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Theoretical and Methodological Issues in Studying Children's Capacities in Legal Contexts

Jennifer L. Woolard,¹ N. Dickon Reppucci,¹ and Richard E. Redding¹

Understanding children's capacities in legal contexts is an urgent priority for psychology and the law. The distinction between capacity and performance is discussed in light of two research goals: (a) identifying children's capacities relevant to law; and (b) identifying the circumstances under which their performance varies. This discussion leads to three fundamental research issues that are explored. First, in addition to general capacity, the effect of specific legal contexts on performance requires investigation. Second, capacities research must take a developmental approach using appropriate, ecologically valid target and comparison samples. Third, legal standards and their inherent developmental assumptions about children's capacities must be operationalized and investigated from both legal and psychological perspectives.

In the past decade, society has identified child maltreatment and juvenile violence as two of its most pressing social problems. The current response to alleviating these social problems relies in part on legal remedies based on common sense and politically popular value judgments. One way to promote the value of preventing abuse has been to allow, or even to encourage, young children's testimony against their alleged abusers to become a cornerstone of prosecution efforts. The values of protecting public safety and preventing crime has resulted in more severe sanctions, including automatic transfer to adult court, for increasing numbers of ever younger juvenile delinquents. Both of these responses are related to a fundamental dilemma regarding children and the law—What is the nature of children's capacities in legal contexts? The issue of capacity is the central scientific concern. However, societal pressure to act on these issues created a momentum for change that has outpaced any empirical effort to inform law and policy.

Although the law has long recognized that children are less "mature" and less "capable" than adults in many legally relevant domains, it is unclear to what degree particular capacities vary with chronological age and levels of cognitive and socioemotional development. Over a decade ago, psychologists (e.g., Melton,

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Koocher, & Saks, 1983; Weithorn, 1984) called for research on these issues, and some legal scholars have explicitly grounded their statutory proposals in empirical research about children's capacities (e.g., Redding, 1993). While some research has been completed (e.g., Ambuel & Rappaport, 1991; Grisso, 1981; Scherer, 1991; Scherer & Reppucci, 1988; Weithorn & Campbell, 1982), the foundation of empirical knowledge is fragile. The importance of age effects on capacity remains unresolved, and context and its interaction with chronological age must be investigated.

The Supreme Court's decision in *Stanford v. Kentucky* (1989), allowing 16 year olds to face the death penalty, the laws that are now being enacted in many states to allow juveniles age 14 or even younger to be automatically transferred to adult court, and the fundamental procedural changes in child testimony against alleged abusers facilitated by *Craig v. Maryland* (1990) have all made understanding children's capacities an urgent priority rather than an interesting academic exercise. The societal debate on juvenile violence and child maltreatment continues, with little attention to scientific information about children's capacities. Indeed, there is a history of controversy within the scientific community over the extent of its participation in a variety of policy debates. (See, e.g., Gardner, Scherer, & Tèster, 1989; Melton, 1990; and Scherer & Gardner, 1990; regarding adolescents' competence to consent to abortion; and Goodman, Levine, Melton, & Ogden, 1991; Goodman, Levine, & Melton, 1992; and Underwager & Wakefield, 1992; regarding whether child witnesses should be afforded special procedural protections when testifying against their alleged abuser.) Regardless of one's viewpoint on the role of advocacy, however, a scientific perspective on children's capacities can provide a critical analysis of the fundamental assumptions, explicit and implicit, that shape the societal dialogue and structure the legal response. This special issue of *Law and Human Behavior* focuses on children's capacities, a timely and important area for collaboration between psychologists and legal scholars.

In the present article, we draw on cognitive development research to discuss the important distinction between capacity and performance. Then we address three fundamental theoretical and methodological concerns that capacity research must address in order to lay the groundwork for a valuable *scientific* contribution to the social discourse.

