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THE LEGAL CONSTRUCTION OF CHILDHOOD

Elizabeth S. Scott*

American law makers 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 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 college students are legally prohibited from drinking.¹

The picture is complicated further by the fact that policy makers have no clear image of

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¹ In 27 states, a 10 year old charged with murder could be tried as an adult. *See* Dept. of Justice, *Juvenile Offenders and Victims: A National Report* 86-7 (1995). For a discussion of legislative reform lowering the age at which minors can be tried as adults, *see* t.a.n. 105 to 108 *infra*. The voting age and the passage of the 26th Amendment are discussed t.a.n. 42 to 45 *infra*. *See* 23 U.S.C.A. § 158 (2000)(beginning September 30, 1985, federal funds for highway construction will be withheld from any state that has a drinking age of less than 21 years of age.

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.² 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 accommodation.

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 points 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 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.³

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

² Good examples of this rhetoric include judicial language justifying restrictions on adolescent abortion (See *tan 27 & 28 infra*), and political arguments by Progressive reformers advocating for the establishment of a juvenile court. See *t.a.n. 90 to 95 infra*.

³ 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 *t.a.n. 58 to 80 infra*.

evidence of the costs of using crude categories to define legal childhood and adulthood.⁴ In this setting, the boundary of childhood has shifted dramatically over the course of the 20th century. Legal rhetoric seems to suggest that, since the establishment of the juvenile court in 1899, young offenders have been transformed from innocent children to hardened adult criminals. 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. 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.

The essay proceeds as follows: In Part I, I present 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. I turn, in Part II, to the issue of how the state draws the legal boundary between childhood and adulthood. My analysis of the presumptive age of majority includes an examination of the passage of the 26th Amendment, which offers interesting lessons on how we fix this boundary. I then examine medical decisionmaking 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. In Part III, I examine 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

⁴See t.a.n. 129 to 150 *infra*.

legal category not only will promote youth welfare, but will also advance utilitarian objectives of reducing the costs of youth crime.

I. 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 decisionmaking process. Children's decisionmaking also reflects immature judgment, which may lead them to make choices that are harmful to their interests and the interests of others.⁵ This decisionmaking immaturity warrants giving others authority over important decisions affecting children's lives. Finally, children are assumed to be malleable and thus vulnerable to both influence and harm from others.⁶

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,

⁵ See *gen.* Elizabeth Scott, *Judgment and Reasoning in Adolescent Decisionmaking*, 37 Villanova L. Rev. 1607 (1992); FRANKLIN E. ZIMRING, *CHANGING LEGAL WORLD OF ADOLESCENCE* 36 (1982).

⁶ The presumed malleability of children supported the argument that young offenders would respond positively to rehabilitation, a claim that was central to the rehahabilitative model of juvenile justice. See t.a.n 99 *infra*.

responsibility and liberty simply do not apply to them.⁷ 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.*, a United States Supreme Court opinion dealing with parental authority to admit their children to state psychiatric hospitals.

“The law’s concept of a family rests on a presumption that parents possess what children lack in maturity, experience and capacity for judgment required to make life’s difficult decisions. More importantly, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children.”⁸

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.⁹

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 and other helpless members of society.¹⁰ Thus, parental authority is subject to government supervision; if parents fail

⁷ 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 majority 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.” ON LIBERTY 15 (Oxford University Press 1974) (1859).

⁸ 442 U.S. 584 at 602 (1979)

⁹ Robert Scott and I have developed this argument elsewhere. Elizabeth Scott & Robert Scott, *Parents as Fiduciaries*, Va. L.Rev. (1995).

¹⁰ 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. BLACK’S LAW DICTIONARY (1993). 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. 1838]). See generally Douglas R. Rendleman, *Parens Patriae: From Chancery to the Juvenile Court*, 23 S.C. L. REV. 205 (1971).

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 can not decide that their children should work instead of attending school.¹¹ Traditionally policy debates in this area have focused on the allocation of authority between parents and the state.¹²

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. Because they are assumed to lack the capacity for reasoning, understanding and mature judgment, children can not 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.¹³ Through curfew ordinances, the government can limit the freedom of minors to move about in society through restrictions that clearly would be unconstitutional for adults.¹⁴ The premise of these laws is that children roaming

¹¹The Supreme Court enunciated this constraint on parental rights in *Prince v. Massachusetts*, in upholding the Massachusetts child labor law, against a challenge that it infringed on parental authority. 321 U.S. 158 (1944).

¹²This line drawing has been the subject of much constitutional litigation. See, e.g., *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (holding that parents have the right to send their children to private school); *Meyer v. Nebraska*, 262 U.S. 390, 401 (1923) ("The legislature has attempted materially to interfere with...the power of parents to control the education of their own."); *Prince v. Massachusetts*, 321 U.S. 158 (1944) (holding that the state may limit parental freedom and authority when necessary to protect the welfare of children); *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972) (holding that Amish parents can not be penalized for not complying with compulsory school attendance statute). A contemporary debate focuses on parental objections to public school curriculum. See e.g. *Mozert v. Hawkins County Board of Education*, 827 F.2d 1058 (6th Cir. 1987), *cert. denied*, 484 U.S. 1066 (1988)(finding required use of textbook series no unconstitutional burden under Free Exercise Clause).

¹³ *Ginsberg v. New York*, 390 U.S. 629 (1968) (upholding New York statute restricting sale of "obscene material" to minors); *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260 (1988). *Ginsberg v. New York*; *Hazelwood School Dist. v. Kuhlmeier* (upholding prior restraint of school newspaper.)

¹⁴ 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. *Quib v. Strauss*, 11 F.3d 488 (5th Cir. 1993); *Schleifer v. City of Charlottesville*, 963 F. Supp. 534 (W.D. Va. 1997), *aff'd* 159 F.3d 843 (4th Cir. 1998).

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 also 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.¹⁵ 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.¹⁶ 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.”¹⁷

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. 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. The integrity of the criminal law would be undermined if incompetent children were subject to criminal punishment.¹⁸ As Ben Lindsay, an early judge of the Denver Juvenile Court, put it, “Our laws against crimes are as inapplicable to children as they would be to idiots”¹⁹ 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

¹⁵ 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. See discussion in S. DAVIS, E. SCOTT, W. WADLINGTON, & C. WHITEBREAD, *CHILDREN IN THE LEGAL SYSTEM* 101-6 (1997).

¹⁶ See e.g., *Bobby Floars Toyota, Inc. v. Smith*, 296 S.E.2d 320 (NC App. 1980); *Haydocy Pontiac Inc. v. Lee*, 250 N.E.2d 898 (Ohio Ct. App. 1969); *Dodson v. Schrader*, 824 S.W.2d 545 (Tenn. 1992); *Halbman v. Lemke*, 298 N.W. 2d 562 (Wisc. 1980). See ROBERT E. SCOTT AND DOUGLAS L. LESLIE, *CONTRACT LAW AND THEORY* 366-379 (2d ed. 1993).

¹⁷ *Kiefer v Fred Howe Motors*, 158 N.W.2d 288 (Wisc. 1968).

¹⁸ 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*, 39 U.C.L.A. L. Rev. 1511, 1521 (1992).

¹⁹ See BEN B. LINDSEY AND HARVEY J. O' HIGGINS, *THE BEAST* (1909).

responsibility, they make the problem disappear at least at a rhetorical level by simply describing young offenders as adults and not children.²⁰

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 - - services that they need for their survival and development, and that they 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)²¹ is an entitlement in all states, providing all children with the opportunity to develop the capacities needed to become productive citizens. Moreover, because children are vulnerable and unable to assert their own interests, the state enforces 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.²²

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 the rest of us. 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.

²⁰ 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) ("There is no reason that society should be more lenient with a 16-year-old offender than a 30-year-old offender"); Virginia Ellis, *Lungren to Seek Lower Age for Trial as Adult*, L.A. TIMES, Jan. 15, 1993 at A3 (quoting Cal. Att'y Gen. Dan Lungren: "If you commit an adult crime, you'd better be prepared to do adult time"); Jon R. Sorenson, *Pataki Plan on Juvenile Offenders Includes Longer Sentences in Adult Jails*, BUFFALO NEWS, Dec. 10, 1995 at 16A (quoting N.Y. Governor Pataki: "Adult crime should mean adult time").

