CHAPTER 10

The Legal Regulation of Adolescence

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The scientific view of the boundaries between childhood and adulthood recognizes adolescence as a discrete developmental period "beginning in biology and ending in society," (Lerner & Galambos, 1998, p. 414). Scientists generally divide the span of adolescence into early (ages 11 to 14), middle (ages 15–18) and late (ages 18–21) periods (Steinberg, 2008). Few believe that development in all domains tracks these phases with stagelike consistency, but instead considers adolescent development as a series of transitions to maturity, the pace of which varies among adolescents and across domains within an individual (Steinberg, 2008). Biological, cognitive, and social transitions affect adolescents' capacities to respond to their environment and elicit changing expectations and reactions from the larger social world (Lerner & Galambos, 1998; Steinberg, 2008).

To what extent does legal regulation recognize the developmental reality of adolescence as a discrete stage and distinguish between adolescents and children (and between adolescents and adults)? The answer is, not very much at all. Generally, policymakers ignore this transitional developmental stage, classifying adolescents legally either as children or as adults, depending on the issue at hand. Lawmakers have quite a clear image of childhood, and legal regulation is based on this image (Scott, 2000). Children are assumed to be vulnerable and dependent and to lack the capacity to make competent decisions. Thus, not surprisingly, they are not held legally accountable for their choices or behavior. Children also are not accorded most of the legal rights and privileges that adults enjoy, such as voting, driving, drinking, and making their own medical decisions. Finally, children are assumed to be vulnerable and unable to care for themselves, and thus their parents and the government are obligated to provide the care, support, and education that allow them to develop into healthy adults. Once children cross the line to legal adulthood, they are considered autonomous citizens responsible for their own conduct, entitled to legal rights and privileges, and no longer entitled to protections.

The simple binary classification of legal "childhood" and legal "adulthood" in fact is more complex than it seems because the boundary between childhood and adulthood varies depending on the policy purpose. For example, for most purposes, children become legal adults on their 18th birthday, which is the modern "age of majority" in most states. However, 20-year-old college students are legally prohibited from drinking alcohol, while youth in elementary school can be subject to the adult justice system when they are charged with crimes. Thus, although legal regulation offers a clear account of the attributes of children that indicate the need for treating them differently from adults under the

This chapter draws on Elizabeth Scott, "The Legal Construction of Adolescence," *Hofstra Law Review 29:* 547–98 (2000).

law, children's legal status is complicated by the shifting boundary between childhood and adulthood.

For most purposes, adolescents are described in legal rhetoric as though they were indistinguishable from young children, and are subject to paternalistic policies based on assumptions of dependence, vulnerability, and incompetence. For other purposes, teenagers are treated as fully mature adults, who are competent to make decisions, accountable for their choices and entitled to no special accommodation. The variation is due mostly to the fact that different policy goals are important in different context, rather than to efforts to attend to variations in developmental maturity in different domains. For example, although many of the same cognitive and psychosocial capacities affect decision making both behind the wheel and in a bar, allowing 16-year-olds to drive gives young persons independence and mobility, while restricting the privilege to buy alcoholic beverages until age 21 protects youth (and the rest of us) from the costs of immature judgment.

Is there a cost to a legal approach that ignores the developmental realities of adolescence? In our view, the binary classification of childhood and adulthood works quite well for most purposes. It has the advantage of simplicity and administrative efficiency, and arguably it promotes parental responsibility by linking parents' support obligation to their children's general status as dependents. Moreover, because adult rights and duties are extended at different ages for different purposes, the transition to adulthood takes place gradually, even without an intermediate stage of legal adolescence. Adolescents may benefit if they are allowed to make some adult decisions, but not others. To return to our example, 16-year-olds acquire experience in the adult domain of driving long before they are legally authorized to make other adult choices, such as drinking. Thus, even though the crude legal categories distort developmental reality, for the most part, the binary classification system is not harmful to the welfare of adolescents or to general social welfare. In fact, in some areas in which legal regulation subjects adolescents to special treatment (different from adults or children), youth would be better served by the standard approach. As we will discuss, regulation of adolescent abortion is such a case.