CAPACITY VERSUS PERFORMANCE

The focus on children's capacities raises two research goals: (1) identifying children's capabilities relevant to law; and (2) identifying the circumstances under which their performance varies. Cognitive research describes these goals as the competence-performance distinction (Wood & Power, 1987). Although definitions of competence and performance vary, generally competence refers to the knowledge and abilities expressed under ideal circumstances. Performance includes the processing activities required to demonstrate knowledge, as well as the interpersonal and contextual factors affecting performance. Because the law is concerned about children's capacities only as they are *demonstrated* in a particular legal context, le-

gally relevant research necessarily must address performance and how it may vary with age, psychosocial development, context, and task.

Developmental and cognitive research have demonstrated that capacities, or competence, as measured by a standardized test or laboratory task, may outshine performance (Fischer & Pipp, 1984; Fischer & Silvern, 1985; Scott, Reppucci, & Woolard, 1995; Wood & Power, 1987). Indeed, much of the recent theorizing and testing of the competence–performance distinction comes from research on children's cognitive development (e.g., Chandler & Chapman, 1991). For example, children have a variety of strategies from which they draw in solving counting problems (e.g., simple addition) (Siegler, 1991). The choice of strategy depends on which strategies are available (their capacity), as well as the demands of the task at hand (performance constraints). A five year old may retrieve the answer from memory when asked to solve a simple addition problem like $2 + 3$. The same child may use a count-on strategy when adding a small number to a larger number like $2 + 9$ (e.g., "9, 10, 11"), or the child may count from one by holding up fingers for the numbers on each hand and then count fingers. Children can use a variety of strategies depending on what type of problem they are asked to solve. As they get older, they learn new strategies and more frequently choose efficient strategies. Thus, performance can vary as the strategy repertoire and learning experiences change over time. This cognitive developmental research is designed to understand how new strategies are learned, selected, and used under a variety of developmental circumstances and task constraints.

Psycholegal research shares analogous goals of understanding children's capacities and performance, but for legally relevant constructs in a variety of *legal* contexts. The articles in this special issue herald the trend toward a developmental, ecological, systems approach to psycholegal research on children's capacities, particularly in two substantive areas. The first, children's capacities as witnesses or participants in legal proceedings, has an impressive research history (for reviews, see Ceci & Bruck, 1993, 1995; Goodman et al., 1992). It includes children's ability to participate in criminal trials (e.g., as victims or witnesses of crime; see Perry & Wrightsman, 1991) and civil proceedings, particularly for family matters (e.g., as participants in custody determinations; see Garrison, 1991; Scott, Reppucci, & Aber, 1988). Special concerns have been raised about young children's memory and suggestibility (see Ceci & Bruck, 1993, 1995).

The second area focuses on adolescent's capacities to assume adult responsibility for decision making or for criminal conduct. During the past 15 years, several studies of adolescents' capacities to make informed decisions, e.g., in understanding their Miranda rights (Grisso, 1981) and making treatment decisions (Kaser-Boyd, Adelman, & Taylor, 1985; Weithorn & Campbell, 1982), have raised questions regarding more active participation in legal decision making (see Redding, 1993). Mostly, these studies have examined adolescents' abilities to meet adult standards to make informed decisions, particularly for medical treatment (e.g., abortion; see Ambuel & Rappaport, 1992; Lewis, 1980). Recently, the focus has expanded to examine developmental considerations in a wider variety of legal contexts. For example, changes in juvenile and criminal justice are now questioning traditional pre-

sumptions of adolescent immaturity (and corresponding incapacity) to choose to commit illegal acts, as well as to participate fully in the resultant legal proceedings.

State-of-the-art research, and our emerging understanding of young children's and adolescents' capacities, raise new theoretical and methodological issues. Three issues emerge as key topics for future research. First, in addition to general capacity, the effect of specific legal contexts on performance must be investigated. Second, capacity research must take a developmental approach using appropriate, ecologically valid target and comparison samples. Third, legal standards and their inherent developmental assumptions about children's capacities must be operationalized and investigated from both legal and psychological perspectives. We explore the capacity/performance distinction for each of these three emerging research issues.

