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## The Legal Construction of Adolescence

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# THE LEGAL CONSTRUCTION OF ADOLESCENCE

*Elizabeth S. Scott\**

## I. INTRODUCTION

American lawmakers have had relatively clear images of childhood and adulthood—images that fit with our conventional notions. Children are innocent beings, who are dependent, vulnerable, and incapable of making competent decisions. Several aspects of the legal regulation of childhood are based on this account. Children are assumed not to be accountable for their choices or for their behavior, an assumption that is reflected in legal policy toward their criminal conduct. They are also assumed to be unable to exercise the rights and privileges that adults enjoy, and thus are not permitted to vote, drive, or make their own medical decisions. Finally, children are assumed to need care, support, and education in order to develop into healthy productive adults. The obligation to provide the services critical to children's welfare rests first with parents and ultimately with the state. When children cross the line to legal adulthood, they are assumed to be autonomous persons who are responsible for their conduct, entitled as citizens to legal rights and privileges, and no longer entitled to support or special protections.

This picture is deceptively simple, of course. In fact, the legal regulation of children is extremely complex. Much of the complexity can be traced ultimately to a single source—defining the boundary between childhood and adulthood. Thus, the question, "What is a child?" is readily answered by policy makers, but the answer to the question, "When does childhood end?" is different in different policy contexts. This variation makes it very difficult to discern a coherent image of legal

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\* University Professor and Robert C. Taylor Research Professor, University of Virginia School of Law. For helpful comments, thanks to Robert Scott, Bill Stuntz, David Tanenhaus, and Frank Zimring, and to participants in a colloquium sponsored by the MacArthur Foundation Research Network in Adolescent Development and Juvenile Justice. This Essay was first delivered as a lecture at the 2000 Sidney & Walter Siben Distinguished Professorship Lecture at Hofstra University School of Law on October 25, 2000.

childhood. Youths who are in elementary school may be deemed adults for purposes of assigning criminal responsibility and punishment, while seniors in high school cannot vote and most college students are legally prohibited from drinking.<sup>1</sup>

The picture is complicated further by the fact that policy makers have no clear image of adolescence. Generally, they ignore this transitional developmental stage, classifying adolescents legally either as children or as adults, depending on the issue at hand. For many purposes, adolescents are described in legal rhetoric as though they were indistinguishable from young children, and are subject to paternalistic policies based on assumptions of dependence, vulnerability, and incompetence.<sup>2</sup> For other purposes, teenagers are treated as fully mature adults, who are competent to make decisions, accountable for their choices and entitled to no special accommodations.<sup>3</sup>

For the most part, this binary classification scheme works well. A bright line rule that designates a particular age as the boundary between childhood and adulthood for multiple purposes (the "age of majority"), regardless of actual maturity, has the advantage of providing a clear signal of the attainment of adult legal status. It is also administratively efficient and promotes parental responsibility. Moreover, by shifting the boundary and extending adult rights and duties at different ages for different purposes, lawmakers accomplish the transition from childhood to adulthood gradually, without creating an intermediate category for adolescence. Adolescents may benefit if they are allowed to make some adult decisions or perform some adult functions, but not others. Thus, for example, the gap between the minimum legal threshold for driving and drinking offers young persons independence and mobility, while protecting them (and us) from the costs of immature youthful judgment. Indeed, the experience with the burdensome administrative and social

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1. In twenty-seven states, a ten-year-old charged with murder could be tried as an adult. See OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, JUVENILE OFFENDERS AND VICTIMS: A NATIONAL REPORT 86-87 (1995). For a discussion of legislative reform lowering the age at which minors can be tried as adults, see *infra* text accompanying notes 145-50. The voting age and the passage of the Twenty-Sixth Amendment are discussed *infra* notes 61-68. See 23 U.S.C. § 158 (Supp. IV 1999) (beginning September 30, 1985, federal funds for highway construction will be withheld from any state that has a drinking age of less than twenty-one years of age).

2. Good examples of this rhetoric include judicial language justifying restrictions on adolescent abortion. See *infra* text accompanying notes 40-41 (discussing the language used by the Court in *Bellotti v. Baird*, 443 U.S. 622 (1979)); see also *infra* text accompanying notes 120-39 (noting the political arguments by Progressive reformers advocating for the establishment of a juvenile court).

3. See, e.g., *infra* note 80 (providing some circumstances in which teenagers are treated as adults).

costs of an intermediate category in the context of abortion regulation reinforces the conclusion that the transition to adulthood generally is regulated more efficiently through binary legislative categories—even if the crude classification of adolescents sometimes distorts developmental reality.<sup>4</sup>

In some contexts, however, categorical assumptions that ignore the transitional stage of adolescence can lead to harmful outcomes. In particular, juvenile justice policy offers ample evidence of the costs of using crude categories to define legal childhood and adulthood.<sup>5</sup> In this setting, the boundary of childhood has shifted dramatically over the course of the twentieth century. Since the establishment of the juvenile court in 1899, young offenders have been transformed in legal rhetoric from innocent children to hardened adult criminals.<sup>6</sup> On my view, however, both the romanticized vision of youth offered by the early Progressive reformers and the harsh account of modern conservatives are distortions—and both have been the basis of unsatisfactory policies. The architects of the traditional juvenile court pretended that youth welfare was the only goal of juvenile justice policy. This fiction ignored the government's interest in punishment and public protection, and ultimately, it did not serve the interests of young offenders or that of society. Modern reformers focus only on punishment and public protection, and ignore any differences between juvenile offenders and adults.<sup>7</sup> A policy that ignores youth welfare is not only anomalous, but is unlikely to achieve the utilitarian goal of reducing the social costs of youth crime. In this context, effective legal regulation requires the (conventional) accommodation of youth welfare and social utility goals, and also (and this is less typical) a realistic account of adolescence.

This Essay proceeds as follows: Part I presents the legal account of childhood, sketching the traits that are assumed to distinguish children from adults and the policies that are based on these assumptions. Contrasting with the straightforward account of childhood is the absence of any clear vision of adolescence. Part II turns to the issue of how the state draws the legal boundary between childhood and adulthood. The analysis of the presumptive age of majority includes an examination of

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4. The judicial by-pass hearing (to provide a forum for a pregnant teenager to demonstrate that she should be allowed to make the abortion decision without involving her parents) is a key element of abortion regulation. For a discussion of the legal and constitutional framework that has resulted from efforts to accommodate competing interests, see *infra* text accompanying notes 102-15.

5. See discussion *infra* Part III.B.

6. See discussion *infra* Part III.

7. See *infra* notes 141-43 and accompanying text.

the passage of the Twenty-Sixth Amendment, which offers interesting lessons on how we fix this boundary. Part II then examines medical decision-making and abortion rights, contexts that clarify the benefits of a binary classification scheme. Abortion regulation particularly is instructive of the costs of an intermediate category that uses a case-by-case approach. Part III examines juvenile justice policy, a context in which the general efficiency of binary classification does not hold. Strikingly different (and largely fictional) accounts of young offenders have been deployed in service of the policy agendas of Progressives and of modern conservatives. I conclude that a justice policy that treats adolescence as a distinct legal category not only will promote youth welfare, but will also advance utilitarian objectives of reducing the costs of youth crime.

## II. LEGAL IMAGES OF CHILDHOOD AND ADOLESCENCE

### A. *Assumptions About Childhood in Legal Policy*

Paternalistic legal regulation of children is based on a conventional understanding of childhood, an understanding that conforms quite well to the developmental account of human capacities in the early stages of life. Immature youths are assumed to be unable to look out for themselves, and thus are in need of adult supervision and guidance. Several interrelated dimensions of immaturity are important in shaping legal policies that treat children differently from adults. First, children are dependent on others—initially, for survival and, as they grow, for the care that will enable them to mature to adulthood. This dependency means that others provide for their basic needs—for food, shelter, health care, affection, and education—so that they may become healthy, productive members of society. Children also lack the capacity to make sound decisions. Because of their immature cognitive development, children are unable to employ reasoning and understanding sufficiently to make choices on the basis of a rational decision-making process.<sup>8</sup> Children's decision-making also reflects immature judgment, which may lead them to make choices that are harmful to their interests and the interests of others.<sup>9</sup> This decision-making immaturity warrants giving others authority over important decisions affecting children's lives.

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8. See generally FRANKLIN E. ZIMRING, *THE CHANGING LEGAL WORLD OF ADOLESCENCE* 36 (1982); Elizabeth S. Scott, *Judgment and Reasoning in Adolescent Decisionmaking*, 37 *VILL. L. REV.* 1607 (1992).

9. See generally Scott, *supra* note 8.

Finally, children are assumed to be malleable and thus vulnerable to both influence and harm from others.<sup>10</sup>

This account of childhood leads quite naturally to the conclusion that children must be subject to adult authority, and that the deeply ingrained political values of autonomy, responsibility, and liberty simply do not apply to them.<sup>11</sup> Under American law, primary responsibility for the welfare of children and authority over their lives is given to their parents. Justice Burger captured the conventional rationale for this assignment in *Parham v. J.R.*,<sup>12</sup> a United States Supreme Court opinion dealing with parent's authority to admit their children to state psychiatric hospitals.<sup>13</sup>

The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children.<sup>14</sup>

Parents are charged with their children's basic care and with the duty to protect them from harm. They also are authorized to make decisions on their behalf about matters ranging from nutrition, medical treatment, and residence to (in theory) the choice of friends and reading material. Parental responsibility and authority go hand in hand. In some sense it is fair to view parental "rights" as legal compensation for the burden of responsibility that the law imposes on parents.<sup>15</sup>

Of course, parents do not have total authority over their children's lives. Society has an important stake in the healthy development of children, and it will bear the burden of parental failure to fulfill their obligations. Moreover, under its historic *parens patriae* authority, the government has the responsibility to look out for the welfare of minors

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10. The presumed malleability of children supported the argument that young offenders would respond positively to rehabilitation, a claim that was central to the rehabilitative model of juvenile justice. See BARRY C. FELD, *BAD KIDS: RACE AND THE TRANSFORMATION OF THE JUVENILE COURT* 92 (1999).

11. Even John Stuart Mill assumed that liberal principles do not apply to children: "It is, perhaps, hardly necessary to say that this doctrine [liberty] is meant to apply only to human beings in the maturity of their faculties. We are not speaking of children or of young persons below the age which the law may fix as that of manhood or womanhood." JOHN STUART MILL, *ON LIBERTY* 9 (Elizabeth Rapaport ed., Hackett Publishing Co., Inc. 1978) (1859).

12. 442 U.S. 584 (1979).

13. See generally *id.*

14. *Id.* at 602.

15. Robert Scott and I have developed this argument elsewhere. See generally Elizabeth S. Scott & Robert E. Scott, *Parents as Fiduciaries*, 81 VA. L. REV. 2401 (1995).

and other helpless members of society.<sup>16</sup> Thus, parental authority is subject to government supervision; if parents fail to provide adequate care, the state will intervene to protect children's welfare. The state also preempts parental authority more categorically on some issues. For example, under child labor and school attendance laws, parents cannot decide that their children should work instead of attending school.<sup>17</sup> Traditionally, policy debates in this area have focused on the allocation of authority between parents and the state.<sup>18</sup>

It may be useful to sketch more precisely how assumptions about children's dependency, incompetence, and vulnerability are expressed in legal regulation. First, children's rights and privileges are far more restricted than are those accorded adults.<sup>19</sup> Because they are assumed to lack the capacity for reasoning, understanding, and mature judgment, children cannot vote, make most medical decisions, drink alcohol, or drive motor vehicles. Their First Amendment right of free speech is more limited than is that of adults, in part because it is assumed that they may be vulnerable to harmful effects. Thus, for example, the Supreme Court has held that the state can restrict children's access to obscene material that would be protected speech for adults, and that public school officials can censor material in school newspapers.<sup>20</sup> Through curfew

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16. The government's *parens patriae* authority arose out of the king's duty to provide for persons under legal disability, such as infants and the insane. See BLACK'S LAW DICTIONARY 1137 (7th ed. 1999). Originally developed by chancery courts as an equitable concept applied to property rights, the *parens patriae* doctrine formally entered American jurisprudence to justify commitment of juveniles to refuges in the leading case of *Ex Parte Crouse*, 4 Whart. 9 (Pa. 1839). See generally Douglas R. Rendleman, *Parens Patriae: From Chancery to the Juvenile Court*, 23 S.C. L. REV. 205 (1971).

17. The Supreme Court enunciated this constraint on parental rights in *Prince v. Massachusetts*, 321 U.S. 158 (1944), by upholding the Massachusetts child labor law, against a challenge that it infringed on parental authority. See *id.* at 170.

18. This line drawing has been the subject of much constitutional litigation. See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205, 234 (1972) (holding that Amish parents cannot be penalized for not complying with a compulsory school attendance statute); *Prince*, 321 U.S. at 166-67 (holding that the state may limit parental freedom and authority when necessary to protect the welfare of children); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534-35 (1925) (holding that parents have the right to send their children to private school); *Meyer v. Nebraska*, 262 U.S. 390, 401 (1923) ("[T]he legislature has attempted materially to interfere with . . . the power of parents to control the education of their own."). A contemporary debate focuses on parental objections to public school curriculum. See, e.g., *Mozert v. Hawkins County Bd. of Educ.*, 827 F.2d 1058, 1065 (6th Cir. 1987) (finding the required use of a textbook series no unconstitutional burden under the Free Exercise Clause), *cert. denied*, 484 U.S. 1066 (1988).

19. See Bruce C. Hafen & Jonathan O. Hafen, *Abandoning Children to Their Autonomy: The United Nations Convention on the Rights of the Child*, 37 HARV. INT'L L.J. 449, 453 (1996).

20. See, e.g., *Ginsberg v. New York*, 390 U.S. 629, 637 (1968) (upholding a New York statute restricting the sale of "obscene material" to minors); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 276 (1988) (upholding the prior restraint of a school newspaper).

ordinances, the government can limit the freedom of minors to move about in society through restrictions that clearly would be unconstitutional for adults.<sup>21</sup> The premise of these laws is that children roaming the streets at night may get in trouble (through the exercise of immature judgment), and that they will be vulnerable to harmful influences.

Second, children are not held to an adult standard of legal accountability for their choices and behavior, because of assumptions about their cognitive and social immaturity, and their vulnerability to undue influence. Thus, under the infancy doctrine in contract law, minors are free to disaffirm most contracts.<sup>22</sup> Many of the cases involve motor vehicles, which courts seem to believe that youths might be tempted to purchase without considering the obligation that they are undertaking.<sup>23</sup> As one court put it, a minor "should be protected from his own bad judgments as well as from adults who would take advantage of him."<sup>24</sup>

In the same category, but of broader importance, is the traditional legal response to criminal conduct by juveniles. The founders of the Juvenile Court at the turn of the last century advocated against assigning criminal responsibility to the offenses of children.<sup>25</sup> Children were not criminally responsible, on their view, because they lacked the capacity for reasoning, moral understanding, and judgment on which attributions of blameworthiness must rest.<sup>26</sup> The integrity of the criminal law would be undermined if incompetent children were subject to criminal

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21. Courts recognize that curfew ordinances would violate the rights of adults to move about in public, but uphold carefully tailored ordinances that are directed at juveniles. See *Schleifer v. City of Charlottesville*, 159 F.3d 843, 852 (4th Cir. 1998) (upholding as constitutional a nocturnal juvenile curfew ordinance); *Qutb v. Strauss*, 11 F.3d 488, 496 (5th Cir. 1993) (same).

22. Minors are liable only on contracts for necessities. Under the traditional rule, minors can disaffirm other contracts, at their option, returning consideration in possession, but with no liability for use or damage. Under the modern (minority) rule, minors can disaffirm, but must compensate the contracting party for use or damage, unless overreaching by the other party is involved. For a more comprehensive discussion, see SAMUEL M. DAVIS ET AL., *CHILDREN IN THE LEGAL SYSTEM: CASES AND MATERIALS* 101-06 (1997).

23. See, e.g., *Bobby Floars Toyota, Inc. v. Smith*, 269 S.E.2d 320 (N.C. Ct. App. 1980); *Haydcoy Pontiac, Inc. v. Lee*, 250 N.E.2d 898 (Ohio Ct. App. 1969); *Dodson v. Shrader*, 824 S.W.2d 545 (Tenn. 1992); *Halbman v. Lemke*, 298 N.W.2d 562 (Wis. 1980); see also ROBERT E. SCOTT & DOUGLAS L. LESLIE, *CONTRACT LAW AND THEORY* 366-79 (2d ed. 1993).

24. *Kiefer v. Fred Howe Motors, Inc.*, 158 N.W.2d 288, 290 (Wis. 1968).

