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GAULT'S LEGACY: DIGNITY, DUE PROCESS, AND ADOLESCENTS' LIBERTY INTERESTS IN LIVING DONATION

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I. INTRODUCTION

In re Gault formalized the Supreme Court's recognition that constitutional guaranties are not just for "adults alone."[1] The Court interpreted the federal Constitution to require the government, in its role as *parens patriae*, to treat minors (i.e., persons under eighteen) fairly when they are faced with deprivation of their liberty interests and to facilitate their participation in decision-making processes.

Two basic principles can be distilled from *Gault*. First, *Gault* vitalized interests in life, liberty, and property of the Due Process Clause for *all* persons.[2] Second, *Gault* established that for minors these interests are promoted and protected by government processes that facilitate fair treatment and include minors' participation in decisional processes affecting their lives.[3] Taken together, these principles transcend the delinquency proceeding before the Court in *Gault* by emphasizing the state's *parens patriae* role in devising process-oriented approaches whenever minors'

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1. *In re* Gault, 387 U.S. 1, 13 (1967). In the year preceding *Gault*, the Supreme Court first recognized the concept of "children's rights" when in *Kent v. United States*, 383 U.S. 541, 560–65 (1966), it reversed an order by a juvenile court judge who certified an adolescent for trial as an adult in the absence of any—let alone adequate—procedural safeguards. For an interesting perspective in this vein, see Monrad G. Paulsen, Kent v. United States: *The Constitutional Context of Juvenile Cases*, 1966 SUP. CT. REV. 167. Prior to the 1960s, the Court had only intimated at federal Constitutional guaranties extending to minors. *See, e.g.*, Cooper v. Aaron, 358 U.S. 1 (1958); W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

2. *In re Gault*, 387 U.S. at 13 ("[N]either the Fourteenth Amendment nor the Bill of Rights is for adults alone.").

3. *Id.* at 19–26.

constitutionally protected interests are implicated, thereby promoting dignity of minors.[4]

This Essay develops *Gault*'s due process framework for application to adolescent (fourteen through seventeen years of age) decision making about medical donation, though this framework may be adapted to other contexts involving youths. The Essay synthesizes due process values for process-oriented approaches to adolescents' liberty interests and also suggests the essentials of a legal model for adolescents' decision making about medical donation.

Medical donation entails surgical invasion for removal of an organ or other tissue for transfer or graft to benefit another person. Our society finds revolting and rejects any possibility of coercing or forcing an adult to donate an organ or other tissue against his will.[5] Yet, minors, including adolescents who are becoming adults, are denied meaningful input concerning whether they must or may donate an organ or tissue. As discussed below,[6] maintaining bodily integrity is the very foundation of personal liberty, but adolescents' constitutionally protected liberty interests receive scant, if any, attention.

Although adolescents routinely donate regenerative tissues and blood,[7] the focus will be on organ donation, specifically live-kidney donation.[8] Technological advances for kidney removal,[9]

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4. In *Gault*, the Court applied these principles to a state's delinquency adjudication of a youth who had been committed to a correction facility for six years but who had not been afforded proper notice of the proceedings, a privilege against self-incrimination, or counsel's assistance, all of which would have optimized opportunity for confronting accusers prior to adjudication and commitment. *Id.* at 28, 31–56.

5. *See* National Organ Transplant Act, Pub. L. No. 98-507, 98 Stat. 2339, 2342–45 (1984) (codified as amended at 42 U.S.C. §§ 273–274 (2000)); Organ Donation and Recovery Improvement Act, Pub. L. No. 108-216, 118 Stat. 584 (codified as amended at 42 U.S.C. §§ 273a, 274f-1 to -4 (Supp. IV 2004)); REVISED UNIF. ANATOMICAL GIFT ACT (amended 2006), 8A U.L.A. 8 (Supp. 2007); McFall v. Shimp, 10 Pa. D. & C.3d 90, 92 (C.P. 1978); *infra* notes 64–65 and accompanying text. Federal and state legislation advance a policy of donation based on acts of altruism.

6. *See infra* text accompanying notes 83–88.

7. *See* Bryan Shartle, Comment, *Proposed Legislation for Safely Regulating the Increasing Number of Living Organ and Tissue Donations by Minors*, 61 LA. L. REV. 433, 437 (2001) (noting blood and bone marrow are the primary tissues donated by minors).

8. *See Departments of Labor, Health and Human Services, Education, and Related Agencies Appropriations for 2001: Hearings Before a Subcomm. of the H. Comm. on Appropriations*, 106th Cong. 1080 (2000) (statement of Jack Moore, Jr., Chairman, National Kidney Foundation of the National Capital Area), *available at* http://www.kidney.org/news/pubpol/jackmoore.cfm (reporting a 123% increase in living organ donation in the last decade); *see also* Alvin E. Roth et al.,

the rise in chronic diseases among adolescents and young adults,[10] and the grim statistic that salvageable lives are primarily lost because demand for transplantable kidneys far exceeds the supply[11] have all dramatically increased the number of kidney donation procedures. The idea that adolescents should be living donors of vital non-regenerative organs seems contradictory to

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Efficient Kidney Exchange: Coincidence of Wants in Markets with Compatibility-Based Preferences, 97 AM. J. ECON. REV. 828, 828 (2007) (observing that, in 2005, "6,563 kidney transplants [were] from living donors" in contrast to the "just over 9,900 transplants of deceased donor kidneys for the over 60,000 patients waiting for such transplants in the United States, with a median waiting time of over three years"); Elaine R. Berg, Letter to the Editor, *Living Organ Donors*, N.Y. TIMES, Dec. 23, 2002, at A24 (stating that, in 2001, living donors of kidneys surpassed the number of deceased donors for the first time).

9. Among these advances are laparoscopic nephrectomy technique and management of graft rejection, including better antirejection drugs. Nicholas R. Brook & Michael L. Nicholson, *Non-Directed Live Kidney Donation*, 368 THE LANCET 346, 346 (2006); *see also* Gretchen Reynolds, *Will Any Organ Do?*, N.Y. TIMES, July 10, 2005, § 6 (Magazine), at 37 (discussing the medical and ethical questions raised by organ transplant advances).

10. *See* Karen C. Swallen et al., *Overweight, Obesity, and Health-Related Quality of Life Among Adolescents: The National Longitudinal Study of Adolescent Health*, 115 PEDIATRICS 340 (2005) (finding that obesity in adolescence is linked with poor physical quality of life).

11. *See* COMM. ON INCREASING RATES OF ORGAN DONATION, INST. OF MED., ORGAN DONATION: OPPORTUNITIES FOR ACTION 2 (James F. Childress & Catharyn T. Liverman, eds., 2006) [hereinafter ORGAN DONATION] (stating that those waiting for a kidney transplant constitute "more than 70 percent of the individuals on the current transplant waiting list"); Peter Coy, *Death Benefits: Organ Donor Economics*, BUS. WK., Feb. 5, 2007, at 14 (emphasizing the dire situation that is now giving rise to pragmatic responses of market incentives for donation); Reynolds, *supra* note 9, at 38 (underscoring the desperation in trend toward using "marginal" organs for transplant). This shortfall has trended toward living donation from which networks for both directed (including paired organ exchange) and non-directed "domino paired donation" have emerged. *See* ORGAN DONATION, *supra*, at 263–67; Brook & Nicholson, *supra* note 9, at 346–47; Francis L. Delmonico, *Exchanging Kidneys: Advances in Living-Donor Transplantation*, 350 NEW ENG. J. MED. 1812, 1812 (2004) (noting that the use of kidney transplantation from living donors has become the dominant approach in part because of superior outcomes and the advent of laparoscopic nephrectomy); Faith McLellan, *U.S. Surgeons Do First "Triple Swap" Kidney Transplantation*, 362 LANCET 456 (2003); Robert A. Montgomery et al., *Domino Paired Kidney Donation: A Strategy to Make Best Use of Live Non-Directed Donation*, 368 THE LANCET 419 (2006) (examining the effect of allocating a living non-directed organ to a pool of incompatible donor-patient pairs); Susan L. Saidman et al., *Increasing the Opportunity of Live Kidney Donation by Matching for Two and Three Way Exchanges*, 81 TRANSPLANTATION 773 (2006) (proposing a computerized matching protocol for use in facilitating donor exchanges that otherwise would not readily occur); Michael T. Morley, Note, *Increasing the Supply of Organs for Transplantation Through Paired Organ Exchanges*, 21 YALE L. & POL'Y REV. 221 (2003) (arguing for increased federal facilitation of paired organ exchanges).

suppositions about their cognitive ability, vulnerability, and immaturity.[12] Notwithstanding this, adolescents do constitute a living donor group,[13] along with younger children who are utilized by parents as living donors for siblings.[14]

Adolescents' medical donation decisions, whether for family members or friends, are neither insignificant nor inconsequential. Yet, the subject has scarcely drawn scholarly attention, let alone debate.[15] Important issues include the decision-making process and the extent to which adolescents' desires either to donate or to decline to donate are respected. Adolescent donation is virtually absent from the policy dialogue surrounding transplantation, and laws governing organ donation and transplant omit altogether reference to the complex considerations surrounding minors as living donors. Not only is donation of tissue and organs by adolescents overlooked by federal and state legislation, but reported case law authorizing parents' decisions to compel donation from their children for benefit to siblings is also both inapposite to the complexities of adolescent medical donation and inadequate to resolve the issues attendant thereto.

While not addressing the ethical or legal permissibility of live-kidney donation from persons with questionable decision-making capabilities,[16] this Essay defines the issues and invites debate about whether and under what circumstances adolescents can consent—or decline—to be living donors and have those decisions legally protected. This inquiry is compelled because medical advances must be applied consistently with *Gault*'s rationale that adolescents possess protected liberty interests, which

12. Bellotti v. Baird, 443 U.S. 622, 623, 634 (1979).

13. Adolescents needing transplant kidneys benefit maximally from those donated by youths due to compatibility in both tissue-type and fit; without these living donors, many persons would die or live a decreased quality of life. The Gift of a Lifetime: The Transplant Waiting List, http://www.organtransplants.org/understanding/unos (last visited Nov. 20, 2007).

14. *See, e.g.*, Hart v. Brown, 289 A.2d 386 (Conn. Super. Ct. 1972) (affirming right of parents to consent to kidney transplant from one twin to the other once certain conditions were met). *See generally* Shartle, *supra* note 7 (discussing the need for legislation to regulate living organ and tissue donations by minors).

15. *See* Michele Goodwin, *My Sister's Keeper?: Children and Compelled Donation*, 29 W. NEW. ENG. L. REV. 357, 358 (2007).

16. Notable writings on this issue include John A. Robertson, *Organ Donations by Incompetents and the Substituted Judgment Doctrine*, 76 COLUM. L. REV. 48 (1976); Cara Cheyette, Note, *Organ Harvests from the Legally Incompetent: An Argument Against Compelled Altruism*, 41 B.C. L. REV. 465 (2000); Michael T. Morley, Note, *Proxy Consent to Organ Donation by Incompetents*, 111 YALE L.J. 1215 (2002); Sara Lind Nygren, Note, *Organ Donation by Incompetent Persons: A Hybrid Approach*, 2006 U. CHI. LEGAL F. 471.

cannot be deprived unless the state as *parens patriae* invokes prior processes that are fair, impartial, and orderly. As the Court has recognized, due process is flexible and calls for such procedural protections as society evolves.[17]

Adolescents have liberty interests in bodily integrity—interests that include freedom from unwanted bodily invasion and removal of tissue and also in choosing or refusing to undergo a surgical harvesting of organs for another. Autonomous choice in accordance with personal intent derived from one's values is a liberty of action.[18] Undue constraints on these protected liberty interests under color of state laws implicate the cardinal principles of *Gault.* When adolescents' liberty interests trigger due process guaranties, *Gault*'s maxim of participation finds expression in the process of decision making and the dignity that underlies it.

