

# CHILDREN'S PREFERENCE IN ADJUDICATED CUSTODY DECISIONS

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Historically, courts usually paid little attention to the child's wishes in deciding which parent should have custody upon divorce. Today, statutes in many states direct courts to consider the child's preference, often as one among several factors that guide decision making.<sup>1</sup> With some exceptions, the law gives only general guidance

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<sup>1</sup> See, e.g., CAL. CIV. CODE § 4600 (West Supp. 1988) (court shall give due weight to wishes of child capable of intelligent preference). The Michigan statute is representative of legislative efforts to guide judicial decision making about custody and indirectly limit discretion. It lists several factors to be considered by the court including:

- (a) The love, affection, and other emotional ties existing between the parties involved and the child.
- (b) The capacity and disposition of the parties involved to give the child love, affection, and guidance and continuation of the educating and raising of the child in its religion or creed, if any.
- (c) The capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs.
- (d) The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining a continuity.
- (e) The permanence, as a family unit, of the existing or proposed custodial home or homes.
- (f) The moral fitness of the parties involved.

and does not specify under what circumstances and to what extent the child's desire should affect the decision.<sup>2</sup> Little is known about how important this factor is, what variables influence the weight accorded the child's preference, or how courts obtain and evaluate evidence about the child's wishes.<sup>3</sup>

This Article began as a straightforward empirical study of the way in which courts in one state involve children in proceedings to decide their custody when their parents divorce.<sup>4</sup> We were interested in how judges obtained information about children's preferences as well as judicial perceptions about the children's responses. We also wanted to learn about the extent to which judges considered the child's preference in deciding custody suits and the factors that influenced this calculation.

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- (g) The mental and physical health of the parties involved.
  - (h) The home, school, and community record of the child.
  - (i) The reasonable preference of the child, if the court deems the child to be of sufficient age to express preference.
  - (j) The willingness and ability of each of the parents to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent.
  - (k) Any other factor considered by the court to be relevant to a particular child custody dispute.

MICH. COMP. LAWS ANN. § 722.23 (West. Supp. 1988).

For a review of the trend toward legal consideration of the child's preference regarding custody, see Siegel & Hurley, *The Role of the Child's Preference in Custody Proceedings*, 11 FAM. L.Q. 1 (1977); Jones, *Judicial Questioning of Children in Custody and Visitation Proceedings*, 18 FAM. L.Q. 43 (1984). See also W. KRAM & N. FRANK, *THE LAW OF CHILD CUSTODY: DEVELOPMENT OF THE SUBSTANTIVE LAW* (1982).

<sup>2</sup> The exceptions include prescriptions about considering the preference of a child above a given age. See *Harbin v. Harbin*, 238 Ga. 109, 230 S.E.2d 889 (1976) (child fourteen years or more is mature enough to select the parent with whom he desires to live despite previous adjudications that the parent was unfit); OHIO REV. CODE ANN. § 3109.04 (Baldwin 1983) (child twelve years or older may choose parent unless court finds selected parent unfit); GA. CODE ANN. § 19-9-1(a) (Supp. 1988) (child fourteen or older may choose parent unless parent unfit).

<sup>3</sup> For an empirical study of judicial interviewing of children, see Lombard, *Judicial Interviewing of Children in Custody Cases: An Empirical and Analytic Study*, 17 U.C. DAVIS L. REV. 807 (1984). For a study of the attitudes of judges and attorneys toward children's participation and preference in custody decisions, see Felner, Terre, Farber, Primavera, Goldfarb, Aber & Bishop, *Party Status of Children During Marital Dissolution: Child Preference and Legal Representation in Custody Decisions*, 14 J. CLINICAL CHILD PSYCHOLOGY 42 (1985).

<sup>4</sup> For a description of the study, see Part II, *infra*.

The study consisted of a survey of judges in Virginia, a state in which the statutory provision regulating custody decisions does not explicitly direct courts to consider the child's preference.<sup>5</sup> We assumed that, despite the absence of statutory guidance, courts would consult with and be influenced by the preferences of at least some children. This proved to be correct. The study yielded several interesting findings about the role of children in judicial decision making and about the process of involving children in custody proceedings. We examine these findings and analyze their legal implications in Parts II and III of the Article.

On reflection, the most interesting lesson of this study was derived from our initial assumption that the child's preference would count in some custody decisions despite the absence of statutory direction. Analysis of the data suggested that for courts making custody decisions, the weight accorded the child's preferences was directly correlated to the age of the child. Indeed, the uniformity of judicial response suggested that courts apply an implicit rule favoring the parent preferred for custody by the adolescent child. Further, custody of older children is litigated less frequently than is that of younger children, suggesting that parents may also defer to the wishes of adolescents. These findings suggest that parents and judges are guided in making decisions about custody by a social norm supporting participation by adolescents in important decisions affecting their lives.

This admittedly tentative hypothesis suggests a broader theme. Because custody decision rules regulate important long-term relationships, social norms may play a uniquely important role; the relationship between legal rules and social norms in this context

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<sup>5</sup> See VA. CODE ANN. § 20-107.2 (Supp. 1988). The statute explicitly directs consideration of several other factors:

The court, in determining custody . . . shall consider the following:

- a. The age and physical and mental condition of the child or children;
- b. The age and physical and mental condition of each parent;
- c. The relationship existing between each parent and each child;
- d. The needs of the child or children;
- e. The role which each parent has played, and will play in the future, in the upbringing and care of the child or children; and
- f. Such other factors as are necessary to consider the best interest of the child or children.

merits more thoughtful examination than it has yet received.<sup>6</sup> Evolving child custody law may be better understood if studied against a backdrop of changing family roles.<sup>7</sup>

Part I of this Article examines the trend toward recognizing children's custody preferences. It describes the related debate over whether the child should have a decisional role and, if so, how evidence should be elicited. Part II describes the findings of a study of attitudes and practices of judges who decide custody cases in Virginia. The study was designed to determine whether children's preferences counted in the judicial decision and by what means evidence of these preferences was elicited.

In Part III we analyze the findings of the Virginia study and suggest implications for legal policy. We conclude that a short, private judicial interview directed solely at eliciting the preference of the adolescent child who wants to have a voice in the decision represents the optimal accommodation of the conflicting interests of parents and children in custody determinations. We further argue that the implicit legal rule favoring the custodial choice of adolescent children should be adopted as a presumption. The "adolescent preference" rule is consistent with developmental knowledge about adolescence and with the legal trend toward recognition of adolescent autonomy in other settings. Moreover, such a rule

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<sup>6</sup> Robert Ellickson has studied the way in which social norms complement and even supplant legal rules in regulating relationships and resolving disputes among cattle owners and other residents of Shasta County, California. Ellickson, *Of Coase and Cattle: Dispute Resolution Among Neighbors in Shasta County*, 38 STAN. L. REV. 623 (1986). See also Ellickson, *A Critique of Economic and Sociological Theories of Social Control*, 16 J. LEGAL STUD. 67 (1987) [hereinafter Ellickson, *Critique*] (an examination of social norms and other social control mechanisms). Stewart Macauley studied relationships among Wisconsin business firms and found that norms of honoring commitments and producing a good product and standing behind it were important regulators of behavior among firms. Macauley, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963). Robert Scott argued that social norms together with non-bargained patterns of cooperation play an important role in regulating long term contractual relationships. Scott, *Conflict and Cooperation in Long-Term Contracts*, 75 CALIF. L. REV. 2005 (1987).

<sup>7</sup> This perspective may have prescriptive importance as well. Legal rules that depart significantly from social norms are costly to enforce and may result in unintended effects. Some aspects of the recent trend toward joint custody indicate a failure to calculate the importance of existing norms in pursuing a goal of social change. See *infra* note 141 and accompanying text.

encourages private ordering and lends greater certainty to custody decision making for a significant category of cases.

In Part IV, we examine the basis of the "adolescent preference" rule and suggest that it is derived from a modern social norm supporting a voice for teenagers in important matters affecting their lives. In general, social norms and customs regarding family roles tend to play a critical role in custody decisions and policies. We suggest that the precision or generality of custody decision rules is positively (and perhaps normatively) linked to the extent of the social consensus about family roles in marriage and divorce. Attending to the function of social norms in custody law may offer a valuable perspective for legal policy.

#### I. INVOLVING CHILDREN IN CUSTODY DISPUTES: THE SCOPE OF THE CONTROVERSY

In recent years, statutory law in many states has attempted to guide the judicial inquiry in divorce custody disputes by specifying the factors to be considered in the decision.<sup>8</sup> One factor that has been emphasized is the child's preference regarding her future custodian. Increasingly, judges are directed by statute to solicit and consider the child's wishes. In a few states, the older child's choice as to custodial parent must be honored by the court except in unusual circumstances.<sup>9</sup> At least in these jurisdictions, the directive that the child's preference regarding custody be honored constitutes a new decision rule for custody of older children, supplementing and redefining the best interest of the child standard.

##### A. *The Substantive Focus and the Child's Preferences*

The movement toward allowing the child to have a role in the custody decision may be seen in two lights. In part, it reflects a growing skepticism about the paternalism of traditional legal policy toward children.<sup>10</sup> Increasingly, the law recognizes that children have

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<sup>8</sup> E.g., MICH. COMP. LAWS ANN. § 722.23 (West Supp. 1988), *quoted at supra* note 1.

<sup>9</sup> *See supra* note 2.

<sup>10</sup> In *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), the Supreme Court for the first time recognized children as "persons" with a constitutionally protected interest in free expression. *Id.* at 511. The trend toward reduced paternalism is also reflected in the law regulating minor's medical

a legitimate interest in the important decisions affecting their lives. This trend is supported by research on children's competency which suggests that adolescents, at least in some situations, may reason like adults in decision making.<sup>11</sup> To be sure, the relevance of notions of "competency" in decision making by children about their own custody is not well defined. Indeed, a cynic might suggest that the law has turned to children to make custody decisions because of dissatisfaction with the performance of parents and judges. Nonetheless, the hope is that involving the child will result in a better outcome—or at least one that is more acceptable to the child.

This suggests another meaning of the trend toward recognizing children's preferences about custody. The history of custody law is one of optimism followed by disappointment as the law has searched for an optimal means of resolving custody disputes.<sup>12</sup> The tender years presumption, the best interest of the child standard, and a presumption favoring joint custody have each in turn been embraced

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and reproductive decisions. See generally ADOLESCENT ABORTION (G. Melton ed. 1985) (a review of the legal, social science, clinical, and ethical dimensions of adolescent abortion decisions); CHILDREN'S COMPETENCE TO CONSENT (G. Melton, G. Koocher & M. Saks eds. 1983) (law and social science perspectives on adolescent decision making about medical matters, etc.). The most important changes may be in regulation of juvenile delinquency adjudication. In *In re Gault*, 387 U.S. 1 (1967), the United States Supreme Court accorded juveniles facing delinquency charges many procedural protections of adult criminal defendants, including the right to an attorney, to cross-examine witnesses, and to remain silent. *Id.* at 10-24. For a thoughtful analysis of legal policy toward adolescents, see F. ZIMRING, THE CHANGING LEGAL WORLD OF ADOLESCENCE (1982). Zimring argues for a legal stance that recognizes the semi-autonomous status of adolescents and allows opportunity to experiment with adult decision making while protecting minors from undue costs of mistakes.

<sup>11</sup> See CHILDREN'S COMPETENCE TO CONSENT, *supra* note 10. The findings of two research studies are noteworthy. Lois Weithorn found that 14-year-olds reasoned about medical decisions similarly to adults. Weithorn & Campbell, *The Competency of Children and Adolescents to Make Informed Treatment Decisions*, 53 CHILD DEV. 1589 (1982). The other study, conducted by Thomas Grisso and associates, examined the competency of minors to understand and waive their *Miranda* rights. Grisso found that 15-year-olds of normal intelligence understood their *Miranda* rights as well as adults, but that younger children had reduced comprehension. T. GRISSO, JUVENILES' WAIVER OF RIGHTS: LEGAL AND PSYCHOLOGICAL COMPETENCE (1981).