25. See ELLEN RYERSON, *THE BEST-LAID PLANS: AMERICA'S JUVENILE COURT EXPERIMENT* 36-37 (1978).

26. See Elizabeth S. Scott, *Criminal Responsibility in Adolescence: Lessons from Developmental Psychology*, in *YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE* 294, 326-27 (Thomas Grisso & Robert G. Schwartz eds., 2000) [hereinafter *YOUTH ON TRIAL*].



punishment.<sup>27</sup> As Ben Lindsay, an early judge of the Denver Juvenile Court, declared, “our laws against crime [are] as inapplicable to children as they would be to idiots.”<sup>28</sup> Even contemporary advocates for criminal punishment implicitly acknowledge that children, because of their immaturity, are less blameworthy than adults. In arguing that young offenders be held to adult standards of criminal responsibility, they make the problem disappear at least at a rhetorical level by simply describing young offenders as adults and not children.<sup>29</sup>

A third category of legal policies directed at children includes explicit and implicit legal protections and entitlements that respond to children’s dependency. The law requires parents and the state to provide children with support, care, and education<sup>30</sup>—services needed for survival and development, that children are unable to provide for themselves. Parental child support obligations, public welfare support, Medicaid, and Head Start programs provide a safety net that is designed to assure that children’s basic needs are met. Public school education (including educational services to disabled children) is an entitlement in all states, providing all children with the opportunity to develop the capacities needed to become productive citizens.<sup>31</sup> Under the Education for All Handicapped Children Act of 1975,<sup>32</sup> Congress requires all states to provide educational services to disabled children.<sup>33</sup> Moreover, because

27. Proportionality requires that punishment be proportionate to the harm caused and the blameworthiness of the offender. Children are assumed not to be blameworthy moral agents. See Peter Arenella, *Convicting the Morally Blameless: Reassessing the Relationship Between Legal and Moral Accountability*, 39 UCLA L. REV. 1511, 1521 (1992).

28. BEN B. LINDSEY & HARVEY J. O’HIGGINS, *THE BEAST* 133 (University of Washington Press 1970) (1909).

29. See, e.g., Alfred S. Regnery, *Getting Away with Murder: Why the Juvenile Justice System Needs an Overhaul*, 34 POL’Y REV. 65, 68 (1985) (“[T]here is no reason that society should be more lenient with a 16-year-old first offender than a 30-year-old first offender.”); Virginia Ellis, *Lungren to Seek Lower Age for Trial as Adult*, L.A. TIMES, Jan. 15, 1993, at A3 (quoting California Attorney General Dan Lungren: “[I]f you commit an adult crime, you’d better be prepared to do adult time”); Jon R. Sorensen, *Pataki Plan on Juvenile Offenders Includes Longer Sentences in Adult Jails*, BUFFALO NEWS, Dec. 10, 1995, at A16 (quoting New York Governor Pataki: “Adult crime should mean adult time”).

30. See Scott & Scott, *supra* note 15.

31. See 20 U.S.C. § 5801(5) (1994) (calling for “new initiatives at the [f]ederal, [s]tate, local, and school levels to” enable students “to succeed in the world of employment and civic participation”); *id.* § 5812(3)(A) (delineating National Education Goals, specifically that “every school in America will ensure that all students learn to use their minds well, so they may be prepared for responsible citizenship”); *id.* § 6301(a)(1) (“[D]eclar[ing] it to be the policy of the United States” to provide “a high-quality education for all individuals,” because education is “a societal good” and “a moral imperative.”).

32. 20 U.S.C. § 1401 (Supp. IV 1999).

33. See *id.* § 1412.

children are vulnerable and unable to assert their own interests, the state enforces the parents' duty to provide adequate care through elaborate civil and criminal child abuse and neglect regulation. This system not only provides incentives for parents to identify their own interests with those of their children, but also offers the necessary substitute care, when parents fail egregiously in their responsibilities.<sup>34</sup>

Taken together, this complex network of legal regulation suggests that policy makers view children as a very special class of citizens, a group whose unique traits and circumstances warrant a different regulatory scheme from that which applies to adults. In general, these policies of restricted rights and privileges, limited responsibility, and special protections are grounded firmly in a consistent account of what it means to be a child.

### B. Adolescence in Legal Rhetoric

No one thinks that adolescents are similar to toddlers in their reasoning and judgment, dependency, or vulnerability. The empirical assumptions about developmental immaturity that shape the legal images of childhood do not fit comfortably with conventional notions of adolescence. As compared with younger children, adolescents are close to adulthood. They are physically mature, and most have the cognitive capacities for reasoning and understanding necessary for making rational decisions.<sup>35</sup> Yet, adolescents are not fully formed persons in many regards; they continue to be dependent on their parents and on society, and their inexperience and immature judgment may lead them to make poor choices, which threaten harm to themselves or others.<sup>35</sup>

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34. See Scott & Scott, *supra* note 15, at 2449.

35. Jean Piaget concluded that the highest stage of cognitive development (the capacity to engage in formal operational thinking) is attained by mid-adolescence. See BÄRBEL INHELDER & JEAN PIAGET, *THE GROWTH OF LOGICAL THINKING FROM CHILDHOOD TO ADOLESCENCE: AN ESSAY ON THE CONSTRUCTION OF FORMAL OPERATIONAL STRUCTURES* xiii (Anne Parsons & Stanley Milgram trans., 1958). At this point, youths are capable of hypothetical reasoning (comparing the consequences of two alternatives). See generally *id.*; JOHN H. FLAVELL ET AL., *COGNITIVE DEVELOPMENT* (3d ed. 1993) (describing Piaget's contributions to cognitive theory). Although most modern cognitive psychologists do not believe that cognitive development is stage-like, but rather proceeds at different rates in different domains, by age fourteen or fifteen, adolescents come close to cognitive maturity in many realms. See ROBERT S. SIEGLER, *CHILDREN'S THINKING* 53 (1986); William Gardner et al., *Asserting Scientific Authority: Cognitive Development and Adolescent Legal Rights*, 44 *AM. PSYCHOLOGIST* 895, 897 (1989).

36. See Elizabeth S. Scott et al., *Evaluating Adolescent Decision Making in Legal Contexts*, 19 *LAW & HUM. BEHAV.* 221, 226-27 (1995); see also Laurence Steinberg & Elizabeth Cauffman, *Maturity of Judgment in Adolescence: Psychosocial Factors in Adolescent Decision Making*, 20

Conventional wisdom about adolescence generally tracks scientific knowledge about human development—individuals in this group are proceeding through a developmental stage between childhood and adulthood—they are neither children nor adults.<sup>37</sup>

Although lawmakers have occasionally recognized the distinctive character of adolescence,<sup>38</sup> more typically this transitional stage is invisible, and adolescents are incorporated into the binary legal categories of childhood or adulthood. For many purposes—voting, military service, domicile, contracting, and entitlement to support—adolescents are legal children until a bright line age of majority transforms them into adults. For other purposes, adult status is attained either before the age of majority (driving), or after (drinking).<sup>39</sup>

When extending legal rights or responsibilities to minors is the subject of policy debate, adolescents are usually described either as children or as mature adults—depending upon the desired classification. Abortion jurisprudence provides a good example of the elusiveness of

LAW & HUM. BEHAV. 249, 259-60 (1996) (explaining that the tendency for adolescents to make poor choices, which may create danger might be attributed to the development of temperance).

37. See generally JOHN DACEY & MAUREEN KENNY, ADOLESCENT DEVELOPMENT (2d ed. 1997); DOUGLAS C. KIMMEL & IRVING B. WEINER, ADOLESCENCE: A DEVELOPMENTAL TRANSITION (1985); DAVID R. SHAFFER, DEVELOPMENTAL PSYCHOLOGY: CHILDHOOD AND ADOLESCENCE (2d ed. 1989); NORMAN A. SPRINTHALL & W. ANDREW COLLINS, ADOLESCENT PSYCHOLOGY: A DEVELOPMENTAL VIEW (3d ed. 1995); Laurence Steinberg & Elizabeth Cauffman, *The Elephant in the Courtroom: A Developmental Perspective on the Adjudication of Youthful Offenders*, 6 VA. J. SOC. POL'Y & L. 389 (1999).

38. An example is creative regulation of motor vehicle licensing. Youths aged sixteen can get drivers licenses in most states, but in some states, the privilege is subject to some restrictions until adulthood. For example in California, Maryland, and Nebraska, minors cannot drive after midnight unless supervised by certain adults. See CAL. VEH. CODE § 12814.6 (West 2000); MD. CODE ANN., TRANSP. § 16-113 (1999); NEB. REV. STAT. ANN. § 60-4,120.01 (Michie Supp. 2000). This driving curfew is even earlier in other states. See, e.g., LA. REV. STAT. ANN. § 32:416.I (West 2000) (11 p.m.); N.C. GEN. STAT. § 20-11 (1999) (9 p.m.); S.C. CODE ANN. § 56-1-175 (Law. Co-op. 1999) (daylight hours only); S.D. CODIFIED LAWS § 32-12-12 (Michie 2000) (8 p.m.). This trend, adopted or being adopted in many states, is called "graduated licensing" and involves a three-step process: a minor must first get a restricted learner's permit and then a restricted provisional license before receiving a "full" unrestricted license as an adult. See, e.g., IOWA CODE ANN. § 321.180B (West 1999); D.C. Act 13-190 (D.C. Code Supp. 2000) (graduated licensing to take effect beginning Sept. 1, 2000). The State of New York is unusual in that it varies its restrictions depending on the region of the state. See N.Y. VEH. & TRAF. LAW § 501(3)(c) (Consol. 2000) (indicating that minors are not permitted to drive within the limits of New York City). Thus, in these states, adolescents are accorded an adult privilege, but with restrictions that acknowledge that they are not ready to assume full adult responsibilities.

Another context in which adolescents are distinguished from younger children is in the adjudication of child custody disputes. In most states, the preferences of teens regarding custody is given greater weight than are those of younger children. See Elizabeth S. Scott et al., *Children's Preference in Adjudicated Custody Decisions*, 22 GA. L. REV. 1035, 1050 (1988).

39. See, e.g., N.J. STAT. ANN. § 9:17B-1 (West 1993).

adolescence in legal rhetoric. When the Supreme Court recognizes parental authority and other constraints on the rights of pregnant minors, teens are described as children. In *Bellotti v. Baird*,<sup>43</sup> for example, Justice Powell points to the vulnerability of children, their lack of experience, perspective, and judgment, and the guiding role of parents in the upbringing of their children as the basis for limiting adolescent abortion rights.<sup>41</sup> In contrast, advocates who favor conferring adult abortion rights on teens present quite a different image of pregnant adolescents. In *H.L. v. Matheson*,<sup>42</sup> for example, Justice Marshall argued (in dissent) that Utah's statutory restrictions amounted to a state-created "obstacle to the exercise of the minor woman's free choice."<sup>43</sup>

In general, both advocates and lawmakers ignore the developmental realities of adolescence, and endorse fictional accounts in which adolescents are either immature children (and thus dependant, incompetent, and vulnerable), or mature adults (and thus self-sufficient, competent, and responsible). This does not mean, however, that such binary classification is generally bad policy, or that it disserves the interests of adolescents. To the contrary, this approach works well for the most part. To a considerable extent, classification of adolescents as children (for most purposes) or adults (for some purposes) constitutes a coherent and socially beneficial scheme.

### III. DRAWING THE LINE BETWEEN LEGAL CHILDHOOD AND ADULTHOOD

As I have suggested, children cross over the line to legal adulthood at different ages for different purposes. The baseline, of course, is the age of majority, the age at which presumptive adult legal status is attained. However, a complex regime of age grading defines childhood as a category with multiple boundaries. Youths charged with murder can be tried as adults at age ten or younger in many states,<sup>44</sup> and high school

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40. 443 U.S. 622 (1979).

41. *See id.* at 634, 643. Despite this rhetoric, however, Justice Powell acknowledges that many adolescents may be sufficiently mature to make their own abortion decisions. *See id.* at 643 n.23. *Bellotti* requires that a minor be given the opportunity (through a hearing) to demonstrate her maturity and ability to make an autonomous decision. *See id.* at 643; *infra* text accompanying notes 107-13.

42. 450 U.S. 398 (1981).

43. *Id.* at 441 (Marshall, J., dissenting).

44. *See* NEV. REV. STAT. ANN. § 62.040 (Michie 1996 & Supp. 1999) (providing that the juvenile court does not have jurisdiction over persons accused of murder, without regard to age); VT. STAT. ANN. tit. 33, § 5506 (Supp. 2000) (stating that children age ten and up may be transferred to adult court if charged with certain enumerated offenses including, but not limited to, murder,

students can obtain contraceptives without parental permission.<sup>45</sup> On the other hand, non-custodial parents may be obliged to contribute to their children's college expenses<sup>46</sup> and young adults cannot drink or run for Congress.<sup>47</sup> What explains this variation?

The logic of the multiple boundaries of childhood is far from obvious. Most straightforwardly, age grading can be explained as a function of different maturity requirements in different legal domains. Both youths and society benefit if adult legal status is conferred when (and only when) young citizens are capable of fulfilling the law's expectations. Thus, no one would challenge that the maturity demanded to fulfill the role of president (currently limited to citizens age thirty-five or older) is greater than that needed to drive a car or vote. However, perusal of the scheme of regulations suggests that, although crude assumptions about maturity play an important role, age grading policies are often shaped by other considerations as well. Examination of specific policies suggests that lines are drawn on the basis of a number of diverse policy concerns. Concern about youth welfare, protection of parental authority, and societal benefit are all a part of the mix, as is straightforward administrative convenience. On issues such as abortion access, political controversy and compromise have played a powerful role in the way in which the boundary of childhood is set. In the discussion that follows, I examine the complexity of age grading, and extract some lessons from the diverse responses that policy makers have offered to the question: "When does childhood end?"

### A. *The Categorical Approach—Age of Majority*

#### 1. The Logic of a Presumptive Age of Majority

The age of majority is the natural place to begin. The common law age of majority was twenty-one, apparently because, in the Middle Ages, most men were presumed capable of carrying armor at this age.<sup>48</sup>

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aggravated assault, and kidnapping); WIS. STAT. ANN. § 938.183 (West 2000) (providing that adult court has original jurisdiction over juveniles age ten and over who are alleged to have attempted to commit or committed murder).

45. See *infra* notes 80-82 and accompanying text.

46. See 750 ILL. COMP. STAT. ANN. 5/513 (West 1999 & Supp. 2000).

47. The minimum age for service in the House of Representatives is twenty-five. U.S. CONST. art. I, § 2. For the Senate, it is thirty. See *id.* § 3.

48. See SENATE COMM. ON THE JUDICIARY, LOWERING THE VOTING AGE TO 18, S. REP. NO. 92-26, at 5 (1971); VIRGINIA GRACE COOK, THE AGE OF MAJORITY 6 (1972) (describing the historical development of the age of majority).

Currently, legal adulthood begins at age eighteen.<sup>49</sup> This milestone signals the end of parental authority and responsibility, as well as the withdrawal of the state from its protective *parens patriae* role. The financial support obligation of parents generally ends when children attain the age of majority, as does parents' common law right to their children's earnings.<sup>50</sup> The safety net of government support and protection is also terminated; for the most part, federal and state financial support, medical services, and abuse and neglect jurisdiction end when children become legal adults at age eighteen.<sup>51</sup>

On reaching the age of majority, individuals acquire most of the legal capacities necessary to function as citizens and members of society. Legal adults have the right to make decisions about domicile and medical treatment, and the legal capacity to enter binding contracts, sign leases, purchase real estate, and make wills.<sup>52</sup> Upon attaining the age of majority, individuals are also accorded the rights and privileges of citizens, including the right to serve on juries and (perhaps of greatest symbolic importance) the right to vote.<sup>53</sup>

The designation of a categorical legal age of majority can be understood as reflecting a crude judgment about maturity and competence. Individuals at the specified age are assumed to be mature enough to function in society as adults, to care for themselves, and to make their own self-interested decisions. Before this threshold is crossed, authority to make these decisions rests largely either with the

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49. For example, the Virginia Code provides:

For the purposes of all laws of the Commonwealth [of Virginia] including common law, case law and statutory law, unless an exception is specifically provided in this Code, a person shall be an adult, shall be of full age and shall reach the age of majority when he becomes eighteen years of age.

VA. CODE ANN. § 1-13.42(b) (Michie 1995). In California, "[a]n adult is an individual who is 18 years of age or older." CAL. FAM. CODE § 6501 (West 1994).

50. Some states have adjusted the age for terminating the parental support obligation to accommodate the post-majority dependency of college students. See *infra* text accompanying notes 71-73.

51. See, e.g., 28 U.S.C. § 1738A(b)(1) (1994) (indicating that "child" for purposes of the Uniform Child Custody Jurisdiction Act means person under age eighteen); 42 U.S.C. § 619(2) (Supp. III 1998) (defining "minor child" for purposes of the Social Security Act to include children under eighteen or those under nineteen who attend post-secondary or vocational school full-time); FLA. STAT. ANN. § 39.41(2)(a) (West 1998 & Supp. 2000) (stating that jurisdiction over dependent children ends at age eighteen); 705 ILL. COMP. STAT. ANN. 405/1-1 (West 1994) (providing that abuse and neglect jurisdiction extends to minors under age eighteen); N.J. STAT. ANN. § 9:6-8.21 (West 2000) (defining abused or neglected child to mean a child under age eighteen); UTAH CODE ANN. § 78-3a-103(1)(a) (Supp. 2000) (providing that an abused or neglected child includes a minor under age eighteen).