In some contexts, however, binary categorical assumptions that ignore the transitional stage of adolescence can lead to harmful outcomes. Juvenile justice policy provides a stark example of a failure of the binary approach. This is an arena in which the boundary of childhood shifted dramatically over the course of the twentieth century, and strikingly different accounts of young offenders have been deployed in service of the different policy agendas. The juvenile justice system was established at the end of the nineteenth century with the purpose of providing rehabilitation to young offenders instead of punishment in the criminal justice system. The Progressive reformers who founded the juvenile court were very committed (in their rhetoric, at least) to describing and dealing with young offenders as children (Van Waters, 1926). In recent years, a major law reform movement has transformed this system, such that today even preadolescents can be tried as adults for serious crimes in many states (Snyder & Sickmund, 2006). Developmental research indicates both portraits (i.e., adolescents as children and adolescents as adults) are largely fictional; developmental reality is much more complex. Moreover, in our view, both the romanticized vision of youth offered by the early Progressive founders and the harsh account of modern conservatives have been the basis of unsatisfactory policies. In contrast to many other areas of legal regulation, binary classification in the juvenile justice sphere imposes significant costs on both young offenders and society. In this context, effective legal regulation requires a realistic account of adolescence based on developmental theory and empirical research.

For over 30 years, social scientists and legal scholars have argued for the need for

developmental research on adolescence to inform legal policy and practice (Grisso & Lovinguth, 1982; Melton, 1981; Reppucci, Weithorn, Mulvey, & Monahan, 1984; Wald, 1976). In this chapter we describe and evaluate the extent to which legal regulation recognizes the developmental reality of adolescence and differences between adolescents and either children or adults. First, we present the legal account of childhood, sketching the traits that are assumed to distinguish children from adults, and the absence of any clear vision of adolescence. Next, we describe how the legal boundary between childhood and adulthood is determined, and we show that the judgment is determined by policy (and politics) as much as science. Our analysis includes a description of the forces that led to the passage of the 26th Amendment, which extended voting rights to 18-year-olds—an enactment that led states to lower the age of majority for many other purposes. We then examine medical decision making and abortion rights; the latter is an issue that clarifies the difficulties in creating a special legal status for adolescence. Finally, we examine juvenile justice policy, and explain why binary classification has not worked well in this context. We describe recent research that supports the conclusion that a justice policy that treats adolescence as a distinct legal category not only will promote youth welfare, but will also help reduce the costs of youth crime.

LEGAL ASSUMPTIONS ABOUT CHILDHOOD

Several assumptions undergird the legal regulation of children. Because children are assumed to be incapable of looking out for themselves, they need adult care and protection. Specifically, three interrelated dimensions of immaturity guide legal policy. First, children are dependent beings, and must rely on adults to meet their basic needs for survival—food, shelter, clothing—and for education and care to allow them to mature into healthy, productive adults. Children are also presumed to be incapable of making sound decisions, due to cognitive immaturity that limits youthful understanding and reasoning, and psychosocial immaturity that may lead to poor judgment and harmful or risky choices (Scott, 1992; Zimring, 1982). Finally, children are presumed to be malleable, making them susceptible to influence and vulnerable to harm from others (Van Waters, 1926).

These assumptions about childhood justify the need for adult control over children's lives and clarify why the legal rights, privileges, and duties assigned to adults are not extended to children. The law accords parents the primary authority and responsibility for rearing children and caring for their needs. Parents have authority to make decisions about all aspects of children's lives, from medical care and education to the most mundane aspects of daily living. In turn, the law charges parents with safeguarding children's welfare and protecting them from harm. The U.S. Supreme Court elaborated on the basis of parents' legal and constitutional authority in *Parham v. J.R* (1979), an opinion that dealt with the commitment of children to state psychiatric hospitals:

> The law's concept of a family rests on a presumption that parents possess what children lack in maturity, experience, and capacity for judgment required to make life's difficult decisions. More importantly, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children. (p. 602)

Parents do not have blanket authority in making child-rearing decisions, however. When parents fail to fulfill their duties, the consequences redound to the child and to a society interested in a healthy, productive citizenry. When parents abuse or neglect their children, the state intervenes on children's behalf under its *parens patriae* authority to protect the welfare of minors (Rendleman, 1971). The state also preempts parental authority categorically on some matters. Thus, parents' decisions about their children's behavior are subject to child labor and compulsory school attendance

laws that remove discretion on these matters (*Prince v. Massachusetts*, 1944).

The unique legal status of children is revealed in several distinct aspects of legal regulation. First, the rights and privileges of children are more restricted than are those of adults. For example, concerns about juvenile crime and victimization led to curfew laws that restrict minors' nighttime freedom in ways that would clearly be unconstitutional if applied adults (*Schleifer v. City of Charlottesville*, 1997). Limitations on free speech (such as censorship of school newspapers) are imposed on youth because of their presumed vulnerability (*Hazelwood School District v. Kuhlmeier*, 1988; *Morse v. Frederick*, 2007). Minors are not permitted to vote, drink alcohol, drive a vehicle, or give consent to their own medical treatment.