²¹ See Education for All Handicapped Children Act of 1975, P.L. 94-142, 20 USC 1401 et. seq. (1975) Under this statute, Congress requires all states to provide educational services to disabled children.

²² See discussion in Scott and. Scott, *Parents as Fiduciaries*, supra note 9.

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.²³ 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.²⁴ 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 or adults.²⁵

Although law makers have occasionally recognized the distinctive character of adolescence,²⁶ more typically this transitional stage is invisible, and adolescents are incorporated

²³ Piaget concluded that the highest stage of cognitive development (the capacity to engage in formal operational thinking) is attained by mid-adolescence. At this point, youths are capable of hypothetical reasoning (comparing the consequences of two alternatives). *See generally*, BARBEL INHELDER & JEAN PIAGET, *THE GROWTH OF LOGICAL THINKING FROM CHILDHOOD TO ADOLESCENCE* (1958); JOHN 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 stagelike, but rather proceeds at different rates in different domains, by age 14 or 15, adolescents come close to cognitive maturity in many realms. ROBERT SIEGLER, *CHILDREN'S THINKING* (1991); William Gardner, David Scherer, Maya Tester, *Asserting Scientific Authority: Cognitive Development and Adolescent Legal Rights*, 44 *Amer Psychologist* 895 (1989).

²⁴ Elizabeth S. Scott, N. Dickon Reppucci and Jennifer L. Woolard, *Evaluating Adolescent Decision-Making in Legal Contexts*, 19 *LAW & HUM. BEHAV.* 221 (1995). *See also* Laurence Steinberg & Elizabeth Cauffman, *Maturity of Judgement in Adolescence: Psychosocial Factors in Adolescent Decisionmaking*, 20 *L. & Human Behavior* 249 (1996),

²⁵ *See generally* JOHN DACEY AND MAUREEN KENNY, *ADOLESCENT DEVELOPMENT* (2d ed. 1997); DOUGLAS C. KIMMEL, *ADOLESCENCE: A DEVELOPMENTAL TRANSITION* (2d ed. 1995); DAVID SCHAFFER, *DEVELOPMENTAL PSYCHOLOGY: CHILDHOOD AND ADOLESCENCE* (2d ed. 1989); NORMAN SPRINTHALL, *ADOLESCENT PSYCHOLOGY: A DEVELOPMENTAL VIEW* (3d ed. 1995). Laurence Steinberg and 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).

²⁶ An example is creative regulation of motor vehicle licensing. Youths of 16 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 can not drive after midnight unless supervised by certain adults. *Cal. Veh. Code* §12814.6 (2000); *Md. Transportation Code* §16-113 (1999); *R.R.S. Neb.* §60-4,120.01 (2000). This

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).

When extending legal rights or responsibilities to minors is the subject of policy debate, adolescents are usually described as either children or as mature adults--depending upon the desired classification. Abortion jurisprudence provides a good example of the elusiveness of 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* 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.²⁷ In contrast, advocates who favor conferring adult abortion rights on teens present quite a different image of pregnant adolescents. In *H.L. v. Matheson*, 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."²⁸

In general, both advocates and law makers ignore the developmental realities of

driving curfew is even earlier in other states. *See e.g.*, La. R.S. 32:416.1 (2000) (11 p.m.); N.C. Gen. Stat. §20-11 (1999) (9 p.m.); S.C. Code Ann. §56-1-175 (1999) (daylight hours only); S.D. Codified Laws §32-12-12 (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 §321.180B (1999), 1999 D.C. Act 190 (graduated licensing to take effect beginning 9/1/2000). The State of New York is unusual in that it varies its restrictions depending on the region of the state. *See* N.Y. CLS Veh. & Tr. §501(3)(c) (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 is that of younger children. *See* Elizabeth Scott, N.D. Reppucci, & Mark Aber, *Children's Preference in Adjudicated Custody Decisions*, 22 Ga. L. Rev. 1035 (1988).

²⁷ 443 U.S. 622 (1979). Despite this rhetoric however, Justice Powell acknowledges that many adolescents may be sufficiently mature to make their own abortion decisions. *Bellotti* requires that a minor be given the opportunity (through a hearing) to demonstrate her maturity and ability to make an autonomous decision. *See* t.a.n. 72 to 73 *infra*.

²⁸ *H.L. v. Matheson*, 450 U.S. 398, 441 (1981) (Marshall, J., dissenting).

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 .

II. 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 10 or younger in some states,²⁹ and high school students can obtain contraceptives without parental permission.³⁰ On the other hand, non-custodial parents may be obliged to contribute to their children's college expenses and young adults are can not drink or run for Congress.³¹ 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 functions 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

²⁹ See 33 NEV. REV. STAT. § 62.040 (2000) (juvenile court does not have jurisdiction of persons accused of murder, without regards to age); VT. STAT. ANN. tit. 33, § 5506 (2000) (children age 10 and up can be transferred to adult court if charged with certain enumerated offenses including, but not limited to, murder, aggravated assault, and kidnaping); WIS. STAT. § 938.183 (1999) (adult court has original jurisdiction over juveniles age 10 and over who are alleged to have attempted or committed murder).

³⁰ See t.a.n. 56 to 57 infra.

³¹ Under Article I Section. 2 of the U.S. Constitution, the minimum age for service in the House of Representatives is 25. For the Senate it is 30 (Art. I, sect. 3).

citizens age 35 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 well as 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 age 21, apparently because, in the Middle Ages, most men were presumed capable of carrying armor at this age.³² Currently, legal adulthood begins at age 18.³³ 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 attains the age of majority, as does parents’ common law right to their children’s earnings.³⁴ 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

³² S. COMM. ON THE JUDICIARY, LOWERING THE VOTING AGE TO 18, S. REP. NO. 92-26 at 5 (1st Sess. 1971). See VIRGINIA GRACE COOK, THE AGE OF MAJORITY 6 (1972) (describing the historical development of the age of majority).

³³ 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 (Michie 2000). In California, “An adult is an individual who is 18 years of age or older.” Cal Fam Code § 6501 (Reed 2000).

³⁴ Some states have adjusted the age for terminating the parental support obligation to accommodate the post-majority dependency of college students. See t.a.n 47 to 51 below.

become legal adults at age 18.³⁵

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.³⁶ 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.³⁷

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 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. Although the process of psychological development and maturing continues into the adult years, there are only modest differences between late adolescents and adults in decisionmaking capacity.³⁸ In fact, one likely effect of the categorical approach is that minors will sometimes

³⁵ See e.g., 28 U.S.C.A. § 1738A(b)(1)(Reed 2000) ("child" for purposes of Uniform Child Custody Jurisdiction Act means person under age 18); 42 U.S.C.A. § 619 (Reed 2000) ("child" for purposes of Social Security Act includes children under 18 or those under 19 who attend post-secondary or vocational school full-time); Fla. Stat. § 39.41(2)(a) (1993) (jurisdiction over 'dependent children ends at age 18); 705 I.L.C.S. § 405/1-1 et seq. (West 1994) (abuse and neglect jurisdiction extends to minors under age 18); N.J.Stat. 9:6-8.21 (2000) (abused or neglected child means a child under age 18); Utah Code Ann. § 78-3a-103(1)(a)(I) (Supp. 1998) (abused or neglected child means a minor under age).

³⁶ See note 33 *supra*.

³⁷ See t.a.n. 43 to 46 *infra*.