52. See *supra* note 39 and accompanying text.

53. See *infra* text accompanying notes 61-68.

parents, who can be assumed to act in the child's interest, or with the state. Empirical evidence from developmental psychology supports that by age eighteen (and certainly by age twenty-one), most individuals attain the presumed adult competence in many domains.<sup>54</sup> Although the process of psychological development and maturing continues into the adult years, there are only modest differences between late adolescents and adults in decision-making capacity.<sup>55</sup> In fact, one likely effect of the categorical approach is that minors will sometimes continue to be treated as legal children when they are competent to make decisions or perform adult functions. For this reason, this approach has been challenged, sometimes successfully, on the ground that it deprives competent youths of the ability to exercise rights and privileges that adult citizens enjoy.<sup>56</sup>

The use of a bright line rule to designate the end of childhood ignores individual variations in developmental maturity as well as varying maturity demands across the range of legal rights and responsibilities. Nonetheless, it generally functions quite well. For most purposes, no great harm results from postponing adult legal status until the designated age, or from giving parents legal authority and thereby involving them in their adolescent children's lives. Most adolescents have no pressing need to execute contracts, and if they do, parental involvement is probably desirable in most cases. Moreover, an extended dependency period offers benefits in the form of entitlement to support

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54. See Steinberg & Cauffman, *supra* note 36, at 255.

55. Developmental research indicates that most persons, by age sixteen, have "the ability to engage in hypothetical and logical decision-making . . . , to demonstrate reliable episodic memory . . . , to extend thinking into the future . . . , to engage in advanced social perspective-taking . . . , and to understand and articulate one's motives and psychological state." Steinberg & Cauffman, *supra* note 37, at 402. Generally, late adolescence (ages seventeen to nineteen) is marked by the ability to delay gratification, to think ideas through, to make independent decisions, to compromise, and to set goals. See *Normal Adolescent Development*, AM. ACAD. OF CHILD & ADOLESCENT PSYCHOL., at <http://education.indiana.edu/cas/adol/development.html>. Accompanying these abilities is greater self-reliance and emotional stability, a higher level of concern for the future, and acceptance of social institutions and cultural traditions. See *id.*

56. See Gary B. Melton, *Toward "Personhood" for Adolescents: Autonomy and Privacy as Values in Public Policy*, 38 AM. PSYCHOLOGIST 99, 99-100 (1983); Lois A. Weithorn & Susan B. Campbell, *The Competency of Children and Adolescents to Make Informed Treatment Decisions*, 53 CHILD DEV. 1589, 1589-90 (1982). In *Bellotti v. Baird*, 443 U.S. 622 (1979), the Supreme Court accepted the claim that mature minors should not be deprived of abortion rights. See *id.* at 647. Not all challenges using developmental arguments have been successful. The Supreme Court has sometimes rejected developmental arguments against abortion restrictions. In *Hartigan v. Zbaraz*, 484 U.S. 171 (1987), the Court rejected the developmental argument of the American Psychological Association ("APA"). See *id.* at 172; see also Brief for Amicus Curiae American Psychological Association at 13-15, *Hartigan v. Zbaraz*, 484 U.S. 171 (1987) (No. 85-673) [hereinafter APA Brief].

and other protections of childhood.<sup>57</sup> Indeed, if maintaining parents' enthusiasm for their obligations toward their children is important, retention of parental authority may be worthwhile—as long as parents have no serious conflict of interest with their children.<sup>58</sup> Political support for special governmental benefits for children and adolescents may also be strengthened by maintaining the bright line between childhood and adulthood for most purposes.<sup>59</sup>

A bright line age of majority is a clear signal; all who deal with the young person understand that he does—or does not—have legal capacity. A more tailored approach that attempts to confer adult status in different domains on the basis of a more targeted assessment of maturity is likely to generate uncertainty and error. Moreover, it almost certainly would be administratively less efficient. A strategy of customized age grading introduces complexity and cost to legal policy, as it involves multiple judgments about the appropriate maturity threshold for a broad range of tasks and functions. Most cumbersome of all would be an approach that confers adult legal rights or responsibilities on the basis of individualized assessments of maturity. Because such a strategy is costly and burdensome, predictably it is only employed when the stakes are high.<sup>60</sup>

The upshot is that a categorical approach that treats individuals below a designated age as legal minors for most purposes works well, despite some inevitable distortion of the developmental capacities of young persons, as long as that age corresponds roughly to some threshold of developmental readiness to assume the responsibilities and privileges of adulthood. Because of the advantages of this categorical approach, variations that depart from the presumptive age should attract our interest. These variations can be explained as serving some political

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57. See Scott, *supra* note 8, at 1667-69.

58. In earlier work, Robert Scott and I develop this argument. Withdrawing parental authority and autonomy (either by extensive state supervision or by treating children as legal adults) may undermine parents' motivation to fulfill their obligations. See Scott & Scott, *supra* note 15, at 2430.

59. Although policies that treat youths as children for some purposes and adults for others might be perfectly coherent, the public may believe that there should be rough parity between rights and responsibilities. See Scott, *supra* note 8, at 1611. Thus, children's rights advocates in the 1960s who argued for broad rights of self-determination for adolescents (often on the ground that they were very like adults in their capacities), may have undermined the effectiveness of arguments for lenient policies toward youth crime. See *id.* at 1607.

60. Individualized hearings are used to determine whether particular young persons should be treated as legal adults or as children in at least two contexts. First, many statutes regulating adolescents' access to abortion provide for judicial by-pass hearings to evaluate maturity. See *infra* text accompanying notes 106-13. Also, one means of deciding whether youths accused of crimes will be tried as adults is the judicial transfer hearing. See *infra* text accompanying notes 145-47.



or social goal that would be undermined by adherence to the conventional boundary of childhood.

## 2. Determining the Age of Majority—The Passage of the Twenty-Sixth Amendment

What determines the location of the presumptive boundary between childhood and adulthood? Clearly, it is based on some rough assessment about the level of maturity required to function as an adult in society, but (also clearly) no single age is dictated by developmental considerations. In the past generation, the boundary has shifted downward, in response to the passage of the Twenty-Sixth Amendment, lowering the age at which citizens have a right to vote in federal and state elections. The social and political forces that led to this constitutional reform, and the arguments made in support of its passage, provide an interesting lesson about the way in which the presumptive boundary of childhood is drawn.

The right to vote has long been the defining marker of legal adulthood and the age of majority has been linked with this important symbol of full-fledged citizenship. Like many other legal rights, the right to vote is withheld from minors because of assumptions about developmental immaturity. It is assumed that education and an informed understanding of the issues are important to political participation in a democracy, and that adults are more likely to meet these criteria than children and adolescents.<sup>61</sup> Although this assumption may not hold in many cases<sup>62</sup>—many adolescents would be better informed voters than many adults—the withholding of the right to vote from minors has generated little controversy in recent years. This is probably because of a combination of two factors suggested above. The administrative cost of identifying minors who are “competent” to exercise their voting rights

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61. For a comprehensive discussion on the history of the voting age in America, see WENDELL W. CULTICE, *YOUTH'S BATTLE FOR THE BALLOT: A HISTORY OF VOTING AGE IN AMERICA* (1992). In this work, Ian McGowan, then-Executive Director of Youth Franchise Coalition, states that eighteen was a better age for voting than sixteen or seventeen because eighteen is the age that most persons graduate from high school and take on adult responsibilities. *See id.* at 105-06. *But see Why Not Seventeen?*, 22 NAT'L REV. 244, 245 (1970) (“We can't think of a single argument for a voting age of eighteen that doesn't apply just as well to seventeen.”). For an overview of why eighteen-year-olds deserved the vote, see SENATE COMM. ON THE JUDICIARY, *LOWERING THE VOTING AGE TO 18*, S. REP. NO. 92-26, at 5-7 (1971).

62. *See Melton, supra* note 56, at 100-01. Thus, voting rights were not an issue in the children's rights movement in the 1960s, when advocates argued for broad self-determination rights for adolescents.

would be substantial, and the cost of postponing the opportunity to exercise voting rights does not seem to be a great deprivation.<sup>63</sup>

If the latter point is true, how can we explain the extensive effort undertaken in the late 1960s to amend the United States Constitution to extend voting rights to eighteen-year-old citizens?<sup>64</sup> First, the political context and climate were important. The Twenty-Sixth Amendment was enacted in the midst of the Vietnam War, when many legal minors between the ages of eighteen and twenty-one were drafted into military service and sent into battle. Moreover, across the country, college students involved in the civil rights and anti-war protest movements demonstrated an interest in political participation and a commitment to social change. The Senate committee that recommended the enactment of the Twenty-Sixth Amendment emphasized these political facts.<sup>65</sup> It also emphasized that the young adults who would be enfranchised under the new amendment were "mentally and emotionally capable of full participation in our democratic form of government." Finally, the report noted that legal minors were treated as adults for the purposes of criminal responsibility and punishment in all states, and that many were engaged in adult roles as employees and taxpayers. The common law age of majority was dismissed as a matter of historical accident.<sup>66</sup>

Several points about this political initiative are interesting. First, the Amendment's supporters believed it was important to emphasize that the common law boundary between childhood and adulthood distorted developmental reality. The argument for lowering the age of majority was based in part on an empirical claim that, for most purposes, psychological maturity was achieved by age eighteen, suggesting a view that legal status should follow intuitions about developmental maturity.<sup>67</sup> Another important theme is that parity should exist between rights and responsibilities. On this view, fairness required the extension of voting rights to eighteen-year-olds because they were subject to the most onerous responsibility of citizenship (military service) and were often held legally accountable for their behavior under criminal law.<sup>68</sup> There is

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63. See *supra* note 60 and accompanying text.

64. For a discussion of the political movement that led to the passage of the Twenty-Sixth Amendment, see CULTICE, *supra* note 61. Cultice describes a youth movement to lower the voting age in the late 1960s, that became nationally recognized as LUV (Let Us Vote), and spread to over 3000 high schools and 400 colleges. See *id.*

65. See SENATE COMM. ON THE JUDICIARY, LOWERING THE VOTING AGE TO 18, S. REP. NO. 92-26, at 6.

66. See *id.* at 7.

67. See *id.* at 5.

68. See *id.* at 6.

little question that the image of young persons dying for their country in Vietnam who were not deemed mature enough to participate in elections carried much symbolic weight in the political process. It goes a long way towards explaining the timing of this constitutional reform. Finally, this reform reveals the extent to which legal childhood and adulthood are social and political constructs, rather than simply products of scientific understanding of human development. One implicit goal of the reform was to reconceptualize college student protesters from immature troublemakers who were "outside the system" into citizens with a stake in democratic processes. The broader point, of course, is that young persons between eighteen and twenty-one years of age were recast as legal adults in large part because of circumstances in the social and political environment.

### 3. The Limitations of the Categorical Approach—The Case of Child Support

After the passage of the Twenty-Sixth Amendment in 1971, the age of majority was lowered to age eighteen for many other purposes, through legislative and judicial action at the state and federal level.<sup>69</sup> Although much of this reform was uncontroversial, in one area, the legal change was quite problematic. Many courts interpreted the legal reform to require that non-custodial parents' obligation to provide financial support for their minor children must end at age eighteen (because by definition, recipients were no longer minors).<sup>70</sup> The impact of this downward shift suggests why a bright line rule defining the boundaries of childhood sometimes is inadequate.

The issue of when child support obligations should end continues to be a subject of debate. In many ways, modern eighteen-year-olds are ready to function as legal adults. However, college attendance has

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69. See CAL. FAM. CODE § 6501 (West 1994); VA. CODE ANN. § 1-13.42 (Michie 1995); Charles F. Willson, Note, *But Daddy, Why Can't I Go to College? The Frightening De-Kline of Support for Children's Post-Secondary Education*, 37 B.C. L. REV. 1099, 1101-02 (1996) (discussing the role of the Twenty-Sixth Amendment in the lowering of the age of majority).

70. Some state courts have found that divorced parents are not obligated to pay for their children's college expenses because they are only responsible during the child's minority. See *Cariseo v. Cariseo*, 459 A.2d 523, 524 (Conn. 1983); *Jones v. Jones*, 257 S.E.2d 537, 538 (Ga. 1979); *Peterson v. Peterson*, 319 N.W.2d 414, 414 (Minn. 1982). Other states do not extend child support to college expenses because married parents would not have the same obligation. See *Dowling v. Dowling*, 679 P.2d 480, 483 (Alaska 1984); *In re Marriage of Plummer*, 735 P.2d 165, 167 (Colo. 1987); *Grapin v. Grapin*, 450 So. 2d 853, 854 (Fla. 1984); *Curtis v. Kline*, 666 A.2d 265, 270 (Pa. 1995) (holding legislation allowing for post-majority support for college by non-custodial parents to be violative of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution).

become the norm as preparation for a successful life,<sup>71</sup> extending the period of financial dependency on parents for many young people. If the lowering of the age of majority to age eighteen (when many children are still in high school) signifies the end of parents' legal obligation to provide financial support to their children, many children will obtain a college education only with great difficulty—if at all. In intact families, parents who have the financial means usually support their children's college education, implicitly acknowledging that, in this domain, an extension of childhood status is important to their children's welfare. Non-custodial parents may be less likely to identify their own interest with that of children with whom they no longer share a home. This may justify imposing a legal obligation on these parents to act towards their children as they would had the family remained together—even though no such *legal* obligation is imposed on parents in intact families. In fact, non-custodial parents often are subject to formal legal mandates not applicable to parents in intact families—support for a minor child's private school education, for example.<sup>72</sup> A legal directive is necessary because non-custodial parents cannot be counted on to act in their children's interest.

Some courts and legislatures have authorized the extension of parents' child support obligation beyond the age of majority to provide financial support for college.<sup>73</sup> The underlying premise is that children's

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71. "[F]ew things are as certain as that people with more education earn more money." *Education and Earnings: 1987*, 35 OCCUPATIONAL OUTLOOK Q. 25, 25 (1991). According to the Census Bureau, persons with degrees beyond high school earn, on average, more than twice that of persons who hold only a high school diploma (\$2339 vs. \$1080 mean monthly earnings). See Rosalind R. Bruno, *What's It Worth?: Field of Training and Economic Status: 1993*, U.S. Bureau of the Census, CURRENT POPULATION REP., ser. P70-51, at 1 (1995).

72. See, e.g., HAW. REV. STAT. § 576D-7 (1993) (stating that private school expenses can be considered when calculating child support payments); LA. REV. STAT. ANN. § 9:315.6(1) (West 2000) (providing that the expense of a special or private school may be added to the basic child support obligation "to meet the particular educational needs of the child[ren]"); *Litmans v. Litmans*, 673 A.2d 382, 395 (Pa. Super. Ct. 1996) (noting that divorced parents have a duty to provide for their minor child's private school education as long as such an education is a reasonable expense). But see *Rizzo v. Rizzo*, No. FA 90-0439639S, 1996 Conn. Super. LEXIS, 592, at \*4 (Conn. Super. Ct. Feb. 8, 1996) ("[R]equiring the non-custodian parent to pay for expenses for a child's attendance at a private school . . . is generally not a support obligation of a parent."). See generally *Heefers v. Jones*, 672 A.2d 1299, 1310 (N.J. Super. Ct. Ch. Div. 1994) (listing criteria used in varying jurisdictions to determine when the non-custodial parent must pay for private school expenses).

73. See *LeClair v. LeClair*, 624 A.2d 1350, 1358 (N.H. 1993) (upholding legislation requiring college support for children of non-custodial parents); *Childers v. Childers*, 575 P.2d 201, 209 (Wash. 1978) (holding that the non-custodial parent must pay college costs after the statute was changed to read "dependent" rather than "minor"); see also IRA MARK ELLMAN ET AL., *FAMILY LAW: CASES, TEXT, PROBLEMS* 499-501 (1998); Glen A. Smith, Note, *Educational Support Obligations of Noncustodial Parents*, 36 RUTGERS L. REV. 588, 618 (1984) (explaining that some

financial dependency on their parents as they acquire a college education justifies extending the legal boundary of childhood beyond its presumptive limit. The recognition by lawmakers that, in this domain, older adolescents are not autonomous adults enhances general social welfare (by creating more educated citizens), as well as the welfare of youths who receive the benefit.

*B. Medical Decision-Making—A Case Study in  
Legal Line Drawing*

The legal regulation of medical treatment of children and adolescents conforms, in general, to the categorical approach, under which childhood ends at the age of majority. There are many exceptions, however, under which adolescents are given adult status. In the regulation of abortion, moreover, some states have adopted procedures that implicitly create a special category for adolescents. In its variation and complexity, the legal regulation of minors' access to medical treatment offers a rich context in which to examine the construction of the legal boundaries of childhood.

Most medical treatment of minors requires the consent of their parents.<sup>74</sup> Thus, adolescents cannot obtain routine medical treatment on their own, and, unlike adults, cannot refuse treatment that their physicians and parents conclude is necessary.<sup>75</sup> The basis for parental authority in this area is relatively straightforward. Medical treatment must be based on competent informed consent—otherwise the treatment provider commits a battery on the patient.<sup>76</sup> Because minors are presumed incompetent to give informed consent, parental consent is necessary. Although developmental psychology evidence indicates that older minors are mature enough in their cognitive development to make

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states have extended the support obligation based on the idea that college is necessary to succeed and is attended after children have reached the age of majority).