Second, children are not held accountable for their choices or responsible for their behavior to the same extent as adults because of assumptions about their cognitive and social immaturity and vulnerability to influence. For example, under the infancy doctrine in contract law, minors can avoid liability on their contracts, presumably because they cannot be expected to exercise adult-like judgment or to resist a seller's influence when considering a purchase (Scott & Kraus, 2007). Also, youth (traditionally, at least) have not been held to adult standards for their criminal conduct. The juvenile court was created in part on the premise that youthful misconduct is in part a product of immaturity and that young offenders are less culpable than their adult counterparts (Arenella, 1992; Scott & Steinberg, 2003).

Third, children are accorded special legal protections and entitlements because of their dependency. Parents are required by law to provide the necessities of food, shelter, clothing, and care for their children and the government subsidizes the provision of these services when parents who are financially unable to do so themselves. The public education system guarantees a free education to children in all states. Civil and criminal child maltreatment laws encourage parents to care for their children; failure to do so can result in coercive interventions ranging from parenting assistance to termination of parental rights and/or criminal conviction.

In summary, assumptions about the vulnerability, incompetence, and dependency of children result in a complex set of regulations that accord children a unique status in law. Minors are provided special legal protections and entitlements, held less accountable for their actions, and accorded fewer rights and privileges than adults. Policy makers have multiple goals of protecting children, promoting parental responsibility, and ensuring that children mature into productive adults, all of which are grounded in a set of shared assumptions about what it means to be a child.

DRAWING THE LINE BETWEEN LEGAL CHILDHOOD AND ADULTHOOD

Although the law sets varying age boundaries depending on the domain of interest, the presumptive boundary between childhood and adulthood is the legal age of majority, which currently is age 18. To some extent, this line tracks developmental knowledge; late adolescents are more similar to adults than children in their physical and cognitive development (Gardner, Scherer, & Tester, 1989; Siegler & Alibali, 2004). However, childhood has multiple legal boundaries that are reflected in a complex system of age grading. Deviations from the age of majority can be explained in part as justified because different decision-making domains require different maturity levels. For example, greater maturity is required to serve as president than to drive a motor vehicle. However, although assumptions about maturity and immaturity play a role in the legal judgment about when children become adults for different purposes, other considerations factor into the age grading scheme. Lawmakers balance the competing goals of promoting youth welfare, protecting parental authority, and considering societal benefit. Administrative efficiency also plays a role, as

does political controversy and compromise, as is seen most clearly in the debate over minors' access to abortion. In this section, we examine the categorical approach of the age of majority, and then turn to medical decision making and abortion access to illustrate the complexity of domain-specific variation in the legal view of adolescence. Both of these latter issues have generated interest among researchers interested in evaluating the legal standard guiding boundary drawing by comparing adolescent and adult capacities.

The Age of Majority: The Legal Invisibility of Adolescence

The age of majority functions as the threshold to legal adulthood for many purposes. Upon attaining the age of 18, adolescents are no longer subject to parental authority; parents are no longer responsible for their children, and the state withdraws the services and protections available under its *parens patriae* powers. Eighteen-year-olds have the legal authority to consent to medical treatment, to execute contracts, deeds and leases, to vote, and to serve on juries (e.g., *Va. Code Ann.* §1-13.42). They are considered responsible, autonomous individuals who bear the consequences, both good and bad, of their actions and choices.

The legal age of majority represents a crude judgment that late adolescents are mature enough to function in society as adults, but it is not tailored to recognize any specific developmental milestone. Life-span research confirms that development is by no means complete at age 18; indeed, some have suggested that young adulthood should constitute a new post-adolescence phase of development (Arnett, 2000; Arnett & Tanner, 2006). Differences between late adolescents and adults are a matter of degree rather than kind, yet as with most phases of development individuals vary widely in their capacities (Scott, Reppucci, & Woolard, 1995; Steinberg & Cauffman, 1996).

The categorical age of majority ignores variation among individuals as well as varying maturity demands in different decision domains, but extending legal childhood into late adolescence has some advantages, even though adult privileges and rights likely are often withheld from competent youth (Melton, 1983a). An extended dependency period assures that youth receive protections and support, both from their parents and from the government, and it may reinforce parental responsibility (Scott & Scott, 1995). A bright line rule creates certainty regarding expectations for the relationship between youth, parents, and the state. Domain- or decision-specific assessments of adolescents' capacities would undermine that certainty, creating a complex, inefficient, and costly process prone to error. Moreover, for most purposes postponement of adult status imposes few costs on adolescents. Thus, even though it sacrifices developmentally accuracy, the categorical approach embodied in the current operationalization of the age of majority meets most of the legal system's needs with minimal developmental cost to adolescents.

