

A Question of Capacity: Towards a Comprehensive and Consistent Vision of Children and Their Status under Law

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Introduction

The law of children has developed in a patchwork and inconsistent fashion. Decisionmakers including Congress, state legislatures, the Supreme Court, and state courts have created laws and decided cases without a comprehensive vision of what it means to be a child or how children think and behave. Particularly troublesome is the varying manner in which the question of psychological capacity has been addressed by decisionmakers, if at all.

Some areas of the law view children as “infants” who do not have the capacity to act. For example, a child cannot make a simple contract to purchase a car. Furthermore, in the 2004 Term, the Supreme Court held that minors, as a category, cannot receive the death penalty. The Court based its decision, in part, on the reduced capacity of children. The Court rejected the then-existing case-by-case test for whether a person should receive the death penalty and adopted, instead, a categorical exception for all minors.

Other areas of the law presume capacity in all instances or disregard the question of capacity altogether. The Supreme Court decided in the *Gault* case that alleged delinquents have a constitutional right to counsel. This decision did not contain any discussion of whether a child has the ability to exercise that right in a rational manner. In other areas, such as abortion rights, courts and legislatures have mandated case-by-case determinations of competency before allowing a child to either exercise a right or be held responsible for a decision. The debate over the Twenty-Sixth Amendment focused on the capacity of 18, 19, and 20-year-olds to handle the responsibilities of full citizenship and, at the same time, a recognition that it was fundamentally inconsistent and unfair to deprive them of the right to vote but to require some of them to fight in a war.

This article examines the methods and processes that created rules relating to children. Rather than viewing the rights and responsibilities of children as subsets of categories of law, decisionmakers should strive to develop a legal code that applies a consistent vision of what it means to be a child.

In the last century, a rich body of psychological literature was developed about the rate and process of child development. Lawmakers should draw upon this research to create laws that cohesively and logically deal with children's rights and responsibilities.

The law is inconsistent not only in *how* it treats children, but also how it *has decided* to treat children in different contexts. The former proposition is well-documented in legal and psychological scholarship. This article will focus, instead, on the latter proposition: The inconsistent methodology, rhetoric, and arguments used by decisionmakers in shaping and creating the law of children. This article will proceed as follows. In Part I, I will posit a definition of capacity and summarize the current state of affairs in child development. In Part II, I will show how decisionmakers have erratically used the notion of capacity. Some have outdated beliefs about psychological capacity. Some have not considered the question of capacity at all. Others have left the decision of capacity to an individual case-by-case decisionmaker. In Part III, I will argue that the law of children should be consistent in its use of capacity; that, as a matter of relative institutional competence, state legislatures are best suited to make these policy calls; and that experts in child psychology and children's law should create a Model Children's Code to bring us closer to a cohesive jurisprudence of children.

I. Capacity and the Modern Child

A. A Working Definition of Capacity

Competency is central to an understanding of children's rights and responsibilities.¹ For better or worse, the law cares in most instances about whether children are capable of exercising certain rights or being held accountable for their actions. A child can disaffirm a contract because he is

¹ Jennifer L. Woolard et al., *Theoretical and Methodological Issues in Studying Children's Capacities in Legal Contexts*, 20 LAW & HUM. BEHAV. 219, 219 (1996).

presumed incapable of navigating the adult marketplace.² Children who commit crimes are generally handled in a different system (the juvenile justice system) because it is believed they have diminished responsibility due to their age.³

“Competency” according to the noted bioethicists Beauchamp and Childress is “the ability to perform a task.”⁴ Competency is therefore relative to the task that is being considered. A person is rarely incompetent over all aspects of his or her life; more often, an impaired person is competent to make some decisions but not others.⁵ When speaking about the ability to make a decision, the analysis of competency is closely tied to the field of psychology.⁶ It requires an assessment of the individual’s “capacity to understand the material information, to make a judgment about the information in light of their values, to intend a certain outcome, and to communicate freely their wishes to care givers or investigators.”⁷

In general, the law cares about competency out of respect for the autonomy of the individual.⁸ Rights flow from our unique ability, as human beings, to reason and rationalize. Rights are “only thought appropriate for those who possess the capacity for rational choice: a criterion commonly held to exclude children.”⁹ There is an argument that, particularly in the context of “rights,” capacity should be irrelevant. A

² See *infra* Part II.A.1.

³ See *infra* Part II.A.5.

⁴ TOM L. BEAUCHAMP & JAMES F. CHILDRESS, *PRINCIPLES OF BIOMEDICAL ETHICS* 70 (5th ed. 2001).

⁵ *Id.* at 70.

⁶ *Id.* at 69.

⁷ *Id.* at 71; see also Rhonda Gay Hartman, *Adolescent Autonomy: Clarifying an Ageless Conundrum*, 51 *HASTINGS L.J.* 1265, 1266 (1999-2000).

⁸ BEAUCHAMP & CHILDRESS, *supra* note 4, at 69; Lee E. Teitelbaum, *Children's Rights and the Problem of Equal Respect*, 27 *HOFSTRA L. REV.* 799, 803 (1999).

⁹ Teitelbaum, *supra* note 8, at 803. Teitelbaum quotes John Stuart Miller, “It is perhaps hardly necessary to say that this doctrine is meant to apply only to human beings in the maturity of their faculties. We are not speaking of children.” *Id.* (quoting John Stuart Mill, *On Liberty*, in *THE UTILITARIANS* 484 (Doubleday Books 1973)).

person intrinsically has rights, whether or not they are capable of exercising them according to societal standards. Such a “laissez faire” approach, as Professor Garvey calls it, promotes freedom as being an intrinsic good in and of itself.¹⁰ Professor Federle has made the case that there is a questionable link between rights and capacity.¹¹ However, Professor Garvey and others have criticized the laissez faire approach as “unjust” and “impractical.”¹² Although freedom has social value, it is not absolute, particularly when we consider that children may harm themselves in the foolish exercise of those freedoms.¹³ In contrast, we limit an adult’s freedoms only when they will conflict with the rights of others. Restrictions on children’s liberties, however, are for their own benefit.¹⁴

Competency is also a requirement of due process. An incompetent adult cannot stand trial for a criminal charge.¹⁵ Competency requires that a defendant have a rational understanding of the nature of the proceedings against him and the ability to consult with his lawyer with a reasonable degree of rational understanding.¹⁶

“Capacity” is synonymous with “competency.” They both refer to the ability of the individual to make a decision.

¹⁰ John H. Garvey, *Freedom and Choice in Constitutional Law*, 94 HARV. L. REV. 1756, 1764 (1981).

¹¹ Katherine Hunt Federle, *On the Road to Reconceiving Rights for Children: A Postfeminist Analysis of the Capacity Principle*, 42 DEPAUL L. REV. 983, 1011 (1992-1993).

¹² Garvey, *supra* note 10, at 1764.

¹³ *Id.*

¹⁴ *Id.* at 1770; Elizabeth S. Scott, *The Legal Construction of Adolescence*, 29 HOFSTRA L. REV. 547, 550 (2000) [hereinafter Scott, *Legal Construction*].

¹⁵ *Drope v. Missouri*, 420 U.S. 162, 172 (1975) (“For our purposes, it suffices to note that the prohibition [on trying an incompetent person] is fundamental to an adversary system of justice.”); *Medina v. California*, 505 U.S. 437, 446 (1992) (“The rule that a criminal defendant who is incompetent should not be required to stand trial has deep roots in our common-law heritage.”). In *Medina*, the Supreme Court held that due process is not violated if a state puts the burden of proving incompetency by a preponderance of the evidence on a defendant. *Id.* at 439-46.

¹⁶ *Dusky v. U.S.*, 362 U.S. 402 (1960) (per curiam).

There is necessarily a normative judgment involved with setting a threshold of capacity or competency. Capacity is measured in degrees, not absolutes. Where the capable/incapable line is drawn on the spectrum is a human decision. Few people, even children, have zero psychological capacity. When we label someone as incompetent, we are really saying that they are “not competent enough” to make a particular decision.

B. Psychological Understanding of Children’s Capacities

We know a significant amount more about child psychology and development than we did at the turn of the twentieth century, when the first juvenile court was established and when a great deal of the common law and statutes defining children’s rights and responsibilities were in place. Scientific research has confirmed what nearly every parent knows: “the period between twelve and eighteen years of age is a time of very significant physical, cognitive, and emotional development.”¹⁷

Physically, we know that children’s brains grow and mature over time. The development of magnetic resonance imaging and other scientific advances have showed us that a young child’s brain is very different from that of an older adolescent.¹⁸ Research has indicated that the temporal lobes and prefrontal cortex—which are responsible for mature reasoning and self-control—do not fully develop until late adolescence.¹⁹ Yet, we know very little about the extent of any correlation between deficiencies in brain development and, for example, delinquency or other antisocial behavior. A small research study by Lewis et al. administered a battery of

¹⁷ David O. Brink, *Immaturity, Normative Competence, and Juvenile Transfer: How (Not) to Punish Minors for Major Crimes*, 82 TEX. L. REV. 1555, 1571 (2004).

¹⁸ Dorothy Otnow Lewis et al., *Ethics Questions Raised by the Neuropsychiatric, Neuropsychological, Educational, Developmental, and Family Characteristics of 18 Juveniles Awaiting Execution in Texas*, 32 J. AM. ACAD. PSYCH. & L. 408, 409 (2004).

¹⁹ *Id.*

tests to 18 males on Texas death row who were juveniles at the time of the commission of their crimes. The study found that 84% of the admittedly small sample “exhibited significant impairment on the unstructured test of executive function, the Iowa Gambling Task, measuring the ability to anticipate future consequences and modify behavior in response to negative feedback.”²⁰ Of the 18 subjects tested for abnormal prefrontal lobes, 5 had one abnormality, 3 had two, 2 had three, and 3 had more four or more.²¹ The team documented a number of other deficiencies—educational, developmental, psychological, and familial—in many of the inmates’ upbringings. Because of the small sample size, however, the research team was unable to determine if there was a cause-effect relationship between the physical and performance deficiencies and the subjects’ criminal behavior.²²

A number of experiments conducted during the twentieth century have shed considerable light on the psychological development of children and, specifically, their ability to make reasoned judgments. The most influential researcher in this area was Jean Piaget, who concluded that children develop in four stages and have adult-like reasoning abilities by age 15.²³ In the “sensorimotor stage,” babies learn about the world around them through touch and other actions.²⁴ From age two through seven, children undergo the “preoperational stage” in which they learn to communicate.²⁵ However, they do not have the ability to understand the consequences of their actions.²⁶ In the “concrete operational stage,” children age 11 through 12 begin to think in a logical fashion and can order their worlds into hierarchies.²⁷ The last

²⁰ *Id.* at 414-15.

²¹ *Id.*

²² *Id.* at 424.

²³ Gary B. Melton, *Taking Gault Seriously: Toward a New Juvenile Court*, 68 NEB. L. REV. 146, 153 (1989) [hereinafter Melton, *Gault*]; Wallace J. Mlyniec, *A Judge's Ethical Dilemma: Assessing a Child's Capacity to Choose*, 64 FORDHAM L. REV. 1873, 1878 (1996).

²⁴ See GRACE J. CRAIG, HUMAN DEVELOPMENT 34-36 (8th ed. 1999).

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

stage, the “formal operational stage,” runs through age 15.²⁸ Children learn to think hypothetically, reasoning through a series of options by considering likely outcomes.²⁹ By age 15, a child has amassed an adult-like cognitive ability.³⁰ Some have criticized Piaget’s stage-like theory of development as too rigid. Critics have suggested, instead, that cognitive development occurs gradually and incrementally.³¹

In recent years, researchers have focused their efforts on trying to understand the effect, if any, of “psychosocial” influences on adolescent decisionmaking. Steinberg and Cauffman argue that cognition and maturity go hand-in-hand:

An individual facing a particular decision may have the cognitive skills to evaluate the costs and benefits of various courses of action, but if the individual is especially impulsive, he or she may not make a wise decision. By the same token, even the most responsible and temperate individual will not make competent decisions if

²⁸ *Id.*

²⁹ *Id.*

³⁰ RUTH L. AULT, CHILDREN'S COGNITIVE DEVELOPMENT 73 (2d ed. 1983); ROBBIE CASE, INTELLECTUAL DEVELOPMENT: BIRTH TO ADULTHOOD 5 (1985); BARRY J. WADSWORTH, PIAGET'S THEORY OF COGNITIVE AND AFFECTIVE DEVELOPMENT 138-39 (1996); Hartman, *supra* note 7, at 1285 (adolescents reach a stage of "formal operational thinking that allows them to reason deductively and think both abstractly and hypothetically"); Mlyniec, *supra* note 23, at 1878-79.

³¹ See CRAIG, *supra* note 24, at 150; Hartman, *supra* note 7, at 1285 ("Although contemporary researchers challenge the Piagetian model and focus instead on specific task attainment, they nonetheless underscore its value to understanding cognitive development."); Elizabeth S. Scott, *Judgment and Reasoning in Adolescent Decisionmaking*, 37 VILL. L. REV. 1632 (1992) [hereinafter Scott, *Judgment*] ("Today, few cognitive psychologists accept that cognitive development is strictly stage-like --- that is, that children in a given stage engage in a characteristic reasoning process across many tasks, and that this process differs from reasoning at other stages."); *but see* ROBERT S. SIEGLER, EMERGING MINDS: THE PROCESS OF CHANGE IN CHILDREN'S THINKING 7 (1996) (positing that theories of continuous development are in the minority).

he or she lacks the requisite cognitive skills or access to relevant information.³²

While adolescents may engage in an adult-like *process* of decisionmaking, they may not reach the “right” *results*.³³ Steinberg and Cauffman have identified a number of factors that may influence decisionmaking outcomes in a negative way.³⁴ For example, adolescents’ outcomes differ from adults because of peer influence and different perceptions of risk and time.³⁵ Adolescents engage in more risky behaviors than adults³⁶—not because they do not recognize the risks of their conduct, but because they believe other factors outweigh the risk.³⁷

Additional research is particularly needed in the area of delinquency.³⁸ Most children who engage in delinquent acts will outgrow such behavior by adulthood; only a small percentage will go on to become career, adult criminals.³⁹

³² Laurence Steinberg & Elizabeth Cauffman, *Maturity of Judgment in Adolescence: Psychosocial Factors in Adolescent Decision Making*, 20 LAW & HUM. BEHAV. 249, 251 (1996).

³³ Mlyniec, *supra* note 23, at 1884 (“Piaget’s cool calculating fifteen-year-old appears to be subject to some very hot influences during adolescence. Such experiences must be taken into account in a judge’s assessment.”); Steinberg & Cauffman, *supra* note 32, at 250; Elizabeth S. Scott & Thomas Grisso, *The Evolution of Adolescence: A Developmental Perspective on Juvenile Justice Reform*, 88 J. CRIM. L. & CRIMINOLOGY 137, 161 (1997-98); Scott, *Judgment*, *supra* note 31, at 1609.

Professor Scott traced this paradigm to the law and ethics of medical decisionmaking, which focuses on process, not outcomes. Scott, *Judgment*, *supra* note 31, at 1609.

³⁴ Steinberg & Cauffman, *supra* note 32, at 251-52.

³⁵ Scott & Grisso, *supra* note 33, at 162-64.

³⁶ Jeffrey Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 DEV. REV. 339, 339-43 (1992) (adolescents are overrepresented in categories of reckless behavior such as drunk and reckless driving, sex without contraception, illegal drug use, delinquency and crime).

³⁷ Steinberg & Cauffman, *supra* note 32, at 258.

³⁸ Scott, *Legal Construction*, *supra* note 14, at 591 (“The psychological research evidence suggests that developmental factors characteristic of adolescence contribute to immature judgment in ways that seem likely to affect criminal choices.”); Steinberg & Cauffman, *supra* note 32, at 254.

³⁹ Scott & Grisso, *supra* note 33, at 154-55.

Yet, we know very little about why certain children fall into one category as opposed to the other.⁴⁰ Research on the influence of psychosocial factors affecting judgment has been described as “sketchy.”⁴¹

An area warranting further exploration is whether capacity should be limited to process or whether we should examine an individual’s outcomes as well. Much of our appreciation for capacity flows from the medical context, in which informed consent rests on process, not whether the individual reaches the “right result.” Beauchamp and Childress’ definition, likewise, focuses on the mental process of deliberation. Steinberg and Cauffman’s work, therefore, creates a two-fold question: (1) Do children reach different results because of their immaturity?; and (2) Do we care (i.e., is reaching the right result relevant to one’s capacity)?

II. How the Law Views the Capacity of Children

With respect to age, individuals are categorized into two groups: children and adults. The latter have capacity; the former do not. This “binary classification,” as Professor Scott calls it, creates a demarcation line at the “age of majority.”⁴² Persons below the line (children) are incapable of action and require support and protection.⁴³ Persons above the line (adults) have full capacity. “In the space of a literal moment, one is transformed from a legally incompetent ‘infant’ to an adult who is presumed legally competent.”⁴⁴ There is no separate legal status of adolescence.⁴⁵

⁴⁰ *Id.* at 155.

⁴¹ *Id.* at 164; *see also* Scott, *Judgment*, *supra* note 31, at 1635; Steinberg & Cauffman, *supra* note 32, at 256.

⁴² Scott, *Legal Construction*, *supra* note 14, at 547; J. Shoshanna Ehrlich, *Shifting Boundaries: Abortion, Criminal Culpability and the Indeterminate Legal Status of Adolescents*, 18 WIS. WOMEN'S L.J. 77, 80 (2003); Scott, *Judgment*, *supra* note 31, at 1607.

⁴³ *Id.*

⁴⁴ Ehrlich, *supra* note 42, at 78-79.

⁴⁵ *Id.* at 79.

The line is not necessarily drawn at age 18 for all purposes, however.⁴⁶ In many states, a child can drive at 16, be sentenced to adult prison for certain offenses at 14, but be legally incapable of possessing alcohol until age 21.⁴⁷ This inconsistency has been widely documented, analyzed, and critiqued.⁴⁸

The fact that we have different line demarcations based on the right or responsibility involved is not the end of the story. There are also differences in how capacity is determined at each of those lines. In some cases, capacity is categorical: The demarcation line applies to every child. In other areas, capacity is individual: An adult must determine that the particular child is either capable or incapable. In this section, I will catalogue this diverse treatment of capacity by courts and legislatures. In doing so, I will attempt to show three things. First, I will confirm that there is inconsistency and a lack of intelligent design to the hodgepodge nature of children's law. Second, I will show that certain decisionmakers, particularly the courts, have had problems

⁴⁶ *Id.* at 80; Scott, *Legal Construction*, *supra* note 14, at 547-48 ("[T]he answer to the question, 'When does childhood end?' is different in different policy contexts. This variation makes it 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 most college students are legally prohibited from drinking.")

⁴⁷ *See, e.g.*, VA. CODE ANN. §§ 46.2-334 (2005) (driver's license at age 16¼), 16.1-269.1 (transfer for adult prosecution at age 14 for certain crimes); 4.1-305 (prohibition on possession of alcohol by those under age 21); *see also* Scott, *Legal Construction*, *supra* note 14, at 547-48.

⁴⁸ *See, e.g.*, Gary B. Melton, *Children's Competence to Consent: A Problem in Law and Social Science*, in CHILDREN'S COMPETENCE TO CONSENT 1, 16-17 (Gerald P. Koocher, Gary B. Melton, & Michael J. Saks eds., 1983) (describing the law of children as "a patchwork of rules without clear underlying purpose.") [hereinafter Melton, *Consent*]; Hartman, *supra* note 7, at 1267 (law is inconsistent); Donald L. Beschle, *The Juvenile Justice Counterrevolution: Responding to Cognitive Dissonance in the Law's View of the Decision-Making Capacity of Minors*, 48 EMORY L.J. 65, 67 (1999) (law has dissonance); Jacqueline Cuncannan, Note, *Only When They're Bad: The Rights and Responsibilities of Our Children*, 51 WASH. U. J. URB. & CONTEMP. L. 273, 285 (1997) (describing inconsistency in Supreme Court decisions).

with internal consistency in that they have adopted different views of children's capacities. Third, using excerpts from judicial opinions and legislative debates, I will show that courts and legislatures have not been using the latest in psychological research to confirm their assumptions about children's capacities.

A. *Categorical Incapacity*

For the most part, children lack legal capacity to make decisions on their own. This traditional rule relates to both their exercise of rights and the duties that other caretakers (particularly their parents) owe them.

1. *Contracts: Unsupported Rhetoric*

Every minor⁴⁹—regardless of individual capacity, misrepresentations about his age,⁵⁰ or the fairness of an individual bargain—has a right to disaffirm⁵¹ most contracts,

⁴⁹ For purposes of contract law, the common law age of majority was 21. This was reduced in most states to 18 in the 1970s. JOSEPH M. PERILLO, CORBIN ON CONTRACTS § 27.2 (2002) [hereinafter CORBIN]; RICHARD A. LORD, WILLISTON ON CONTRACTS § 9:3 (1993) [hereinafter WILLISTON]. The right to disaffirm rests with the minor, not a parent or other contracting party. CORBIN, *id.* § 27.2; WILLISTON, *id.* § 9:10.

For an interesting survey of the history of the infancy defense, in general, and the law of disaffirmance in Louisiana in particular, see Melvin John Dugas, *The Contractual Capacity of Minors: A Survey of the Prior Law and the New Articles*, 62 TUL. L. REV. 745 (1987-88).

⁵⁰ At common law, the fact that a minor lied about his age to a merchant did not prevent him from exercising his right to disaffirm the contract. In some states, this rule has been modified by statute, or by courts using estoppel. WILLISTON, *supra* note 49, § 9:22; Larry A. DiMatteo, *Deconstructing the Myth of the "Infancy Law Doctrine": From Incapacity to Accountability*, 21 OHIO N.U. L. REV. 481, 496-97 (1994-1995); *Sternlieb v. Normandie Nat. Securities Corp.*, 188 N.E. 726, 726 (N.Y. 05/06/15 1934); *La Rosa v. Nichols*, 105 A. 201 (N.J. 1918).

⁵¹ At early common law, contracts by minors were void. CORBIN, *supra* note 49, § 27.2. The doctrine has since evolved to make contracts by minors merely voidable at their election. DiMatteo, *supra* note 50, at 486; WILLISTON, *supra* note 49, § 9:5; *Dodson v. Shrader*, 824 S.W.2d 545, 547 (Tenn. 1992).

entered into during minority, upon reaching the age of majority.⁵² “To some observers it has seemed that the infant has capacity to contract coupled with an additional power of disaffirmance. It has been said that ‘the law confers a privilege rather than a disability.’”⁵³

The infancy defense or doctrine has been justified on the grounds that unsophisticated minors are likely to enter into foolish contracts,⁵⁴ squander their wealth, and be taken advantage of by crafty adults.⁵⁵ Capacity is a traditional requirement of the “classical school” of contracts.⁵⁶ Minors (and, formerly, women) have historically been deemed to lack the capacity to contract.⁵⁷

Upon disaffirming, the minor is entitled the return of the consideration given. He is also required to return any consideration that he received from the other contracting party.⁵⁸ Under common law, if the minor was no longer in possession of the item or if the good had been damaged, he

In some jurisdictions, the act of disaffirmance can be done during the period of minority. CORBIN, *supra* note 49, § 27.4. No specific language or actions are required to disaffirm. *Id.* § 27.4. However, notice must be given within a reasonable time after reaching the age of majority. WILLISTON, *supra* note 49, § 9:13.