<sup>12</sup> See Derdeyn, *Child Custody Decisions in Historical Perspective*, 133(2) AM. J. PSYCHIATRY 1369 (1976) (reviewing historical background of interparental child custody disputes).

with enthusiasm; however, each has proved unsatisfactory, either intrinsically or in application.<sup>13</sup> The search continues for a custody rule that will result in the "right" decision without increasing the already considerable destructive impact of divorce on children. Some observers argue that a rule recognizing the child's preference as a primary factor in the custody decision will achieve this elusive goal.<sup>14</sup> According to this view, allowing the child to make the custody decision will result in the best possible custodial arrangement. Moreover, such a rule is easy to apply and avoids the punishing enforcement costs of the best interest standard.

The child's role in the decision making process has become more controversial as it has increased in importance. Critics, often in the mental health profession, question the child's competency to make this decision.<sup>15</sup> Others suggest that if the law focuses on the child's preference, children will unwillingly be made to assume a decisional role in a situation in which they experience conflicting loyalties, and that this will increase pressure at an already stressful time.<sup>16</sup> Judicial opinions have also reflected concern about the risk of psychological damage to a child called upon to express in court a preference for

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<sup>13</sup> In part, this is due to the dilemma posed by the resolution of custody decisions. As Robert Mnookin has pointed out, the ability to predict outcomes of alternative custody arrangements is poor, and there is no consensus about what values should be promoted by the custody arrangement. This makes rule formulation difficult. Mnookin, *Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. 226, 292 (Summer 1975). See also Scott & Derdeyn, *Rethinking Joint Custody*, 45 OHIO ST. L.J. 455 (1984) (recent enthusiasm for joint custody represents, in part, an effort to fashion a decision principle that functions more satisfactorily than the tender years presumption or the best interest standard).

<sup>14</sup> See Melton & Lind, *Procedural Justice in Family Court: Does the Adversary Model Make Sense?*, in LEGAL REFORMS AFFECTING CHILD AND YOUTH SERVICES 65 (1982) (children should have party status in custody proceedings); Bersoff, *Representation for Children in Custody Decisions: All that Glitters is Not Gault*, 15 J. FAM. LAW 27 (1976-77) (argues for providing representation for children and making them an integral part of the custody decision).

<sup>15</sup> Schuman, *The Unreliability of Children's Expression of Preference in Domestic Relations Litigation: A Psychiatric Approach*, 69 MASS. L. REV. 14 (1984) (arguing that although some children are competent to express custodial preference, most children are not).

<sup>16</sup> Emery, *Child Custody Decision-Making* (April 1987) (paper presented at the Conference of the Society for Research in Child Development) (arguing that the tension of divorce will be heightened if children are pressured to choose between

one parent over the other. As one court stated, "The principles of humanitarianism are so strongly against the placing of a child between his parents that we feel the trial court should have a wide latitude in protecting the child."<sup>17</sup>

In contrast, supporters of a decisional role for the child argue that the child has a right to participate in the proceedings in a manner corresponding to her preferences and capacities.<sup>18</sup> Other supporters argue that the child will benefit from having a voice in such a critically important decision.<sup>19</sup> The child whose strong desires about custody are ignored may suffer greatly—she may be dissatisfied with the outcome and feel helpless about her situation.<sup>20</sup> No research has directly tested these contradictory assertions.

There is also much controversy and uncertainty about the way in which these legal provisions are, or should be, applied. Except under laws that direct courts to follow the preferences of children above a given age, statutory provisions are usually general guidelines, directing consideration of the child's wishes among several other factors.<sup>21</sup> The variables that should affect the weight to be given to the child's preference are seldom defined by law; little is known about how the child's wishes affect the calculations judges make in different cases and under different statutes, including those that do not specifically refer to the child's preference. Age, maturity, the

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parents); J. WESTMAN, CHILD ADVOCACY 253 (1979) ("generally speaking it is not fair to place a child in the position of making choices between parents").

<sup>17</sup> Parker v. Parker, 467 S.W.2d 595, 597 (Ky. 1971).

<sup>18</sup> See Bersoff, *supra* note 14; see also MacDougall, *The Child as Participant in Divorce Proceedings*, 3 CAN. J. FAM. L. 141, 162-63 (1980) (suggesting that the child's interest in custody proceedings may be better promoted if the child has legal representation and if a legislative directive requires judges to consider teenagers' custodial wishes).

<sup>19</sup> See Melton & Lind, *supra* note 14; Newman & Collester, *Children Should Be Seen and Heard: Techniques for Interviewing the Child in Contested Custody Proceedings*, 2(4) FAM. ADVOCATE 8, 10 (1980) ("the bottom line is children have a lot to say if only we take time to listen").

<sup>20</sup> Cf. LEARNED HELPLESSNESS THEORY AND COMMUNITY PSYCHOLOGY: THEORETICAL AND EMPIRICAL APPROACHES 121 (M. Gibbs, J. Lachenmeyer & J. Sigal eds. 1980) (learned helplessness theory describes psychologically debilitating effects that result from lack of control over events).

<sup>21</sup> See factors listed in MICH. COMP. LAWS ANN. § 722.23, *supra* note 1. See also UNIF. MARRIAGE & DIVORCE ACT § 402, 9A U.L.A. 561 (1987); ARIZ. REV. STAT. ANN. § 332 (Supp. 1987).



reasons for the choice, and the intensity of the preference would seem to be relevant; however, little research on judicial decision making has been reported.<sup>22</sup> On reflection, it is puzzling that supporters and critics of a decisional role for the child have not generally focused on the age of the child as important in determining the child's role.<sup>23</sup>

### B. Procedural Issues

Little research exists on the process by which the child's preference is elicited. The spectre of reluctant children enduring cross-examination in open court has been raised by critics who presume that participation in adversary proceedings is harmful to children.<sup>24</sup> Indeed, in another context, concern about the presumed harm to children of testifying in sexual abuse prosecutions has led to procedural reforms such as videotaped testimony and special arrangements for testimony out of the courtroom.<sup>25</sup> A few courts

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<sup>22</sup> Felner and his colleagues studied attitudes of judges and attorneys toward children's participation in custody proceedings. Felner, *supra* note 3, at 44-48. Lowery studied the variables taken into account by Kentucky judges in making custody decisions by presenting judges with a list of factors that might be relevant and asking them to indicate the importance of each. She found that the child's preference was one factor taken into account but that it was not accorded significant weight. Lowery did not attempt to examine the variables such as age or maturity that might correlate to the weight accorded the child's preference. Lowery, *Child Custody Decisions in Divorce Proceedings: A Survey of Judges*, 12 *PROF. PSYCHOLOGY* 492, 496-97 (1981).

<sup>23</sup> Further, researchers studying custody decision making have not examined how age might affect this factor. See description of study by Lowery, *supra* note 22, at 494-95.

<sup>24</sup> See Siegel & Hurley, *supra* note 1, at 43 (judicial aversion to bringing children into court to testify about custodial preferences is based on concern that this would result in psychological harm); Jones, *supra* note 1, at 74 ("under no circumstances should a child in a custody or visitation proceeding be questioned in open court").

<sup>25</sup> The appropriate legal response to the problem of protecting child witnesses in sexual abuse cases has been the subject of much controversy. Child victims are presumed to be vulnerable to psychological harm if they testify against defendants in sexual abuse trials. Note, *The Testimony of Child Victims in Sex Abuse Prosecutions: Two Legislative Innovations*, 98 *HARV. L. REV.* 806, 807 (1985). Among the reform proposals are provisions for the admissibility into evidence of a videotaped pretrial interview of the child, *id.* at 813; some states allow the child to testify out of the courtroom (with closed circuit television). A California statute allows the judge to order out-of-court testimony in a narrow category of cases in which testimony may be presumed traumatic. See *CAL. PENAL CODE* § 1347 (West Supp. 1988). Other states provide special exceptions to the hearsay rule that allow a third

have held that the judge must allow a competent child called by a party to testify in custody cases.<sup>26</sup> However, there is little evidence of judicial attitudes and practices or of how frequently children actually act as witnesses.

An alternative means of obtaining evidence from children in custody proceedings is the judicial interview in chambers.<sup>27</sup> The interview has been promoted as a means for the child to express a preference regarding custody in a less stressful setting, in which fear of adverse parental reaction may be reduced. On the other hand, a private interview may preclude parents from hearing all the evidence relevant to the custody decision.<sup>28</sup> This is particularly troublesome if the child not only reveals her preference, but also comments on relevant parental behavior not previously known to the court (such

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party to testify about the child's statements in sexual abuse cases. *See, e.g.*, WASH. REV. CODE ANN. § 9A.44.120 (1988). Critics of procedural reforms have focused on the harm to defendants' rights if children are permitted to provide evidence in a manner that avoids confrontation and cross-examination by the defendant. Note, *supra*, at 809, 811-16. In 1988, the United States Supreme Court held that the sixth amendment right of confrontation of a defendant charged with sexual assault of a minor was violated by the use of a screen placed between the child witness and the defendant. *Coy v. Iowa*, 108 S. Ct. 2798 (1988). The screen, which was designed to allow the complaining witness to avoid viewing the defendant while giving testimony, was authorized under a 1985 Iowa statute. *Id.* at 2798 n.1. In an opinion by Justice Scalia, the Court emphasized that the right of confrontation signified the right to a face-to-face encounter. *Id.* at 2801. In a rigorous dissent, Justice Blackmun criticized this literal reading of the sixth amendment. *Id.* at 2805-10. The conflict between protecting the interests of children and those against whom they would offer evidence is analogous to the child custody context. For a review of the research literature on child sexual abuse and a description of the legal reforms, see J. HAUGAARD & N.D. REPPUCCI, *CHILD SEXUAL ABUSE: AN INTEGRATION OF THEORY, RESEARCH, AND CLINICAL PRACTICE* (1988).

<sup>26</sup> *See J.L.W. v. D.C.W.*, 519 S.W.2d 724 (Mo. App. 1975) (parent has a right to call upon his children, if competent, to testify in a child custody proceeding where such evidence is relevant).

<sup>27</sup> Indeed, some observers apparently assume that testimony in court is inappropriate and that interview by a judge is the only option for obtaining evidence from the child. *See Comment, Child Custody: The Judicial Interview of the Child*, 47 LA. L. REV. 559, 559-61 (1987) ("It seems clear that putting the child on the witness stand in a custody case, and expecting him to express a preference or reveal damaging facts about one or both parents is almost certain to make the situation worse.").

<sup>28</sup> A private judicial interview of a five-year-old child was struck down in *Watermeier v. Watermeier*, 462 So. 2d 1272 (La. Ct. App.), *cert. denied*, 464 So. 2d 301 (La. 1985).

as drug or alcohol use, physical abuse, or sexual activities). Some states require that in-chambers interviews be recorded and made available to parties and their attorneys.<sup>29</sup> In general, however, little is known about judicial practice in responding to potentially conflicting interests in this setting.

Three interrelated issues emerge from the debate over the child's role in custody decisions. The first is the issue of whether participating in the decision is harmful or beneficial to the child. The second question focuses on the weight accorded the child's preference by courts and the factors that influence the decisional weight. Finally, the debate focuses on how information about the child's wishes is elicited and whether courts can (or do) balance three potentially conflicting interests—the state's interest in the accuracy of evidence,<sup>30</sup> the child's interest in expressing her wishes with minimal psychological stress, and the contesting parents' interest in hearing relevant evidence.

The age of the child would seem to be a key variable in thinking coherently about these issues. The appropriateness of a decisional role for the child, the weight accorded the child's preferences, the probable psychological harm, and the reliability of the expressed preferences may all correlate to the age and maturity of the child. Thus, any analysis of particular issues that fails to distinguish between older and younger children may have limited value.