The right to vote has long been a defining marker of legal adulthood, and it has historically been linked to the age of majority. A cornerstone of participatory democracy, the right to vote is withheld from minors because they are presumed less capable of exercising the right through educated, informed understanding (Cultice, 1992). Thus, the question of when individuals are capable of exercising this right is a consideration in the judgment of when the right should be extended. In the 1960s, research suggested that adolescents possess some of the capacities that are important to political participation. For example, abstract understanding of rights, a sense of community, and conception of the individual as part of the larger social contract develop throughout adolescence into adulthood (Adelson & O'Neil, 1966; Torney-Purta, 1992). Moreover, recent research that separates understanding of rights, civil liberties, and democracy from hypothetical situations that place rights in conflict with other moral principles, even young children evince more

sophisticated understanding that previously thought (Helwig & Turiel, 2002; chapter 7, vol.1, this *Handbook*).

Most of that early work on "political socialization" focused on attitudes and perceptions of children and adolescents, rather than their underlying cognitive capacities. More recent work examines the development of political socialization and cognitive representations of the social order and political system (e.g., Helwig & Turiel, 2002; but empirical data on age differences between adolescents and adults or developmental trajectories are quite limited (see chapter 7, vol. 1 of this *Handbook*). Although some reviews of political socialization research suggest that there is no particular point when persons learn about politics or develop civic engagement (Dudley & Gitelson, 2002; Flanagan & Sherrod, 1998; Sherrod, Flanagan, & Youniss, 2002), recent theoretical and empirical research supports the importance of civically motivated behavior during adolescence as a predictor of civic engagement, including voting behavior, in adulthood (Campbell, 2006).

Although adolescents may possess the necessary capacities to engage in informed voting behavior, only rarely in our history has attention focused on the age at which the right to vote is extended, and for the most part, few objections have been expressed over withholding this right from minors—in contrast to protest over withholding other constitutionally protected rights, such as the right to make abortion decisions. This probably reflects recognition that it would be costly to identify those individual adolescents who are capable of making informed voting decisions. Lawmakers may also assume that adolescents (and society) incur little harm by postponing the exercise of voting rights until age 18.

In the 1960s, these factors were overcome by a substantial and ultimately successful effort to lower the voting age from 21 to 18. The historical record of this important reform, which is embodied in the 26th Amendment to the U.S. Constitution, highlights the importance of the social and political factors in defining adult status, and underscores that developmental maturity may not be the core consideration (Cultice, 1992). During the Vietnam War, legal minors, who were not permitted to vote or exercise other adult rights, were being drafted into military service and sent into battle. Moreover, college students were actively engaged in political participation, protesting against the Vietnam War and in support of civil rights. Noting these political facts, the Senate committee that considered the proposal to lower the voting age also documented in its report that this age group already engaged in a number of adult roles as employees, taxpayers, and citizens subject to criminal laws and punishments (S. Rep. No. 92-26, 1971). The report emphasized that, for most purposes, psychological maturity is achieved by age 18.

The passage of the 26th Amendment offers an interesting account of the forces that influence judgments about when children become legal adults. First, social and political forces in large measure propelled the initiative to shift the boundary of childhood, but legislators also felt it was important to ground their proposal in substantive developmental claims about the cognitive and psychosocial maturity of 18-year-olds. Another interesting theme is that, in defining the boundary of adult status, lawmakers thought that parity should exist between rights and responsibilities. On this view, 18-year-olds were recast from children into adults with the most important right of citizenship because they were required to bear the most onerous civic responsibility—military service.

Because the right to vote has always been the marker of legal adulthood, the age of majority was lowered to age 18 for most purposes after the passage of the 26th Amendment. This took place through sweeping legislative and judicial action at both the state and federal level that lowered the age of adult status in domains as disparate as medical decision making, contracting, and entitlement to support.

Medical Decision Making: Special Legal Status for Adolescents

In contrast to the sparse empirical foundation for the extension of voting rights to late adolescents, a substantial body of research has focused on adolescents' capacity to consent to medical treatment. Although in general, adolescents are subject to their parents' authority in this realm, the law has granted adolescents the authority to consent to certain types of treatment without involving their parents. Moreover, a complex regulatory scheme governs adolescent decisions to obtain abortion; in this domain lawmakers have adopted the unusual approach of treating adolescents as a category distinct from childhood and adulthood. Although the capacities to consent to different medical procedures may develop comparably, different social and political considerations have shaped legal policies in these various contexts. Thus, the broad domain of medical decision making offers an interesting case study in how factors other than maturity may determine the boundary between childhood and adulthood.