³⁸ 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 and Cauffman, *supra* note 24 at 402. Generally, late adolescence (age 17 to 19) is marked by the ability to delay gratification, to think ideas through, to make independent decisions, to compromise, and to set goals. *Late Adolescent Development*, Center for Adolescent Studies at Indiana University, <<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

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.³⁹

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 and other protections of childhood. 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.⁴⁰ 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.⁴¹

A bright line age of majority is a clear signal; all who deal with the young person

traditions. *Id.*

³⁹ Gary B. Melton, *Toward "Personhood" for Adolescents: Autonomy and Privacy as Values in Public Policy*, 38 AM. PSYCHOLOGIST 99 (1983); Lois A. Weithorn and Susan B. Campbell, *The Competency of Children and Adolescents to Make Informed Treatment Decisions*, 53 CHILD DEV. 1589 (1982). In *Bellotti v. Baird*, the Supreme Court accepted the claim that mature minors should not be deprived of abortion rights. 443 U.S. 622, 647 (1979). 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 developmental argument of the American Psychological Association. Brief for Amicus Curiae – American Psychological Ass'n, *Hartigan v. Zbaraz*, 484 U.S. 171 (1987) (No. 85-673)(hereafter APA Brief)

⁴⁰ 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 E. Scott and R. Scott, *Parents as Fiduciaries*, *supra* note 9 at 2430.

⁴¹ 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. Thus, children's rights advocates in the 1980's 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 E. Scott, *Judgment and Reasoning*, *supra* note 5.

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.⁴²

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 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 26th 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 26th 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 some interesting lessons 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

⁴² 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 t.a.n. 72 to 77 *infra*. Also, one means of deciding whether youths accused of crimes will be tried as adults is the judicial transfer hearing. See t.a.n 105 to 106 *infra*.

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 will be more likely to meet these criteria than children and adolescents.⁴³ Although this assumption may not hold in many cases - - 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.⁴⁴ 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 would be substantial, and the cost of postponing the opportunity to exercise voting rights does not seem to be a great deprivation.

If the latter point is true, how can we explain the extensive effort undertaken in the late 1960's to amend the United States Constitution to extend voting rights to 18 year old citizens?⁴⁵ First, the political context and climate were important. The 26th Amendment was enacted in the midst of the Viet Nam War, when many legal minors between the ages of 18 and 21 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 26th Amendment emphasized these political facts. It also emphasized that the young adults who would be enfranchised under the new amendment were “mentally and

⁴³For a comprehensive discussion on the history of the voting age in America, see WENDEL CULTICE, *YOUTH'S BATTLE FOR THE BALLOT: A HISTORY OF THE VOTING AGE IN AMERICA* (1992). In this work, Ian McGowan, then Executive Director of Youth Franchise Coalition, is quoted as saying that 18 was a better age for voting than 16 or 17 because 18 is the age that most persons graduate from high school and take on adult responsibilities. *Id.* at 105-106. *But see Why Not Seventeen*, 22 NAT'L REV. 244 (1970) (“We can't think of a single argument for a voting age of 18 that doesn't apply just as well to seventeen.”). For an overview of why 18-year-olds deserved the vote, see S. COMM. ON THE JUDICIARY, *LOWERING THE VOTING AGE TO 18*, S. REP. NO. 92-26 (1st Sess. 1971).

⁴⁴Thus, voting rights were not an issue in the children's rights movement in the 1980's, when advocates argued for broad self determination rights for adolescents. See Melton, *supra* note 39.

⁴⁵For a discussion of the political movement that led to the passage of the 26th Amendment, see WENDEL CULTICE, *supra* note 43. 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.

emotionally capable of full participation in our democratic form of government.⁴⁶ 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.

A couple of 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 18, suggesting a view that legal status should follow intuitions about developmental maturity. Another important theme is that parity should exist between rights and responsibilities. On this view, fairness required the extension of voting rights to 18 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 the criminal law. There is little question that the image of young persons dying for their country in Viet Nam who were not deemed mature enough to participate in the electoral process carried much symbolic weight in the political process. It goes a long way toward 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 18 and 21 years 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 26th Amendment in 1971, the age of majority was lowered to age 18 for many other purposes, through legislative and judicial action at the state and federal level.⁴⁷

⁴⁶ SENATE COMM. ON THE JUDICIARY, *supra* note 32.

⁴⁷ See Virginia and California statutes cited in note 33 *supra*. See Charles F. Wilson, 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, 1101-1102 (1996) (discussing the role of the 26th Amendment in the lowering of the age of majority).

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 18 (because by definition, recipients were no longer minors).⁴⁸ 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 obligation should end continues to be the subject of debate. In many ways, modern 18 year olds are ready to function as legal adults. However, college attendance has become the norm as preparation for a successful life,⁴⁹ extending the period of financial dependency on parents for many young people. If the lowering of the age of majority to age 18 (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 toward 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.⁵⁰ A legal directive is necessary because non-custodial

⁴⁸ 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 (Conn. 1983); *Jones v. Jones*, 257 S.E.2d 537, 538 (Ga. 1979); *Peterson v. Peterson*, 319 N.W.2d 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 (Alaska 1984); *In re Plummer*, 735 P.2d 165 (Colo. 1987); *Grapin v. Grapin*, 450 So.2d 853 (Fla. 1984); *Curtis v. Kline*, 666 A.2d 265 (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 U.S. Constitution).

⁴⁹ "Few things are as certain as that people with more education earn more money." *Education and Earnings: 1987*, 35 OCCUPATIONAL OUTLOOK Q. 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 (\$2,339 vs. \$1,080 mean monthly earnings). Rosalind R. Bruno, *What's It Worth? Field of Training and Economic Status: 1993*, U.S. Bureau of the Census, CURRENT POPULATION REP., Series P70-51 at 1 (1995).

⁵⁰*See e.g.* Haw. Rev. Stat. § 576D-7 (1985 and Supp. 1991) (private school expenses can be considered when calculating child support payments); La. R.S. 9:315.6 (expense of a special or private school may be added to

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.⁵¹ The underlying premise is that children's 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 law makers 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 Decisionmaking - 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 the 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. Thus, adolescents can not obtain routine medical treatment on their own, and, unlike adults, can not refuse treatment that their physicians and parents conclude is necessary.⁵² The basis for parental authority in this

the basic child support obligation " . . . to meet the particular educational needs of the [children]."); *Litmans v. Litmans*, 673 A.2d 382 (Pa. Super. 1996) (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, citing 42 Pa.C.S.A. §1910.16-5(1)). *But see* *Rizzo v. Rizzo*, No. FA 90-0439639S, 1996 Conn. Super. LEXIS 592 at *4 (Conn. Super. Ct. Feb. 8, 1996) (requiring 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* *Hoefers v. Jones* 672 A.2d 1299 (N.J. Super. 1994) (list of criteria used in varying jurisdictions to determining when non-custodial parent must pay for private school expenses).

⁵¹ *See* *LeClair v. LeClair*, 624 A.2d 1350(N.H. 1993) (upholding legislation requiring college support for children of non-custodial parents); *Childers v. Childers*, 575 P.2d 201 (Wash. 1978) (non-custodial parent must pay college costs after statute was changed to read 'dependent' rather than 'minor'). *See also* ELLMAN, KURTZ & SCOTT, *FAMILY LAW* (1998) at 499-501; Glen A. Smith, *Educational Support Obligations of Non-Custodial Parents*, 36 RUTGERS L. REV. 588 (1984).

⁵² 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

area is relatively straightforward. Medical treatment must be based on competent informed consent - - otherwise the treatment provider commits a battery on the patient.⁵³ 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 competent medical decisions,⁵⁴ 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 conventional 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.

The most well established of these exceptions historically is the mature minor doctrine. 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

cosmetic plastic surgery, most surgeons likely would decline to perform the surgery. The American Academy of Pediatrics guidelines advise against treatment under these circumstances. Committee on Bioethics, American Academy of Pediatrics, *Informed Consent, Parental Permission, and Assent in Pediatric Practice (RE9510)*, 95 PEDIATRICS 314 (1995).

⁵³ See e.g., *Younts v. St. Francis Hospital and School of Nursing, Inc.*, 469 P.2d 330 (Kan. 1970) (“A surgical operation on the body of a person is a technical battery or trespass, regardless of result, unless the person or some authorized person consents to it”)

⁵⁴ Melton; Weithorn and Campbell, *supra* note 39.