GLOBAL VERSUS SITUATIONAL EFFECTS

Legally relevant capacities can be identified either theoretically or through previous empirical work. Beyond the identification, however, the next step entails understanding the conditions under which performance deviates from capacity. Most of the phenomena of interest such as memory recall, susceptibility to suggestion and influence, and perception of risk in decision making are developmental phenomena that change with the legally relevant age period. Often, the pathways of change have been studied in other substantive arenas or as a general developmental phenomenon. For example children's ability to recall previous events in narrative form has been studied in a variety of laboratory tasks in the field of cognitive development. This interest in understanding and documenting normative development has often resulted in a focus on more global issues of development (e.g., understanding of adolescents' general cognitive abilities) rather than on context-specific issues (e.g., understanding of an adolescent's capacity to consult with a lawyer about his or her defense).

The study of children's capacities in legal environments is an intentional focus on a very specific and unusual set of situations or contexts. Cognitive, socioemotional, or other situation-specific factors may vary in their salience and impact across legal contexts. Thus, a comprehensive understanding of children's capacities requires a dual approach. On the one hand, the general, global nature of relevant capacities and their developmental trajectories must be understood. On the other hand, the capacities also must be assessed and evaluated in specific legal contexts. This dual approach provides an understanding of the relationship between the global nature of capacities and the situation-specific effects on performance.

One example of an emerging developmental and contextual paradigm is seen in new approaches to the study of adolescent decision-making (e.g., Scott, 1992; Scott et al., 1995) that question the legal relevance of past research on adolescents' competence to consent, which generally has found adolescents to be as cognitively competent as adults. Scott and colleagues (1995) point out that past research has been primarily laboratory-based and has failed to consider several highly important contextual and socioemotional variables (like the effects of peer and parental pres-

sure, and attitudes toward risk) that may influence adolescents' actual performance in real life.

Continuing this approach, Steinberg and Cauffman (1996, this issue) conceptualize the psychosocial factors in adolescent decision making as dispositions to behave under situational constraints, rather than definitive traits that consistently appear under a variety of circumstances. Both Scott et al. (1995) and Steinberg and Cauffman (1996) emphasize that their hypotheses about judgment and decision making are primarily theoretical and await empirical verification, because existing studies were not conducted in legally relevant situations. For example, there is a lack of research examining adolescents' risky choices and their relationship to violent behavior (e.g., "bad" judgment or decision making). Grisso (1996, this issue) argues that this is in part due to the lack of research on the interpersonal and situational contexts in which such choices occur. Investigation of potential similarities and/or differences between adolescents and adults occurring as a function of development cannot advance without research on the relevant contexts.

Child witness research has done much to advance our understanding of contextual influences on children's performance. As the articles in this issue demonstrate, the field has advanced to identifying the situational characteristics that constrain or enhance the reliability and consistency of memory, recall, and accuracy of communication. Recent research has moved beyond documenting the accuracy of children's narrative accounts of experienced events to examine the effects of age and context on other specific abilities. Gross and Hayne (1996, this issue) test children on a real-life experience to identify the practical conditions under which eyewitness recognition memory is more accurate. Others have focused on the effect of courtroom tactics on children's accuracy and reliability. Carter, Bottoms, and Levine (1996, this issue) integrate developmental and contextual influences by examining how two task demands, developmentally inappropriate questioning techniques and the socioemotional context of the interview, affect children's reports of a real-life event.

Research of this type will also increase our understanding of how children's performance in particular legal contexts may be enhanced, i.e., so that performance more closely approximates capacity, permitting children's involvement to the extent their capacities will allow. This points to another important research area that has been largely neglected. Psycholegal researchers need to follow the trend in cognitive development research of investigating how practice, training, eliminating age-inappropriate performance demands, and/or task simplification may enhance performance (see Fischer & Pipp, 1984; Siegler, 1991).

Emerging research on children and adolescents underscores the importance of situation and context. Moreover, because the constructs of interest are ongoing developmental processes, the interaction of context with development is crucial.

DEVELOPMENTAL APPROACH WITH APPROPRIATE COMPARISONS

Historically, the legal system has viewed children as immature and lacking the same capacities as adults. In comparison to adults, this focus on incapacities

has cast children as less reliable witnesses, less capable of making informed decisions, and less deserving of punishment for illegal acts. For example, holding in *Parham v. J.R.* (1979) that children do not have a constitutional right to challenge their civil commitment, the Supreme Court observed that “Most children, even in adolescence, simply are not able to make sound judgments” (p. 603). Increasingly, however, the Court shows ambivalence about children’s capacities. For instance, the Court in 1988 found it unconstitutional to execute juveniles under 16, saying that adolescents “are less mature and responsible than adults” (*Thompson v. Oklahoma*, 1988, p. 833). Only one year later, in *Stanford v. Kentucky* (1989), however, the Court upheld the death penalty for juveniles 16 and older, with the majority not even addressing the issue of maturity.