⁵² See generally *Pippen v. Mutual Ben. Life Ins. Co.*, 130 N.C. 23, 40 S.E. 822 (1902); *Dixon National Bank of Dixon v. Neal*, 5 Ill.2d 328, 336, 125 N.E.2d 463 (1955).

⁵³ CORBIN, *supra* note 49, § 27.2. (quoting SIMPSON, *CONTRACTS* 216 (2d ed. 1965)).

⁵⁴ DiMatteo, *supra* note 50, at 481 n.3; *Sternlieb v. Normandie Nat. Securities Corp.*, 188 N.E. at 728; *Porter v. Wilson*, 209 A.2d 730, 731 (N.H. 05/06/15 1965).

⁵⁵ *Dodson*, 824 S.W.2d at 547; Scott, *Legal Construction*, *supra* note 14, at 553.

⁵⁶ WILLISTON, *supra* note 49, § 9:1 (“The formation of contracts requires the existence of parties capable of contracting, but capacity of any person to contract is to be presumed unless he falls within one of the classes of persons who are held by the law to have no capacity, or only a limited capacity to contract.”).

⁵⁷ *Hall v. Butterfield*, 59 N.H. 354, 355, 1879 WL 5111 (N.H. 1879); DiMatteo, *supra* note 50, at 484 (“This Willistonian formalism reasons that since a minor lacks legal capacity, then, by definition, there can be no contract.”).

⁵⁸ CORBIN, *supra* note 49, § 27.6.

generally had no duty to make restitution to the other party.⁵⁹ The minor was entitled to be placed in *status quo ante* while the other party was not. Modern courts, however, have sometimes imposed a duty on the minor to make restitution to the other contract party if he returns an item that has been damaged, used, or otherwise devalued while in his possession.⁶⁰

The common law has also developed other exceptions to the infancy doctrine. One of the first to develop had to do with contracts for the “necessaries of life.”⁶¹ The law did not want to discourage merchants from selling basic necessities to minors out of fear that the minor would later disaffirm.⁶² As Professor DiMateo noted:

The courts have had difficulty defining the necessities of life. This definitional problem is compounded by a number of factors. First, in our ever changing technological society, what may not be a necessity today may be redefined as one in the future. Second, what may be a necessity for one minor may not be a necessity for another.⁶³

Legislatures have also carved out exceptions to the infancy defense.⁶⁴ Beginning in the 1960s, some state

⁵⁹ *Id.*; *Halbman v. Lemke*, 99 Wis.2d 241, 298 N.W.2d 562 (1980).

⁶⁰ CORBIN, *supra* note 49, § 27.6; DiMatteo, *supra* note 50, at 491-95; *Dodson*, 824 S.W.2d at 549 (court adopts rule requiring restitution to place adult in *status quo ante* as well, absent evidence of fraud, noting “This rule will fully and fairly protect the minor against injustice or imposition, and at the same time it will be fair to a business person who has dealt with such minor in good faith.”); *Pettit v. Liston*, 191 P. 660 (Ore. 1920); *Hall*, 59 N.H. at 358.

⁶¹ DiMatteo, *supra* note 50, at 488; CORBIN, *supra* note 49, § 27.8 WILLISTON, *supra* note 49, § 9:18;. The minor is liable for the reasonable value of the necessities, not their contract price. *Id.*

⁶² Irving M. Mehler, *Infant Contractual Responsibility: A Time for Reappraisal and Realistic Adjustment?* 11 KANSAS L. REV. 361, 364-65 (1963).

⁶³ DiMatteo, *supra* note 50, at 489.

⁶⁴ *Id.* at 483 n.10.

legislatures prohibited minors from disaffirming their contracts in certain discrete areas where legislatures wanted to bring certainty and finality to dealings. Minors were no longer able to disaffirm contracts relating to insurance, student loans, safety deposit boxes, bail bonds, or child support.⁶⁵ In other areas, legislatures created pockets where capacity to contract without a right of disaffirmance could be decided on an individual case-by-case basis. A young athlete or actor, and the team or studio that wanted to hire him, could bring the contract to a court for ratification ahead of time. Once ratified, the minor lost his or her right to disaffirm the contract.⁶⁶

The origins of the infancy defense/doctrine/privilege can be traced to at least the 13th Century.⁶⁷ The basic concepts of the rule have been in place since at least the 15th Century.⁶⁸ Apart from the legislative tinkering in the last century or so, the doctrine is primarily a development of the common law. By examining judicial decisions, therefore, we can get a good sense of the rulemakers' views of children and their capacity to make marketplace decisions. In the domain of contract law, the common law judges viewed minors, including those 18 to 21-years-old, as "infants." At least one court acknowledged that the use of the term "infant" is deliberate, albeit not necessarily reflective of every young adult's capacity to make decisions:

It is not always flattering to our young men in college and in business, between the ages of eighteen and twenty-one, to refer to them as infants, and yet this is exactly what the law considers them in their mental capacities and abilities to protect themselves in ordinary transactions and business relationships. That

⁶⁵ CORBIN, *supra* note 49, § 27.3; WILLISTON, *supra* note 49, § 9:6; DiMatteo, *supra* note 50, at 513.

⁶⁶ *See, e.g.*, Warner Bros. Pictures, Inc. v. Brodel, 31 Cal.2d 766, 192 P.2d 949 (1948) (actress had no right to disaffirm because contract was approved by court ahead of time).

⁶⁷ WILLISTON, *supra* note 49, § 9:2.

⁶⁸ *Id.*

many young people under twenty-one years of age are improvident and reckless is quite evident, but these defects in judgment are by no means confined to the young.⁶⁹

Courts have been primarily concerned with adults taking advantage of young people due to their inexperience in the marketplace. “Although the origins of the doctrine are somewhat obscure, it is generally recognized that its purpose is the protection of minors from foolishly squandering their wealth through improvident contracts with crafty adults who would take advantage of them in the marketplace.”⁷⁰ Judges also expressed concern over minors squandering their money. A sampling of such concern is quoted here:

Contracts entered into by infants for the purpose of business and trade are viewed with great suspicion by the Courts, and have been frequently declared absolutely void. The Courts are very watchful over the rights of an infant, who in contemplation of law is incapable of carrying on business and trade with proper discretion.⁷¹

and:

[T]he common-law conception that a minor does not possess the discretion and experience of adults and therefore must be protected from his own contractual follies generally holds sway today.⁷²

and:

An infant is not competent to contract. This positive inhibition is the way of the law to protect infants against their own lack of

⁶⁹ *Sternlieb*, 188 N.E. at 728.

⁷⁰ *Halbman*, 99 Wis.2d at 245; *see also Dodson*, 824 S.W.2d at 547.

⁷¹ *Skinner v. Maxwell*, 66 N.C. 45, 47 (1872).

⁷² *Porter*, 209 A.2d at 731.

discretion and against the snares of designing persons.⁷³

Since many of these decisions predated Piaget and other researchers in the area of child development, it is not surprising that the courts' assumptions about minors—"infants" who are unsophisticated and need protection from crafty adults—are not cited or defended. The courts were presumably drawing upon their common experience and personal views of what it means to be a child.⁷⁴

There has not been a wholesale effort to change the infancy doctrine despite criticism from academics and even courts,⁷⁵ despite the advances in child development research that suggests that children, particularly older adolescents, are not the naïve infants that the common law decisions suggest. Indeed, there is widespread agreement among psychologists that children's cognitive abilities develop at a far earlier age than originally thought.⁷⁶

In *Kiefer v. Fred Howe Motors*,⁷⁷ the Wisconsin Supreme Court noted the inconsistent treatment of minors under the law. "Paradoxically, we declare the infant mature enough to shoulder arms in the military, but not mature enough to vote; mature enough to marry and be responsible for his torts and crimes, but not mature enough to assume the burden of his own contractual indiscretions."⁷⁸ Yet, despite the common law tradition of contract law, the court stated that any reform must come from the state legislature, and encouraged reform through that forum.⁷⁹

⁷³ In re O'Leary's Estate, 352 Pa. 254, 256, 42 A.2d 624 (1945).

⁷⁴ DiMatteo, *supra* note 50, at 505 (courts' assumptions are conclusory, undocumented, and do not account for the increased sophistication of modern youth).

⁷⁵ *Id.* at 506.

⁷⁶ *Supra* Part I.

⁷⁷ *Kiefer v. Fred Howe Motors, Inc.*, 39 Wis.2d 20, 158 N.W.2d 288 (1968).

⁷⁸ *Id.* at 24, 158 N.W.2d at 290.

⁷⁹ *Id.* ("We suggest that the appellant might better seek the change it proposes in the legislative halls rather than this court.").

The inconsistency between contract law and other areas, such as criminal justice and delinquency, has been well documented in academic literature and by courts.⁸⁰ Indeed, at least one expert in this area, Professor DiMateo, has cataloged the inconsistency within the infancy doctrine itself:

The fragmentation of the original concept of incapacity into a number of subdoctrines of capacity-incapacity has damaged this 'rule of law' beyond repair. This balkanization of doctrine has been further accelerated by the enactment of a myriad of statutory exceptions. In fact, one may argue that the infancy doctrine has not gone through a constructive evolutionary process, but has suffered an implosion or deconstruction. Unfortunately, the shell of the doctrine is still masqueraded as the law of the land.⁸¹

Strong arguments exist to change, or even totally abandon, the infancy doctrine/defense. Minors make a great deal of contributions to the marketplace as consumers, employees, and sellers.⁸² Some have suggested that minors

⁸⁰ See, e.g., DiMatteo, *supra* note 50, at 508 ("Doctrinally, it is difficult to explain that an infant may have the requisite state of mind or understanding to be held responsible for a crime or a tort, but not for a contract."); Porter, 209 A.2d at 731 ("A stranger must think it strange that a minor in certain cases may be liable for his torts and responsible for his crimes and yet is not bound by his contracts."); Mehler, *supra* note 62, at 361 (describing paradox).

⁸¹ DiMatteo, *supra* note 50, at 515.

⁸² Dugas, *supra* note 49, at 745 ("The sheer dollars amounts spent yearly by minors and the large number of minors in the work force suggest that young persons can and do contract daily."); DiMatteo, *supra* note 50, at 482 (discussing different role of children in society and marketplace); *Dodson*, 824 S.W.2d at 549.

The most recent census information shows young persons age 16 through 19 account for 7.2 million workers; by 2012, this number is projected to increase to 7.6 million. The participation rate of this age group in the workforce is high—44.3% for males and 44.8% for females. In 2003, this age group contributed 5.9 million hours of labor per week. See U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2004-2005 Tables B570B&B582 (2004).

are the sophisticated ones—taking advantage of innocent adults who are ignorant of the infancy doctrine and using the defense as a “sword” instead of a “shield.”⁸³ If many children (or, at least older adolescents) indeed have sufficient capacity to contract, as many believe,⁸⁴ then an overbroad infancy doctrine will be depriving legitimate consumers of access to the marketplace. After all, the doctrine is designed to discourage minors’ participation in commerce.⁸⁵ There is also some concern that the law is sending the wrong message by telling otherwise capable minors that it is morally and legally acceptable to break promises.⁸⁶

A wholesale revisiting of the interaction between children and contract law, in the context of a larger project that I propose *infra*, could very well determine that children have the cognitive ability to differentiate between good and bad decisions and, therefore, the undocumented assumptions of the early common law courts no longer hold water. Alternatively, some remnants of the infancy doctrine could survive if one places weight on psychosocial factors, such as peer pressure and impulse control, in conceptualizing the capacity of children to form contracts.

2. *Voting: The Line Moves*

Eligibility to vote based on age has always been accepted in this country. Prior to the ratification of the Twenty-Sixth Amendment, many states prohibited those who

⁸³ DiMatteo, *supra* note 50, at 485.

⁸⁴ *Id.* at 509; Hartman, *supra* note 7, at 1303 (“I agree with Professor DiMatteo that conclusive incapacity belies the reality of adolescent capability and market savvy.”); Mehler, *supra* note 62, at 373 (“The minor has long remained a special charge of the law. But in our fast-moving and rapidly changing society, the ancient timeworn cloak of protection thrown over him has long since lost its real need or useful purpose. The technologically oriented and knowledgeably mature youth of our hectic age is not at all comparable to the minor of even five or six decades ago who needed the solicitous attention and protection the law so thoughtfully afforded him.”).

⁸⁵ DiMatteo, *supra* note 50, at 504; CORBIN, *supra* note 49, § 27.2.

⁸⁶ DiMatteo, *supra* note 50, at 506; *Dodson*, 824 S.W.2d at 549-50.

were less than 21-years-old from voting.⁸⁷ A minor's lack of capacity is the basis for tying the right to vote to age. Access to the ballot box is a component of self-government. Minors are presumptively incapable of governing themselves because they lack the capacity to do so; therefore, the disenfranchisement of minors is just.⁸⁸

Recently, however, the demarcation line has moved. In 1971, the states ratified the Twenty-Sixth Amendment to the Constitution, prohibiting disenfranchisement of persons 18-years or older based on age.⁸⁹ The proposition that minors are incapable of voting remains true. What has changed, however, is the age of majority for purposes of voting.

Inconsistency in the treatment of minors was central to the debate in Congress over whether to propose the Twenty-Sixth Amendment to the states for ratification. A Senate Judiciary Committee report supported the amendment, noting that persons 18 through 21-years-old could be prosecuted in adult courts in 49 states, could create wills in 26 states, and could be drafted and die in the armed services; furthermore,

⁸⁷ SENATE COMMITTEE ON THE JUDICIARY, LOWERING THE VOTING AGE TO 18, S. REP. NO. 92-26 (1971) [hereinafter SENATE REPORT].

⁸⁸ Garvey, *supra* note 10, at 1761; Scott, *Legal Construction*, *supra* note 14, at 552 ("Because they are assumed to lack the capacity for reasoning, understanding, and mature judgment, children cannot vote.").

⁸⁹ U.S. CONST. amend. XXVI ("The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.").

Efforts to enfranchise 18 to 21-year-olds began primarily with the Voting Rights Act of 1970 which was designed to extend the protections of the Voting Rights Act of 1965 to persons aged 18 to 21, 79 Stat. 437, as extended and amended by 84 Stat. 314, 42 U.S.C. §§ 1971 et seq. Congress attempted to use its powers under section 5 of the Fourteenth Amendment to force states to lower the voting age for *state* elections. SENATE REPORT, *supra* note 87, at 8-10. That provision of the Voting Rights Act was declared unconstitutional by the Supreme Court in *Oregon v. Mitchell*, 400 U.S. 112 (1970), thus prompting Congress to propose an amendment to the Constitution. One of the concerns of Congress was that states would be forced to have two separate balloting measures, because the Supreme Court, in *Mitchell*, had also upheld Congress' lowering of the voting age for purposes of *federal* elections. SENATE REPORT, *supra* note 87, at 10-18.

three million of them were full-time employees and taxpayers, and half were married.⁹⁰ The committee concluded, “[O]ur 18-year-old citizens have earned the right to vote because they bear all or most of an adult citizen’s responsibilities.”⁹¹ The committee was troubled by past reliance on the age of 21 as the age of majority, noting that it was a “historical accident” that this age had been used.⁹²

The interplay between rights and responsibilities was not lost on the committee: “It is difficult to justify holding a person legally responsible for his or her actions in a criminal court of law when we continue to refuse to consider that same person responsible enough to take action in a polling booth.”⁹³ The anomaly of permitting 18-year-olds to be drafted, but prohibiting them from voting, was particularly troublesome for many.⁹⁴

Congress was correct to consider the question of capacity in the first place. In my view, the conclusion that 18 to 20-year-olds possessed sufficient capacity to vote was also correct. I take issue with Congress’s failure to rely on then-current research on child psychology. Instead, the Judiciary Committee based much of its recommendation on the opinions of various politicians, who opined that the generation of young people in question was the most intelligent and service-oriented in history.⁹⁵ The Committee’s report contained one reference to a researcher, an anthropologist, who had noted that minors were developing physically at an earlier rate than in previous generations.⁹⁶ Most of the report, however, contained only colorful rhetoric by politicians praising the maturity, education, and commitment of the youth in question,

⁹⁰ *Id.* at 6.

⁹¹ *Id.*

⁹² *Id.* at 5 (“There is no magic to the age of 21. The 21 year age of maturity is derived only from historical accident. In the eleventh century, 21 was the age at which most males were physically capable of carrying armor.”).

⁹³ *Id.* at 6.

⁹⁴ Teitelbaum, *supra* note 8, at 808.

⁹⁵ SENATE REPORT, *supra* note 87, at 3.

⁹⁶ *Id.* at 5.

but with little if any consideration of the psychological literature on child development.⁹⁷

3. Alcohol: Time for the Line to Move?

The purchase, possession, and consumption of alcohol⁹⁸ is also linked to age. 23 U.S.C. § 158 requires, as a condition of receipt of federal highway funds, that a state impose a drinking age of 21.⁹⁹ One of the arguments advanced by opponents to this federal law was taken from the fight to lower the voting age to 18. Opponents have claimed that it was unfair to draft an 18, 19, or 20-year-old but deem him legally incapable of consuming a beer.¹⁰⁰ Proponents have pointed to the increased risk of accidents, injury, and death when 18 through 21-year-olds are given the privilege to purchase, possess, and consume alcohol.¹⁰¹ Many state legislatures reacted to a plethora of research studies examining the increased dangers of alcohol consumption by young adults and voluntarily raised their state's drinking age.¹⁰² The studies that have been cited in favor of an increased driving age have focused on the effects of altering the driving age on car accidents and the like.¹⁰³ They have not examined the psychological capacity or incapacity for minors to either think through the consequences of their actions or to avoid making

⁹⁷ See, e.g., *id.* at 4 (quoting Deputy Attorney General Richard Kleindienst, "America's 10 million young people between the ages of 18 and 21 are better equipped today than ever in the past to be entrusted with all of the responsibilities and privileges of citizenship. Their well-informed intelligence, enthusiastic interest, and desire to participate in public affairs at all levels exemplifies the highest qualities of mature citizenship.").

⁹⁸ In some states, the possession of tobacco by minors is also prohibited. See, e.g., N.H. REV. STAT. ANN. § 126-K:6 (setting minimum age for possession at 18).

⁹⁹ This law was upheld by the Supreme Court in *South Dakota v. Dole*, 483 U.S. 203 (1987) (valid exercise of Congress' spending power).

¹⁰⁰ Michael Philip Rosenthal, *The Minimum Drinking Age for Young People: An Observation*, 92 DICK. L. REV. 649, 653 (1988) (discussing history and arguments for/against the law).

¹⁰¹ *Id.* at 657-62.

¹⁰² *Id.* at 654 (although noting that these studies were not without criticism).

¹⁰³ *Id.* at 657-62.

bad decisions. For example, one author concluded that young people “have not shown that they can be treated like adults in alcohol-related decisions and they have not shown themselves to be responsible.”¹⁰⁴ Rather, the increased risk of injury and death as a result of decreasing the drinking age has been used as a proxy for capacity.

A recent effort by a Wisconsin legislator has revitalized debate on the subject of the capacity and privilege of 18 through 21-year-olds to drink alcohol. State Representative Mark Pettis, a Republican, sponsored a bill that would lower the drinking age to 19 for soldiers, but only if the federal government agreed not to cut highway funds as a result.¹⁰⁵ The inconsistent view of young soldiers was the crux of Representative Pettis’ argument in favor of the bill. He stated, “We’re treating these young men and women as adults when they’re at war. But we treat them like teenagers when they’re here in the states.”¹⁰⁶ Mothers Against Drunk Driving opposed the proposal on the basis that the higher drinking age is necessary for the protection of young people and society at-large.¹⁰⁷ Neither side has cited the psychological research on capacity.

4. Death Penalty: From Individual Determinations to Categorical Incapacity

Persons who commit crimes while under the age of 18 are now categorically incapable of receiving the death penalty. The so-called “juvenile death penalty”¹⁰⁸ was ruled unconstitutional by the Supreme Court in 2005 in *Roper v.*

¹⁰⁴ *Id.* at 660.

¹⁰⁵ J.R. Ross, *Let Underage Soldiers Drink, Lawmaker Says: Bill Assumes Wisconsin Would Keep its Federal Highway Funds—A Long Shot at Best*, Wis. St. J., June 1, 2005, at B1.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ I disagree with the use of this term to describe the class of defendants that we are talking about as it implies that states were executing kids. Since the re-legalization of the death penalty, I am not aware of any state having executed a minor. What we are talking about is a class of adults facing execution *for crimes committed as minors*.

Simmons.¹⁰⁹ This decision, in effect, shifted the juvenile death penalty from the category of individual determinations of capacity to the category of categorical incapacity.

Prior to *Roper*, defendants could be executed for crimes committed while age 16 or above.¹¹⁰ This was, of course, not a categorical rule that required every such defendant to be executed. Discretion to impose the death penalty was vested with individual juries and judges. Capacity had to be determined on a child-by-child basis. The Supreme Court ruled in *Eddings v. Oklahoma* that it was error to prohibit a capital defendant from presenting mitigation evidence that would have showed the existence of a troubled home life.¹¹¹ This was particularly true because the defendant in *Eddings* was 16-years-old at the time of the murder. The Court reasoned:

[Y]outh must be considered a relevant mitigating factor. But youth is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence to psychological damage. Our history is replete with laws and judicial recognition that minors, especially in their earlier years, generally are less mature and responsible than adults. Particularly “*during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment*” expected of adults.¹¹²

The quotation in *Eddings* is not from a journal of child psychology or one of Piaget’s works. It is instead from the

¹⁰⁹ 543 U.S. 551 (2005).

¹¹⁰ For many of the same reasons as in *Roper*, the Supreme Court had decided, years earlier, that it was categorically unconstitutional to execute persons from crimes committed while 15 or younger. See *Thompson v. Oklahoma*, 487 U.S. 815 (1988).

¹¹¹ *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982).

¹¹² *Id.* at 115-16. (quoting *Bellotti v. Baird*, 443 U.S. 622 (1979)) (emphasis added).

Supreme Court's earlier decision in *Bellotti v. Baird*, dealing with the question of abortion rights for children.¹¹³ This is significant but troubling at the same time. On the one hand, the Court tried to adhere to a consistent view of childhood—children as infants with diminished capacity. On the other hand, the Court relied on its own notions of childhood, maturity, competence, and capacity instead of turning to research studies.

For opponents of the juvenile death penalty, *Eddings* was only a partial victory. It required juries to consider, as mitigating evidence, the age of the defendant as well as a troubled upbringing that may have contributed to his criminal act. Three subsequent cases—*Thompson v. Oklahoma*,¹¹⁴ *Stanford v. Kentucky*,¹¹⁵ and *Roper v. Simmons*¹¹⁶—dealt with the question of whether there should be a categorical exception to the death penalty for those who committed capital crimes while minors.

In 1988, the Supreme Court established a categorical rule of incapacity in *Thompson v. Oklahoma*. Thompson had murdered his brother-in-law and disposed of his body in a river.¹¹⁷ A judge ordered him to stand trial as an adult, finding him competent and that he knew and appreciated the wrongfulness of his conduct.¹¹⁸ Upon review, a plurality of the Court decided that it was cruel and unusual punishment to execute Thompson, who was 15-years-old at the time of the offense.¹¹⁹ In undertaking its Eighth Amendment¹²⁰ analysis, the Court looked to the practice of legislatures and sentencing juries.¹²¹ Oklahoma law prevented 15-year-olds from voting,

¹¹³ See *infra* Part II.B.2.

¹¹⁴ 487 U.S. 815 (1988).

¹¹⁵ 492 U.S. 361 (1989).

¹¹⁶ *Roper*, 543 U.S. at 551.

¹¹⁷ *Thompson*, 487 U.S. at 819.

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 818-20.