Medical Treatment: Informed Consent and Mature Minors

Adolescents do not have the legal authority to consent to most medical treatments until they reach the age of majority. Presumed to lack the necessary capacities, they are subject to the decision-making authority of their parents, who are presumed to act in their children's best interests. The basis for parental authority in this area is relatively straightforward. Medical treatment must be based on competent informed consent—otherwise, the treatment provider commits a battery on the patient (e.g., *Younts v. St. Francis Hospital*, 1970). For consent to be informed, it must be knowing, rational, and voluntary (Meisel, Roth, & Lidz, 1977). In general, these legal concepts have been translated to mean that an individual must have a factual understanding of the information provided, utilize a rational process to assimilate information, and make a decision that is not simply the result of coercion or deference to another. Legal regulation gives parents authority to give informed consent to their children's (including adolescents') medical treatment, in part because lawmakers assume that children and adolescents are not competent to do so themselves.

Thus, an interesting threshold question is whether this assumption about adolescents' incompetence is valid. Competence is a legal construct that may differ depending on the context; a finding of competence to consent to one form of medical treatment does not necessarily indicate a generalized "competence to consent" to all treatments. Nonetheless, basic cognitive capacities known to develop during childhood and adolescence underlie the ability to provide informed consent, regardless of the specific context. Grisso and Vierling (1978) map the legal terms of *knowing, intelligent,* and *voluntary consent* onto relevant psychological concepts and developmental considerations. Using their framework, we summarize what is known about adolescents' capacities generally, providing detail from a recent review (Miller, Drotar, & Kodish, 2004) and empirical studies of informed consent.

Grisso and Vierling (1978) define *knowing* consent as the match between the meaning of the information provided to the patient and the meaning attached by the patient to that information; this implicates understanding of specific terms as well as ethical and legal concepts such as rights and confidentiality. Research on children's knowledge of rights reports an age-based progression from concrete thinking about what rights can do for an individual to more abstract appraisals of rights and moral implications, typically emerging in adolescence (Melton, 1980, 1983b; Melton & Limber, 1992), although concrete thinking about rights still persists in adolescence (e.g., Ruck, Keating, Abramovitch & Koegl, 1998).

Intelligent consent refers to the capacity for assimilating and processing the information in a rational manner to reach a decision. Such a process implicates a wide range of abilities

for abstract reasoning and logical thinking. Recent reviews conclude that these basic cognitive capacities have developed sufficiently by about mid-adolescence, although variations exist among individuals and within individuals across decision domains (Steinberg & Cauffman, 1996). In one study, for example, Weithorn and Campbell (1982) presented 9-, 14-, 18-, and 21-year-olds with hypothetical dilemmas regarding alternative treatments for two medical conditions (diabetes and epilepsy) and two psychological conditions (depression and enuresis). The 14-year-olds performed comparably to the two adult groups on outcome scores for evidence of choice, reasonableness of outcome (as judged by experts in the field), rationality of reasons, and understanding on three of four dilemmas. In the epilepsy dilemma, however, a higher percentage of adolescents rejected the reasonable treatment, which occasionally had physical side effects that might affect attractiveness. Although able to express a reasonable treatment choice, the 9-year-olds clearly demonstrated poorer capacities than adolescents and adults to understand and reason about the information provided.

Voluntary consent is given freely, not as a product of coercion or deference to others. Scherer and colleagues (Scherer, 1991; Scherer & Reppucci, 1998) presented groups of children, adolescents, and adults with three hypothetical treatment dilemmas in which the degree of parental influence varied. Most participants in all groups deferred to parental authority for less serious treatment decisions, but adolescents and young adults were less likely than children to go along with parental wishes regarding a kidney transplant. Developmental aspects of deference to the authority of medical personnel are less well known. In this realm, research on consent to treatment is sparse; once treatment decisions have been made, however, adolescents are generally less compliant than adults but rates vary by the type of treatment and related factors such as complexity of regime (Cromer & Tarnowski, 1989).

The research literatures on consent to treatment are limited by their reliance on samples of white, middle class youth responding to hypothetical vignette, but it indicates that, by age 14, most adolescents have developed the capacities to meet the threshold requirements for informed consent to medical and mental health treatment. Thus, empirical evidence largely contradicts the legal presumption of minors' incompetence to consent to treatment.

Even if many adolescents are competent to make medical decisions, giving parents legal authority may be a sensible policy for most medical treatments. It obviates the need and cost of individual competence assessments and it encourages parents to provide for their children's welfare—and to pay their medical bills. Moreover, although adolescents may be competent to make medical decisions within the informed consent framework, psychosocial influences on decision making may lead them to make choices that reflect immature judgment. For example, as mentioned, Weithorn and Campbell (1982) found adolescents more reluctant than adults to choose a beneficial treatment with untoward effects on physical appearance, perhaps due to greater youthful sensitivity to peer approval. In general, it seems likely that children and their parents do not have a conflict of interest about most treatment decisions, so the standard approach of giving parents authority generally functions satisfactorily to protect children's interests in this realm.

