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# Underage Drinking: Does Current Policy Make Sense?

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## UNDERAGE DRINKING: DOES CURRENT POLICY MAKE SENSE?

by  
Judith G. McMullen\*

*This Article examines the history of laws and policies regulating consumption of alcoholic beverages by young people in the United States, and examines youth drinking patterns that have emerged over time. Currently, all 50 states have a minimum drinking age of 21. Various rationales are offered for the 21 drinking age, such as the claim that earlier drinking hinders cognitive functions and the claim that earlier drinking increases the lifetime risk of becoming an alcoholic. While there is sufficient evidence to support the claim that it would be better for adolescents and young adults if they did not drink prior to age 21, research shows that vast numbers of underage persons consume alcoholic beverages, often in large quantities. The Article discusses the question of why underage drinking laws have not been able to effectively stop underage drinking.*

*Normally, discussions of underage drinking focus on persons under age 21 as one group. This Article breaks underage drinkers into two groups: minors (drinkers under the age of 18) and young adults (drinkers between the ages of 18 and 21). The Article goes on to separately analyze the two groups' drinking patterns and reasons for drinking. The Article concludes that prohibitions on drinking by minors could be made more effective because restrictions on activities by minors are expected and normally honored by parents, law, and society. The Article also concludes, however, that the enforcement of a drinking prohibition for young adults between the ages of 18 and 21 is doomed to remain largely ineffective because the drinking ban is wholly inconsistent with other legal policies aimed at that age group. The Article discusses three areas (health care decisions, educational decisions, and smoking) where persons over the age of 18 have virtually unfettered personal discretion, and applies the reasoning of those situations to the decision about whether to consume alcoholic beverages. The Article also compares the total drinking ban for young adults with the graduated privilege policies applied to drivers' licensing. The Article concludes that the total prohibition of alcohol consumption for young adults is inconsistent with other policies affecting young adults, and this inconsistency, coupled with harms that may come from the 21 drinking age, make the current policies*

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*ineffective and ill-advised for young adults between the ages of 18 and 21.*

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## I. INTRODUCTION

On the surface, youth alcohol policy is simple and straightforward: the legal age for alcohol consumption is 21 in all states, and drinking before then is illegal. As it happens, though, these laws are not terribly effective. Huge numbers of youngsters age 12 and up (and probably younger) consume alcoholic beverages, despite the law.<sup>1</sup> The numbers of underage drinkers skyrocket once kids are over 18, and college campuses are known hotbeds of underage consumption.<sup>2</sup> According to researchers, large numbers of young people drink alcohol, many heavily, before they attain the legal drinking age.<sup>3</sup>

This Article addresses the question of why underage drinking laws have not been able to effectively stop underage drinking. It examines some of the classic reasons: ambivalence among adults as to the law, feelings of entitlement by young people, and glorification of alcohol consumption by society as a whole. The Article argues that alcohol consumption by adolescents under the age of 18 could be reduced by stricter and more consistent enforcement. However, the Article goes on to conclude that the prohibition of alcohol consumption cannot ever be effective for the 18 to 21 year old cohort, because

<sup>1</sup> See, e.g., NAT'L RES. COUNCIL INST. OF MED., REDUCING UNDERAGE DRINKING: A COLLECTIVE RESPONSIBILITY 35–57 (Richard J. Bonnie & Mary Ellen O'Connell eds., 2004).

<sup>2</sup> *Id.* at 43–48.

<sup>3</sup> *Id.* at 40–42.

it is wholly inconsistent with other legal policies aimed at that age group. Further, the Article argues that outlawing alcohol consumption for young adults<sup>4</sup> may cause harm because the policy may encourage unhealthy alcohol consumption patterns in young adults, and it carries the risk of engendering a lack of respect for the law in general.

Underage drinking laws need to be assessed in two parts. One policy is the prohibition of alcohol consumption for minors, i.e. persons under the age of 18. The second policy is prohibition of alcohol consumption for persons between the ages of 18 and 21. While similar justifications are offered for the restrictions on each of these groups, in fact, as we shall see, there are very different factors at play in terms of parental control, societal expectations, and overall consistency with other situations where the law asserts control over individual behaviors. Most articles on youth alcohol policy address whether the current policy is a good thing. This Article concedes that it might indeed be a good thing if persons under age 21 abstained from alcohol. However, the Article goes on to discuss how the youth alcohol policy fits—or does not fit—into the patchwork of laws and policies concerning state intervention into the lives of parents and their children.

This Article argues that banning alcohol consumption for the under-18 crowd is consistent with other child protective policies advanced by state laws, largely because the law does not accord many rights of self-determination to minors. Thus, the ban could be reasonably effective if enforcement were increased—perhaps with such measures as holding parents and other adults accountable for behaviors that facilitate illegal underage drinking. However, the Article also concludes that current alcohol policy for persons over age 18 is *not* consistent with analogous policies for persons who are legally adults: e.g., the right to refuse medical treatment or the right to smoke cigarettes. In fact, the alcohol laws governing young adults seem to substitute state policies for both parental judgment and the young person's self-determination on this single issue. Thus, the Article concludes that the policy cannot ever be widely effective with this group, and creates as many problems as it solves. This is despite the inarguable fact that alcohol consumption may well be harmful to persons in this disputed age group.

First, the Article gives an overview of drinking policies in the United States, from colonial times to the present.<sup>5</sup> Second, the Article discusses the current laws and the justifications offered for them.<sup>6</sup> Next, the Article examines the effectiveness of the laws and the drinking patterns among younger underage youths (up to age 18),<sup>7</sup> and older underage youths (ages 18 to 21).<sup>8</sup> The Article compares youth drinking policies with other policies affecting young adults and argues that the practical and philosophical differences between the drinking ban

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<sup>4</sup> Throughout the Article, I will use the term “young adults” to denote persons in the 18 to 21 year-old age group.

<sup>5</sup> See *infra* Part II.

<sup>6</sup> See *infra* Part III.A–B.

<sup>7</sup> See *infra* Part III.C.

<sup>8</sup> See *infra* Part III.D.

for 18 to 21 year-olds and other legal policies affecting that age group make the alcohol ban for young adults largely unenforceable.<sup>9</sup> The Article also discusses problems arguably caused by the prohibition of alcohol use by young adults and examines whether the drinking age law might have significant value despite its unenforceability.<sup>10</sup> Finally, the Article suggests that alcohol use by 18 to 21 year olds might be more appropriately addressed in a manner analogous to drivers' licensing policies for young drivers: by providing a combination of alcohol education and supervision to young adults who choose to drink.

## II. HISTORY OF YOUTH ALCOHOL POLICIES IN THE UNITED STATES

Throughout the seventeenth and most of the eighteenth centuries, adults and children alike regularly consumed alcohol.<sup>11</sup>

[E]veryone was expected to consume alcoholic beverages as dietary staples, and overindulgence was tolerated at weddings, funerals, militia musters, and on holidays. Women drank in the home; men drank more frequently and more copiously at home, in the fields or the shop, and at taverns and during public events such as elections; solicitous parents shared beer with children at meals and encouraged boys to develop a taste for distilled spirits.<sup>12</sup>

Seventeenth and eighteenth century Americans considered alcohol to be healthful.<sup>13</sup> It was also relatively cheap (compared to coffee and tea) and clean (compared to the brackish, bad-tasting water that was frequently available).<sup>14</sup> However, consumption of alcohol increased steadily throughout the eighteenth century, and by the early nineteenth century, a host of temperance associations had arisen to oppose alcohol consumption.<sup>15</sup> Originally, the temperance movement, as exemplified by popular minister Dr. Benjamin Rush, focused on avoidance of distilled spirits and allowed moderate consumption of beer and wine, but it evolved to advocacy of total abstinence from any alcohol.<sup>16</sup>

While some of the roots of the temperance movement were in parallel to social developments that are beyond the scope of this Article,<sup>17</sup> there is no doubt that part of the backlash against alcohol consumption was a reaction to

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<sup>9</sup> See *infra* Part IV.

<sup>10</sup> See *infra* Part V.

<sup>11</sup> THOMAS R. PEGRAM, *BATTLING DEMON RUM: THE STRUGGLE FOR A DRY AMERICA, 1800-1933* 7-10 (1998).

<sup>12</sup> *Id.* at 7-8.

<sup>13</sup> *Id.* at 9.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 13-42.

<sup>16</sup> MARK EDWARD LENDER & JAMES KIRBY MARTIN, *DRINKING IN AMERICA: A HISTORY* 68-74 (1987).

<sup>17</sup> See generally PEGRAM, *supra* note 11. To cite one example, Pegram notes: "The upsurge in the popularity of temperance reform was deeply influenced by the spirit, message, and methods of the Second Great Awakening, a series of religious revivals that swept through the United States between 1795 and 1837." PEGRAM, *supra* note 11, at 17.

the dire consequences of over-consumption: “Visions of progress for families as well as fears of violence and poverty at the hands of drunken husbands inspired many women to undertake temperance activism.”<sup>18</sup> These policies typically addressed regulation of drinking generally, but some specifically regulated sale or consumption of alcohol by minors.<sup>19</sup>

The temperance movement continued throughout the nineteenth and into the twentieth century. Beginning around 1890, Progressive Era reformers addressed problems associated with alcohol along with other social problems.<sup>20</sup> At this point, the “child savers” among the Progressive Reformers became concerned about routine exposure of young children to the harms now associated with alcohol:

The progressive belief in the powerful influence of the environment on children raised further concern. It was commonplace in turn-of-the-century American cities for children to collect pails at factory gates, fill them with beer at saloons, and bring them to lurching workmen, a practice known as “rushing the growler.” Such early and continued exposure to the culture of drinking, to say nothing of the easy access to intoxicating drinks, disturbed the “child savers” of the Progressive Era, especially settlement residents such as Jane Addams and a growing corps of social workers who were determined to improve conditions in urban neighborhoods.<sup>21</sup>

The early twentieth century brought with it Prohibition (the 18th Amendment).<sup>22</sup> Prohibition was aimed at eliminating the culture of drinking, particularly male drinking, and was not aimed specifically at youth drinking. Although Prohibition lasted only a few years, it did indeed change American drinking habits. Obviously, the clandestine drinking that occurred while Prohibition was in force could not occur in saloons, as was previously common. However, the secretive drinking that did take place had another new element: men and women imbibed together.<sup>23</sup> Previously, it was considered indecent for men to drink in the presence of women. But, “[d]rinking at dances, with women, and to excess had become, by the latter twenties, a new code of permissible behavior among college students because it was sanctioned by peer opinion.”<sup>24</sup> When Prohibition finally ended, and individual states resumed regulation of alcohol consumption, this new pattern continued.<sup>25</sup>

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<sup>18</sup> PEGRAM, *supra* note 11, at 17.

<sup>19</sup> Scott J. Shelley, *Border Crossing, Club Hopping, and Underage “Possession” of Alcohol: An Analysis of the Law Enforcement Response to the Problem of Cross-Border Underage Drinking in Southern Arizona*, 43 ARIZ. L. REV. 709, 709 (2001).

<sup>20</sup> PEGRAM, *supra* note 11, at 86.

<sup>21</sup> PEGRAM, *supra* note 11, at 90.

<sup>22</sup> U.S. CONST. amend. XVIII, *repealed* by U.S. CONST. amend. XXI.

<sup>23</sup> PEGRAM, *supra* note 11, at 176.

<sup>24</sup> PAULA S. FASS, *THE DAMNED AND THE BEAUTIFUL: AMERICAN YOUTH IN THE 1920’S* 317 (1977).

<sup>25</sup> PEGRAM, *supra* note 11, at 186–87.