¹²⁰ U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

¹²¹ *Thompson*, 487 U.S. at 822 n.7.

sitting on juries, marrying without parental consent,¹²² and purchasing alcohol or cigarettes.¹²³ The Court acknowledged the federalism aspects of defining childhood,¹²⁴ but nevertheless concluded that there was near uniformity in the view that 15-year-olds are categorically different from older adolescents.¹²⁵ To support its position, the plurality drew upon its own sense of experience and belief about children stating, "All of this legislation is consistent with the experience of mankind, as well as the long history of our law, that the normal 15-year-old is not prepared to assume the full responsibilities of an adult."¹²⁶ Of the states that legislated a minimum age for the death penalty, all drew that line at age 16.¹²⁷ In looking at the sentencing practices of juries, the plurality noted that only a handful of persons had been executed for crimes committed as children.¹²⁸

The plurality stated that it valued consistency in the law of children. The following passage, while omitting any reference to research in child psychology or development, is instructive:

It is in this way that paternalism bears a beneficent face, paternalism in the sense of a caring, nurturing parent making decisions on behalf of a child who is not quite ready to take on the fully rational and considered task of shaping his or her own life. ... [The laws] reflects this basic assumption that our society

¹²² I question the Court's reliance on the prohibition against marriage without parental consent. This is not a categorical rule of incapacity. It is an individualized determination. Indeed, a person under 16 could get married, but only if a parent gives his or her permission, which would presumably be withheld if the parent believed that the marriage would not be in the child's best interests or if the child was not sufficiently mature to make the decision.

¹²³ *Thompson*, 487 U.S. at 823-24.

¹²⁴ *Id.* at 824 ("The line between childhood and adulthood is drawn in different ways by various States.").

¹²⁵ *Id.*

¹²⁶ *Id.* at 824-25.

¹²⁷ *Id.* at 829.

¹²⁸ *Id.* at 832.

makes about children as a class; we assume that they do not yet act as adults do, and thus we act in their interest by restricting certain choices that we feel they are not yet ready to make with full benefit of the costs and benefits attending such decisions. It would be ironic if these assumptions that we so readily make about children as a class—about their inherent difference from adults in their capacity as agents, as choosers, as shapers of their own lives—were suddenly unavailable in determining whether it is cruel and unusual to treat children the same as adults for purposes of inflicting capital punishment. *Thus, informing the judgment of the Court today is the virtue of consistency, for the very assumptions we make about children when we legislate on their behalf tells us that it is likely cruel, and certainly unusual, to impose on a child a punishment that takes as its predicate the existence of a fully rational, choosing agent, who may be deterred by the harshest of sanctions and toward whom society may legitimately take a retributive stance.*¹²⁹

Another passage of the plurality's opinion contains similar *ipse dixit* reasoning:

Thus, the Court has already endorsed the proposition that less culpability should attach to a crime committed by a juvenile than to a comparable crime committed by an adult. The basis for this conclusion is too obvious to require extended explanation. *Inexperience, less education, and less intelligence make the teenager less able to evaluate the consequences of his or her conduct while at the same time he or she is much more apt to be motivated by*

¹²⁹ *Id.* at 825 n.23 (emphasis added).

mere emotion or peer pressure than is an adult.
The reasons why juveniles are not entrusted with the privileges and responsibilities of an adult also explain why their irresponsible conduct is not as morally reprehensible as that of an adult.¹³⁰

The italicized portion is based on the plurality's conception of childhood which, as was shown *supra*, is at odds at least with Piaget's conclusion that by mid-adolescence a child's cognitive capacity is as developed as a young adult's.¹³¹ Although the Court did cite to the work of Dr. Lewis *et al.* from 1987¹³² as well as the work of other researchers, it did not analyze the methods and conclusions of those studies.¹³³ The Court also did not address Piaget's conclusion that mid-adolescents are nearly identical, from the standpoint of cognition, as adults. As I address in Part III, I do not believe (from a legal process standpoint) that the Supreme Court is the best institution, relatively speaking, to make these kinds of determinations or to critique the methods and conclusions of psychological studies.

The concurrence and dissent favored individual determinations of capacity, even when the defendant was 15-years-old. Justice O'Connor criticized the plurality's categorical treatment of 15-year-olds. While acknowledging that children are viewed differently under the law,¹³⁴ she wrote, "[I]t does not necessarily follow that all 15-year-olds are incapable of the moral culpability that would justify the

¹³⁰ *Thompson*, 487 U.S. at 835 (emphasis added).

¹³¹ *See supra* Part I.B.

¹³² *Thompson*, 487 U.S. at 835 n.42 (citing Lewis, Pincus, Bard, Richardson, Prichep, Feldman, & Yeager, *Neuropsychiatric, Psychoeducational, and Family Characteristics of 14 Juveniles Condemned to Death in the United States* 11 (1987)).

¹³³ *Id.* at 835 nn.42-43.

¹³⁴ *Id.* at 853-54 ("Legislatures recognize the relative immaturity of adolescents, and we have often permitted them to define age-based classes that take account of this qualitative difference between juveniles and adults.").

imposition of capital punishment.”¹³⁵ Justice O’Connor reasoned that it was better for state legislatures to decide to create a categorical exception to the death penalty for juveniles.¹³⁶ She cautioned the plurality not to “substitute our inevitably subjective judgment about the best age at which to draw a line in the capital punishment context for the judgments of the Nation’s legislatures.”¹³⁷

Justice Scalia’s dissent criticized, among other things, the plurality’s attempt to formulate a consistent jurisprudence about juvenile capacity. He preferred a view of capacity that was relative to the decision being made. He wrote:

I leave to a footnote my discussion of the plurality’s reliance upon the fact that in most or all States, juveniles under 16 cannot vote, sit on a jury, marry without parental consent, participate in organized gambling, patronize pool halls, pawn property, or purchase alcohol, pornographic materials, or cigarettes. Our cases sensibly suggest that constitutional rules relating to the maturity of minors must be drawn with an eye to the decision for which the maturity is relevant. ... It is surely constitutional for a State to believe that the degree of maturity that is necessary fully to appreciate the pros and cons of smoking cigarettes, or even of marrying, may be somewhat greater than the degree necessary

¹³⁵ *Id.* at 853.

¹³⁶ *Id.* at 854. In addition to leaving the question of whether to create a categorical exception for the juvenile death penalty to individual states, naturally it follows that Justice O’Connor would support the continued use of individual determinations of capacity on a case-by-case basis. There are two components of these determinations. First, as in *Thompson*, a judge may have to determine whether the minor should stand trial as an adult in the first place (absent a legislative waiver, *see infra* Part II.C.3). Second, the jury must determine that the particular defendant deserved the death penalty, even after consideration of his age and mitigating evidence of a troubled home life. *See Eddings*, 455 U.S. at 104.

¹³⁷ *Thompson*, 487 U.S. at 854.

fully to appreciate the pros and cons of brutally killing a human being.¹³⁸

To be clear, *Thompson* and the cases that followed (*Stanford* and *Roper*) were not debates of categorical incapacity (minors may never receive the death penalty) versus categorical capacity (minors who commit murder must always be executed). They presented instead the question of whether there should be categorical incapacity for the death penalty or, rather, individual case-by-case determinations.

A year later, *Stanford v. Kentucky*¹³⁹ presented the question of whether *Thompson*'s categorical exception for 15-year-olds should be extended to a 16-year-old convicted of murder. This time, the Court declined to rule that 16-year-olds were categorically incapable of receiving the death penalty. Instead, the Court left in place the *Eddings* case-by-case framework.¹⁴⁰ The Court reasoned that there was no national consensus—as evidenced by the actions of state legislatures and sentencing juries—against the juvenile death penalty.¹⁴¹

Justice Scalia, writing for a plurality, continued an argument he raised in *Thompson* concerning the dissent's analogies to laws of voting, drinking, and gambling as evidence of the immaturity and lack of capacity possessed by minors.¹⁴² He wrote,

It is, to begin with, absurd to think that one must be mature enough to drive carefully, to drink responsibly, or to vote intelligently, in order to be mature enough to understand that murdering another human being is profoundly

¹³⁸ *Id.* at 871 n.5.

¹³⁹ 492 U.S. 361 (1989). As with *Thompson*, the legal issue was whether the defendant's death sentence violated the Cruel and Unusual Punishment Clause of the Eighth Amendment. Justice Scalia, who penned a dissent in *Thompson*, authored the Court's opinion in *Stanford*.

¹⁴⁰ *Id.* at 374-75.

¹⁴¹ *Id.* at 370-71. A majority of states that authorized the death penalty provided an age floor of 16. *Id.* at 371.

¹⁴² *Id.* at 374.

wrong, and to conform one's conduct to that most minimal of all civilized standards.¹⁴³

While a psychologist versed in Piaget's theory of development would probably agree with Justice Scalia that the average 16-year-old *knows* that it is wrong to murder, a researcher belonging to the Steinberg-Cauffman school of thought might disagree. If one agrees that minors are more susceptible to peer influence than adults, then this may impact negatively their ability to "conform [their] conduct to that most minimal of all civilized standards."¹⁴⁴ In sum, perhaps the answer is not as clear, from a psychological standpoint, as Justice Scalia makes it out to be.

Perhaps recognizing the Supreme Court's lack of institutional competence to make policy decisions based on scientific evidence and the like, Justice Scalia and the plurality decided that the Court's role was to identify evolving standards of decency, not to set them.¹⁴⁵ It was incumbent on the defendant and his *amici* to present their psychological and other evidence to state legislatures.¹⁴⁶

The *Stanford* dissent raised many of the same arguments that were used to create a categorical exception in the juvenile death penalty for 15-year-olds in *Thompson*. The dissent pointed out the differential treatment of minors, as a class, in voting, marriage, medical treatment, driving, possession of pornography, and gambling:¹⁴⁷

In these and a host of other ways, minors are treated differently from adults in our laws, which reflects the simple truth derived from *communal experience* that juveniles as a class have not the level of maturation and responsibility that we presume in adults and

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 378.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 394-95.

consider desirable for full participation in the rights and duties of modern life.¹⁴⁸

Here, again, the justices who would create a categorical incapacity for the death penalty drew upon their own assessment of the abilities of minors to make decisions. Later, the dissent cited to previous cases dealing with minors¹⁴⁹ and amicus briefs that review the scientific literature.¹⁵⁰ However, the dissent essentially “trusted” the *amici*’s interpretation of the validity of those studies. Further, the dissent did not satisfactorily identify the *magnitude* of the difference between minors and adults. While minors and adults may be different in terms of capacity, are they so different as to warrant a categorical determination of incapacity? This decision, to me, seems best suited for legislatures because of the necessity of reviewing the methods behind the studies that are cited, something that the Supreme Court does not have the relative institutional competence to do.¹⁵¹

The dissent rejected the Court’s use of an individual determination of capacity, arguing that the jury will use the age of the defendant as only one factor of many.¹⁵² The dissent was concerned that the seriousness of the offense or the heinous nature of a particular crime may outweigh the defendant’s age.¹⁵³ This goes back to the problem of determining the magnitude of the difference between adults and minors’ capacity. All adolescents may very well be immature and cognitively inferior to adults, but the critical inquiry is *how* immature and disabled are they? An individual jury might agree that a particular adolescent is immature and/or does not possess full reasoning ability *but only to a small extent*. In such a case, the seriousness or heinousness of

¹⁴⁸ *Stanford*, 492 U.S. at 395 (emphasis added).

¹⁴⁹ *E.g.*, *Bellotti v. Baird*, 443 U.S. 622 (1979).

¹⁵⁰ *E.g.*, Brief of the American Society for Adolescent Psychiatry et al. as Amici Curiae at 4, *Stanford*, 492 U.S. at 395 (Docket No. 87-5765).

¹⁵¹ *See infra* Part III.B.

¹⁵² *Stanford*, 492 U.S. at 396-97.

¹⁵³ *Id.* at 396-97.

the criminal act might, in the jury's view, outweigh the small extent that there is a cognitive or psychosocial impairment. The question boils down to the following: How much are we willing to trust juries, as institutional decisionmakers, to decide the question of juvenile capacity on a case-by-case basis? The dissent's fear was that juries would nearly always be improperly swayed by the heinousness of the act and vote "death." But if we trust juries, if we give them jury instructions that comport with *Eddings*, and if the defense presents evidence of a cognitive impairment, undue peer influence, or the like, then the jury should get it "right." It just may be that in most cases juries do not believe the argument that, as Justice Scalia wrote, the defendant could not "conform [his] conduct to that most minimal of all civilized standards."¹⁵⁴

The final chapter in the law of the juvenile death penalty was written in 2005 with the Supreme Court's decision in *Roper v. Simmons* declaring the juvenile death penalty unconstitutional altogether.¹⁵⁵ This, in effect, moved the *Thompson* line from 15/16 to 17/18 and overruled *Stanford*. The central basis for the Court's decision was its conclusion that, since *Stanford*, a national consensus developed that the juvenile death penalty was altogether "cruel and unusual punishment."¹⁵⁶ *Roper* involved familiar debates about whether the juvenile death penalty was inconsistent with other areas of juvenile law, whether the Court should apply its own judgment of what is "cruel and unusual punishment," how much deference is owed to the states, whether to look to international law and the opinions of professional organizations, as well as Justice Scalia's argument that it takes only minimal capacity to know that it is wrong to kill people and to stop oneself from doing so.

In *Roper*, we see continued resort to the Court's own view of the nature of childhood with only citation to, but no

¹⁵⁴ *Id.* at 374.

¹⁵⁵ 543 U.S. 551 (2005).

¹⁵⁶ *Id.*

critical analysis of, compilations of scientific studies by professional organizations. For example, the majority writes,

[A]s any parent knows and as the scientific and sociological studies respondent and his *amici* cite tend to confirm, “[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions.”¹⁵⁷

Justice Scalia once again dissented from the creation of a categorical finding of incapacity with respect to the juvenile death penalty. His opinion highlighted one of the problems associated with the majority’s citation (without analysis) of various scientific studies, authors, and *amici*: the Supreme Court is not equipped to conduct a valid and critical analysis of scientific method and conclusions. Writing of the majority, Justice Scalia wrote, “It never explains why those particular studies are methodologically sound; none was ever entered into evidence or tested in an adversarial proceeding.”¹⁵⁸ He also pointed to the *amicus* brief of the American Psychological Association as an example of how professional organizations can themselves be inconsistent in their use of scientific studies:

We need not look far to find studies contradicting the Court’s conclusions. As petitioner points out, the American Psychological Association (APA), which claims in this case that scientific evidence shows persons under 18 lack the ability to take moral responsibility for their decisions, has previously taken precisely the opposite position before this very Court. In its brief in *Hodgson v. Minnesota* ... the APA found a “rich body of research” showing that juveniles are mature

¹⁵⁷ *Id.* at 569 (quoting *Johnson v. Texas*, 509 U.S. 350 (1993)).

¹⁵⁸ *Id.* at 617.

enough to decide whether to obtain an abortion without parental involvement. ... The APA brief, citing psychology treatises and studies too numerous to list here, asserted: “[B]y middle adolescence (age 14-15) young people develop abilities similar to adults in reasoning about moral dilemmas, understanding social rules and laws, [and] reasoning about interpersonal relationships and interpersonal problems.” ... Given the nuances of scientific methodology and conflicting views, courts—which can only consider the limited evidence on the record before them—are ill equipped to determine which view of science is the right one. Legislatures “are better qualified to weigh and ‘evaluate the results of statistical studies in terms of their own local conditions and with a flexibility of approach that is not available to the courts.’”¹⁵⁹

The story of the Supreme Court’s jurisprudence on the juvenile death penalty yields five conclusions about the process by which these decisions were reached: (1) the Court acknowledged the inconsistent treatment of juvenile’s capacity, (2) the majorities, concurrences, and dissents each tried to reconcile the inconsistencies in some fashion, (3) some of the Justices cited to some of the psychological literature on child development, (4) but no Justice critically examined the methods and conclusions of said literature, and (5) many of the Justices relied on their own notions of child development to support their conclusions one way or another about whether the juvenile death penalty should be categorically abolished or left to the discretion of individual judges and sentencing juries.

I find it interesting, as well, that those Justices who supported a categorical determination of incapacity did not give major discussion in their opinions to the common law

¹⁵⁹ *Id.* at 617-618 (citations omitted).

court decisions in the areas of contract law, property, and torts. As demonstrated in this article, many of these decisions contain rich and vivid descriptions of juveniles as “infants” who are unable to handle their own affairs. To the extent that the Court tried to reconcile the inconsistent view of capacity under law, they were doing so with respect to their own jurisprudence only. The citations were to cases such as *Bellotti v. Baird*,¹⁶⁰ *Ginsberg v. New York*,¹⁶¹ *New Jersey v. TLO*,¹⁶² *Schall v. Martin*,¹⁶³ and *Parham v. J.R.*¹⁶⁴ Concepts of contract law, property, and torts were only mentioned in passing, if at all.¹⁶⁵

5. Delinquency: Unsupported Assumptions and Hodgepodge Evolution

Prior to the establishment of the juvenile court around the turn of the twentieth century, the common law of childhood criminal responsibility operated on a spectrum whereby the youngest offenders were categorically not criminally responsible, the oldest offenders categorically answered for their crimes in adult court, and the middleground of offenders were judged on a case-by-case basis.¹⁶⁶ The common law drew these lines at ages 7 and 14.¹⁶⁷ A child less than 7-years-old could not be punished for a violation of a criminal law.¹⁶⁸ At the other end of the spectrum, any child older than 14-years-old was treated as an adult.¹⁶⁹ In the middle of the spectrum, the ages of 7 and 14, a rebuttable presumption of incapacity existed.¹⁷⁰ As one court held:

¹⁶⁰ 443 U.S. 622 (1979) (abortion rights).

¹⁶¹ 390 U.S. 629 (1968) (minors' access to pornography).

¹⁶² 469 U.S. 325 (1985) (Fourth Amendment in schools).

¹⁶³ 467 U.S. 253 (1984) (pretrial detention of delinquents).

¹⁶⁴ 442 U.S. 584 (1979) (mental health commitments).

¹⁶⁵ See, e.g., *Thompson*, 487 U.S. at 823.

¹⁶⁶ Kim Taylor-Thompson, *State of Mind/States of Development*, 14 STAN. L. & POL'Y REV. 143, 145 (2003).

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

[B]etween the age of seven and the age of fourteen years, the infant shall be presumed to be incapable of committing crime upon the same principle, the presumption being very strong at seven, and decreasing with the progress of his years; but then this presumption, in this case, may be encountered by proof; and if it shall appear by *strong* and *irresistible* evidence that he had sufficient discernment to distinguish good from evil, to comprehend the nature and consequences of his acts, he may be convicted and have judgment of death.¹⁷¹

The individualized determinations that occurred between ages 7 and 14 were designed to test the moral culpability of each individual defendant:

If the intelligence to apprehend the consequences of acts; to reason upon duty; to distinguish between right and wrong; if the consciousness of guilt and innocence be clearly manifested, then this capacity is shown; in the language of the books, the accused is *capax doli*, and, as a rational and moral agent, must abide the results of his own conduct.¹⁷²

This framework for minors' criminal liability was abandoned in many states after the first juvenile court was established in Illinois in 1899.¹⁷³ The so-called "Child Savers Movement" pushed for the establishment of separate courts for minors who committed crimes to provide rehabilitation,

¹⁷¹ State v. Aaron, 1818 WL 1527, *6 (N.J. 1818) (emphasis in the original).

¹⁷² Aaron, 1818 WL at *11.

¹⁷³ See C. Antoinette Clark, *The Baby and the Bathwater: Adolescent Offending and Punitive Juvenile Justice Reform*, 53 U. KAN. L. REV. 659, 666-67 (2005) (describing creation of first juvenile court as a product of the work of progressive reformers).

not punishment.¹⁷⁴ In doing so, they had a consistent vision of children and their capacity to abide by the requirements of the law.¹⁷⁵ Children—also known as “infants”—were viewed as psychologically troubled, malleable victims who needed the guiding hand and protection of the state.¹⁷⁶

Judge Julian Mack’s 1909 *Harvard Law Review* article on the subject of the new juvenile courts¹⁷⁷ typifies this view of children:

[T]he child who has begun to go wrong, who is incorrigible, who has broken a law or an ordinance, is to be taken in hand by the state, not as an enemy but as a protector, as the ultimate guardian, because either the unwillingness or inability of the natural parents to guide it toward good citizenship has compelled the intervention of public authorities.¹⁷⁸

The purpose of the juvenile court is:

[T]o get away from the notion that the child is to be dealt with as a criminal; to save it from the brand of criminality, the brand that sticks to it for life; to take it in hand and instead of first stigmatizing and then reforming it, to protect it from the stigma.¹⁷⁹

Judge Mack’s description of the role of the juvenile court judge is apt because it demonstrates the victim-status that was afforded delinquents: “Seated at a desk, with the child at his

¹⁷⁴ Francine T. Sherman, *Thoughts on a Contextual View of Juvenile Justice Reform Drawn from Narratives of Youth*, 68 *TEMPLE L. REV.* 1837, 1839 (1995); Melton, *Gault*, *supra* note 23, at 151; Scott, *Legal Construction*, *supra* note 14, at 553.

¹⁷⁵ Sherman, *supra* note 174, at 1839.

¹⁷⁶ Scott & Grisso, *supra* note 33, at 138; Melton, *Gault supra*, note 23, at 151.

¹⁷⁷ Julian W. Mack, *The Juvenile Court*, 23 *HARV. L. REV.* 104 (1909).

¹⁷⁸ *Id.* at 107.

¹⁷⁹ *Id.* at 109.

side, where he can on occasion put his arm around his shoulder and draw the lad to him, the judge, while losing none of his judicial dignity, will gain immensely in the effectiveness of his work.”¹⁸⁰

Disposition of juvenile delinquency cases required, more often than not, merely the oversight and assistance of a probation officer in the community. The probation officer’s task was to aid parents, most of whom were, in Judge Mack’s view, poor, illiterate foreigners “without an understanding of American methods and views.”¹⁸¹

Whatever may be said of the validity of these sentiments, they were (at least) consistent with the state of the law of children at the time. The law of contracts, recall, viewed even 20-year-olds as “infants” that were categorically incapable of managing their own affairs.¹⁸² The *parens patriae* revolution in juvenile justice was consistent with the paternalism shown with contract law, medical decisionmaking, compulsory school attendance, and limitations on work.¹⁸³

In the late 1980s and early 1990s, a counterrevolution began to develop.¹⁸⁴ This law-and-order view argued for greater punishment and accountability in juvenile justice on the basis that child-offenders were willful, malicious, and adult-like.¹⁸⁵ As Professor Scott has noted, there were “strikingly different images of young offenders” between the Child Savers and the reformers of the 1990s.¹⁸⁶ In some states, the reforms of the 1990s created a shift from the rehabilitation of the child to the protection of the community.¹⁸⁷ In these states, however, there now exists a

¹⁸⁰ *Id.* at 120.

¹⁸¹ *Id.* at 116-17.

¹⁸² *See supra* Part II.A.1.

¹⁸³ Beschle, *supra* note 48, at 88-90.

¹⁸⁴ Sherman, *supra* note 174, at 1837.

¹⁸⁵ Scott, *Legal Construction*, *supra* note 14, at 579.

¹⁸⁶ *Id.* at 579.