Most exceptions to the general rule that parents have authority to make medical decisions for their children arise in contexts in which minors' welfare and the general social welfare would be compromised if parental consent were required. The traditional mature minor doctrine allows older competent minors to consent to routine beneficial treatment or treatment in emergency situations when parents would likely consent or are unavailable (Wadlington, 1973). More interesting are statutes in many states that give minors the authority to consent to specific types of

medical treatments. These typically include treatment for sexually transmitted diseases, substance abuse, mental health problems, and contraception and pregnancy (e.g., *Va. Code Ann.* §44.1-2969).

These minor consent statutes presume that adolescents are competent to consent to the designated medical treatments, but not on the basis of a judgment about adolescent maturity. Instead, minors are allowed to seek treatment without involving their parents out of concern that the standard requirement of parental consent may expose vulnerable youth to harm. The harm may come from two sources. First, lawmakers may rightly be concerned that for the kinds of treatments targeted by minors' consent statutes, parents, in fact, may have a conflict of interest with their children; if so, the traditional presumption that parents will generally act to promote their children's welfare may not hold. For example, parents may be angry when they learn of their children's sexual activity or drug use. Just as important, adolescents' fears about the anticipated parental reaction, whether accurate or not, might deter some adolescents from seeking needed treatment. Removing the parental consent barrier to treatment benefits the adolescents themselves as well by encouraging them to seek treatment; it also may reduce the prevalence of harmful and costly conditions (e.g., drug addiction, unwanted pregnancy), and thus benefit social welfare as well.

Access to Abortion: Competing Ideologies and Developmental Capacities

Of the issues in which lawmakers have departed from the standard legal treatment of adolescence, none has generated more controversy than the question of when and if legal minors should have access to abortion. This debate has brought into stark relief conflicting perspectives on adolescents and their capacities. Conservatives depict pregnant teens as children who should be subject to their parents' authority, while advocates for youthful self-determination describe them as adults who should have the freedom to make their own decisions about abortions. Moreover, both sides are concerned not only with the developmental capacities and rights of minors, but also with the larger contest over abortion rights, regardless of age (Gorney, 1998; Rubin, 1998). Developed against the background of this intense controversy, the resulting legal framework is a complex product of judicial and political compromise. Thus, in many states, lawmakers regulating abortion have rejected the conventional binary classification and created a separate legal category for adolescents, in which teens are subject to judicial proceedings to determine whether they will be authorized to make their own decisions about abortion. We argue that this costly regulatory scheme harms the interests of pregnant teens and offers little in the way of social benefit.

Advocates of adolescent self-determination argue that adolescents should be accorded adult status in this context because the decision to terminate a pregnancy differs in many ways from other types of medical treatment. Because this choice is grounded in constitutionally based privacy and autonomy rights, lawmakers cannot ignore evidence that adolescents have the developmental maturity to make this decision. In the last 2 decades, researchers have struggled to investigate adolescent decision making about abortion in ecologically valid ways. Social scientists have examined many dimensions of the abortion decision, including moral and personal dimensions of reasoning (e.g., Smetana, 1981), patterns of consultation with others (e.g., Finken & Jacobs, 1996; Resnick, Bearlinger, Stark, & Blum, 1994), and the medical and mental health sequelae (Pope, Adler, & Tschann, 2001; Quinton, Major, & Richards, 2001).

The few studies that have focused on this decision context have found few significant differences between the capacities of older adolescents and adults to meet the legal requirements for informed consent to abortion. Lewis (1980) interviewed 42 adolescents and adults

about their pregnancy decisions, and found no age-based differences in decision-making strategy or abstract reasoning. Adolescents did view their decisions as more externally compelled (through pressure from parents) than adults, indirectly implicating the voluntariness prong of competence. Ambuel and Rappaport (1992) interviewed young adolescents (ages 15 and under), older adolescents (ages 16–17), and adults (ages 18–21) awaiting pregnancy test results at a medical clinic. Responses were scored according to four criteria relevant to legal competence: volition of choice, global quality of reasoning, consequences, and richness of reasoning. Overall, these researchers found no age differences in any dimensions of competence. Young adolescents who reported they would not consider abortion as an option scored significantly worse than adults on volition, consequences, and global quality of reasoning. Although limited, these studies are consistent with more general research on decision making in their conclusion that mid- to late adolescents have developed the basic cognitive capacities required to provide valid informed consent.