## II. AN EMPIRICAL STUDY OF JUDICIAL ATTITUDES AND PRACTICES

We undertook the empirical study described below to learn about three related aspects of the role of children in custody disputes. First we wanted to determine whether courts making divorce custody decisions in Virginia consider the preferences of children, despite the absence of statutory directives to do so.<sup>31</sup> If so, we were interested in learning what variables determined whether the child's preference counted in the custody decision. Our second focus was procedural. We wanted to learn how courts obtained evidence from children, what attitudes judges held towards different means of

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<sup>29</sup> See, e.g., *id.*

<sup>30</sup> The state as *parens patriae* also has an interest in protecting the child from undue stress.

<sup>31</sup> See *supra* note 5.

eliciting children's preferences, and judicial perceptions about the psychological harm or benefit to children from participating in the process. We also wanted to determine, at least indirectly, whether judges were concerned about parents' due process rights, and the extent to which they accommodated the tension between parents' and children's interests. Third, and related to both substantive and procedural issues, we hoped to evaluate the relevance of the child's age to judicial attitudes and practices concerning children's preference issues.

The survey was directed at juvenile court and circuit court judges in Virginia who together decide all custody cases in that state.<sup>32</sup> Eighty-six male and two female judges responded,<sup>33</sup> ranging in age from 33 to 69, with an average age of 53 years. One issue was whether the attitudes of the two judicial groups would differ. We speculated that the juvenile court judges might reflect the paternalistic philosophy of the traditional juvenile court, perhaps being less inclined to give substantive weight to the child's preference and less concerned about procedural rights of parties than circuit court judges. To the contrary, however, the groups were virtually indistinguishable in their attitudes and practices.<sup>34</sup>

The judges reported that children below the age of six were the subject of fifty percent of litigated custody disputes,<sup>35</sup> and most agreed that children's wishes in this age group were irrelevant to the decision. In contrast, the vast majority of judges reported that

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<sup>32</sup> In Virginia, juvenile and domestic relations district court judges have jurisdiction to decide disputes about custody and visitation and to order child support. Only judges in the circuit court (the trial court of record) have jurisdiction over divorce suits.

<sup>33</sup> Questionnaires were sent to all juvenile and circuit court judges. Almost two-thirds (44) of the 69 juvenile and domestic relations court judges responded and slightly over one-third (44) of the 125 circuit court judges. Since divorce and custody cases represent a relatively small portion of the subject matter encountered by circuit court judges (who hear civil and criminal cases), they may have had less interest in the survey.

<sup>34</sup> One reason for this may be that most juvenile court judges were appointed well after the reform movement in juvenile justice began. The mean year of appointment was 1977-78. Procedural reforms in the juvenile justice system began with the United States Supreme Court's opinion in *In re Gault*, 387 U.S. 1 (1967), and by the late 1970s the informal paternalistic model was considerably weakened.

<sup>35</sup> In Part IV, *infra*, we analyze the possible relevance of the finding that parents apparently are much more inclined to litigate custody of younger children.

they routinely attempted in some way to get information about older children's wishes. Even for children in the six to nine year age group, sixty-five percent of judges tried to obtain some information about the child's preference, although usually not directly from the child.<sup>36</sup> For children over fourteen years of age, ninety-seven percent of judges considered the child's views.

#### A. *The Interview in Chambers*

The interview of the child in chambers was preferred by two-thirds of the judges as the means of learning about the child's wishes. Even among circuit court judges, who might be assumed to be more concerned about procedural correctness, only one judge favored testimony in court over the in-chambers interview. About thirty-four percent of the judges preferred to elicit evidence about the child's wishes indirectly, through testimony of mental health professionals, parties, or guardians *ad litem*. More than two-thirds said they routinely interviewed children fourteen and over; one half typically saw ten to thirteen year olds, but less than one quarter interviewed six to nine year olds as a general practice. Few judges ever interviewed children under the age of six years.

Two-thirds of the judges polled stated that they preferred not to initiate the judicial interview themselves, although many would do so if they thought it important.<sup>37</sup> The judicial interview was usually requested by one of the parents' attorneys. The interview in chambers typically lasted less than fifteen minutes.<sup>38</sup> Most judges believed that children wanted to talk to them; seldom did children resist. Judges also typically believed that they established rapport with the child and that children were generally candid in the interview.<sup>39</sup>

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<sup>36</sup> Less than one-quarter routinely interview children in this age group.

<sup>37</sup> This may reflect due process concerns, since judges in most circumstances do not call witnesses. Custody suits are generally treated as unique, however; for example, mental health professionals may evaluate the family and testify at the court's initiative.

<sup>38</sup> This comports with the research results of Lombard, who found judicial interviews of children in her study to last eighteen minutes. Lombard, *supra* note 3. Although the "inadequacy" of brief interviews has been the focus of much criticism, we argue that such interviews may represent the best available accommodation of conflicting interests.

<sup>39</sup> Seventy-three percent believed they established rapport; ninety percent believed children were candid.

The majority of the judges talked to the child alone. When other participants, such as the parents' attorneys, were allowed to participate, they were generally restricted to observing and listening to the judge's interview. For example, only a small minority of judges<sup>40</sup> suggested that parents' attorneys ever asked any questions. Of those courts in which parents' attorneys were present, about half of the judges believed that this inhibited the child; most judges<sup>41</sup> believed children would rather talk to them alone. Guardians *ad litem* were viewed as less objectionable than parents' attorneys and were more likely to be allowed to participate in the interview.<sup>42</sup> On the other hand, few judges<sup>43</sup> involved mental health professionals in the interview, although this practice is frequently recommended in the mental health literature.<sup>44</sup>

Judges described the most important purposes of the interview as getting an impression of the child to compare with other evidence<sup>45</sup> and learning the child's wishes regarding custody.<sup>46</sup> Some judges also acknowledged that, through the interview, they hoped to learn about the parents' behavior and activities<sup>47</sup> and to confirm the veracity of the parents' evidence.<sup>48</sup>

Data gleaned from the follow-up interviews of a sampling of judges indicated that many judges attempted to ensure the child's confidentiality.<sup>49</sup> Several judges reported that they did not disclose

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<sup>40</sup> Seventeen percent.

<sup>41</sup> Seventy-eight percent.

<sup>42</sup> Thirty percent of judges allowed guardians *ad litem*.

<sup>43</sup> Eight percent.

<sup>44</sup> See M. GOLDZBAND, CONSULTING IN CHILD CUSTODY 129-45 (1982) (the use of a mental health professional as a liaison in court is a new concept, but one that ought to increase and become rapidly accepted); J. WESTMAN, *supra* note 16, at 284 (mental health professionals may increasingly aid courts and families to arrive at rational decisions in disputes concerning their children).

<sup>45</sup> Sixty-nine percent designated this as "very important." We are somewhat skeptical about the importance attached to this by the judges. Any interest that courts have in making an independent judgment about the child would seem to apply to children of all ages. Yet, judges rarely interview young children.

<sup>46</sup> This was designated "very important" by fifty-eight percent of judges.

<sup>47</sup> This was described as "very important" by sixteen percent; "somewhat important" by forty-six percent.

<sup>48</sup> Eighteen percent described this as "very important"; forty-two percent as "somewhat important."

<sup>49</sup> Twelve judges participated in follow-up interviews. We were particularly interested in judicial attitudes toward parental access to interview disclosures. In the

to parents or attorneys what the child said in chambers. If parents' attorneys were present, some judges instructed them not to talk to their clients. This might create an uncomfortable situation for the attorney, particularly if the child provides evidence regarding the parents. One judge even reported ordering the child, attorneys, and parents not to discuss the interview. Many judges apparently believed that the child should be assured that she may confide in the judge without fearing that parents will learn of the disclosures.

Judges varied in their concern about the impact of evidence regarding the parents offered by the child in a confidential interview. When asked what their response would be to a damaging new disclosure about a parent, some judges said they would stop the interview; others would confront the parent; other responses included initiating a social service investigation, directing the guardian *ad litem* to look into the matter, and ignoring the disclosure. These responses suggest that it may be difficult to protect both the child's confidentiality and the right of parents to hear and confront evidence.

Judges generally believed that most children either want to express a preference<sup>50</sup> or are reluctantly willing to do so.<sup>51</sup> Many judges believed that the primary reason that a child might be reluctant to express a preference was a desire not to injure or alienate either parent, not the absence of a preference. A majority of judges stated that children felt pressured by parents to express a preference, and many judges were concerned that they not add to that pressure. Many judges<sup>52</sup> never asked younger children directly about their preferences. Rather, the majority, if they interviewed younger children at all, typically attempted to discern preference through indirect questions or through the child's unsolicited comments.<sup>53</sup> However, almost one-third of the judges asked older children directly about

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initial survey, only twelve percent reported that they recorded the interview and less than half (forty-eight percent) took notes.

<sup>50</sup> Forty-three percent.

<sup>51</sup> Sixteen percent.

<sup>52</sup> Thirty-nine percent.

<sup>53</sup> Indirect inquiries might include such questions as which parent should sit next to the child on a long trip, which parent would the child want with her on a desert island (if allowed to only bring one), and which parent would rescue the child at the end of an imaginary adventure.

their preference. In general, the interview may be characterized as an opportunity for the child to offer a preference (with some encouragement) rather than a direct inquiry.

*B. Factors Influencing the Weight Given the Child's Preference*

The judges were asked about factors influencing the weight given the child's preference. As we predicted, the child's age was a critical variable. Nearly ninety percent of the judges surveyed reported that the preference of children aged fourteen and older was either dispositive (absent unusual circumstances) or extremely important.<sup>54</sup> The wishes of children aged ten to thirteen were accorded somewhat less weight and the preferences of younger children were discounted significantly.<sup>55</sup> In general, there was a clear correlation between the age of the child and the weight given her preference.

The reason most frequently offered for crediting the older child's preference was that, practically, adolescents have the freedom to associate with the parent of choice. The judges also expressed the view that the preferences of older children were more intense than those of younger children. A majority recognized the greater maturity of adolescents and a substantial proportion acknowledged respect for older children's preferences because they are "almost adults and have a right to a significant voice."<sup>56</sup> Most judges rejected the notion that older children would be less subject to parental influence as a reason to give greater weight to their preferences.

Of the reasons that children may give for preferring one parent over another, the two most frequently offered by older children included continuity with home, school, and friends,<sup>57</sup> and dislike of one parent's new partner.<sup>58</sup> One might postulate that children may

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<sup>54</sup> Twenty-two percent described the preference of children 14 years or older as dispositive; sixty-seven percent as extremely important.

<sup>55</sup> For ten- to thirteen-year-olds, fifty-four percent of judges rated their preference as extremely important, and forty-two percent somewhat important. For six- to nine-year-olds, seventy-six percent rated the child's preferences as somewhat important, sixteen percent as not important.

<sup>56</sup> This basis for deferring to the child's wishes—the recognition of the legitimate interest that older children may have in self-determination—is a central thesis of children's rights advocates. Less than one-half of the judges (forty-three percent) acknowledged this as an important factor.

<sup>57</sup> Eighty-seven percent.

<sup>58</sup> Eighty-one percent.



find these reasons more palatable and less hurtful to the non-chosen parent than reasons which may seem more obvious to a lay observer—a closer relationship with one parent<sup>59</sup> or a historically hostile and distant relationship with the non-chosen parent.<sup>60</sup> Also, judges suggested that children often chose the parent who offered more freedom and less discipline,<sup>61</sup> a reason which many judges did not find worthy of consideration.<sup>62</sup>

The judges were divided in their response to proposed statutory changes that would guide or limit judicial discretion. Thirty-seven percent of respondents would approve a statutory amendment directing courts to consider the child's preference. Judicial attitudes were also divided about the desirability of a statutory presumption that the older child's custodial preference be respected. More than one-third of the judges were opposed<sup>63</sup> to such a provision, while thirty-six percent favored (fourteen percent strongly) one. Of those who favored such a rule, all thought it should apply to children sixteen and older, and two-thirds to children over thirteen. Thus, although in practice deferential to the wishes of older children, many judges were opposed to limits of judicial discretion.