Although male and female college students drank together from the 1920s on, the patterns of drinking were apparently different from those of today. A 1949 study by Robert Straus and Selden Bacon of Yale University found that at that time 17% of men and 6% of women admitted to drinking more than once a week, compared to 26% of men and 21% of women today.<sup>26</sup> When asked about the main changes in college student drinking patterns since 1949, Robert Straus identified three significant differences:

First, the women have caught up with the men . . . . Second, it's pretty obvious that the numbers of students drinking in larger amounts have gone up significantly for men, and even more so for women. Third, the reasons for drinking have changed. The percent of students who say they drink to get drunk is way up. We had very few in 1950.<sup>27</sup>

After Prohibition ended, health concerns, as well as the moral issues involved in drinking, led states to restrict the access of young people to alcoholic beverages. The actual state regulations varied somewhat. For example, although most states had a minimum drinking age of 21, New York had a minimum drinking age of 18.<sup>28</sup> These variations continued for several decades, with a trend occurring in the 1970s whereby a greater number of states reduced the drinking age to 18.<sup>29</sup> Federal legislation in the 1980s resulted in all fifty states increasing the drinking age to 21, which remains the state of affairs as of this writing.<sup>30</sup> Proponents of this shift argue that it has significantly decreased the number of traffic deaths among young people.<sup>31</sup>

Looking at the history of youthful imbibing in this country, it is clear that by 1800 there was already a significant split in popular opinion about an appropriate youth alcohol policy. Of course, much of the opinion split can be attributed to differing opinions about the morality or desirability of alcohol consumption in general.

On the one hand, those favoring prohibition of alcohol sales and consumption claimed that imbibing showed moral weakness and led to crime, economic loss, family violence, and health problems. For example, shortly before Prohibition, the American Medical Association condemned alcoholic

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<sup>26</sup> HENRY WECHSLER & BERNICE WUETHRICH, DYING TO DRINK: CONFRONTING BINGE DRINKING ON COLLEGE CAMPUSES 29 (2002). Straus and Bacon surveyed more than six thousand students on twenty-seven campuses. *Id.* at 28.

<sup>27</sup> *Id.* at 28–29.

<sup>28</sup> Michael P. Rosenthal, *The Minimum Drinking Age for Young People: An Observation*, 92 DICK. L. REV. 649, 652 (1988).

<sup>29</sup> ROBERT H. MNOOKIN & D. KELLY WEISBERG, CHILD, FAMILY, AND STATE: PROBLEMS AND MATERIALS ON CHILDREN AND THE LAW 662 (5th ed. 2005). Lowering the drinking age was one response to the 26th Amendment, which lowered the federal voting age to 18. *Id.*

<sup>30</sup> Joseph H. Brown, *Feds Demand Under-21 Prohibition*, TAMPA TRIBUNE, June 10, 2001, at 6.

<sup>31</sup> See MNOOKIN & WEISBERG, *supra* note 29, at 671–72 (citing studies showing reductions in fatal car crashes among drivers under age 21 after the minimum drinking age was raised. However, this conclusion is somewhat controversial because some researchers claim that the deaths are just shifted to an older age group.).

beverages, relying on insurance industry actuarial studies showing that drinkers had significantly higher mortality rates than abstainers.<sup>32</sup>

On the other hand, those favoring legal alcohol sales and consumption argued that moderate consumption was harmless, if not beneficial, to health and that social events involving alcohol were pleasant and desirable.<sup>33</sup> Moreover, as Prohibition became a legal reality, many of its opponents argued that the widespread lack of enforcement and failure to effectively eliminate alcohol consumption actually engendered in young people a lack of respect for the law.<sup>34</sup> Certainly, young people flouted the law. Two out of every three students on college campuses consumed alcoholic beverages during Prohibition, according to polls.<sup>35</sup> Indeed, “[f]or some, carrying hip flasks and engaging in the occasional display of public drunkenness reflected the ‘smart,’ cosmopolitan outlook one found in the irreverent films of the period.”<sup>36</sup> Moreover, “elders often preached control rather than abstinence. In a 1931 magazine article, one woman expressed the wish that her grandsons ‘know the difference between drinking like gentlemen and lapping it up like puppies.’”<sup>37</sup> By the 1920s, some student editors of college papers asserted that not only did Prohibition act as a stimulus—rather than a deterrent—to student drinking, it also engendered contempt for law.<sup>38</sup>

Long after Prohibition, alcohol consumption by minors periodically resurfaced as a subject for public debate. In the Vietnam War climate of the 1970s, when many states made alcohol consumption legal for youths of 18 or 19, it was argued that if a young person is old enough to give his life for his country, he should be considered old enough to choose to drink.<sup>39</sup> A decade later, armed with traffic fatality statistics, opponents of youthful drinking launched a successful campaign to pass federal legislation that essentially forced the individual states to raise the drinking age to 21.<sup>40</sup> Currently, perhaps because of the large numbers of young people in military service in Iraq and Afghanistan, the debate has resurfaced.<sup>41</sup>

As we stand at the dawn of the twenty-first century, it appears that large numbers of people under age 21 continue to drink, and many of them binge drink in ever-increasing amounts.<sup>42</sup> Haunted by the specter of deaths from

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<sup>32</sup> PEGRAM, *supra* note 11, at 89.

<sup>33</sup> PEGRAM, *supra* note 11, at 175–76.

<sup>34</sup> PEGRAM, *supra* note 11, at 178 (attributing this view to Pauline Sabin, a prominent woman who worked for the repeal of Prohibition in the 1930s).

<sup>35</sup> *Id.* at 176.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 177.

<sup>38</sup> FASS, *supra* note 24, at 320–23.

<sup>39</sup> WECHSLER & WUETHRICH, *supra* note 26, at 30.

<sup>40</sup> This occurred in 1986, during the Reagan administration, when federal law forced states to comply with the 21 mandate, or risk losing federal highway funds. Brown, *supra* note 30.

<sup>41</sup> See, e.g., James Fuller, *21 It's the Law. But is It Fair?*, CHI. DAILY HERALD, July 17, 2005, at 1.

<sup>42</sup> See *infra* Part III.C–D.



alcohol poisoning or traffic accidents, some argue that the emphasis should be on learning moderate and responsible drinking.<sup>43</sup> Others, citing the same traffic accidents, as well as research that seems to show that alcohol may be more harmful to teenagers than it is to adults, argue that abstinence should be the goal and that stricter enforcement against youth and adults alike is the answer.<sup>44</sup> Meanwhile, 21 remains the legal drinking age, and people younger than that continue to consume alcohol, often to excess. The next Part will discuss current laws and the policies behind them, and will discuss whether these laws have effectively achieved their goals.

### III. ASSESSING CURRENT POLICIES AND PATTERNS

#### A. Structure of Current Laws

Currently, all fifty states have a minimum legal drinking age of 21.<sup>45</sup> Enforcement is aimed at both underage drinkers and their suppliers. Underage drinkers may be penalized with municipal or state citations or drivers' license suspensions.<sup>46</sup> Parents or other individual adults who supply alcohol to underage persons may be held criminally responsible, which might result in assessment of a fine or a jail sentence, although several states do not impose these penalties on parents who are serving alcoholic beverages to their *own* children.<sup>47</sup> Adults who provide alcohol to minors may also be exposed to civil liability in the event of harm caused by the underage drinker.<sup>48</sup> Bar owners or storeowners may be hit with fines or may lose their liquor licenses.<sup>49</sup> Penalties

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<sup>43</sup> See, e.g., Ruth C. Eng, Editorial, *The Drinking Age Debate; Current Approach to Controlling Underage Drinking Isn't Working*, ROCKY MOUNTAIN NEWS, May 10, 1998, at 1B.

<sup>44</sup> See generally NAT'L RES. COUNCIL INST. OF MED., *supra* note 1.

<sup>45</sup> Shelley, *supra* note 19, at 709.

<sup>46</sup> See, e.g., MNOOKIN & WEISBERG, *supra* note 29, at 663; WIS. STAT. § 125.07(4) (2004).

<sup>47</sup> One Maryland father was charged with maintaining a disorderly house, "a misdemeanor subject to a fine of up to \$300 or a maximum jail sentence of six months." Other possible charges include "contributing to the delinquency of a minor" and "drinking in prohibited places." Veronica T. Jennings, *Md. Parents Cited in Teen Drinking Crackdown*, WASH. POST, June 14, 1988, at B1. Some states impose criminal liability on persons who provide alcohol to minors, where the minor later dies or suffers bodily harm as a consequence of the drinking. See, e.g., WIS. STAT. § 125.075 (2004). However, some states, such as Wisconsin and Texas, allow drinking in the presence of a minor's own parent. MNOOKIN & WEISBERG, *supra* note 29, at 664.

<sup>48</sup> See, e.g., WIS. STAT. § 125.035 (2004); *Congini v. Portersville Valve Co.*, 470 A.2d 515 (Pa. 1983) (holding that guardian had a cause of action against the minor ward's employer where the employer served alcohol at a party, minor became drunk, drove away from the party with the knowledge of employer's agent, and the minor was subsequently injured in an automobile accident.). *But see* *Charles v. Seigfried*, 651 N.E.2d 154, 165 (Ill. 1995) (holding that there is no common law right of action against social hosts who serve alcohol to minors).

<sup>49</sup> See, e.g., MNOOKIN & WEISBERG, *supra* note 29, at 663-64; WIS. STAT. § 125.07.

for underage driving while under the influence are effectively more severe for young adults than for adults over the age of 21, because the offense is typically committed if the young driver has *any* detectable alcohol in her blood.<sup>50</sup>

### B. Policy Objectives

There are two stated justifications for enforcing a minimum drinking age: protection of young people, and protection of society. Numerous studies and statistics are offered to support each justification.

The first argument, that a 21 drinking age protects young people from harm, is supported by recent research that suggests alcohol can have an especially detrimental effect on the developing brain. The American Medical Association released a report in 2002 stating that drinking by adolescents and young adults could result in long-term brain damage, including diminishment of memory, reasoning, and learning abilities.<sup>51</sup> Experts think that memory and learning impairment is worse in adolescents, who may experience adverse effects after consuming only half as much alcohol as adults.<sup>52</sup> Human research at the University of Pittsburgh showed that heavy-drinking girls between the ages of 14 and 21 had smaller hippocampi than girls of the same age who were non-drinkers.<sup>53</sup> Admittedly, this research does not prove whether it is the heavy drinking that causes changes in the hippocampus, or the reduced size of the hippocampus that causes the urge to engage in heavy drinking.<sup>54</sup> Moreover, teenage hormonal changes, eating habits, or abuse of other substances like marijuana could also be causes of learning and memory impairment.<sup>55</sup> However, research with rats has shown similar bad effects from alcohol consumption on the rodents' learning and memory, even extending into adulthood.<sup>56</sup>

In addition, some researchers contend that alcohol abuse in the teenage years is more likely to lead to alcohol dependence later in life than if the drinking had begun at a later age. A study released in 1998 by the National Institute of Alcohol Abuse and Alcoholism concluded that “[c]hildren who

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<sup>50</sup> See JAMES H. HEDLUND & ANNE T. MCCARTT, DRUNK DRIVING: SEEKING ADDITIONAL SOLUTIONS 8 (2002), available at <http://www.aaafoundation.org/pdf/DrunkDriving-SeekingAdditionalSolutions.pdf> (last visited Mar. 8, 2006).

<sup>51</sup> Michael Stroh, *Younger Drinkers Risk Damaging Brain Cells*, BALTIMORE SUN, Dec. 10, 2002, at 1A.

<sup>52</sup> Joseph A. Califano, Jr., Editorial, *Don't Make Teen Drinking Easier*, WASH. POST, May 11, 2003, at B7.