74. See Susan D. Hawkins, Note, *Protecting the Rights and Interests of Competent Minors in Litigated Medical Treatment Disputes*, 64 *FORDHAM L. REV.* 2075, 2075 (1996); Weithorn & Campbell, *supra* note 56, at 1589.

75. See *id.* Whether many physicians would provide non-essential medical treatment to an objecting adolescent on the basis of parental consent is uncertain. For example, if parents were intent on their protesting child receiving cosmetic plastic surgery, most surgeons likely would decline to perform the surgery. The American Academy of Pediatrics guidelines advise against treatment under these circumstances. See Committee on Bioethics, American Academy of Pediatrics, *Informed Consent, Parental Permission, and Assent in Pediatric Practice (RE9510)*, 95 *PEDIATRICS* 314, 315-16 (1995).

76. See, e.g., *Younts v. St. Francis Hosp. & Sch. of Nursing, Inc.*, 469 P.2d 330, 336 (Kan. 1970) ("A surgical operation on the body of a person is a technical battery or trespass, regardless of its result, unless the person or some authorized person consents to it.").

competent medical decisions,<sup>77</sup> giving parents legal authority usually makes good sense. It reduces uncertainty and cost for medical service providers who would otherwise need to assess the competence of their young patients. Beyond this, legal authority over health care decisions encourages parents to fulfill their general responsibilities to provide for their children's welfare—and to pay their children's medical bills! Most medical treatments present no conflict of interest; parents can be counted on to have their children's interests at heart in making treatment decisions. Thus, in requiring parental consent for most medical treatments, lawmakers adopt the traditional boundary of childhood for the conventional reasons.

### 1. The Mature Minor Doctrine and Minors' Consent Statutes

There are many exceptions to this general rule, however. The requirement of parental consent is set aside under certain circumstances and for particular kinds of treatment, giving adolescents legal authority to make their own medical decisions. The policy objectives of these exceptions vary, but most involve circumstances in which general social welfare and the welfare of the young person needing treatment would be undermined if parental consent were required and the traditional boundary of childhood were maintained.

Historically, the most well established of these exceptions is the mature minor doctrine.<sup>78</sup> Under this doctrine, legally valid consent can be obtained from an older competent minor for routine beneficial medical treatment or in an emergency situation. This exception facilitates necessary treatment when parental consent may be hard to get, under circumstances in which it is assumed that parents would likely consent. It also protects medical providers from liability for what may be only technical violations of the informed consent requirement.<sup>79</sup>

Aside from the general mature minor rule, legislatures in many states have enacted more targeted statutes, under which minors are deemed adults for the purpose of consenting to particular kinds of treatments. These typically include birth control and treatment for

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77. See Melton, *supra* note 56, at 101; Weithorn & Campbell, *supra* note 56, at 1595-96.

78. See Walter Wadlington, *Minors and Health Care: The Age of Consent*, 11 OSGOODE HALL L.J. 115, 120-21 (1973) (discussing the states which as early as the mid-1960s passed mature minor laws, which include: Mississippi, 1966; Alabama, 1972; Virginia, 1972; and Texas, 1972).

79. For a comprehensive discussion of the mature minor doctrine, see *id.* The principles of the mature minor doctrine seem to be influential, even in jurisdictions that have not formally adopted the doctrine. See Angela R. Holder, *Minors' Rights to Consent to Medical Care*, 257 JAMA 3400, 3400 (1987) (arguing that there have been very few cases in which a physician has been sued for non-negligent care of an adolescent without parental consent).

sexually transmitted diseases, substance abuse, mental health problems, and pregnancy.<sup>80</sup> Minors' consent statutes typically do not include a minimum age at which a minor is deemed an adult, but, because of the nature of the specified conditions and treatments, only adolescents are likely to seek treatment. Implicitly, these laws assume that the young patients are competent to consent to the treatment, an assumption that is likely valid for mid-adolescents.

These statutes are curious in that they give minors adult legal status out of concern for youthful vulnerability.<sup>81</sup> No one argues that minors should be deemed adults because they are particularly mature in making decisions in these treatment contexts. Rather, the focus is on the harm of requiring parental consent. The targeted treatments all involve situations in which the traditional assumption—that parents can be counted on to respond to their children's medical needs in a way that promotes the child's interest—simply might not hold. For example, some parents may become angry upon learning of their child's drug use or sexual activity. Moreover, even if most parents would act to promote their children's welfare, adolescents may be reluctant to get help if they are required to inform their parents about their condition, either because they fear their parents' reactions or because they do not want to disclose private information.<sup>82</sup> Removing this obstacle encourages adolescents to seek treatment that may be critically important to their health. Of course, society also has an interest in reducing the incidence of sexually transmitted diseases, substance abuse, mental illness, and teenage pregnancy. Together, these social benefits largely explain why lawmakers shift the boundary of childhood for the purpose of encouraging treatment of these conditions.

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80. See VA. CODE ANN. § 54.1-2969(D) (Michie 1998) (providing that minors are deemed adults for purposes of consenting to these treatments); see also ALA. CODE § 22-8-6 (1997) (stating that a minor may consent to treatment for pregnancy, venereal disease, drug dependency, alcohol toxicity, or any reportable disease); ME. REV. STAT. ANN. tit. 22, §§ 1502, 1823, 1908 (West 1992 & Supp. 2000) (providing that a minor may consent to treatment for abuse of alcohol or drugs, emotional or psychological problems, venereal disease, sexual assault, and family planning).

81. See, e.g., *In re E.G.*, 549 N.E.2d 322, 327 (Ill. 1989).

82. See Wadlington, *supra* note 78, at 122. But see Susan F. Newcomer & J. Richard Udry, *Parent-Child Communication and Adolescent Sexual Behavior*, 17 FAM. PLAN. PERSP. 169, 174 (1985) (stating "that teenagers are frequently ignorant of their parents' attitudes toward sex-related issues" and minors' fears about parental reactions may not reflect the parents' actual beliefs or attitudes). According to a 1980 study, requiring parental consent or notice before issuing contraceptives to teenagers would "lead many of them to abandon contraception or to use less effective methods." Aida Torres et al., *Telling Parents: Clinic Policies and Adolescents' Use of Family Planning and Abortion Services*, 12 FAM. PLAN. PERSP. 284, 291 (1980).

## 2. The Battle Over Adolescents' Access to Abortion

In the generation since *Roe v. Wade*,<sup>83</sup> legislatures and courts have struggled with the issue of whether the government can regulate access to abortion for adolescents more restrictively than would be allowed for adult women.<sup>84</sup> On this issue, the boundary between childhood and adulthood has been the subject of intense legal and political controversy, pitting advocates for adolescent self-determination, who describe pregnant teens as adults, against conservatives who depict these minors as children who should be subject to their parents' authority.<sup>85</sup> Both sides care deeply about this issue, and both have a political agenda that is linked to the larger ideological contest over abortion.<sup>86</sup> Not surprisingly, under these circumstances, the resulting legal framework is complex and the product of political compromise. In many states, lawmakers regulating adolescents' access to abortion reject the conventional strategies of legislative line drawing and binary classification. Rather, they treat adolescents as a distinct legal category, different from children and adults, and employ judicial hearings to classify teens on a case-by-case basis.<sup>87</sup> I will argue that this costly regulatory scheme offers little in the way of social benefit.

Many features of an adolescent's decision to terminate her pregnancy distinguish abortion from routine medical decisions, and give

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83. 410 U.S. 113 (1973).

84. See Melton, *supra* note 56, at 101; Robert H. Mnookin, *Bellotti v. Baird: A Hard Case, in THE INTEREST OF CHILDREN: ADVOCACY, LAW REFORM, AND PUBLIC POLICY* 149, 153 (R.H. Mnookin ed., 1985) (describing the advocacy movement against restrictions on adolescent abortion and the challenge of a Massachusetts statute in *Bellotti v. Baird*).

85. Language in Supreme Court opinions illustrates this rhetorical battle. See *supra* notes 40-43 and accompanying text.

86. For example, the National Organization for Women, a prominent pro-choice group, has actively opposed parental notification and consent laws. See Kristin Thomson, *A Pro-Choice View of Abortion Laws, in THE ABORTION CONTROVERSY: A DOCUMENTARY HISTORY* 270 (Eva R. Rubin ed., 1994). On the other hand, the Catholic Church and fundamentalist Protestant groups that are opposed to abortion generally have advocated for restrictions on adolescent access to abortion, including parental consent and notification provisions. See CYNTHIA GORNEY, *ARTICLES OF FAITH: A FRONTLINE HISTORY OF THE ABORTION WARS* 165 (1998); Basile J. Uddo, *The Public Law of Abortion: A Constitutional and Statutory Review of the Present and Future Legal Landscape, in ABORTION AND PUBLIC POLICY: AN INTERDISCIPLINARY INVESTIGATION WITHIN THE CATHOLIC TRADITION* 163, 175-76 (R. Randall Rainey et al. eds., 1996); see generally CENTER FOR REPRODUCTIVE LAW AND POLICY, *TIPPING THE SCALES: THE CHRISTIAN RIGHT'S LEGAL CRUSADE AGAINST CHOICE* (1998).

87. Some states adhere to a standard binary classification, and adopt the approach of the minors' consent statutes. See *infra* text accompanying note 97. Others would clearly choose to classify pregnant minors as children, but are prevented from doing so by constitutional constraints imposed by the Supreme Court. See *Planned Parenthood v. Danforth*, 428 U.S. 52, 74-75 (1976) (striking down a parental consent requirement in a Missouri statute).



rise to arguments that pregnant teens should be deemed adults in this context. Advocates for self-determination in the abortion debate focus on the constitutional importance of reproductive choice, and argue that most adolescents possess the developmental maturity to make the decision on their own.<sup>88</sup> Moreover, there are some notable differences between the right of privacy implicated in the abortion decision and other important rights of citizens that are not extended to minors, regardless of their competence. One justification for deferring many legal rights (the right to vote, for example) until the age of majority is that postponement results in no great deprivation. In contrast, the decision by the pregnant teen about whether or not to have a child cannot be postponed, and it has enormous consequences for the individual.<sup>89</sup> Moreover, given the health risks of pregnancy and childbirth, and the consequences for the girl's future welfare, the paternalistic argument for making abortion available to minors is a powerful one.

This line of analysis challenges the wisdom of the traditional classification of adolescents as legal children in the abortion context, and argues against governmental prohibition of access to abortion for minors. But should parents be legally excluded from their traditional role of making important decisions for their minor children?<sup>90</sup> In many regards, the arguments for allowing minors to consent to abortion without involving their parents are similar to those made in support of minors' consent statutes. Here, as in the context of treatment for sexually transmitted diseases or substance abuse, the interests of parents and children may conflict. The pregnancy may be unwelcome evidence that the child has rejected the parents' moral code. Moreover, some parents may strongly oppose abortion on moral or religious grounds, and thus refuse to consent to a procedure that they find abhorrent.<sup>91</sup> In short, the

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88. Gary Melton argues that adolescents are capable of making the abortion decision without adult intervention, either parental or judicial—that research indicates that adolescents are not far from adults in their decision-making capacity. See Melton, *supra* note 56, at 100-01. The APA agreed. In its amicus brief to the Supreme Court in *Hartigan v. Zbaraz*, 484 U.S. 171 (1987), the APA noted that adolescents do not differ from adults in their formal operational thinking—for example, the ability to understand future consequences—and moral reasoning, and thus, that the statutory restrictions at issue could not be justified. The Court was not persuaded by the developmental argument. See APA Brief, *supra* note 56, at 13-15; see also Weithorn & Campbell, *supra* note 56, at 1595 (noting findings of an abortion-specific study that shows adolescents age fourteen and up to be just as capable as adults in making decisions about abortion).

89. In *Bellotti v. Baird*, 443 U.S. 622 (1979), Justice Powell noted this attribute of abortion. See *id.* at 635, 640.

90. Most pregnant teens *do* consult with their parents before they seek abortion. See Torres et al., *supra* note 82, at 287.

91. See *id.*

parents' view of the right decision may be based on their own values and interests rather than on concern for their child's health and welfare per se. Even if this is not so, many teens may fear their parents' response and postpone dealing with the pregnancy if parental involvement is required for abortion.<sup>92</sup> This postponement could result in later (and riskier) abortions. Under these circumstances, the state might legitimately intervene to protect the child's welfare by allowing adolescents to obtain an abortion without parental involvement.

An important difference between abortion and treatment for substance abuse or sexually transmitted diseases, of course, is that the abortion decision involves a highly contested moral choice that is absent in those other treatments. There is only one right answer to the question of whether a teen with a drug problem should get treatment.<sup>93</sup> Many would object to that description of the decision to terminate a pregnancy. Thus, a core issue in classifying pregnant teens as adults or children is whether parents (or courts) should have the authority to impose their values on the pregnant adolescent or whether her values should be determinative. In these terms, the argument for shifting the boundary of childhood downward is straightforward. The pregnant teen possesses sufficient maturity to make this decision, and indeed, if she completes the pregnancy, she will be subject to the legal obligations of parenthood. She also has the most important stake in the outcome. As Justice Blackmun indicated in *Roe v. Wade*,<sup>94</sup> an important justification for giving control of this decision to the woman is that an unwanted pregnancy imposes a substantial burden on the individual.<sup>95</sup> There is no

92. See, e.g., *Hodgson v. Minnesota*, 497 U.S. 417, 439 (1990) (stating that parental notification may have an "adverse effect[] . . . in the distressingly large number of cases in which family violence is a serious problem"); Holder, *supra* note 79, at 3402 (stating that teenagers' statements such as "If my father finds out I'm pregnant, he'll kill me" are not "always adolescent hyperbole"); Suellyn Scarnecchia & Julie Kunce Field, *Judging Girls: Decision Making in Parental Consent to Abortion Cases*, 3 MICH. J. GENDER & L. 75, 82 (1995) (noting that the teenage girl "will not want to tell her parents about the abortion because she wishes to avoid their anticipated anger, disappointment, or humiliation").

93. See ZIMRING, *supra* note 8, at 64-65 (stating that a parent who refused to help his or her child get treatment for venereal disease or substance abuse would be guilty of neglect).

94. 410 U.S. 113 (1973).

95. In his landmark opinion, Justice Blackmun described the substantial burden that an unwanted pregnancy imposes on a woman:

Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, . . . the additional difficulties and continuing stigma of unwed motherhood may be involved.

reason to assume that this burden would be felt less acutely by an adolescent than by an adult woman. Moreover, the burdens and health risks of pregnancy and childbirth are even greater with the younger teen.<sup>96</sup> Thus, while her self-determination claim may be weaker, the paternalistic argument that her parents' opposition to abortion should not be dispositive is stronger.

The response of lawmakers to this controversial dilemma has varied. Some states have adopted the approach of the minors' consent statutes, classifying pregnant teens as adults for the purpose of making this decision.<sup>97</sup> Others have downplayed the differences between abortion and other medical decisions, and have sought to retain parental authority to the extent possible.<sup>98</sup> Over the last generation, the constitutional parameters of minors' abortion rights have emerged in a series of United States Supreme Court decisions.<sup>99</sup> The resulting

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*Id.* at 153.

96. *See, e.g.*, Scarnecchia & Field, *supra* note 92, at 112 (stating that abortion "should be presumed to be in a younger teen's 'best interests' because of the higher risks of carrying a pregnancy to term").

97. *See* CONN. GEN. STAT. ANN. § 19a-601 (West 1997) (deeming minors' consent sufficient, after counseling); HAW. REV. STAT. § 577A-2 (1993) (providing that a minor has the capacity to consent to abortion); WASH. REV. CODE ANN. § 9.02.100 (West 1998) (stating "that every individual possesses a fundamental right of privacy with respect to personal reproductive decisions," including abortion). New Hampshire has no restrictions on abortion.

98. *See, e.g.*, Scarnecchia & Field, *supra* note 92, at 89, 118 (stating that thirty-three states have laws in effect prohibiting minors from obtaining abortions in the absence of either parental consent or notification, or a judicial by-pass). For an illustrative example of a parental notice statute, see generally the Parental Notice of Abortion Act of 1995, 750 ILL. COMP. STAT. ANN. 70/15, 70/40 (West 1999) (stating that absent an exception, a physician will be subject to state disciplinary action if he "willfully" performs abortions on minors without either "notice to an adult family member" or judicial by-pass). An example of a parental consent statute is Michigan's Parental Rights Restoration Act, MICH. COMP. LAWS ANN. §§ 722.903, 722.905, 722.907 (West 1993 & Supp. 2000) (stating that absent a medical emergency, "[a] person who intentionally performs an abortion" on a minor without her parent/legal guardian's written consent or a consent waiver by the probate court shall be "guilty of a misdemeanor").