More specifically, due process posits whether there is at stake a protected interest in life, liberty, or property and, if so, what process must be accorded the person by the state prior to deprivation of that interest.[19] The Supreme Court has analogized due process to the Magna Carta's "guaranties against the oppressions and usurpations" of the royal prerogative and thus a restraint on governmental action against an individual.[20] Although due process evolves and its content is flexible, opportunities to be heard and to participate meaningfully in the decision-making process are essential.[21]

State omissions rather than actions do not necessarily entail "deprivations" within the meaning of the Due Process Clause. However, when judges or legislators diminish adolescents' interests qualifying as life, liberty, or property based upon anecdotal assumptions about their capabilities, there is a state deprivation

17. Mathews v. Eldridge, 424 U.S. 319, 334 (1976) ("'[D]ue process is flexible and calls for such procedural protections as the particular situation demands.'" (quoting Morrissey v. Brewer, 408 U.S. 471, 481 (1972))); *In re* Gault, 387 U.S. 1, 20–21 (1967) ("Due process of law is the primary and indispensable foundation of individual freedom.").

18. Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 269, 279 n.7 (1990); Jay Katz, *Informed Consent—Must It Remain a Fairy Tale?*, 10 J. CONTEMP. HEALTH L. & POL'Y 69, 83 (1993).

19. U.S. CONST. amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property without due process of law . . . .").

20. Hurtado v. California, 110 U.S. 516, 531 (1884). *Accord* McGautha v. California, 402 U.S. 183, 243 (1971) (Douglas, J., dissenting); *In re Gault*, 387 U.S. at 62 (Black, J., concurring).

21. *In re Gault*, 387 U.S. at 30. *See* Morrissey v. Brewer, 408 U.S. 471, 485 (1972) (holding that minimal due process for parole revocation includes both a preliminary hearing for initial inquiry and later a revocation hearing).

within the meaning of the Due Process Clause. Due process is an affirmative command to curb unfairness and oppression, and therefore state deprivations can be shaped by conceptions of the primary purposes of the Due Process Clause and by visions of how those purposes should be achieved in relation to minors.[22]

Gault made clear that the Due Process Clause engenders a proactive interrelationship between minors and the state, in its role as *parens patriae*.[23] The state falls short of its *Gault*-assigned role when it fails to ensure sufficient processes exist to protect adolescents' liberty interests in various decision-making contexts, including medical donation. This shortfall results in part from the state's adherence to factual inaccuracies and potentially fallacious bases for constraining adolescents' liberty rights in specific contexts without particularized examination. It also results from the state's failure to establish adequate processes for safeguarding adolescents' liberty interests against unfair encroachment or usurpation.

This Essay ascertains the precise impact of *Gault*'s due process requirement upon adolescents' living donation and addresses the state's role in structuring a decision-making process compatible with the unifying principles derived from *Gault*. Part II will briefly look at the existing categorical legal rule that differentiates adolescents from adults and discusses whether that rule constitutes a distinction without a difference when applied to medical donation by adolescents. Part II also critiques reported case law that has authorized parents' decisions about donation by their children and argues that not only are these analyses inappropriate as guidance for donation by adolescents but that they are also inconsistent with the principles of *Gault*. These principles and their values will be developed and applied to adolescents' liberty interests in Part III, and used to inform state *parens patriae* action and state law development in Part IV.

II. A DISTINCTION WITH—AND WITHOUT—A DIFFERENCE

A. *Adolescents' Developmental Capabilities and the Supreme Court*

Minors, under law, presumptively lack cognitive capabilities to exercise decisional rights.[24] The law also presumes parents or guardians will decide upon medical care for minors in ways that

22. *In re Gault*, 387 U.S. at 13, 18–21.

23. *Id.* at 16–17, 23–27.

24. Rhonda Gay Hartman, *Coming of Age: Devising Legislation for Adolescent Medical Decision-Making*, 28 AM. J.L. & MED. 409, 409–10 (2002).

promote their best interests.[25] The decisions of parents or guardians concerning minors' medical care are subject only to limited exceptions affording minors autonomous decision making in defined areas[26] or when parents' or guardians' decision making harms minors, thereby constituting grounds for state intervention.[27]

As a subset of minors, the law distinguishes adolescents' decisional rights and responsibilities from those of adults. The Supreme Court has reinforced this conventional distinction for death penalty eligibility. In *Roper v. Simmons*, the Court held that capital punishment for crimes committed by minors violated the Eighth and Fourteenth Amendments.[28] The Court reasoned that transitory personality traits, susceptibility to negative influences, and underdeveloped senses of responsibility endemic to adolescence make imposition of this most severe sanction a disproportionate punishment.[29]

Yet as the Court observed, this bright-line, eighteen-years-of-age distinction may be one without a difference beyond the capital context.[30] The Court recognized that qualities distinguishing minors from adults "do not disappear when an individual turns eighteen. By the same token, some under eighteen have already attained a level of maturity some adults will never reach."[31] Adolescents are distinguishable from younger children and, in certain contexts, indistinguishable from adults in terms of requisite cognitive levels for legal rights and responsibilities.[32] The degrees of vulnerability, immaturity, and impetuousness lessen-

25. *See* Troxel v. Granville, 530 U.S. 57, 68 (2000) (plurality opinion) (quoting Parham v. J.R., 442 U.S. 584, 602 (1979)).

26. *See, e.g.*, *In re* E.G., 549 N.E.2d 322 (Ill. 1989) (addressing the mature minor doctrine); *see also* COLO. REV. STAT. § 13-22-106 (2004) (sexual assault); MD. CODE ANN., HEALTH–GEN. § 20-102(c)(3) (West 2006) (sexually transmitted disease); MASS. GEN. LAWS, ch. 112, § 12E (2005) (substance abuse); MICH. COMP. LAWS ANN. § 333.5127 (West 2001) (HIV); 50 PA. STAT. ANN. § 7201 (West 2006) (voluntary mental health treatment); R.I. GEN. LAWS § 23-4.6-1 (2001) (routine medical care).

27. *See, e.g.*, Santosky v. Kramer, 455 U.S. 745 (1982) (requiring clear and convincing evidence of allegations proffered by the State in seeking to sever the rights of parents in their natural child).

28. Roper v. Simmons, 543 U.S. 551, 578 (2005).

29. *Id.* at 569–70.

30. *Id.* at 574.

31. *Id.*

32. *See, e.g.*, Bruce Ambuel & Julian Rappaport, *Developmental Trends in Adolescents' Psychological and Legal Competence to Consent to Abortion*, 16 LAW & HUM. BEHAV. 129 (1992); Catherine C. Lewis, *A Comparison of Minors' and Adults' Pregnancy Decisions*, 50 AM. J. ORTHOPSYCHIATRY 446 (1980).

ing cognitive capabilities depend upon particular decision-making contexts.

Roper clearly recognized that, depending on the context, the legal distinction between adolescents and adults may lack a difference. Less clear is the extent to which adolescents are entitled to legal deference for decision-making rights in contexts such as medical donation. The Court in *Roper* relied on studies suggesting traits that mitigate blameworthiness and culpability and thus make capital punishment disproportionate for juvenile crime consistent with decency standards of a civilized society.[33] However, capabilities to formulate the degree of intent to commit criminal acts justifying the death penalty are distinguishable from capacities about deliberating and deciding medical or donative matters of importance to youths.[34]

Additionally, accreting scientific investigations about minors' decision-making capabilities in other contexts such as custodial interrogation or trial competency demonstrate that adolescents both differ from younger children in cognitive abilities and depart from conventional suppositions.[35] More significantly, other published studies—specifically those in medical decision-making contexts—suggest that the very traits sustaining the Court's analysis in *Roper* do not inhibit adolescents' cognitive abilities in quite the same way in non-criminal contexts.[36] These studies strengthen the Court's observation that, depending on the context, differing capabilities between adolescents and adults are more a matter of degree, not of kind.[37]

Adolescents may differ from adults in how they process and deliberate on information, but these differences may not bear on actual decisional capabilities for understanding the benefits and consequences of specific actions. How these cognitive functions are measured is relevant to assessing whether, in terms of decision making that merits legal protection, the conventional eighteen-year line should be redrawn because it amounts to a legal

33. *Roper*, 543 U.S. at 563, 578.

34. *Id.* at 568 (reserving death penalty eligibility for only the worst and most deserving crimes).

35. *See generally* YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE (Thomas Grisso & Robert G. Schwartz eds., 2000); Thomas Grisso, *Adolescents' Decision Making: A Developmental Perspective on Constitutional Provisions in Delinquency Cases*, 32 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 3 (2006); Thomas Grisso, *Juveniles' Capacities to Waive Miranda Rights: An Empirical Analysis*, 68 CAL. L. REV. 1134 (1981).

36. *See, e.g.*, Rhonda Gay Hartman, *Adolescent Decisional Autonomy for Medical Care: Physician Perceptions and Practices*, 8 U. CHI. L. SCH. ROUNDTABLE 87, 96–121 (2001).

37. *See Roper*, 543 U.S. at 572–74.

distinction without an empirical difference. Given that adolescents differ developmentally not just from adults but also from children, *a fortiori*, those differences deserve particularized legal policy approaches to adolescents' decisional rights.[38]

Little guidance for both determining and facilitating adolescents' decision-making capabilities for medical donation is found in existing law. Reported case law is scant, suggesting minors who serve as living donors, whether in their own right or by parental influence, do so in the absence of adequate state supervision. Moreover, cases involving parents' consent for younger minors to serve as living donors for siblings are inapposite to adolescents as potential donors. Courts have simply subsumed parents' decision-making authority about medical donation into existing case law developed for situations where parents consent to medically necessary procedures. Here, the procedure is wholly unnecessary for the donor child.

B. *Case Law Concerning Minors as Living Donors*

Case law related to medical donation by minors largely involves parents' decisions to compel their children to serve as living donors for siblings. In contrast to parents seeking medical care for their children, parental intent in donative circumstances tends to sacrifice one child's interests for another. However well-intentioned, parents' decisions that one child will serve as a living organ or skin donor for another child demand close scrutiny.

Parents' decisions in these contexts are replete with biases out of kinship and desperation and thus can be inimical to the donor child's interests. While not necessarily malevolent, parents' motivations are influenced by personal priorities, parental conflicts, and the impact on the entire family, which can cloud consideration of or even subvert the donor child's interests. That parents will conceive a child in the hope of an exact match for the purpose of saving an ill child[39] or will avail themselves of preimplantation genetic diagnosis of embryos created through *in*

38. Scientific evidence from the collaboration between neuroscience and neurobiology should shed new light on understanding brain functioning and its relationship to decision-making capabilities by providing nuanced insights about the mind and also new ways of thinking about adult and adolescent cognitive development. *See* Jeffrey Rosen, *The Brain on the Stand: How Neuroscience Is Transforming the Legal System*, N.Y. TIMES, Mar. 11, 2007, § 6 (Magazine), at 48.