<sup>53</sup> Stroh, *supra* note 51. The hippocampus is a part of the brain involved in memory and learning.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*; Kathleen Fackelmann, *Teen Drinking, Thinking Don't Mix; Alcohol Appears to Damage Young Brains, Early Research Finds*, USA TODAY, Oct. 18, 2000, at 1D (citing Aaron M. White et al., *Binge Pattern Ethanol Exposure in Adolescent and Adult Rats: Differential Impact on Subsequent Responsiveness to Ethanol*, 24 ALCOHOLISM: CLINICAL & EXPERIMENTAL RES. 1251 (2000)).

begin drinking regularly by age 13 are more than four times as likely to become alcoholics as those who delay consuming alcohol until age 21 or older . . . .<sup>57</sup>

The study found that children who started drinking regularly at age 13 faced a 47% lifetime risk of becoming an alcoholic, compared with a 25% risk for youth who began drinking at age 17, and a 10% risk for people who began drinking at age 21.<sup>58</sup> However, it is not clear why some children are prone to such early and heavy drinking and others are not. It may be, for example, that children who begin drinking heavily at age 13 do so because of some biological characteristic that also causes them to have more of a lifetime risk for alcoholism.<sup>59</sup> In other words, rather than the early drinking causing the later alcoholism, it may be a symptom of the existing vulnerability to alcoholism.

It is also claimed that withholding drinking privileges until a later age protects young people by reducing the number of fatal automobile accidents involving teenagers. Indeed, “[t]he National Highway Traffic Safety Administration estimates that since the ‘70s, the age-21 policy has saved 20,970 teenage lives from serious car crashes alone.”<sup>60</sup> For example, “[i]n 1982, a study by the National Highway Traffic Safety Administration found that 5,380 persons between the ages of 15 and 20 had died in drunken driving accidents that year . . . . [By 1995] the number had been reduced to 2,206 nationwide . . . .”<sup>61</sup> However, drunk driving enforcement in general has been taken more seriously since the drinking age was changed, and this might also account for some of the improvement.<sup>62</sup>

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<sup>57</sup> Sally Squires, *Early Drinking Said to Increase Alcoholism Risk*, WASH. POST, Jan. 20, 1998, at Z7 (These findings “are drawn from the National Longitudinal Alcohol Epidemiologic Survey, a national sample that included face-to-face interviews with nearly 28,000 current and former drinkers aged 18 years and older.”).

<sup>58</sup> *Id.* However, there were some gender and racial variations in these risk statistics: “Early drinking is especially risky for boys. Those who began drinking by age 13 had a 50 percent lifetime risk of alcoholism. For girls, the risk was 43 percent for those who began drinking at age 13. Among blacks, those who were drinking alcohol at age 13 had a 44 percent lifetime risk of alcoholism, while nonblack children the same age had a 48 percent lifetime risk.” *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> Alexander Wagenaar, Letter to the Editor, *Teenage Drinking: Rites and Wrongs*, WASH. POST, May 9, 2003, at A34.

<sup>61</sup> Kevin Cullen & Karen Avenoso, *Deaths Show Backsliding on Alcohol; Teen-age Drinking May Undo Progress*, BOSTON GLOBE, Aug. 6, 1996, at B1.

<sup>62</sup> See HEDLUND & MCCARTT, *supra* note 50, at 7–9 (citing several examples of improved public awareness and enforcement of drunk driving laws throughout the 1980s and 1990s, including mandatory driver’s license suspension, mandatory jail time, administrative license revocation, widely used breath test equipment, training in field sobriety testing, sobriety checkpoints, special drunk driving saturation patrols, zero tolerance for youth, and lowering of BAC limits to 0.08 by many states). See also Glen Martin, *Holiday Sees Rise in DUI Arrests; 3,000 Officers Join Effort to Prevent Highway Deaths*, S.F. CHRON., May 31, 2005, at B1 (California Highway Patrol Officer Mike Wright said, “Each year we’ve been able to throw more and more resources at the problem, so we’re getting more and more arrests . . . . Bigger is better. We have more people looking for drunks, so we’re catching more drunks.”).

The second argument, that a 21 drinking age protects society from the bad effects of underage drinking, is partly supported by data on traffic fatalities that could be caused by young drunk drivers.<sup>63</sup> In addition, there is another claimed benefit to society in banning underage drinking: the possible reduction of crime perpetrated by persons under age 21. Alcohol has been shown to be a major contributing factor in teen deaths from accidents, homicide, and suicide, and it has also been shown to increase the chances of juvenile delinquency and crime.<sup>64</sup> Alcohol abuse appears to increase the likelihood that young people will engage in unprotected sex or acquaintance rape, suicide, and other violent behavior.<sup>65</sup> Of course, alcohol is a known inhibition-reducer and is implicated in crimes for all age groups.<sup>66</sup> Moreover, both the drinking and other problem behaviors may be caused by the general turmoil of adolescence, which is characterized by impulsiveness, sensation seeking, and unconventionality.<sup>67</sup>

There is no doubt that a significant number of young people consume alcohol in violation of the minimum age laws. While state laws outlaw alcohol purchase and consumption for all persons under age 21, there are in fact two distinct groups of underage drinkers who present different issues. First of all are the minors (high school and younger drinkers), and second are the young adults or college age drinkers.<sup>68</sup>

### C. Underage Drinking by Minors

Studies show that a significant minority of high school students consume alcohol on a regular basis: “According to 2002 Monitoring the Future (MTF) data, almost half (48.6 percent) of twelfth graders reported recent (within the past 30 days) alcohol use.”<sup>69</sup> Although younger teens report lower incidences of alcohol use, “NHSDA<sup>70</sup> data indicate that the average age of self-reported first use of alcohol among individuals of all ages reporting any alcohol use

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<sup>63</sup> Cullen & Avenoso, *supra* note 61.

<sup>64</sup> Califano, Jr., *supra* note 52.

<sup>65</sup> Cullen & Avenoso, *supra* note 61.

<sup>66</sup> Nat’l Council on Alcoholism and Drug Dependence, FYI: Alcohol & Crime, <http://www.ncadd.org/facts/fyicrime.html> (last visited Mar. 8, 2006).

<sup>67</sup> Nat’l Inst. on Alcohol Abuse and Alcoholism, *Youth Drinking: Risk Factors and Consequences*, ALCOHOL ALERT NO. 37, July 1997, available at <http://pubs.niaaa.nih.gov/publications/aa37.htm> (last visited Mar. 8, 2006).

<sup>68</sup> I am using the terms “college age” and “young adult” to refer to persons between the ages of 18 and 21. Of course, some kids are only 17 when they enter college, many young people in that age group do not attend college, and many people attending colleges and universities are over age 21. However, many studies and discussions of underage drinking concern college students and refer to drinking patterns among persons of “college age,” perhaps because there is a significant drinking culture on many college campuses.

<sup>69</sup> NAT’L RES. COUNCIL INST. OF MED., *supra* note 1, at 35.

<sup>70</sup> See *id.* at 36 (now called the National Survey on Drug Use and Health).

decreased from 17.6 years to 15.9 years between 1965 and 1999.”<sup>71</sup> Moreover, underage drinkers are more likely than adults to be heavy drinkers.<sup>72</sup>

Even for those minors who are not regular drinkers, certain rites of passage such as school dances, proms, and graduation can be the occasion of much alcoholic excess. A notorious incident that occurred in Scarsdale, New York in 2002 provides an excellent example of the dynamics. In the fall of 2002, The New York Times reported that the prestigious Scarsdale High School homecoming dance and pre-dance parties included widespread binge drinking “which left scores of students falling-down drunk, 27 with three-day school suspensions and five hospitalized with acute alcohol poisoning . . . .”<sup>73</sup> When the principal arrived at the dance shortly after its 8 pm start, he “found perhaps a third of the 600 students there in a stupor from drinking screwdrivers they had mixed at various homes. They had used vodka sneaked from their parents['] liquor cabinets and disguised in Poland Spring water bottles.”<sup>74</sup>

While major high school events have precipitated underage drinking for generations, the New York Times cited differences noted by education and mental health experts. First, “[t]he drinking starts younger . . . . The quantity and speed of alcohol consumption are dangerously high and the goal seems to be total oblivion.”<sup>75</sup> Second, certain psychological factors are different: baby boomer parents are less likely to be seen as authority figures by their children, and the children in upscale communities are in a super-competitive atmosphere with “enormous pressure to succeed.”<sup>76</sup> If they don’t meet parental expectations, they may drown their sorrows in drugs or alcohol. Finally, “[e]ducators and mental health professionals also say that affluence breeds a sense of entitlement in children. ‘They’re told from the time they’re young that they’re the prize of the community . . . . The conclusion an adolescent may draw is: ‘I’m special. I get to do what I want.’”<sup>77</sup>

The Scarsdale incident also illustrates another phenomenon that has become common: placing much of the blame for underage drinking on adults, especially parents. According to Geraldine Greene, executive director of the Scarsdale Family Counseling Service, underage drinking is “an adult failure. In every case, an adult has let a child down. Somewhere along the way they haven’t exercised due care.”<sup>78</sup> Although Greene’s comments could be directed at a large variety of adults, including parents, vendors, and teachers, she is most critical of affluent parents who she feels do not take enough time to raise their

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<sup>71</sup> *Id.* at 38.

<sup>72</sup> *Id.* at 39 (This was true even among the 7% of 12–14-year-olds who reported drinking at all. “With increasing age, more youth drink and more drinkers are heavy drinkers.”).

<sup>73</sup> Jane Gross, *Teenagers’ Binge Leads Scarsdale to Painful Self-Reflection*, N.Y. TIMES, Oct. 8, 2002, at B1.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

teenagers properly.<sup>79</sup> Adolescent psychologist Dr. Alan Tepp said that while parents hold their adolescents to ever-higher achievement standards, “at the same time, we’re putting less restraint on them, watching them less. We push them, and then allow them out.”<sup>80</sup>

Studies provide some support for these opinions. Large amounts of time free from adult supervision, including after-school time without parent contact, has been related to higher alcohol consumption among teens.<sup>81</sup> “‘Hanging out’ with friends in unstructured, unsupervised contexts is generally related to negative outcomes, while spending time with others in adult-sanctioned, structured contexts is generally related to positive outcomes.”<sup>82</sup>

There is, of course, a more direct way in which parents can be responsible for youth drinking: they may provide the liquor consumed by high school aged children. Some parents take the position that kids will drink anyway, and if the parents allow supervised drinking at home parties, this will reduce more dangerous binge drinking or drinking in cars, followed by driving while intoxicated.<sup>83</sup> For example, a 17-year-old graduate of Scarsdale High School said, “I know one of my friend’s parents said, ‘If you’re staying in the house, then I don’t have a problem with you drinking.’ That’s kind of promoting it . . . .”<sup>84</sup> Indeed, “having parents who sanction alcohol use (even in ‘controlled’ settings) is related to heavier drinking among adolescents.”<sup>85</sup> A Westchester County District Attorney commented that the “number of kids getting drunk at home is on the increase, as is the frequency of alcohol being provided by an adult or older sibling . . . .”<sup>86</sup>

Herein lies part of the enforcement problem: some parents think drinking is a normal rite of passage for teenagers; others believe in zero-tolerance. A Scarsdale police detective, firmly in the latter camp, said, “Parents should send a clear message to their kids that this behavior will not be condoned . . . .”<sup>87</sup>

Yet even parents who might be willing to crack down are not always convinced that it will work. A principal in Chappaqua, New York quoted a parent who told him that “setting earlier curfews just makes the kids drink faster.”<sup>88</sup> He added that since many parents feel powerless to stop their kids from drinking, they have adopted the view that “until society solves the problem, I want my kids alive.”<sup>89</sup>

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<sup>79</sup> *Id.*

<sup>80</sup> *Scarsdale School Suspends 28 Students for Drunkenness*, N.Y. TIMES, Sept. 27, 2002, at B6.

<sup>81</sup> NAT’L RES. COUNCIL INST. OF MED., *supra* note 1, at 82.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> Elizabeth Nesoff, *A Prim Suburb Rallies to Curb Teen Drinking*, CHRISTIAN SCI. MONITOR, July 22, 2003, at 2.

<sup>85</sup> NAT’L RES. COUNCIL INST. OF MED., *supra* note 1, at 82.