Those who argue that adolescents should be classified as adults for purposes of abortion decision making do not rely solely on developmental claims or on the constitutional importance of the decision. After all, minors may be competent to exercise constitutional rights in other domains (e.g., voting, jury service) but are not granted the right to do so, in part because no great harm results from postponement. A distinguishing feature of the childbearing decision is that it cannot be postponed and that it has enormous consequences for the individual, often for the course of her future life. Moreover, pregnancy and childbirth pose substantial health risks for teens—and for their children—as well as negative consequences for the future welfare of both young mothers and their children (Furstenburg, Brooks-Gunn, & Chase-Lansdale, 1989). For these reasons, advocates who have little interest in adolescent self-determination per se might well support adolescent access to abortion on paternalistic grounds (Scott, 1992).

The rationale for allowing adolescents to make decisions about abortion without involving their parents is similar in many regards to that which supports the minor consent statutes, discussed earlier. As with treatment for substance abuse, contraception, and sexually transmitted diseases, the decision about abortion is one on which parents' interests may not be consonant with their children. Parents' moral or religious views about abortion or teenage sexual behavior may trump concerns for the health or welfare of their pregnant adolescents. Although substantial research documents parental attitudes, behaviors, and influence on adolescent sexual behavior (Brooks-Gunn & Furstenburg, 1989; Meschke, Bartholomae, & Zentall, 2002), only a few studies have examined parental views or decision making in the abortion context (Henshaw & Kost, 1992; Resnick et al., 1994; Torres, Forrest, & Eisman, 1980).

Abortion is similar to treatments targeted by minor consent statutes in another way. Even if parents would be supportive of the choices their daughters make, teens might postpone dealing with the pregnancy because they fear their parents' reactions—a consequence with potentially even greater consequences that postponing other treatments. Approximately one-half to two-thirds of all adolescents do consult their parents about pregnancy; younger adolescents, who may be most in need of parental support and advice, are more likely than older girls to talk to their parents (Adler, Ozer & Tschann, 2003). Indeed, most adolescents who obtain an abortion consult parents or another adult (Resnick et al., 1994). In a nationally representative sample of unmarried minors having an abortion, 61% had told their parents; the most common reasons for nondisclosure were desires to preserve the relationship with parents (e.g., they might be hurt, disappointed, or angry), to prevent interference with relationships (e.g., parents might prevent the continuation of a relationship with the sexual partner), and to protect parents from additional problems (e.g., parents

already had enough stress; Henshaw & Kost, 1992). In a study of women obtaining an elective, first-trimester abortion, adolescents scored significantly higher than adults on perceptions that having an abortion conflicts with how thier parents viewed them (Quinton et al., 2001). At 1 month postabortion, adolescents reported fewer benefits and greater harm from the abortion than adults, a difference that was explained in part by the significant age difference in parental conflict. Some observers have suggested that adolescents have unrealistically negative views of potential parental reaction to sex-related issues (Newcomer & Udry, 1985), but in large measure the accuracy of their beliefs is less relevant than the impact of those beliefs and concerns on adolescent behavior. In the Henshaw and Kost (1992) study, a substantial proportion of adolescents who did not tell their parents about their abortions reported as the reasons that they had experienced family violence, feared domestic violence, or thought they might be kicked out of the house if their parents found out about the abortion. Five of 26 Massachusetts young women who pursued a judicial bypass to parental consent requirements (i.e., a provision under the state's law that permits an adolescent to act without her parents' involvement if a judge agrees that the minor is mature enough to make the decision herself or that this course of action is in her best interests under the circumstances) did so out of fear of parental reaction; each of them described prior threatened or actual harm (Ehrlich, 2006). One-fourth of minors seeking judicial bypass under Minnesota's two-parent notification law brought one parent with them in the quest to legally bypass notification of the other parent (O'Keefe & Jones, 1990). Thus, standard legal requirements of parental consent to minors' medical treatment may pose a threat to the welfare of pregnant teens.

In one way, abortion is different from the treatments targeted by minors' consent statutes, but the difference itself arguably points in the direction of adolescent self-determination in this context. Unlike other procedures for which adolescents can provide consent without their parents' involvement, abortion involves a highly contested moral choice. Few dispute that the "right" choice for adolescents with a drug problem is treatment. However, no consensus exists about the "right" choice for a pregnant adolescent. Thus, a core issue in classifying pregnant teens as children or as adults is whether parents (or courts) should have the authority to impose their values on a pregnant adolescent or whether her values should determine whether she ends the pregnancy or has a child.