99. *See, e.g.*, *Lambert v. Wicklund*, 520 U.S. 292, 293 (1997) (upholding a parental notification requirement, with judicial by-pass procedure); *Planned Parenthood v. Casey*, 505 U.S. 833, 839 (1992) (upholding a parental consent requirement, with judicial by-pass procedure); *Ohio v. Akron Ctr. for Reprod. Health*, 497 U.S. 502, 519-20 (1990) (upholding a state law requiring parental notification or consent, with judicial by-pass procedure); *Hodgson v. Minnesota*, 497 U.S. 417, 455 (1990) (upholding a requirement of notice to both parents, with by-pass procedure); *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 440-41 (1983) (striking down a city ordinance requiring parental consent without adequate by-pass procedure, and declaring that persons under fifteen may not be presumed immature); *H.L. v. Matheson*, 450 U.S. 398, 409 (1981) (upholding a parental notice requirement in case of immature, dependent minor); *Bellotti*, 443 U.S. at 647-50 (striking down a parental consent requirement with judicial discretion to require consent for a mature minor); *Planned Parenthood v. Danforth*, 428 U.S. 52, 74 (1976) (striking down a parental consent requirement).

constitutional framework authorizes states to subject adolescents to procedural requirements that would clearly be unacceptable for adults.<sup>100</sup> At the same time, the Court has made clear that abortion is different from other medical decisions, and that pregnant teens cannot be simply classified as children subject to their parents' authority.<sup>101</sup>

The Court has clarified (to some extent) the constitutional limits of state regulation of adolescent abortion by proposing a procedural framework that seeks to accommodate the competing interests of the pregnant minor, her parents, and the state. Under this framework, states must allow a mature minor to make the abortion decision without parental consent, but can require that she demonstrate in a judicial proceeding that she is mature enough to make the decision.<sup>102</sup> Even younger teens cannot be legislatively presumed to be unable to make a mature abortion decision.<sup>103</sup> If the court finds a minor not to be mature, a determination must be made (under the state's *parens patriae* authority) of whether authorizing abortion without parental involvement is in her best interest.<sup>104</sup> (Of course, the minor who is willing to tell her parents can obtain abortion with their consent.) The Supreme Court has also upheld statutory requirements that give parents notice of their child's abortion, without authority to withhold consent.<sup>105</sup>

The heart of this regulatory scheme is the judicial by-pass hearing, required in many states as a predicate to assigning adult status to the pregnant minor.<sup>106</sup> Under this approach, in contrast to most age grading policies, the boundary between childhood and adulthood is not a legislatively mandated bright line; rather, it is set by an individualized

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100. See, e.g., *Bellotti*, 443 U.S. at 633-35 (acknowledging the need to protect a child's constitutional rights while recognizing "that the constitutional rights of children cannot be equated with those of adults [because of] the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing").

101. See *id.* at 649 (explaining that if parental consent is denied, the minor must have recourse to a prompt judicial determination of her maturity).

102. See *id.* at 647.

103. See *City of Akron*, 462 U.S. at 440.

104. See *Bellotti*, 443 U.S. at 647-48.

105. The Court has upheld statutes requiring notice to both parents, even where only one parent lives with the child, as long as a by-pass hearing is available. See *Hodgson v. Minnesota*, 497 U.S. 417, 427 (1990); see also *supra* note 99 (discussing other opinions upholding statutory notice requirements).

106. See, e.g., ALA. CODE § 26-21-4 (1992); ALASKA STAT. § 18.16.030 (Michie 2000); CAL. HEALTH & SAFETY CODE § 123450 (West 2000); DEL. CODE ANN. tit. 24, § 1784 (1997); IND. CODE ANN. § 16-34-2-4 (West 1997); LA. REV. STAT. ANN. § 40:1299.35.5 (West 2000); MONT. CODE ANN. § 50-20-212 (1999); N.C. GEN. STAT. § 90-21.8 (2000); OHIO REV. CODE ANN. § 2151.85 (Anderson 1998); VA. CODE ANN. § 16.1-241(V) (Michie 1999).

evaluation of the minor's maturity. In by-pass hearings, courts apply an indeterminate legal standard, following Justice Powell's rather vague prescription in *Bellotti v. Baird*<sup>107</sup> that the pregnant adolescent who "is mature and well enough informed to make intelligently the abortion decision on her own" should be authorized to do so without parental consent.<sup>108</sup> Not surprisingly, perhaps, judicial judgments about where the line between childhood and adulthood should be drawn often seem to depend on attitudes about abortion and teen pregnancy. Some conservative courts raise the bar very high, evaluating petitioners under a standard for general maturity that most minors are unlikely to meet.<sup>109</sup> One is sometimes left to conclude that a "mature" minor would have consulted with her parents (and thus have no need for the judicial by-pass procedure), and probably would never have been foolish enough to become pregnant.<sup>110</sup> Other courts appear to rubber-stamp petitions by pregnant teens. For example, Robert Mnookin found that Massachusetts judges, called upon to implement a statute based on the guidelines set forth by Justice Powell in *Bellotti*, almost invariably ordered abortion without informing parents, even on the rare occasions when they concluded that a petitioner was not a "mature minor."<sup>111</sup> These courts appear to have been motivated largely by a paternalistic concern for the health and welfare of pregnant minors, rather than by any deference for

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107. 443 U.S. 622 (1979).

108. *Id.* at 647. The proposal by advocates that an informed consent standard be the decision rule has not been widely implemented. Advocates argue for this more determinate standard on the ground that abortion is a medical procedure, and thus the maturity requirement should focus on competence to make an informed treatment decision. See APA Brief, *supra* note 56, at 9. These advocates argue further that developmental research supports that by mid-adolescence, teens have the capacity for reasoning and understanding necessary to make an informed medical decision. See *id.* at 14-15; Bruce Ambuel, *Adolescents, Unintended Pregnancy, and Abortion: The Struggle for a Compassionate Social Policy*, 4 CURRENT DIRECTIONS IN PSYCHOL. SCI. 1, 4 (1995) (recommending that the age for requiring parental consent be lowered from eighteen to fourteen to accommodate existing psychological research on adolescents' capacity to consent to abortion). An informed consent limits the ability of judges to make decisions on the basis of their own values and attitudes.

109. See *H.B. v. Wilkinson*, 639 F. Supp. 952, 954 (D. Utah 1986) (outlining the factors to be applied to determine "maturity," which are largely impractical).

110. For example, a Utah court rejected the petition of a seventeen-year-old who was described as a good student, concluding that she lacked the requisite "experience, perspective and judgment." *Id.* at 958. The court emphasized that she lived at home, engaged in sexual activity without contraceptives, sought counsel from friends rather than family members or church officials, and failed to recognize the long-term consequences of abortion. See *id.* at 955-56.

111. See Mnookin, *supra* note 84, at 239-40. Between 1981 and 1983, ninety percent of the 1300 petitioning minors in Massachusetts courts were deemed "mature." See *id.* at 239. In the rest (with one exception), abortion without parental consent was determined to be in the minors' best interest. That sole exception went to a neighboring state. See *id.* "Every pregnant minor who has sought judicial authorization for an abortion has secured an abortion." *Id.* (emphasis omitted).

adolescent autonomy.<sup>112</sup> As Mnookin asks rhetorically: “[H]ow could the judge determine that it is in the interest of a minor to give birth to a child if she is too immature even to decide to have an abortion?”<sup>113</sup>

The legal framework endorsed by the Court can be understood as an effort to find an acceptable resolution to a highly contested dispute about the boundary of childhood—a dispute that has more to do with conflicting attitudes about abortion itself than with views on parental authority or the maturity or autonomy interests of adolescents. In defining the constitutional restrictions on state authority to classify adolescents as children in this context, the Court allows states to limit adolescent abortion rights to a circumscribed group of mature individuals. At the same time, it prohibits categorical classification of pregnant teens as children solely on the basis of age. This regulatory scheme, with its emphasis on the by-pass hearing, creates an elaborate and costly procedural mechanism for classifying adolescents as children or adults. In effect, however, the framework also creates a distinct legal category for adolescents—and thus is a rare departure from the conventional binary classification of adolescents as either adults or children. On the one hand, even the mature pregnant teen is not quite an adult; the requirement that she demonstrate her maturity creates a substantive burden on her efforts to obtain abortion services that likely would be unacceptable for adult women. Moreover, even mature teens may be subject to parental notice requirements.<sup>114</sup> On the other hand, traditional parental authority to make medical decisions for their children is curtailed by the availability of the by-pass hearing and by the right of mature minors to make their own decisions.<sup>115</sup>

The endorsement of this unique regulatory scheme may indicate that, in this context, the Court recognizes that adolescents are neither children nor fully mature adults. More clearly, the framework represents an effort to accommodate competing legal and political interests on a

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112. Under this approach, access to abortion is facilitated in much the same way (and for the same reasons) as treatments covered by minors' consent statutes.

113. Mnookin, *supra* note 84, at 263.

114. The Supreme Court has not ruled on this issue. In *H.L. v. Matheson*, 450 U.S. 398 (1981), which upheld Utah's parental notification statute, the Court explicitly stated that it was not considering the question of whether parental notice could be required for a mature minor. *See id.* at 413. The Fourth Circuit Court of Appeals recently upheld the Virginia statute that requires notice to all parents. *See Planned Parenthood v. Camblos*, 155 F.3d 352, 367 (4th Cir. 1998). The court reasoned that a notice requirement is less burdensome than a requirement of parental consent, and thus, Supreme Court precedent did not rule out such a statute. *See id.* at 371-72.

115. Moreover, under parental notice statutes, parents have no authority to override their child's decision once they receive notice. *See supra* note 99 for a description of cases involving notice statutes.

sharply contested moral issue. It may be that, under these circumstances, the Court deems the creation of an intermediate category to be the only viable solution. Perhaps the endorsement of the by-pass hearing reflects a view that the classification decision can be better resolved by courts than in the politically-charged legislative arena. The Massachusetts experience suggests that courts in that state usually classify minors as adults to promote their welfare, a response that is conventional in other settings. The process is costly and cumbersome, however, and the statutory solution seems unsatisfactory to most observers.<sup>116</sup> There is little evidence that it promotes the interests of pregnant teens or responds to their developmental needs. The requirement of a by-pass hearing leads to costly delay and seems likely to result in later abortions in many cases—in part, because it will be viewed as an obstacle by many girls. Moreover, under the by-pass model, judicial attitudes about abortion may color decisions about maturity and best interest, creating uncertainty and inconsistency. Setting aside the perceived need for constitutional compromise, this regulatory framework has little to recommend it. Legislatures adhering to the conventional objectives that guide legal regulation of minors would focus on the health and welfare of the pregnant teen and on the social costs of teen pregnancy. From this perspective, the creation of an intermediate category of adolescence in this context holds no apparent advantage over the legislative line drawing and binary classification of the minors' consent statutes.

### C. Summary

The law's approach to defining childhood turns out to be more coherent than it at first appears. A categorical demarcation of the legal age of majority functions quite well for most purposes, even though it may not mirror the developmental transition to adulthood, or even most adolescents for some purposes of many adolescents. When that line is shifted, some important policy objective is being served. Legal regulation lowering or raising the threshold of legal adulthood usually reflects dual objectives; it serves both the public interest and the interest of the adolescents who are classified either as legal adults or children. Sometimes, as with laws extending parents' support obligation through college, the goal of promoting the welfare of young persons seems to predominate—although investment in education also carries societal

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116. Robert Mnookin reports widespread dissatisfaction with the post-*Bellotti* Massachusetts statute among judges, lawyers for minors, and health professionals. See Mnookin, *supra* note 84, at 243-64.

benefits. In other contexts, policy makers pursue both paternalistic goals and public protection. This is the case with the minors' consent laws and with federal law which prohibits alcohol use by young persons over the age of majority.<sup>117</sup> On the whole, legal policy facilitates the transition to adulthood through a series of bright line rules that reflect society's collective interest in young citizens' healthy development to productive adulthood.

The legal framework seems to work well in another way. For the most part, as I have suggested, lawmakers employ a rather simplistic scheme that ignores developmental transition and categorizes adolescents as either children or adults. Although some critics have lamented this approach and argued for policies that are tailored to respond to the exigencies of this developmental stage,<sup>118</sup> there is little evidence that, in most contexts, the interests of adolescents are harmed by a regime of binary classification. Creating a separate legal category for adolescents would add complexity, but generally with little promised payoff. Indeed, the effect of a legal regime that includes a series of legislative bright line rules is to extend adult rights and responsibilities over an extended period of time into early adulthood, without incurring the costs of establishing an intermediate category, or of undertaking a case-by-case inquiry into maturity. Perhaps this is the lesson of abortion regulation. In that context, burdensome procedural requirements create social and administrative costs, and there is little evidence that the welfare of adolescents is advanced through the creation of an intermediate category. Occasionally, to be sure, useful exceptions to the binary classification scheme are introduced. For example, under recent statutory reforms, young drivers are accorded the adult privilege of operating motor vehicles, subject to special restrictions as they gain experience and learn responsibility.<sup>119</sup> In this setting, youth welfare and social welfare are both served by the creation of an intermediate category.

The legal account of childhood up to this point is for the most part a success story. It is also a story with simple themes, in part because the two important objectives in drawing the boundaries—promoting youth

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117. See *supra* note 1 and accompanying text.

118. The strongest objections have come from those who advocate treating adolescents as adults for a broader range of legal purposes. See Melton, *supra* note 56, at 102.

119. For a description of these statutes, see *supra* note 38. Franklin Zimring adopted the learner's permit metaphor in describing the law's optimal stance to adolescence. See ZIMRING, *supra* note 8, at 89-90. He argues that adolescents should be permitted to gain experience in adult activities and decisions, but be protected from their mistakes and bad judgment. See *id.* at 90-93.



welfare and social welfare—are straightforward and usually are aligned in pointing toward a particular classification. In the next Part, I turn to juvenile justice policy, a legal setting in which regulation has been less successful, and in which, recently at least, these goals have been treated as irreconcilable. Moreover, the standard strategies of binary classification have not worked well in this setting, and the tendency to ignore the developmental realities of adolescence has impeded the creation of effective policies for more than a century.

#### IV. JUVENILE CRIME AND THE DEFINITION OF CHILDHOOD

In the past one hundred years, legal policy towards youth crime has undergone three periods of reform. The first period began with the founding of the first Juvenile Court in Chicago in 1899.<sup>120</sup> The goal of the Progressive reformers was to create a separate court and correctional system for juveniles that would focus solely on the welfare of young offenders, with a goal of rehabilitation rather than punishment.<sup>121</sup> In the 1960s, a new wave of reform grew out of disillusion over the perceived failure of rehabilitation as the basis of juvenile justice policy. After the United States Supreme Court announced that due process was required in delinquency proceedings,<sup>122</sup> legislatures and law reformers introduced the principle of accountability and recognized public protection as a goal of juvenile justice policy. At the same time, they sought to retain the unique character of the juvenile justice system, with its focus on youth welfare.<sup>123</sup> For approximately the past decade, policy makers have responded to public fear of what is perceived to be a dramatic increase in

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120. See RYERSON, *supra* note 25, at 4, 45, 46.

121. See Sanford J. Fox, *The Juvenile Court: Its Context, Problems and Opportunities*, in PRESIDENT'S COMMISSION ON LAW ENFORCEMENT & ADMINISTRATION OF JUSTICE 11(1967) (describing the purpose of the founders of the Juvenile Court as promoting the welfare of delinquents); RYERSON, *supra* note 25, at 35-56 (describing how the theory of rehabilitation was implemented in the procedures of the court); Eric J. Fritsch & Craig Hemmens, *An Assessment of Legislative Approaches to the Problem of Serious Juvenile Crime: A Case Study of Texas 1973-1995*, 23 AM. J. CRIM. L. 563, 566-67 (1996).

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

123. The most important reform initiative in the 1970s and 1980s was the Juvenile Justice Standards Project, sponsored by the Institute of Judicial Administration and the American Bar Association. The Standards Relating to Dispositions were of greatest importance for my purposes. See IJA-ABA, *JUVENILE JUSTICE STANDARDS: STANDARDS RELATING TO DISPOSITIONS 1-4* (1980) [hereinafter IJA-ABA]. Also important was a task force on sentencing policy, sponsored by the 20th Century Fund. See generally *Report of the Twentieth Century Fund Task Force on Sentencing Policy Toward Young Offenders*, in *CONFRONTING YOUTH CRIME* 1, 3 (1978) [hereinafter *Report of the Twentieth Century Fund Task Force*].

youth crime.<sup>124</sup> The goal of this contemporary reform movement has been to protect society from young offenders by subjecting juveniles who commit serious crimes to the same standard of punishment as their adult counterparts.