The study of children’s capacities in legal contexts raises the question, To whom should their capacities and performances be compared? Two potential answers emerge: “normal” samples and adult samples. Depending on which comparison sample is chosen, differences could be attributed to the defining characteristics of the sample (e.g., the special characteristics of delinquents or hospitalized children) or to age (e.g., the special characteristics of youth or immaturity).

Particularly when using institutionalized samples or other special populations, the importance for policy-relevant work of taking the next step to understand normal development cannot be underestimated (Zaslow & Takanishi, 1993). Normal adolescents are the appropriate comparison group for samples that are facing, or are at risk of facing, a legal situation with contextual constraints.

Understanding normative populations is critical because the very capacities of interest influence selection into the at-risk population, resulting in an important selection bias. For example, cognitive and psychosocial influences on adolescent judgment may affect the decision-making behavior that brings them to the legal system. The portrait of development created by the at-risk sample does not reflect adolescents as a population, but a particular segment of adolescents. Policy regarding adolescents as a class may be more usefully informed by an understanding of the capacity and performance of both groups—adolescents who are likely to enter the system as well as adolescents generally. For example, Mulvey and Peebles’ (1996, this issue) study of the decision-making competence of children at risk for institutional placement includes a comparison with a community sample of adolescents matched on age, ethnicity, gender, and family socioeconomic status. In doing so, the investigators are able to delineate the specific aspects of competence on which the two samples differ.

Given the potential impact of developmental phenomena on children’s performance, age is naturally a salient factor. If capacities are changing, performance cannot necessarily be attributed to the child’s stable, unchanging characteristics or individual traits. Cross-sectional research without older comparison groups may mask the possibility that a child may “age out” of a particular behavior or cognitive level. Thus, psycholegal research must mirror the trend in developmental research toward identifying developmental pathways or trajectories that lead to the relevant behavior. Moffitt’s (1993) identification of two types of delinquents with different developmental pathways for delinquent behavior ultimately may have implications for the legal response to juvenile offenders. These types of offenders cannot be

distinguished by a cross-sectional sample of same-aged adolescent delinquents, because during the peak offending years, persistent offenders and adolescence-limited offenders have similar profiles.

The identification of trajectories and pathways runs counter to the legal tendency to identify bright line distinctions based on age. The most common and encompassing rule is the age of adulthood, usually 18 years, although it may vary for some specific situations like contraceptive access and alcohol use. The legal status of adulthood confers a number of rights and responsibilities that are withheld from juveniles. This categorization suggests a second useful comparison sample in the study of children's capacities—legal adults. For example, most studies examining adolescents' ability to give informed consent have compared adolescent and adult performance, generally finding that 15-year-old adolescents of normal intelligence have capacities similar to adults. However, these findings have been challenged because of methodological limitations of the studies, e.g., relatively small samples of middle-class white youth responding to vignettes of various behaviors in a laboratory setting. Moreover, commentators have suggested that adolescent decision making incorporates additional constructs, which, although inapplicable to adults, remain critical for an accurate portrait of adolescents' capacities (Grisso, 1996; Scott et al., 1995; Steinberg & Cauffman, 1996). The assumption that adolescents may differ qualitatively and quantitatively from adults must be examined empirically with appropriate samples and situations.

DEVELOPMENTAL ASSUMPTIONS IN POLICY AND PRACTICE

While the legal system focuses on individual cases, legal decisions take place in a larger social and organizational context. Advances in community and developmental psychology have fostered the application of a systems approach to the study of psycholegal concepts (Roesch, 1988, 1995). Using a systems framework (e.g., Bronfenbrenner, 1979), the legal system can be analyzed in terms of the assumptions about development ("developmental frameworks") that shape policy and practice regarding children's involvement. Assumptions include implicit or explicit developmental frameworks for understanding children's capacities, and children's actual behavior or performance in legal settings.