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.⁵⁵

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 treatment for sexually transmitted diseases, substance abuse, mental health problems, and birth control and pregnancy.⁵⁶ 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. 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.⁵⁷

⁵⁵ For a comprehensive discussion of the mature minor doctrine, see Walter Wadlington, *Minors and Health Care: The Age of Consent*, 11 OSGOODE HALL L.J. 115 (1973). 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 (1983) (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).

⁵⁶ VA. CODE §54.1-2969 (Michie 1999)(minors deemed adults for purposes of consenting to these treatments.). See also ALA. CODE § 22-8-6 (2000)(a minor may consent to treatment for pregnancy, venereal disease, drug dependency, alcohol toxicity or any reportable disease); 22 ME. REV. STAT. ANN. tit. 22 §§ 1502, 1823, 1908 (West 1999)(a minor may consent to treatment for abuse of alcohol or drugs, emotional or psychological problems, venereal disease, sexual assault and family planning).

⁵⁷ See Wadlington, *supra* note 55 at 122. But see Susan F. Newcomer & J. Richard Udry, *Parent-Child Communication and Adolescent Sexual Behavior*, 17 Fam. Plan. Persp. 169, 174 (1985) ("minors 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

Removing this obstacle encourages them to seek treatment which may be critically important to their health. Of course, society also has an interest in reducing the incidence of sexually transmitted diseases, substance abuse, teen age pregnancy and mental illness. Together these social benefits largely explain why lawmakers shift the boundary of childhood for the purpose of encouraging treatment of these conditions.

2. The Battle over Adolescents' Access to Abortion

In the generation since *Roe v. Wade*, 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.⁵⁸ 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.⁵⁹ Both sides care deeply about this issue, and both have a political agenda that is linked to the larger ideological contest over abortion.⁶⁰ Not surprisingly, under these circumstances, the resulting legal framework is complex and the product of political compromise. In many states, law makers regulating adolescents' access to abortion reject the conventional strategies of legislative line

before issuing contraceptives to teenagers would "lead many of them to abandon contraception or to use less effective methods." Aida Torres, Jacqueline D. Forrest, & Susan Eisman, *Telling Parents: Clinic Policies and Adolescents' Use of Family Planning and Abortion Services*, 12 Fam. Plan. Persp. 284, 291 (1980).

⁵⁸ Gary B. Melton, *supra* note 39; Robert Mnookin, *Bellotti v. Baird: A Hard Case*, 150 in *IN THE INTEREST OF CHILDREN: ADVOCACY, LAW REFORM AND PUBLIC POLICY*, 153, R.H. MNOOKIN, ED. (1985) (describing the advocacy movement against restrictions on adolescent abortion and the challenge of Massachusetts statute in *Bellotti v. Baird*.)

⁵⁹ Language in Supreme Court opinions illustrates this rhetorical battle. See t.a.n. notes 27 & 28 *supra*.

⁶⁰ For example, the National Organization for Women a prominent pro-choice group, has actively opposed parental notification and consent laws. Kristin Thomas, *Back Alley Laws: Redefining Anti-Abortion Legislation* in *THE ABORTION CONTROVERSY: A DOCUMENTARY HISTORY* 270 (Eva R. Rubin, ed. 1995). 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. 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, 175-176 (R. Randall Rainey, S.J. & Gerard Magill, eds. 1996). See generally *CENTER FOR REPRODUCTIVE LAW AND POLICY, TIPPING THE SCALES: THE CHRISTIAN RIGHT'S LEGAL CRUSADE AGAINST CHOICE* (1998).

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.⁶¹ 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 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.⁶² 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 about whether or not to have a child can not be postponed, and it has enormous consequences for the individual.⁶³ 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

⁶¹ Some states adhere to a standard binary classification, and adopt the approach of the minors' consent statutes. See t.a.n. 66. Others would clearly choose to classify pregnant minors as children, but are prevented from doing so by constitutional constraints imposed by the Supreme Court. *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52 (1976)(parental consent requirement in Missouri statute struck down).

⁶² 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. Melton, *supra* note 39. The American Psychological Association agreed. In its amicus brief to the Supreme Court in *Hartigan v. Zbaraz*, the APA noted that adolescents do not differ from adults in their formal operational thinking (i.e. 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 A.P.A. Brief, *supra* note 40. See also Weithorn and Campbell, *supra* note 39 at 1595 (noting findings of abortion-specific study that shows adolescents age 14 and up to be just as capable as adults in making decisions about abortion).

⁶³ In *Bellotti v. Baird*, Justice Powell noted this attribute of abortion. *Bellotti*, 443 U.S. 622 at 634.

important decisions for their minor children?⁶⁴ In many regards, the arguments for allowing minors to consent to abortion treatment 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 child 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 refuse to consent to a procedure that they find abhorrent. In short, the 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. 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 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. Many would object to that description of the decision to terminate 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*, an important justification for giving control of this decision to the woman is that an unwanted pregnancy imposes a substantial burden on the individual.⁶⁵ There is no reason to assume that this burden would be felt less acutely by an

⁶⁴ Most pregnant teens *do* consult with their parents before they seek abortion. See Torres, et. al., *Telling Parents*, supra note 57 at 287.

⁶⁵ "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

adolescent than by an adult woman. Moreover, the burdens and health risks of pregnancy and child birth are even greater with the younger teen. 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 law makers 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.⁶⁶ Others have downplayed the differences between abortion and other medical decisions, and have sought to retain parental authority to the extent possible. Over the last generation, the constitutional parameters of minors' abortion rights have emerged in a series of United States Supreme Court decisions.⁶⁷ The resulting constitutional framework authorizes states to subject adolescents to procedural requirements that would clearly be unacceptable for adults. At the same time, the Court has made clear that abortion is different from other medical decisions, and that pregnant teens can not be simply classified as children subject to their parents' authority.

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

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." *Roe v. Wade*, 410 U.S. 113, 153 (1973).

⁶⁶ See HAW. REV. STAT. § 577A-2 (2000) (minor has capacity to consent to abortion); CONN. GEN. STAT. § 19a-601 (1999) (minors' consent sufficient, after counseling); WASH. REV. CODE § 9.02.100 (2000) ("every individual possesses a fundamental right of privacy with respect to personal reproductive decisions[including abortion]"). New Hampshire has no restrictions on abortion.

⁶⁷*Lambert v. Wicklund*, 520 U.S. 292 (1997) (upholding parental notification requirement, with judicial bypass procedure); *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833 (1990)(upholding parental consent requirement, with judicial bypass procedure); *Ohio v. Akron Ctr. For Reprod. Health*, 497 U.S. 502 (1990) (upholding state law requiring parental notification or consent, with judicial bypass procedure); *Hodgson v. Minnesota*, 497 U.S. 417 (1990)(upholding requirement of notice to both parents, with bypass procedure); *City of Akron v. Akron Ctr. For Reprod. Health*, 462 U.S. 416 (1983)(striking down city ordinance requiring parental consent without adequate bypass procedure, and declaring that persons under 15 may not be presumed immature); *H.L. v. Matheson*, 450 U.S. 398 (1981)(upholding parental notice requirement in case of immature, dependent minor); *Bellotti v. Baird*, 443 U.S. 622 (1979)(parental consent requirement with judicial discretion to require consent for mature minor struck down); *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52 (1976)(parental consent requirement struck down).

require that she demonstrate in a judicial proceeding that she is mature enough to make the decision.⁶⁸ Even younger teens can not be legislatively presumed to be unable to make a mature abortion decision.⁶⁹ 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.⁷⁰ (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.⁷¹

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.⁷² 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 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* that the pregnant adolescent who is "mature and well enough informed to make her own decision" about abortion be authorized to do so without parental consent.⁷³ Not surprisingly, perhaps, judicial judgments about where the line between

⁶⁸ *Bellotti v. Baird*, 443 U.S. at 647.

⁶⁹ *Akron v. Akron Center for Reproductive Health*, 462 U.S. at 440.