39. *See* Gina Kolata, *More Babies Being Born to Be Donors of Tissue*, N.Y. TIMES, June 4, 1991, at B1, B6.

vitro fertilization in an attempt to exact a match vividly illustrates these points.[40]

Precisely because the surgical procedure to which parents are consenting for the donor child is solely for treating another child medically,[41] parental decision making about medical donation is distinguishable from that about necessary medical care. Consequently, the adequacy of due process to protect and promote donor children's interests takes on greater significance. As Justice Stevens has observed, "The constitutional protection against arbitrary state interference with parental rights should not be extended to prevent the States from protecting children against the arbitrary exercise of parental authority that is not in fact motivated by an interest in the welfare of the child."[42] Indeed not all medical procedures on minors are solely within parental authority. For example, courts require *de novo* hearings and clear and convincing proof, along with a panoply of other procedural safeguards, prior to authorizing parental consent for sterilization procedures on minors.[43]

Yet, the concerns distinguishing parental decision making in terms of therapeutic and non-therapeutic medical procedures remain relatively unexplored by courts. Somewhat surprising is the relative ease with which several courts have justified authorizing parents' decisions to use children as donors for the benefit of other children, largely by reference to medical benefits for the recipient children and to uncertain psychological benefits that supposedly overshadow risks to the donor children. By deferring to parental judgments in ways that obscure careful evaluation of donor children's interests,[44] courts have tended to eclipse children's liberty interests and thus undermine the fairness and dignity of process for decision making made manifold in *Gault* when minors' interests are implicated.[45]

Hart v. Brown[46] and *In re Sydney Cowan*,[47] though decided thirty years apart, explicate these points. Both cases involved one

40. *See* Susan M. Wolf et al., *Using Preimplantation Genetic Diagnosis to Create a Stem Cell Donor: Issues, Guidelines, and Limits*, 31 J.L. MED. & ETHICS 327 (2003) (recommending protections and limits on preimplantation genetic diagnosis to protect children from exploitation until they are mature enough to decide donation).

41. *See* Little v. Little, 576 S.W.2d 493, 495 (Tex. Ct. App. 1979).

42. Troxel v. Granville, 530 U.S. 57, 89 (2000) (Stevens, J., dissenting); *see also* Prince v. Massachusetts, 321 U.S. 158, 168–69 (1944).

43. *See, e.g.*, *In re* A.W., 637 P.2d 366 (Colo. 1981).

44. Hartman, *supra* note 24, at 434–46.

45. *In re* Gault, 387 U.S. 1, 18–27 (1967).

46. Hart v. Brown, 289 A.2d 386 (Conn. Super. Ct. 1972).

47. *In re* Sydney Cowan, No. 180564 (Ala. Prob. Ct. 2003).

identical twin whose parents decided should be a living donor for her sibling. The state courts ceded to parents' decisions about compelling seven-year-old Margaret Hart and six-year-old Sydney Cowan to have their bodies surgically invaded and tissue extracted to benefit their sisters. Insofar as the best odds of success in transplantation are concerned, identical twins share a complete genetic identity. But, medical benefits to one child should not circumvent careful consideration of endangerments to donor children borne by short- and long-term surgical and post-surgical risks.[48] The courts' analyses gave way to a mechanical balancing of interests that subordinated risks to the donor children in favor of the benefits to the recipient children. Unfortunately, mechanization of a best interests test in this context has led courts to disregard donor children's liberty interests.

More specifically, the question before the courts should have been whether the prospective donor children's liberty interests were protected adequately. Instead, the question framed by the courts was whether parents have the right to consent to surgical operations on both the recipient and donor children.[49] Framing the issue in this way invites balancing tests that generally fail to consider the donor child's liberty interests and find in favor of parents' preferences. Such interests balancing by courts not only fails to satisfy due process for prospective donor children but also leads to the anomalous result that children have no process for protection of their liberty interests.

Inasmuch as the courts relied on children's best interests, a similar argument grounded in due process should be predicated on a donor child's liberty interests as a basic right to be free from a surgical invasion of one's body and removal of tissue along with short- and long-term consequences. Though noting the risk potential, the courts in neither case delved into the donor children's interests in not having their bodies surgically invaded and their tissues extracted and in not having the quality and longevity of their own lives compromised.

Among the issues deserving particularized scrutiny were the hardships created by the deprivation of their liberty interests. In addition to serious risks attendant to surgical procedures were long-term consequences of severe scarring for Sydney Cowan[50] and of not having a spare kidney in the event of congenital kid-

48. *See infra* notes 141–48 and accompanying text.

49. *See Hart*, 289 A.2d at 387.

50. For more detailed description and discussion of the consequences to Sydney Cowan, see Samuel J. Tilden, *Ethical and Legal Aspects of Using an Identical Twin as a Skin Transplant Donor for a Severely Burned Minor*, 31 AM. J.L. & MED. 87, 107–12 (2005).

ney failure for Margaret Hart.[51] Although physicians who cared for Katheleen Hart and Jennifer Cowan, the recipient children, testified about the benefits and risks of the surgeries on the donor children, the courts overlooked the physicians' biases that arose out of involvement with the recipient children and that afforded meager protections to Margaret's and Sydney's distinct interests.[52] Also overlooked was the nature and quality of post-surgery support, including counseling and other emotional support, for the donor children in the event the recipient children died.[53]

Moreover, the reliance of courts on supposed psychological benefits to donor children seems unwarranted. It is one thing to posit the possibility that donor children may derive such benefits, but it is quite another to subjugate a child's liberty interests to unpredictable and speculative benefits. Although both little girls intimated at wanting to help their sisters, how they were involved and the extent to which they meaningfully participated in the donative decision-making processes required independent examinations. These inquiries were crucial for a myriad of reasons, not the least of which were influences exerted by parents that shaped their children's responses, convincing the courts that not donating would be deleterious to them.

Furthermore, findings by courts on the aforementioned points would have provided cues to state legislatures for developing criteria to restrain arbitrary actions and to guide courts in promoting donor children's interests.[54] Without legislative guidance or a careful adherence to *Gault*'s mandate, children's protected liberty interests in living donation will likely remain insufficiently scrutinized by courts.

The absence of legislative guidance notwithstanding, courts are the ultimate gatekeepers of children's constitutionally protected interests and thus must ensure fair processes regarding

51. *See* Nygren, *supra* note 16, at 474 (cautioning against marginalizing physical risks to donors especially in kidney donation from which the donor is placed "at a greater risk for kidney complications in the future").

52. *See* Arthur L. Caplan, *Biomedical Technology, Ethics, Public Policy, and the Law: Am I My Brother's Keeper?*, 27 SUFFOLK U. L. REV. 1195, 1199 (1993) ("[Conflicted doctors] cannot both advocate for the best interests of patients who need transplants and simultaneously protect the best interests of prospective donors.").

53. In contrast, the Illinois Supreme Court explored available emotional support for a prospective three-year-old donor child and refused to authorize parental consent to marrow donation for a twin sister. *See* Curran v. Bosze, 566 N.E.2d 1319 (Ill. 1990).

54. *See* Goodwin, *supra* note 15, at 372–77 (evaluating whether the tort doctrine of rescue applies legitimately to children in medical donation cases).

potential deprivations of those interests. This gate-keeping function requires engaging children about what it means to be a living donor and how they think about it. Their answers provide a critical canvas on which to evaluate responses about helping their siblings that, as *Hart* and *Cowan* demonstrated, can provide an evidentiary record for courts to authorize parental consent for the surgical removal of a kidney for transplant and skin for graft.[55] In *Hart*, for example, the court should have scrutinized the conversations that occurred with Margaret, inquiring into who initially spoke with her about Katheleen's congenital kidney failure and also about how Margaret viewed her role in assisting her sister. These inquiries were relevant in terms of what Margaret actually understood from her own perspective, including whether she perceived any guilt and concomitant obligation to comply with donation in order to preserve parental love and care for her. Indeed, she sensibly may have perceived that she alone shouldered the burden for easing familial tensions in this situation.

Closer scrutiny of the conversations with Margaret would likely reveal subtle, even undue, pressures placed upon her that subsequently shaped her responses. This suggests that, rather than rely upon routine appointments of guardians *ad litem* for best interests recommendations, courts should also ensure the donor child's voice is not only represented but also heard meaningfully.[56] Both direct and representative participation of donor children seems more compatible with elemental fairness and accuracy underlying due process.

Another dimension of this case genre is a "substituted judgment" concept. Under that common law doctrine, judges somehow divine the putative wishes of persons regarded as legally incompetent (i.e., substituting their choices in ways believed to likely have been those of incompetent persons, if they were competent). No decisive lines of argument or authority exist in donative decision-making contexts,[57] although a few courts have

55. *See* Hart v. Brown, 289 A.2d 386, 389 (Conn. Super. Ct. 1972).

56. *Cf.* Lainie Friedman Ross, *Moral Grounding for the Participation of Children as Organ Donors*, 21 J.L. MED. & ETHICS 251 (1993) (finding parental consent sufficient regardless of the child's opinion in some contexts); Shartle, *supra* note 7, at 465 (proposing that the appointed attorney "must attempt to prevent the donation" and make the proceedings adversarial).

57. For further discussion of the doctrine's application in living donor contexts, see Cheyette, *supra* note 16, at 469 (criticizing the use of substituted judgment and arguing "organ harvests from children and mentally disabled adults should be categorically prohibited"); Morley, *supra* note 16, at 1219 (assailing the position that substituted judgment is misplaced in this realm and that decisions about compelling donation from one child for another "falls

relied on its rhetoric when compelling a minor to be a living donor for another.[58] *Little v. Little* is instructive. There, the Court of Civil Appeals in Texas relied on the substituted judgment doctrine to affirm a probate court's authorization of a kidney removal from Anne Little, a fourteen-year-old with Down's Syndrome, for transplant to her brother.[59] By substituting its judgment that "Anne desires to donate her kidney to her brother and would do so if she were competent to make such decision," the court contrived psychological benefits as promoting her best interests when it authorized parental consent to the kidney harvest.[60]

Little illustrates that substituted judgment is more problematic than a lip service best interests analysis by stultifying the donor child's protected interests and by perpetuating result-oriented paths to sanctioning parental requests based on conjectured benefits. As the court in *Little* conceded, "It is clear in transplant cases that courts, whether they use the term 'substituted judgment' or not, will consider the benefits to the donor as a basis for permitting an incompetent to donate an organ."[61]

Using substituted judgment as the basis for authorizing the use of children as donors is misguided because any predictions about what donor children would want are indeterminate and utterly speculative.[62] Decisively rejecting this standard as altogether inapplicable regarding prospective donor children, the Illinois Supreme Court reasoned that it is "not possible to discover that which does not exist, specifically, whether the 3 1/2-year-old twins would consent or refuse to consent to the pro-

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squarely within the constitutionally protected range of discretion of parent-guardians, and may not be reviewed by courts").

58. *See, e.g.*, Little v. Little, 576 S.W.2d 493, 496–500 (Tex. App. 1979). *Cf.* Curran v. Bosze, 566 N.E.2d 1319, 1323 (Ill. 1990). For thoughtful consideration of *Curran*, see Janet B. Korins, Curran v. Bosze*: Toward a Clear Standard for Authorizing Kidney and Bone Marrow Transplants Between Minor Siblings*, 16 VT. L. REV. 499 (1992).

59. *Little*, 576 S.W.2d at 496–500.

60. *Id.* at 494, 498–99.

61. *Id.* at 498.