Embedded in the reform rhetoric of different periods are strikingly different images of young offenders, and distinctive stories about their typical characteristics. These accounts, in turn, have been employed to shape and justify juvenile justice policy. The Progressive reformers in the early years of the juvenile court described young offenders as innocent vulnerable children to be molded into productive adults through rehabilitative interventions. The post-*Gault* reformers of the 1970s and 1980s offered a more realistic view. Young offenders were less culpable than adults because they lacked developmental experience and mature judgment, but they were not blameless children. In contrast, the descriptions by the reformers of the 1990s suggest that adolescent offenders are indistinguishable from adult criminals.<sup>125</sup>

Situating these accounts of childhood into the earlier discussion, the Progressive reformers adopted the conventional approach of treating delinquent youths as legal children and ascribing to them the traits of innocence and vulnerability. The modern conservative reformers, on this view, advocate shifting the boundary of childhood downward, and defining young offenders as adults. As we have seen, these moves are not unusual among policy makers—although, the contemporary advocates of more punitive policies display a singular lack of concern for youth welfare, and would count youngsters as adults at an age when they are deemed children for virtually every other legal purpose.<sup>125</sup>

For reasons that I will explore shortly, however, neither of these approaches works well as a basis for policy towards adolescent offenders. The standard binary categories fail as public policy in this context because they undermine society's interest in public protection and accountability (a flaw of the traditional court), or because they harm

124. "The juvenile violent crime arrest rate . . . increased 64% between 1988 and 1994 . . ." Patricia Torbet & Linda Szymanski, *State Legislative Responses to Violent Juvenile Crime: 1996-97 Update*, JUV. JUST. BULL. (Office of Juvenile Justice and Delinquency Prevention), Nov. 1998, at 1, 2. "[T]he number of juveniles arrested for murder more than doubled between the mid-1980's and the peak in 1993 . . ." *Id.* According to the Federal Bureau of Investigations, more juveniles were arrested for violent crime in 1991 and 1992 than in any other two-year-period in United States history. See Fritsch & Hemmens, *supra* note 121, at 564 (stating that juvenile homicide increased 171% from 1985 to 1992). Since the mid-1990s, the juvenile crime rate (including the homicide rate) has actually declined. See Torbet & Szymanski, *supra*, at 2.

125. See YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE 1-2 (Thomas Grisso & Robert G. Schwartz eds., 2000).

126. See *supra* note 39 and accompanying text.

young offenders and diminish their prospects for productive adulthood (the deficiencies of contemporary policies). Indeed, I will argue that, although the Progressive reformers focused on youth welfare and modern conservatives emphasize public protection, both models are seriously flawed *even in terms of their self-defined goals*. Only policies that attend to adolescence as a distinctive developmental stage between childhood and adulthood are likely to realize both of these objectives. Only the post-*Gault* reformers understood this.

A. *The Early Juvenile Court: Young Offenders as Innocent Children*

The Progressive reformers at the turn of the century had an ambitious agenda for improving the lives of children and promoting their development into productive adults. Juvenile justice reform was only one part of a far-reaching initiative that included compulsory school attendance laws, restrictions on child labor, and the creation of a child welfare system.<sup>127</sup> In an era in which mid-adolescents often assumed adult roles and burdens, an important objective of the reform was to expand the boundaries of childhood, and to promote the idea that older youths, like younger children, should enjoy the protection and solicitude of the state. Miriam Van Waters described the underlying theory of the juvenile court in the following terms:

[T]he child of [the] proper age to be under [the] jurisdiction of the juvenile court is encircled by the arm of the state, which, as a sheltering, wise parent, assumes guardianship and has power to shield the child from the rigours of common law and from [the] neglect or depravity of adults.<sup>128</sup>

Several strategies were employed to accomplish this goal. First, as the statement by Van Waters suggests, reformers employed romantic rhetoric—describing the youthful subjects of reform policies in childlike terms, drawing upon a shared understanding of the innocence, vulnerability, and dependency of childhood. Images of children working

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127. The “Century of the Child” began around 1890 with a broad agenda of institutional and legal reform and social programs providing services aimed at children. For a discussion of Progressive era reforms directed at children, see generally JOSEPH F. KETT, *RITES OF PASSAGE: ADOLESCENCE IN AMERICA 1790 TO THE PRESENT* 221-27 (1977); MURRAY LEVINE & ADELINE LEVINE, *A SOCIAL HISTORY OF HELPING SERVICES: CLINIC, COURT, SCHOOL, AND COMMUNITY* 23 (1970); SUSAN TIFFIN, *IN WHOSE BEST INTEREST?: CHILD WELFARE REFORM IN THE PROGRESSIVE ERA* 14-33 (1982).

128. MIRIAM VAN WATERS, *YOUTH IN CONFLICT* 3 (1926). Van Waters was a prominent juvenile court reformer.

in factories under horrendous conditions were evoked to generate support for child labor and school attendance laws, under which youths remained in school until age sixteen in many jurisdictions.<sup>127</sup> Reinforcing this image of youthfulness was the metaphor of the state as the kind parent concerned only with the welfare of children.

The challenge of reshaping the image of young criminals was particularly daunting. At the dawn of the juvenile court movement, only young children were insulated from criminal prosecution on grounds of infancy.<sup>130</sup> A primary focus of the energies by the Progressive reformers was the establishment of a separate court for the adjudication and correction of offenders up to sixteen or eighteen years of age, a court that would also respond to the needs of children who were subject to abuse and neglect by their parents.<sup>131</sup> Central to the philosophy of the new juvenile court (and to the political strategy of reformers) was the claim that delinquent youths and children who were neglected by their parents were not very different from each other. *All* of the children who came within the jurisdiction of the court were innocent victims of inadequate parental care, and the state's role in both delinquency and neglect cases was to intervene "in the spirit of a wise parent toward an erring child."<sup>132</sup> Indeed, parental neglect was understood to be the primary cause of delinquency.<sup>133</sup> The political objective was to promote an image of young offenders as children whose parents had failed them, rather than as criminals who threatened the community.

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129. See generally 2 CHILDREN AND YOUTH IN AMERICA: A DOCUMENTARY HISTORY 601-719 (Robert H. Bremner ed., 1971); 3 CHILDREN AND YOUTH IN AMERICA: A DOCUMENTARY HISTORY 299-518 (Robert H. Bremner ed., 1974).

130. Under the common law infancy defense, children under age seven were without criminal capacity, and children over age fourteen were to be treated as adults. See Andrew Walkover, *The Infancy Defense in the New Juvenile Court*, 31 UCLA L. REV. 503, 510-11 (1984). Children between ages seven and fourteen were presumed incapable of committing crimes, yet this presumption could be overcome by the state if it were able to prove that the child understood the wrongfulness of his or her acts. See *id.* at 511. The presumption garnered less weight as the child approached age fourteen. See *id.* at 511 n.22.

131. See *id.* at 515-17; Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 106 (1909).

132. VAN WATERS, *supra* note 128, at 5; see Fox, *supra* note 121, at 11 (noting that the juvenile court "expressed a purpose of extending to the delinquent child the same care and protection that was available for the neglected one").

133. Even the revisionist historians who are suspicious of the benign intentions of the Progressive reformers implicitly accept that they viewed parents as the source of the (delinquency) problem. For example, Anthony Platt argues that the reformers sought to remove children from the influence of their immigrant parents and to substitute guidance by (in their view) wholesome American government officials. See ANTHONY M. PLATT, *THE CHILD SAVERS: THE INVENTION OF DELINQUENCY* 139 (2d ed. 1977); see also RYERSON, *supra* note 25, at 126 (stating that the Reformers believed that delinquency is caused by faulty adult supervision).

The reformers pursued this goal by emphasizing the similarity between young delinquents and neglected children, and by advocating similar treatment. Judge Mack's famous challenge is representative: "Why is it not just and proper to treat these juvenile offenders, as we deal with the neglected children, as a wise and merciful father handles his own child whose errors are not discovered by the authorities?"<sup>134</sup> Other juvenile court evangelists, such as Judge Ben Lindsay, offered heartwarming stories of wayward children who came before the court, and were set on the right path through the guidance of the fatherly judge (himself) and other court personnel.<sup>135</sup> These romanticized accounts of young delinquents included older youths as well as young boys and girls, and serious crimes as well as minor misdeeds.<sup>136</sup> All of the young miscreants were described sympathetically as innocent children gone astray who needed only the firm (but kind) parenting that the court could provide.

Although the Progressive reformers effectively expanded the boundaries of childhood through child labor and school attendance reforms, their efforts in the juvenile justice context were less successful. The romanticized descriptions of adolescent offenders as innocent children played an important role in reinforcing the idealistic premise that no conflict of interest pitted the state against the young offender, and that the purpose of state intervention in delinquency cases (as in child welfare cases) was solely to promote the welfare of the youngster before the court. This was always a shaky premise that ignored the fact that young offenders, unlike children whose parents provide inadequate care, cause social harm through their criminal conduct. On reflection, it seems clear that the failure to recognize adequately the state's inherent interest in protecting society in delinquency cases constituted a corrosive flaw at the heart of the rehabilitative model of juvenile justice. Acceptance of rehabilitation likely was always predicated on its effectiveness in reducing youth crime and protecting society.<sup>137</sup>

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134. Mack, *supra* note 131, at 107.

135. See LINDSEY & O'HIGGINS, *supra* note 28, at 135-39; see also LEVINE & LEVINE, *supra* note 127, at 203-23 (stating that Judge Lindsey used to take his delinquents to shows, out for meals, and even visited their homes).

136. See LINDSAY & O'HIGGINS, *supra* note 28, at 170-77; VAN WATERS, *supra* note 128, at 3.

137. Justice Fortas, in his majority opinion for *In re Gault*, stated: "The child was to be 'treated' and 'rehabilitated' and the procedures, from apprehension through institutionalization, were to be 'clinical' rather than punitive." *In re Gault*, 387 U.S. 1, 15-16 (1967). However, he noted that "the high crime rates among juveniles . . . could not lead us to conclude that . . . the juvenile system, functioning free of constitutional inhibitions as it has largely done, is effective to reduce crime or rehabilitate offenders." *Id.* at 22 (citation omitted).

Moreover, the non-adversarial procedures, indeterminate sentences, and rejection of the criminal law principle of proportionality that were the hallmarks of the traditional juvenile justice system were justified on *parens patriae* grounds;<sup>138</sup> ultimately, it became clear that they harmed the interests of young offenders.<sup>139</sup> In short, the traditional model of juvenile justice failed to promote the welfare of the young charges of the system, and it failed to serve the larger societal interest. As the twentieth century progressed, the myth of the rehabilitative ideal was discredited, together with the image of the adolescent offender as an innocent child.

### B. *Young Offenders as Adults: Contemporary Justice Reform*

In contrast to the Progressives, who described young offenders as innocent children, conservative reformers today describe them as adults who should be held fully accountable for their crimes.<sup>140</sup> Responding initially to an increase in violent juvenile crime (particularly homicide), reformers in the past decade have argued for policies under which juveniles (at least those who commit serious crimes) are tried in adult courts and sentenced to adult prisons.<sup>141</sup> The goals of modern criminal justice reform are public protection and punishment, and in service of these goals, reform rhetoric has obliterated any distinctions between youthful offenders and adults. As one early supporter of "get tough" policies argued, "there is no reason . . . [to] be more lenient with a 16-year-old first offender than a 30-year-old first offender."<sup>142</sup>

These advocates for tougher juvenile crime policies reject virtually every aspect of the Progressive image of young offenders as immature children. On their view, the romanticized accounts of youngsters getting into scrapes with the law have no relevance in a world in which savvy young offenders commit serious crimes. These reformers apparently assume that there are no psychological differences between adolescent

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138. See W. VAUGHAN STAPLETON & LEE E. TEITELBAUM, IN DEFENSE OF YOUTH: A STUDY OF THE ROLE OF COUNSEL IN AMERICAN JUVENILE COURTS 15-21 (1972).

139. See *infra* notes 172-74 and accompanying text. For a discussion of how juvenile court procedures and dispositional structure were grounded in the rehabilitative model, see RYERSON, *supra* note 25, at 35-56; STAPLETON & TEITELBAUM, *supra* note 138, at 15-21 (describing how the theory of rehabilitation was reflected in the procedural scheme of the court). For a scathing critique of the procedural structure of the juvenile court, see FRANCIS A. ALLEN, THE BORDERLAND OF CRIMINAL JUSTICE: ESSAYS IN LAW AND CRIMINOLOGY (1964).

140. See FRANKLIN E. ZIMRING, AMERICAN YOUTH VIOLENCE 8 (1998).

141. In the second half of the 1990s, violent juvenile crime actually declined, but this has not yet affected the enthusiasm for stricter policies. See Torbet & Szymanski, *supra* note 124 at 1.

142. Regnery, *supra* note 29, at 68.

and adult offenders that are important to criminal responsibility.<sup>143</sup> Juvenile offenders “are criminals who happen to be young, not children who happen to commit crimes.”<sup>144</sup> This stance is partly (perhaps largely) strategic. Images of childhood are associated with legal protection and leniency; thus, policies that punish juveniles as adults are politically more palatable if adolescent offenders are described as criminals, rather than as children.

The modern reformers have pursued their agenda of shifting the boundary of childhood downward through several legislative strategies. The age of judicial transfer has been lowered in many states and a broader range of felonies can trigger a transfer hearing.<sup>145</sup> In a transfer hearing, an individualized determination is made on whether the young defendant should be deemed a legal adult for purposes of criminal prosecution or adjudicated as a child in juvenile court.<sup>146</sup> In contrast to the standard applied under traditional juvenile court statutes, the inquiry that determines this classification today is not made on the basis of amenability to treatment (which is, in part, a maturity inquiry), but rather on the seriousness of the offense and criminal record.<sup>147</sup> Under legislative waiver statutes, young offenders charged with designated serious crimes

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143. Elsewhere, Thomas Grisso and I have called this the “competence assumption.” Elizabeth S. Scott & Thomas Grisso, *The Evolution of Adolescence: A Developmental Perspective on Juvenile Justice Reform*, 88 J. CRIM. L. & CRIMINOLOGY 137, 139 (1997); see also Janet E. Ainsworth, *Youth Justice in a Unified Court: Response to Critics of Juvenile Court Abolition*, 36 B.C. L. REV. 927, 948-49 (1995) (arguing that little distinction exists between adult and adolescent offenders); Eric K. Klein, *Dennis the Menace or Billy the Kid: An Analysis of the Role of Transfer to Criminal Court in Juvenile Justice*, 35 AM. CRIM. L. REV. 371, 406 (1998) (arguing that people are not referring to violent or chronic juvenile offenders when they speak of a “child”).

144. Regnery, *supra* note 29, at 65.

145. Between 1992 and 1995, eleven states lowered the age for transfer; twenty-four states added crimes to automatic/legislative waiver statutes, and ten states added crimes to judicial waiver statutes. See PATRICIA TORBET ET AL., NAT’L CTR. FOR JUVENILE JUSTICE, STATE RESPONSES TO SERIOUS AND VIOLENT JUVENILE CRIME 6 (1996). For example, North Carolina added all Class A felonies to its list of crimes which trigger transfer hearings, and Missouri lowered its minimum transfer age from fourteen to twelve for all felonies. See *id.*

146. See *id.* at 25.

147. See CAL. WELF. & INST. CODE § 707 (West 2000). In an allegation of involvement in a murder, a minor who has committed two or more felonies while over age fourteen shall be presumed to be not a fit and proper subject to be dealt with under the juvenile court law. See *id.* Under traditional transfer statutes, the inquiry on the youth’s amenability to treatment focused on how the youth was likely to respond to rehabilitative interventions. See Matthew Thomas Wagman, Note, *Innocence Lost in the Wake of Green: The Trend Is Clear—If You Are Old Enough to Do the Crime, Then You Are Old Enough to Do the Time*, 49 CATH. U. L. REV. 643, 643 (2000). Thus, past treatment efforts, malleability, and general immaturity were important considerations. See *id.* at 643 n.2. Modern statutes are less concerned about whether the defendant is immature. Some statutes require that the court determine whether the youth is competent to stand trial in adult court, a constitutional due process requirement. See VA. CODE ANN. § 16.1-269.1 (Michie 1999).

are defined categorically as adults, and excluded from juvenile court jurisdiction based on age and offense, without an inquiry into maturity.<sup>148</sup> Under “direct file” statutes, prosecutors determine the classification; they can bring charges in either adult or juvenile court for a range of serious offenses.<sup>149</sup> Finally, blended sentencing statutes subject juveniles to stiff minimum sentences in juvenile court, which are completed through transfers to prison when the offender becomes an adult.<sup>150</sup> The upshot is that the mantra of punitive reformers, “adult time for adult crime,” is a reality for many juveniles. Through a variety of policy initiatives, the boundary of childhood has shifted dramatically and many offenders who are not yet in high school are tried and sentenced as adults.

Modern reformers advocate treatment of juvenile offenders as adults primarily in pursuit of the utilitarian goal of public protection, and assume that strict policies will enhance social welfare.<sup>151</sup> In this regard, the justice reforms bear some similarity to other laws that shift the boundary of childhood to define adolescents as adults. The medical consent statutes and federal restrictions on alcohol sales discussed previously also aim to reduce the social cost of harmful behaviors by minors. An obvious difference, of course, is that contemporary juvenile justice reformers make no serious claim that young offenders themselves will benefit. On this ground, the initiative to shrink the category of legal childhood in the criminal justice context is unique, and seemingly inconsistent with the values and policies that generally shape legal

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148. Legislative waiver, also called “statutory exclusion,” refers to the statutory scheme wherein juveniles above a certain age who commit certain crimes are automatically charged and tried in adult court. See TORBET ET AL., *supra* note 145, at 4. For example, in California, juveniles age fourteen and up are automatically tried in adult court for the crimes of murder, rape, and a number of other sexual offenses, including lewd and lascivious acts on a child under the age of fourteen. See CAL. WELF. & INST. CODE § 707(b), (e).