Some of the explicit assumptions are the guiding philosophies that are clearly stated but ill-defined, such as *parens patriae* or "best interests of the child" (Repucci & Crosby, 1993). Though these doctrines serve as the foundation for legal decision making, their definition and implications are unclear. The implicit assumptions can also guide the policies and practices of children's involvement. For example, the importance of age in judicial perceptions of children's expression of custody preferences indicates that judges may have a developmental framework of children's capacities and abilities (Scott et al., 1988). Crosby (1996) and Cashmore and Bussey (1996) take an important step toward identifying the variations in beliefs among judges, mental health professionals, and attorneys. Age specifications in statutes also may represent implicit developmental frameworks.

The identification of developmental assumptions is also useful in identifying the issues and forces underlying trends in the changing legal roles of juveniles. Statutory restrictions on the age at which juvenile offenders can and/or must face adultlike punishment in criminal court may reflect developmental frameworks. These legislative changes are based in part on concerns for public safety, but they also represent changing views on how "adultlike" certain juvenile offenders are. Grisso (1996) examines current legal trends toward retributive responses to violent juveniles, particularly those who commit homicide. His approach moves a step back from investigating the implementation of retributive policies to question the fundamental premise that some juveniles *merit* a retributive response. He uses existing research to examine potential challenges to the increase in retribution and identifies a number of areas in which further applied research is critically needed.

The integration of psychological research with legal practice requires clarity in the operationalization of legal policies and procedures. Developmental differences and similarities can have implications for legal constructs such as competence (can children make legal decisions?), responsibility (do children choose or cause their behavior?), and accountability (does wrongful behavior merit punishment?). Clarity in operationalizing legal standards may be difficult to achieve because the legal system itself often is unclear regarding juvenile standards. For example, competency to stand trial is emerging as an important legal standard that is being extended to juveniles (Grisso, Miller, & Saks, 1987). It is unclear whether the components of competency for adults are appropriate for juveniles (see, e.g., *In re W.A.F.*, 1990; *State v. Kaempf*, 1979) or if juvenile competency, because of ongoing developmental processes, may have additional components. Likewise, transfer statute criteria are often vague descriptions of psychosocial constructs. Terms like "amenability to treatment" and "emotional maturity" are two examples of criteria that rarely have been defined, much less empirically investigated in legal contexts.

CONCLUSION

The legal basis for the juvenile court resides in the *parens patriae* power of the state as legal guardian of the community and those citizens who are not competent to care for themselves. Throughout its history, the juvenile court has based its *parens patriae* power on assumptions about children's capacity, as has the law on allowing children to testify in court. Currently, the issue of children's capacity has taken on increased importance as society tries to combat child maltreatment and juvenile violence. Research on children's capacities is urgently needed to inform the law about the conditions under which young children can testify (either in juvenile or adult court) against their alleged abuser and on the circumstances under which a juvenile can be held to adult standards of criminal responsibility. This urgency cannot be overstated, given the accelerating trend toward transferring even young children for trial and sentencing in adult court, based on assumptions that they have the capacity to be responsible for their conduct.

It has been said that the law is "policy analysis without benefit of data" (Saks, 1989, p. 1110), but contextually relevant research on children's capacities in specific

legal contexts has the potential to help change this state of affairs. Even though the relationship between psychology and law may be a "highly neurotic, conflict-ridden ambivalent affair" (Bersoff, 1986, p. 155), developmental/community psychologists can have an impact on law and policy. To do this, however, they must conduct ecologically valid research designed to address relevant and specific legal questions and become familiar with current legal issues and the policy questions that are likely to arise. Bersoff and Glass (1995) state the challenge well:

Social scientists play on a legal ball field. Their work is evaluated according to the rules the legal system lays down But, it is hoped that social scientists will continue to develop situation-specific, ecologically valid, legally relevant, objective data that, despite resistance, will help the Supreme Court, as well as others who make social policy, to arrive at empirically justified decisions that match the real world. (p. 302)

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