<sup>86</sup> Corey Kilgannon, *Drinking Young*, N.Y. TIMES, Oct. 27, 2002, at WE1.

<sup>87</sup> Nesoff, *supra* note 84.

<sup>88</sup> Kilgannon, *supra* note 86.

<sup>89</sup> *Id.*

There are a number of different issues jumbled together here. First, we must consider whether it is reasonable for the state to prevent children under the age of 18 from consuming alcohol. Second, we must address whether we have consensus on this issue in this society. Finally, we must assess the reasonableness of the notion that parents can in large degree control the drinking behavior of their offspring.

Ever since *Prince v. Massachusetts*<sup>90</sup> upheld the state's right to protect a young Jehovah's Witness from the dangers of street preaching, it has been clear that a state can adopt reasonable policies to protect children, even over the heartfelt objections of their parents.<sup>91</sup> Unlike *Prince*, challenges to a state's protective alcohol policy do not rest on First Amendment free exercise claims; at best they depend upon arguments that reasonable parents might exercise their prerogative in favor of allowing their children to engage in moderate social drinking. A state's purposes of preventing traffic accidents, crime, and potential damage to a young imbiber's health or cognitive function would clearly survive any constitutional claim of infringement on parental authority. This is especially true in those few states that allow parents to serve alcohol to their own minor children while those children are in the parent's presence.<sup>92</sup> Even the most inconclusive of the scientific studies cited in Part III.B signals enough risk of harm that a state could reasonably prohibit alcohol consumption by minors.<sup>93</sup>

As to whether we have consensus about whether the absolute ban on consumption is a good thing, the answer is that we clearly do not. While a majority may favor the ban, a significant minority either thinks that it is counterproductive, or simply ineffective. These are the folks that may either look the other way or actually provide alcohol, on the theory that kids will drink anyway, and "I would rather know where they are."<sup>94</sup> In some national surveys, many parents admit to purchasing alcohol for their teenagers, in the

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<sup>90</sup> 321 U.S. 158 (1944).

<sup>91</sup> *Prince v. Massachusetts* was an appeal from convictions for violation of Massachusetts' child labor laws by Sarah Prince, who had allowed her 9-year-old niece to offer Jehovah's Witness literature for sale one evening, shortly before 9 pm. Mrs. Prince argued that her right to religious freedom coupled with her right to raise her children as she saw fit made the enforcement of the statute unconstitutional. However, the U.S. Supreme Court upheld the statute and the convictions, stating that the State's power to protect children from the dangers of street preaching was not foreclosed by the presence of parents, who could reduce, but not eliminate, the possible dangers. The Court famously proclaimed: "Parents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves." *Id.* at 170.

<sup>92</sup> Several states allow parents to supply alcoholic beverages to their own children. See MNOOKIN & WEISBERG, *supra* note 29, at 664; WIS. STAT. § 125.07 (2004).

<sup>93</sup> See NAT'L RES. COUNCIL INST. OF MED., *supra* note 1, at 64-65; Stroh, *supra* note 51; Fackelmann, *supra* note 56.

<sup>94</sup> See NAT'L RES. COUNCIL INST. OF MED., *supra* note 1, at 82; Kilgannon, *supra* note 86.

hopes of providing a safe place for their kids to drink.<sup>95</sup> Ironically, these parents contribute to the fact that the ban is ineffective, and they make it ineffective not only for their own children, but for other people's children as well.

In fact, the combination of typical adolescent rebellion and readily available alcohol supplied by dissenting or indifferent adults makes it impossible for individual parents to completely control whether or not their children consume alcohol, unless the parents achieve round-the-clock supervision, amounting to lockdown, of their children.<sup>96</sup> Thus, penalizing parents for facilitating consumption, but not holding them accountable for the behavior of sneaky adolescent drinkers, makes good sense.

There are a myriad of situations where parents or the state effectively control situations involving persons under age 18. Parents are held responsible for the support and education of their minor children.<sup>97</sup> The law is generally structured to help parents in these endeavors, and to regulate parents who fall short. Thus, fit parents are generally entitled to custody of their minor children,<sup>98</sup> and deference is given to parental decisions about the incidents of that custody.<sup>99</sup> Laws that regulate minors' activities, such as truancy or curfew laws that may penalize errant children, are widely viewed as reinforcements to judicious parental controls.<sup>100</sup> Parents who stray from societal norms, such as parents who abuse their children or parents who are complicit in the truancy of their children, can be subjected to various penalties.<sup>101</sup>

Statutes and cases have attempted to strike a balance between parental prerogatives, children's rights, and societal interests in regulating minors'

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<sup>95</sup> Karina Bland, *Crackdown on Teen Keggers; Don't Buy Liquor, Parents Warned*, ARIZ. REPUBLIC, May 26, 2004, at A1.

<sup>96</sup> In another context, I have noted that advocates of such an extreme form of parental supervision are few. See Judith G. McMullen, "You Can't Make Me!": *How Expectations of Parental Control over Adolescents Influence the Law*, 35 LOY. U. CHI. L.J. 603 (2003) [hereinafter McMullen, "You Can't Make Me!"]. In his 1995 book, *Parent in Control*, author Gregory Bodenhamer advises close monitoring of difficult children and teens, including following them, accompanying them on every outing, and physically forcing or restraining actions. GREGORY BODENHAMER, PARENT IN CONTROL 102-07 (1995). I could find no other authors who advocate such an extreme hands-on approach, although most parenting experts advocate discipline, persuasion, and communication.

<sup>97</sup> See MNOOKIN & WEISBERG, *supra* note 29, at 144-46 (quoting WILLIAM BLACKSTONE, 2 COMMENTARIES \*446, \*446-51).

<sup>98</sup> See MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA 234-59 (1985) (discussing the historical evolution of parental fitness as the basis of custody).

<sup>99</sup> *Troxel v. Granville*, 530 U.S. 57, 65-66 (2000).

<sup>100</sup> See *Ginsberg v. New York*, 390 U.S. 629, 639 (1968) (stating that the "legislature could properly conclude that parents and others, teachers for example, who have this primary responsibility for children's well-being are entitled to the support of laws designed to aid discharge of that responsibility"). *Ginsberg* upheld a New York statute that restricted access of minors to sexually suggestive publications, in this case "girlie magazines." *Id.* at 631-33.

<sup>101</sup> McMullen, "You Can't Make Me!", *supra* note 96, at 622-25.



activities.<sup>102</sup> Where underage drinking is concerned, parents have an important role in restricting minors' access to alcohol.<sup>103</sup> Due to the fact that most minors live with at least one adult, greater adult consensus on the value of banning alcohol consumption by minors, as well as greater adult compliance with the laws, could combine to significantly reduce alcohol consumption by persons under age 18. Moreover, even if adolescent consumption is not reduced to zero, it could be reduced from current epidemic proportions, and abstinence from underage alcohol consumption could be internalized by minors as an important social norm.

#### *D. Underage Drinking by Young Adults*

Regulation of underage drinking becomes more problematic after a young person reaches the age of majority—usually 18—or moves away from home into a dorm or apartment. However imperfect parental supervision may have been before, it becomes nearly impossible at that time. Persons over the age of 18 are legally adults for any purpose *except* consuming alcohol. Even parents of economically dependent college students may not know whether their children are drinking, since schools have no obligation to notify parents when a young person violates underage drinking laws or school rules.<sup>104</sup>

Drinking in the 18 to 21 age group, however, is rampant. Young people in this age group who do not attend college drink less than those that do attend, but they are not teetotalers as a group.<sup>105</sup> And although not every child goes to college, these are the prime college age years for those that do, and college campuses are notorious for widespread alcohol consumption. According to one source, 44% of college students report binge drinking in the past two weeks,

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<sup>102</sup> See *Ginsberg*, 390 U.S. at 639 (The Court balanced parental prerogatives in allowing children to pornographic literature with the State's interest in limiting such access. The Court concluded that the State had an interest in restricting minor's access to sexually suggestive publications, but noted that the New York statute, which forbade the *sale* of such literature to persons under the age of 17, did not preclude a parent from allowing his own child to view such literature purchased by the parent.). See also *Wisconsin v. Yoder*, 406 U.S. 205, 214, 234 (1972) (The Court balanced the social interest in an educated citizenry with the right of parents to bring up children according to the parents' own religious beliefs. Here, the Court found that the state interest did not justify enforcing compulsory education rules requiring formal education until 16 against Amish parents whose religious convictions required them to remove their children from school after the eighth grade.).

<sup>103</sup> See NAT'L RES. COUNCIL INST. OF MED., *supra* note 1, at 82 (stating that "both age-segregation and lack of adult supervision have been related to . . . greater alcohol consumption").

<sup>104</sup> *Id.* at 204 (In the Higher Education Amendments of 1998, "Section 952 clarified that institutions of higher education are allowed (but not required) to notify parents if a student under the age of 21 at the time of notification commits a disciplinary violation involving alcohol or a controlled substance.").

<sup>105</sup> *Id.* at 45 (The 2000 National Household Survey of Drug Abuse (NHSDA) reported that "41 percent of full-time college students aged 18 to 22 engaged in heavy drinking, compared with 36 percent of young adults who were attending college part time or not at all.").

and 23% report frequent binge drinking.<sup>106</sup> Apparently, membership in fraternities and sororities greatly increases the likelihood of excessive drinking: a 2001 survey “showed that three-quarters of fraternity or sorority house residents (80 percent and 69 percent, respectively) are binge drinkers,” an improvement over the 1993 figure of 83%.<sup>107</sup> Although binge drinking is typically defined as five or more drinks per occasion, the bingeing at many Greek organizations is reportedly far more extreme. One consultant stated:

Our organization has worked extensively with Greek groups over the past twenty years and has found some chapters to report that more than 70 percent of their members consume thirteen or more drinks per occasion. We frequently hear from other professionals on campuses that fifteen to twenty drinks per occasion, though not the norm, is not uncommon among some groups of students.<sup>108</sup>

Theories abound as to why drinking is so extreme on college campuses. Researchers Wechsler and Wuethrich think one reason is that students “developed a sense of entitlement to alcohol” after the drinking age was lowered to 18 during the 1970s and then re-raised to 21.<sup>109</sup> They also point to the relaxation of dormitory supervision, the increasingly cultivated party images of fraternities and even schools themselves, and the rising importance of college sports as big business, with attendant alcohol industry sponsorships.<sup>110</sup> They also acknowledge alcohol’s role in larger society as a factor.<sup>111</sup>

I believe that there is another important reason for widespread drinking among young adults: with the exception of alcohol, parental control over the young person’s activities grinds to a halt after age 18, if not before then. Moreover, with the exception of alcohol, and to some extent drivers’ licenses, state control of the activities of a person over 18 is no different for the 18 to 21 age group than for an adult of any age. Once a person attains age 18, he or she can legally marry without parental permission, join the military, enter contracts, smoke, make decisions concerning medical care, or drop out of school. These newfound freedoms occur at age 18, despite the fact that the young person may be immature or financially dependent on his parents, and despite the fact that he may have parents who disapprove of his decisions. It is this legal autonomy in other areas, I think, that makes enforcement of a 21 drinking age impossible.

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<sup>106</sup> *Providing Substance Abuse Prevention and Treatment Services to Adolescents: Hearing Before the Subcomm. on Substance Abuse and Mental Health Services of the Comm. on Health Education, Labor, and Pensions*, 108th Cong. 19 (2004) (prepared statement of Sandra A. Brown, Professor of Psychology and Psychiatry, Univ. of Cal.-San Diego).

<sup>107</sup> WECHSLER & WUETHRICH, *supra* note 26, at 35.

<sup>108</sup> *Id.* at 38 (quoting Mark Nason, prevention consultant with Prevention Research Institute, “a nonprofit organization that develops curricula to reduce the risk of alcohol and drug problems”).

<sup>109</sup> *Id.* at 30.