149. See TORBET ET AL., *supra* note 145, at 4; see also NEB. REV. STAT. ANN. § 43-276 (Michie Supp. 2000) (providing that the county attorney has the discretion, with certain considerations, to file a juvenile petition, a mediation referral, or a criminal charge for juveniles under age sixteen who have committed a felony).

150. Blended sentencing models vary primarily on the basis of whether original jurisdiction is vested in the juvenile court or criminal court. See TORBET ET AL., *supra* note 145, at 11-14. The juvenile jurisdiction models include “juvenile-inclusive” where the offender would receive both a juvenile and an adult sentence, and “juvenile-contiguous” where the offender receives a sentence from the juvenile court, which extends past the age of juvenile jurisdiction. See *id.* at 13. The criminal court methods mimic the juvenile court types and include “criminal-inclusive” (both). See *id.* For the inclusive methods, the criminal sentence is usually suspended unless there is a violation of parole, and in the contiguous method, various procedures are used to determine if the remainder of the sentence will be carried out once the offender becomes an adult. See *id.*

151. Elsewhere I call this “the ‘utilitarian assumption.’” Scott & Grisso, *supra* note 143, at 139.



regulation of children. Holding immature offenders to adult standards of criminal responsibility also challenges important principles that define the boundaries of criminal punishment.<sup>152</sup> Under these circumstances, it is fair, at a minimum, to require substantial evidence that the reforms will produce the promised social benefits. In fact, as I argue shortly, even if the only goal of juvenile justice policy were to minimize the social cost of youth crime, responses that treat young offenders like adult criminals are unlikely to achieve that goal. Both social welfare and youth welfare are undermined by these policies.

### C. *The Post-Gault Reformers: Justice Policies in a Developmental Framework*

*In re Gault*<sup>153</sup> exposed the flawed foundations of the rehabilitative model of juvenile justice and shattered the myth that delinquency interventions were aimed at promoting the welfare of wayward but innocent children. As Justice Fortas pointed out, many juveniles got "the worst of both worlds."<sup>154</sup> Because of the Court's ostensibly benign purposes, they were not accorded the procedural protections that adult criminal defendants received. At the same time, many young offenders were sent to correctional institutions for long sentences where they received little rehabilitation.<sup>155</sup>

In the 1970s and 1980s, several reform groups responded to the challenge of *Gault* by proposing juvenile justice policies based on a realistic account of adolescence.<sup>156</sup> These initiatives rejected the image of young offenders as innocent children that was so central to the Progressive account and to traditional policies.<sup>157</sup> However, the post-*Gault* reformers were mindful of criminal law principles limiting

152. See *supra* notes 140-50 and accompanying text.

153. 387 U.S. 1 (1967).

154. *Id.* at 18 n.23 (quoting *Kent v. United States*, 383 U.S. 541, 556 (1966)).

155. Justice Fortas' statement should not be taken to mean that most juveniles were punished as harshly as adult criminals. Although the traditional court ultimately failed even in terms of its own objectives, juvenile court dispositions, in general, were not as punitive as were those given adult offenders. See *id.* at 29.

156. The most sweeping reform project was the Juvenile Justice Standards Project, created by the American Bar Association and the Institute for Judicial Administration. See IJA-ABA, *supra* note 123. Also important was a task force on juvenile sentencing sponsored by the Twentieth Century Fund. See generally *Report of the Twentieth Century Fund Task Force*, *supra* note 123. Franklin Zimring was the reporter on the Twentieth Century Fund Task Force, and author of the report of the project. See *id.* His monograph, *Confronting Youth Crime*, is the most thoughtful and coherent statement of the perspective of the post-*Gault* reformers.

157. See *Report of the Twentieth Century Fund Task Force*, *supra* note 123, at 6-8; IJA-ABA, *supra* note 123, at 5-13.

punishment, and motivated to devise a system that served the interests of young offenders as well as that of society. Thus, they rejected the alternative of classifying adolescents as fully responsible adults. Young offenders, under their account, possessed sufficient capacity for understanding, reasoning, and moral judgment to be held accountable for their offenses (and indeed needed lessons in accountability), but were psychologically less mature and therefore less blameworthy than adult offenders.<sup>158</sup> Moreover, as Franklin Zimring, the most prominent of the reformers, argued, if delinquent youths were given "room to reform," predictably many would mature out of their tendencies to get involved in crime.<sup>159</sup>

The law reform groups struggled with the challenge of creating a modern juvenile justice system that recognized that public safety and retribution were legitimate policy goals, but that also acknowledged the differences between adult and juvenile offenders.<sup>160</sup> Under this new justice model, juvenile dispositions were to be based on the seriousness of the offense, rather than on the needs of the offender.<sup>161</sup> However, because juveniles were less blameworthy than their adult counterparts, their dispositions were to be categorically of shorter duration.<sup>162</sup> Furthermore, separate dispositional programs for juveniles were justified to prepare them for adult roles and to insulate them from association with adult criminals.<sup>163</sup> In short, the post-*Gault* reformers adopted a model of juvenile justice policy that was grounded in the realities of adolescent development and rejected conventional binary classification of young offenders as either children or adults.

These reform efforts influenced legislative change. Many states enacted statutes that explicitly rejected the traditional notion that rehabilitation is the only purpose of juvenile justice intervention, and recognized the importance of retribution and public protection.<sup>164</sup> Modern statutory sentencing provisions focus on the seriousness of the

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158. See *Report of the Twentieth Century Fund Task Force*, *supra* note 123, at 6-7.

159. See *id.* at 7.

160. See IJA-ABA, *supra* note 123, at 5 (indicating that the purpose of Standard 1.1 is to reduce crime by developing individual responsibility while recognizing unique characteristics of juveniles).

161. See *id.* at 6.

162. See *id.* (stating that under Standards 1.2E & 2.1, range of punishment should be based on offense, while actual punishment should be age appropriate).

163. See *id.* at 15-20.

164. Many states revised their juvenile codes to include new statements of purpose. See Tertet & Szymanski, *supra* note 124, at 4; see also WASH. REV. CODE ANN. § 13.06.010 (West 1993) ("It is the intention of the legislature in enacting this chapter to increase the protection afforded the citizens of this state . . .").

offense and the prior record of the offender as key considerations. Nevertheless, until recently, most statutory reforms also embodied the core premise of the post-*Gault* initiatives—that because of their developmental immaturity, most juveniles should be subject to a juvenile court proceeding (though one that was characterized by procedural formality and due process protections), and to more lenient punishment than adults in separate correctional facilities.<sup>165</sup>

Despite the recent trend toward classifying young offenders as adults, the lessons of the post-*Gault* developmental model have persisted. Some states have undertaken legislative reforms accommodating the interests of the young offender and of society. For example, Pennsylvania's Juvenile Act<sup>166</sup> adopts a "balanced approach," embracing three goals: community protection, accountability, and "competency development" (to enable young offenders to become productive community members when they return to society).<sup>167</sup> Moreover, some courts insist on considering the immaturity of offenders in sentencing young criminals, despite statutory encouragement to impose "adult time for adult crime." Thus, a Michigan judge recently insisted on sentencing a thirteen-year-old boy convicted of committing homicide when he was eleven to a juvenile facility, despite a statutory provision authorizing adult penalties.<sup>168</sup> Finally, new reform groups are at work, promoting juvenile justice policies that acknowledge the realities of adolescent development.<sup>169</sup> In the next Section, I will argue that this model is likely to be a more effective long-term strategy to respond to juvenile crime than either the traditional approach or contemporary policies.

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165. See Jennifer A. Zepeda, Comment, *Sentencing Juveniles for Murder in France and the United States: Are They Juveniles Who Commit Adult Crimes or Adult Criminals Who Are Juveniles?*, 22 LOY. L.A. INT'L & COMP. L. REV. 289, 296-97 (1999).

166. 42 PA. CONS. STAT. ANN. § 6301 (West 1999).

167. See *id.* § 6301(b)(2) (stating that the purpose of the Juvenile Act is, "to provide for children committing delinquent acts programs of supervision, care and rehabilitation which provide balanced attention to the protection of the community, the imposition of accountability for offenses committed and the development of competencies to enable children to become responsible and productive members of the community").

168. See Louise Knott & Oralandar Brand-Williams, *Young Killer Gets Juvenile Detention: State's Get-Tough Policy Blasted by Sentencing Judge*, DETROIT NEWS, Jan. 14, 2000, at A1.

169. The John D. & Catharine T. MacArthur Foundation Research Network on Adolescent Development and Juvenile Justice combines an ambitious research agenda with initiatives to inform policy makers about developmental knowledge. See generally YOUTH ON TRIAL, *supra* note 26. The Network has sponsored a volume by researchers on adolescent adjudicative competence and culpability. See *id.* For further information on this study, see the John D. and Catherine T. MacArthur Foundation Homepage, at <http://www.macfound.org/index.htm> (last modified Feb. 16, 2001).

*D. The Case for a Developmental Approach to  
Juvenile Justice Policy*

Although the boundary of childhood is drawn in most legal contexts without reference to the transitional developmental stage of adolescence, an approach that categorically defines adolescents charged with crimes as either children or adults has costly consequences. Both the Progressives who established the traditional juvenile court and modern punitive reformers are committed to fictional accounts about the clientele of the juvenile justice system, because these accounts are essential to their policy agendas. This stratagem, although it is standard among policy makers, fails in this context, and policies based on the conventional binary categories fail either to promote youth welfare or to serve the public interest. These objectives will be better served I will argue if policy makers recognize that young offenders are neither innocent children nor mature adults.<sup>170</sup>

Despite its benign tone, the myth constructed by the architects of the traditional juvenile court ultimately did more harm than good. Even assuming that the Progressive reformers had pure intentions (an assumption that some have challenged),<sup>171</sup> the myth was probably never persuasive when applied to older youths charged with serious crimes. It led many to conclude that the juvenile justice system was insufficiently concerned about public safety and accountability.<sup>172</sup> Moreover, those who cared about the interests of young offenders recognized that the fictional premise of the traditional model obscured the extent to which punishment and public protection were important but hidden forces that determined the disposition of young offenders.<sup>173</sup> Because its avowed goal was to promote the welfare of young delinquents, the juvenile court operated without the procedural constraints that protect adult criminal defendants, whose interest was always understood to be in conflict with that of the state. Further, again, because the ostensible purpose of intervention was to rehabilitate rather than punish the child, the court and correctional system had virtually unbridled discretion in fashioning dispositions, unconstrained by the principles limiting criminal

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170. The analysis in this Section draws on Scott, *supra* note 26.

171. See PLATT, *supra* note 133, at 4. Platt argued that anti-immigrant sentiment was an important motivation of Progressive reforms, and that an important goal of state intervention was to combat the "foreign" influence of immigrant parents on their children. See *id.* at 25-26.

172. The focus of criticism was the ineffectiveness of rehabilitation, as evidenced by juvenile recidivism rates. See FELD, *supra* note 10, at 92-94. Many critics assumed that tougher penalties would more effectively deter crime. See *id.* at 94.

173. See *id.* at 72.

punishment.<sup>174</sup> Thus, as Justice Fortas noted, juveniles, indeed, sometimes got the worst of both worlds—no procedural protections and little rehabilitation in prison-like correctional facilities.<sup>175</sup>

In contrast, modern reformers who would “get tough” on juveniles make no pretense that they aim to benefit young offenders, an objective that is made irrelevant by their assumption that adolescents deserve the same punishment for their offenses as their adult counterparts. They also assume (and argue) that shifting the boundaries of childhood is essential to protect society from the ravages of juvenile crime. The empirical evidence from developmental psychology and criminology challenges both of these assumptions. First, it supports the argument that holding young offenders fully accountable for their crimes violates the principle of proportionality, which defines fair criminal punishment. The constraints of proportionality are satisfied if juvenile offenders are held to a standard of diminished criminal responsibility, because their decisions about involvement in criminal activity reflect immaturity of understanding and judgment. Second, the assumption that strict penal policies promote social welfare is challenged by evidence about the role of antisocial behavior in adolescent development. This evidence suggests that many adolescents are inclined to engage in criminal activity and desist with maturity. Thus, policy makers who are focused on utilitarian goals must calculate not only the direct costs of the harm caused by young offenders, but also the long term costs of criminal punishment.

### 1. Criminal Responsibility in Adolescence

The criminal law assumes that most offenders make rational autonomous choices to commit crimes, and that the legitimacy of punishment is undermined if the decision is coerced, irrational, or based on a lack of understanding about the meaning of the choice.<sup>176</sup> The

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174. Francis Allen wrote a scathing criticism of the juvenile court before *Gault*, challenging the fairness of the lax procedures, as well as the premise of rehabilitation. See generally ALLEN, *supra* note 139; see also Sheldon Glueck, *Some “Unfinished Business” in the Management of Juvenile Delinquency*, 15 SYRACUSE L. REV. 628, 629 (1964) (“[E]ven a juvenile court can . . . overstep the bounds of fairness . . .”); Orman W. Ketcham, *The Unfulfilled Promise of the Juvenile Court*, 7 CRIME & DELINQ. 97, 101 (1961) (“The state has no right to substitute governmental for parental neglect.”) (emphasis omitted); Monrad G. Paulsen, *Fairness to the Juvenile Offender*, 41 MINN. L. REV. 547, 550 (1957) (“We cannot take away precious legal protection simply by changing names from ‘criminal prosecution’ to ‘delinquency proceedings.’”).

175. See *supra* notes 154-55 and accompanying text.

176. These mitigating factors are recognized in the criminal law defenses of duress, insanity, and mistake of fact. See PETER W. LOW ET AL., *CRIMINAL LAW: CASES AND MATERIALS* 246-57, 604-06, 752-54 (2d ed. 1986) (discussing mistake of fact, duress, and insanity, respectively).

principle of proportionality requires that punishment be proportionate to blameworthiness, which in turn is mitigated if the individual's decision-making capacity is deficient.<sup>177</sup> Thus, a defendant whose decision-making is grossly distorted by mental illness may be fully excused from responsibility under the insanity defense.

The relationship between immaturity and criminal responsibility has been obscured for much of the twentieth century by the adjudication and disposition of juveniles in a separate system that lacked a vocabulary to analyze these issues. Historically (prior to the founding of the juvenile court), the presumption that immaturity was relevant to assessing blame was captured in the common law infancy defense.<sup>173</sup> However, punishment, responsibility, and blameworthiness had no place in the rehabilitative model of juvenile justice, and thus, the issue of how the criminal law should take immaturity into account in assigning punishment received little attention for decades. Recently, as policy makers seek to punish children as adults, this issue has become salient once again. Yet, a doctrinal, analytic, and scientific vacuum of sorts exists, and there is much empirical and conceptual work to be done to provide a sound basis for policy.

The psychological research evidence suggests that developmental factors characteristic of adolescence contribute to immature judgment in ways that seem likely to affect criminal choices.<sup>177</sup> In general, youths are likely to have less knowledge and experience to draw on in making decisions than adults.<sup>169</sup> Moreover, peer conformity is a powerful influence on adolescent behavior, and may lead teens to become involved in criminal activity to avoid social rejection.<sup>181</sup> It is not surprising that, in contrast to adult crime, most juvenile criminal activity takes place in groups.<sup>182</sup> Adolescents also seem to perceive risks

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177. *See id.* at 7.

178. *See supra* note 130 and accompanying text.

179. *See Scott, supra* note 26, at 292. The research evidence is based on studies of psychological development in several domains. *See id.* at 300-07.

180. *See id.* at 302.

181. Research supports that conformity and compliance are important influences in adolescent behavior. *See generally* Thomas J. Berndt, *Developmental Changes in Conformity to Peers and Parents*, 15 DEVELOPMENTAL PSYCHOL. 608 (1979); Philip R. Costanzo & Marvin E. Shaw, *Conformity as a Function of Age Level*, 37 CHILD DEV. 967 (1966). There is also evidence that peer conformity plays an important role in youth crime. *See generally* Albert J. Reiss, Jr. & David P. Farrington, *Advancing Knowledge About Co-Offending: Results from a Prospective Longitudinal Survey of London Males*, 82 J. CRIM. L. & CRIMINOLOGY 360 (1991) (describing the importance of peer influence on adolescent crime).

182. *See Reiss & Farrington, supra* note 181, at 360; *see also* Franklin E. Zimring, *Kids, Groups and Crime: Some Implications of a Well-Known Secret*, 72 J. CRIM. L. & CRIMINOLOGY

differently or less well than adults, and they are more inclined to engage in risky activities (smoking, drinking, unprotected sex, and delinquent behavior, for example).<sup>183</sup> Finally, time perspective changes with maturity. As compared to adults, adolescents tend to focus more on immediate, rather than long term, consequences.<sup>184</sup>

It is not difficult to speculate about how these traits might contribute to youthful decisions to get involved in criminal activity—although it must be acknowledged that we have little direct research evidence about decision-making “on the street.” A youth, considering the prospect of a convenience store holdup, might fail to perceive risks that adults would recognize. In part, this may be due to a greater tendency to discount the future and to focus on short-term consequences. Peer approval, the excitement of the situation, and the possibility of getting some money may all weigh more heavily in his or her decision-making than the possibility of apprehension or the long term consequences for his or her future resulting from a criminal conviction.<sup>185</sup>

These developmental influences on adolescent decision-making—peer influence, risk perception and preference, and time perspective—together contribute to immature judgment, which distinguishes adolescent decision-making about involvement in crime from that of adults.<sup>186</sup> This developmental immaturity constitutes evidence supporting the argument that adolescents are less blameworthy in their criminal choices than are adults. On the other hand, adolescents are not innocent children. At least by mid-adolescence, the differences between adolescents and adults are considerably more subtle than those that

867, 867 (1981) (discussing the frequently ignored fact that adolescents commit crimes in groups, and the consequences of this ignorance when analyzing juvenile criminal activity).