### C. *Testimony in Court: Judicial Attitudes and Practices*

One objection to involving children in custody litigation is that they might be called upon by one parent to testify in open court, a prospect that many assume would be harmful.<sup>64</sup> Many judges reported that children either never or infrequently were called upon to testify in court in custody cases.<sup>65</sup> The majority believed that this would be harmful to the child<sup>66</sup> and expressed opposition to the practice.<sup>67</sup> A minority of judges were neutral or favorable to attorneys calling children as witnesses.<sup>68</sup> Many judges<sup>69</sup> reported that they would

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<sup>59</sup> Eighty percent.

<sup>60</sup> Seventy-five percent.

<sup>61</sup> Seventy-one percent.

<sup>62</sup> Forty-four percent of judges gave this response.

<sup>63</sup> Twenty-three percent strongly; fourteen percent mildly.

<sup>64</sup> See Jones, *supra* note 1, at 74; Comment, *supra* note 27, at 559-60.

<sup>65</sup> Twelve percent of judges reported that children never testify; forty-five percent reported that testimony was "infrequent."

<sup>66</sup> Twenty-one percent always; thirty percent sometimes.

<sup>67</sup> Thirty-three percent, strong opposition; twenty-one percent, mild opposition.

<sup>68</sup> Twenty-three percent neutral; four percent favorable.

<sup>69</sup> Sixty-two percent.

discourage an attorney from seeking to call the child as a witness; several explicitly acknowledged a willingness to exert pressure should the issue arise. This may be effective discouragement since attorneys in custody cases may be peculiarly responsive to judicial pressure. Since the legal standard is vague, few decisions will be overruled; thus, antagonizing the trial judge may be imprudent.

Despite general disapproval of children as witnesses in this context, most judges<sup>70</sup> reported that they would allow testimony by children if an attorney insisted. This reflects the traditional judicial posture toward the introduction of relevant evidence by parties. If a child has relevant evidence to offer *other* than custodial preference, an in-chambers interview may not be an adequate mechanism. Also, the party against whom the evidence is offered has an interest in, and arguably a right to hear the evidence, to cross-examine the child, and to refute the evidence.

#### *D. Summary and Analysis*

The survey results suggest that many judges in Virginia consult with children about their wishes regarding custody and that the preferences of adolescents are extremely important to the decision. Although Virginia law, unlike that in many states, does not direct the court to consider the child's wishes, judges uniformly reported that preference of adolescents is an important and often the dominant consideration in resolving disputes about their custody.

Most judges were opposed to open court testimony by children in custody proceedings, generally preferring to learn of the child's preference through a brief, private in-chambers interview. The judges reported that the interview usually lasted less than fifteen minutes; thus, a probing inquiry into the child's motivation, ambivalence, or sense of coercion about the expressed custody preference rarely occurred. Rather, a child who has a preference regarding custody may make her wishes known, and, at least with some judges, may be assured that these disclosures will not be reported to either parent. Judges also use the in-chambers interview to form an impression of the child, or in some cases to learn about parents' behavior and activities.

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<sup>70</sup> Ninety percent.

### III. THE IMPLICATIONS OF THE STUDY: REGULATING THE CHILD'S ROLE IN THE PROCEEDING

Judges in Virginia followed an implicit rule regarding the relevance of the child's preference in custody proceedings despite the absence of any statutory guidance. They also generally followed implicit procedural guidelines for obtaining evidence regarding the child's preference.<sup>71</sup> In this Part, we analyze the implications for legal policy that may be derived from the findings of the study. First, we examine the procedural problems created by a decision to involve the child in the custody proceeding. We argue that although the practice of obtaining input from the child through a brief, private interview seems inadequate from the perspective of both parents and children, in fact, it may represent the best accommodation of the conflicting interests of parents and children in this context, particularly if the opportunity to have a voice in the decision is limited to adolescents.

Second, the implicit substantive rule followed by the surveyed judges—deferring generally to the custodial preferences of adolescents but not of young children—has much to recommend it. An adolescent preference rule encourages judicial restraint in the exercise of paternalistic decision making authority over families, because courts applying the rule will tend to defer to a family member (the adolescent) as decision maker. It indirectly encourages private ordering of some custody disputes since parents will be influenced by the rule to follow the preferences of teenagers rather than to litigate custody.<sup>72</sup> Further, recognizing the interests of adolescents in having a voice in decisions affecting their lives is consistent with the recent

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<sup>71</sup> Most judges, without legal guidance, interview older children briefly in chambers. There is variation about which participants are allowed to be present, whether notes are taken, etc. See Jones, *supra* note 1, at 80-84. Professor Jones believes that judicial interviews should not be recorded, but that notes taken during the interview for judges' own reference are acceptable.

<sup>72</sup> For an insightful analysis of the impact of the substantive legal rules on the bargaining behavior of parties negotiating a divorce agreement, see Mnookin & Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 *YALE L.J.* 950 (1979). On the issue of custody of an adolescent, the preference rule may affect strategic bargaining, giving a "chip" to the preferred parent. *Id.* at 966-68. This effect may not be particularly costly, however, if the legal rule is supported by a social norm favoring adolescent choice.

trend toward expanded recognition of adolescents' interest in decision making.<sup>73</sup> Finally, child development research suggests that it may be appropriate to distinguish between adolescents and younger children in fashioning a preference rule.

*A. Obtaining Evidence Regarding the Child's Preference*

The problem confronting courts seeking to hear directly from the child in custody disputes may be simply stated. If judges use a brief, in-chambers interview to obtain information from the child, as most prefer to do, they may be criticized on two grounds. First, critics concerned with the rights of parents as litigants focus on the perceived due process problems inherent in an informal, private interview of the child in which the judge may hear evidence not known to the affected party.<sup>74</sup> A quite different objection focuses on the inadequacy of a brief interview as a means of ascertaining a child's "real preferences."<sup>75</sup>

However, alternatives to the brief, private interview are also problematic. If the court defers to the parents' interest in responding to all evidence (by requiring the child to testify in court or by allowing parties or their attorneys to participate in the in-chambers interview), then the child may endure significant stress in confronting the rejected parent and in being subjected to cross-examination. If the court responds to the criticism of superficiality by attempting to undertake a probing inquiry about the child's preferences during a private interview, evidence not heard by the parties may be disclosed by the child. The challenge for the law is to protect parents from "secret" evidence while at the same time allowing the child to express his or her real preference to the judge in the least stressful way possible.<sup>76</sup>

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<sup>73</sup> See *supra* note 71; see generally F. ZIMRING, *supra* note 10. This has been particularly true of issues in which according legal rights to teenagers also promotes their welfare. In this category may be the right to obtain contraceptives or to consent to substance abuse or mental health treatment. *Id.* at 7-11, 112.

<sup>74</sup> See Lombard, *supra* note 3, at 820; Jones, *supra* note 1, at 55. Professor Jones asserts that the due process rights of parents are affected if the child's questioning is not recorded because the parents have no opportunity to respond.

<sup>75</sup> Newman & Collester, *supra* note 18, at 11 (proposing interview of one-half to one hour).

<sup>76</sup> Also at stake is the state's independent interest in custody cases both in protecting the child and in making the custody decision based on all available evidence.

1. *The Accuracy of the Interview.* Critics suggest that brief judicial interviews are an inadequate basis for learning the child's "true" preference in a custody dispute. Our study indicates that judges are aware that children may have many reasons for expressing a preference regarding custody. The child may have a long-term, closer relationship with the preferred parent, a distant or hostile relationship with the non-chosen parent, a hostility toward a parent's new mate or, most commonly, a preference for the continuity of home, school, and friends. Some critics assert children may sometimes express a custodial preference that may not be in their "best interest" or that may not reflect their "true," or at least long-term, preference.

Decision theory would suggest that children at the time of divorce may be influenced by short-term cognitive and emotional biases that potentially distort the decision making process.<sup>77</sup> Decision makers tend to weigh heavily data that is vivid or directly related to immediate experience and to undervalue abstract or remote information.<sup>78</sup> The context of divorce may lead younger children particularly to weigh heavily the loss of the absent parent or to be heavily influenced by transitory anger at the "guilty" parent.<sup>79</sup> Moreover, the "week-end" parent who entertains the child and imposes few rules may seem more attractive than the parent associated with the school week routine. Choices may be affected by sympathy for the parent who has been left by the other or for the parent who has not been chosen by the other children.

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<sup>77</sup> The effect of cognitive biases on decision making has been the subject of extensive social science research in recent years. Kahnemann and Tversky have described several heuristics used by decision makers in making inferences and assessing probabilities. These heuristics are useful ways of organizing large amounts of data, but they may sometimes bias decision making. Kahnemann & Tversky, *Judgment Under Uncertainty: Heuristics and Biases*, in *JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES* (D. Kahnemann, P. Slovic, & A. Tversky eds. 1982).

<sup>78</sup> This bias in decision making is called availability heuristic. *Id.* at 11. An example is the individual whose Volvo automobile suffers frequent repair problems. In evaluating the merits of Volvos, she is likely to be influenced by this fact as much as, or more than, contrary consumer report evaluations.

<sup>79</sup> Wallerstein and Kelly, in a longitudinal study of the impact of divorce on children, found that these responses were typical of children in the age nine to twelve category. See J. WALLERSTEIN & J. KELLY, *SURVIVING THE BREAK UP* (1980). This would argue for not weighing heavily the preferences of children in this age group.

Even if such biases and motivations could be revealed through skillful probing inquiry, judges generally do not attempt to undertake such an examination and probably do not have the professional skills to do so.<sup>80</sup> However, if preference is to count in the legal decision, utilizing mental health professionals to interpret ambiguous signals from the child is also questionable. Despite claims to the contrary,<sup>81</sup> mental health expertise to undertake such a murky inquiry has not been demonstrated.<sup>82</sup>

Another source of error may be the reluctance of some judges to inquire directly about the child's preference because of the (empirically unsupported) assumption that a direct question regarding the preferred custodian will be painful to the child. The survey results suggest that some judges believe they can accurately infer preference from a child's answers to other questions about his or her parents and their relationship.<sup>83</sup> The problem with this approach is that it may lead to error as frequently as accepting the child's stated preference on its face.

The problems presented by critics of the brief interview may be more relevant to inquiries of younger children than adolescents. First, the biases that may distort the expression of a choice may influence decision making of teenagers less than that of younger children. Second, judicial evaluation of the rationale for the preference

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<sup>80</sup> See J. GOLDSTEIN, A. FREUD, J. SOLNIT & S. GOLDSTEIN, *IN THE BEST INTERESTS OF THE CHILD* (1986) (arguing that professionals involved in legal decision making about children (attorneys, judges, mental health professionals) may often step beyond the boundaries of their professional competence and assume dual (and often conflicting) roles).

<sup>81</sup> Alan Levy asserted that the task of mental health professionals in this context "is to interpret the child's statement and to examine its relationship to the various factors affecting its development. Conscious and unconscious levels of meaning must be considered." Levy, *The Meaning of the Child's Preference in Child Custody Determinations*, 8 J. PSYCHIATRY & L. 218, 223 (1980). This would seem to be an amorphous inquiry and a questionable basis for judicial opinion. For a critical view of clinical input by mental health professionals involving children, see Melton, *Shrinking the Power of the Expert's Word*, 9(5) FAM. ADVOCATE 22 (1986).

<sup>82</sup> Moreover, judicial evaluation of the merits of the preference is also troublesome.

<sup>83</sup> For examples of questions suggested by mental health professionals, see *supra* note 53.

of the adolescent may be less justified. Finally, direct inquiry about the adolescent's preferences is probably more appropriate—at least judges are more ready to ask teenagers directly about their wishes.

2. *The Protection of Parents' Rights.* Related to the uncertainty about the effectiveness of a probing inquiry of the child's preference is the concern about revelations that such an inquiry may produce. The more the judge questions the child and seeks to obtain information about the source of her feelings about each parent, the more likely it is that the court will hear evidence that may not have been disclosed by the adversely affected party. Thus, any benefit obtained by broadening or deepening the judicial inquiry is purchased directly at the expense of judicial fairness to the affected parent.<sup>84</sup> Given the questionable benefit, the cost may not be justified.