<sup>110</sup> *Id.* at 30–31.

<sup>111</sup> *Id.* at 31–32.

For the sake of discussion, I will compare the 21 drinking age policy with policies aimed at the 18 to 21 age group in the areas of medical decision-making, decisions to forgo education, decisions about smoking, and regulations concerning driving. All of these represent adult privileges that can have serious consequences for the young person, and potentially for others around him. All also represent situations where a mistake in judgment, perhaps due to immaturity, can have dire consequences. Yet, unlike current alcohol policy, the policies in these areas defer to the judgment of the young person, for good or ill. If the main reason for forbidding alcohol consumption for persons under the age of 21 is protection from the adverse physical effects of youth drinking, such as greater likelihood of later alcoholism or greater damage to the brain, then the policy is entirely consistent with other policies for children under the age of 18. It is, however, completely unprecedented compared with other policies for young people in the 18 to 21 age group.

#### IV. COMPARING THE DRINKING BAN WITH OTHER POLICIES AFFECTING YOUNG ADULTS

##### A. *Medical Decision-Making Before and After Age 18*

A useful comparison can be made with policies concerning the ability of patients to consent to or refuse medical care on their own behalf. Up until age 18, the general rule is that parents must consent to their children's medical care, and they may normally refuse medical care for their minor children whenever the parents believe that the refusal is appropriate.<sup>112</sup> In life and death situations, a parent's refusal of medical care may be challenged as a form of neglect, and such challenges may well be upheld in the courts.<sup>113</sup>

A competent adult, however, may direct his own medical care, and may consent to or refuse any kind of treatment, including lifesaving treatment.<sup>114</sup> The right to accept or refuse medical care may be based on any or all of the following: a common law right of self-determination; a federal constitutional right of self-determination, privacy, or freedom of religion; or a state constitutional right to self-determination or religious liberty.<sup>115</sup> However, the right to refuse medical treatment is not an absolute right.<sup>116</sup> A state has an interest in the health and well-being of its citizens which will be balanced against the patient's interests in refusing medical treatment. Generally, "courts consider four State interests—the preservation of life, the prevention of suicide, the protection of third parties, and the ethical integrity of the medical

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<sup>112</sup> MNOOKIN & WEISBERG, *supra* note 29, at 361.

<sup>113</sup> *Id.* at 380–82.

<sup>114</sup> See *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 269–70 (1990).

<sup>115</sup> See *Stamford Hosp. v. Vega*, 674 A.2d 821, 830–31 (Conn. 1996).

<sup>116</sup> *In re Fetus Brown*, 689 N.E.2d 397, 402 (Ill. App. Ct. 1997).

profession—when deciding whether to override competent treatment decisions.”<sup>117</sup>

As of this writing, the vast majority of cases dealing with these issues involve a patient who has refused consent to medical care, and a medical or government entity that seeks to impose lifesaving treatment over the patient’s objections. Sometimes, a patient will refuse treatment on religious grounds, such as a Jehovah’s Witness’s refusal to accept a blood transfusion.<sup>118</sup> Other patients may refuse treatment that would prolong life but not cure or alleviate the underlying excruciating and fatal disease.<sup>119</sup>

In balancing the patient’s interest in refusing medical treatment with the state’s interest in imposing treatment, the courts tend to view the state interests as having varying degrees of importance. Preserving the integrity of the medical profession seems to be the least important state concern. For one thing, patient autonomy and informed consent to treatment are consistent with standards of the medical profession.<sup>120</sup> For another thing, an individual’s constitutional rights take precedence over the interests of a professional group. As one court has observed, “Given the fundamental nature of the constitutional rights involved, protection of the ethical integrity of the medical profession alone could never override those rights.”<sup>121</sup> Similarly, while prevention of suicide is a legitimate state interest, it is rarely a basis for decision in the “right to refuse treatment” cases, because suicide is narrowly defined as an affirmative act accompanied by the desire to die.<sup>122</sup> Merely refusing treatment, where lack of treatment could result in a natural death, does not qualify as

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<sup>117</sup> *Id.*

<sup>118</sup> See, e.g., *Public Health Trust v. Wons*, 541 So. 2d 96 (Fla. 1989); *St. Mary’s Hosp. v. Ramsey*, 465 So. 2d 666 (Fla. Dist. Ct. App. 1985).

<sup>119</sup> See, e.g., *Bouvia v. Super. Ct. of Los Angeles County*, 225 Cal. Rptr. 297 (Cal. Ct. App. 1986) (upholding the right of a bedridden woman with cerebral palsy and arthritis to have her feeding tube removed); *Satz v. Perlmutter*, 362 So. 2d 160 (Fla. Dist. Ct. App. 1978) (upholding decision of 73-year-old man suffering from advanced Lou Gehrig’s disease to have his respirator disconnected). Another type of case involves a patient who is comatose and relatives who seek permission to discontinue medical care on the patient’s behalf. See *Cruzan*, 497 U.S. at 286–87 (The parents of a young woman who was in a persistent vegetative state sought a court order permitting removal of her feeding and hydration tubes. Their claim that she had previously told her roommate that she would not want to live if she were permanently sick or injured had been rejected by a Missouri court as unreliable. The U.S. Supreme Court held that the Constitution did not require the State to allow any decision-maker other than the patient to exercise the right to refuse treatment on the patient’s behalf.). Since cases involving surrogate decision-makers only indirectly address the patient’s own right to refuse treatment, they are outside the scope of the current discussion.

<sup>120</sup> *Public Health Trust*, 541 So. 2d at 100–01 (Ehrlich, C.J., concurring).

<sup>121</sup> *Id.* at 101.

<sup>122</sup> *Id.* at 100 (upholding refusal of a blood transfusion by a woman of the Jehovah’s Witness faith, and stating that it is “uncontested that this case does not implicate the state’s interest in the prevention of suicide. Mrs. Wons does not desire to die. Rather, she has chosen not to live, if to do so would require that she receive blood. Should she die because no blood transfusion is administered, her death would be of natural causes, not suicide.”); see also *Vacco v. Quill*, 521 U.S. 793, 800–02 (1997).

suicide. The last two state interests—preservation of life and protection of third parties—are the focus of most of the cases involving an assertion of an individual's right to refuse medical treatment.

A state interest in the preservation of life has been recognized as the most important basis for state interventions in private medical decisions.<sup>123</sup> Although stated broadly, it is not interpreted as an interest in preserving life in all events or at any cost. Some courts have opined that as the likely quality of the preserved life improves, the state interest becomes stronger.<sup>124</sup> While preservation of life may be a good in itself, it must always be balanced against the price paid by the person whose life is preserved.<sup>125</sup> For example, in *Satz v. Perlmutter*,<sup>126</sup> the appellee was a 73-year-old man, terminally ill with Lou Gehrig's disease. The court upheld his right to disconnect his respirator on the grounds that his rights to privacy and self-determination outweighed any interest the State might have had in artificially delaying the moment of his death.<sup>127</sup> In other words, it is not considered a legitimate exercise of state interest to forcibly preserve the life of a person who will thereby suffer intractable pain and misery up until the point of death.<sup>128</sup> However, as the facts of *Satz* illustrate, a state interest in imposing unwanted medical treatment to preserve life is only asserted in life-or-death circumstances; the patient's right to self-determination clearly controls treatment choices in non-crisis situations.

Perhaps the widest variety of fact patterns can be seen in cases where the state asserts an interest in protecting third parties as a justification for imposing medical treatment on an unwilling recipient. The claim of right to refuse medical treatment has been raised against forced drug testing for student athletes,<sup>129</sup> use of delousing shampoo in prisons,<sup>130</sup> administration of

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<sup>123</sup> See, e.g., *Superintendent of Belchertown State Sch. v. Saikewicz*, 370 N.E.2d 417, 425 (Mass. 1977); *In re Guardianship of Browning*, 568 So. 2d 4, 14 (Fla. 1990).

<sup>124</sup> *Saikewicz*, 370 N.E.2d at 425-26 ("There is a substantial distinction in the State's insistence that human life be saved where the affliction is curable, as opposed to the State interest where . . . the issue is not whether but when, for how long, and at what cost to the individual that life may be briefly extended.").

<sup>125</sup> *Bouvia v. Super. Ct. of Los Angeles County*, 225 Cal. Rptr. 297, 305 (Cal. Ct. App. 1986) (upholding decision of a young woman bedridden with cerebral palsy and arthritis, who was completely unable to care for herself and was in constant severe pain, to have a feeding tube removed, and stating that "[w]e do not believe it is the policy of this State that all and every life must be preserved against the will of the sufferer. It is incongruous, if not monstrous, for medical practitioners to assert their right to preserve a life that someone else must live, or, more accurately, endure, for '15 to 20 years.' We cannot conceive it to be the policy of this State to inflict such an ordeal upon anyone."). See also *Public Health Trust*, 541 So. 2d at 100 (Ehrlich, C.J., concurring) (upholding right of a competent adult woman to refuse a blood transfusion on the basis of her Jehovah's Witness beliefs, and stating that, "[i]n some circumstances the cost to the individual of the life-prolonging treatment, in economic, emotional, or as in this case, spiritual terms, may be too high. . . . That 'cost' must be looked at from the patient's point of view.").

<sup>126</sup> 362 So. 2d 160 (Fla. Dist. Ct. App. 1978).

<sup>127</sup> *Id.* at 164.

<sup>128</sup> See, e.g., *Satz*, 362 So. 2d. at 164; *Bouvia*, 225 Cal. Rptr. at 305.

<sup>129</sup> *Hill v. Nat'l Collegiate Athletic Ass'n*, 865 P.2d 633 (Cal. 1994).

<sup>130</sup> *Russell v. Richards*, 384 F.3d 444 (7th Cir. 2004).

antipsychotic medication to non-consenting patients,<sup>131</sup> lifesaving treatment of pregnant women,<sup>132</sup> and lifesaving treatment of the parents of minor children.<sup>133</sup>

In general, the less intrusive the medical treatment, the easier it is for a state to successfully assert that medical treatment imposed over an individual's objections is justified when balanced with potential harm to third parties that could result from a lack of treatment. For example, requiring prisoners to wash with delousing shampoo upon admission to a facility is a small burden necessary to prevent an outbreak of lice among other prisoners.<sup>134</sup> Similarly, drug testing of student athletes is considered a minimal invasion of student rights for the legitimate purpose of maintaining integrity in intercollegiate sports.<sup>135</sup>

On the other hand, intrusive measures like blood transfusions, surgery, or forced administration of drugs can only be imposed on unwilling parties if the state shows very serious adverse consequences to third parties in the absence of the imposed treatment. For example, a blood transfusion or Caesarean section might be ordered over the objections of a pregnant woman in order to save the life of her viable fetus. In *Crouse Irving Memorial Hospital v. Paddock*,<sup>136</sup> a pregnant woman with several serious complications consented to a Caesarian section, but refused consent to any blood transfusions on the grounds that transfusions violated her religious beliefs. The court held that the hospital could administer blood transfusions to the mother to secure the health of the baby and could continue the transfusions immediately after the baby's delivery to stabilize the mother's condition.<sup>137</sup>

Although several cases have advanced the argument that lifesaving medical care could be imposed on an objecting parent of minor children in order to prevent the children from losing their parent, courts have been reluctant to order care on this basis. The argument is that a state interest in making sure a child is not abandoned justifies imposing lifesaving treatment upon the parent whose death would constitute abandonment.<sup>138</sup> However, courts have narrowly defined abandonment to mean that the parent's death

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<sup>131</sup> *Rennie v. Klein*, 720 F.2d 266 (3d Cir. 1983).

<sup>132</sup> *In re Fetus Brown*, 689 N.E.2d 397 (Ill. App. Ct. 1997); *Crouse Irving Mem'l Hosp. v. Paddock*, 485 N.Y.S.2d 443 (N.Y. Sup. Ct. 1985).

