Children's Rights: A South African Account*, 88 TEMP. L. REV. 887 (2016).

16. 543 U.S. 551 (2005).

17. Scott et al., *supra* note 5.

18. Ton Liefwaard, *Child-Friendly Justice: Protection and Participation of Children in the Justice System*, 88 TEMP. L. REV. 905 (2016).

free legal assistance for children.

Theresa Glennon provides a closing reflection on future directions for legislators, judges, advocates, and researchers to examine the crucial connections between the adolescent development research at the core of the Symposium and intersecting categories such as race, sexual orientation, gender identity, and disability. In “The Developmental Perspective and Intersectionality,”<sup>19</sup> Glennon argues that some children and youth may have significantly worse experiences in the school discipline, child welfare and juvenile justice systems due to the biased perceptions of legislators, system actors, and the general public, based on factors such as race, sexual orientation, gender identity and expression, mental health, disabilities, and adverse childhood experiences. These factors lead many to have distorted perceptions of the development of those youth. In addition, the youth themselves may have experienced alternative developmental pathways that need recognition and highlight differing needs. She encourages future work at these important intersections to ensure that no children and youth are excluded from the benefits of this important research so we can truly create an inclusive “developmental jurisprudence.”<sup>20</sup>

Together, the articles that follow address many of the important legal issues that advocates, researchers, scholars, and courts will face in the years and decades to come. They raise important questions about how our court systems, processes, and decisions can better reflect our growing knowledge of adolescent development, how advocates in the United States can help both shape and learn from international developments on the rights of children, and how systems and individuals can work to protect children from the harms of court involvement, while simultaneously empowering them to make decisions about their legal cases and their own lives.

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19. Theresa Glennon, *The Developmental Perspective and Intersectionality*, 88 TEMP. L. REV. 929 (2016).

20. See Buss, *supra* note 8.