62. *See* Morley, *supra* note 16, at 1235–36 ("The substituted judgment test is best left to situations where a previously competent person expressed definite preferences regarding medical treatment, including organ donation, and due to an accident or some other intervening circumstance, is later unable to effectuate her wishes on her own."); Nygren, *supra* note 16, at 502 ("Without adequate evidence, the substituted judgment standard will become a forum for the decision maker to decide whether he, rather than the patient, would be an organ donor in a similar situation.").

posed bone marrow harvesting procedure if they were competent . . . ."[63]

Standards of substituted judgment or best interests provide dubious, if any, assurances that courts scrutinize all relevant factors affecting donor children's interests. Indeed, courts' invocation of these standards seems outcome determinative: they endorse parents' decisions based on whatever evidence is presented, in contradistinction to *Gault*'s command to protect children's liberty interests. In other words, the courts should not slavishly carry out parents' choices but instead safeguard donor children's interests.

What emerges from this genre of cases and these lines of thought is, quite clearly, a lack of coherently elaborated liberty interests of donor children and processes afforded to them prior to deprivations of those interests. By emphasizing parents' preferences at the expense—or disregard—of donor children's protected interests, these cases, at worst, create a duplicitous double standard whereby parents choose to endanger one child to benefit another, with courts legitimizing the choice through contrived benefits to the donor child. At best, these cases evince the complexities arising from the use of children as living donors and courts' predilections for sanctifying the preferences of parents rather than for protecting children's interests in not serving as donors.

In striking contrast, state courts have rejected as "revolting" the mere idea of authorizing the forcible extraction of bodily tissue from an adult for another.[64] To compel one person to submit to a body intrusion for this purpose, according to one court, "would change every concept and principle upon which our society is founded. To do so would defeat the sanctity of the individual, and would impose a rule which would know no limits, and one could not imagine where the line would be drawn."[65]

This line-drawing admonition was borne out in Sydney Cowan's case. There, the court authorized parents' decision making about surgical excision of skin from Sydney for allograft to Jennifer by relying on previous cases involving the harvest of internal organs for transplant.[66] In contrast to organ donation,

63. *Curran*, 566 N.E.2d at 1326.

64. McFall v. Shimp, 10 Pa. D. & C.3d 90, 91 (C.P. 1978); *see also* Cheyette, *supra* note 16, at 468 (highlighting the troubling paradox when courts "rush to defend legally competent donors from compelled harvests but defer to third-party interests when faced with legally incompetent donors").

65. *McFall*, 10 Pa. D. & C.3d at 91–92.

66. *In re* Sydney Cowan, No. 180564 (Ala. Prob. Ct. 2003). In addition, line delineations based on biological family relationships have become attenu-

skin donation entails potentially greater tangible and intangible, including dignitary, harms to the donor.[67] By subordinating children's interests to parental preferences and presuming speculative, derivative benefits for children as justification for subjecting them to organ and tissue removal that is declined by many rational and intelligent adults, courts diminish the intrinsic worth and dignity of children in contravention of *Gault*'s dictates.

Overarching considerations from this genre of cases are both the extent to which parents are capable of protecting donor children's interests and the extent to which law may compel children to undergo a risky organ or tissue harvesting solely for the medical benefit of another child.[68] A related inquiry concerns the processes through which the donor child's competing interests are both identified and explored. Young children are not capable of deciding donation in their own right, and therefore the propriety and quality of the process for potentially depriving them of their organs or scarring them permanently takes on even greater significance under *Gault*. The central concern of the Court in *Gault* was "not with the outcome of the governmental action, but with the processes through which the action takes place."[69] The method of interaction between courts and children about medical donation must be fair, impartial, and orderly in terms of expressing a judgment that minors are important in their own right, and that they must be treated with understanding, compassion, and respect, regardless of whether courts ultimately approve the parents' decisions.

In contrast to donation by a younger child compelled by parents and endorsed by courts, "compelled donation" from adolescents is unthinkable. When the prospective donor is an adolescent capable of decision making, *Gault* necessitates an inquiry into *how*—not whether—due process should be applied to decision making about living donation. Precisely because adolescents differ from children in terms of capable decision mak-

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ated with the expansion of non-nuclear families. These changes raise questions about line-drawing by judges when compelled donation from a child is requested by parents for a non-biological sibling (e.g., an adopted or step-sibling) who would benefit regardless of inexact match. *See generally* Note, *Looking for a Family Resemblance: The Limits of the Functional Approach to the Legal Definition of Family*, 104 HARV. L. REV. 1640 (1991).

67. *See generally* Tilden, *supra* note 50.

68. *See* Cheyette, *supra* note 16, at 469 (stating such forcible extraction disproportionately burdens those who are "wholly unprepared and exposes them to harms from which they are wholly unprotected").

69. Richard B. Saphire, *Specifying Due Process Values: Toward a More Responsive Approach to Procedural Protection*, 127 U. PA. L. REV. 111, 159 (1978).

ing, it seems clear that parents or judges cannot compel them to be living donors. Less clear is the extent to which legal protection should be afforded to their decisions about living donation (especially when those decisions conflict with parents' preferences), and how states should structure oversight of living donation by adolescents. Implication of adolescents' liberty interests suggests state *parens patriae* responsibilities for structuring decision-making processes that measure up to the essentials of due process. According to *Gault*, both the appearance and actuality of fairness, impartiality, and orderliness are important from adolescents' perspectives whenever their liberty interests are implicated.[70] The task is to ascertain the application of the Due Process Clause in the context of adolescents' living donation and in state-structured decisional processes that engender its unifying principles and underlying values.

III. DECONSTRUCTING "ESSENTIALS OF DUE PROCESS"

The Due Process Clause requires a two-fold inquiry whenever a person's interest in life, liberty, or property may be deprived through state action: both the nature of the interest within the ambit of protection and the state-engineered process provided that person prior to deprivation of that interest must be examined.[71] Due process is a hybrid concept which concerns both substantive interests accorded constitutional protection and the state's obligation to afford fair pre-deprivation processes. It is also influenced importantly by our conceptions of the dignity and respect that is owed to each individual.[72]

Fair processes for decision making have long been regarded by the Court as the very essence of justice; this is so because the "validity and moral authority of a conclusion largely depend on the mode by which it was reached."[73] Thus, the decision-making process is essential to adolescents' substantive liberty interests in

70. *In re* Gault, 387 U.S. 1, 26 (1967).

71. *See* Morrissey v. Brewer, 408 U.S. 471, 481 (1972).

72. Sanford Kadish, *Methodology and Criteria in Due Process Adjudication: A Survey and Criticism*, 66 YALE L.J. 319, 347 (1957); *see also* Duncan v. Louisiana, 391 U.S. 145, 212 (1968) (Fortas, J., concurring) ("It is the . . . deepening realization of the substance and procedures that justice and the demands of human dignity require, which has caused this Court to invest the command of 'due process of law' with increasingly greater substance."); *In re* Yamashita, 327 U.S. 1, 41 (1946) (Murphy, J., dissenting) (highlighting "our beliefs as to due process and the dignity of the individual").

73. *See* Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 171–72 (1951) (Frankfurter, J., concurring).

living donation.[74] By providing adolescents a chance for participation through which their dignity finds expression, a state-engineered process for decision making about living donation has an intrinsic value. Regardless of the result, due process represents a valued human interaction from which adolescents, as affected persons, perceive self-worth from participating in decisions that vitally concern them.[75]

Procedural fairness in interactions between minors and the state is a prerequisite.[76] Although the *Gault* Court considered delinquency proceedings entailing commitment to a state institution,[77] its broader statements about due process as "the primary and indispensable foundation of individual freedom" transcend delinquency proceedings to the "totality of the relationship of the juvenile and the state."[78] *Gault*'s unifying principles—that states ensure minors' meaningful participation through fair, impartial, and orderly decision-making processes in matters that can adversely impact their liberty interests—apply to other settings that implicate liberty interests. The nature of the minors' interests at stake and the state's role as *parens patriae* in both protecting and promoting those interests are pivotal to *when* and to *how* these due process essentials apply.

As previously noted, minors' decisions are treated differently from those of adults by law.[79] This treatment differential is predicated on chronological age and assumptions about diminished decisional capabilities.[80] Insofar as adolescents are concerned, assumptions underlying laws that constrain minors may be unsubstantiated—indeed inapplicable—to decision making by adolescents about living donation. Those laws impair rather than protect adolescents' liberty interests. As studies demonstrate, adolescents may reason differently than adults but are capable of comprehending information about available options.[81]

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74. *See also* Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 289 (1990) (O'Connor, J., concurring) (commenting that, if due process protects anything, it protects a person's decision about medical procedures).

75. *In re Gault*, 387 U.S. at 26.

76. *Id.*

77. *Id.* at 13, 28, 31–56.

78. *Id.* at 13, 20; *see also* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986) (addressing the state's power to prevent lewd speech by students in public schools); Parham v. J.R., 442 U.S. 584 (1979) (addressing the state's power for admitting children to mental care facilities).

79. *See supra* notes 24–27 and accompanying text.

80. *See* Roper v. Simmons, 543 U.S. 551, 602 (2005); Bellotti v. Baird, 443 U.S. 622, 623, 633 (1978); *see also supra* Part II.A.

81. *See* Hartman, *supra* note 36, at 123–28.

Central to the due process notion of dignity is the truth or accuracy of the data upon which governments' actions are premised. Accuracy depends not on anecdotal assertions but on reliable determinations. *Gault* premised fairness on government actions that demonstrate individuated treatment of minors; as a subset of minors, adolescents' cognitive capacities and decision-making abilities must not be based on conventional notions, especially notions about younger children's abilities. States' *parens patriae* authority therefore must afford adolescents not just a voice but also some decision in living donation so that their participation is meaningful and not merely symbolic. In this regard, *Gault* applies and adapts to decision-making processes involving adolescents' protected liberty interests under the Due Process Clause.

A. *Liberty Interests in Living Donation*

The Court has long acknowledged that liberty interests evolve and are shaped by society's experiences and conscience.[82] Liberty is a broad but bounded concept traced to freedom from personal restraints.[83] Bodily integrity is primary to any freedom from government-engineered constraints on our physical persons and on our decision making about ourselves. Bodily integrity, although indeterminate, is a constitutionally protected interest. According to *Cruzan*, this interest is central to decision making about medical procedures and thus "is more properly analyzed in terms of a Fourteenth Amendment liberty interest."[84]

Although the Court has not squarely addressed the contours of bodily integrity in living donation, these interests sensibly comprise a sphere of protected liberty. In reaffirming the "substantive force of the liberty protected by the Due Process Clause" in matters of bodily integrity, the Court has explained:

> These matters, involving the most intimate and personal choices a person can make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of exis-

82. *See* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 466 (1985) ("History makes clear that constitutional principles of equality, like constitutional principles of liberty, property, and due process, evolve over time.").

83. *See* Henry Paul Monaghan, *Of Liberty and Property*, 62 CORNELL L. REV. 405, 409–14 (1977).

84. Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 279 n.7 (1990); *see also* Monaghan, *supra* note 83, at 409–10.