¹⁸⁷ Scott & Grisso, *supra* note 33, at 139. Consistent with this new belief, some states altered the “purpose clauses” of their juvenile justice codes to

disharmony between juvenile justice and other areas of the law, such as contracts. Children are old enough to be criminally liable (albeit pursuant to a sentence of a juvenile court), but not old enough to make a simple contract. For those advocates of the traditional philosophy of the juvenile court, a new problem developed in the 1980s and 1990s. During this time, children's rights advocates were arguing for adolescents to have autonomy in making health care decisions, including whether to have abortions.¹⁸⁸ "Indeed, the very same evidence that had been used to advocate for young people's autonomy in medical decision-making could provide—and has provided—fuel for recent calls to treat juvenile delinquents as adults within our legal and penal systems."¹⁸⁹

The 1980s and 1990s also saw increased use of judicial, prosecutorial, or automatic "transfer" or "waiver" to have more children tried and punished in adult courts for their crimes.¹⁹⁰ Apart from legislative waiver, this shift created a subcategory of juvenile justice where capacity is measured (in theory) on an individual, case-by-case basis, by either a judge or prosecutor. The theory behind transfer is that the most serious offenders and those who have "outgrown" the delinquency system should be punished and held fully accountable in the adult system.¹⁹¹ Judicial and prosecutorial transfer require someone—either a judge or prosecutor, respectively—to assess the facts and background of an individual child's case to determine if he or she should be tried and punished as an adult.¹⁹² The only exception to this individualized inquiry is legislative waiver, in which any

require considerations of public safety and accountability, not just rehabilitation. See Brink, *supra* note 17, at 1562.

¹⁸⁸ Elizabeth Cauffman et al., *Justice for Juveniles: New Perspectives on Adolescents' Competence and Culpability*, 18 QUINNIPIAC L. REV. 403, 407 (1999).

¹⁸⁹ *Id.* at 408-9.

¹⁹⁰ Scott & Grisso, *supra* note 33, at 139.

¹⁹¹ Clark, *supra* note 173, at 711 n.279 (those who advocate holding serious offenders accountable in adult court conceptualize such children as adults because of their behavior).

¹⁹² See *infra* Part II.B.7.

juvenile who is accused of a particular crime, such as murder, is automatically prosecuted as an adult.¹⁹³

The Child Savers and the reformers of the 1990s both adhered to a binary classification of young people as either children or adults.¹⁹⁴ The Child Savers' conception of childhood was erroneous because they viewed all children as victims of circumstances and ignored the social and personal harm that some of them intentionally caused. On the other hand, the reformers in the 1990s viewed adolescents as no different from adults.¹⁹⁵ Neither of these views is probably supported by our current understanding of child psychology.¹⁹⁶ Adolescents indeed have more cognitive ability than was once thought.¹⁹⁷ On the other hand, they may be more susceptible to psychosocial factors such as peer influence and lack of impulse control.¹⁹⁸ "The psychological

¹⁹³ See *infra* Part II.C.3.

¹⁹⁴ Scott, *Legal Construction*, *supra* note 14, at 587-89.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ Professor Melton has called the theories that led to the establishment of the juvenile courts "bankrupt" and "without foundation." Melton, *Gault*, *supra* note 23, at 166; see also Janet E. Ainsworth, *Re-Imagining Childhood and Reconstructing the Legal Order: The Case for Abolishing the Juvenile Court*, 69 N.C. L. REV. 1083, 1101 (1991) ("From our vantage point in the late twentieth century, the Progressives' use of the word 'child' to describe the adolescent youth accused of violating the law seems incongruous if not willfully perverse."). "[A] large body of recent psycholegal scholarship that indicates juveniles, especially adolescents, commonly are more competent decisionmakers than the law historically has presumed." Melton, *Gault supra*, note 23, at 153.

¹⁹⁸ Cauffman, *supra* note 188, at 409-10 ("One line of reasoning that has been proposed to reconcile adolescent risk-taking with their mature cognitive capacities is derived from behavioral decision theory. According to this view, adolescents and adults employ the same logical processes when making decisions, but differ in the sorts of information they use and the priorities they hold; adolescents may make bad decisions, but they do not make decisions badly, or, at least, any differently than would an adult with the same priorities. According to this view, for example, adolescents engage in unprotected sex more often than adults not because adolescents suffer from a "personal fable" that permits them to deny the possibility of pregnancy, or because they are misinformed about the risks of the activity, but because in the calculus of a sixteen-year-old, the potential benefits of unprotected sex (spontaneity, physical pleasure, etc.) simply outweigh in

research evidence suggests that developmental factors characteristic of adolescence contribute to immature judgment in ways that seem likely to affect criminal choices.”¹⁹⁹ Accordingly, Professor Scott and others have argued for the creation of a third category of adolescence that reflects the modern view that this group has greater cognitive abilities than children, but less self-control than adults.²⁰⁰

6. Medical Treatment: Cracks in Foundational Concepts

Minors are categorically incapable of giving informed consent for most medical procedures.²⁰¹ The flip-side of this doctrine is that the power to decide when a child will have a medical procedure vests with the child’s lawful guardian, usually a parent.²⁰² The rationales for these rules flow from the common law view of children as incomplete persons who lack the maturity to engage in reasoned decisionmaking. The law strives to protect children from making bad decisions that could adversely impact their health.²⁰³

value the potential costs (pregnancy, infection, etc.). Within this model, age differences in decision-making stem from differences in decision calculus, or performance on the decision task, not the capacities for decision-making itself.”).

¹⁹⁹ Scott, *Legal Construction*, *supra* note 14, at 591.

²⁰⁰ Ainsworth, *supra* note 197, at 1118.

²⁰¹ Hartman, *supra* note 7, at 1306-7; Scott, *Legal Construction*, *supra* note 14, at 566; Scott, *Judgment*, *supra* note 31, at 1617. This principle applies, as well, to the area of advanced directives. Minors are incapable of executing such directives because they are deemed to lack the capacity to do so. Hartman, *supra* note 7, at 1322-23.

²⁰² Scott, *Legal Construction*, *supra* note 14, at 566; Hartman, *supra* note 7, at 1306-7. I have been told that, as a practical matter, few physicians would strap a child to a gurney and physically perform a procedure on a child-patient who refuses to consent to a non-emergency course of treatment.

In contrast to other incompetents, the test is not one of surrogate decisionmaking (i.e., what would the patient decide if competent?) but instead best-interests decisionmaking (i.e., what is the best course of treatment for the health and welfare of the child?). Hartman, *supra* note 7, at 1307.

²⁰³ Scott, *Judgment*, *supra* note 31, at 1618 & 1625.

Modern research on child development has challenged some of these assumptions. For example, a 1983 study by Charles Lewis examined elementary students' responses to questions when they came to a school nurse for minor medical treatment. He found that "almost all displayed ability to participate" in treatment decisions.²⁰⁴ In another study, children ages 6 to 9 were asked to consent to a trial of swine influenza vaccine.²⁰⁵ Lewis documented the students' responses after they were given a brief overview of the vaccine project. He found that the children displayed significant insight into the process, based in part on the questions they asked. For example, they inquired of the side effects of the vaccine, why they were picked for the trial, risks of getting the flu, and whether the presenters had taken the shot.²⁰⁶

The Supreme Court's decision in *Parham v. J.R.* is indicative of the views of many courts as to the medical decisionmaking rights of children. *Parham* involved a class action challenge to a Georgia law permitting the "voluntary" commitment of a child, by his or her parents, to a state mental hospital if a physician agreed with the admission.²⁰⁷ The Court, per an opinion by Chief Justice Burger, held that the statute was constitutional.²⁰⁸ Without a citation to empirical research on cognitive ability,²⁰⁹ Chief Justice Burger held: "Most children, even in adolescence, simply are not able to make sound judgments concerning many decisions, including their need for medical care or treatment."²¹⁰ He further opined that only a small minority of parents will not act in a child's

²⁰⁴ Charles E. Lewis, *Decision Making Related to Health*, in CHILDREN'S COMPETENCE TO CONSENT 75, 79 (Gerald P. Koocher, Gary B. Melton, & Michael J. Saks eds., 1983).

²⁰⁵ If the children consented, permission forms were sent home to parents.

²⁰⁶ Lewis, *supra* note 204, at 81.

²⁰⁷ *Parham v. J.R.*, 442 U.S. 584, 586 (1979).

²⁰⁸ *Id.* at 606-7.

²⁰⁹ Hartman, *supra* note 7, at 1333-34 ("Ultimately, the Supreme Court should revisit the issue of adolescent mental health treatment and commitment with an enlightened analysis that is receptive to and reliant upon factual evidence.").

²¹⁰ *Parham*, 442 U.S. at 603.

best interest when deciding whether to “voluntarily” admit the child to a state mental hospital.²¹¹ Burger’s opinion has been criticized for making unsupported assumptions about children, their decisionmaking abilities, and the good-natured intentions of their parents.²¹² Gary Melton wrote, “Chief Justice Burger appears to be much more comfortable in making inferences from the ‘pages of human experience’ than from systematic empirical research.”²¹³ This is perhaps best explained by the fact that many judges do not like to try to delve into scientific studies that have not been tested through the adversary process.²¹⁴ Melton suggests that judges should be educated informally about the current state of research on child development.²¹⁵

However, this seemingly straight-forward rule has shown signs of cracking in recent years. In certain areas of medical decisionmaking, minors’ capacity is now viewed either on an individual basis or they are categorically capable of consenting. The mature minor doctrine, abortion rights cases, and statutes waiving parental consent for treatment of certain diseases have all created large exceptions to the rule that a minor generally cannot consent to medical treatment.²¹⁶ This approach to medical decisionmaking by children has been criticized as inconsistent and haphazard.²¹⁷

²¹¹ *Id.* at 602-3. Relying on Blackstone and citations to other historical authorities, Burger wrote, “The law’s concept of the family rests on the presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life’s difficult decisions.”

²¹² Hartman, *supra* note 7, at 1333-34.

²¹³ Melton, *Consent*, *supra* note 48, at 12.

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *See infra* Parts II.B.1, II.B.2, & II.C.1.

²¹⁷ Walter J. Wadlington, *Consent to Medical Care for Minors: The Legal Framework*, in CHILDREN’S COMPETENCE TO CONSENT 57, 57 (Gerald P. Koocher, Gary B. Melton, & Michael J. Saks eds., 1983) (“As a result of this somewhat haphazard process, the rules regarding majority today are a melange of legal anachronism and contemporary expediency which reflect only minimally our current understanding about the intellectual and emotional capacities and interests of young persons.”).

7. Wills: An Attempted Evolution

Testamentary capacity is based, in part, on the age of testator. A minor is deemed not to have the capacity to make a valid will or to otherwise make a testamentary designation.²¹⁸ With respect to age, the law has always used a categorical, rather than individual, approach to capacity. Current law draws the line at age 18.²¹⁹ Previously, different ages had been used. In 1859, Texas had a statute stating that a person under 21 was "incapable of making a will."²²⁰ At common law, the rule appeared to be that a child 14-or-above had the capacity to make a will disposing of personal property, but had to wait until age 21 to dispose of real property.²²¹ Some authorities suggest that the age for the disposition of personal property varied based on gender: females could execute wills at age 12, while males had to wait until age 14.²²²

In comparison to the law of contract, courts addressing the testamentary capacity of minors made an effort to reconcile their decisions with other rights and responsibilities of children to develop a consistent jurisprudence. Minors did not have the capacity to dispose of property by deed, and so it was thought that they should not be able to dispose of real property by will until reaching the age of majority (which, at the time, was 21).²²³ Other courts expressed the desire to be

²¹⁸ *Deane v. Littlefield*, 18 Mass. 239 (1829) (will); *Burst v. Weisenborn*, 1 Pa. Super. 276 (1896) (testamentary designation through relief association fund). Like the law of contract, this rule is based on a perceived notion that children do not have "sufficient maturity to act with discretion." *Williams v. Baker*, 4 N.C. 401 (1816).

²¹⁹ UNIFORM PROBATE CODE § 2-501 (1969) (capacity requires that the testator be above the age of 18 and of sound mind).

²²⁰ *Moore v. Moore*, 23 Tex. 637 (1859).

²²¹ *Deane*, 18 Mass. at 250 ("That an infant of fourteen years and upwards, is capable of disposing of his personal estate by will seems to be a well settled doctrine at common law.").

²²² See, e.g., *Campbell v. Browder*, 75 Tenn. 240 (1881); *Major v. Hunt*, 41 S.E. 816 (S.C. 1902).

²²³ *Williams*, 4 N.C. at 401 ("We cannot subscribe to the doctrine that a person may have a legal capacity to dispose of property by will, and yet be under a legal incapacity to dispose of the same property by deed.").

consistent with the then-existing criminal law, which provided that minors who are 14 could be punished and so they desired 14 as the age of testamentary capacity.²²⁴

The present-day rule of capacity at age 18 to make a will should perhaps be revisited. Adolescents' cognitive abilities are almost fully developed.²²⁵ Concerns about undue influence due to psychosocial factors could be addressed in two ways. First, the existing law of undue influence for all wills could apply on a case-by-case basis to juveniles. Second, it could be argued that creating a will is not the type of decision that is likely to result from impulse or peer pressure—the type of concerns that conversely may be present in decisions relating to delinquency.

8. *Parens Patriae and the Duty of Care: Presumptive Incapability*

Children are presumptively incapable of taking care of themselves. Until a child reaches the age of majority, he or she is owed a duty of care by his or her parents or other legal guardian.²²⁶ If a parent fails to carry out this duty, the state—under its *parens patriae* authority—steps in to take care of the child.²²⁷ A parent who neglects a child can be criminally prosecuted²²⁸ and/or have his or her parental rights

²²⁴ *Deane*, 18 Mass. at 250 ("That an infant of fourteen years and upwards, is capable of disposing of his personal estate by will seems to be a well settled doctrine at common law. Being then of legal discretion so as to be liable to punishment for crimes, and according to our statute having a right to choose his own guardian over his person and property, he is also of discretion in point of law to dispose of his personal estate by will.").

²²⁵ See *supra* Part I.B.

²²⁶ *Cariseo v. Cariseo*, 459 A.2d 523, 524 (Conn. 1983); see, e.g., TEX. FAMILY CODE § 151.001(a)(2) (a parent has "the duty of care, control, protection, and reasonable discipline of the child").

²²⁷ *Cuncannan*, *supra* note 48, at 291 ("The doctrine of parents patriae operates on the presumption that minors are not legally competent and therefore, in the absence of parental guidance, must be protected and guided by the state.").

²²⁸ See, e.g., CAL. PENAL CODE § 270 (criminal neglect).

terminated.²²⁹ Sometimes the state aids parents in carrying out their duties. For example, compulsory school attendance and curfew laws are designed to ensure that all children—categorically—are provided with sufficient education²³⁰ and do not cause harm to themselves or others at night.²³¹

The duty of care is categorical in nature. There is an explicit line between majority and minority. Apart from the limited exception for emancipated children (discussed *infra*), courts will not look to see if a neglected child was able to take care of himself. Nor will a court look to see if a young adult who is above the age of majority is too immature or otherwise incapable of taking care of himself.²³² Courts have adhered to a rigid binary rule: either a person is a child (and unable to take care of himself) or an adult (and is able to take care of himself).

*Wisconsin v. Yoder*²³³ is a striking example of the complexities involved with the parents' duty to provide support and the interrelationship between the state, the parents, and the child. In *Yoder*, the Supreme Court held that the First Amendment prohibited Wisconsin from convicting Amish parents for failing to keep their children in public school until age 16.²³⁴ The Court was satisfied that the Amish were acting reasonably. They sent their children to public schools until the 8th grade, and, thereafter, provided them with

²²⁹ See, e.g., TEX. FAMILY CODE § 161.001 (parental rights can be terminated for abuse or neglect).

²³⁰ *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972) ("There is no doubt as to the power of a State, having a high responsibility for education of its citizens, to impose reasonable regulations for the control and duration of basic education.").

²³¹ Scott, *Legal Construction*, *supra* note 14, at 553 (curfew laws are designed to protect children).

²³² This question has arisen in the context of whether noncustodial parents have a duty to support a young adult who goes away to college. See, e.g., *Cariseo*, 459 A.2d. at 142-43 (noncustodial parent had no duty to pay child support for 18-year-old who chose to live at home with custodial parent while attending college); *but see*, e.g., *Jones v. Jones*, 257 S.E.2d 537 (Ga. 1979) (noncustodial father could voluntarily agree to support children until 22, but court had no authority to modify the amount he had agreed to).

²³³ *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

²³⁴ *Id.*

at-home training and apprenticeships that were commensurate with the skills they would need in their agrarian society.²³⁵ In the context of this article, it is interesting to note that the majority refused to consider whether the parents' wishes were at odds with their children's. Justice Douglas, in a dissenting opinion, wrote that it would be a violation of an Amish child's rights not to at least get the child's input and thoughts, provided "the child is mature enough to express potentially conflicting desires."²³⁶ This individualized inquiry would require judges to, first, determine if the child possessed sufficient maturity to express an opinion, second, to determine what that opinion was, and, third, to give appropriate weight to that opinion. Justice Douglas would have abandoned the binary conception of personhood (a person is either a child or adult) and create a tertiary system where persons would be categorized as adults, children with sufficient maturity to provide input, and a catch-all category of all other children. To support his position, Douglas cited research on child development.²³⁷ Professor Melton has noted that this is relatively unique in Supreme Court jurisprudence.²³⁸

B. Individual Determinations of Capacity

The previous section showed how the law, in most areas, deems a person under the age of majority (usually 18) to be categorically incapable. The law of children has gradually evolved to include a number of exceptions to this general rule. These exceptions have developed for various policy reasons and by different institutional decisionmakers. The exceptions that are outlined in this section are individual in nature. That is, before a minor is deemed to be capable of either exercising a right or privilege, or to be held responsible for an action, an

²³⁵ *Id.* at 211-212.

²³⁶ *Id.* at 242.

²³⁷ *Id.* at 246 n.3.

²³⁸ Melton, *Consent*, *supra* note 48, at 3 ("Yoder is particularly noteworthy in the present context because it is the only case [by 1983] in which a Supreme Court opinion—albeit in a lone dissent by Justice Douglas—included a citation of developmental research to support an assertion about children's capacities.").

adult, such as a judge or parent, must determine that the particular minor is sufficiently capable. I have already touched on a few of these in the previous part: transfer/waiver, the pre-*Roper* rule of capital punishment for 16 and 17-year-olds, certain sports and acting-related employment contracts, and abortion.

1. *Mature Minor Doctrine: An Exception to Medical Decisionmaking*

We saw in the last part that minors are categorically incapable of either giving consent for medical treatment or refusing medical treatment deemed appropriate for them by their parents or other legal guardians.²³⁹ Some states provide an exception to this rule through “mature minor” statutes. These statutes permit “mature” adolescents to consent to medical procedures.²⁴⁰ Many of these statutes do not define what it means to be “mature,”²⁴¹ leaving this decision to individual judges and physicians.²⁴² Some states apply the “mature minor” doctrine when the minor is near the age of majority and demonstrates the ability to comprehend the nature and potential impact of the treatment.²⁴³

The mature minor doctrine essentially carves out a new category of adolescents who, on a case-by-case basis, may have the capacity to give consent for medical treatment. This view is supported by our current understanding of child psychology and development. Several studies have examined adolescents’ choices in health care. Professor Hartman summarized the finding of these studies by stating that adolescents are “rather thorough and thoughtful about their choices.”²⁴⁴ One study by Lois Weithorn and Susan Campbell found that 14-year-olds make health-related decisions in the same way as young adults.²⁴⁵ This finding is consistent with

²³⁹ See *supra* Part II.A.6.

²⁴⁰ Hartman, *supra* note 7, at 1310.

²⁴¹ *Id.* at 1311.

²⁴² *Id.* at 1315-17; Mlyniec, *supra* note 23, at 1892-94.

²⁴³ Wadlington, *supra* note 217, at 60-61.

²⁴⁴ Hartman, *supra* note 7, at 1318.

²⁴⁵ *Id.* at 1320.

Piaget's conclusion that minors' cognitive abilities are in place by age 15 or so.²⁴⁶ While *no* 8 or 9-year-old would be capable of giving consent, the mature minor doctrine recognizes that *some* 14 or 15-year-olds might be able to do so.²⁴⁷

I pause to note that there is an entire category of medical decisionmaking in which all minors are deemed categorically *capable* of giving consent. As I will demonstrate in Part II.C.1, *infra*, these narrow exceptions exist to promote public health. We see, then, that children's ability to make health care decisions is a hodgepodge of categorical rules and individual determinations, based on the type of decision being contemplated.

2. Abortion: Individual Determinations Through Judicial Bypasses

Like the death penalty decisions, the Supreme Court's decisions relating to the rights of minors to obtain abortions contain a rich discussion about the role of children and their capacity to make important decisions. Yet, also like the death penalty cases, the abortion rights cases involve generalized discussions of capacity that are based on the justices' personal views of the abilities of children. The Court's reliance on psychological studies is sparse and untested.

Two cases—*Planned Parenthood v. Danforth*²⁴⁸ and *Bellotti v. Baird*²⁴⁹—stand for the proposition that a minor's right to an abortion cannot be subject to a "veto" by a parent.

²⁴⁶ See *infra* Part I.B.

²⁴⁷ On the other hand, at least one study has found that elementary students were rather insightful about the decision whether to consent to a vaccine trial. See Lewis, *supra* note 204. Our understanding of the thinking process of young children may be enhanced if we account for their diminished abilities to verbally express their thought process.

²⁴⁸ 428 U.S. 52 (1976).

²⁴⁹ 443 U.S. 622 (1979). The cited opinion was the second time the same case was decided by the Supreme Court. In *Bellotti I*, 428 U.S. 132 (1976), the Court held that the district court committed error in not certifying questions of Massachusetts law to that state's Supreme Judicial Court.

Planned Parenthood v. Danforth,²⁵⁰ involved a challenge to a Missouri law that required “the written consent of one parent or person in loco parentis of the woman if the woman is unmarried and under the age of eighteen years, unless the abortion is certified by a licensed physician as necessary to preserve the life of the mother.”²⁵¹ The Supreme Court found that this statute was unconstitutional because it gave third-parties—namely, the juvenile’s parents—a veto power over the abortion decision.²⁵² The Court’s rationale for this rule of law flowed directly from its pronouncements in *Roe* that the abortion decision is a fundamental right.²⁵³

Bellotti involved a class action challenge to Massachusetts’ abortion law which prohibited an unmarried minor from obtaining an abortion without the consent of both parents.²⁵⁴ If the parents refused to give consent, the minor could seek permission from a judge who may give his consent “for good cause shown.”²⁵⁵ Two plurality opinions emerged from the Supreme Court. Justice Powell held that the Massachusetts statute violated minors’ constitutional right to an abortion in two respects. First, it permitted a judge to withhold consent from an otherwise mature and competent minor.²⁵⁶ Second, it did not provide an opportunity for a minor to seek a judicial hearing without first attempting to obtain the consent of her parents.²⁵⁷ Justice Stevens held that the statute was unconstitutional because it gave a third-party

²⁵⁰ 428 U.S. 52 (1976).

²⁵¹ *Id.* at 58.

²⁵² *Id.* at 72-76. The Court stated, “[T]he State does not have the constitutional authority to give a third party an absolute, and possibly arbitrary, veto over the decision of the physician and his patient to terminate the patient’s pregnancy, regardless of the reason for withholding the consent.” *Id.* at 74.

²⁵³ William H. Danne, Jr., Annotation, *Validity, Construction, and Application of Statutes Requiring Parental Notification of or Consent to Minor’s Abortion*, 77 A.L.R. 5TH 1 § 6 (2000).

²⁵⁴ 443 U.S. at 625.

²⁵⁵ *Id.* The Massachusetts Supreme Judicial Court, in answering one of the district court’s certified questions of law, held that the judge must rule based on the minor’s “best interests.” *Id.* at 630.