Although supporters of an in-depth interview of the child generally also recognize the need to protect parents' rights,<sup>85</sup> the methods suggested to provide this safeguard are generally unsatisfactory. Courts could permit the parents' attorneys to be present at the interview and to cross-examine the child. This would change the character of the interview, however, and possibly reduce its benefit in providing a low-stress setting for the child to reveal custodial preferences.<sup>86</sup> Although some judges in our study allowed attorneys to be present, few would permit parents' attorneys to take an active

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<sup>84</sup> This is not true, of course, if the child's disclosures are revealed to the parties, who are allowed to cross-examine the child and refute harmful statements made by the child. Indeed, some courts have required that a record be made of the interview or that the parties' attorneys be present, so that the parents may have access to all evidence presented by the child. See *Watermeier v. Watermeier*, 462 So. 2d 1272 (La. Ct. App.), *cert. denied*, 464 So. 2d 310 (La. 1985). This response, however, has its own costs in terms of potentially heightened stress for the child.

<sup>85</sup> See Comment, *supra* note 27, at 571-78 (arguing that due process rights can be protected by a verbatim record of the interview).

<sup>86</sup> Another alternative is to provide a record of the interview to the parties and their attorneys. This offers parents access to the child's statement, but the right of cross-examination is lost and the evidence can be confronted only indirectly. From the child's perspective, the interview itself may be less stressful than if attorneys were present, but the child may be inhibited by the knowledge that her disclosures will be revealed to the parents. Such a record is required in several states. See, e.g., COLO. REV. STAT. § 14-10-126(1) (1986); DEL. CODE ANN. tit. 13, § 724(a) (1981) (the court may interview a child in chambers and may permit presence of counsel, but the court shall, at the request of the parties, make a record of the interview).

role. Some would not allow them to discuss the child's disclosures with their clients.

Our study results suggest that many judges believed that children want to talk to them alone. Children feel pressured by their parents and inhibited when parties' attorneys are present. There is no direct empirical evidence about whether children value confidentiality in expressing their preferences about custody to judges. Some children may not care and may even want to express their wishes directly to their parents;<sup>87</sup> others may experience anxiety about invoking parental anger and disappointment if their statements are disclosed, and may only express their wishes candidly if confidentiality is assured. In terms of the *child's* interest, there is little to be gained by a mandatory disclosure rule. Those children who want to reveal their preferences to their parents can do so themselves; others may benefit from assurances of confidentiality.<sup>88</sup>

The problem of protecting both children and parents may be manageable if two safeguards are followed. First, the in-chambers interview of the child should be restricted to the limited purpose of obtaining the child's preference. Although cognitive biases, intrapsychic influences, or even overt coercion by a parent may distort the child's expression, it is not clear that a probing interview will enhance accurate judicial understanding of the child's preference.<sup>89</sup> The private, in-chambers interview of the child is not an appropriate forum for the production of substantive evidence about parental behavior. Testimony in court by the parties, their witnesses, or court-appointed mental health professionals provides the protection required by due process.<sup>90</sup>

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<sup>87</sup> Melton & Lind, *supra* note 13. Drawing on social psychology research by Thibaut and Walker that suggests that litigants derive satisfaction from participating in adversary proceedings, Melton and Lind argue that children may benefit from the opportunity to advocate openly for their custodial preferences.

<sup>88</sup> The guardian *ad litem* may have an important role in informing and advising his or her adolescent client regarding the availability and purpose of the interview with the judge, its confidential nature, and its limited purpose. See Landsman & Minow, *Lawyering for the Child: Principles of Representation in Custody and Visitation Disputes Arising from Divorce*, 87 YALE L.J. 1126, 1137-38 (1978) (a child's interests are significantly affected by the custody suit, thereby requiring legal representation that is separate from the parents). The child who has a preference may be urged to use the opportunity to make his or her wishes known.

<sup>89</sup> Moreover, it is unclear that there is any objective referent against which to measure the validity of preferences under any circumstances.

<sup>90</sup> If the child is the only source of important evidence, testimony in court may



A second safeguard is to limit the judicial inquiry to adolescents about custodial preferences. Adolescents are arguably less vulnerable and better able to express their actual desires than younger children.<sup>91</sup> Furthermore, direct questioning is likely to be less subject to errors in assessment than indirect inquiries.

Most judges in our study did not favor testimony in open court by children in custody cases. The assumption is that many children find formal testimony stressful, particularly when it requires the rejection of one parent in a face to face situation. Melton and Lind<sup>92</sup> have challenged the generally-held assumption that testifying in court is harmful to children; they point out that this conclusion is unsubstantiated and is inconsistent with the findings of Thibaut's and Walker's social psychology research studies showing satisfaction

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be required. At a minimum, the court may require some mechanism by which the child's evidence may be subject to cross-examination and refutation by the parties. The guardian *ad litem*, through conversations with the child, may also determine whether the child has substantive evidence to offer which should be presented through more formal channels.

Judges will not likely want to restrict artificially the child's disclosures. If the child talks about issues that have previously been introduced into evidence, little harm is done. However, the child should be aware that if he or she talks about the parent and provides information which has not been previously disclosed, the judge may provide that information to the parties and their attorneys. If judicial interviews usually involve adolescents, or younger children who affirmatively indicate a desire to disclose a preference, there should seldom be misunderstanding of the purpose of interviews; both children and parents may be protected.

<sup>91</sup> Susan Scott-Meehan studied the involvement of a group of children, aged 9 to 12, in custody litigation. She found that many experienced loyalty conflicts and pressure to express a preference which, at least for some children, was unwelcome. S. Scott-Meehan, *Child Custody Disputes: The Experience of Children and the Implications for Social Policy* (unpublished dissertation available at Stanford University, 1982). Adolescents may be somewhat less likely to experience loyalty conflicts than younger children. Cf. J. WALLERSTEIN & J. KELLY, *supra* note 79. Further, since they may be less suggestible to adult authority figures, they may be less vulnerable to coercion. Scherer and Reppucci found that adolescents were less vulnerable to parental suggestion when confronted with important treatment issues than when decisions were trivial. Scherer & Reppucci, *Adolescents' Capabilities to Provide Voluntary Informed Consent: The Effects of Parental Influence and Medical Dilemmas*, 12 LAW & HUMAN BEHAV. 123 (1988). See also Melton, *Children's Competency to Testify*, 5 LAW & HUMAN BEHAV. 73 (1981) (suggestibility to adult authority figures decreases as children grow older). Adolescents evidence less transitory anger at the parent responsible for the family dissolution and less tendency to feel inconsolable loss at the absence of a parent. See J. WALLERSTEIN & J. KELLY, *supra* note 79.

<sup>92</sup> See Melton & Lind, *supra* note 14.

of parties from adversary proceedings.<sup>93</sup> However, the child's position in a custody adjudication may be very different from responses of college students in simulated adversarial disputes, and thus the application of these research findings is unclear. Until further research on children's experience in custody disputes is available, it is plausible to assume that some, if not most, children would prefer not to face their parents in court to express their preference for one of them. Further, it is reasonable to hypothesize that such testimony may have a negative impact on the relationship between the child and the non-chosen parent.

If children are permitted to express their preferences in a private interview, testimony by a child is only necessary if the child has substantive evidence to offer which is unavailable from other sources. In this situation, fairness to the parties requires that evidence be taken through testimony in court and be subject to examination and cross-examination. It would seem likely that in most cases evidence from the parties and their witnesses, together with that offered by the guardian *ad litem*, would obviate the need for testimony by the child.

### *B. Devising a Substantive Decision Rule*

The larger decisional role given adolescents in disputes over custody in recent years reflects two trends in family law. First, it comports with the search for more determinate decision rules that promote private ordering of decisions around divorce.<sup>94</sup> Second, it

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<sup>93</sup> See J. THIBAUT & L. WALKER, *PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS* (1975) (concluding that adversary proceedings are favored because evidentiary control is largely in the hands of the disputants).

<sup>94</sup> Much has been written about the costs of applying the indeterminate best interest of the child standard, the current dominant decision rule in resolving custody disputes. The standard requires both a prediction which is difficult or impossible to make—what will be the effect on the child of being in the custody of each parent—and a value judgment about the meaning of “best interests.” The standard invites litigation, a particularly costly course in this context, and may increase hostility between parties whose cooperation after the divorce would probably be beneficial to the child. See generally Mnookin, *supra* note 13. Many observers have concluded that the costs of custody disputes are reduced and the results more satisfactory to all participants if the parties reach an agreement about custody themselves. Thus, proposals that reduce the probability of litigation (such as mediation) have been embraced. See Scott & Emery, *Child Custody Dispute Resolution: The Adversarial System and Divorce Mediation*, in L. WEITHORN, *PSY-*

reflects an emerging "jurisprudence of adolescence," the central theme of which is that adolescents should be given some autonomy in the transition to legal adulthood.<sup>95</sup>

1. *Child Preference Rule and Private Ordering.* In recent years, the law has increasingly authorized and indeed encouraged couples contemplating divorce to resolve their disputes without submitting to litigation. With the advent of no-fault divorce, couples for the first time could legitimately present a divorce agreement to a court and have that agreement ratified.<sup>96</sup> In contrast to the response of courts in an earlier era, courts today are receptive to pre-divorce and even pre-marital agreements resolving property and support issues.<sup>97</sup> Although courts theoretically retain a supervisory interest in custody arrangements agreed upon by the parents,<sup>98</sup> custody agreements

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CHOLOGY AND CHILD CUSTODY DETERMINATIONS: KNOWLEDGE, ROLES, AND EXPERTISE 23 (1987). Dissatisfaction with the best interest standard has contributed to interest in joint custody. A rule preferring joint custody would encourage parties to agree to this arrangement. For a critique of a custody decision rule favoring joint custody, see Scott & Derdeyn, *supra* note 13, at 469.

<sup>95</sup> The law traditionally recognized a "bright line" between minority and majority. Children, whether toddlers or teenagers, were presumed incompetent and were subject to the legal authority of their parents or the state in every realm. This uniformly paternalistic stance toward children began to weaken in the 1960s; a milestone was the Supreme Court's opinion in *In re Gault*, 387 U.S. 1 (1967), according minors the right to an attorney and other adult procedural rights when they face delinquency charges. See *generally supra* note 10.

<sup>96</sup> Under "fault" divorce laws, no divorce could be granted unless one party proved that the other was at fault. Thus, divorce could not be obtained by agreement between the parties. This often led to collusion between parties when both wanted the divorce. See *generally* Wadlington, *Divorce Without Fault Without Perjury*, 52 VA. L. REV. 32 (1966). Divorce by agreement came with the "no fault" era.

<sup>97</sup> Many states follow the policy of the Uniform Marriage and Divorce Act, directing courts to ratify the separation agreement of the parties unless unconscionable. See UNIF. MARRIAGE & DIVORCE ACT § 306, 9A U.L.A. 216 (1987). See also N.Y. DOM. REL. LAW § 236(3) (McKinney 1986). Antenuptial agreements may be subject to greater scrutiny but provisions regarding property are increasingly ratified. See UNIF. PREMAR. AGREEMENT ACT § 3, 9B U.L.A. 369 (1983) (requiring enforcement of premarital agreements regarding disposition of property and providing spousal support in most circumstances).

<sup>98</sup> State law directing courts to ratify property agreements between parties (absent unconscionability) exclude custody agreements from this mandatory directive. See N.Y. DOM. REL. LAW § 236(4) (McKinney 1986). Further, custody agreements are subject to court modification based on "changed circumstances" throughout the child's minority. See VA. CODE ANN. § 20-108 (Supp. 1988).

typically receive judicial ratification with little examination. This trend reflects in part a pessimism about the capability of courts to make better decisions for families facing divorce than couples can make themselves. Parties may accept a custody arrangement to which they voluntarily agreed more readily than one imposed by a court.<sup>99</sup> The trend toward private ordering also recognizes the extraordinary psychological and economic costs of litigation around divorce. The use of adversary proceedings to reach outcomes in custody disputes is extremely costly and often inimical to the best interest of the child.<sup>100</sup>

At first glance, it would seem that a custody rule deferring to the adolescent child's preference would have little to do with the private ordering trend; here the parents have failed to privately resolve their dispute. However, when a court defers to the child's wishes regarding custody, the child is the substitute for the legally preferred private decision makers—the parents—who are disqualified because they cannot agree. The rationale for preferring private ordering over judicially imposed outcomes operates here; the custody arrangement chosen by the adolescent child is most likely to be workable because it will be satisfactory to the child.<sup>101</sup>

A second objective of private ordering is achieved by recognizing the child's preference. A rule directing courts to defer to the wishes of adolescents will affect parties' bargaining in the shadow of that rule upon divorce. Parents will be less likely to contest the custody of their adolescent children and more likely to defer to the child's wishes. Thus all family members may benefit because litigation of custody matters is discouraged.<sup>102</sup>

This result may occur even in a state like Virginia without an announced legal rule.<sup>103</sup> Judges reported that the majority of custody

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<sup>99</sup> This psychological assumption supports divorce mediation as a dispute resolution mechanism. See Scott & Emery, *supra* note 94.