183. See Lita Furby & Ruth Beyth-Marom, *Risk Taking in Adolescence: A Decision-Making Perspective*, 12 DEVELOPMENTAL REV. 1, 1-2 (1992) (describing decision-making about risky behavior in a rational decision-making framework); William Gardner & Janna Herman, *Adolescents' AIDS Risk Taking: A Rational Choice Perspective*, in ADOLESCENTS IN THE AIDS EPIDEMIC 17, 17-34 (William Gardner et al. eds., 1990); see also Thomas J. Cottle et al., *Adolescent Perceptions of Time: The Effect of Age, Sex, and Social Class*, 37 J. PERSONALITY 636 (1969) (discussing the effects of age, sex, and social class on adolescent perceptions of time); A.L. Greene, *Future-Time Perspective in Adolescence: The Present of Things Future Revisited*, 15 J. YOUTH & ADOLESCENCE 99 (1986) (discussing how a mixture of experimental, contextual, and self-referent factors influence the future that adolescents envision).

184. See Scott et al., *supra* note 36, at 231; see also Joseph P. Allen et al., *The Relationship of Adolescents' Expectations and Values to Delinquency, Hard Drug Use, and Unprotected Sexual Intercourse*, 2 DEV. & PSYCHOPATHOLOGY 85 (1990); Jari-Erik Nurmi, *How Do Adolescents See Their Future? A Review of the Development of Future Orientation and Planning*, 11 DEVELOPMENTAL REV. 1, 1-3, 47-48 (1991); Steinberg & Cauffman, *supra* note 36, at 408-09.

185. See Scott, *supra* note 26, at 303-05.

186. See Scott et al., *supra* note 36, at 227.

distinguish from the norm—the defendant who is excused from responsibility by reason of insanity.<sup>187</sup> Thus, adolescent immaturity should not excuse young offenders from criminal responsibility, but rather should support a standard of diminished responsibility.<sup>188</sup> A diminished responsibility standard recognizes that most young offenders are in a transitional developmental stage and calibrates criminal liability accordingly.<sup>189</sup> Under such a regime, young offenders can be held accountable for the bad choices they make, without bearing the full costs of their mistakes.<sup>190</sup>

## 2. Adolescent Development and the Social Costs of Juvenile Crime

It is unlikely that many people who support punishing young offenders as adults will be persuaded by arguments that juveniles should be subject to a standard of diminished responsibility. The likely response is that the differences between adults and adolescents are modest and should be ignored, because the top priority of justice policy must be to respond to the powerful threat to social welfare posed by juvenile crime. In this Section, I challenge the claim that punitive policies are the optimal means to achieve public protection and to minimize the social cost of youth crime, and suggests that utilitarian ends can better be served by policies that protect the future prospects of young offenders.

The argument for discounting youth as a mitigating factor in applying criminal sanctions has a superficial appeal. After all, youths who are in prison cannot be on the street committing crimes. However, the utilitarian assumption ignores the long-term costs of punitive policies, costs that are likely to be substantial given the developmental patterns of antisocial behavior in adolescence. Criminal behavior is rare

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187. The insanity defense is available only to severely disordered offenders. Only a small percentage of defendants successfully assert the insanity defense. See, e.g., Ira Mickenberg, *A Pleasant Surprise: The Guilty but Mentally Ill Verdict Has Both Succeeded in Its Own Right and Successfully Preserved the Traditional Role of the Insanity Defense*, 55 U. CIN. L. REV. 943, 967-70 (1987) (reviewing research showing that the insanity defense is rarely used and rarely successful); see also Michael L. Criss & D. Robert Racine, *Impact of Change in Legal Standard for Those Adjudicated Not Guilty by Reason of Insanity 1975-1979*, 8 BULL. AM. ACAD. PSYCHIATRY & L. 261, 264-66 (1980) (illustrating through statistical data that the use and success of the insanity defense is rare).

188. Franklin E. Zimring makes a similar argument in *AMERICAN YOUTH VIOLENCE* 75-81 (1998), and *The Hardest of the Hard Cases: Adolescent Homicide in Juvenile and Criminal Courts*, 6 VA. J. SOC. POL'Y & L. 437, 447-48 (1999).

189. Barry Feld has made a similar argument. See FELD, *supra* note 10, at 317.

190. Franklin Zimring describes adolescence as a probationary period, in which young offenders learn lessons in accountability. See ZIMRING, *supra* note 8, at 89-96.



in early adolescence; it increases through age sixteen, and decreases sharply from age seventeen onward.<sup>191</sup> Most teenage males participate in some delinquent behavior, a fact that has led Terrie Moffitt, a developmental criminologist, to conclude that delinquent behavior is “a normal part of teen life.”<sup>192</sup> However, most youthful criminal conduct is what Moffitt has called “adolescence-limited” behavior. The typical adolescent offender predictably will desist from criminal activity and mature into a productive (or at least not criminal) citizen if he survives this stage without destroying his or her life chances.<sup>193</sup> Contrary to the assumption of advocates for tougher sanctions, only a small minority are “life-course-persistent” offenders (in Moffitt’s parlance)—youths who are at high risk for lives as career criminals.<sup>194</sup> Whether and when individuals in the first group will assume conventional adult roles is likely to depend in part on the state’s response to their youthful criminal conduct. A policy of categorically imposing adult criminal penalties on young offenders may increase the probability that they will become career criminals, or it may delay desistance.<sup>195</sup> At a minimum, it seems a

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191. See generally David P. Farrington, *Offending from 10 to 25 Years of Age*, in PROSPECTIVE STUDIES OF CRIME AND DELINQUENCY 17 (Katherine Teilmann Van Dusen & Sarnoff A. Mednick eds., 1983).

192. Terrie E. Moffitt, *Adolescence-Limited and Life-Course-Persistent Antisocial Behavior: A Developmental Taxonomy*, 100 PSYCHOL. REV. 674, 675 (1993).

193. See *id.* Several other researchers have documented the tendency of antisocial and criminal behavior to increase in adolescence and then decline sharply after adolescent years. See, e.g., RICHARD JESSOR & SHIRLEY L. JESSOR, *PROBLEM BEHAVIOR AND PSYCHOSOCIAL DEVELOPMENT: A LONGITUDINAL STUDY OF YOUTH* (1977); Alfred Blumstein & Jacqueline Cohen, *Characterizing Criminal Careers*, 237 SCI. 985, 991 (1987); David P. Farrington, *Age and Crime*, in 7 CRIME AND JUSTICE: AN ANNUAL REVIEW OF RESEARCH 189, 236 (Michael Tonry & Norval Morris eds., 1986); Farrington, *supra* note 191, at 17; Travis Hirschi & Michael Gottfredson, *Age and the Explanation of Crime*, 89 AM. J. SOC. 552, 557 (1983); Edward P. Mulvey & John F. LaRosa, Jr., *Delinquency Cessation and Adolescent Development: Preliminary Data*, 56 AM. J. ORTHOPSYCHIATRY 212, 214, 222 (1986).

194. Under Moffitt’s taxonomy, these two groups differ in ways that may be important to desistance. See generally Moffitt, *supra* note 192. Life-course-persistent offenders tend to have problems in many domains beginning in early childhood, and their offending begins at a younger age. See *id.* In contrast, adolescent-limited offenders have little history of problem behavior in childhood. See *id.* Thus, adolescents for whom delinquency is limited to this developmental stage will not bear the cumulative effects of lifelong antisocial conduct. See Moffitt, *supra* note 192, at 691. Typically, their delinquent activity is also of a less serious nature. See *id.* They are also more likely to have acquired social and academic skills that prepare them for adult roles. See *id.* Finally, their delinquency does not reflect deeply entrenched personality disorders as may often be true of life-course-persistent offenders. See *id.* All of these factors may facilitate the transition to conventional adult roles. See *id.* at 690-91.

195. Some recent research results support this claim. One study found that recidivism was lower among New Jersey youths adjudicated in Juvenile Court than among similar New York offenders tried and punished as adults. See Jeffrey Fagan, *The Comparative Advantage of Juvenile Versus Criminal Court Sanctions on Recidivism Among Adolescent Felony Offenders*, 18 LAW &

modest claim that criminal punishment will undermine the future educational and employment prospects and general social productivity of those offenders whose criminal conduct is adolescence-limited.

Developmental analysis suggests that the policy reformers who embrace utilitarian objectives have failed to include in their calculus some important social costs of punitive policies.<sup>195</sup> Predictions about the effectiveness of these policies are based on one of two assumptions—perhaps on both. Either the reformers believe that most young offenders are incipient career criminals (and thus, the social benefits of adult punishment may outweigh the predicted costs to their future life prospects), or they believe that the future course of young offenders' lives will not be affected negatively by adult criminal punishment. The psychological evidence indicates that the first assumption is simply inaccurate; the second seems implausible.

What would the features of a juvenile justice policy be based on a realistic account of adolescence? First, such a policy would incorporate principles of accountability through the adoption of a diminished responsibility standard. This is important for several reasons. Public acceptance and moral legitimacy are crucially important to the success of criminal justice policy.<sup>197</sup> There is substantial evidence that American society cares about youthful accountability, and would support policies based on diminished responsibility, as long as public protection were not sacrificed.<sup>198</sup> Moreover, lessons in accountability benefit young offenders; adolescents need to learn from their foolish choices, so that they can assume adult roles and responsibilities successfully.<sup>197</sup> Second, a developmentally-based juvenile justice policy would seek to protect, rather than damage, adolescents' prospects for a productive future. Procedural protections that limit the stigma and lasting impact of delinquency status are worthwhile (for example, closed hearings and

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POL'Y 77 (1996). The John D. and Catherine T. MacArthur Foundation Research Network on Adolescent Development and Juvenile Justice has recently undertaken a longitudinal study that should provide important information on this issue.

196. See Scott, *supra* note 26, at 292-93.

197. See PAUL H. ROBINSON & JOHN M. DARLEY, *JUSTICE, LIABILITY, AND BLAME: COMMUNITY VIEWS AND THE CRIMINAL LAW* 5-11 (1995) (describing empirical studies supporting the argument that the criminal law conforms, at least roughly, to societal attitudes, and that this is important to its legitimacy); Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 *Nw. U. L. REV.* 453, 468-71 (1997) (same).

198. See ROBINSON & DARLEY, *supra* note 197, at 127. These researchers found that respondents in their study favored more lenient punishment of immature minors, particularly if young offenders were civilly committed. See *id.* at 145-47. This suggests that a concern about public safety mediates attitudes about youthful culpability.

199. See ZIMRING, *supra* note 8, at 89-90.

sealed records).<sup>200</sup> Dispositional programs that emphasize education and job skills can better prepare young offenders for adult roles.

Finally, it seems important to maintain a separate system of adjudication and disposition for juveniles, a system in which juveniles are accorded procedural protections, but are subject to reduced penalties and offered programs that promote their healthy development. Some observers have argued that a unified criminal justice system that provided a "youth-discount" in sentencing would better serve the interests of both young offenders and society.<sup>201</sup> Such an approach is consistent with a diminished responsibility model, and would afford young defendants the full range of procedural protections. My objections to this proposal are largely practical. I am skeptical that the criminal justice system has either the ability or inclination to respond to adolescents as a separate legal category. Political pressure appears to function as a one way ratchet, toward ever stiffer penalties. A separate juvenile justice system is more likely to recognize the reduced culpability of young offenders through more lenient sentencing, and to invest in programs designed for adolescents.<sup>202</sup>

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200. See Andrew R. Kintzinger, Comment, *Freedom of the Press vs. Juvenile Anonymity: A Conflict Between Constitutional Priorities and Rehabilitation*, 65 IOWA L. REV. 1471, 1484-85 (1980); Kathleen M. Laubenstein, Comment, *Media Access to Juvenile Justice: Should Freedom of the Press Be Limited to Promote Rehabilitation of Youthful Offenders?*, 68 TEMP. L. REV. 1897, 1901-02 (1995).

201. Barry Feld argues that the juvenile and criminal courts should be reunified. See FELD, *supra* note 10, at 289. He bases his position on what he terms the "built-in contradiction" of the juvenile justice system: while the court claims to offer treatment, its jurisdiction is not based on a need for treatment, but rather on the offense committed, thus "highlight[ing] the aspect of youths that rationally elicits the least sympathy and ignor[ing] . . . social conditions most likely to evoke a desire to help." *Id.* at 295. His plan for unification includes full procedural protections for young offenders, and differential sentencing tied to the age of the offender. See *id.* at 297. For example, a fourteen-year-old offender would receive twenty-five percent of the adult sentence, and a sixteen-year-old would receive fifty percent of the adult sentence. See *id.* at 317. The larger discount for the younger offender corresponds "to the developmental continuum" of responsibility. See *id.* This sentencing policy would be standardized and not discretionary, see *id.* at 304, and would be based on the idea that "youthfulness constitutes a universal form of 'reduced responsibility' or 'diminished capacity.'" *Id.* at 317.

202. A separate juvenile court is also a better forum for accommodating the more limited trial competence of young defendants, without sacrificing procedural protections. The Supreme Court in *In re Gault* extended many procedural protections to juveniles, requiring the state to prove the guilt of juvenile defendants through fair procedures. See *In re Gault*, 387 U.S. 1, 30 (1967). These protections benefit juveniles, but younger adolescents may be more limited in their capacity to make decisions in the process or to assist their attorney. See generally Scott & Grisso, *supra* note 143.

## V. ADOLESCENCE IN THE DEFINITION OF CHILDHOOD

It could be said that adolescence and the juvenile court are of about the same age. Only at the beginning of the twentieth century, with the publication of G. Stanley Hall's *Adolescence*,<sup>203</sup> was this transitional developmental stage between childhood and adulthood identified and described.<sup>204</sup> Over the course of the twentieth century, legal policy makers have tended to ignore adolescence, and to classify and describe adolescents categorically as either children or as adults, depending on the issue at hand. Through the creation of a series of bright line rules, however, the process of becoming a legal adult is extended through adolescence and into early adulthood, without establishing an intermediate category for this group. This approach generally has functioned effectively to promote both youth welfare and social welfare.

It has not worked well in juvenile justice policy. The experience of the twentieth century reveals that justice policies that treat young offenders either as children or as adults undermine both social welfare and youth welfare. Both Progressive and conservative juvenile justice models are flawed because they fail to attend to the unique importance, in this context, of recognizing and reconciling the conflicting interests of young offenders and society, without sacrificing either. The Progressives failed to see the conflict, while modern conservatives fail to see the need for reconciliation. A policy based on the developmental reality of adolescence offers the promise of meeting this challenge successfully.

The twenty-first century may see policy makers paying attention to the transitional stage of adolescence in other domains. Our experience with abortion regulation tells us that this move can be costly, and should be undertaken only when binary categories are inadequate. In some contexts, living as an adult in society presents complex challenges, and adolescents (and society) might benefit from a probationary period in which adult skills can be acquired, with protection against the costs of inexperienced choices.<sup>205</sup> For example, recent innovations in the regulation of adolescent driving privileges allow young persons to gain

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203. G. STANLEY HALL, *ADOLESCENCE* (1904).

204. See KETT, *supra* note 127, at 216-21. Hall saw adolescence "as torn by dualisms which disrupted the harmony of childhood; hyperactivity and inertia, social sensibility and self-absorption, lofty intuitions and childish folly." *Id.* at 217.

205. In the early 1980s, Franklin Zimring adopted the metaphor of the "learner's permit," describing adolescence as a period in which young persons learn lessons in freedom and responsibility, in preparation for adulthood, without bearing the full cost of their mistakes. See ZIMRING, *supra* note 8 at 89-98. The developmental model of juvenile justice policy fits this model.

experience while limiting risk.<sup>206</sup> On issues as varied as liability on contracts and preferences in custody disputes, courts and legislatures in the late twentieth century have recognized, implicitly at least, that adolescents are persons who are not yet adults, but are different from young children.<sup>207</sup>

Adolescence itself has become increasingly complex in the modern era. Young persons are more sophisticated and have more freedom than ever before; at the same time, dependency extends further into adulthood. Legal regulation of this category of citizens will never be simple, although the themes that underlie much existing policy are likely to continue to dominate. As a general matter, the long term interests of adolescents converge with the interests of society. Policies that recognize this convergence are likely to be effective.

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206. *See supra* note 38 and accompanying text.

207. A modern variation of the infancy defense adopted by some courts allows minors to disaffirm contracts, but holds them accountable for damage, unless the other party engaged in overreaching. *See Dodson v. Shrader*, 824 S.W.2d 545, 549 (Tenn. 1992). Adolescents' preferences are given substantial weight in custody disputes, unless their choice of custodian is clearly against their interest. *See supra* note 38 and accompanying text.