⁷⁰ *Id.* at 647-648.

⁷¹ 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. *Hodgson v. Minn.*, 497 U.S. at 423. See note 67 *supra*, for a discussion of other opinions upholding statutory notice requirements.

⁷² See e.g., ALA. CODE § 26-21-4 (2000); ALASKA STAT. § 18.16.030 (Michie 2000); CAL HEALTH & SAF. CODE § 123450 (West 2000); DEL. CODE ANN. tit. 24, § 1784 (1999); IND. CODE ANN. § 16-34-2-4 (Michie 2000); LA. REV. STAT. ANN. § 40:1299.35.5 (West 2000); MONT. CODE ANN. § 50-20-212 (1999); N.C. GEN. STAT. § 90-21.8 (1999); OHIO REV. CODE ANN. § 2151.85 (Anderson 2000); VA. CODE ANN. § 16.1-241(V) (Michie 2000).

⁷³ See *Bellotti v. Baird*, 443 U.S. 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. 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 A.P.A. Brief, *supra* note 39. See B. Ambuel, *Adolescents, Unintended Pregnancy, and Abortion: The Struggle for Compassionate Social Policy*, 4 CURRENT DIRECTIONS IN PSYCHOL. SCI. 1, 4 (1995) (recommending that the age for requiring parental consent be lowered from 18 to 14 to accommodate existing

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. 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.⁷⁴ 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.”⁷⁵ These courts appear to have been motivated largely by paternalistic concern for the health and welfare of pregnant minors, rather than by any deference for adolescent autonomy.⁷⁶ As Mnookin asks rhetorically, “[H]ow could a 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?”⁷⁷

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

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.

⁷⁴ For example, a Utah court rejected the petition of a 17 year old who was described as a good student, concluding that she lacked the requisite “experience, perspective and judgment.” *H.B. v. Wilkinson*, 639 F. Supp. 952 (D. Utah 1986). 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.

⁷⁵ Robert. H. Mnookin, *supra* note 58 at 239-240 (Between 1981 and 1983, 90% of the 1300 petitioning minors in Massachusetts courts were deemed “mature”. 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. “Every pregnant minor who has sought judicial approval for an abortion has secured an abortion”. *Id* at 239.

⁷⁶ Under this approach, access to abortion is facilitated in much the same way (and for the same reasons) as treatments covered by minor consent statutes.

⁷⁷ R. Mnookin, *supra* note 58 at 263.

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.⁷⁸ 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.⁷⁹

The endorsement of this unique regulatory scheme may indicate that, in this context, the Court recognizes that adolescents are neither children or fully mature adults. More clearly, the framework represents an effort to accommodate competing legal and political interests on a 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.⁸⁰ There is little evidence that it promotes the

⁷⁸ The Supreme Court has not ruled on this issue. In *H.L. v. Matheson*, 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. 450 U.S. at 413. The 4th Circuit Court of Appeals recently upheld the Virginia statute which requires notice to all parents. 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. *Blue Ridge Planned Parenthood v. Camblos*. 155 F.3d 352 (4th Cir. 1998).

⁷⁹ Moreover, under parental notice statutes, parents have no authority to override their child's decision once they receive notice. See supra note 71 for a description of notice statutes.

⁸⁰ Robert Mnookin reports widespread dissatisfaction with the post- *Bellotti* Massachusetts statute, among judges, lawyers for minors, and health professionals. See Robert Mnookin, supra note 58 at 243-64.

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 abortion 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 not to be as incoherent as 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 of many adolescents, or even most adolescents for some purposes. 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 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 who are legal adults.⁸¹ 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 citizen's healthy development to productive adulthood.

The legal framework seems to work well in another way. For the most part, as I have suggested, law makers employ a rather simplistic scheme that ignores developmental transition and categorizes adolescents as either children or adults. Although some critics have lamented this

⁸¹ See note 1 *supra*.

approach and argued for policies that are tailored to respond to the exigencies of this developmental stage,⁸² 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, but subject to special restrictions as they gain experience and learn responsibility.⁸³ 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 welfare and social welfare - - are straightforward and usually are aligned in pointing toward a particular classification. In the next section, 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.

⁸²The strongest objections have come from those who advocate treating adolescents as adults for a broader range of legal purposes. See G. Melton, *supra* note 39.

⁸³ These statutes are described, in note 26 *supra*. Frank Zimring adopted the learner's permit metaphor in describing the law's optimal stance to adolescence. He argues that adolescence should be permitted to gain experience in adult activities and decisions, but be protected from their mistakes and bad judgment. FRANK ZIMRING, *CHANGING LEGAL WORLD*, *supra* note 5.

III. JUVENILE CRIME AND THE DEFINITION OF CHILDHOOD

In the past 100 years, legal policy toward youth crime has undergone three periods of reform. The first period began with the founding of the first Juvenile Court in Chicago in 1899. 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.⁸⁴ 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,⁸⁵ 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.⁸⁶ For approximately the past decade, policy makers have responded to public fear of what is perceived to be a dramatic increase in youth crime.⁸⁷ The goal of this contemporary reform movement has been 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

⁸⁴See SANFORD J. FOX, *THE JUVENILE COURT: ITS CONTEXT, PROBLEMS AND OPPORTUNITIES* 11 (describing the purpose of the founders of the Juvenile Court as promoting the welfare of delinquents); ELLEN RYERSON, *THE BEST LAID PLANS: AMERICA'S JUVENILE COURT EXPERIMENT* 35-56 (1978)(describing how the theory of rehabilitation was implemented in the procedures of the court).

⁸⁵ *In re Gault* 387 U.S. 1 (1967).

⁸⁶The most important reform initiative in the 1970s and 80s 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 ABA\ IJA Juvenile Justice Standards, Standards Relating to Dispositions, Introduction (1982) Also important was a task force on sentencing policy, sponsored by the 20th Century Fund.; Franklin E. Zimring, Twentieth Century Fund Task Force on Sentencing Policy Toward Young Offenders: Confronting Youth Crime 3 (1978).

⁸⁷The juvenile violent crime arrest rate increased 64% between 1988 and 1994. The number of juveniles arrested for murder more than doubled between the mid-1980s and the peak in 1993. Patricia Torbet & Linda Szymanski, OJJDP, Juvenile Justice Bulletin November 1998: State Legislative Responses to Violent Juvenile Crime: 1996-97 Update. According to the FBI, more juveniles were arrested for violent crime in 1991 and 1992 than in any other 2 year period in US history. See also Eric Fritsch & Craig Hemmens, An Assessment of Legislative Approaches to the Problem of Serious Juvenile Crime: A Case Study in Texas 1973-1995, 23 Am. J. Crim. L. 563, 564 (1996) (juvenile homicide increased 171% from 1985-92). Since the mid-1990's, the juvenile crime rate (including the homicide rate) has actually declined. See Patricia Torbet et al. *Id.* at 2.

young offenders, and a distinctive story 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 1970's and 1980's 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 1990's suggest that adolescent offenders are indistinguishable from adult criminals.

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.⁸⁸

For reasons that I will explore shortly, however, neither of these approaches works well as a basis for policy toward 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 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

⁸⁸See note 29 supra.

improving the lives of children and promoting their development into productive adults. Juvenile justice reform was only one part of a far-reaching initiative which included compulsory school attendance laws, restrictions on child labor and the creation of a child welfare system.⁸⁹ 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 rigors of the common law and from the neglect and depravity of adults.”⁹⁰

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 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.⁹¹ 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 children under the age of seven were insulated from

⁸⁹ 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* MURRAY LEVINE AND ADELIN LEVINE, *A SOCIAL HISTORY OF HELPING SERVICES: CLINIC, COURT, SCHOOL AND COMMUNITY* 23 (1970); JOSEPH KETT, *rites of passage: adolescence in America 1790 to the present* 221-27 (1977); SUSAN TIFFIN, *in whose best interest? child welfare reform in the progressive era* 14-33 (1982).