²⁵⁶ *Id.* at 651.

²⁵⁷ *Id.* at 651.

veto in every instance to either a parent or a judge.²⁵⁸ Justice Stevens and his plurality criticized the Powell plurality for giving an “advisory opinion” as to how Massachusetts, or any other state, could structure a parental consent requirement.²⁵⁹ Justice White dissented on the ground that the statute’s judicial bypass provision was constitutional as written.

Justice Powell’s opinion has, over time, become the law of the land with respect to minor’s access to abortions.²⁶⁰ In sum, a state may not condition a minor’s access to an abortion on the receipt of parental consent. It must also provide a “bypass” procedure in which a neutral and detached party²⁶¹ must give its consent to the abortion if it finds either that: (1) the minor is sufficiently mature and informed to make the decision on her own; or (2) the abortion would be in her best interests.²⁶²

In essence, Justice Powell’s plurality opinion held that a minor’s right to seek an abortion is not absolute.²⁶³ His

²⁵⁸ *Id.* at 654.

²⁵⁹ *Id.* at 656 n.4.

²⁶⁰ Danne, *supra* note 253, § 8 (“both federal and state courts have uniformly recognized, at least implicitly, that state legislation requiring parental consent for a minor’s abortion can meet federal constitutional standards only if it provides an alternative procedure, generally termed a “bypass option,” whereby a qualified minor can show that she should be granted authorization for the abortion without the need to secure parental consent”); Teresa Stanton Collett, *Seeking Solomon’s Wisdom: Judicial Bypass of Parental Involvement in a Minor’s Abortion Decision*, 52 BAYLOR L. REV. 513, 520 (2000); Emily Buss, *The Parental Rights of Minors*, 48 BUFF. L. REV. 785, 785 n.2 (2000) (noting that a majority of states have adopted the Powell plurality’s suggested framework).

²⁶¹ Which need not necessarily be a judicial officer. *See Bellotti*, 443 U.S. at 643 n.22.

²⁶² *Id.* at 647-48. The judicial bypass procedure must provide for an anonymous and quick determination. *Id.* at 644.

²⁶³ As noted by Professor Garvey, *Bellotti* is not the victory that many children’s rights advocates assert it to be. Garvey, *supra* note 10, at 1760 (“For all of *Bellotti v. Baird*’s talk about the child’s right to ‘seek’ an abortion, five members of the Court agreed that the state could prevent an immature minor from making that decision—four by committing the choice to a court, one by committing it to the child’s parents.”); *see also* Martin Guggenheim, *Minor Rights: The Adolescent Abortion Cases*, 30

opinion was based on several arguments and premises. The opinion began by noting that children have a unique status under the law and that the state has a duty to children.²⁶⁴ Further, the Court has expressed “concern for the vulnerability of children.”²⁶⁵ Nevertheless, a minor’s constitutional rights are not automatically coextensive with that of an adult’s.²⁶⁶ Further, “the Court has held that the States validly may limit the freedom of children to choose for themselves in the making of important, affirmative choices with potentially serious consequences.”²⁶⁷ The basis for this line of cases is premised on the Court’s belief that “minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them.”²⁶⁸ The Court provided no citation for this proposition to any psychological literature on the subject of child development.²⁶⁹ Finally, Justice Powell noted, “The State commonly protects its youth from adverse governmental action and from their own immaturity by requiring parental consent to or involvement in important decisions by minors.”²⁷⁰ There was a brief mention in the plurality’s opinion to expert testimony in the district court that established that “parental involvement in a minor’s

HOFSTRA L. REV. 589, 591 (2002) (commentators have, in error, viewed the abortion cases as bestowing rights on children).

To be clear, the plurality did uphold a third-party veto—a judge could prohibit a minor from obtaining an abortion. What is constitutionally prohibited is an “absolute, and possibly arbitrary, veto.” *Bellotti*, 443 U.S. at 643.

²⁶⁴ *Bellotti*, 443 U.S. at 633.

²⁶⁵ *Id.* at 634.

²⁶⁶ *Id.* at 635. For example, because of the unique purposes of the delinquency system, alleged delinquents do not have a constitutional right to a jury trial. *Id.* (citing *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971)).

²⁶⁷ *Id.*

²⁶⁸ *Id.*

²⁶⁹ Justice Powell merely cited to a concurring opinion by Justice Stewart in which he found that, “[A]t least in some precisely delineated areas, a child—like someone in a captive audience—is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees.” *Id.* at 635 n.13 (quoting *Ginsberg v. New York*, 390 U.S. 629, 649 (1968) (Stewart, J., concurring)).

²⁷⁰ *Id.* at 637.

abortion decision, if compassionate and supportive, was highly desirable.”²⁷¹

It is clear that the plurality approached its decision from a distinct worldview of a child’s ability to make the decision to have an abortion. Justice Powell wrote, “[It] is a grave decision, and a girl of tender years, under emotional stress, may be ill-equipped to make it without mature advice and emotional support.”²⁷² Once again, this rationale was based on the Justices’ personal views of children, not the abundant literature on child development that existed at the time that *Bellotti* was decided.²⁷³

One criticism of the *Bellotti* decision is that its assumptions were incorrect, particularly if one accepts the Piagetian view that a child’s cognitive ability is nearly fully developed by age 15. Further, if whether or not the decision to have an abortion is viewed as falling under the rubric of a medical decision, then the only question is one of cognitive ability.²⁷⁴ Therefore, whether or not the minor is “mature” or

²⁷¹ *Id.* at 640 n.20.

²⁷² This was a direct quote from Justice Stevens' concurrence in *Danforth*. *Id.* at 641 (quoting *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 91 (1976) (Stevens, J., concurring)).

²⁷³ Ehrlich, *supra* note 42, at 85-86, 91 (“However, despite its surface appeal, the reasonableness of this legal construct is immediately called into doubt by the Court’s selective construction of adolescent reality. In creating this intermediate status, the Court relied upon a stagnant vision of teens as lacking decisional capacity and ignored (as it continues to do today) the growing body of research indicating that this understanding is profoundly flawed.”). I disagree with Professor Ehrlich’s conclusion that the Court viewed teens as lacking decisional capacity. Rather, the Court created a system of individualized inquiry. *Some* teens will be found to be sufficiently mature to make the abortion decision on their own. The *Bellotti* plurality rejected the suggestion, however, of creating a system in which minors were categorically capable of giving consent—i.e., that all minors were capable of giving consent.

²⁷⁴ *Id.* at 108. On the other hand, Professor Foster suggests a counterargument: “It may be argued that the decision to have an abortion is precisely the kind of decision a distraught young girl should not make on her own, not only because of immaturity of judgment, but also because of the emotional dimension of the decision. It may be said that she lacks the ability to give an informed consent.” HENRY H. FOSTER JR., A “BILL OF RIGHTS” FOR CHILDREN 63-4 (1974). This looks at the question of

is making the “correct” decision are both irrelevant questions. The only inquiry should be whether the patient was capable of engaging in a rational, internal, decisionmaking process.²⁷⁵

The judicial bypass procedure is an individualized inquiry, focusing on the unique maturity or best interests of the particular minor-applicant.²⁷⁶ However, it has been criticized as “elaborate and costly.”²⁷⁷ It is not necessarily more accurate at sorting out competent minors from incompetent ones. As Professor Scott has noted, nearly every judicial bypass petition is granted on one or both prongs of the *Bellotti* test.²⁷⁸ Professor Mlyniec has also criticized the Court for failing to give any real guidance to lower courts in determining how maturity, under the first prong of the *Bellotti* test, is to be ascertained.²⁷⁹ This leads some judges to apply their personal beliefs about childhood capacity.²⁸⁰

It is also inconsistent to determine that a minor that has the physical capacity and ability to carry a child to term would have an incomplete and imperfect right to terminate that pregnancy.²⁸¹ It is doubtful that a physician would perform an unwanted abortion solely at the request of the pregnant child’s parents. This is despite the general rule that a child’s parents can generally force a child to have an unwanted procedure or treatment since they alone have the ability to consent to medical treatment on her behalf.

The abortion cases and *Parham v. J.R.* are not complimentary though they were decided the same Term as

capacity not only in terms of cognitive ability, but also as to the quality of the end result in terms of maturity of judgment and psychosocial variables. Ehrlich, *supra* note 42, at 106.

²⁷⁵ See Scott, *Judgment*, *supra* note 31, at 1609 (informed consent for decisionmaking looks at process, not outcomes).

²⁷⁶ Scott, *Legal Construction*, *supra* note 14, at 570-74; Ehrlich, *supra* note 42, at 85-86. In contrast, some states have no parental consent law; in these states, a minor is categorically capable of giving consent for an abortion.

²⁷⁷ Scott, *Legal Construction*, *supra* note 14, at 575.

²⁷⁸ Scott, *Judgment*, *supra* note 31, at 1668.

²⁷⁹ Mlyniec, *supra* note 23, at 1889.

²⁸⁰ *Id.* at 1891.

²⁸¹ Ehrlich, *supra* note 42, at 91.

Bellotti II. *Parham* viewed all minors, including late adolescents, as children that need the guiding hand of their parents, who nearly always have their children's best interests at heart. Doctors could be trusted to carefully screen out those cases where the parents had ulterior motives. In the abortion cases, children are likewise viewed as incapable of making a medical decision—but only *presumptively* so. That presumption can be overcome by making an appropriate showing to a judge. Doctors, unlike in *Parham*, are not trusted to make the screening function.²⁸²

Furthermore, there is an inconsistency between the juvenile justice and death penalty cases, on the one hand, and the abortion decisions, on the other. In 2001, eighteen of the twenty-three states with the juvenile death penalty also had restrictions on minors' access to abortion.²⁸³ This evinces an inconsistent view of the capacity of children—incapable of consenting to a constitutionally-protected medical procedure, but capable of receiving the death penalty.²⁸⁴ This was a criticism of conservative efforts in the areas of capital punishment and access to abortion for minors.²⁸⁵ Liberals, on the other hand, have had to wrestle with the proposition that a minor is mature enough to make a major decision about whether to carry a baby to term, on the one hand, but developmentally incapable of deciding to avoid committing a capital offense, on the other hand.²⁸⁶ Some have tried to

²⁸² Arguably, physicians might be able to serve as the type of neutral, non-judicial fact-finder contemplated by footnote 22 of *Bellotti II*.

²⁸³ Nicole A. Saharsky, Note, *Consistency as a Constitutional Value: A Comparative Look at Age in Abortion and Death Penalty Jurisprudence*, 85 MINN. L. REV. 1119, 1148 (2001) ("Of the twenty-three states with the juvenile death penalty, eighteen are among the most restrictive in limiting minors' access to abortion.").

²⁸⁴ Another way to look at this inconsistency is between the ability to make a fairly complex decision about one's future, on the one hand, and the relatively simple decision not to commit an intentional and violent crime.

²⁸⁵ "Admittedly, with a bit of smugness, I thought it ironic that the same 'conservative' forces that were fueling this transformation [getting tough on juvenile crime] were also likely to support laws requiring parental involvement in the abortion decisions of minors." Ehrlich, *supra* note 42, at 82.

²⁸⁶ *Roper*, 543 U.S. 551, 620 (2005) (Scalia, J., dissenting).

reconcile this seeming inconsistency. Professor Ehrlich concludes, "Clearly, this decisional process [abortion] bears little, if any, resemblance to the 'on the street' setting in which decisions to engage in criminal activity are most likely to be made, often in accordance with 'street codes that reward displays of physical domination and social approval for antisocial behavior.'²⁸⁷ Professor Ehrlich and Justice Scalia, therefore, have taken diametrically opposite views of the relevant capacities in question.

3. Emancipation: An Exception to the Parental Duty of Support

I just demonstrated that parents have a duty to support their children and that their refusal to do so can lead to criminal charges and termination of parental rights.²⁸⁸ However, the law in many states recognizes an exception to the parental duty to support: emancipation. An emancipated minor is an older adolescent who has been determined to be sufficiently mature to live on his or her own.²⁸⁹ A determination of emancipation relieves a child of the disabilities of being a minority and relieves the child's parents of the duty of support. Virginia's emancipation statute is typical:

An order that a minor is emancipated shall have the following effects:

Justice Scalia also leveled this criticism upon the American Psychological Association, which took the view in the abortion cases that minors were mature, rational decisionmakers, but, in the death penalty cases, immature infants who were easily swayed by others. *Id.* at 617-18; *see also* Scott, *Judgment, supra* note 31, at 1630 n.91 ("Organized psychology has been very involved in the effort to fight restrictions on adolescent access to abortion.").

²⁸⁷ Ehrlich, *supra* note 42, at 108 (quoting Jeffrey Fagan, *Contexts of Choice by Adolescents in Criminal Events*, in *YOUTH ON TRIAL, A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE* 382 (Thomas Grisso & Robert G. Schwartz eds., 2000)).

²⁸⁸ *See infra* Part II.A.8.

²⁸⁹ *See, e.g.*, VA. CODE § 16.1-333 (2005) (emancipation requires finding, *inter alia*, that "minor is or is capable of supporting himself and competently managing his own financial affairs.").

1. The minor may consent to medical, dental, or psychiatric care, without parental consent, knowledge, or liability;
2. The minor may enter into a binding contract or execute a will;
3. The minor may sue and be sued in his own name;
4. The minor shall be entitled to his own earnings and shall be free of control by his parents or guardian;
5. The minor may establish his own residence;
6. The minor may buy and sell real property;
7. The minor may not thereafter be the subject of a petition under this chapter as abused, neglected, abandoned, in need of services, in need of supervision, or in violation of a juvenile curfew ordinance enacted by a local governing body;
8. The minor may enroll in any school or college, without parental consent;
9. The minor may secure a driver's license ... without parental consent;
10. The parents of the minor shall no longer be the guardians of the minor;
11. The parents of a minor shall be relieved of any obligations respecting his school attendance ...;
12. The parents shall be relieved of all obligation to support the minor;
13. The minor shall be emancipated for the purposes of parental liability for his acts;
14. The minor may execute releases in his own name;
15. The minor may not have a guardian ad litem appointed for him pursuant to any statute solely because he is under age eighteen; and

16. The minor may marry without parental, judicial, or other consent.²⁹⁰

Emancipation is ordinarily determined on an individual child-by-child basis. Although some states provide for emancipation upon marriage or enlistment in the armed services,²⁹¹ the matter must still be determined by a judge. Emancipation is not a true automatic, categorical finding of capacity. To aid in the individualized determination of capacity for emancipation purposes, many states permit the appointment of a guardian *ad litem* and an investigation by a probation department or social services agency.²⁹²

4. Driving and Marriage: What Appears Categorical is Actually Individual

Driving and marriage are frequently thought of as categorical/binary privileges. For minors below a certain age, these privileges are denied. In many cases, however, this age-boundary is not 18. Instead, there is a transitional period in which older adolescents between the ages of 16 and 18 can drive or marry, provided they have the permission of their parents. This sets up an interim period in which an individualized inquiry about capacity must be made.²⁹³

A temporary “learner’s permit” is typically conditioned on the consent of the parent of the child-applicant.²⁹⁴ In other words, a child cannot get a temporary driver’s license on his own. Presumably each parent makes an individualized decision about his or her child as to whether or not he or she is mentally and physically prepared for the

²⁹⁰ *Id.* § 16.1-334.

²⁹¹ *See, e.g., id.* § 16.1-333.

²⁹² *See, e.g.,* CONN. GEN. STAT. § 46b-150(a) (2005) (permitting, but not requiring, investigation by probation officer or the Commissioner of Children and Families).

²⁹³ Teitelbaum, *supra* note 8, at 809.

²⁹⁴ *See, e.g.,* VA. CODE ANN. § 46.2-334 (2005) (providing that minor's application for a license must be co-signed by a parent or other legal guardian and may be revoked at any time during the age of minority by the parent).

responsibilities of even a limited license. Even after a child passes his or her written and "road" tests and the state determines that he or she should receive a full driver's license, it may still be conditional on the permission of the parents. A colleague recently reminded me that Virginia still requires minors to attend a "driver's license" ceremony at the local juvenile court in which the child's license is given to a parent, not the child-driver. As a prosecutor in Alexandria, Virginia, I can recall sitting in on a few of these ceremonies and watching one of the juvenile court judges explain the responsibilities of driving and the consequences of driving while intoxicated and other behavior. The judge would then call each child and parent up to the bench and hand the license to the parent. It was then up to the parent to decide when the child was ready to receive the license.²⁹⁵

Similarly, many states permit minors above a certain age to get married, but only with parental permission.²⁹⁶ This reflects the view that persons 18 or older have sufficient maturity and discretion to make the marriage decision independently, that persons below a certain age are never able to make the decision whether to get married, and that a certain class of young people are only *presumptively* incapable of

²⁹⁵ For more on the Virginia drivers' license ceremony, see VA. CODE ANN. § 46.2-336 (2005) ("The Department [of Motor Vehicles] shall forward all original driver's licenses issued to applicants under the age of eighteen years to the judge of the juvenile and domestic relations court in the city or county in which the licensee resides. The judge or a substitute judge shall issue to each person to be licensed the license so forwarded, and shall, at the time of issuance, conduct a formal, appropriate ceremony, in which he shall illustrate to the licensee the responsibility attendant on the privilege of driving a motor vehicle. If the licensee was under the age of eighteen years at the time his application was made, he shall be accompanied at the ceremony by a parent, his guardian, spouse, or other person in loco parentis.").

²⁹⁶ See, e.g., ARK. CODE ANN. § 9-11-102 (2006) ("Every male who has arrived at the full age of seventeen (17) years and every female who has arrived at the full age of sixteen (16) years shall be capable in law of contracting marriage. ... However, males and females under the age of eighteen (18) years shall furnish the clerk, before the marriage license can be issued, satisfactory evidence of the consent of the parent or parents or guardian to the marriage.").

giving consent. The latter class must be joined in their consent by their parents.

Thus, with respect to marriage and driving, the law does not follow the traditional binary classification of childhood and adulthood. Instead, there is a middleground in which individual minors can exercise the rights and privileges of adulthood, provided a parent determines that it is permissible.

5. Child Custody Disputes and Witness
Capacity: Whether to Hear the Voice of the
Child is Left to Judicial Discretion

Some children can have important contributions to make to judicial proceedings. A child may witness a crime, for example, and be summoned to give testimony by the prosecutor. Or, an accused delinquent may want to give his side of the story. Finally, a child may want a family court judge to hear his preference as to which of two divorcing parents he or she wants to live with. Each of these cases requires the presiding judge to determine whether to “hear” the child.

In many jurisdictions, there is no categorical age boundary for testimony of child-witnesses.²⁹⁷ They provide, instead, for an individualized determination of competence to testify. Some states have rebuttable presumptions of competency or incompetency based on age. Although the age-boundary varies, it is generally around early to mid-adolescence.²⁹⁸ The Federal Rules of Evidence contain no express requirement of competency to testify.²⁹⁹ Rule 601

²⁹⁷ Bennett L. Gershman, *Child Witnesses and Procedural Fairness*, 24 AM. J. TRIAL ADVOC. 585, 588 (2001); see generally Nora A. Uehlien, Annotation, *Witnesses: Child Competency Statutes*, 60 A.L.R. 4TH 369, § 2[a] (1988) (“The determination of the competency of a young child to testify is largely a matter addressed to the sound discretion of the trial court, which makes its decision by reference to the common-law or statutory provisions.”).

²⁹⁸ Uehlien, *supra* note 297, § 2[a].

²⁹⁹ Belle Kinnan Deaver, *The Competency of Children*, 4 COOLEY L. REV. 522, 528 (1987).

provides, instead: "Every person is competent to be a witness except as otherwise provided in these rules."³⁰⁰ However, this rule is subject to the qualification that every witness must swear or affirm to tell the truth: "Before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to do so."³⁰¹

A trial judge, therefore, may have to make a determination whether a child-witness understands the difference between the truth and lies and has an appreciation for the obligation to testify truthfully.³⁰² A study of federal cases from 1979 has revealed that many federal judges continue to hold competency hearings for children.³⁰³ This is despite Rule 601 and a federal statute that provides that all children are presumed competent to be witnesses and that age alone cannot be used to disqualify a witness.³⁰⁴

Judges who undertake competency reviews of a child-witness generally do so with a preliminary examination outside the presence of the jury.³⁰⁵ Some states prohibit anyone but the judge from participating in the examination.³⁰⁶ Others give a limited right to counsel to question the child.³⁰⁷ To aid in the *voir dire* process, some courts have ordered psychiatric examinations of children-witnesses.³⁰⁸

³⁰⁰ FED. R. EVID. 601.

³⁰¹ *Id.* R. 603.

³⁰² Thomas D. Lyon, *Child Witnesses and the Oath: Empirical Evidence*, 73 S. CAL. L. REV. 1017, 1022 (2000).

³⁰³ *Id.* at 1024 ("One can interpret competency under 601 as referring to the witness' perception, memory, and narration, leaving the issue of sincerity to the requirements of the oath. Doing so has enabled the federal courts to continue assessing children's oath-taking competency in the face of Congressional attempts to cut back on competency hearings for child witnesses.").

³⁰⁴ 18 U.S.C. § 3509(c) (2005).

³⁰⁵ Uehlien, *supra* note 297, § 2[a].

³⁰⁶ *Id.*

³⁰⁷ *Id.*

³⁰⁸ *Id.*

In a child custody dispute, the judge or lawyers may wish to obtain the views of the child himself, whether under oath or not.³⁰⁹ This, too, is an individualized inquiry. A multi-state survey that was published in 1996 found that family court judges asked children about their wishes in 53.22% of custody cases.³¹⁰ Judges and mental health professionals who were surveyed overwhelmingly said that the weight given to the wishes of the child depended on the maturity of the child.³¹¹ However, there was disagreement between the two groups on the question of whether age was determinative of whether or not to hear the child.³¹² The survey found that children under 8 were not likely to be asked of their views, while children 14 and older were likely to be asked.³¹³

In states that require judges to consider the views of sufficiently capable children, little guidance is given as to how to determine whether a child has sufficient maturity, reason, or capacity. This lack of definition has been criticized as “leaving the arduous task of interpreting and applying the stark statutory language to the courts.”³¹⁴ Professor Mlyniec believes that some judges simply fall back on their own views of child development and maturity, with little to no consideration given to the extensive psychological literature on the subject, partly because they can only spend a few minutes with each child.³¹⁵

³⁰⁹ Catherine A. Crosby-Currie, *Children's Involvement in Contested Custody Cases: Practices and Experiences of Legal and Mental Health Professionals*, 20 LAW & HUM. BEHAV. 289, 290-92 (1996). In some states, the views of certain children must be considered by judges when determining which of several placements will be in their best interests. Hartman, *supra* note 7, at 1287-88.

³¹⁰ Crosby-Currie, *supra* note 309, at 298.

³¹¹ *Id.* at 300-1 (99% of judges and 91.9% of mental health professionals agreed that weight of testimony depended on maturity).

³¹² *Id.* (85.6% of judges versus 29.6% of mental health professionals).

³¹³ *Id.* at 305.

³¹⁴ Hartman, *supra* note 7, at 1287-88.

³¹⁵ Mlyniec, *supra* note 23, at 1874-75, 1887-89.

6. Waiver of Rights: Just Like Adults?

The juvenile justice system is based on a paternalistic belief that children—even those that are accused of crimes—require protection, not punishment.³¹⁶ Having a separate juvenile justice system as a matter of policy is one thing; implementing it has raised a number of additional questions relating to the capacity of minors. The landmark Supreme Court decisions of the 1960s and 1970s bestowing some adult criminal justice rights on juveniles have created questions about when, if ever, juveniles are capable of waiving those rights.