<sup>133</sup> *Public Health Trust v. Wons*, 541 So. 2d 96 (Fla. 1989); *St. Mary's Hosp. v. Ramsey*, 465 So. 2d 666 (Fla. Dist. Ct. App. 1985).

<sup>134</sup> *Russell*, 384 F.3d at 448–50.

<sup>135</sup> *Hill v. Nat'l Collegiate Athletic Ass'n*, 865 P.2d 633, 637 (Cal. 1994).

<sup>136</sup> 485 N.Y.S.2d 443 (N.Y. Sup. Ct. 1985).

<sup>137</sup> *Id.* at 446.

<sup>138</sup> A state interest in the protection of innocent third parties “could well prove to be superior to a competent adult's right of self-determination when the exercise of that right would deprive that individual's dependents of their source of support and care.” *Fosmire v. Nicoleau*, 536 N.Y.S.2d 492, 496 (N.Y. App. Div. 1989) (case vacating an ex parte order which had authorized hospital to provide blood transfusions to a woman over her objections).

would leave the child without any means of care and support.<sup>139</sup> Thus, where the patient was a non-custodial father, or where the surviving parent would care for the child, courts have refused to find a state interest in preventing abandonment sufficient to justify imposition of lifesaving care such as blood transfusions.<sup>140</sup>

When we consider the question of state prohibition of alcohol use by persons in the 18 to 21 age group in the context of these cases, the alcohol prohibition is largely inconsistent with the state approach in the medical context.

The first question is how to characterize the young adult's desire to drink. If we characterize it as a desire to use a legal (but hardly essential) substance, then a state would not have a great burden to justify regulation. However, if we characterize the desire to drink as one of many decisions comprising the young adult's right to bodily self-determination, then a state must balance significant interests against the young adult's rights. Of the four state interests asserted in the medical decision-making cases,<sup>141</sup> three arguably apply here: the prevention of suicide, the preservation of life, and the protection of third parties.<sup>142</sup>

As discussed above, the medical treatment cases define suicide narrowly as an affirmative self-destructive act accompanied by the desire to die.<sup>143</sup> Although drinking is an affirmative act, it is arguable whether it is in itself self-destructive. Moreover, a young adult's decision to drink is not uniformly accompanied by a desire to die. A state might legitimately argue, however, that alcohol use increases the likelihood of suicide. Studies have shown a strong association between suicide and alcohol use in the youth population.<sup>144</sup> The exact role that alcohol might play in youth suicide is unclear. One possibility is that since alcohol lowers inhibitions, it may make it easier for depressed youth to carry out suicidal plans. It is also true that factors such as depression or traumatic life events have been associated with both alcohol use or abuse and suicide.<sup>145</sup> Thus, while the association is clear, there is no proven cause-effect relationship.<sup>146</sup>

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<sup>139</sup> See *id.* at 496–97 (holding that the State's interest in protecting the mother's minor child would be satisfied where there was a concerned surviving parent capable of supporting child, as well as a supportive extended family).

<sup>140</sup> See *id.*; see also *St. Mary's Hosp. v. Ramsey*, 465 So. 2d 666, 668 (Fla. Dist. Ct. App. 1985) (upholding right of competent adult patient to refuse blood transfusion, despite the fact that he was the non-custodial father of a minor child).

<sup>141</sup> *In re Fetus Brown*, 689 N.E.2d 397, 402 (Ill. App. Ct. 1997).

<sup>142</sup> The fourth, preservation of the ethical integrity of the medical profession, is not relevant here.

<sup>143</sup> *Public Health Trust v. Wons*, 541 So. 2d 96, 100 (Fla. 1989).

<sup>144</sup> *Alcohol and Suicide: Facts in Brief*, <http://www.suicidreferencelibrary.com/test4~id~1247.php> (last visited Mar. 8, 2006).

<sup>145</sup> Paul J. Gruenewald et al., *Suicide Rates and Alcohol Consumption in the United States, 1970–89*, 90 ADDICTION 1063, 1063–75 (1995).

<sup>146</sup> *Id.* at 1063.

In addition, alcohol use has been correlated with suicide in other adult age groups, making it harder to justify regulation of the 18 to 21 age group only.<sup>147</sup> While many people expect that suicide rates—with or without alcohol—are highest in teens or young adults, in fact the elderly are most at risk for suicide in the United States.<sup>148</sup>

A state's interest in preserving life could also be raised to justify a 21 minimum age for consumption of alcohol. Alcohol consumption poses a threat to life and health in the form of deaths from alcohol poisoning or alcohol-related accidents.<sup>149</sup> Alcohol use has also been shown to have an adverse impact on quality of life, resulting in impairment of memory and learning and sometimes resulting in addiction.<sup>150</sup>

However, in the context of medical decision-making cases, the interest in preserving life has been limited to instances where there is an immediate and mortal threat to an individual's life. A case where a blood transfusion, feeding tube, or surgery is necessary to prevent imminent death is the epitome of the situation where a state's interest in the preservation of life is successfully asserted.<sup>151</sup>

It is difficult to draw an analogy between the imminent harm faced in the medical decision-making cases and the potential harms of alcohol consumption by a young adult. In the vast majority of cases where a young adult chooses to drink alcohol, there is neither any immediate threat to life nor any clearly demonstrable harm. While studies show dangers of excess consumption of alcohol,<sup>152</sup> moderate alcohol consumption may not be dangerous to young adults. Even if moderate consumption causes adverse effects, such as impairment of memory or learning capacity (as has been suggested by some studies)<sup>153</sup> this is far from the immediate threat to life and health that is usually required before a state can trump the health decisions of a competent adult.

To the extent that alcohol consumption by young adults may be dangerous to health, there is no immediate state interest in usurping the normal right of a competent adult to assess risks and make decisions that affect his or her bodily integrity. In the medical decision-making cases, a state's interest in life is clearly viewed as a justification for state intervention to determine whether refusal of lifesaving medical care is a free, informed, and competent decision.<sup>154</sup> However, it is rare to find a case where a competent adult's refusal of treatment is overruled,<sup>155</sup> and I can find no cases where a decision to

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<sup>147</sup> *Id.* at 1071.

<sup>148</sup> Nat'l Instit. of Mental Health, Frequently Asked Questions About Suicide, [www.nimh.nih.gov/suicideprevention/suicidefaq.cfm](http://www.nimh.nih.gov/suicideprevention/suicidefaq.cfm) (last visited Mar. 8, 2006).

<sup>149</sup> See generally NAT'L RES. COUNCIL INST. OF MED., *supra* note 1, at 58–63.

<sup>150</sup> See *id.* at 63–65.

<sup>151</sup> Superintendent of Belchertown State Sch. v. Saikewicz, 370 N.E.2d 417, 425 (Mass. 1977).

<sup>152</sup> Stroh, *supra* note 51.

<sup>153</sup> See *supra* Part III.B.

<sup>154</sup> Satz v. Perlmutter, 362 So. 2d 160, 162 (Fla. Dist. Ct. App. 1985).

<sup>155</sup> *Id.* at 163.



overrule the decision of a competent adult is upheld on appeal based only on a state's interest in preservation of life.

Finally, a state could argue that limiting alcohol consumption to persons age 21 or above is justified by the interest in protecting third parties who might be damaged by the drinking of young adults. In the context of drinking by young adults, there are two readily identifiable third party groups that are arguably protected by a minimum drinking age of 21. The first group is high school students under the age of 18 who may have less access to alcohol if high school students over the age of 18 cannot legally obtain alcohol. The second group is persons who might be killed or injured in automobile accidents involving young adults who have been drinking alcohol prior to driving.

It is sometimes claimed that an older drinking age makes it easier to keep alcohol away from high school students, especially the younger ones. However, as we have seen, many underage drinkers of all ages receive alcohol from adults, including parents.<sup>156</sup> Moreover, the average age at which adolescents take their first drink has *dropped* over the past few decades, during the same period in which the drinking age was lowered from 21 to 18 in many states and then re-raised from 18 to 21.<sup>157</sup> Hence, it does not appear that raising the drinking age to a level that precludes legal drinking by any high school students has been effective in keeping alcohol away from adolescents.

Protection of society from automobile accidents caused by drunken young adults is a frequently invoked justification for the prohibition of alcohol consumption by persons under age 21. There have been various reports that raising the drinking age to 21 has reduced the number of traffic fatalities in the 18 to 21 age group.<sup>158</sup> However, the reduction in fatalities may be equally due to the fact that society has, during the same time period, made drunk-driving laws stricter and enforcement more aggressive.<sup>159</sup>

The causal link between allowing young adults to consume alcohol and accidents injuring third parties is somewhat attenuated. In the first place, not all young adults who drink will drink to excess. Second, not all young adults who drink to excess will choose to drive a car while under the influence. Third, since many adults in the over-21 age group also drive while intoxicated, there is no clear reason why young adults could not be handled in a similar fashion: that is, imposition of criminal penalties where there are violations of restrictions on driving while under the influence.

The medical-decision cases are instructive. In cases where protection of third parties was asserted as a countervailing state interest, the state had to show more than a loose relationship between the decision to forgo treatment

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<sup>156</sup> See *supra* Part III.C.

<sup>157</sup> For example, between 1965 and 1999, the average age of first alcohol use decreased from 17.6 years to 15.9 years. NAT'L RES. COUNCIL INST. OF MED., *supra* note 1, at 40.

<sup>158</sup> See, e.g., Raquel Rutledge, *Drinking Age Still Debated; 20 Years Ago, Law Made it 21*, MILWAUKEE J. SENTINEL, July 18, 2005, at B1.

<sup>159</sup> See, e.g., Heidi Coleman, *Reductions in Alcohol-Related Traffic Deaths*, 72 POLICE CHIEF 18 (2005) (attributing reductions in alcohol-related traffic deaths in 1999 and in 2003 to high-visibility law enforcement).

and a potentially bad impact on some innocent third party. For example, in the Florida case *In re Dubreuil*,<sup>160</sup> it was claimed that the mother's refusal of medical treatment would result in abandonment of her children. Therefore, it was argued that the State's interest in protecting children from abandonment justified imposing lifesaving medical treatment on their unwilling mother.<sup>161</sup> In quashing the lower court's order requiring medical care, the Florida Supreme Court held that the State had not carried the burden of proving that if the mother had died, the children would have been abandoned.<sup>162</sup> The court noted that there was no evidence that the children's father or other relatives could not take over care of the children.<sup>163</sup>

Thus, even in a situation where the mother's action (refusal of treatment) would likely lead to severe adverse consequences for her children (loss of their mother), the state essentially bore the burden of showing that there was no other way to prevent abandonment of the children (such as the assumption of their care by their father or by other family members).<sup>164</sup> In the case of drinking by young adults, the decision to drink does not have a result as predictable as the expected result of refusing a blood transfusion in a life-threatening situation. A decision to drink may or may not result in intoxication. Intoxication may or may not result in a decision to drive drunk. However, even if we assume that the drinking of young adults *necessarily* leads to drunk driving, a state cannot reasonably claim that there is no other way to protect innocent third parties. Enforcement of drunk-driving laws is the logical remedy for driving under the influence by all age groups.

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<sup>160</sup> 629 So. 2d 819, 824 (Fla. 1993).

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* at 827-28.