⁹⁰ MIRIAM VAN WATERS, *Youth in Conflict* 9 (1926). Van Waters was a reformer and juvenile court judge.

⁹¹ *See*, 2 *CHILDREN & YOUTH IN AMERICA: A DOCUMENTARY HISTORY* 601-719 (Robert H. Bremner, ed., 1971); 3 *CHILDREN & YOUTH IN AMERICA: A DOCUMENTARY HISTORY* 299-518 (Robert H. Bremner, ed., 1974).

criminal prosecution on grounds of infancy.⁹² A primary focus of the energies of the Progressive reformers was the establishment of a separate court for the adjudication and correction of offenders up to 16 or 18 years of age, a court that would also respond to the needs of children who were subject to abuse and neglect by their parents. 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."⁹³ Indeed, parental neglect was understood to be the primary cause of delinquency.⁹⁴ 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.

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?"⁹⁵ 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

⁹² Under the common law infancy defense, children under age 7 were without criminal capacity, and children over 14 were to be treated as adults. Andrew Walkover, *The Infancy Defense in the New Juvenile Court*, 31 UCLA L. REV. 503, 510-511 (1984). Children between ages 7 to 14 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. *Id.* at 511. The presumption garnered less weight as the child approached age 14. *Id.* at n 22.

⁹³ See VAN WATERS, *supra* note 90 at 11. See also SANFORD J. FOX, *supra* note 84 at 12 (The juvenile court "expressed a purpose of extending to the delinquent child the same care and protection that was available for the neglected one.").

⁹⁴ 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. *THE CHILD SAVERS: THE INVENTION OF DELINQUENCY* 139 (2d ed. 1977) See also ELLEN RYERSON, *supra* note 84.

⁹⁵ Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 107 (1909).

right path through the guidance of the fatherly judge (himself) and other court personnel.⁹⁶ These romanticized accounts of young delinquents included older youths as well as young boys and girls, and serious crimes as well as minor misdeeds.⁹⁷ 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 youngster before the court. This was always a shaky premise, which 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.⁹⁸ 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; ultimately, it became clear that they harmed the interests of young offenders.⁹⁹ In short, the

⁹⁶ LINDSAY & O'HIGGINS, *supra* note 19 at 135-139. See also LEVINE & LEVINE, *supra* note 89 at 203-23.

⁹⁷ LINDSAY & O'HIGGINS, *supra* note 19 at 170-77.; VAN WATERS, *supra* note 90.

⁹⁸ 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." 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 justice system, functioning free of constitutional inhibitions as it had largely done, is effective to reduce crime or rehabilitate offenders." *Id.* at 22.

⁹⁹ See t.a.n. 127 to 129 *infra*. For a discussion of how juvenile court procedures and dispositional structure were grounded in the rehabilitative model, see ELLEN RYERSON, *supra* note 84 at 35-56 (1978); W. VAUGAN STAPLETON AND LEE E. TEITELBAUM, *IN DEFENSE OF YOUTH: A STUDY OF THE ROLE OF COUNSEL IN AMERICA JUVENILE COURTS* 15-21 (1972) (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 ALLEN,

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 20th 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. 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.¹⁰⁰ 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.¹⁰¹ As one early supporter of “get tough” policies argued, “there is no reason to be more lenient with a 16 year old offender than a thirty year old offender.”¹⁰²

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 and adult offenders that are important to criminal responsibility.¹⁰³ Juvenile offenders are “criminals who happen to be young, not children who

THE BORDERLAND OF CRIMINAL JUSTICE (1964).

¹⁰⁰ In the second half of the 1990's, violent juvenile crime actually declined, but this has not yet affected the enthusiasm for stricter policies. See State Responses, note 86 *infra*.

¹⁰¹ See note 29 *supra* (describing minimum age requirements for murder) See also descriptions of young offenders by politicians and commentators at note 20 *supra*.

¹⁰² See Regnery, *supra* note 20 at 68.

¹⁰³ Elsewhere Thomas Grace and I have called this the “competence assumption.” See Elizabeth Scott & Thomas Grace, *The Evolution of Adolescence*, *supra* note 86 at 139. See Janet E. Ainsworth, *Youth Justice in a Unified Court: Response to Critics of Juvenile Court Abolition*, 36 B.C. L. REV. 927, 939-946 (1995) (arguing that little distinction exists between adult and adolescent offenders); See also 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

happen to be criminal.”¹⁰⁴ 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 ranges of felonies can trigger a transfer hearing.¹⁰⁵ In a transfer hearing, an individualized determination is made of whether the young defendant should be deemed a legal adult for purposes of criminal prosecution or adjudicated as a child in juvenile court. 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 of the seriousness of the offense and criminal record.¹⁰⁶ Under legislative waiver statutes, young offenders charged with designated serious crimes are defined categorically as adults, and excluded from juvenile court jurisdiction based on age and offense, without an inquiry into maturity.¹⁰⁷ Under “direct file” statutes, prosecutors determine

(1998) (arguing that people are not referring to violent or chronic juvenile offenders when they speak of a ‘child’).

¹⁰⁴ Regnery, *Id.* at 65.

¹⁰⁵ Between 1992 and 1995, 11 states lowered the age for transfer; 24 states added crimes to automatic/legislative waiver statutes, and 10 states added crimes to judicial waiver statutes. Patricia Torbet, Richard Gable, Hunter Hurst IV, Imogene Montgomery, Linda Szymanski, and Douglas Thomas, Office of Juvenile Justice and Delinquency Prevention, U.S. Dep’t of 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 14 to 12 for all felonies. *Id.*

¹⁰⁶ CAL WEL. & INST. CODE § 707 (2000)(a minor who has committed 2 or more felonies while over age 14 shall be presumed to be not a fit and proper subject to be dealt with under the juvenile court law). Under traditional transfer statutes, the inquiry was on the youth’s amenability to treatment focused on how the youth was likely to respond to rehabilitative interventions. Thus, past treatment efforts, malleability, and general immaturity were important considerations. 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. VA. CODE ANN. § 16.1-269.1 (2000).

¹⁰⁷ 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. *State Responses* supra note 87 at 4. For example, in California, juveniles age 14 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 14. CAL. WEL. & INST. CODE § 602 (2000).

the classification; they can bring charges in either adult or juvenile court for a range of serious offenses.¹⁰⁸ Finally, blended sentencing statutes subject juveniles to stiff minimum sentences in juvenile court, which are completed through transfer to prison when the offender becomes an adult.¹⁰⁹ 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.¹¹⁰ 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 regulation of children. Holding immature offenders to adult standards of criminal responsibility also challenges important principles that define the boundaries of criminal punishment.¹¹¹ 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 will argue shortly, even if the only goal of juvenile justice

¹⁰⁸ See State Responses, *supra* note 87 at 4. See NEB. REV. STAT. § 43-276 (2000) (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 16 who have committed a felony).

¹⁰⁹ Blended sentencing models vary primarily on the basis of whether original jurisdiction is vested in the juvenile court or criminal court. See State Responses, *supra* note 87 at 11-14. The juvenile jurisdiction models include “juvenile-inclusive” wherein 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. *Id.* at 13. The criminal court methods mimic the juvenile court types and include “criminal-inclusive” (both). *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. *Id.*

¹¹⁰ Elsewhere I call this the “utilitarian assumption.” Scott & Grace, *supra* note 86 at 139.

¹¹¹ See t.a.n. 131 to 143 *infra*.

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 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. 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.¹¹²

In the 1970s and 80s, several reform groups responded to the challenge of *Gault* by proposing juvenile justice policies based on a realistic account of adolescence.¹¹³ These initiatives rejected the image of young offenders as innocent children that was so central to the Progressive account and to traditional policies.¹¹⁴ However, the post-*Gault* reformers were mindful of criminal law principles limiting 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

¹¹² See 387 U.S. at 18 n.23 (citing Handler, *The Juvenile Court and the Adversary System: Problems of Function and Form*, 1965 WISC. L. REV. 7). 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.