> tence, of meaning, of the universe, and of the mystery of human life.[85]

For adolescents who may serve as prospective living donors, moreover, *Gault*'s mandate that due process is not exclusively for adults directs that both the substantive and procedural aspects of the government's relationship with adolescents be defined in this context.[86]

The freedom for determining boundaries of bodily integrity and the dignity that is derived from decision making about one's body, whether adult or adolescent, involve liberty interests that trigger procedural safeguards.[87] Minimally, this includes the due process essentials of fairness, impartiality, and orderliness required by the Court in *Gault* whenever minors' liberty interests are implicated.[88] By explicitly including minors in due process's protections, the Court implied that adolescents, like adults, must experience an ethic of mutual respect and self-esteem—in a word, dignity.[89] One could even say that dignity is the most fundamental of all values anchored in the liberty protections of the Due Process Clause.[90]

B. *Dignity's Centrality to Liberty Interests*

Courts historically have recognized dignity's salience to liberty interests and to the meaning found in decision making about significant personal matters.[91] Decision-making processes are tightly connected to a dignity norm underlying due process. Underscoring the personal meaning found in participating in decision-making processes is the state's commitment "to foster the dignity and well-being of all persons within its borders."[92] Liberty interests embrace dignitary values of self-identity and individualism, and thus due process of law must be defined in terms of its impact upon the dignity of those persons whom it affects. An ethic of reverence underlies the idea of dignity because our capacities for reasoning afford moral development

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85. Lawrence v. Texas, 539 U.S. 558, 574 (2003) (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992)).

86. *In re* Gault, 387 U.S. 1, 13 (1967).

87. *See Cruzan*, 497 U.S. at 269 n.7; *see also id.* at 289 (O'Connor, J., concurring).

88. *In re Gault*, 387 U.S. at 26; *see also infra* Part III.C.1.

89. JOHN RAWLS, A THEORY OF JUSTICE 256 (1971).

90. Meachum v. Fano, 427 U.S. 215, 233 (1976) (Stevens, J., dissenting); *see also* Spencer v. Kemna, 523 U.S. 1, 24 n.5 (1998) (quoting Rosenblatt v. Baer, 383 U.S. 75, 92 (1966) (Stewart, J., concurring)).

91. *See* Brown v. Walker, 161 U.S. 591, 632 (1896).

92. Goldberg v. Kelly, 397 U.S. 254, 264–65 (1970).

through which relationships with others, our environments, and especially ourselves are understood.[93] Even at very young ages, children develop levels of moral reasoning, including understandings of right and wrong concerning themselves and others.[94]

As a value underlying due process, dignity is reflected through fair, impartial, and orderly processes,[95] which is why it is not only central to constitutional interpretation as in *Gault* but also to medical consent.[96] Adolescents realize personal dignity in large measure by participating in decision-making processes that impact matters of importance to them and in having their participation regarded and respected by others who talk *with* rather than *to* them.[97] An inability to express their voices and views about significant personal matters or a perception of unjust deprivations of their interests demoralizes adolescents. The demoralizing effects from withered self-concepts and damaged identities can harm adolescents in the long-term. Deprivations of dignity are not inconsequential for anyone, let alone adolescents who seem more sensitized to perceiving affronts to their abilities and hence to their worth.

Particularly for adolescents, a sense of dignity springs not necessarily from the outcomes of government determinations but from the interactions between them and the government that occur through decision-making processes. In *Gault*, the Court underscored that both the appearance and the actuality of fairness, impartiality, and orderliness are impressive to minors.[98] Even when outcomes are viewed as unjust, the results may be accepted as legitimate if the decision-making processes reflect dignitary values of individualism, self-identity, and self-respect. This was the thrust of *Gault* wherein the Court directed that state-engineered decision-making processes regarding minors must comport with "essentials of due process and fair treatment."[99]

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93. RAWLS, *supra* note 89, at 22–25, 251–57.

94. *See generally* ROBERT COLES, MORAL INTELLIGENCE OF CHILDREN (1997).

95. *In re* Gault, 387 U.S. 1, 26 (1967).

96. *See* Peter H. Schuck, *Rethinking Informed Consent*, 103 YALE L.J. 899, 900–01 (1994).

97. According to John Rawls,

> Self-respect is not so much a part of any rational plan of life as the sense that one's plan is worth carrying out. Now our self-respect normally depends on the respect of others. Unless we feel that our endeavors are honored by them, it is difficult if not impossible for us to maintain the conviction that our ends are worth advancing.

RAWLS, *supra* note 89, at 178.

98. *In re Gault*, 387 U.S. at 26.

99. *Id.* at 30.

C. *State Action,* Parens Patriae, *and Process*

Regarding due process as indispensable to the social compact defining individual rights and delimiting states' powers,[100] the Court emphasized the special impact that due process has for minors, for whom "the appearance as well as the actuality of fairness, impartiality and orderliness—in short, the essentials of due process—may be a more impressive and more therapeutic attitude . . . ."[101] This raises several complex questions. Chief among them are those of interpretation and application. What is meant by fairness in decision making about living donation? By impartiality? Orderliness? How should due process essentials be thought about in terms of the state's relationship with adolescents in various contexts, including living donation?

1. Fairness, Impartiality, and Orderliness

Fairness is a defining aspect of due process. Yet the Court's references to fairness have been rather oblique and less than specific in defining both its scope and composition as a constitutional value. Indeed, the Court's mandate of fairness in *Gault* was more conclusive than explanative, leaving open how fairness should be defined when a minor's liberty interests are implicated. Minimally, fairness reflects an even-handed rather than capricious characteristic of government conduct and safeguards against discriminatory or patently arbitrary actions. Put another way, fair processes constitute buffers against arbitrary abrogation of constitutionally protected interests.[102] Thus, government processes for living donation decision making by adolescents must reflect not pretense but particularized consideration of their decision-making abilities.[103] Objective, scientific data rather than sweeping assertions grounded in conventional suppositions about youth should inform legislative treatment of adolescents. Inaccurate information on which legislative action is based yields "mistaken assumptions, which in turn produce substantially unfair results."[104]

A corollary to fair, factually-based processes is the *appearance* of fairness from adolescents' perceptions that repose trust in the decision-making process and generate a sense of being treated justly. This perception-of-fairness value enhances a personal

100. *Id.* at 20.

101. *Id.* at 26.

102. *Id.* at 19–21.

103. *See id.* at 24 (expressing concern about the State's reliance on pretension in relation to facts in its treatment of minors).

104. Saphire, *supra* note 69, at 166.

sense of dignity and the unquantifiable human interest in receiving regular and respectful treatment from the state. Conversely, donative decision-making processes perceived by adolescents as being partial or even prejudiced not only undermine the appearance of just treatment but can also have longer-term, damaging effects on adolescents.[105]

Indeed, for processes to be fair they must be impartial—that is, predispositions must not be inherent to the process. Any notion of impartiality concerning adolescents in decision making about living donation entails equal and nonbiased approaches, both actual and perceived.[106] There is little question that someone uninvolved in the care of the potential recipients should conduct this decision-making process.[107]

Neutrality in this decisional process suggests that those who discuss living donation with adolescents should not only have no actual bias but should also appear to be independent and nonbiased. Ostensible partiality of physicians involved in the care of transplant recipients circumvents due process values. This is so because there is an inherent conflict of interest, both in advocating for their transplant patients' interests and in protecting prospective donors' interests. Physicians of would-be recipients "may be so eager to proceed that their enthusiasm may color the extent or kind of information made available to prospective donors."[108] Physicians might create biasing influences on adolescents through their attitudes and approaches to donative conversations that directly or indirectly inhibit adolescents' unfettered participation. Underscoring this point is the reality that adolescents may already be disadvantaged in donative decision making relating to family members due to requests and expectations.

Both participation and accuracy are inextricably intertwined with fairness through consistent, cohesive state-structured approaches to adolescents' participation in decisions affecting their lives. Participation in the decision-making process is a *sine qua non* of procedural due process and was central to the Court in *Gault.* A frank and forthright interchange through dialogue about living donation in a conversational setting underscores the intrinsic purpose of due process by giving more than symbolic content to adolescents' participation and to the processes for interaction that are important in their own right.

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105. *See* RAWLS, *supra* note 89, at 28–31.

106. *In re Gault,* 387 U.S. at 26.

107. *See* Authors for the Live Organ Donor Consensus Group, *Consensus Statement on the Live Organ Donor,* 284 J. AM. MED. ASS'N 2919 (2000), *available at* http://www.kidney.org/transplantation/livingdonors/pdf/jama_article.pdf.

108. Caplan, *supra* note 52, at 1199–1200.

Aside from psychological benefits adolescents derive from participating in conversations about living donation is the value of a process that ensures adolescents' opportunities to be heard about matters profoundly affecting them. This dialogue about the various consequences of living donation is requisite to adolescents' liberty interests, to society, and to our constitutional framework. Few choices are more private and intimate than those concerning the use of one's own body.[109] Thus, adolescents' necessary participation in meaningful dialogue and decision making about living donation is manifest. Participation is a component of processes that are, in fact, meaningful to the donation decision. Participation also addresses a broader concern for reaching an accurate decision about living donation—one that truly reflects an adolescent's personal values and desires.

Orderliness in the state's fair and impartial treatment of minors is also essential to providing rudimentary due process and preventing incursions on minors' protected interests under *Gault.* Implicit to orderly government processes are official actions that administer reliable patterns in approaches to adolescents' interests. Such patterns result in regularities that not only instill confidence regarding fairness and impartiality but also inspire respect for them. Timeliness in official actions matters; preventing undue incursions by state actions on adolescents' liberty interests in medical donation necessitates that due process precede any potential deprivation.

Time sequence is indeed critical to living donation decision-making processes, raising a question as to whether collateral legal remedies could ever be adequate for persons who have suffered deprivation of their protected interests. Children who had been used as donors might, upon reaching adulthood, pursue avenues for post-deprivation remedies. Beyond liberty interests in being free from bodily invasion and consequent physical, psychological, and dignitary harms are rights not to have the government authorize the taking of one's property for another's use without just compensation. It is neither far-fetched nor fanciful to think that judicial authorization for the harvest of organs or tissues from minors arguably runs afoul of the Takings Clause.[110] If human tissues constitute forms of property, as some courts have found,[111] then taking kidneys or skin from minors for

109. *See* Lawrence v. Texas, 539 U.S. 558, 574 (2003); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992).

110. U.S. CONST. amend. V.

111. *See, e.g.*, Hecht v. Superior Court, 20 Cal. Rptr. 2d 275 (Ct. App. 1993) (gametes); Moore v. Regents of the Univ. of Cal., 249 Cal. Rptr. 494 (Ct. App. 1988) (cells); Massey v. Duke Univ., 503 S.E.2d 155 (N.C. Ct. App. 1998)

others arguably impairs both proprietary and privacy interests protected by the Takings Clause, especially when state action exacts their surrender.[112] As such, the Takings Clause could operate to curb both exploitation and expropriation of minors for living donor purposes.[113]

Moreover, post-deprivation remedies by way of tort suits may be available to minors upon reaching majority for injuries including subsequent health problems.[114] Damage claims could plausibly be based on tort theories of conversion (i.e., nonconsensual taking of their property interests in their organs or tissues for another's use), should a court find a property interest as a condition precedent to recovery. Another theory on which recovery could be based is battery (i.e., harmful or offensive touching through surgical harvest of one's organs or tissue without one's consent), if a minor is denied the opportunity to be heard meaningfully about not serving as a living donor before the time of harvest.[115]

Regardless of any avenues available under state law, after-the-fact redress through post-deprivation proceedings is unsuitable as "unfortunate prescriptions of remedy" under *Gault*.[116] Timing matters in terms of the harms incurred by non-regenerative organ and tissue removal. That children upon becoming adults will not be able to fully recover their interests through

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(deceased body); Emeagwali v. Brooklyn Hosp. Ctr., 815 N.Y.S.2d 494 (Sup. Ct. 2006) (fetal tissue). These courts, however, have carefully avoided setting unsavory precedent that human tissues constitute commodities.