<sup>163</sup> *Id.* As the court notes in *Dubreuil*, the majority of courts that have addressed a state interest in protecting children from abandonment in the context of the right to refuse medical treatment have found no abandonment. *Id.* at 824 n.8. However, the court also notes that abandonment was found in at least two cases. *Id.* See *In re President & Dirs. of Georgetown Coll., Inc.*, 331 F.2d 1000 (D.C. Cir. 1964) (court granted permission to a hospital to administer a blood transfusion to a dying woman who was a Jehovah's Witness, as well as the mother of a seven-month-old child); *In re Winthrop Univ. Hosp.*, 490 N.Y.S.2d 996 (N.Y. Sup. Ct. 1985) (court ordered a mother of two to receive blood transfusions during surgery, despite the patient's religious objections). As the court in *Dubreuil* also pointed out, however, these two cases have questionable precedential value: *Georgetown* is distinguishable from many similar cases because it involved a patient who was incapacitated at the time her consent was sought, and *Winthrop*, a New York case, was undermined by a later New York case. *Dubreuil*, 629 So. 2d at 824 n.8. See also *Fosmire v. Nicoleau*, 536 N.Y.S.2d 492 (N.Y. App. Div. 1989) (upholding the right of a woman to refuse blood transfusions necessitated by bleeding after she gave birth by Caesarian section). The court found that the State's interests did not supersede the woman's right to medical self-determination, and noted in particular that there was another parent capable of caring for the child. *Fosmire*, 536 N.Y.S.2d at 497. While *Fosmire* did not expressly overrule *Winthrop*, it certainly seemed to change the applicable standard for assessment of whether a state interest should supersede an individual's right to medical self-determination.

<sup>164</sup> *In re Dubreuil*, 629 So. 2d at 827.

### B. Compulsory Education

Decision-making about whether to continue formal education is another area where young adults have the legal right to self-determination. All states have compulsory education laws that require school attendance until a specified age, typically 16 or 18.<sup>165</sup> However, once a child has reached the age at which compulsory education ends, he or she is free to drop out of school.<sup>166</sup> Since compulsory attendance laws establish a requirement that schooling continue until the requisite age—instead of until a minimum level of education is completed—a student above that age can decide to forgo additional education even if he has not yet completed high school. At that point, a parent might have emotional or financial leverage over the young person but no legal authority to require further schooling.<sup>167</sup> The freedom to forgo further education is granted despite the fact that failure to complete high school is linked to diminished job opportunities and increases the likelihood of economic hardships later in life:

Overall, 3.2 million low-income working families—or 35 percent of all such families—have at least one parent who did not finish high school or obtain a General Equivalency Diploma (GED), the most basic building block for entry into the working world. By comparison, only 12 percent of working families that are not low-income have a parent who has not completed high school. Similarly, far more working families earning good incomes have parents with some post-secondary education than do low-income working families.<sup>168</sup>

If we analyze the decision of a young adult to forgo completion of high school, we can see that it carries certain risks for both the young adult and for third parties. As the above excerpt illustrates, failure to obtain a high school diploma will jeopardize a young adult's economic future. As a direct consequence of his poor economic prospects, his ability to support his family will suffer. His family may suffer an economic abandonment analogous to the physical and emotional abandonment alleged in cases where a parent's decision to forgo medical treatment results in the abandonment of minor children.<sup>169</sup> If the undereducated young adult cannot fulfill his obligations to support himself

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<sup>165</sup> Judith G. McMullen, *Behind Closed Doors: Should States Regulate Homeschooling?*, 54 S.C. L. REV. 75, 87 (2002) [hereinafter McMullen, *Behind Closed Doors*]. However, universal acceptance of homeschooling by all fifty states effectively places decisions about whether and how to educate children into the hands of their parents. *Id.*

<sup>166</sup> *See generally id.*

<sup>167</sup> As I have observed in another context, even prior to the age of 18 a parent may have no effective control over a determined truant child. *See generally* McMullen, "You Can't Make Me!", *supra* note 96, at 624 (arguing that punishing parents for the truancy of their children has limited effectiveness, since even "good" parents may not be able to control recalcitrant children).

<sup>168</sup> TOM WALDRON ET AL., WORKING HARD, FALLING SHORT: AMERICA'S WORKING FAMILIES AND THE PURSUIT OF ECONOMIC SECURITY 9 (2004), available at [http://www.nam.org/s\\_nam/bin.asp?CID=201501&DID=232465&DOC=FILE.PDF](http://www.nam.org/s_nam/bin.asp?CID=201501&DID=232465&DOC=FILE.PDF) (last visited Mar. 8, 2006).

<sup>169</sup> *Id.*

and his family, society will suffer because the costs of supporting the underemployed young adult and his family will be spread among the citizens of his community.<sup>170</sup> Despite these adverse consequences to the young adult and his family, he is unquestionably free to decide to forgo further education.

In some ways, the decision to forgo future education is more likely to lead to adverse consequences than the decision of a young adult to drink an alcoholic beverage because failure to complete high school is demonstrably linked to poor outcomes while light to moderate drinking is not so reliably linked. Nonetheless, it can be argued that requiring a young adult to complete high school would require an affirmative action, which is more intrusive and more difficult to enforce than a requirement that a young adult refrain from some activity. Even if this is true, current alcohol policy is not consistent with other policies affecting young adults, because we do not prohibit young adults from engaging in another clearly hazardous activity: smoking.

### C. *Smoking*

Smoking represents another behavior that is left to the discretion of persons aged 18 and over,<sup>171</sup> despite the fact that the decision to smoke may be directly harmful to young adults and indirectly harmful to third parties. The health risks of smoking are well-known and no longer debatable. Smoking has been clearly linked to respiratory diseases and to numerous cancers, including cancers of the lung, throat, esophagus, cervix, kidney, and oral cavity.<sup>172</sup> It has also been directly linked to heart disease and stroke.<sup>173</sup> In addition, there is evidence that smoking by children and adolescents results in impaired lung growth and early onset of lung function decline.<sup>174</sup> Early smoking appears to further increase the risk of lung cancer.<sup>175</sup>

Smoking poses health risks for third parties as well as for smokers. Secondhand smoke, defined as “a mixture of the smoke given off by the burning end of a cigarette, pipe, or cigar, and the smoke exhaled by smokers,”<sup>176</sup> has been classified as a known carcinogen by the U.S. Environmental Protection Agency.<sup>177</sup> Secondhand smoke increases the risk of death from heart disease and is thought to cause 3,000 lung cancer deaths

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<sup>170</sup> Roland Bénabou, *Workings of a City: Location, Education, and Production*, 108 Q. J. ECON. 619 (1993).

<sup>171</sup> WIS. STAT. § 254.92 (2004).

<sup>172</sup> *Executive Summary*, THE HEALTH CONSEQUENCES OF SMOKING: A REPORT OF THE SURGEON GENERAL (2004), [http://www.cdc.gov/tobacco/sgr/sgr\\_2004/pdf/executivesummary.pdf](http://www.cdc.gov/tobacco/sgr/sgr_2004/pdf/executivesummary.pdf) (last visited Mar. 8, 2006).

<sup>173</sup> Ctr. for Disease Control, *Health Effects of Smoking Among Young People*, [http://www.cdc.gov/tobacco/research\\_data/youth/stspta5.htm](http://www.cdc.gov/tobacco/research_data/youth/stspta5.htm) (last visited Mar. 8, 2006).

<sup>174</sup> *Executive Summary*, *supra* note 172, at 4.

<sup>175</sup> Ctr. for Disease Control, *supra* note 173.

<sup>176</sup> U.S. Env'tl. Prot. Agency, *Health Effects of Exposure to Secondhand Smoke*, <http://www.epa.gov/iaq/ets/healtheffects.html> (last visited Mar. 8, 2006).

<sup>177</sup> *Id.*

annually in nonsmokers.<sup>178</sup> Secondhand smoke is particularly harmful to children. It has been identified as a cause of Sudden Infant Death Syndrome (SIDS), and it increases the risk of lower respiratory tract infections such as pneumonia and bronchitis, worsens asthma, and is associated with new asthma symptoms in children who have not previously exhibited symptoms.<sup>179</sup> Growing knowledge about the hazards of secondhand smoke has led to restrictions on smoking in many public spaces.<sup>180</sup>

Cigarette smoking shares many characteristics with the consumption of alcohol. For one thing, neither could be said to be a fundamental right.<sup>181</sup> For another, both activities are known to be harmful to the consumer. Both activities carry particular risks for adolescents and young adults, and both activities can be harmful to third parties. Indeed, it could be argued that smoking is *more* harmful than drinking alcohol, both with respect to the user and with respect to third parties. This is because there is no safe level of smoking for either the smoker or the third party subjected to secondhand smoke. However, the hazards of drinking are most often associated with excessive consumption of alcohol.

Despite these similarities, the current legal rules treat smoking and drinking differently. Young adults aged 18 to 21 can legally choose to smoke, despite health risks to themselves and to third parties.<sup>182</sup> However, young adults aged 18 to 21 cannot legally choose to consume alcohol, even in circumstances where health risks are minimal and third parties are not at risk.<sup>183</sup>

#### D. Drivers License Policies

Driving is another state regulated activity that imposes special restrictions on minors. However, despite the fact that most states employ an age-based graduated scale of driving privileges,<sup>184</sup> driving by young adults is not banned outright. Attaining the age of majority is not a prerequisite for driving. Thus, drivers' license policies provide an example of regulation of a behavior for young people without an outright ban.

Most states allow people aged 16 and over to obtain drivers licenses, with learners' permits available some time before that.<sup>185</sup> Some states allow certain

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<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> See, e.g., Eric M. Weiss, *Backers of D.C. Smoking Ban Split on Tactics*, WASH. POST, June 28, 2005, at B2.

<sup>181</sup> One could argue that smoking and drinking alcohol are examples of the fundamental right to bodily integrity. However, one could not speak of a right to smoke or drink in the same sense as the right to, for example, freedom of religion.

<sup>182</sup> WIS. STAT. § 254.92 (2004).

<sup>183</sup> Shelley, *supra* note 19, at 733.

<sup>184</sup> MNOOKIN & WEISBERG, *supra* note 29, at 649.

<sup>185</sup> See, e.g., WIS. STAT. § 343.06(1)(c) (2004) (authorizing drivers' licensing for persons aged 16 to 18 where certain educational requirements are met); WIS. STAT. § 343.07(1) (2004) (authorizing instruction permit for persons at least 15 years and 6 months

types of driving, such as operation of farm vehicles or driving a vehicle to a rural school, beginning at earlier ages.<sup>186</sup> Of course, young people are not the only drivers subject to restrictions. Driving requires a state license for persons of all ages, and persons of all ages are subject to various rules such as license renewal requirements, speed limits, traffic laws, requirements of insurance coverage, and vehicle licensing.<sup>187</sup> Due in large part to pressure from the insurance industry, licenses held by persons under age 18 may be subject to greater restrictions than licenses held by persons over the age of 21.<sup>188</sup> For example, in some states, young drivers may not have more than one passenger or may not drive after curfew hours.<sup>189</sup> However, these restrictions are a far cry from an outright ban on driving by young adults (or even older minors). Thus, once again, the total prohibition of alcohol consumption by young adults represents a level of government control that is inconsistent with the restriction of drivers' license requirements for that age group, just as it is inconsistent with policies concerning health care decisions, education, and smoking.

#### V. PROBLEMS CAUSED BY THE PROHIBITION OF ALCOHOL USE BY YOUNG ADULTS

There are two potential problems that may result from the prohibition of alcohol use by young adults. The first problem is that the impossibility of enforcing the law will engender a lack of respect for the law in general among young adults. The second problem is that, for those who choose to violate the law, the necessity of sneaking around to drink may lead to more dangerous drinking patterns and may preclude access to avenues that might imbue healthier drinking habits.

##### A. *The Difficulty of an Unenforceable Law*

Laws that are difficult or impossible to enforce have always been problematic. Of course, no law is one hundred percent enforceable: history is replete with unsolved crimes and unpunished offenders of every sort.<sup>190</sup>

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of age). *But see* MNOOKIN & WEISBERG, *supra* note 29, at 648 (stating that licenses to drive commercial vehicles or school buses typically have higher age requirements).

<sup>186</sup> *See, e.g.*, WIS. STAT. § 343.08 (2004) (Allows persons as young as 14 years of age to receive restricted licenses to operate cars, farm trucks, or certain types of motorcycles during daylight hours and upon a showing of necessity. The exception does not apply in cities having a population of 500,000 or more.). *See also* MNOOKIN & WEISBERG, *supra* note 29, at 648.