<sup>100</sup> See *id.*; Mnookin, *supra* note 13, at 249-55.

<sup>101</sup> Of course, one party will also be satisfied.

<sup>102</sup> See Mnookin & Kornhauser, *supra* note 72. In part, this is simply the result of replacing a broad standard with a clear rule. If the outcome of litigation is evident to the parties because the rule directs a result, the party unlikely to succeed in the litigation has less incentive to litigate.

<sup>103</sup> Our study suggests that an explicit statutory rule may not be needed since judges follow an implicit child's preference rule without statutory guidance. However, unless there are significant costs involved in announcing an explicit rule, it

disputes involved younger children. The smaller number of disputes involving adolescents may have several possible explanations. First, it may in part reflect the demographics of divorce. Couples with young children may be more likely to divorce than those whose marriages have endured long enough to have teenagers. Second, parties may bargain in the shadow of the implicit decision rule recognizing the adolescent's custody wishes. For example, attorneys may advise their clients that seeking custody when a teenager wishes to be with the other parent is not likely to be successful. An alternative explanation, which will be explored further in Part IV, is that social norms may guide parents to respect their children's wishes regarding custody. Independently of their knowledge of legal rules, parents may believe that teenagers who have a preference have a right to a voice about their custody or that defying a child's wishes will be either costly or fruitless. Whatever the explanation, it is plausible that custody of adolescents may be less frequently litigated because children, in fact, have a voice in the decision within the family.

A legal presumption favoring the custodial preferences of adolescents is a clear rule—a rule that lends greater certainty to this category of custody disputes. In general, clear rules have lower application costs than broad standards that incorporate many variables. The indeterminate best interest of the child standard has been much criticized as a custody decision rule because of its substantial application costs.<sup>104</sup> Lending certainty to a category of custody cases through the use of an easily applied rule is a positive achievement, as long as the outcome directed by the rule comports with the overall legal objective: a custody decision that reflects the best

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would seem desirable to do so, as it would enhance certainty and predictability in decision making. A child's preference rule will not discourage litigation in all potentially applicable cases; another response by one of the parties is possible. A parent who is not preferred or who is uncertain about the child's choice may put pressure on the child *not* to express a preference. See *supra* note 13.

<sup>104</sup> In contrast, the tender years presumption that preceded the best interest standard as the dominant custody decision rule was easily applied and promoted predictability, as it incorporated fewer variables. Despite lower application costs, the tender years presumption became less satisfactory when maternal custody was less clearly the correct outcome. In other words, the rule less accurately mirrored the overall objective of the law. See Scott & Derdeyn, *supra* note 13, at 446.

interest of the child.<sup>105</sup> To measure the substantive merits of an adolescent preference rule, it may be useful to examine such a presumption in the context of evolving legal policy toward minors.

2. *The Growing Case for a "Rebuttable Presumption of Liberty."*<sup>106</sup> The growing recognition of a role for children in custody decisions reflects society's perception that the line between minority and majority status is no longer a bright one. The traditional legal stance of withholding any decision making authority from minors was based in part on the unexamined premise that minors of any age were incapable of participating in important decisions affecting their lives and that their welfare required that they be subject to parental and state authority. This stance has been somewhat modified over the past twenty years. The law increasingly gives minors the liberty to make decisions which directly or indirectly restrict the authority of their parents and the state. Paradoxically, expanded legal rights of adolescents are supported and constrained by paternalistic as well as libertarian goals. Thus, minors may seek treatment for drug or alcohol abuse, but may not purchase alcohol.<sup>107</sup> They

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<sup>105</sup> Since this objective is by its nature paternalistic, it may in fact *not* be fully satisfactory as applied to adolescents. This, together with the difficulty in defining the best interest standard, since it is a value-based construction, may argue for a recasting of the legal objective when adolescents' custody is at issue. Perhaps the goal is better defined as the outcome most satisfactory to the teenager unless clearly harmful to her welfare. See *infra* note 118.

<sup>106</sup> This phrase was coined by Zimring, see *supra* note 10, at 52.

<sup>107</sup> Access to contraceptives surely has as much to do with the paternalistic objective of protecting against the high cost of teenage pregnancy as with "reproductive autonomy." Scott, *Adolescent Reproductive Rights: Abortion, Contraception, and Sterilization*, in CHILDREN, MENTAL HEALTH AND THE LAW 125, 137-39 (N.D. Reppucci, L. Weithorn, E. Mulvey, & J. Monahan eds. 1983). Thus, there is no inconsistency in legal policy that restricts the access of minors to alcohol or pornography, but treats them as adults for the purpose of consenting to certain kinds of medical treatment.

Many states have laws designating types of medical treatment that minors may seek without parental consent. These include drug and alcohol treatment, treatment for venereal disease, and outpatient mental health treatment. The underlying policy is to encourage minors to seek treatment that is important to their health and that they would be less inclined to seek if they were required to involve their parents. See VA. CODE ANN. §54-325.2 (Supp. 1988) (a minor is deemed an adult for the purpose of consenting to medical services with respect to birth control, pregnancy, substance abuse, mental illness, or emotional disturbances). Many states also have general "mature minor" provisions that authorize physicians to treat minors without parental consent (and without fear of liability). See Wadlington, *Minors and*

may exercise first amendment free speech rights in schools as long as it does not interfere with educational objectives.<sup>108</sup>

Franklin Zimring has offered a thoughtful analysis of the appropriate legal response toward adolescents in modern society, suggesting that the law treat adolescents as though they have a "learner's permit" for adult life.<sup>109</sup> Zimring argues that teenagers should be given as much freedom to learn to make their own choices as they can handle without excessive or lasting destructive effects. Adolescents are approaching a complex modern world and may benefit from experience with adult liberties and responsibilities while they remain in a protected status.<sup>110</sup>

The question arises whether some standard of competency should be applied to children's custodial preferences. On other issues such as medical decision making, legal authority of minors is premised on a finding (or presumption) of competency. A cognitive competency requirement is appropriate for medical decisions because of the requirement of informed consent.<sup>111</sup> Decisions about custody do

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*Health Care: The Age of Consent*, 11 OSGOODE HALL L.J. 115 (1973) (discussing the mature minor rule and minor's authority to consent to treatment in particular situations).

<sup>108</sup> The Supreme Court announced in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 506 (1969), that "it can hardly be argued that . . . students . . . shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." Nevertheless, it has since become clear that schools may restrict student expression in a way that would be unacceptable for adults if it is vulgar or implicates curricular purposes. See *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 680-86 (1986) (holding that school officials acted within authority in suspending student who made off color campaign speech); *Hazelwood School Dist. v. Kuhlmeier*, 108 S. Ct. 562 (1988) (holding that prior restraint and censorship of school newspaper does not violate students' first amendment rights because official supervision implicated curriculum objectives).

<sup>109</sup> See F. ZIMRING, *supra* note 10.

<sup>110</sup> *Id.* at 89-98. In Zimring's view, adolescents should be protected from the full burden of adult responsibilities, but should have some experience of adult decision making freedom and accountability.

<sup>111</sup> See Roth, Meisel, & Lidz, *Tests of Competency to Consent to Treatment*, 134 AM. J. PSYCHIATRY 279 (1977) (description of various tests of competency to consent to treatment, including: (1) evidencing a choice; (2) "reasonable" outcome of choice; (3) choice based on "rational" reasons; (4) ability to understand; and (5) actual understanding); Meisel, *The "Exceptions" to the Informed Consent Doctrine: Striking a Balance Between Competing Values in Medical Decision-Making*, 1979 WIS. L. REV. 413, 433-86 (examining the exceptions to the requirement of informed consent (emergencies, incompetent patients, waiver) as a vehicle for an-

not fit as neatly into the competency construct because of the important emotional component. Nonetheless, although requirements of competency have not been legally defined in this context, judicial pronouncements and statutory provisions regarding children's preferences are phrased in terms of cognitive decision making capability. For example, a California statute directs the court to consider the child's preference "if a child is of sufficient age and capacity to reason so as to form an intelligent preference as to custody."<sup>112</sup> Thus, the analogue to other cognitive decision making tasks may be relevant.

Lois Weithorn conducted research comparing the decision making of adults and minors concerning medical treatment.<sup>113</sup> She found that, in contrast to nine-year-olds, fourteen-year-olds reasoned about medical decisions in much the same way that the adults did. These findings are consistent with cognitive development theory that predicts that by the age of fourteen, minors reach a stage of formal operational thinking that allows them to think hypothetically.<sup>114</sup>

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alyzing the tension underlying legal policy in this context between promoting self determination and health). Minors, unlike adults, were traditionally presumed to be incompetent to make medical decisions. Since informed consent is a prerequisite to medical treatment (which would otherwise be a battery), parents have legal authority to consent to medical treatment for their children. In recent years, researchers have challenged the presumed incompetency of minors in this context. See Weithorn & Campbell, *supra* note 11, at 1589. This may have contributed to changed policies regarding minors' consent to treatment in recent years. See Wadlington, *supra* note 107, at 117, 121.

<sup>112</sup> CAL. CIV. CODE § 4600 (West Supp. 1988).

<sup>113</sup> Weithorn & Campbell, *supra* note 11, at 1589.

<sup>114</sup> Under a Piagetian model of cognitive development, children reach the highest stage of cognitive development, which involves the capacity to engage in formal operational thinking, between the ages of twelve and fourteen. *Id.* at 1590-91. Modern research in cognitive development has challenged Piaget's stage theory and suggests that the development of operational skills does not progress in stages and may vary in a given individual depending on the task. See Byrnes, *Formal Operations: A Systematic Reformulation*, 8 DEVELOPMENTAL REV. 66, 66-67 (1988) (the decline in interest in the formal operations model can be linked to the shift away from Piagetian theory toward views of conceptual development which explain age differences through domain specificity and the acquisition of expertise); Siegler, *Developmental Sequences Within and Between Concepts*, 46 MONOGRAPHS OF THE SOC'Y FOR RES. IN CHILD DEV. (1981) (children's reasoning across different concepts is less consistent than expected on the basis of the Piagetian theory).



Using the analogy of competency to make medical decisions, Weithorn has suggested a line of inquiry that may be useful in assessing competency for custody decision making. Under this method, competency would involve an understanding of the custody decision and its implications, as well as an ability to weigh the short- and long-term consequences of each alternative. Most adolescents are likely to be found competent by this standard.<sup>115</sup>

Another requirement of informed decision making that is relevant to custody cases is voluntariness.<sup>116</sup> The child's wishes about custody should be independent and not a product of parental coercion. A legal rule focusing on the child's preference may encourage coercive maneuvers by parents. Such maneuvering would be costly if the preference of younger children were legally important,<sup>117</sup> but adolescents are likely more independent of their parents and also arguably less vulnerable to parental coercion.<sup>118</sup>

There are also persuasive philosophical and practical grounds for recognizing the preferences of adolescents. Teenagers are only a few years away from adulthood and have a claim to respect for their interest in self-determination. A paternalistic judicial determination that the child's best interest is served by a custody decision that the child affirmatively opposes, violates her interest in autonomy and imposes the judge's values on the child.<sup>119</sup> On more practical grounds, adolescents who are placed with a parent with whom they

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<sup>115</sup> See Weithorn, *Children's Capacities in Legal Contexts*, in CHILDREN, MENTAL HEALTH, AND THE LAW, *supra* note 107, at 25, 42-45. The appreciation standard of informed consent to medical decisions requires that the decision maker be capable of understanding the described procedures, consequences, risks and benefits, and comparing it to alternatives including no treatment.