112. Refusing to authorize surgical harvest of a kidney from one minor for an adult sibling, a state appellate court rejected the notion that minors' property interests are less important than their liberty interests. Finding in the law an unqualified protection comparatively for property interests, the court stated that it is inconceivable that less protection should be afforded "to a minor's right to be free in his person from bodily intrusion to the extent of loss of an organ." *In re* Richardson, 284 So.2d 185, 187 (La. Ct. App. 1973).

113. For thoughtful development of the Takings Clause in the context of organ donation for transplantation, see Erik S. Jaffe, Note, *"She's Got Bette Davis['s] Eyes": Assessing the Nonconsensual Removal of Cadaver Organs Under the Takings and Due Process Clauses*, 90 COLUM. L. REV. 528 (1990).

114. *See* Lake v. Arnold, 232 F.3d 360 (3d Cir. 2000) (involving claims based on state law and federal civil rights statutes against parents, physicians, and hospital by a woman who underwent a nonconsensual tubal ligation at age sixteen); Dina Mishra, Comment, *'Tis Better to Receive: The Case for an Organ Donee's Cause of Action*, 25 YALE L. & POL'Y REV. 403 (2007) (discussing the growing importance of donees' causes of action, given trends in living organ donation).

115. *See* Caplan, *supra* note 52, at 1198 (observing that, without consent, "the use of living persons would be taking not giving, battery rather than altruism").

116. *In re* Gault, 387 U.S. 1, 20 (1967).

post-deprivation litigation is inescapable. Given the nature of the interests at stake, the decision-making process, including use of accurate and adequate procedural protections, must precede rather than follow any deprivation of those interests.[117]

The absence of regular, regulated processes involving minors "has not always produced fair, efficient, and effective procedures" and heightens the possibility that minors will be treated unfairly and arbitrarily in contravention of *Gault*.[118] The question is not whether due process applies to adolescents' decision making about medical donation, but *how* the state should structure a process that ensures meaningful participation and decision making. Put another way, how the essentials for due process and fair treatment are effectuated for medical donation depends on the state's evolving *parens patriae* role regarding adolescents.

2. Role of *Parens Patriae*

Parens patriae refers to the state's role as sovereign and guardian of minors' interests; it is a concept of standing that is utilized to protect those interests.[119] According to *Gault*, a stagnant view of this Latin phrase makes the meaning murky and its relevance dubious;[120] rather, *parens patriae* is inherently elastic and evolving to protect minors' interests and promote their welfare. If, as the Court emphasized in *Gault*, the state retains moral responsibilities to promote fair and benevolent treatment of minors, then state *parens patriae* processes that facilitate minors' decision making and ensure their participation in the decisional process achieve those aims.

As the Court in *Gault* also emphasized, the state as *parens patriae* has an overriding moral responsibility to include adolescents' meaningful participation in decision making that implicates due process interests.[121] Moral legitimacy of adolescents' medical donation is sensibly borne by the process by which that decision is made. Their active participation in any decisional process suggests a dialogue as an expression of their dignity. The importance of being heard, essential to due process, resonates in

117. *See* Saphire, *supra* note 69, at 161 (emphasizing "the fundamental role of prior dialogue in the fairness and legitimacy of deprivation decisions" compared with post-deprivation participation that would reduce individual consultation to "a mere afterthought").

118. *In re Gault*, 387 U.S. at 18–19.

119. BLACK'S LAW DICTIONARY 1114 (6th ed. 1990).

120. *In re Gault*, 387 U.S. at 16.

121. *Id.* at 16–19.

especially beneficial ways with adolescents as they prepare to become adults.[122]

3. Facilitating a Process for Informed Decision Making

If, as *Gault* held, states in their *parens patriae* roles are morally responsible for facilitating minors' participation in decision making, then statutory schemes must ensure minors receive careful, compassionate, and individualized treatment about living donation. The quality of adolescents' participation and degree of autonomous decision making about either choosing or declining to donate freely, voluntarily, and meaningfully are central to a constitutionally adequate state process. As with any informed consent process, participation implicates the norm of respect for persons.[123] Indeed, dignity embodied by the due process maxim of participation finds expression through a decision-making process and a corollary respect for the choices made.[124]

An informed decision-making process facilitates meaningful engagement that promotes dignity for the prospective donors and their choices.[125] While not necessarily instilling in persons a philosophy of giving, it affords them an opportunity to develop such a philosophy. Moreover, participatory processes that give meaning to due process values provide a shield against pressures brought to bear on any potential donor, let alone an adolescent who may be capable though impressionable. Adolescents may perceive an obligation to donate to a relative as a way of defining the relationship.[126] Conversely, adolescents may want to be a living donor for a non-family member or may want to decline to donate to a sibling despite respective parental oppositions or preferences. Human relationships are complex by nature, and the microcosm of living donation heightens these complexities. The complicated range of family relationships can create subtle but real pressures on potential donors. Inasmuch as interfamilial influences impact prospective donors, their emotional relationships with the recipients can "call into question their ability to provide consent."[127]

More specifically, the languishing of someone awaiting a life-saving organ coupled with coercive pressures exerted by interested parties can cause a prospective donor to experience guilt,

122. *See id.* at 26.

123. Katz, *supra* note 18, at 83–86.

124. *See* Schuck, *supra* note 96, at 900–01 (recognizing the fundamental role of informed consent in the Supreme Court's conception of autonomy).

125. *See id.* at 933–34.

126. Caplan, *supra* note 52, at 1205.

127. *Id.* at 1206.

blameworthiness, or a general sense of letting others down that impinge, if not nullify, free and voluntary consent.[128] Different degrees and types of coercion impact adolescents who are, in many respects, still dependent on family. They may perceive no option other than to donate (essentially no choice at all). Even for non-relatives, such as friends or classmates, adolescents may perceive no other option than to indicate a willingness to be living donors of organs or tissues—especially when the ability to find other possible donors is limited by time or other factors. Thus, states should structure formalized, prophylactic protections for adolescents that include standardized approaches to decision-making processes to explore their personal concerns and facilitate their choice about whether or not to be a living donor.[129]

Through state-designed processes that recognize their decision making about medical donation, adolescents perceive an importance in their own right and a respect for their choices. As the Court in *Gault* suggested when it underscored the propriety of the decision-making process, adolescents derive benefit from the process of decision making that responds to basic values of self-respect and autonomy, separate and apart from the ultimate choice about donation.[130] A decision-making process that fosters adolescents' development is closely connected to the dignity value underlying due process, reflecting an ethic of reverence for human beings and their personal decisions that express individuality and self-identity. Adolescents ascribe value to engaging with others about matters affecting their lives that enhance their developing self-image and self-identity. Engaging in decision making about living donation would also enrich adolescents by heightening consciousness about service to others and by imbibing moral values about selfless acts that transcend into other areas of their lives.

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128. *See* Denise Grady, *Transplant Frontiers: Healthy Give Organs to Dying, Raising Issue of Risk and Ethics*, N.Y. TIMES, June 24, 2001, at A1 ("[A] relative's fatal illness itself can be coercive, evoking a powerful sense of obligation and the feeling that to say no is to let the patient die without trying to help.").

129. The seriousness of donative decisions require processes through which prospective donors are able to "look within and confront their fears, values, and feelings" about themselves in relation to others. *Id.*; *see also* Joel D. Kallich & Jon F. Merz, *The Transplant Imperative: Protecting Living Donors from the Pressure to Donate*, 20 J. CORP. L. 139, 153 (1995) ("A need exists for the development of a standard presentation of the risks and benefits of living donation that is not vague, but is understandable to a lay audience."); Shartle, *supra* note 7, at 435 ("[L]egislation . . . is desperately needed to protect the physiological and psychological health of minors.").

130. *See In re* Gault, 387 U.S. 1, 26 (1967).

The very nature of living "donation" involves an act of giving a gift to another. For living donors, it is a profound personal gift of the body. Donations are driven by motives and desires shaped by personal values. Some decisions about donation are based on perceived advantage or disadvantage to oneself. Other decisions may derive from an unselfish regard for the welfare of another person, as when an adolescent, without being asked, wants to donate to a friend or classmate who may die if he does not receive a kidney; the benefit derived is the benefit to the person receiving the kidney. This is altruism, although the concept is not a simple one. Quite to the contrary, its complexity warrants scrutiny in terms of its meaning in specific contexts. For example, altruism is not present with young children whom parents compel to serve as donors for siblings. Unlike a child, an adolescent is capable of acting on altruistic desires by agreeing to a surgical harvest of her kidney for transplant in her sibling. Yet these altruistic motives seem purer when an adolescent desires to be a living donor for someone, such as a classmate, who is not connected to her family unit.[131]

Thus, among the benefits adolescents may derive from participating in decision making about living donation is an appreciation of altruism. Altruism engenders self-sacrifice and an unselfish devotion to others' welfare. As such, it is revered in any civilized society because it finds expression through social interactions that reflect mutual respect and dignity.[132] The act of donating human tissues suggests the value of altruism.[133] Yet, altruism in the context of tissue donations merits closer examination in terms of its meaning and limitations. For example, living donation can entail a form of self-interest in which the donor derives a benefit (e.g., reputation enhancement, good feelings about oneself, or defining a relationship with the recipient) from the act of donation.

Altruism in a pure sense portends a selflessness in which an altruist derives no self-benefit from donation;[134] otherwise, the

131. Joseph P. DeMarco, *In Defense of Kidney Donation*, 4 AM. J. BIOETHICS 33, 34 (2004) ("The fact that people do make autonomous choices about living donation adds to the morally commendable nature of the act.").

132. *See* RAWLS, *supra* note 89, at 251–57.

133. *See* UNIF. ANATOMICAL GIFT ACT (amended 2006), 8A U.L.A. 17 (Supp. 2007). *But see* Christopher Robertson, *Framing the Organ System: Altruism and Cooperation*, 4 AM. J. BIOETHICS 46, 46 (2004) ("There is some question of whether altruism was *ever* the right way to think about cadaveric organ donation, since the typical donor is not sacrificing anything (as he or she is already dead and the organs will rot otherwise).").

134. Philanthropic giving without tangible self-benefit suggests one such example of altruism in a pure sense. *See* Jim Holt, *Good Instincts: Why Is Anyone*

selflessness of the act is marginalized. Altruism also implies a personal awareness and decision about offering one's self for another's benefit, rather than being compelled to give of one's self to another.[135] Normative judgments about altruism toward others give meaning to donative decision making, no less for adolescents than for adults in identical situations. Decision-making processes about living donation provide opportunities to adolescents for learning about self-sacrifice, for reaching for something that had seemed beyond them, and for gaining deep understanding about themselves in relation to altruistic acts and others' needs. Society, therefore, has an interest in cultivating altruism in adolescents as they develop into adults, which suggests that decision-making schemes about living donation further the state's *parens patriae* role in "the totality" of its relationship with adolescents.[136]

Processes designed to facilitate adolescents' decision making for medical donation also further the norms of autonomy (self-determination), beneficence (health and well-being promotion), and nonmaleficence (harm prevention) underlying bioethical policy.[137] The doctrine of informed consent, which is the primary legal implementation of bioethical norms, envisages a process through which physicians disclose relevant information to patients in ways they can comprehend and understand, and in settings conducive to deliberation about available treatment options so that choices reflect their views and values.[138]

An Altruist?, N.Y. TIMES, Mar. 9, 2008, § 6 (Magazine), at 11. Volunteering for public service is another. *See, e.g.*, ROBERT COLES, THE CALL OF SERVICE (1993) (exploring voluntary public service and the rationales, impulses, and values which inspire it).