My short time as a juvenile prosecutor³¹⁷ led me to conclude that the single most damning piece of evidence against an alleged delinquent was the post-arrest statement he inevitably gave to the police. Nearly every case I prosecuted contained a “confession” or “statement” of some sort. It may not have been a full *mea culpa*, but it was enough to place the defendant at the scene of the crime or in an accessory role. Juveniles confess, they confess often, and their confessions are nearly always inculpatory.

When and how such confessions come into evidence, however, is a separate question. The Supreme Court’s decision in *Fare v. Michael C.*³¹⁸ addressed this issue from a constitutional perspective. In *Fare*, a juvenile was interrogated by police. After being read the *Miranda* warnings, he asked to speak with his probation officer. The police refused. The Court held that the juvenile’s request for a probation officer was not an invocation of his right to counsel or to remain silent.³¹⁹ The standard for assessing whether a minor has validly waived his *Miranda* rights is the same as in an adult case. The trial court must look to the totality of the

³¹⁶ Even in those states that have moved towards a system of juvenile justice that is based on accountability and public safety, rehabilitation has not been abandoned altogether.

³¹⁷ I was an Assistant Commonwealth’s Attorney for the City of Alexandria, Virginia, from 2001-2003. The views expressed herein are, of course, my own and not necessarily that of my former employer.

³¹⁸ *Fare v. Michael C.*, 442 U.S. 707 (1979).

³¹⁹ *Id.* at 718-24.

circumstances to determine if the waiver was knowingly and voluntarily given.³²⁰ Nevertheless, a juvenile confessor is not necessarily held to the same knowledge or intelligence of an adult. Like all defendants, his ability to waive his rights must be judged by his “age, experience, education, background, and intelligence, and into whether he has the capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights.”³²¹ Here, the Court found an adequate waiver because the defendant was 16½ -years-old, on probation, had average intelligence, was not worn down, had served time in a youth camp, and had numerous contacts/run-ins with the police.³²² The Court did not create a new rule for juveniles. Rather, the Court applied an existing rule for adults—the totality of the circumstances test—to a case that involved a minor defendant. *Fare* did not require any special care in assessing a juvenile confession. The inquiry, like that of adult confessions, is necessarily individual.

Underlying the holding of *Fare* is the assumption that persons under 18 are presumptively capable of waiving their Fifth Amendment rights.³²³ This is inconsistent with the common law rules relating to contracts and medical decisionmaking by minors. *Fare* also demonstrates an internal inconsistency within the Supreme Court itself. *Fare* was decided the same Term—in fact, on the same day!—as *Parham v. J.R.*, yet their views of the capabilities of children could not be more different.³²⁴ Recall that in *Parham*, Chief

³²⁰ *Id.* at 724-25.

³²¹ "This totality-of-the-circumstances approach is adequate to determine whether there has been a waiver even where interrogation of juveniles is involved. ... The totality approach permits -- indeed, it mandates -- inquiry into all the circumstances surrounding the interrogation. This includes evaluation of the juvenile's age, experience, education, background, and intelligence, and into whether he has the capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights." *Id.* at 725.

³²² *Id.* at 726-27.

³²³ Hartman, *supra* note 7, at 1299.

³²⁴ *Parham's* majority opinion was written by Chief Justice Burger; *Fare's* was authored by Justice Blackmun.

Justice Burger wrote that “[m]ost children, even in adolescence, simply are not able to make sound judgments concerning many decisions,”³²⁵ and that, “[t]he law’s concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life’s difficult decisions.”³²⁶ Why then did the Supreme Court not adopt a *per se* rule excluding confessions obtained without the express consent of a parent? If a child cannot consent to a simple medical procedure without parental consent, how can he validly waive his constitutional rights and make a confession?

Immediately after *Fare*, the Tenth Circuit decided *United States v. Palmer* in which this inconsistency was raised by Judge McKay in his dissent.³²⁷ Palmer was charged in federal court with assault on a car and its occupants while in Indian country.³²⁸ The defendant gave an inculpatory statement to the FBI.³²⁹ The majority found that the confession was lawfully obtained.³³⁰ The defendant’s mother gave permission for the interview, the defendant did not express a misunderstanding of his rights, and the defendant did not request a lawyer, parent, probation officer, or any other person to be present during the interview.³³¹ “For all that appears in the record,” the majority wrote, “the defendant is a normal 17-year-old.”³³² The dissent took issue with this. “The government makes much of the fact that the Navajo boy in this case was 17 years old, but all this shows is that he is presumed incapable, as a minor, of exercising full-scale judgment on his own behalf.”³³³ The dissent noted that the rest of the legal system recognizes that minors have reduced capacity to make decisions because they are immature and

³²⁵ Parham v. J.R., 442 U.S. 584, 603 (1979).

³²⁶ *Id.* at 602.

³²⁷ 604 F.2d 64, 68 (10th Cir. 1979).

³²⁸ *Id.* at 65.

³²⁹ *Id.*

³³⁰ *Id.* at 66-68.

³³¹ *Id.* at 67.

³³² *Id.*

³³³ *Id.* at 68.

inexperienced.³³⁴ The dissent would have held that the confession was inadmissible absent affirmative proof by the government that the defendant had sufficient capacity to waive his rights.³³⁵

Psychological research lends interesting insight to the question of parental presence during interrogations. A study by Professor Grisso found that 71.3% of parents who were present during a police interview with their children said nothing about whether they should waive their right to remain silent, and 16.7% actually encouraged their children to speak to the police.³³⁶ Professor Grisso concluded that the presence of a juvenile's parents during an interrogation actually adds very little to helping ensure that the child's rights are protected.³³⁷

Grisso also conducted research into the capacity of juveniles to understand their *Miranda* rights. He found that adolescents, by age 15, employ an adult-level understanding of *Miranda* rights.³³⁸ However, of the cases Grisso studied in which the police sought to question the juvenile, only 10% exercised their right to remain silent.³³⁹ Below age 15, only a handful of juveniles stood up to the police and refused to waive their rights.³⁴⁰ Grisso concluded, "As a class, juveniles of ages 14 and below demonstrate incompetence to waive their right[s] to silence."³⁴¹ Although Grisso's groundbreaking work postdates *Fare*, only a few appellate decisions since

³³⁴ *Id.* ("The Anglo-American legal system has long recognized the reduced capacity of minors to make reasonable decisions on their own behalf, as a result of their immaturity and lack of experience.")

³³⁵ *Id.*

³³⁶ THOMAS GRISSO, JUVENILES' WAIVER OF RIGHTS: LEGAL AND PSYCHOLOGICAL COMPETENCE 185 (1981).

³³⁷ Thomas Grisso, *Juveniles' Consent in Delinquency Proceedings*, in CHILDREN'S COMPETENCE TO CONSENT 131, 137 (Gerald P. Koocher, Gary B. Melton, & Michael J. Saks eds., 1983).

³³⁸ GRISSO, *supra* note 336, at 106.

³³⁹ *Id.* at 191.

³⁴⁰ *Id.*

³⁴¹ *Id.* at 193.

have examined the waiver of juvenile rights through the lens of his research findings and the questions he has raised.³⁴²

Likewise, courts have held that alleged juvenile delinquents have the capacity to waive their right to counsel, proceed *pro se*, and plead guilty without the advice of counsel.³⁴³ Professor Berkheiser summarized a series of studies that showed that half of accused delinquents appear in juvenile court without counsel and plead guilty.³⁴⁴ Several explanations have been suggested: reluctance of parents to hire or even request a lawyer, judicial “ambivalence” towards lawyers in juvenile court, inadequately staffed public defenders’ offices, and waivers that are obtained early in the process before the family is able to realize what has happened.³⁴⁵

This is not to say that a lawyer may be much help to the juvenile. The psychological literature on the subject suggests that merely assigning a lawyer to a juvenile will do little to protect that juvenile’s rights because many juveniles are presumptively incapable of appreciating the role of the lawyer. One-third of juveniles studied by Grisso in 1981 believed that attorneys only defend the innocent, not the guilty.³⁴⁶ Many children believed that their lawyers work for the court or were appointed to collect facts for the judge to use later on in determining what should happen to the child.³⁴⁷

A consistent view of childhood capacity might hold that it is better to have more protections for children in this context. After all, if a child is unable to make a simple

³⁴² Mlyniec, *supra* note 23, at 1900.

³⁴³ Hartman, *supra* note 7, at 1299.

³⁴⁴ Mary Berkheiser, *The Fiction of Juvenile Right to Counsel: Waiver in the Juvenile Courts*, 54 FLA. L. REV. 577, 580-81 (2002).

³⁴⁵ *Id.*

³⁴⁶ GRISSE, *supra* note 336, at 129; Grisso, *supra* note 337, at 143.

³⁴⁷ Grisso, *supra* note 337, at 143. Given the “best interests” (versus stated interests) representation that some juvenile court lawyers engage in, this view may in fact be supported by fact. See Ellen Marrus, *Best Interests Equals Zealous Advocacy: A Not So Radical View of Holistic Representation for Children Accused of Crime*, 62 MD. L. REV. 288 (2003).

contract, why is he capable of waiving important constitutional rights?³⁴⁸ A contract and a waiver of rights are both expressions of individual free will. The Supreme Court has appeared to develop its jurisprudence on children in two separate spheres: non-criminal and criminal. Professor Berkheiser concluded:

Research by child development experts supports the Supreme Court's solicitude for children and the protections the Court has erected for their lack of decision making ability in non-criminal areas of the law. However, nothing in the social science research suggests that juveniles encountering criminal or delinquency proceedings should receive less protection. To the contrary, empirical studies underscore the need for courts to rethink the presumption of capacity that has dominated the delinquency system.³⁴⁹

An alternative way to view the waiver cases is that the Court wants to permit or encourage waivers for social policy reasons such as crime control and effective law enforcement. Regardless of the motivation, it is curious how even the Supreme Court—which presumably has a working knowledge of its own body of decisions—has developed patchwork areas of children's law by applying or ignoring, as the case may be, the question of capacity.

³⁴⁸ As I demonstrate in Part II.C.2, I also believe that the knife cuts the other way as well. The Supreme Court's cases extending adult, procedural rights—such as the right to trial counsel—to children did so without any consideration of whether children are capable of exercising those rights. In the waiver context, at least there is some, limited individualized inquiry into capacity.

At a minimum, there needs to be more research about the interaction between children and their lawyers. Grisso, *supra* note 337, at 142.

³⁴⁹ Berkheiser, *supra* note 344, at 625.

7. Judicial Transfer and Prosecutorial Waiver: Individual Determinations or Categorical Assumptions Based on the Seriousness of the Offense?

Not every minor who is accused of a crime is tried and sentenced in juvenile court. Certain juveniles can be “transferred” or “waived” to adult court, where they have all of the rights of an adult defendant and, if found guilty, receive an adult sentence.³⁵⁰ There are three ways in which this can occur. First, a juvenile court judge can order that the juvenile stand trial as an adult—this is called “judicial transfer” and was the traditional way in which prosecution as an adult could occur. In more recent years, two new forms of transfer have emerged. “Prosecutorial waiver” occurs when a juvenile is “transferred” because he is accused of committing one of a series of designated crimes and a prosecutor “certifies” or “elects” to have the juvenile tried and sentenced as an adult. Finally, “legislative waiver” occurs when, by a statute, a juvenile is automatically tried as an adult because he is accused of committing a very serious offense, such as murder. In this section, I will address the first two kinds of transfer: judicial and prosecutorial since these involve individualized inquiries into particular cases and juveniles. Since “legislative waiver” creates an entire category of juveniles who must stand trial as adults, I consider this to be a form of categorical capacity and discuss the same in Part II.C.3.

The juveniles who are being transferred are younger and more numerous than ever before.³⁵¹ The increase in transfer cases stems from a perception in the 1990s that juveniles of that era were more dangerous and that the juvenile justice system was coddling them.³⁵² Reformers of the 1990s

³⁵⁰ An exception to this rule, after *Roper v. Simmons*, is that a person cannot receive the death penalty for a crime committed as a juvenile. See *supra* Part II.A.4.

³⁵¹ Brink, *supra* note 17, at 1555-56.

³⁵² Scott, *Legal Construction*, *supra* note 14, at 579; Ehrlich, *supra* note 42, at 104; Joseph Allen & Claudia Worrell Allen, *Getting the Elephant Out of the Courtroom: Applying Developmental Perspectives to the Disposition*

viewed many juveniles merely as smaller versions of adult criminals.³⁵³

For children's rights advocates, judicial transfer is preferable to prosecutorial waiver because the former vests decisionmaking over a child's case in a neutral, detached, and impartial judge as opposed to a political official. Judicial transfer statutes often provide guidance to the judge to aid in determining whether a particular juvenile should be tried as an adult.³⁵⁴ Prosecutorial waiver statutes, on the other hand, do not.³⁵⁵

(Not Just the Assessment) of Juvenile Offenders, 6 VA. J. SOC. POL'Y & L. 419, 419 (1999).

³⁵³ *Id.*

³⁵⁴ VA. CODE ANN. § 16.1-269.1(A)(4) (2005), for example, provides that a juvenile court judge may transfer a juvenile to adult court if:

The court finds by a preponderance of the evidence that the juvenile is not a proper person to remain within the jurisdiction of the juvenile court. In determining whether a juvenile is a proper person to remain within the jurisdiction of the juvenile court, the court shall consider, but not be limited to, the following factors:

- a. The juvenile's age;
- b. The seriousness and number of alleged offenses, including (i) whether the alleged offense was committed in an aggressive, violent, premeditated, or willful manner; (ii) whether the alleged offense was against persons or property, with greater weight being given to offenses against persons, especially if death or bodily injury resulted; (iii) whether the maximum punishment for such an offense is greater than twenty years confinement if committed by an adult; (iv) whether the alleged offense involved the use of a firearm or other dangerous weapon by brandishing, threatening, displaying or otherwise employing such weapon; and (v) the nature of the juvenile's participation in the alleged offense;
- c. Whether the juvenile can be retained in the juvenile justice system long enough for effective treatment and rehabilitation;
- d. The appropriateness and availability of the services and dispositional alternatives in both the criminal justice

One criticism of transfer is that the seriousness of the alleged offense often weighs heavily into the transfer/certification decision and outweighs mitigating evidence of a minor's immaturity. An assumption is that the offense is a proxy for the juvenile's maturity or lack thereof.³⁵⁶ A minor who commits a very serious offense is, by the nature of the commission of the act itself, adult-like in his decisionmaking and deserving of an adult punishment. This view of equating conduct with capacity has drawn criticism

and juvenile justice systems for dealing with the juvenile's problems;

e. The record and previous history of the juvenile in this or other jurisdictions, including (i) the number and nature of previous contacts with juvenile or circuit courts, (ii) the number and nature of prior periods of probation, (iii) the number and nature of prior commitments to juvenile correctional centers, (iv) the number and nature of previous residential and community-based treatments, (v) whether previous adjudications and commitments were for delinquent acts that involved the infliction of serious bodily injury, and (vi) whether the alleged offense is part of a repetitive pattern of similar adjudicated offenses;

f. Whether the juvenile has previously absconded from the legal custody of a juvenile correctional entity in this or any other jurisdiction;

g. The extent, if any, of the juvenile's degree of mental retardation or mental illness;

h. The juvenile's school record and education;

i. The juvenile's mental and emotional maturity; and

j. The juvenile's physical condition and physical maturity.

³⁵⁵ See, e.g., VA. CODE ANN. § 16.1-269.1(C) (2005) ("The juvenile court shall conduct a preliminary hearing whenever a juvenile fourteen years of age or older is charged with murder in violation of § 18.2-33, felonious injury by mob in violation of § 18.2-41, abduction in violation of § 18.2-48, malicious wounding in violation of § 18.2-51, malicious wounding of a law-enforcement officer in violation of § 18.2-51.1, felonious poisoning in violation of § 18.2-54.2, adulteration of products in violation of § 18.2-54.2, robbery in violation of § 18.2-58 or carjacking in violation of § 18.2-58.1, rape in violation of § 18.2-61, forcible sodomy in violation of § 18.2-67.1 or object sexual penetration in violation of § 18.2-67.2, *provided the attorney for the Commonwealth gives written notice of his intent to proceed pursuant to this subsection.*") (emphasis added).

³⁵⁶ Allen & Allen, *supra* note 352, at 420.

from researchers who have adopted the Steinberg-Cauffman theory that juveniles are more susceptible than adults to psychosocial factors such as peer influence.³⁵⁷ The criticism of the “transfer movement” is similar to the criticism of Justice Scalia’s view that it does not take much capacity to know that it is wrong to kill someone. The Steinberg-Cauffman school of thought would respond that a juvenile may know that it is wrong to commit a serious crime, such as murder, but he may commit the crime anyway because of peer pressure and lack of impulse control.

It is important to differentiate here between judicial transfer and prosecutorial waiver. When a judge has to decide whether to order a juvenile to stand trial as an adult, the minor’s cognitive ability and maturity are factors that he either must, or at least may, consider.³⁵⁸ On this basis, I disagree with the conclusions of Lewis *et al.* that “under certain circumstances (i.e., serious violent crime), emotional and cognitive immaturity are ignored and juveniles can be tried and sentenced as adults.”³⁵⁹ The judicial transfer hearing either requires or permits consideration of cognitive ability and maturity (or lack thereof). So, these factors are not being “ignored.” They are being considered and rejected in individual cases based on the total history and circumstances of a particular juvenile.

It is with the “proxy” argument where greater attention by the psychology community is needed. Lewis *et al.*’s biggest complaint, and justifiably so, is with judges who consider only one factor, the charged offense. First, focusing only on the charged offense ignores the statutory duty in many

³⁵⁷ *Id.* at 419; Ehrlich, *supra* note 42, at 108, 110.

³⁵⁸ See, e.g., TEX. FAMILY CODE ANN. § 54.02 (Vernon 2005) (“In making the determination required by Subsection (a) of this section, the court shall consider, among other matters: ... the sophistication and maturity of the child.”).

³⁵⁹ Lewis *et al.*, *Ethics Questions Raised by the Neuropsychiatric, Neuropsychological, Educational, Developmental, and Family Characteristics of 18 Juveniles Awaiting Execution in Texas*, at 408-9; see also Hartman, *supra* note 7, at 1267 (“Statutes omit core consideration of decisional capability”).

states to consider a series of factors, including the psychological status of the juvenile. Second, if one adopts the Steinberg-Cauffman construct of child development, then there is more to ask than “did the child commit the crime?” The answer to the question “Why?” is perhaps even more important. A minor’s capacity can be diminished even though he is able to reason what the correct action would have been due to his or her heightened susceptibility to psychosocial factors.

All of these concerns are heightened when one considers the use of prosecutorial certification/waiver.³⁶⁰ These statutes do not require a hearing or independent, judicial determination that the minor should stand trial as an adult.³⁶¹ The decision to certify a juvenile as an adult is made by the prosecutor, whose only source of information about a case comes from police reports and victim and witness interviews. The prosecutor ordinarily does not have access to the juvenile because he or she is represented by counsel. In some jurisdictions, he may have the ability to consult with the juvenile’s probation officer (if he had one at the time of the offense) to learn more about the minor’s background.³⁶² Presumably prosecutors—more so than judges—engage in the “proxy” reasoning that I discussed earlier. Judges are presented with a full social history of the child, while prosecutors see only police reports. Presented with information that the minor committed a serious crime such as murder or armed robbery, a prosecutor is more likely to use this information as an indicator of how “grown up” this young person has become.

³⁶⁰ See generally Clark, *supra* note 173, at 679.

³⁶¹ See, e.g., FLA. STAT. ANN. § 985.227(1)(a) (West 2005) (permitting state attorney to file charges in adult court where “in the state attorney’s judgment and discretion the public interest requires that adult sanctions be considered or imposed” and the juvenile, aged 14 or 15, is charged with one of a series of crimes).

³⁶² This was my experience as a juvenile court prosecutor. In speaking with other prosecutors around the country, I believe this is a common practice when there is a good, working relationship between the office of the prosecutor and probation services.

This is not to say that I disagree with the proxy argument. I think it can be a helpful *starting point* for consideration of an individual juvenile's case. It might even work as a rebuttable presumption. Such a structure would allow for the defense to present evidence to either a judge or prosecutor that a particular juvenile lacked substantial capacity—due to immaturity or diminished cognitive ability—to understand what he was doing or to control his behavior. Certainly more research is needed to help answer how the Steinberg-Cauffman construct applies to criminal behaviors by adolescents. Otherwise, Piaget's conclusions as to cognitive ability, when combined with a minor's commission of a particularly serious, violent crime, make the "proxy" argument appealing from a policy standpoint.

Naturally the "transfer movement" is at odds with the traditional notions of children as infants who are incapable of acting for themselves. Transfer is also antithetical to the concept that children need to be rehabilitated, not punished. It makes certain assumptions about juveniles that are rejected in other areas of the law, such as in contract law. It may be that a plausible argument could be made that the decision to make a contract is more difficult and requires greater capacity than resisting a compulsion to kill someone. Or, perhaps more research will show that the decision to engage in criminal behavior is actually a complex one, fraught with dangers of peer acceptance and perceptions.³⁶³

8. Torts: Liability for the Protection of Victims

Despite their incapacity to contract or to make their own health care decisions, minors are liable in tort.³⁶⁴ Even very young children have been sued for their intentional torts

³⁶³ See Ehrlich, *supra* note 42, at 108.

³⁶⁴ Hartman, *supra* note 7, at 1304. An exception to this rule is that a minor cannot be sued for a tort that arises out of a contract. *Faces, Inc. v. Kennedy*, 447 A.2d 592, 594 (N.J. 1981). An additional exception relates to family members. Generally, a child cannot sue his or her parents in tort. The rationale for this rule has nothing to do with capacity; instead, it is based on preserving family harmony. Hartman, *supra* note 7, at 1305.

or negligence.³⁶⁵ Unlike criminal law or contract law, infancy is not a defense to a tort action.³⁶⁶ The policy behind this rule is to compensate victims for their injuries.³⁶⁷ Unlike criminal law, the purpose is not to punish wrongdoers.³⁶⁸ Children's diminished moral culpability due to age does not negate the damage they have caused.

Still, our tort system is not a no-fault scheme; in general, the plaintiff must prove that the defendant acted with intent, knowledge, or negligence. A very young child (what the cases refer to as a child of "tender years"³⁶⁹) may not be able to form the intent, knowledge, or negligence required for liability.³⁷⁰ Furthermore, in a negligence action, the defendant is held to a standard of conduct comparable to children of similar age, intelligence, and experience.³⁷¹ This does add an element of individualized determination, so I hesitate to categorize tort liability as completely categorical. While all children are capable of being held liable in tort, each child is

³⁶⁵ See, e.g., *Brown v. Dellinger*, 355 S.W.2d 742 (Tex. App. 1962) (defendants, 7- and 8-years-old, sued for trespass after they set a fire which eventually consumed the plaintiff's house); *Garratt v. Dailey*, 279 P.2d 1091 (Wash. 1955) (5-year-old Brian Dailey pulled a chair out from under the plaintiff; sued for battery; case remanded for trial on whether defendant had intent or knowledge).

³⁶⁶ *Brown*, 355 S.W.2d at 746 ("[A]s a general rule, minors are civilly liable for their own torts.").

³⁶⁷ *Ellis v. D'Angelo*, 116 Cal.App.2d 310, 313, 253 P.2d 675 (Ct. App. 1953) (battery by 4-year-old).

³⁶⁸ *Id.*

³⁶⁹ *Id.* at 314.