¹¹³ The most sweeping reform project was the Juvenile Justice Standards Project, created by the American Bar Association and the Institute for Judicial Administration. See note 86 *supra*. Also important was a task force on juvenile sentencing sponsored by the Twentieth Century Fund. Frank Zimring was the reporter on the Twentieth Century Fund Task Force, and author of the report of the project. *Id.* His monograph, *Confronting Youth Crime* is the most thoughtful and coherent statement of the perspective of the post-*Gault* reformers.

¹¹⁴ Zimring, *Id.*; ABA \ IJA, *Id.* .

accountable for their offenses (and indeed needed lessons in accountability¹¹⁵), but were psychologically less mature and therefore less blameworthy than adult offenders.¹¹⁶ Moreover, as Frank 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.¹¹⁷

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.¹¹⁸ 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. However, because juveniles were less blameworthy than their adult counterparts, their dispositions were to be categorically of shorter duration.¹¹⁹ Furthermore, separate dispositional programs for juveniles were justified, to prepare them for adult roles and to insulate them from association with adult criminals.¹²⁰ 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.¹²¹ Modern

¹¹⁵Zimring has argued that adolescents need to learn that their conduct has consequences for which they are responsible, but that the lesson should not be destructive to the child’s future. See Zimring, *CHANGING LEGAL WORLD* supra note 5 at _.

¹¹⁶Zimring, *Confronting Youth Crime*, supra note 86 at 6-7.

¹¹⁷Zimring, *Id.*

¹¹⁸ Juvenile Justice Standards, Standards Relating to Dispositions, supra note 86. (Standard 1.1, purpose is to reduce crime by developing individual responsibility while recognizing unique characteristics of juveniles).

¹¹⁹ *Id.* at 6 (Standards 1.2E & 2.1; range of punishment should be based on offense, while actual punishment should be age appropriate)

¹²⁰ *Id.* at 15-20

¹²¹ Many states revised their juvenile codes to include new statements of purpose. State Responses supra note 87 at 4. See also WASH REV CODE § 13.06.010 (“It is the intention of the legislature in enacting this chapter to increase the protection afforded the citizens of this state...; established 1983).

statutory sentencing provisions focus on the seriousness of the 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.

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 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).¹²² 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 13 year old boy convicted of committing homicide when he was 11 to a juvenile facility, despite a statutory provision authorizing adult penalties.¹²³ Finally, new reform groups are at work, promoting juvenile justice policies that acknowledge the realities of adolescent development.¹²⁴ 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.

¹²² 42 Pa.C.S. § 6301 (1999)(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.")

¹²³ Louise Knott and Oralandar Brand-Williams, *Young killer gets juvenile detention: State's get-tough policy blasted by sentencing judge*, The Detroit News, January 14, 2000, at A1.

¹²⁴The 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. The Network has sponsored a volume by researchers on adolescent adjudicative competence and culpability. See THOMAS GRACE & ROBERT SCHWARTZ, *YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE* (2000).

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 either 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 or mature adults.

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 challenged¹²⁵), 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.¹²⁶ 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. 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

¹²⁵ ANTHONY PLATT, *THE CHILD SAVERS*, supra note 93. 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.

¹²⁶ The focus of criticism was the ineffectiveness of rehabilitation, as evidenced by juvenile recidivism rates. Many critics assumed that tougher penalties would more effectively deter crime. See discussion in BARRY FELD, *BAD KIDS*, (1998) at 65-72.

principles limiting criminal punishment.¹²⁷ 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.¹²⁸

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.¹²⁹ The principle of

¹²⁷ 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 supra* note 99. *See also* Sheldon Glueck, *Some Unfinished Business in the Management of Juvenile Delinquency*, 15 SYRACUSE L. REV. 628, 629 (1964) (“Even a juvenile court can...overstep the bounds of fairness”); Orman W. Ketchum, *The Unfulfilled Promise of the Juvenile Court*, 7 CRIME & DELINQ. 97, 101 (1961) (“The state has no right to substitute governmental neglect for parental neglect”); Monrad G. Paulson, *Fairness to the Juvenile Offender*, 41 MINN. L. REV. 547, 550 (1957) (“We can not take away precious legal protection simply by changing names from ‘criminal prosecution’ to ‘delinquency proceedings’”).

¹²⁸ *See* note 112 *supra*.

¹²⁹ These mitigating factors are recognized in the criminal law defenses of duress, insanity and mistake of fact. RICHARD BONNIE, ANNE COUGHLIN, JOHN JEFFRIES & PETER LOW, CRIMINAL LAW at 134-137 (mistake of

proportionality requires that punishment be proportionate to blameworthiness, which in turn is mitigated if the individual's decisionmaking capacity is deficient.¹³⁰ Thus a defendant whose decisionmaking 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 20th 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.¹³¹ 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 got 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.¹³² In general, youths are likely to have less knowledge and experience to draw on in making decisions than adults. Moreover, peer conformity is a powerful influence on adolescent behavior, and may lead teens to become involved in criminal activity to avoid social rejection.¹³³

fact), 399-413 (duress), and 445-456 (insanity).

¹³⁰ Id at 9-10.

¹³¹ See note 92 *supra*.

¹³² See Elizabeth Scott, *Criminal Responsibility in Adolescence*, in THOMAS GRACE & ROBERT SCHWARTZ, *YOUTH ON TRIAL*, *supra* note 124. The research evidence is based on studies of psychological development in several domains.

¹³³ Research supports that conformity and compliance are important influences in adolescent behavior. See, P.R. Costanzo & M.E. Shaw, *Conformity as a Function of Age Level*, 37 *CHILD. DEV.* 967 (1966). See also T.J. Bradnt, *Developmental Changes in Conformity to Peers & Parents*, 15 *DEV'L. PSYCH.* 608 (1979). There is also evidence that peer conformity plays an important role in youth crime. See e.g. Albert Reiss, Jr. & David 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).

It is not surprising that, in contrast to adult crime, most juvenile criminal activity takes place in groups.¹³⁴ Adolescents also seem to perceive risks 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).¹³⁵ Finally, time perspective changes with maturity. As compared to adults, adolescents tend to focus more on immediate, rather than long term, consequences.¹³⁶

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 decisionmaking "on the street." A youth, considering the prospect of a convenience store hold-up, 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 decisionmaking than the possibility of apprehension or the long term consequences for his future of a criminal conviction.

These developmental influences on adolescent decisionmaking--peer influence, risk perception and preference, and time perspective --together contribute to immature judgment, which distinguishes adolescent decisionmaking about involvement in crime from that of adults.¹³⁷ This developmental immaturity constitutes evidence supporting the argument that adolescents are

¹³⁴ Reiss & Farrington, *Id.* See also Franklin E. Zimring, *Kids, Groups and Crime: Some Implications of a Well-Known Secret*, 72 J. CRIM. L. & CRIMINOLOGY 867, 867 (1981).

¹³⁵ Lita Furby & Ruth Beyth-Marom, *Risk Taking in Adolescence: A Decision-Making Perspective*, 12 DEV. REV. 1 (1992) (describing decisionmaking about risky behavior in a rational decisionmaking framework). W. Gardner, *A Life Span Theory of Risk Taking in ADOLESCENT AND ADULT RISK TAKING: THE 8TH TEXAS SYMPOSIUM ON INTERFACES IN PSYCHOLOGY* (N. Bell, ed., 1992); W. Gardner & J. Herman, *Adolescent AIDS Risk-Taking: A Rational Choice Perspective*, in *Adolescents in AIDS Epidemic 17-34W*. Gardner, S Millstein, & B. Wilcox, eds. (1991). See also T.J. Cottle, P. Howard, & J. Pleck, *Adolescent Perceptions of Time: The Effect of Age, Sex, and Social Class*, 37 PERSONALITY 636 (1969); A.L. Green, *Future-Time Perspective in Adolescence: The Present of Things Future Revisited*, 15 J. YOUTH & ADOL. 99 (1986).