135. *See* Sheldon Zink & Stacey L. Wertlieb, *Forced Altruism Is Not Altruism*, 4 AM. J. BIOETHICS 29, 30 (2004) ("If [the] sense of altruism was to be replaced with the knowledge that donors were not saving a person in need but acting on [self-interest] it would fundamentally change the donor-recipient interaction."); *see also* Robertson, *supra* note 133, at 48 (describing altruism as "a matter of supererogation, not duty").

136. *See In re* Gault, 387 U.S. 1, 13 (1967).

137. The ancient principle of *primum non nocere* ("above all, do no harm") is germane to living donation because doctors are performing surgeries on persons who do not need them and that are to benefit others. Although the donor-patient may derive benefits through spiritual and moral goods from undergoing surgeries for donative purposes that seem consistent with beneficence as the primary norm of biomedical ethics, the meaning and scope of "do no harm" in this context deserves continued discourse. *See* President's Council on Bioethics, Transcript of Session 2: Living Organ Donation: Outcomes and Ethics (Sept. 7, 2006), *available at* http://www.bioethics.gov/transcripts/sept06/session2.html.

138. Katz, *supra* note 18, at 86–87; Schuck, *supra* note 96, at 932–34.

Although the quality of the conversation depends in part on the physician and/or the healthcare institutions, state laws that mandate informed consent processes increase the probability that a conversation will at least take place.[139] In living donation contexts, states should devise decision-making processes with potential donors, especially adolescents, that are conducted by persons other than the physicians caring for recipient patients since those physicians' approaches to the conversation are laden with professional and institutional biases.[140] In addition to guiding transplant facilities in determining how decision-making processes involving youths as living donors should unfold, statutory schemes should set forth criteria for informing and deepening adolescents' understanding about living donation, including all tangible and intangible risks of harm.

While quality-of-life surveys and longitudinal studies on children and adolescents who had been living kidney donors would be valuable for improved risk-benefit analysis,[141] the known risks incurred by donors are not insignificant[142] and include exposure to morbidity and mortality.[143] Formal tracking of the longer-term health and well-being of living donors is virtually nonexistent.[144] The lack of centralized data and precise statistics suggest that living donation is still "a vast scientific and social experiment."[145] Data on surgical harvests indicate live donation of liver and lung tissue is riskier than live donation of kidneys. Even so, youths "are being asked to act as liver donors for their parents."[146]

Despite risks, successful renal transplants can provide donors with the sense that the undertaking "was fruitful and worthwhile."[147] But, emotional ramifications that result from living donation seem reasonably related both to the donor's ongo-

139. *See, e.g.*, 40 PA. STAT. ANN. § 1301.811-A (West 1999).

140. *See supra* notes 105–07 and accompanying text.

141. *See generally* ORGAN DONATION, *supra* note 11.

142. According to one transplant director, the complication rate for living donors is thirty-five to forty percent; ten to fifteen percent of all donors have major complications, and a few have died. Laura Meckler, *What Living Donors Need to Know: Even as Transplants Surge, Data on Long-Term Impact on Givers Remain Scant*, WALL ST. J., Jan. 30, 2007, at B11.

143. *See id.* (quoting a transplant center director who assessed surgical harvest for donation as "a big, big-deal type of surgery"); *see also* Denise Grady, *Death of Donor Halts Some Transplants*, N.Y. TIMES, Jan. 16, 2002, at A15; Denise Grady, *Liver Donors Face Perils Known and Unknown*, N.Y. TIMES, Mar. 19, 2002, at F1.

144. *See* ORGAN DONATION, *supra* note 11, at 9 (recommending central registries for tracking purposes).

145. Grady, *supra* note 128, at A12.

146. *Id.*

147. Montgomery et al., *supra* note 11, at 419.

ing personal condition and to the recipient's condition, especially if the donated kidney fails and the recipient dies.[148] Along with any onset of physical and/or psychological problems are economic burdens borne by donors that can cause distress and disruption. While expenses incurred during the donative process may be covered through reimbursements,[149] subsequent health problems stemming from the donation usually are not.[150]

State legislative provinces are most appropriate for determining the content and criteria for adolescents' decision-making processes about living donation. These determinations should include the procedure, parties, and content of donative discussions. As previously discussed, the decision-making process has intrinsic value because it grants adolescents' a chance for meaningful engagement and an opportunity to express their dignity as persons. Consequently, adolescents who decide to donate to family members should do so free from pressures, either external or internal.

If a process for decision making is to have maximal meaning, adolescents must also be able to decline to donate. So, too, adolescents may decide to donate to non-family members such as friends or classmates. Decisions about serving as living donors for non-related persons should likewise be respected and considered if acts of altruism and self-giving are to mean anything to adolescents. There are, of course, fault lines in this approach, not the least of which are parental concerns about the donation which should be brought to bear on adolescents' decision making. It is plausible that, given the risks mentioned above, parents may resist adolescents' donative desires; however, it seems equally plausible that parents would support adolescents' altruistic desires to aid another who is in need.

Taken together, the due process essentials elucidated by the Court in *Gault* for affording fair treatment to minors in matters affecting their lives suggest a set of values that promote the per-

148. Grady, *supra* note 128, at A12 (reporting the impact on a living donor when the recipient died, noting that a young relative who donated "became depressed, not only because of the death, but because she herself had gone through a painful operation and felt disfigured by the big abdominal scar it had left, while nothing had been gained").

149. *See* 720 ILL. COMP. STAT. 15/12-20 (2002) (providing reimbursement for actual expenses incurred).

150. Additionally, some states provide tax deductions for living donation. *See, e.g.*, IOWA CODE ANN. § 427.7 (West 2006); MINN. STAT. ANN. § 290.01 (West 2007); N.Y. 60-22 § 612 (McKinney 2005). Most adolescents do not file tax returns, however, and those who do probably do not itemize for the benefit of such deduction. Thus, the costs of future health complication as a result of donation likely exceed any form of tax benefit.

sonal dignity of adolescents and the emerging adults within them. Precisely because the Court has recognized minors' constitutionally protected liberty interests and their meaningful participation about deprivations of those interests, states should devise statutory schemes for donative decision-making processes by adolescents that reflect *Gault*'s mandate of providing them with due process and fair treatment.

IV. STATE ACTION ENGENDERING *GAULT*'S PRINCIPLES FOR ADOLESCENTS' DECISIONAL INTERESTS

Since *Gault*, the Supreme Court has reiterated that constitutional protections extend to minors[151] without further particularizing the required procedural safeguards for juvenile proceedings[152]—or for any other specific context.[153] Other than rendering opinions replete with the "essentials of due process and fair treatment" catchphrase, state courts have likewise not explicated *Gault*'s due process requirements. Indeed, neither state courts nor legislatures have paid sufficient attention to the primacy of minors' protected interests and to the due process infrastructure envisioned by *Gault*.

By legally categorizing adolescents as children and curtailing their liberty in personal decision making (based on questionable suppositions about vulnerabilities and immaturities), state action raises *Gault*'s critical concern as to whether "fact and pretension" once again coincide in the treatment of minors.[154] The need for fair procedures is heightened when inaccurate factual bases likely lead to erroneous assumptions and unfair results.[155] Stated differently, the state as *parens patriae* must structure fair, impartial, and orderly decision-making processes whenever minors' constitutionally protected interests are at stake. Rather than endorsing a static concept of due process, *Gault* stands for a concept of due process that is open to state courts' and legislatures' elaboration, so as to reflect evolving views about what the essen-

151. *See* Morse v. Frederick, 127 S.Ct. 2618 (2007); Bd. of Educ. v. Earls, 536 U.S. 822 (2002); Breed v. Jones, 421 U.S. 519 (1975); *In re* Winship, 397 U.S. 358 (1970); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969).

152. *See* Emily Buss, *The Missed Opportunity in* Gault, 70 U. CHI. L. REV. 39, 46 (2003) (criticizing the Court's "adult rights or no rights approach" that has "produced a hodgepodge of procedures" ill suited to children).

153. *See* Rhonda Gay Hartman, *AIDS and Adolescents*, 7 J. HEALTH CARE L. & POL'Y 280 (2004) (discussing the lack of procedural safeguards afforded adolescents in the specific context of HIV testing and treatment).

154. *See In re* Gault, 387 U.S. 1, 22 & n.30 (1967).

155. *See supra* text accompanying notes 102–04.

tials of due process should be in any given context for adolescents.

A. *State Case Law*

Although the Supreme Court itself has not particularized due process essentials for minors' liberty rights since *Gault*,[156] state courts have done even less. Other than quoting extensively "essentials of due process and fair treatment" to which delinquency proceedings must measure,[157] state courts have turned the Court's mandate of due process into mere legal vernacular rather than into processes that adequately protect minors' liberty rights.

A related concern is the cascading effect of state courts' due process recitations that lack principled content and bypass opportunities to translate *Gault*'s principles into various contexts implicating minors' liberty interests. State courts' development of minors' liberty interests could provide useful information to lawmakers for developing policy and legislation to guide the judiciary. Moreover, state court judges, along with counsel representing youths, could—and should—be more active under state constitutions' parallel due process provisions that offer even greater protections for minors' liberty interests than those recognized by the Supreme Court.[158] A cascade of case law attentive to adolescents' liberty interests could be generated because "when a state court is deciding about the meaning of its own due process clause it might well consult the decisions of other state courts," especially those with similar state constitutional provisions.[159] States commonly consult the practices of other states in this regard, meriting a conclusion that " 'comparative law' is a routine and uncontroversial feature of the jurisprudence of state courts."[160]

That state courts have not heretofore elaborated on *Gault*'s principles in contexts implicating adolescents' liberty interests

156. *See generally* Buss, *supra* note 152.

157. *See, e.g.*, *In re* Appeal in Maricopa County, Juvenile Action No. JV-508488, 915 P.2d 1250, 1255 (Ariz. Ct. App. 1996); *In re* Shannon B., 27 Cal. Rptr. 2d 800, 807 (Ct. App. 1994); *In re* Darnel S., 760 A.2d 1023, 1026 (Conn. App. Ct. 2000); State *ex rel.* Juvenile Dep't of Coos County v. Welch, 501 P.2d 991, 994 (Or. Ct. App. 1972); *In re* Farms, 268 A.2d 170, 175 (Pa. Super. Ct. 1970); *In re* CT, 140 P.3d 643, 646 (Wyo. 2006).

158. *See generally* Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131 (1999).

159. Eric A. Posner & Cass R. Sunstein, *The Law of Other States*, 59 STAN. L. REV. 131, 142 (2006).

160. *Id.* at 135.

highlights the importance of legislative action to carry out the *parens patriae* responsibility *Gault* envisioned. Because legislation generally sweeps more broadly than court rulings, maximal opportunities are presented for carefully considering the wide range of issues related to living donation—particularly to adolescents' liberty interests in medical donation. Comprehensive schemes for decision making are currently lacking and, for adolescents, state *parens patriae* protection of their decisional liberty interests is an unfulfilled promise.