³⁷⁰ *Id.* At least one court has suggested that a minor may be sufficiently capable to intend a violent tort, such as battery, but not be able to foresee the consequences of a negligent decision or course of action. *Id.* at 315 ("[A]s between a battery and negligent injury an infant may have the capacity to intend the violent contact which is essential to the commission of battery when the same infant would be incapable of realizing that his heedless conduct might foreseeably lead to injury to another which is the essential capacity of mind to create liability for negligence.").

³⁷¹ *Id.* at 314; *Banks v. United States*, 969 F. Supp. 884, 893 (S.D.N.Y. 1997). ("It has long been settled in New York that 'an infant is expected to exercise a level of care commensurate with his age, experience, intelligence and ability.'" (quoting *Republic Ins. Co. v. Michel*, 885 F. Supp. 426, 433 (E.D.N.Y. 1995))).

still held to a child-like standard of care.³⁷² Age is but one factor for the trier of fact to consider.³⁷³

Despite the fact-intensive nature of the inquiry, principles of civil procedure still require the court to conduct a screening function and determine whether or not the plaintiff has presented sufficient evidence of the defendant-minor's intent, knowledge, or negligence, such that there is a triable issue. This was the issue present in *Ellis v. D'Angelo*, in which a 4-year-old was sued for both battery and negligence after he allegedly shoved and pushed the plaintiff.³⁷⁴ With respect to the battery claim, the court held that there was a factual question as to intent for the jury to decide.³⁷⁵ However, the court ruled that, as a matter of law, a 4-year-old is incapable of being sued for negligence because of his diminished mental capacity.³⁷⁶ The court, not surprisingly, relied on its own beliefs about child development:

We are satisfied from our own common knowledge of the mental development of 4-year-old children that it is proper to hold that they have not at that age developed the mental capacity for foreseeing the possibilities of their inadvertant conduct which would rationally support a finding that they were negligent.³⁷⁷

³⁷² An exception to this rule is when a child engages in an inherently dangerous, adult-like activity, like riding a snowmobile. *E.g.*, *Robinson v. Lindsay*, 92 Wash. 2d 410, 598 P.2d 392 (1979) (plaintiff was injured while riding as a passenger on a snowmobile being driven by defendant, a 13-year-old; held, defendant was held to an adult standard of care because he was engaged in an inherently dangerous activity).

³⁷³ *Banks*, 969 F. Supp. at 893; *Ellis*, 116 Cal. App. 2d at 317 ("When it comes to the count charging battery a very different question is presented. We certainly cannot say that a 4-year-old child is incapable of intending the violent or the harmful striking of another. Whether a 4-year-old had such intent presents a fact question.").

³⁷⁴ *Ellis*, 116 Cal. App. 2d at 312.

³⁷⁵ *Id.* at 317.

³⁷⁶ *Id.* at 316-17.

³⁷⁷ *Id.* at 316.

In *Banks v. United States*, the issue was the comparative negligence, if any, of the plaintiff.³⁷⁸ The 8-year-old was playing on a gate at the post office, at the invitation of one of the postal workers.³⁷⁹ The child had been told in the past not to play on the gate.³⁸⁰ The gate accidentally closed on his fingers, severing two of his fingertips.³⁸¹ The district court, sitting as trier of fact, found that this 8-year-old was not comparatively negligent.³⁸² "These mixed signals would be confusing to any child Harry's age," the court wrote.³⁸³ The court considered the expert testimony of a child psychologist who had determined that the plaintiff suffered from a learning disability and would be particularly confused as to what was proper.³⁸⁴ This case provides an excellent insight into the factors that at least one trier of fact considered in determining the individual liability in a child-negligence case.

At least one jurisdiction has tried to be consistent, at least between criminal and tort laws. In *Hatch v. O'Neill*, the Georgia Supreme Court upheld a statute which tied tort liability to whether a child "has arrived at those years of discretion and accountability prescribed by this Code for criminal offenses."³⁸⁵ The court noted that this was a valid exercise of legislative power.³⁸⁶

³⁷⁸ *Banks*, 969 F. Supp. at 891.

³⁷⁹ *Id.*

³⁸⁰ *Id.* at 894.

³⁸¹ *Id.* at 886.

³⁸² *Id.* at 893.

³⁸³ *Id.* at 894.

³⁸⁴ *Id.*

³⁸⁵ 231 Ga. 446, 447, 202 S.E.2d 44 (1973). The statute remains substantially in effect today: "Infancy is no defense to a tort action so long as the defendant has reached the age of discretion and accountability prescribed by Code Section 16-3-1 for criminal offenses." GA. CODE ANN. § 51-11-6 (2005). Georgia Code § 16-3-1 sets the minimum age for criminal punishment at age 13. *Id.* § 16-3-1.

³⁸⁶ *Hatch*, 231 Ga. at 448 ("The question of the immunity of an infant who is under the age of criminal responsibility from liability for torts is a reasonable subject for regulation by the legislative branch of government and it is not a denial of due process of law to provided that no cause of action exists for torts committed by infants of such age.").

C. *Categorical Capacity*

Most legal rights and responsibilities of children are still governed by *parens patriae* and an assumption that children are categorically incapable of acting or being held responsible for their actions.³⁸⁷ Some exceptions to this rule have either explicitly or implicitly been carved out. These exceptions require a decisionmaker, such as a judge, to determine a child's capacity on an individual, case-by-case basis.³⁸⁸ In this section, I consider a further set of exceptions which view children as categorically capable.

1. *STDs, Substance Abuse, and Mental Health: An Exception for Public Health Reasons*

Children are categorically incapable of either giving consent, or refusing a parent-approved, medical procedure or treatment.³⁸⁹ This is, for the most part, a common law rule that was born out of the law of battery and consent.³⁹⁰ However, there are exceptions to this rule that allow children to give consent on their own. These exceptions have been created by legislatures for public health reasons.

In many states, adolescents can consent—without the need to get parental permission—to receive treatment for sexually-transmitted disease, substance abuse, mental health disorders, or to obtain contraceptives or pregnancy tests.³⁹¹ These exceptions are not based on a fiction that minors are somehow capable of making *these* medical decisions, but not

³⁸⁷ See *supra* Part II.A.

³⁸⁸ See *supra* Part II.B.

³⁸⁹ See *supra* Part II.A.6.

³⁹⁰ Wadlington, *supra* note 217, at 60-61.

³⁹¹ Alabama provides, for example:

Any minor may give effective consent for any legally authorized medical, health or mental health services to determine the presence of, or to treat, pregnancy, venereal disease, drug dependency, alcohol toxicity or any reportable disease, and the consent of no other person shall be deemed necessary. ALA. CODE § 22-8-6 (2005).

others. The exceptions are statutory and exist to promote the public health.³⁹² They are areas in which the government wants to encourage treatment and so it has enacted a law to make it easier for minors to get treatment.³⁹³ Regarding STDs, there is an obvious concern that untreated, sexually active minors will spread diseases to others. An alternative explanation is that this is an area in which a parent may act with hostility or otherwise not in the minor's best interest.³⁹⁴ Either way, the policy concern is focused on the effect of requiring parental consent, rather than the cognitive ability of the minor to consent to the treatment.

Minors' access to contraceptives also has a constitutional twist. In *Carey v. Population Services International*, a plurality of the Supreme Court held that a New York statute was unconstitutional because it prohibited the sale of contraceptives to minors under the age of 16.³⁹⁵ The plurality drew an analogy to the Court's abortion cases. Since a state cannot interfere in a minor's decision to seek an abortion, "*a fortiori*" the state cannot interfere with the ability to obtain contraceptives.³⁹⁶ New York had tried to justify its statute on the grounds that it was a valid regulation of the morality of children and that, as a policy matter, it had the right to control minor's promiscuous sex.³⁹⁷ Justice White concurred in the judgment, but on the narrower ground that the state had not established that the policy would have had the deterrent effects it had alleged.³⁹⁸ Justice Powell, in a concurrence, acknowledged a broader view of the question of children's legal status:

There is no justification for subjecting restrictions on the sexual activity of the young

³⁹² FOSTER, *supra* note 274, at 64 ("Any requirement for parental consent to the treatment of minors for venereal disease is medically and psychologically absurd."); Hartman, *supra* note 7, at 1310;

³⁹³ Scott, *Judgment*, *supra* note 31, at 1617.

³⁹⁴ Scott, *Legal Construction*, *supra* note 14, at 567-68.

³⁹⁵ *Carey v. Population Services Int'l*, 431 U.S. 678, 681-82 (1977).

³⁹⁶ *Id.* at 694.

³⁹⁷ *Id.* at 692.

³⁹⁸ *Id.* at 702.

to heightened judicial review. Under our prior cases, the States have broad latitude to legislate with respect to adolescents. The principle is well settled that ‘a State may permissibly determine that, at least in some precisely delineated areas, a child ... is not possessed of that full capacity for individual choice’ which is essential to the exercise of various constitutionally protected interests.³⁹⁹

The *Carey* plurality chose to analyze the question from a reproductive freedom perspective, instead of a contract law or medical consent perspective. Probably, this was because the New York statute was so specifically drawn. At issue was not a general statute prohibiting contracts by minors or their inability to consent to medical decisionmaking that had the effect of restricting minors’ access to birth control. Still, *Carey* creates an interesting exception in the landscape of children’s rights. Even though state law said that children did not have the cognitive ability to make a simple contract to purchase contraceptives, this was not part of the Court’s analysis. At best, Justice Powell, in a concurrence, tried to reconcile other laws dealing with the reproductive freedom of children. He noted that New York recognized that “its juvenile citizens generally lack the maturity and understanding necessary to make decisions concerning marriage and sexual relationships.”⁴⁰⁰ For example, they lack the ability to marry or to consent to sexual intercourse.⁴⁰¹

Justice Stevens, in a concurrence, addressed the issue of inconsistency head-on. He addressed the plurality’s lack of concern over the capacity of minors and the right of the state, as *parens patriae*, to create laws that protect minors from their own foolish decisions. He wrote:

The State’s important interest in the welfare of its young citizens justifies a number of

³⁹⁹ *Id.* at 705 (quoting *Ginsberg v. New York*, 390 U.S. 629, 649-50 (1968) (Powell, J., concurring in part)).

⁴⁰⁰ *Id.* at 706.

⁴⁰¹ *Id.*

protective measures. ... Such special legislation is premised on the fact that young persons frequently make unwise choices with harmful consequences; the State may properly ameliorate those consequences by providing, for example, that a minor may not be required to honor his bargain.⁴⁰²

Notably absent from *Carey* is any discussion of the psychological literature on whether a juvenile is capable of making the type of decision involved in the case.

In states which do not require parental consent for an abortion, minors have the categorical capacity to consent to the procedure notwithstanding their general incapacity regarding medical decisionmaking.⁴⁰³ Six states, plus the District of Columbia, currently have no parental consent or notification requirement.⁴⁰⁴

2. Rights for Children: Capacity is Irrelevant

Much of the Supreme Court's constitutional jurisprudence on children ignores the question of capacity altogether. This is particularly true in cases, such as *Carey*,⁴⁰⁵ which created or recognized rights for minors. However, in cases where a minor's rights or responsibilities were restricted—such as the abortion cases—the question of capacity was at least discussed and used as a rationale for giving juveniles fewer rights than adults.⁴⁰⁶

⁴⁰² *Id.* at 714 (Stevens, J., concurring in part).

⁴⁰³ Scott, *Legal Construction*, *supra* note 14, at 572.

⁴⁰⁴ PLANNED PARENTHOOD FEDERATION OF AMERICA, LAWS REQUIRING PARENTAL CONSENT OR NOTIFICATION FOR MINORS' ABORTIONS (July 2005),

<http://www.plannedparenthood.org/pp2/portal/medicalinfo/abortion/fact-parental-consent.xml>; CENTER FOR REPRODUCTIVE RIGHTS, RESTRICTIONS ON YOUNG WOMEN'S ACCESS TO ABORTION SERVICES (August 2005), http://www.crlp.org/pub_fac_restrictions.html.

⁴⁰⁵ *Carey v. Population Services Int'l*, 431 U.S. 678, 686-91 (1977).

⁴⁰⁶ *See supra* Part II.B.2.

The cases in the delinquency area highlight the Supreme Court's selective use of capacity as a factor in determining the rights and responsibilities of children. In *Gault*, the Supreme Court held that juveniles are entitled to due process in delinquency proceedings, and they possess the right to counsel, confrontation, cross-examination, notice, and the privilege against self-incrimination.⁴⁰⁷ The Court, per Justice Fortas, held that "whatever may be their precise impact, neither the Fourteenth Amendment nor the Bill of Rights is for adults alone."⁴⁰⁸ Procedural protections are necessary to ensure truthful outcomes.⁴⁰⁹ The task was to determine which adult rights and protections were to be afforded to juveniles.⁴¹⁰ The Court found that each of the aforementioned rights—notice, counsel, confrontation, cross-examination, and against self-incrimination—facilitated the truth-seeking process, and, thus, ensure that juvenile proceedings were fundamentally fair, while preserving much of the rehabilitative goals of a separate justice system.⁴¹¹

These adult-like protections were assumed to benefit the young people they were bestowed upon. Yet, there was no discussion in *Gault* about whether children are capable of exercising the very rights that the Court deemed to be fundamental to due process.⁴¹² Research demonstrates that "younger adolescents may be more limited in their capacity to make decisions in the process or to assist their attorney."⁴¹³

Consider, especially, the right to counsel, which the *Gault* Court noted was the keystone to all other procedural

⁴⁰⁷ In re *Gault*, 387 U.S. 1, 31-57 (1967).

⁴⁰⁸ *Id.* at 13.

⁴⁰⁹ *Id.* at 19-20.

⁴¹⁰ *Id.* at 14 (noting that differences in the treatment of juvenile and adult offenders has been accepted). However, the Court questioned whether the altruistic motives of the juvenile justice system were being realized. *Id.* at 17-18.

⁴¹¹ *Id.* at 31-57.

⁴¹² Teitelbaum, *supra* note 8, at 813 ("discussion of the competence of children rarely appears in decisions extending procedural protection in delinquency cases").

⁴¹³ Scott, *Legal Construction*, *supra* note 14, at 596 n.202.

rights.⁴¹⁴ To a young child, the attorney-client relationship must be one of the most baffling associations of his short life.⁴¹⁵ It is now accepted that the delinquent's lawyer represents the stated interests of the child-client, not the child's best interests.⁴¹⁶ That means that the attorney works for the child and must advocate on his or her behalf. I agree with Professor Buss that it is difficult to accept that even an adolescent is capable of playing his role in this relationship:

Understanding that an unknown, professional adult is required to take direction from a child client further taxes the child's powers of abstract reasoning, requiring him to grasp the lawyer's commitment to professional principles over personal preferences. The lawyer's obligation to defer to the views of a child client is inconsistent with a child's entire world of experience. Adults in charge of professional situations do not take direction from children, especially children accused of wrongdoing.⁴¹⁷

It is ironic and inconsistent that a child is categorically incapable of forming a contract to hire a lawyer, but has *de facto* capacity to make life-altering decisions if a lawyer is appointed for him or her. This is particularly true for younger adolescents who, because of diminished cognitive ability, may be unable to imagine distant, long-range consequences.⁴¹⁸ A juvenile may have difficulty evaluating the pros and cons of a particular plea offer. For example, a juvenile who is detained pretrial may be more likely to accept a felony plea bargain with a suspended/probated commitment rather than a plea to a

⁴¹⁴ *Gault*, 387 U.S. at 38 n.65.

⁴¹⁵ Emily Buss, *Constitutional Fidelity Through Children's Rights*, 2004 SUP. CT. REV. 355, 359.

⁴¹⁶ Lynda Frost & Adrienne E. Volenik, *The Ethical Perils of Representing the Juvenile Defendant Who May Be Incompetent*, 14 WASH. U. J. L. & POL'Y 327, 328 (2004).

⁴¹⁷ Buss, *supra* note 415, at 367.

⁴¹⁸ Scott & Grisso, *supra* note 33, at 170-71. Scott and Grisso noted that this may not be true for older adolescents, who have nearly the same cognitive ability as most young adults.

misdeemeanor that involves further incarceration. The immediate benefit—getting released from detention—is more advantageous, in the short-term, even though the long-term consequences of a felony adjudication and probated commitment may be much more severe.

Researchers who have looked into the child-attorney relationship have only scratched the surface in understanding what children believe about lawyers, how children and their lawyers (mis)communicate, and how attorneys can improve their communication and counseling skills.⁴¹⁹ What we do know is that juveniles, particularly the younger ones, have significant misunderstandings about the role of the lawyer. Professor Grisso found that one-third of juveniles believed that an attorney can only defend an innocent person.⁴²⁰ In other studies, juveniles misunderstood who their lawyers work for.⁴²¹

It is questionable to me why the “stated interests” standard of representation should apply, when so much of the law is focused on what is in the “best interests” of children. This is particularly true when we consider what we know about how juveniles think and are influenced in their decisionmaking. Why do we care about the juvenile’s “stated interests?” Why is his or her opinion relevant, particularly at the disposition stage of a delinquency proceeding? In the end, it must be that there are competing values and policies that are at work which mitigate the juvenile’s lack of capacity. An advocate—instead of a guardian *ad litem*—operates as a check on the state’s awesome power to incarcerate.

There are other constitutional rights where capacity has been deemed irrelevant. In the First Amendment context, two markedly different views of children emerge, depending on whether the Supreme Court was recognizing or limiting their rights. In *Tinker v. Des Moines Independent School District*, the Court held that children had a First Amendment right to wear black armbands at school in protest of the Vietnam

⁴¹⁹ Grisso, *supra* note 337, at 142.

⁴²⁰ GRISSE, *supra* note 336, at 129.

⁴²¹ Grisso, *supra* note 337, at 143.

War.⁴²² Their expressions did not disrupt the learning of other students.⁴²³ The Court began with the premise, “It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”⁴²⁴ It is ironic and a bit perplexing that 8-year-old Paul Tinker lacked the capacity to make a basic contract with a merchant for the purchase of his armband, but possessed both the First Amendment freedom of expression and the capacity to choose to exercise that right. Here, again, it may be that other policies are at work—teaching young people how to exercise their freedoms by giving them constitutional “training wheels,” promoting the free exchange of ideas, or modeling respect for the views of others. I wish the Supreme Court had simply been open if that was their intention, rather than engaging in the type of conclusory reasoning that is evident in *Tinker*.

Other Supreme Court cases impliedly acknowledge that kids—because they are less mature and are more impressionable—possess only limited First Amendment rights. In *Hazelwood School District v. Kuhlmeier*, the Supreme Court held that a student newspaper could be edited for content by a school principal.⁴²⁵ He could edit for grammar and writing style, delete stories that are poorly researched, change language that is vulgar or profane, or strike material that would be unsuitable for immature audiences. The Court impliedly acknowledged that students may not always make the best decisions when it comes to exercising their First Amendment freedoms:

Educators are entitled to exercise greater control over ... student expression to assure that participants learn whatever lessons the activity is designed to teach, that readers or listeners are not exposed to material that may

⁴²² 393 U.S. 503, 508 (1969).

⁴²³ *Id.* (“The school officials banned and sought to punish petitioners for a silent, passive expression of opinion, unaccompanied by any disorder or disturbance on the part of petitioners.”).

⁴²⁴ *Id.* at 506.

⁴²⁵ 484 U.S. 260, 273 (1988).

be inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school.⁴²⁶

The lesson of *Hazelwood*—from a capacity standpoint—is that the principal knows best. Here, an opposite set of assumptions is at work. Children are immature, vulnerable, and need the guiding hand of adults.

[A] school must be able to take into account the emotional maturity of the intended audience in determining whether to disseminate student speech on potentially sensitive topics, which might range from the existence of Santa Claus in an elementary school setting to the particulars of teenage sexual activity in a high school setting. A school must also retain the authority to refuse to sponsor student speech that might reasonably be perceived to advocate drug or alcohol use, irresponsible sex, or conduct otherwise inconsistent with “the shared values of a civilized social order.”⁴²⁷

This is in stark contrast to the bold, presumably competent, First Amendment champion-of-liberties child in *Tinker*.

A similar issue was presented in *Bethel School District No. 403 v. Fraser*, in which a student used an “elaborate, graphic and explicit sexual metaphor” in nominating another student for a student government position during a school-wide assembly.⁴²⁸ The Court upheld the school’s discipline of the child. The Court noted that schools have a responsibility for preparing children for citizenship and teaching them the boundaries of appropriate conduct.⁴²⁹ This is presumably because children lack such knowledge already. The Court expressed concern over Fraser’s audience, which was based on a separate set of assumptions. The Court wrote, “The speech

⁴²⁶ *Id.* at 271.

⁴²⁷ *Id.* at 272.

⁴²⁸ *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 677-78 (1986).

⁴²⁹ *Id.* at 681.

could well be seriously damaging to its less mature audience, many of whom were only 14 years old and on the threshold of awareness of human sexuality.”⁴³⁰ How did the Court “know” that the audience was naïve and ignorant about human sexuality? Why was there no citation to the current literature on children’s sexual development? Could it be that the Supreme Court in *Fraser* was simply resting on its own assumptions (or hopes!) about children? Like *Parham*, the *Hazelwood* and *Fraser* opinions have certain worldviews about the innocence and ignorance of youth that may not be true from a psychological or real world standpoint.

3. Legislative Waiver to Adult Court:
Assumptions About Capacity Based on
Criminal Offense?

As described in Part II.B.7, most states provide some form of judicial or prosecutorial transfer or certification for certain juvenile offenders. These offenders, who are assessed on a case-by-case basis, are then tried and punished as any other adult offender. Some states also contain “legislative waiver” statutes in which any juvenile charged with a designated offense—usually murder—is automatically tried as an adult. No institutional actor possesses discretion over the transfer decision. Instead, the legislature has made a categorical decision that all juveniles who meet the legislative criteria must stand trial as adults. Virginia contains a typical legislative waiver statute: “The juvenile court shall conduct a preliminary hearing [and certify the juvenile for prosecution as an adult] whenever a juvenile fourteen years of age or older is charged with murder ... or aggravated malicious wounding.”⁴³¹

One way to look at the rationale legislative waiver is what I term the “proxy” argument. The reformers who pushed for increased legislative waiver reasoned that the crime a juvenile committed was a sufficient proxy for his maturity and

⁴³⁰ *Id.* at 683.

⁴³¹ VA. CODE ANN. § 16.1-269.1(B) (2005) (citations omitted).

dangerousness.⁴³² If a child is old enough to do a very serious adult crime, he is old enough to do “adult time” because he has, by virtue of having committed the act itself, demonstrated that he is no longer a child but is instead a dangerous adult.⁴³³

The assumptions behind the “proxy” argument may prove false. Scott and Grisso have noted that many adolescents grow out of antisocial behavior: “A representative sample of adolescents involved in criminal activity will include a large group whose antisocial conduct is ‘adolescence-limited’ and a much smaller group whose conduct is ‘life-course-persistent.’”⁴³⁴ Why most juveniles outgrow their antisocial behavior, while only a small percentage become adult offenders, is not understood; more research is clearly needed.⁴³⁵ If the Steinberg-Cauffman view of child development is accepted, then it could be because as children emerge into adulthood they become better capable of resisting antisocial forces, such as peers.

Legislative waiver statutes have also been criticized for taking away discretion from judges or prosecutors to decide whether a particular juvenile is the “life-course-persistent” offender who must be incapacitated or whether the juvenile committed the alleged crime due to diminished cognitive ability.⁴³⁶ Others have criticized these statutes for being inconsistent with other aspects of the law regarding children.⁴³⁷ This inconsistency argument is even more potent with legislative waiver than it is with judicial transfer or prosecutorial certification because automatic statutes are categorical in nature. With transfer or certification, there is at least the *hope* that the judge or prosecutor will be able to screen out those cases where the juvenile was acting as a juvenile, not as an adult.