¹³⁶ Scott, Reppucci, & Woolard, *supra* note 24 at 226-235. See also J.P. Allen, B.J. Leadbeater & J.L. Aber, *The Relationship of Adolescents' Expectations & Values to Delinquency, Hard Drug Use & Unprotected Sexual Intercourse*, 2 DEV. & PSYCHOPATHOLOGY 85 (1990); J. Nurmi, *How Do Adolescents See Their Future?: A Review of the Development of Future Orientation and Planning*, 11 DEV'L. REV. 1 (1991) Lawrence Steinberg & Elizabeth Cauffman, *supra* note 24.

¹³⁷ Scott, *Criminal Responsibility in Adolescence*, *supra* note 132 at 307-10. Scott, Reppucci, and Woolard, *supra* note 24 at 227. See also Steinberg & Cauffman, *Maturity of Judgment in Adolescence Id.*

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 distinguish from the norm the defendant who is excused from responsibility by reason of insanity.¹³⁸ Thus, adolescent immaturity should not excuse young offenders from criminal responsibility, but rather support a standard of diminished responsibility.¹³⁹ A diminished responsibility standard recognizes that most young offenders are in a transitional developmental stage and calibrates criminal liability accordingly.¹⁴⁰ Under such a regime, young offenders can be held accountable for the bad choices they make, without bearing the full costs of their mistakes.¹⁴¹

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 suggest 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 can not be on the street committing

¹³⁸ 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. CINN. L. REV 943, 967-969 (1987)(reviewing research showing that the insanity defense is rarely used and rarely successful). *See also* Criss & Racine, *Impact of Change in Legal Standards for Those Adjudicated Not Guilty By Reason of Insanity*, 8 BULL. AM. ACAD. PSYCHIATRY & L. 261 (1980).

¹³⁹ Frank Zimring makes a similar argument in *Commentary: The Hardest of the Hard Cases: Adolescent Homicide in Juvenile and Criminal Courts*, 6 Va. J. Soc. Pol'y & L. 437 (1999). *See also* FRANKLIN E. ZIMRING, *AMERICAN YOUTH VIOLENCE* 75-81 (1998).

¹⁴⁰ Barry Feld has made a similar argument, *See* BARRY FELD, *BAD KIDS*, *supra* note 126.

¹⁴¹ Frank Zimring describes adolescence as a probationary period, in which young offenders learn lessons in accountability. ZIMRING, *CHANGING LEGAL WORLD*, *Supra* note 5 at 89-101.

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 in early adolescence; it increases through age 16, and decreases sharply from age 17 onward.¹⁴² Most teen age 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.”¹⁴³ 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 life chances.¹⁴⁴ 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.¹⁴⁵ 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

¹⁴² See David P. Farrington, *Offending from 10 to 25 Years of Age*, in PROSPECTIVE STUDIES IN CRIME AND DELINQUENCY (K. Teilmann Van Deusen & S.A. Mednick eds. (1983)

¹⁴³ See Terrie Moffitt, *Adolescence-Limited and Life-Course Persistent Antisocial Behavior: A Developmental Taxonomy*, 100 PSYCHOL. REV. 674 (1993.)

¹⁴⁴ *Id.* Several other researchers have documented the tendency of antisocial and criminal behavior to increase in adolescence and the decline sharply after age 17. See, e.g. Farrington, *Offending from 10 to 25 Years of Age*, supra note 141; David Farrington, *Age and Crime*, in 7 CRIME AND JUSTICE: AN ANNUAL REVIEW OF RESEARCH 189 (Michael Tonry & Norval Morris eds., 1986); Alfred Blumstein & Jacqueline Cohen, *Characterizing Criminal Careers*, 237 Sci. 985 (1987); Travis Hirschi & Michael Gottfredson, *Age and the Explanation of Crime*, 89 Am. J. Soc. 552 (1983); Richard Jessor & Shirley L. Jessor, *Problem Behavior and Psychosocial Development: A Longitudinal Study of Youth* (1977); Edward Mulvey & John La Rosa, *Delinquency Cessation and Adolescent Development*, 56 Am. J. Orthopsychiatry 212 (1986).

¹⁴⁵ Under Moffitt’s taxonomy, these two groups differ in ways that may be important to desistence. Life course-persistent offenders tend to have problems in many domains beginning in early childhood, and their offending begins at a younger age. In contrast, adolescent- limited offenders have little history of problem behavior in childhood. Thus, adolescents for whom delinquency is limited to this developmental stage will not bear the cumulative effects of lifelong antisocial conduct. Typically, their delinquent activity is also of a less serious nature. They are also more likely to have acquired social and academic skills that prepare them for adult roles. Finally, their delinquency does not reflect deeply entrenched personality disorder as may often be true of life-course-persistent offenders. All of these factors may facilitate the transition to conventional adult roles See Moffitt, supra note 143 at 690-691.

career criminals, or it may delay desistance.¹⁴⁶ At a minimum, it seems a 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. 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 be the features of a juvenile justice policy 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.¹⁴⁷ 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.¹⁴⁸ 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. 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

¹⁴⁶ 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. Jeffrey Fagan, *The Comparative Advantages of Juvenile Verses Criminal Court Sanction on Recidivism Among Adolescent Felony Offenders*, 18 L. & 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.

¹⁴⁷ PAUL ROBINSON & JOHN DARLEY, *JUSTICE, LIABILITY AND BLAME* (1995) (describing empirical studies supporting argument that the criminal law conforms, at least roughly, to societal attitudes, and that this is important to its legitimacy.); Paul Robinson, *The Utility of Desert*, 91 NW. U. L. REV. 453 (1997) (same).

¹⁴⁸ See Robinson and Darley, *id* at 127. These researchers found that respondents in their study favored more lenient punishment of immature minors, particularly if young offenders were civilly committed. This suggests that a concern about public safety mediates attitudes about youthful culpability.

stigma and lasting impact of delinquency status are worthwhile (for example, closed hearings and sealed records).¹⁴⁹ 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.¹⁵⁰ 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.¹⁵¹

¹⁴⁹ See Kathleen M. Laubenstein, Comment, *Media Access to Juvenile Proceedings*, 68 TEMP. L. REV. 1897, 1901 (1996); Andrew R. Kintzinger, Note, *Freedom of the Press vs. Juvenile Anonymity: A Conflict Between Constitutional Priorities and Rehabilitation*, 65 IOWA L. REV. 1471, 1484-1485 (1980).

¹⁵⁰ Barry Feld argues that the juvenile and criminal courts should be re-unified. BARRY FELD, *BAD KIDS*, *supra* note 126. 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 highlighting “the aspect of youths that rationally elicits the least sympathy and [ignoring]...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. *Id.* at 297. For example, a 14-year-old offender would receive 25% of the adult sentence, and a 16-year-old would receive 50% of the adult sentence: the larger discount for the younger offender corresponding to the “developmental continuum” of responsibility. *Id.* at 317. This sentencing policy would be standardized and not discretionary, *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.

¹⁵¹ 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. 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 Elizabeth Scott & Thomas Grace, *supra* note

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 20th century, with the publication of G. Stanley Hall's *Adolescence*, was this transitional developmental stage between childhood and adulthood identified and described.¹⁵² 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 20th 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 21st 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 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.¹⁵³ For example, recent innovations in the regulation of adolescent driving privileges allow young persons to gain experience while limiting

¹⁵²See JOSEPH KETT, *supra* note 89 at 217-22. 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.

¹⁵³ In the early 1980's, Frank Zimring adopted the metaphor of the “learners’ 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 FRANKLIN ZIMRING, *CHANGING LEGAL WORLD*, *supra* note 5 at 89-98. The developmental model of juvenile justice policy fits this model.

risk.¹⁵⁴ On issues as varied as liability on contracts and preferences in custody disputes, courts and legislatures in the late 20th century have recognized, implicitly at least, that adolescents are persons who are not yet adults but are different from young children.¹⁵⁵

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.

¹⁵⁴*See note 26 supra.*

¹⁵⁵ 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, supra* note 16. Adolescents' preferences are given substantial weight in custody disputes, unless their choice of custodian is clearly against their interest. *See note 26 supra.*