<sup>116</sup> See Meisel, *supra* note 111, at 457.

<sup>117</sup> Judges in our survey reported that they believed that children feel pressure from parents. The more emphasis courts give to the child's preference in the decision, the more incentive each parent may have to win the child's support for his or her custody claim. Scott-Meehan found in her study that children aged 9 to 12 experience pressure from their parents (and from courts) to state a preference. See S. Scott-Meehan, *supra* note 91.

<sup>118</sup> Scherer and Reppucci recently studied 14-year-old adolescents' responses to a series of medical decision making vignettes. They found that the adolescents were less likely to be influenced by parental preference when the decision involves a major issue (for example, the donation of a kidney) than when the decision involves a minor choice (wart removal). Scherer & Reppucci, *supra* note 91, at 132-36. On an important decision such as their own custody, adolescents may be less vulnerable to parental pressure than they might be on matters of less significance.

<sup>119</sup> Indeed, the paternalistic objective embodied in the best interest standard and

do not want to live may simply disregard the custody order. Many adolescents have considerable freedom and mobility that may allow them to associate with the parent of their choice. Placing a teenager with a parent with whom he does not wish to live may be a prescription for failure of the custodial arrangement. The child will be capable of assuring that the placement is not successful. As one judge in our study commented, "I don't want to give an order I can't enforce." Thus, there is a strong functional basis for deferring to the adolescent's custodial choice. Indeed, if the chosen parent is fit, there may be no better basis for a custody decision than the child's preference.

On philosophical and functional grounds, with at least tentative support from developmental research and theory, an adolescent preference rule makes sense as a custody decision rule regulating this category of custody cases.<sup>120</sup> Moreover, given the general probability that adolescents are "competent" to make custody choices and the difficulty in devising a competency standard in this context, an individualized competency requirement is probably not desirable. Rather, the adolescent's choice need only be restricted if the custodial choice is clearly harmful.

3. *The Preferences of Younger Children.* The issue is more uncertain for younger children. Pre-teenagers may be less emotionally mature and less capable cognitively of making the decision than are adolescents. Wallerstein and Kelly, studying a clinical sample, found that children between the ages of nine and twelve experience great loyalty conflicts at the time of divorce.<sup>121</sup> Greenberg found children in this age group to be less desirous of expressing a custodial

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the inquiry based on it may be less suitable in cases involving adolescents than younger children. Adolescents should arguably have authority to choose their custodian constrained only by a requirement that it not be an overtly harmful choice. Thus, an adolescent preference rule may be supported on the grounds that deferring to the child's preference results in the custody decision that reflects the child's best interest. Alternatively, the argument can be made that courts should be restrained from the paternalistic effort to protect the welfare of the adolescent by imposing its judgment about the optimal custody arrangement on the adolescent.

<sup>120</sup> It is important to qualify the empirical basis for an adolescent preference rule. Although the research on cognitive development suggests that adolescents may be cognitively ready to participate in the decision, the important issues of emotional development have not been addressed at all.

<sup>121</sup> See J. WALLERSTEIN & J. KELLY, *supra* note 79, at 77-78.

preference than teenagers.<sup>122</sup> Encouraging the younger child to express a preference regarding custody may exacerbate the loyalty conflict and burden the child with a sense of responsibility for rejecting the unchosen parent.

Another concern about seeking the preferences of younger children is that their wishes may reflect a response to the upheaval of divorce rather than their relationships with each parent. Younger children are likely more dependent on their parents and family for security and support than teenagers who typically live in a wider world. Thus, young children may be less able to accept the dissolution of the family, and this may distort the children's decision making process.<sup>123</sup> Divorce researchers have observed that children, especially those in the early school age category, intensely miss the parent who has left the home. This longing for the absent parent may influence the child's expression of preferences regarding custody but may not necessarily reflect stronger long-term attachment bonds to the missing parent. Another variable that may affect the child's custody preference is transitory anger directed at one parent during the divorce process, perhaps at the parent blamed for the divorce.<sup>124</sup> For many children, the real preference may be for the lost intact family, a desire which the court cannot accommodate.

Another argument for treating younger children differently from adolescents is that younger children have a reduced interest in self-determination. Although adolescents probably expect and exercise considerable freedom in their daily lives, younger children experience little autonomy. The recent acknowledgment by the law that minors have liberty interests functions as a recognition that adolescents are different from their younger brothers and sisters.<sup>125</sup> The trend toward according minors the authority to make medical decisions and the right to exercise free speech is limited in practice to

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<sup>122</sup> See E. Greenberg, *An Empirical Determination of the Competence of Children to Participate in Child Custody Decision-Making* (unpublished doctoral dissertation available in University of Illinois Microfilms, 1983).

<sup>123</sup> In general, because of the emotional intensity of the divorce context, cognitive error caused by availability may be particularly strong. See Kahnemann & Tversky, *supra* note 77.

<sup>124</sup> See J. WALLERSTEIN & J. KELLY, *supra* note 79, at 68-70, 74-77.

<sup>125</sup> Most thoughtful academic commentary on children's rights has distinguished adolescents from younger children and argued against the traditional uniform treatment of children of all ages. See generally F. ZIMRING, *supra* note 10, at 16-29.

adolescents.<sup>126</sup> In part, this distinction is premised on an assumption that younger children are less competent than older children. The distinction also reflects an implicit recognition that liberty interests are less meaningful to younger children who practice little self-determination. It would not seem controversial that adolescents should have a more important role in decisions regarding their custody than younger children. Their autonomy interests are more compelling legally, normatively, and psychologically than those of younger children.

#### IV. SOCIAL NORMS AND LEGAL RULES IN FAMILY LAW

In this Part we explore a theme suggested by the study results that offers a useful perspective on broader issues in custody law. The survey findings suggest that decisions about the custody of adolescents may reflect not only legal directives but also a social norm supporting a voice for adolescents in important decisions affecting their lives. Social norms and customs may play a peculiarly important role in custody law in general. Courts and legislatures seem to be attentive to the existence or absence of typical models of family role allocation in intact families and, under some circumstances, draw inferences from norms and customs regarding family roles and behavior. We postulate that sensitivity to social norms in this context reflects, in part, a response to the task of legal regulation of long-term relationships.

##### A. *The Adolescent Preference Rule and Social Norms*

1. *Custody Decision Making in the Family.* That fewer custody decisions involve adolescents suggests that some divorcing parents may defer to their adolescent children's custodial preferences. Why is this so? One explanation may be that parties upon divorce bargain "in the shadow of the law."<sup>127</sup> If judges are known to defer to the wishes of adolescents, non-preferred parents may be discouraged by their attorneys from seeking custody. These parents may

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<sup>126</sup> This is especially clear with medical treatment decisions. First, the type of treatment may only be relevant to adolescents (for example, contraception and abortion). Second, the requirement that informed consent be given before medical treatment can be given will exclude younger children who, by most standards, will not be competent to consent to treatment.

<sup>127</sup> See Mnookin & Kornhauser, *supra* note 72, at 950.

reluctantly accede to their child's wishes knowing that they stand little chance of prevailing in court.

While an explicit or implicit adolescent preference rule may contribute to the dearth of custody suits involving teenagers, it seems unlikely that it is a complete explanation. Rather, it is possible that many parents who might battle over the custody of a young child may defer to a teenager's custodial preferences without even considering the option of litigation.

In the traditional family, parents were authoritarian decision makers until children grow up and leave home; this model seems to be eroding. Adolescents would appear to have considerably more freedom within the family than they once did. Indeed, adolescence is a relatively modern construct and by definition suggests a transitional stage between the total dependency of childhood and the autonomous and independent status of adulthood.<sup>128</sup> This process includes an evolving orientation to peers rather than parents and a greater mobility and autonomy; a mobility that likely diminishes dependence on parents and involvement by parents in their children's activities.<sup>129</sup> Certainly by mid-adolescence, many modern teenagers are free of close parental supervision. Further, many would likely assert a claim to participate in a custody decision. It seems likely that in many families *both* parents and teenagers would probably acknowledge the semi-independent status of adolescence.

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<sup>128</sup> The introduction of the concept of adolescence as a distinct stage of human development is often credited to G. Stanley Hall, whose work dates back to the beginning of the twentieth century. See 1, 2 G. HALL, *ADOLESCENCE* (1904). Over the years, some psychologists' views have emphasized the maturational and biological aspects of adolescence; others have concentrated on social learning and culture. See N. SPRINTHALL & W. COLLINS, *ADOLESCENT PSYCHOLOGY: A DEVELOPMENTAL VIEW* 1-17 (2d ed. 1988). With both emphases, it is the commonly held view that a complex combination of changes, both in the individual and in society's view of the individual, create a bridge from the dependence of childhood to the independence of adulthood. See Conger, *Adolescence: A Time for Becoming*, in *SOCIAL AND PERSONALITY DEVELOPMENT* 131-54 (M. Lamb ed. 1978).

<sup>129</sup> See J. COLEMAN, *THE ADOLESCENT SOCIETY: THE SOCIAL LIFE OF THE TEENAGER AND ITS IMPACT ON EDUCATION* (1961) (a study of high school students in social groups found that the transition state adolescents experience involves a balance between parents and friends). Zimring discusses the widespread availability of automobiles and telephones as important factors contributing to freedom and mobility of modern teenagers and to their independence from their families. See F. ZIMRING, *supra* note 10, at 41-44.

It is plausible, therefore, that some parents defer to their adolescent children's custody wishes because they, too, believe that growing independence and maturity confer a claim to participate in this important decision. For a disfavored parent to vigorously pursue custody of an unwilling sixteen year old may risk social approbation.<sup>130</sup> Beyond these concerns, however, respect for the "freedom of choice" of the adolescent may have a functional basis as well. The parental claim to authority is weakened because the parents themselves are not in agreement.<sup>131</sup> Furthermore, a parent who wants custody may realize that an unhappy adolescent will engage in "self-help" behavior to resist an undesired arrangement.<sup>132</sup> Parents may decline to litigate custody because they perceive that enforcing a judicial placement opposed by the child would involve substantial monitoring costs. The child may, as some judges suggested, simply ignore the court order. Alternatively, a child may inflict substantial psychological damage on the non-preferred parent. To be sure, younger children may also impose costs if not happy with the

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<sup>130</sup> This observation suggests the dual meaning of the term social norm. The concept embodies both that which is typically done within a society (custom) and the rules for regulating behavior which are sanctioned if breached. Both are relevant here. It is likely that adolescents are given more control over their custody today; moreover, many believe that they *should* be given a voice.

A mild social sanction, disapproval, or gossip, may be the response to a parent's aggressive pursuit of custody in the face of the teenager's opposition. Many would probably agree that a teenager who has a preference regarding custody should have a central role in the decision absent unusual circumstances (such as a preference for a parent who would provide an unhealthy environment). Gossip and ostracism may be powerful regulations of behavior. See Merry, *Rethinking Gossip and Scandal*, in TOWARD A GENERAL THEORY OF SOCIAL CONTROL, VOLUME 1: FUNDAMENTALS 271 (D. Black ed. 1988) (gossip and scandal flourish whenever there are close-knit social networks and normative homogeneity, whether the society is small-scale or complex).

<sup>131</sup> Further, as long as the parent representing the child's custodial preference also wants custody, the child's wishes are supported by some claim of parental authority. Thus, the child's autonomy interest is joined with a claim of parental authority when balanced against the state's paternalistic claim to decide custody.

<sup>132</sup> Ellickson describes the use of self-help as an important mechanism for enforcing entitlements (in contrast to legal enforcement). See Ellickson, *Critique*, *supra* note 6, at 87. Ellickson found that the neighbors in Shasta County controlled each other's behavior through the means of negative gossip or some other form of retaliation if a neighbor faltered in his behavior. See also A. HIRSHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES (1970).

custody arrangement, but because of their dependent status, parents may predict that they will gradually adjust.