⁴³² Scott & Grisso, *supra* note 33, at 139 (discussing assumptions of punitive reformers).

⁴³³ Of course, if the juvenile is acquitted, there will be no punishment.

⁴³⁴ *Id.* at 154-55.

⁴³⁵ *Id.* at 155.

⁴³⁶ Hartman, *supra* note 7, at 1267.

⁴³⁷ *Id.*; Ehrlich, *supra* note 42, at 104.

III. A Proposal for Reform: Towards a Model Children's Code

To be clear, I do not necessarily take issue with the patchwork results that have been reached by courts and legislatures. There, indeed, may be value and beneficial policy results to the application of different rules of capacity depending on the legal decision that is involved. Instead, this is a critique of the process and rationale by which such results have been achieved and a plea for a more honest, direct, and intelligent discourse in the law of children.

A. Consistency As a Value

I see two principal problems with the law of children and its use of capacity. First, the law has not kept up-to-date with modern research about the psychological development of children. I am not the first person to plead for us in the legal profession to listen to our colleagues in the psychology field.⁴³⁸ Every aspect of the law could benefit from actual evidence and knowledge from the field of psychology. The legal system has puttered along with unfounded and incorrect assumptions for too long. Second, there has developed an internal inconsistency in the law. Again, I am not the first person to document the dissimilar ways in which children are viewed, even by the same policymaker.⁴³⁹

Is there value in resolving these disconnects and inconsistencies? I believe so. With respect to the first disconnect, it seems only logical that if the assumptions that underlie a law or policy are incorrect, the law or policy should be reexamined in light of the truth. This principle is foundational to the rule of law. We can, and should, move

⁴³⁸ See, e.g., Robert Mnookin, *Beyond Kiddie Libbers and Child Savers*, J. CLIN. CHILD PSYCH., Fall 1978, at 163 ("I would like to conclude with a plea for your help. Psychologists can help move the policy debates concerning children's rights beyond the rhetoric of both the child savers and the kiddie libbers.").

⁴³⁹ See, e.g., Hartman, *supra* note 7, at 1269 (proposing a President's Commission for the Study of Adolescence).

away from false assumptions and toward laws that are based on fact.

The second disconnect—the internal inconsistency in the way the law views children—is a bit more complex. If one subscribes to the Langdellian notion of law-as-science, then a body of law that is consistent furthers rationality and logic, a worthy end in and of itself. On the other hand, some have suggested that in the area of children, other policy goals may override our desire to see a scientific, rational, and logical system of laws.⁴⁴⁰ However, this can present a problem for children and third-parties. Children may suffer from “cognitive dissonance”—because the law treats them differently depending on the category of their behavior, they may be made uncomfortable⁴⁴¹ and confused, and their development as citizens can be impaired. Part of the rationale for extending the right to vote to 18-year-olds was because of the message it was sending them otherwise: You are only incomplete citizens of the country, but are nevertheless expected to serve and possibly die for your country in the armed services.⁴⁴² Perhaps underage drinking is so prevalent (notwithstanding the laws against such behavior) because 18 to 20-year-olds, desiring to be considered as full adults, specifically decide to engage in behavior that only full adults can do. In addition, there is value in bringing consistency to the law of children because it would aid third-parties dealing with children. Part of the concern with children’s incapacity to contract, for example, is that it conflicts with society’s current understanding of children’s role in the marketplace. Children contribute millions of dollars to the economy each year.⁴⁴³ I suspect that the average person would be shocked if told about the law of disaffirmance, given today the actions of the modern, market-savvy teenager. Furthermore, children, in many states, can work. This is an individualized determination because a child’s parents must consent to his or

⁴⁴⁰ Beschle, *supra* note 48, at 102.

⁴⁴¹ *Id.* at 67-68 (“Social science has demonstrated that individuals are made uncomfortable when they hold two inconsistent opinions.”).

⁴⁴² *See supra* Part II.A.2.

⁴⁴³ *See supra* Part II.A.1.

her employment. Yet, the law of disaffirmance is not individualized. The law does not look to see whether a particular contract is fair to the minor. A consistent approach to the law of children would make it easier for the law to put third-parties on notice about their responsibilities vis-à-vis children.

We have heretofore proceeded on differing assumptions about children's decisionmaking abilities—this is the inconsistency that I find most troubling. Contract law views all children as improvident and immature. The Supreme Court believes some children are mature enough to decide to have an abortion. In proposing that we work towards cohesiveness in this area, I am not necessarily advocating that the law should not make distinctions based on the type of right or responsibility that is involved. For example, after debate and investigation, a law reform effort may very well conclude that children may be psychologically capable of making a simple contract, but not capable of consenting to major surgery. It is logical to assume that children's psychological capacity will vary based on the circumstance.⁴⁴⁴ What I am calling for, however, is consistency in how we use capacity and in our understanding of what children are capable of. Decisionmakers have been imposing their own, subjective, untested assumptions about children to the areas over which they have had jurisdiction. Further, some decisionmakers—such as the Supreme Court—have themselves taken different views of children. The cases of *Parham v. J.R.* and *Fare v. Michael C.* are a good example of this. If different treatments should exist, we should be able to articulate *why*, instead of pretending that those differences do not exist.

⁴⁴⁴ Beschle, *supra* note 48, at 103 ("Perhaps [adolescents' decision-making] competence varies in different contexts, and the ability to make a responsible decision as to things like health care and reproduction issues is noticeably different from the ability to choose to obey or not obey the criminal law."); Saharsky, *supra* note 283, at 1162 ("It would be impracticable to make the ages of maturity for all activities consistent, and it would be nonsensical to tie the age at which the death penalty may be imposed to the age at which one may purchase pornographic material or gamble.").

It may be that further research into this area will lead psychologists and law reformers to call for the creation of a new category of personhood, adolescence.⁴⁴⁵ This would be a significant move away from the binary classification system of people as either children or adults.⁴⁴⁶ Several experts in this area have already called for the law to view children, above a certain age, as categorically or presumptively capable of making decisions. It may be premature to head in this direction given how little we know about children's minds and particularly their susceptibility to psychosocial influences that Steinberg and Cauffman have researched.

Presumptive capacity, as opposed to *categorical* capacity, may not necessarily be a better compromise. Initially, we must determine *who* should decide the question of capacity⁴⁴⁷—presumably a judge or other neutral fact-finder. Then we must consider the high costs of burdening an already busy court system with these types of decisions.⁴⁴⁸ An individualized system is not necessarily more effective at reducing the number of false positives or negatives.⁴⁴⁹ Rather, such a system may lead to greater uncertainty because a minor's rights and responsibilities are subject to the whims and assumptions of the particular factfinder who is assigned the minor's case.⁴⁵⁰ The fact-finder would have tremendous discretion. Are we willing to vest an individual with such power?⁴⁵¹ The resulting uncertainty means that minors or the

⁴⁴⁵ See, e.g., Allen & Allen, *supra* note 353, at 426; Hartman, *supra* note 7, at 1355-56 (proposing a new category of adolescence, in which capacity is presumed).

⁴⁴⁶ Professor Scott has defended the binary classification system as efficient, although arguably incoherent. Binary classification sends a clear message to children and their parents about when adulthood has been achieved, although there is some incoherency based on the category that is involved. Scott, *Legal Construction*, *supra* note 14, at 548.

⁴⁴⁷ Mnookin, *supra* note 438, at 166.

⁴⁴⁸ Garvey, *supra* note 10, at 1767; Mlyniec, *supra* note 23, at 1905; Scott, *Legal Construction*, *supra* note 14, at 561; Teitelbaum, *supra* note 8, at 817-18.

⁴⁴⁹ Garvey, *supra* note 10, at 1767.

⁴⁵⁰ Mnookin, *supra* note 438, at 164.

⁴⁵¹ *Id.* at 166 (illustrating the problem with individualized determinations, Professor Mnookin asks the question, "How would you feel about a legal

adults that must interact with them are not put on notice as to the former's legal status.⁴⁵²

B. Relative Institutional Competence and Codification

If we decide that the inconsistencies that have been identified here should be resolved, it remains to be determined how such a law reform effort should take place. One of the reasons why the law of children is such a hodgepodge mess is because so many institutional actors have shaped and manipulated the law. Their concerns have been specific to particular issues. In those rare instances when an institution has been concerned with having a consistent legal paradigm for children, it has often limited its inquiry to a few areas and not the entire spectrum of legal rights and responsibilities for young people. For example, much has been made of the interrelationship between the law of abortion and capital punishment. The differences in the Supreme Court's jurisprudence between these areas has been documented, critiqued, and defended. Yet, these areas have not been reconciled with the extremely paternalistic view that continues to exist in contract law.

In bringing order to this chaos, I propose the following: A group of experts in the fields of law and child psychology should develop a Model Children's Code with the hope of creating a document that contains the best knowledge of children's capacity and attempts to bring some consistency to this area of law. This carries with it a two-fold recommendation: first, legislative action is the best way to resolve the current conflicts in the law regarding children; and, second, legislatures, using the Model Code as a guide, should create a comprehensive body of law through codification.

I will address the issue of relative institutional competence first, since if legislatures are not the best

system that allowed persons of any age to vote but only if a state official first determined that they were sufficiently responsible and mature?").

⁴⁵² Scott, *Legal Construction*, *supra* note 14, at 561 (2000); Teitelbaum, *supra* note 8, at 817-18.

institutions to fix the problems I have identified, then codification will not be possible. When we ask, as a policy matter, which institution in a democratic republic should make a decision, we are really asking which institution is *best* suited to carry out the task. This recognizes three things. First, institutions have different competencies⁴⁵³— for example, courts are better at adjudicating individual disputes than a legislature. Second, all institutions may be capable, but one is more capable than the others. Third, no institution may be ideal, but we have to pick between the lesser of two (or several) evils. Thus, institutional competence is relative.⁴⁵⁴ We are not asking which is the best decisionmaker; instead we are asking which is the best compared to all of the other choices.⁴⁵⁵

Neither legislatures nor courts have done a particularly good job so far at developing a consistent approach to children's rights and responsibilities. Both have made a great deal of assumptions about child development, without giving due consideration to the considerable amount of psychological research on the subject. The Supreme Court is a good example of the chaos that has reigned over this area of the law. On the same day of the same Term, the Supreme Court decided *Parham v. J.R.* and *Fare v. Michael C.*, yet two

⁴⁵³ Steven Graines & Justin Wyatt, *The Rehnquist Court, Legal Process Theory, and McCleskey v. Kemp*, 28 AM. J. CRIM. L. 1, 7 (2000).

⁴⁵⁴ Lillian R. BeVier, *Religion in Congress and the Courts: Issues of Institutional Competence*, 22 HARV. J. L. & PUB. POL'Y 59, 62 (1998) ("When we talk about the institutional competence of either the Court or Congress, we must remember that we are talking about an "as compared to what" question. Institutional competence is relative.").

⁴⁵⁵ See generally WILLIAM N. ESKRIDGE, JR. ET AL., CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 572 (3d ed. 2001); HENRY M. HART & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 4 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994); Larry Alexander, *Constitutional Rules, Constitutional Standards, and Constitutional Settlement: Marbury v. Madison and the Case for Judicial Supremacy*, 20 CONST. COMMENT. 369, 376 (2003); Sheila Foster, *Intent and Incoherence*, 72 TUL. L. REV. 1065, 1105-7 (1998); Gary Peller, *Neutral Principles in the 1950's*, 21 U. MICH. J. L. REFORM 561, 569-70 (1989).

different sets of assumptions about childhood emerged.⁴⁵⁶ In *Parham*, the Court found adolescents lacked the capability to decide whether to voluntarily be admitted to state mental hospitals.⁴⁵⁷ In *Fare*, the Court found that children were presumptively capable of waiving their *Miranda* rights and that no special standard should apply to such waivers.⁴⁵⁸

The problem with courts is that they can only decide individual cases.⁴⁵⁹ In a common law system, the collective body of law is the sum of its parts (judicial opinions deciding individual cases).⁴⁶⁰ As such, it is malleable and changeable over time. But like a large ship, it requires a long time to make any fundamental change in course. Except in the area of constitutional law by the Supreme Court, one decision is not likely to have a large effect on the greater whole.⁴⁶¹ There is further an eternal tug-of-war between judicial decisions. This makes it difficult to bring any real consistency to a body of law, except on a very generalized level.

Part of my criticism of courts is that they have rested on their own assumptions about child development.⁴⁶² These

⁴⁵⁶ Melton, *Consent*, *supra* note 48, at 5.

⁴⁵⁷ See *supra* Part II.A.6.

⁴⁵⁸ See *supra* Part II.B.6.

⁴⁵⁹ HART & SACKS, *supra* note 455, at 163.

⁴⁶⁰ Litigants usually do not turn to courts to change the law. Rather, they file and defend lawsuits in order to help their individual stakes. *Id.* at 163 ("In the development of Anglo-American legal systems, courts have functioned characteristically as the place of initial resort for the settlement of problems that have failed of private solution. ... Disputants with a sense of wrong are likely to seek first of all not a change in the law but a declaration that existing law is in accordance with their position.").

⁴⁶¹ Courts, in some sense, "make law" but only to the extent they do so in the context of deciding individual disputes. *Id.* ("the grant of an official remedy [to a court] on account of what has happened in the past may involve a determination of importance to the future. ... To the extent that the court assigns generalized grounds for its decision and to the extent that those grounds are respected in the disposition of similar controversies thereafter, the determination will serve also to guide the future. In some sense 'law' will have been 'made.'").

⁴⁶² See, e.g., *Roper*, 543 U.S. at 569 ("[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions."

assumptions often do not comport with the reality of the “street” or with our current understanding of child psychology. From an institutional point-of-view, however, it is difficult to ask courts to weigh various, and possibly competing, psychological studies. When an appellate judge cites to a published study, he or she has not tested that study in either the laboratory or the witness stand.⁴⁶³ This has resulted, as Justice Scalia pointed out in *Roper*, in the possibility of a battle of the studies in a given case. Appellate courts are not as suited as legislatures to conduct informal hearings and debates about the relative merits of various studies.

Legislatures have likewise not been beacons of consistency, either. During the 1980s and 1990s, many states lowered the age of transfer (indicating a view that certain juveniles were mature enough to be prosecuted as adults) while simultaneously raising or keeping the drinking age at 21 (indicating a view that even some adults (18- to 20-year-olds) are categorically immature to make the simple decision about whether or not to consume alcohol).⁴⁶⁴ Other legislatures have tinkered with the law of children in a very piecemeal fashion. The creation of exceptions to the categorical rule of incapacity in medical decisionmaking is a prime example.

Nevertheless, as between the two, legislatures are best suited to decide “substantive issues involving preferences, values, and ends.”⁴⁶⁵ These issues can be decided using “democratic procedures.”⁴⁶⁶ Courts are not suited to make policy preferences or to engage in guesswork; they, instead, are good at reaching reasoned results in individual cases.⁴⁶⁷ However, legislatures only have relative institutional

(quoting *Johnson v. Texas*, 509 U.S. 350, 367 (1993)); see also Mlyniec, *supra* note 23, at 1874 (arguing that courts should decide “cases not on the basis of personal experience, societal beliefs, or personal assessments about ‘how things should be,’ but on the facts presented to the court, the law as it has developed, and on scientific rather than conventional wisdom regarding life around us.”).

⁴⁶³ Melton, *Consent*, *supra* note 48, at 12.

⁴⁶⁴ Brink, *supra* note 17, at 1585.

⁴⁶⁵ Peller, *supra* note 455, at 594.

⁴⁶⁶ *Id.*

⁴⁶⁷ *Id.* at 595.

competence if their processes are reasoned and deliberative.⁴⁶⁸ In practice, certain normative questions may not be capable of reasoned deliberation because of “various pressures or constraints” which motivate legislators to answer these questions incorrectly.⁴⁶⁹

So when is a legislative enactment the product of reasoned deliberation? Hart and Sacks posit three requirements. First, the process must be informed. The legislature must gather all relevant information before making its decision. Second, the process must be deliberative. There should be an exchange of views. Third, the process must be efficient, with the most important matters being considered before the others.⁴⁷⁰ The law of children is particularly suited for resolution by legislatures, not courts. If we are to have consistency in this area of the law, we must decide which institution is *best* suited to do so, realizing that no institution is perfect. On balance, I favor state legislatures. To bring consistency to the law of children, we need to decide two things: first, what are children capable of doing, and, second, what competing policy values favor basing their legal competency on something other than capacity? These are the types of fact-finding and policy-making that legislatures are best suited to do. Psychologists and legal scholars could testify at committee hearings and legislators can debate the relative merits of various positions and studies, in a way that a court cannot do.⁴⁷¹ Of course, the whole process would be aided if such legislative debates had been flushed out earlier—hence, I propose that we in the academic community work towards developing a Model Children’s Code, one that states could adopt in whole or in part, in much the same way that the

⁴⁶⁸ HART & SACKS, *supra* note 455, at 695; ESKRIDGE, *supra* note 455, at 572.

⁴⁶⁹ Alexander, *supra* note 455, at 376.

⁴⁷⁰ HART & SACKS, *supra* note 455, at 695; ESKRIDGE, *supra* note 455, at 572.

⁴⁷¹ At least one legislator has noted the inconsistency in the law's treatment of children. State Representative Mark Pettis of Wisconsin proposed a bill that would lower the drinking age in his state to 19 for soldiers. Ross, *supra* note 105.

Uniform Commercial Code and the Model Penal Code have done with commercial law and criminal law.

Not every inconsistency in this area of law could be resolved by a state legislature and so my idea of a Model Children's Code may not be adoptable *in toto* by the states. Some matters are of the domain of the federal government, such as the federal juvenile justice system, the draft, and federal voting requirements. Other matters are for the U.S. Supreme Court: free speech in schools, for example. This should not stop academics and psychologists from creating scholarship that tries to tie in these areas of the law with the work of a Model Children's Code. Through an informal education process—that is, after all, one of the main reasons we in academia write law review articles—the Court could be influenced to take a fresh and informed look at its children's law decisions.

Since legislatures are better suited than courts to restructure the law of children in an organized, comprehensive, coherent, and scientifically-sound manner, it remains to be determined what type of product the legislature should produce. I argue here in favor of codification precisely because what is needed is an organized, comprehensive, coherent, and scientifically-sound product. The inconsistencies that others and myself have documented warrant a wholesale revision—not just restatement—of the law of children.

Codification is uniquely continental.⁴⁷² With a few exceptions—most notably being the Uniform Commercial Code and rules of procedure—codification has not been widely used in the United States.⁴⁷³ The codification movement began with Jeremy Bentham, who saw benefits of a single, universal code to govern all areas of the law.⁴⁷⁴

⁴⁷² Daphne Barak-Erez, *Codification and Legal Culture: In Comparative Perspective*, 13 TUL. EUR. & CIV. L.F. 125, 126 (1998). Codification can trace its roots to Roman law. *Id.*

⁴⁷³ Jean Louis Bergel, *Principle Features and Methods of Codification*, 48 LA. L. REV. 1073, 1076 (1988).

⁴⁷⁴ Suzanne Mounts, *Malice Aforethought in California: A History of Legislative Abdication and Judicial Vacillation*, 33 U.S.F. L. REV. 313,

Bentham's code would have been unalterable, except by legislative action.⁴⁷⁵ Codification grew out of a distrust of the courts, who were criticized for making law in an *ex post facto* and *ad hoc* fashion.⁴⁷⁶ A code, Bentham believed, would be more accessible to the people since a well-written, clear, and brief code could be understood by a layperson. In contrast, understanding the common law required the assistance of a lawyer.⁴⁷⁷

Codification is more than merely the task of collecting existing laws and reorganizing them in order to make them easier to find. This is a "purely formal codification," "compilation," or "consolidation."⁴⁷⁸ Many state codes are organized by subject,⁴⁷⁹ for example, but they are not codifications. A true codification requires a systematic and rational plan for an area of law.⁴⁸⁰ It is designed to "institut[e] a coherent body of new or renewed legal rules."⁴⁸¹ It is more than a mere reorganization of the law; it is a rewriting of the law. Prospective in nature, a codification serves to create an intelligent framework for a body of law; all future changes to the law must keep this framework in mind.⁴⁸² Hodgepodge amendments are frowned upon. Codification does not require a legislature to define the resolution of every issue. Where

320 (1999). The Enlightenment had a consistency of its own—the desire to bring rational thought and scientific process to all areas of knowledge, including law. Codification, not common law, was seen as the way to bring rationality and order to law. Barak-Erez, *supra* note 472, at 126.

⁴⁷⁵ Mounts, *supra* note 474, at 320.

⁴⁷⁶ *Id.* at 320-21.

⁴⁷⁷ *Id.* at 320-21; Mark D. Rosen, *What Has Happened to the Common Law?--Recent American Codifications, and Their Impact on Judicial Practice and the Law's Subsequent Development*, 1994 WIS. L. REV. 1119, 1123-24 (1994); Barbara C. Salken, *To Codify or Not to Codify---That is the Question: A Study of New York's Efforts to Enact an Evidence Code*, 58 BROOKLYN L. REV. 641, 645 (1992) ("Bentham thought that the solution lay in writing law in simple language and covering an entire field, thereby leaving little or nothing for judges or commentators to interpret.").

⁴⁷⁸ Barak-Erez, *supra* note 472, at 1127-36; Bergel, *supra* note 473, at 1076.

⁴⁷⁹ See, for example, the New York, Texas, and U.S. codes.

⁴⁸⁰ Bergel, *supra* note 473, at 1076.

⁴⁸¹ *Id.* at 1078.

⁴⁸² *Id.* at 1079.

rules are too rigid, legislatures can create standards for courts or administrative agencies to implement.⁴⁸³

Codification does have its limits and drawbacks. Principally, there can be a tendency for the law to become stagnant. The benefit of the common law is that it can evolve with changing expectations. For codification to be effective, there should be a commitment to reexamining its critical assumptions from time-to-time and to ensure that any amendments proceed with the goal of reaching a new, consistent vision.

I remain persuaded, however, that on balance this area would benefit from the creation of a model code in order to bring the legal system “up to speed” with current psychological research⁴⁸⁴ and to bring internal consistency to the law.

Conclusion

In the area of children and the law, inconsistency is not necessarily a bad thing. By definition, children grow and develop. It is not unreasonable to conclude that our expectations of what children are capable of will vary by age. Not every decision carries the same weight or consequences. In this article, I have attempted to demonstrate that a problem exists in the *way* these inconsistencies have developed over time. There is no intelligent design or cohesive vision to this area of law. Decisionmakers, particularly courts, have used unsupported rhetoric and assumptions to justify their conclusions about what children are capable of. Children, their parents, and third-parties would all benefit from a

⁴⁸³ ESKRIDGE, *supra* note 455, at 572 (“If the legislature decides to deal with a social problem through specific rules, it is expressing its confidence that it was sufficient information to solve the social problem. If the legislature is unsure of how to proceed, it will adopt a standard, essentially delegating rulemaking responsibilities to courts, agencies, or private institutions.”); Graines & Wyatt, *supra* note 453, at 8.

⁴⁸⁴ Academics would have an easier time of ensuring that the code remains up-to-date and does not become frozen. This, in turn, could lead to legislatures following suit.

comprehensive revision and codification of this field. The academic communities of psychology and law should take a fresh look at this subject with the goal of creating a Model Children's Code which could guide legislatures in bringing an intelligent and coherent vision to children's legal status.