B. *State Statutory Law*

Following passage of the National Organ Transplant Act,[161] all states adopted a version of the Uniform Anatomical Gift Act, which governs organ and tissue donation.[162] Although federal and state laws permit compensation for transplant services but proscribe payment for or brokerage of organs, governance has not kept pace with transplant advances[163] and the exponential increase of living donation. In response, Congress enacted the Organ Donation and Recovery Improvement Act to sustain a policy of organ procurement through altruistic acts and to encourage living donation by providing reimbursements for expenses.[164] Adolescents as a donor group are absent from this government oversight. This signals the need for a comprehensive scheme for decision making that includes adolescents as living donors. Such a scheme may be properly achieved through statutory enactment, possibly in combination with central registries and pilot programs focused on youths as living donors.[165]

A few states regulate the donation of regenerative tissues such as blood or bone marrow by minors,[166] but living donation

161. National Organ Transplant Act, Pub. L. No. 98-507, 98 Stat. 2339, 2342–45 (1984) (codified as amended at 42 U.S.C. §§ 273–274 (2000)).

162. UNIF. ANATOMICAL GIFT ACT (amended 2006), 8A U.L.A. 17 (Supp. 2007).

163. *See* Rhonda Gay Hartman, *Face Value: Challenges of Transplant Technology*, 31 AM. J.L. & MED. 7, 35–41 (2005).

164. Organ Donation and Recovery Improvement Act, Pub. L. No. 108-216, 118 Stat. 584 (codified as amended at 42 U.S.C. §§ 273a, 274f-1 to -4 (Supp. IV 2004)).

165. The Organ Donation and Recovery Improvement Act authorizes the Department of Health and Human Services to allocate funding to states for developing initiatives, including pilot programs, in furtherance of Congressional policy. *Id.* For critique and criticism of the Organ Donation and Recovery Improvement Act, see Patrick D. Carson, *The 2004 Organ Donation Recovery and Improvement Act: How Congress Missed an Opportunity to Say "Yes" to Financial Incentives for Organ Donation*, 23 J. CONTEMP. HEALTH L. & POL'Y 136 (2006).

166. *See, e.g.*, WIS. STAT. ANN. § 146.34 (West 2006).

by minors remains largely unregulated. In several important respects, there are advantages to the policy-making province for overseeing the protection of adolescents' liberty interests in living donation. Legislatures explicate public values; for medical donation, they represent a collective judgment about socially acceptable risks generally and for adolescents particularly.[167] As to the latter, state policymakers are positioned to express public policy about tolerable risks that reflect a balance between living donation and adolescents' liberty interests.

The due process framework for donative decision making by adolescents must simultaneously produce a principled and workable structure while allowing flexibility in the evolution of minors' rights. Because legislatures may delineate the scope of procedural safeguards as well as the substantive content of protectable interests, they may devise a decision-making process that safeguards adolescents' protected liberty interests against unfair deprivation and sorts out issues unique to adolescents.

As a subset of minors, adolescents fall within the traditional *parens patriae* oversight of state legislatures. Under that concept, the state protects and promotes adolescents' interests. Such oversight is informed in part by society's interests in adolescents' development into adults. This includes heightening adolescents' consciousness about others' plights and how they can benefit others. This also includes cultivating a sense of altruism for acts of service that inure to society as a whole.[168] To inform policy judgments, legislators should consider scientific data about adolescents' perception of altruism and how it influences their acts and their self-image. Data about adolescent decisional capacities not just for deciding donation but also for dealing with physiological and psychological effects is equally valuable.

Due process essentials for minors in medical donation settings entail normative judgments about informed consent and the roles of transplant surgeons and institutions. In addition to traditional lawmaking about child and family matters, state legislatures oversee at once professional practice and adolescents' decision making in medical settings;[169] a logical extension of that

167. *See In re* Gault, 387 U.S. 1, 70 (1967) (Harlan, J., concurring in part and dissenting in part) ("Legislatures are, as this Court has often acknowledged, the 'main guardian' of the public interest, and, within their constitutional competence, their understanding of that interest must be accepted as 'wellnigh' conclusive." (citing Berman v. Parker, 348 U.S. 26, 32 (1954))).

168. ORGAN DONATION, *supra* note 11 ("[A]ll members of society have a stake in an adequate supply of organs for patients in need, because each individual is a potential recipient as well as a potential donor.").

169. *See, e.g.*, VA. CODE ANN. § 63.2-100 (2002).

oversight is a positive scheme that fosters due process essentials for adolescents' living donation and also minimizes effects of perceived institutional biases.[170] Plainly, institutional approaches to adolescents' donative decision making should be a matter of principle, not caprice.

In addition to reducing arbitrary abrogations of minors' liberty interests, legislative schemes signaling cohesive, consistent approaches to adolescents' liberty interests in medical contexts promote *Gault*'s principles. In contrast, *ad hoc* approaches by medical practitioners and institutions can undermine those principles in significant ways. It seems incontrovertible under *Gault* that state-engineered processes for decision making involving adolescents' protected liberty interests are vital for vindicating values underlying due process. These values are central to the state's *parens patriae* relationship with minors. These values must have some meaning that transcends the contexts in which they are applied. Piecemeal, incremental approaches to adolescents' donative decision making are simply at odds with the Court's view that the essentials of due process must guide consistently the way in which the government acts toward minors.[171]

Furthermore, retrospective *post hoc* approaches make it difficult to assess whether a given approach is fair, impartial, and orderly because it is highly unlikely that acts will occur in factually identical situations. Fairness, impartiality, and orderliness cannot serve as meaningful standards unless they are articulated in terms that transcend any given action or context. Although the difficulty of articulating a coherent model of due process essentials for any specific decision-making context should not be underestimated, state legislators are better positioned than doctors, institutions, or even state court judges to delineate the contours of decision-making processes that customize these essentials.[172]

Gault's central focus was not on outcome but on the process through which state action regarding minors' liberty interests occurs.[173] This Essay concerns the application of *Gault* to adolescents' donative decision making—not only about choosing to give a gift of their bodies to another but also about declining to

170. *See* Mishra, *supra* note 114, at 414 (averring the virtues of "a positive scheme that protects the interests of organ donors, donees, and society in proper and effective organ transplantation").

171. *In re Gault*, 387 U.S. at 18–22.

172. State courts have expressly deferred to state legislatures as the more appropriate forum to resolve issues related to minors in medical donation and decision making. *See, e.g.*, Little v. Little, 576 S.W.2d 493, 500 (Tex. App. 1979).

173. *In re Gault*, 387 U.S. at 26.

donate, notwithstanding family pressures to the contrary. Meaningful engagement in discussions during which all relevant considerations are fleshed out must include the opportunity for adolescents to decline donation and to have that decision respected. It should also include opportunities to decide whether to donate to non-relatives who are in need, with the proviso that parents' views about adolescents' donative desires and about what they believe best serves adolescents' interests must be considered.

A primary concern for legislators, therefore, is to ensure interaction among interested parties in ways that exemplify fairness, impartiality, and orderliness and that enable adolescents to perceive that they are understood and respected. Simply said, legislatures should structure how the conversation about living donation with adolescents should proceed and take shape. Statutes that structure and shield adolescents' decision making about living donation fulfill *parens patriae* obligations under *Gault* by representing a thoughtful, even-handed approach that instills confidence about the integrity of the process. However, statutory guidelines for those conducting a donative decision-making process with adolescents should be implemented in ways tailored to adolescents' needs and cognitive capacities rather than in a formulaic manner.

Similar to oversight of informed consent between doctors and patients, legislators ought to establish a framework that includes the roles and responsibilities of those conducting the decisional process. Precisely because different deprivations demand different procedures under due process,[174] legislatures must delineate the scope of the procedural safeguards, as well as the substantive content of liberty interests in living donation.[175]

The Court also noted implicitly the dignity of adolescents that finds expression through participatory processes engendering perceptions of fair and respectful treatment.[176] Meaningful discussions with adolescents enable them to sort out the considerations and possible choices. Accordingly, adolescents should be able to decide to donate a kidney for a relative or to decline to donate, and that decision in either case should be respected, absent exceptional circumstances.

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174. *Id.* at 13–15.

175. The Commonwealth of Virginia, for example, acknowledges minors' liberty interests in end-of-life decision making and affords terminally ill minors a voice and a decision in their care, including when that care must cease. VA. CODE ANN. § 63.2-100 (2002).

176. *In re Gault*, 387 U.S. at 26.

As to directed donation for a non-relative, such as a friend or classmate, adolescents' donative desires should be heard, and they should be given an opportunity to explore those desires along with all information pertinent to donative decision making. Adolescents' understandings about altruism are likely realized and enriched when they know that their desires are respected and that the person to whom they intend to benefit receives their gift.[177] Any statutory scheme for adolescents' donative decision making should reflect the importance of altruism underlying laws governing cadaveric donation; but, more importantly, such schemes should be designed to cultivate in adolescents a heightened awareness of selfless acts and a realization of the value of altruistic behaviors as they develop into adults.[178]

Law that establishes a process by which adolescents' liberty interests in living donation are both promoted and protected advances *Gault*'s principles in ways that resonate meaningfully with those in this age group. As the Court in *Gault* stressed, "[T]he appearance as well as the actuality of fairness, impartiality and orderliness—in short the essentials of due process—may be more impressive and therapeutic" from the perspective of adolescents, regardless of the ultimate outcome.[179]

In short, the Court in *Gault* pronounced that the Due Process Clause applies whenever state action seeks to deprive minors of life, liberty, or property. The flexibility and underlying values of due process endure, and thus the legislative—and judicial—task is to translate *Gault*'s due process requirements into other contexts implicating minors' protected interests. Specifically, state legislatures can apply the due process framework formulated by *Gault* to different settings and, in so doing, assess the manner in which the underlying values may best be realized for—and by—adolescents.

Among specific considerations for legislators in living donation settings are the adequacy of process to protect adolescents' interests and how policy should be constructed to optimize adolescents' engagement in altruistic actions. State actions that exclude adolescents from living donation or unduly constrain their decision making about living donation trivialize *Gault*'s declaration that due process is not just for adults.[180] What are needed, therefore, are legislative models that embrace *Gault* in various contexts for adolescent decision making and that adhere

177. *See* Mishra, *supra* note 114, at 410.

178. *See supra* notes 132–36 and accompanying text.

179. *In re Gault*, 387 U.S. at 26.

180. *Id.* at 13.

to *Gault*'s principles for states' responsiveness to adolescents and to their liberty interests in matters of significance to them—and, in living donation, of significance to others.

V. CONCLUSION

The Supreme Court's decision in *Gault*, recognizing youths' constitutionally protected interests as well as the state's role as *parens patriae* to facilitate those interests through fair, impartial, and orderly processes, was a renaissance moment. The due process essentials recognized by the Court then are viable now in decision-making matters that affect the lives of minors. Decisions to be living donors of vital tissues such as kidneys have potentially serious, significant, short- and long-term impacts on adolescents. Adolescents also derive meaning and self-worth from donative decision making about profoundly personal gifts for the benefit of other persons. Thus, state-engineered schemes suffused with the principles of *Gault* are essential to ensure that adolescents' liberty interests are both recognized and respected.

Simply put, this Essay offers a new way of thinking about adolescents as living donors and particularly describes how to think comprehensively about the related issues in ways that are compatible with the unifying principles of *Gault*. With the advent of living donation due to both medical advances and advantages, and a living-donor base that is expanding to include adolescents, transplantation policy and its complexities must not ignore adolescents as living donors. The law's recognition of a fair and meaningful process that enables adolescents' decision making about matters of significance to their lives and the personal dignity found therein should be a lasting legacy of *Gault*.