In sum, decisions about custody of adolescents when their parents divorce are usually made within the family and seemingly pursuant to a social norm. This norm may have an ethical or a functional basis. In either case, it supports a recognition by parents today that adolescents who have a preference should have a voice in custody decisions.

2. *Social Norms and Decision Making by Judges.* Evidence from our study in Virginia suggests that judges (as well as parents) may be guided by a social norm that adolescents have a voice in the custody decision. The implicit decision rule favoring the parent preferred by the adolescent child is evidence of such a norm. Moreover, the power of the norm is underscored by the fact that the Virginia statute directs judges to consider a range of other specific factors in deciding the child's best interest, but does not mention the child's preference as a relevant consideration.

Recently, a number of scholars have begun to explore the relationship between social norms and legal rules in the regulation of social behavior.<sup>133</sup> These analyses challenge the dominant assumption of "legal centralism," an assumption that stresses the key importance of announced legal rules in the resolution of disputes and the regulation of behavior in society. Robert Ellickson has demonstrated that social norms are powerful regulators of behavior, and form the basis for dispute resolution, particularly in the regulation of ongoing relationships. Other scholars have demonstrated the importance of social norms in the regulation of business/consumer relationships and of long-term contractual relationships.<sup>134</sup>

Social control objectives are more readily advanced when social norms and legal rules function as complements and are mutually

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<sup>133</sup> Ellickson, *Critique*, *supra* note 6, at 67.

<sup>134</sup> Besides the studies of Macaulay and Scott described in *supra* note 6, other researchers have examined the importance of social norms in regulating behavior. See H. ROSS, *SETTLED OUT OF COURT: THE SOCIAL PROCESS OF INSURANCE CLAIMS ADJUSTMENT* (1980) (study of variance between negligence rules applied by insurance adjusters and legal rules); Ross & Littlefield, *Complaint as a Problem-Solving Mechanism*, 12 *LAW & SOC'Y REV.* 199 (1978) (study of appliance retailer-customer relations suggests retailers refund policy more liberal than law requires).

reinforcing.<sup>135</sup> If legal rules do not conform to social norms they may either be ignored or reshaped, or enforcement will be costly. This is not to say that legal rules should always conform to social norms. A dominant norm, or one accepted by a sub-group in the society, may be deemed morally wrong and legal regulation that attempts to change it may be fully justified. In such situations, the significant enforcement and monitoring costs associated with resistance to legal regulation are anticipated and acceptable prices to pay for the desired goals of a more just social order. Legal regulations to combat racial discrimination are only the most obvious examples of this category. What is important for legal policy makers to understand, however, is the pervasiveness of social norms and the role that they have in regulating social behavior.

The relationship between social norms and legal rules is an important dimension of the legal regulation of child custody. For instance, courts in Virginia seem to have reshaped a legal rule to conform to a social norm of adolescent self-determination. This response may imply that the judges have internalized the social norm (the traditional wisdom about custody decision making).<sup>136</sup> Alternatively, it may represent a judicial determination to use the norm as the basis for resolving custody disputes. This determination in turn derives either singly or in combination from two factors. First, judges may simply determine that departing from the social norm is too costly in this context. Second, judges may view the search for the social norm as the appropriate judicial role in de-

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<sup>135</sup> Ellickson describes the tradition of legal centralism beginning with Thomas Hobbes. Hobbes saw no possibility that some nonlegal system of social control might bring about a medium of order; rather, he believed that a society without a sovereign would be chaotic. Ellickson, *supra* note 6, at 81-84. Legal centrists, in Ellickson's view, exaggerate the role of the state as the sole source of legal control and undervalue the importance of informal controls such as social norms. Hobbes' bleak version of life in the state of nature is pure legal centralism. Law and economics scholars have been extreme legal centrists, in Ellickson's view, since they deny the possibility that controllers other than the state can generate and enforce entitlements. *Id.* at 82-83. Legal rule makers may adopt an extreme legal centrist view when they assume that changing the law will readily change behavior.

<sup>136</sup> One criticism of the broad discretion accorded judges under the best interest of the child standard is that they will apply their own values in deciding which parent's custody is best for the child. Weitzman & Dixon, *Child Custody Awards: Legal Standards and Empirical Patterns for Child Custody, Support and Visitation After Divorce*, 12 U.C. DAVIS L. REV. 473, 504 (1979).



cluding important "relational" issues. Decisions about custody matter a great deal; they affect the lives of family members in important and pervasive ways. Furthermore, a custody decision does not involve a discrete transaction. Rather, it sets the course of an ongoing relationship for years into the future. If the legal decision is not reinforced by normative constraints, it may require continued monitoring. If many people, including the teenagers involved, believe that adolescents should have a role in the decision about their placement, variance from this norm may result in unstable outcomes.

*B. Social Norms and Policy: Interpreting the Recent History of Custody Law*

Social norms and customs are important, not just to understanding judicial decision making, but also to the formulation of legal rules. Saul Levmore has argued that when the behavioral effects of alternative forms of legal regulation are predictable and have an important social control function, then legal rules tend to be uniform across ancient and modern legal systems.<sup>137</sup> On the other hand, where the behavioral effects of alternative rules are unclear or the behavior itself involves matters about which reasonable people may differ in the society, the legal regulation of these behaviors may tend to vary.<sup>138</sup> Levmore's analysis suggests a perspective for thinking about the relationship between social norms and legal rules in a single society as well. In periods when there is consensus about an important social norm, legal rules will tend to reflect the norm, and enforcement and monitoring costs will be low. In times of change that are characterized by conflicting ideologies, the law is less likely to track a clear social norm. The legal rules may thus be less predictable. Rules may adhere to the traditional norm or they may promote a new ideology that seeks to displace the old. In the latter instance, the rule itself may reflect an effort to shape and influence the social norm toward the new ideology. In circumstances where norms are evolving, rulemakers, confronted with conflicting ideologies, may instead adopt discretionary standards that

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<sup>137</sup> Levmore, *Rethinking Comparative Law: Variety and Uniformity in Ancient and Modern Tort Law*, 61 TUL. L. REV. 235 (1986).

<sup>138</sup> Thus all societies, ancient and modern, have rules that discourage theft and negligent behavior. In contrast, legal systems vary in procedural rules. *Id.* at 238.

allow judges to "choose a norm." Thus, the use of broad legal standards may be a recognition that no dominant social norm regulating behavior exists to serve as the basis for a clear legal rule.

These observations form the basis for an admittedly conjectural interpretation of developments in custody law in the last generation. During an era when the dominant norm regulating family responsibilities was that mothers should be caretakers of children, the legal rule officially complemented this norm by strongly favoring mothers over fathers in custody disputes. One way of looking at the recent movement to the gender neutral best interest of the child standard is that it was a response to some perceived erosion of the traditional norm regulating family roles or a mild effort to promote a new ideology.<sup>139</sup> To the extent that the change in the legal rule reflected this latter objective, it suggested a promotion of more flexible parental roles. In turn, this makes the prediction about the better custodian upon divorce less clear than the tender years presumption would have suggested.

As a broad discretionary test, the best interest standard permits judges to choose between conflicting norms. Apparently, courts in general have adopted the more traditional norm in their decisions, even though the legal standard is ostensibly neutral. There is substantial evidence that courts applying the best interest standard do so in a way that is favorable to mothers, and fathers typically do not prevail in custody disputes unless they are able to demonstrate that the mother has some serious disability.<sup>140</sup> These results are often attributed to the insidious biases of judges. Another explanation is

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<sup>139</sup> Thus, as more mothers of young children entered the work force and fathers took an increasingly active parenting role, the presumption that the mother was the optimal custodian on divorce was challenged. See Roth, *The Tender Years Presumption in Child Custody Disputes*, 15 J. FAM. L. 423, 448-57 (1977) (challenging the premise that status as biological mother signifies capacity to promote child's best interests).

<sup>140</sup> See Weitzman & Dixon, *supra* note 136, at 504-05. Mothers obtain custody in 90% of cases; 98% of attorneys believe judges prefer mothers. *Id.* at 503-07. Fathers are not advised to seek custody unless the mother has abandoned the child or is unfit. *Id.* at 508-15. See Lambe, *Handling Contested Custody Cases*, 88 CASE & COMM. 3 (Jul.-Aug. 1983) (suggesting guidelines for the practitioner dealing with difficulties fathers face in suing for custody). Pearson and Ring found that under Colorado's best interest standard, mothers got custody if they were fit. Pearson & Ring, *Judicial Decision-Making in Contested Custody Cases*, 21 J. FAM. LAW 703, 720 (1982-83).

that judges in awarding custody to mothers are continuing to track a powerful social norm which, in fact, has not suffered significant erosion. There is ample evidence today that mothers continue to assume the major responsibilities of caring for children.<sup>141</sup> The discretionary standard gives courts the freedom to subscribe to the goal of gender neutrality or to reinforce the presumably stronger traditional norm; courts seem inclined to opt for the latter course.<sup>142</sup>

Virginia's statutory version of the best interest of the child standard does not include the custodial preference of adolescents among the factors for judicial consideration. This is puzzling and may reflect nothing more than legislative oversight; a plausible explanation, given that the child's preference is explicitly included in the statutory prescriptions in many states. Moreover, it is not surprising that the apparent "oversight" has created few problems. The best interest standard, even in a form that offers some guidance to decision makers, permits significant latitude to courts. Thus, courts are free, under the Virginia statute, to follow the norm regarding adolescent participation that we have described. We have argued that judges in typically awarding custody of younger children to mothers appear to track the traditional norm regarding parental roles without statutory direction to do so. As children grow older, the traditional norm seems less compelling; it may be supplanted

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<sup>141</sup> See Barnett, Determinants of Father's Participation in Child Care (Paper presented at American Psychological Association meeting in Anaheim, California 1983); Cunningham, *Women Still Do Majority of Child Care Housework*, APA MONITOR, Nov. 1983, at 16 (in study of 160 families, 113 fathers were responsible for no child care tasks); Jacobson, *Beyond Empiricism: The Politics of Marital Therapy*, 11 AM. J. FAM. THERAPY 11, 18 (Summer 1983) (citing studies indicating that mothers fill primary parental roles).

<sup>142</sup> The same response may be seen in the operation of joint custody laws. Legislative lobbyists for joint custody advocate laws promoting shared parenting responsibilities (joint physical custody), and argue that a new social norm supports this arrangement. In fact, this norm is largely aspirational; it seems unlikely that in most families mothers and fathers share parenting responsibilities equally. Scott & Derdeyn, *supra* note 13, at 483. There is evidence that joint custody orders by courts seem more typically to result in child care arrangements that approximate sole custody and visitation, with mothers assuming a primary role in child care. See Koopman, Hunt & Stafford, *Child Related Agreements in Mediated & Non-Mediated Divorce Settlements: A Preliminary Examination and Discussion of Implications*, 22 CONCL. CTS. REV. 19 (1984). One reason women have typically resisted joint custody reform legislation may be a view that it distorts the social norm and disadvantages mothers who have fulfilled traditional roles before divorce.

by a norm favoring decisional participation by adolescents. Under the broad directive to reach the outcome that reflects the child's best interest, courts are free to track evolving social norms regulating family roles.

#### CONCLUSION

Courts in Virginia receive no statutory guidance about obtaining evidence from children in custody proceedings or about how the child's preference about custody should be weighed in the judicial decision. Our study of judges suggests that the child's age is the critical variable influencing judicial practice; the extent to which judges hear directly from children and seriously consider their preferences is clearly correlated with age. This judicial response receives support from several perspectives. It is consistent with child development research and theory and with a trend toward expanded recognition of adolescents as persons with a stake in important decisions affecting their lives. Moreover, recognition of adolescents' preferences regarding custody may represent judicial deference to a social norm regarding family roles. In regulating long-term relationships between adolescents and their divorced parents, tracking social norms may increase the stability of outcomes and in other ways reduce the costs of legal enforcement.