<sup>187</sup> *See generally* MNOOKIN & WEISBERG, *supra* note 29.

<sup>188</sup> WIS. STAT. § 343.085 (2004); Courtney Williams, *License Laws Upset Teens*, CHARLESTON GAZETTE, July 9, 2005, at P6D.

<sup>189</sup> *See, e.g.*, WIS. STAT. § 343.085; *see also* Williams, *supra* note 188.

<sup>190</sup> "Small" crimes, such as purse-snatching or low-level speeding while driving are examples of laws that often go unpunished because of the difficulty of apprehending every suspect. However, serious crimes sometimes go unpunished as well. The infamous and unsolved case of Jack the Ripper is but one example. L. PERRY CURTIS, JR., *JACK THE RIPPER & THE LONDON PRESS 1* (2001).

However, laws may serve a useful symbolic or deterrent function despite sporadic enforcement. Indeed, "the effectiveness of symbolic laws depends on public affirmation rather than legal enforcement. 'People obey symbolic laws not for fear of legal sanction, but because they are backed by the consensus of society and the force of major social institutions.'"<sup>191</sup> As Lawrence Friedman has pointed out, even laws that are imperfectly enforced may reduce a given behavior by making it more costly: "[P]olicy choices are essentially selections among various techniques and means of encouraging or discouraging behavior, by making that behavior safer, cheaper, and more pleasant; or more expensive, more aversive."<sup>192</sup>

When we examine the 21 drinking age in this context, it can be argued that the current law reduces drinking by young adults and conveys important social values to all young adults, even those who violate the law. Advocates of the 21 drinking age claim that the law has resulted in more college-age students who abstain from alcohol use (and are willing to admit it), which thereby reduces alcohol-related problems of all sorts.<sup>193</sup> Not everyone credits the 21 drinking age with this progress, however. Richard Keeling, a physician and former director of health services at the University of Wisconsin-Madison, believes that enforcement methods such as crackdowns on house parties and increased fines for alcohol-related offenses are more likely reasons for changes in young adult behavior.<sup>194</sup>

The argument that a 21 drinking age conveys important societal values to teenagers and young adults is less persuasive in light of the fact, already discussed,<sup>195</sup> that the drinking ban for young adults does not seem to be backed by a broad consensus of society. As we have seen, many parents and other adults disagree with the law in principle.<sup>196</sup> These adults may view drinking as a rite of passage, or may believe that an earlier drinking age would be conducive to more moderate drinking habits later. Such adults may not only ignore violations of the drinking ban by young adults, but they may enable the young adults to commit the violations by supplying alcohol or hosting drinking parties.<sup>197</sup> In these circumstances, where the social consensus on youth drinking is divided at best, it is harder to claim that a strong moral message is being delivered to underage drinkers.

In addition, alcohol continues to be glorified in sports sponsorships and advertising, making it unclear exactly what social message teenagers and young

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<sup>191</sup> Elizabeth A. Heaney, *Pennsylvania's Doctrine of Necessities: An Anachronism Demanding Abolishment*, 101 DICK. L. REV. 233, 259 (1996) (quoting Note, *The Unnecessary Doctrine of Necessaries*, 82 MICH. L. REV. 1767, 1798 (1984)).

<sup>192</sup> Lawrence M. Friedman, *Two Faces of Law*, 1984 WIS. L. REV. 13, 14 (1984).

<sup>193</sup> See Rutledge, *supra* note 158 (citing comments of Susan Crowley, director of PACE (Policy, Alternatives, Community and Education), a "10-year, \$1.2 million program aimed at curtailing underage drinking" funded by the Robert Wood Johnson Foundation).

<sup>194</sup> *Id.*

<sup>195</sup> See *supra* Part III.C.

<sup>196</sup> See *id.*

<sup>197</sup> See *id.*

adults are getting about alcohol. Research has shown that adolescents who are exposed to alcohol advertising are more likely to consume alcohol and to consume it in greater amounts.<sup>198</sup> It is clear that vast numbers of adolescents are in fact exposed to alcohol advertising. Voluntary conduct codes adopted in the late 1990s by the Distilled Spirits Council of the United States suggest that ads should only run in media outlets having no more than 30% of their audience under the age of 21.<sup>199</sup> However, 30% of a broadcast such as a sporting event can be a substantial number of underage viewers.

Sporting events often have alcohol companies as sponsors, such as the sponsorship of NASCAR driver Dale Earnhardt by Budweiser beer and the Busch beer sponsorship of the NASCAR Busch series.<sup>200</sup> Stadiums such as Miller Park in Wisconsin and Coors Field in Colorado associate their corporate sponsors with sports. College sports are no exception, with the NCAA allowing one minute per hour of alcohol ads during broadcast of NCAA events.<sup>201</sup> In a recent report, the Center for Science in the Public Interest argued that because the NCAA has many underage followers (including kids as young as 9 or 10), the NCAA is effectively helping brewers to recruit kids to beer drinking in general, as well as to particular brands of beer.<sup>202</sup> The American Medical Association recently joined the Center for Science in the Public Interest in urging the NCAA to ban alcohol advertising during events,<sup>203</sup> but the NCAA decided to retain its existing policy.<sup>204</sup>

#### B. *Potential Harmful Effects of a 21-Year-Old Drinking Age*

Mixed messages sent to young drinkers are only part of the problem. In addition, it is possible that the drinking ban for young adults may have harmful effects.<sup>205</sup> We have seen that even during Prohibition, commentators bemoaned the lack of respect for the law that came from the widely flaunted ban.<sup>206</sup> Some

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<sup>198</sup> CTR. FOR SCI. IN THE PUBLIC INTEREST, TAKE A KID TO A BEER: HOW THE NCAA RECRUITS KIDS FOR THE BEER MARKET 10 (2005), available at <http://www.cspinet.org/new/pdf/ncaa.pdf> (last visited Mar. 8, 2006); Alan W. Stacy et al., *Exposure to Televised Alcohol Ads and Subsequent Adolescent Alcohol Use*, 28 AM. J. OF HEALTH BEHAV. 498, 507-08 (2004); Susan E. Martin et al., *Alcohol Advertising and Youth*, 26 ALCOHOLISM: CLINICAL & EXPERIMENTAL RES. 900, 905 (2002).

<sup>199</sup> Melanie Warner, *A Liquor Maker Keeps a Close Watch on Its Ads*, N.Y. TIMES, July 27, 2005, at C10.

<sup>200</sup> *Id.*

<sup>201</sup> CTR. FOR SCI. IN THE PUBLIC INTEREST, *supra* note 198, at 1.

<sup>202</sup> *See generally id.* (The title of the report is a play on the NCAA's campaign to "Take a Kid to a Game.").

<sup>203</sup> *NCAA Board OKs 12th Game; Decision Could Revive WVU-Herd Series*, CHARLESTON GAZETTE, Apr. 29, 2005, at P1B.

<sup>204</sup> Jeff Miller, *NCAA Extends Brand's Deal; Board Also Approves Start of Academic Performance Guidelines*, DALLAS MORNING NEWS, Aug. 6, 2005, at 11C.

<sup>205</sup> "Of course, many laws also produce side-effects and may do more harm than good. Policy choices should take these costs into account." Friedman, *supra* note 192, at 14.

<sup>206</sup> *See* John Tierney, *Debunking the Drug War*, N.Y. TIMES, Aug. 9, 2005, at A19.



argue that Prohibition may have exacerbated alcohol abuse, at least for some consumers:

It's the same pattern observed during Prohibition, when illicit stills would blow up, and there was a rise in deaths from alcohol poisoning. Far from instilling virtue in Americans, Prohibition caused them to switch from beer and wine to hard liquor. Overall consumption of alcohol might even have increased.<sup>207</sup>

In modern times, many parents and adults fear that banning alcohol outright leads rebellious young adults to drink in more dangerous ways: "The pattern for underage students is more dangerous. . . . Afraid of being caught, they drink a lot in a short period of time. They do it less often but more intensely."<sup>208</sup>

The legal ban on drinking before age 21 also eliminates the possibility of teaching responsible drinking behaviors to young adults who, because of relative economic dependence, are often accessible to parents, college administrators, and others. The president of Middlebury College in Vermont, John McCardell, believes that the lack of supervised drinking experience for young adults causes much of the problem.<sup>209</sup> He argues that colleges should play an active role in teaching students how to drink responsibly.<sup>210</sup> Says McCardell: "You have to give them some exposure. . . . That doesn't mean sending everybody out to get drunk. But if you're serious about teaching somebody biology, you're going to include a laboratory. College campuses could be little laboratories of progressiveness."<sup>211</sup>

Nor is McCardell alone in his views. A recent article in the student newspaper at Tufts University quoted several University administrators who expressed similar concerns. "It's very complicated when you're living in a country where the legal drinking age forces you to bury your head in the sand," said Margot Abels, Director of Drug and Alcohol Education Services.<sup>212</sup> Tufts Dean of Students, Bruce Reitman, regrets that the 21 drinking age makes it impossible for faculty members to "model responsible drinking," as they did when an 18 drinking age allowed Friday afternoon student-faculty sherry hours where alcohol was used in a civilized, non-abusive manner.<sup>213</sup> Nowadays, Reitman notes, it is "naïve" to tell freshmen that he expects them to never touch alcohol, especially in light of a recent survey of Tufts freshmen that indicated

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<sup>207</sup> *Id.* (arguing that media exaggeration and law enforcement overreaction to amphetamine use makes the problem worse, not better).

<sup>208</sup> Rutledge, *supra* note 158 (quoting Richard Keeling, physician and former director of health services at the University of Wisconsin-Madison).

<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

<sup>212</sup> Keith Barry, *Survey Offers Insight Into Freshman Substance Use*, TUFTS DAILY, Mar. 11, 2005, available at <http://www.tuftsdaily.com/media/paper856/news/2005/03/11/News/Survey.Offers.Insight.Into.Freshman.Substance.Use1490476.shtml?norewrite&source domain=www.tuftsdaily.com>.

<sup>213</sup> *Id.*

that more than 80% of respondents had tried alcohol before arriving at the University.<sup>214</sup>

The notion of allowing young adults to drink, at least in supervised settings such as college-sponsored parties, has some parallels with the grant of driving privileges to young drivers. Combining education and supervision with probationary privileges allows young drivers to acquire necessary skills. If they proceed through their probationary period without incident, they may obtain regular drivers' licenses. If they have violations, they may face delays or lose their licenses altogether.<sup>215</sup> Likewise, college campuses could sponsor parties where adult supervision is provided. Alcohol education could be incorporated into the mandatory curriculum. Nor are colleges the only institutions that could institute this approach. Churches, community centers, or other organizations frequented by young people could also provide much needed education and supervision to young adults who choose to drink. Otherwise, the furtive, excessive drinking patterns exhibited by a significant percentage of young adults may cause far greater problems than would come from lowering the drinking age.

## VI. CONCLUSION

This Article has attempted to show that prohibiting alcohol consumption by young adults aged 18 to 21 is a policy that is neither currently effective, nor likely to be effective in the future. This failure is partly due to the fact that parents, who are key players in the control of minors, no longer have legally enforceable control over offspring who have attained the age of majority. The failure of policy is also due to the fact that an outright ban on drinking by young adults is philosophically different from policies governing analogous decisions that may be made by adults in our society. Whereas adults may make questionable decisions in areas such as education, health, or smoking, decisions about alcohol are uniquely restricted. Due to this dichotomy, I believe that prohibition of alcohol use by young adults will never be widely effective, no matter how desirable a teetotaler young adult population might be.

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<sup>214</sup> *Id.* (The administrators were commenting in light of an online questionnaire sent to freshmen. 600 students, or 47.1% of the Class of 2008, responded to the October, 2004 survey.).

<sup>215</sup> MNOOKIN & WEISBERG, *supra* note 29, at 649.