The legal regulation of adolescent access to abortion varies in different states. Some states (e.g., Connecticut, Washington) have shifted the boundary of childhood downward and classified pregnant teens as adults for abortion decisions, adopting the approach of the minor consent statutes. Others have maximized the reach of parental authority to the extent that it is constitutionally permitted, within limits set by the U.S. Supreme Court in a series of decisions have defined the parameters of state regulation. These decisions permit restrictions that would be unconstitutional for adults while simultaneously preventing states from subjecting adolescents to conventional parental authority over their children. Parental consent cannot be required of mature minors, but states can require that the determination of "maturity" be the subject of a judicial proceeding (*Bellotti v. Baird*, 1979). Under Supreme Court doctrine, if a minor is found to be immature, the court, exercising the state's *parens patriae* authority, must determine whether an abortion without parental involvement is in her best interest (*Bellotti v. Baird*, 1979; *City of Akron v. Akron Center for Reproductive Health*, 1983). Although parents are not granted veto power over an adolescent's abortion (*Bellotti v. Baird*, 1979; *City of Akron v. Akron Center for Reproductive Health*, 1983; *Planned Parenthood of Central Missouri v. Danforth*, 1976), states can require that parents must be notified of their daughter's intent to obtain an abortion (*H.L. v. Matheson*, 1981; *Hodgson v. Minnesota*, 1990; *Ohio v. Akron Center for*

Reproductive Health, 1990; *Ayotte v. Planned Parenthood of Northern New England*, 2006). Indeed, the Court upheld a parental requirement that *both* parents be notified, even if they are divorced (*Hodgson v. Minnesota*, 1990).

A substantial majority of states have responded to Supreme Court's pronouncements by passing laws requiring parental involvement in minors' abortion decisions, either through consent or notification, unless the pregnant minor demonstrates that she is "mature and well enough informed" to make her own abortion decision in a judicial bypass hearing (Alan Guttmacher Institute, 2008; *Bellotti v. Baird*, 1979, p. 647). The Court has provided no further guidance to judges making these determinations, and studies and judicial opinions confirm that the indeterminacy of such a standard results in wide variability of bypass hearing outcomes. In some states, virtually all petitions are granted using justifications that appear paternalistic rather than autonomy focused (Mnookin, 1985). In Massachusetts, 1,000 hearings per year resulted in just 13 denials over a 10-year period (Mnookin, 1985). Similarly, only 9 minors were deemed immature out of 477 Ohio bypass hearings that lasted an average of 12 minutes (Yates & Pliner, 1988). However, some states grant few petitions, and advocates recommended that adolescents go to nearby states to seek an abortion (Lewin, 1992). The capacities of those adolescents seeking abortion via judicial bypass (as a distinct subgroup of adolescents seeking abortion) have not been systematically studied (but see Ehrlich, 2006, for results of extensive interviews); nonetheless, it is highly unlikely that the extreme variation in the outcomes of bypass hearings (i.e., virtually all young women in one state are competent to consent, whereas all in another state are not) are a function of neutral competence assessments, particularly given the hearings' limited duration. Much more likely is that the attitudes of courts about abortion, teen pregnancy, and parental authority play an important role in judges' evaluations of "maturity."

The legal framework endorsed by the Supreme Court can be understood as an effort to find an acceptable resolution to a highly contested dispute about the boundary of childhood—a dispute that has more to do with conflicting attitudes about abortion itself than with views on the maturity or autonomy interests and capacities of adolescents. In a legal framework that predicates the minor's exercise of her constitutional right of choice on her ability to persuade a court of her maturity, even mature teens are subject to greater regulation than their adult counterparts. At the same time, however, states are precluded from treating pregnant adolescents as children subject to their parents' authority, solely because they are minors. This regulatory scheme eschews the standard binary classification of childhood and adulthood in favor of a special intermediate status for adolescents, albeit through a costly, time-consuming procedure of individualized maturity determinations.

On its face, this exception to the bright line rule is consistent with recognition of adolescence as a unique developmental period. However, it appears that this regulatory framework that treats adolescence as an intermediate category can be understood as the result of political and moral compromise, rather than as an expression of developmentally based legal theory. Although this compromise may remove the controversy from the politically charged legislative arena to the more deliberative setting of the courtroom, the regulatory scheme has little to recommend it. Empirical research has yet to examine the impact of participation in bypass hearings on health and developmental outcomes, but this procedural hurdle may lead pregnant teens to delays that can increase the health risks of abortion. Moreover, there is little reason to believe that the assessment of maturity that is the function of bypass hearings serves any useful purpose. Few studies examine the factors that predict judicial decision making. In some jurisdictions minimal variability in the outcome measure precludes meaningful statistical analysis; in others, judicial

attitudes about abortion or teen pregnancy may trump adolescent capacities as an outcome predictor (Ehrlich, 2006). Some courts even refuse to conduct bypass hearings. (Silverstein, 2007). The upshot is that the creation of an intermediate category of adolescence in this context apparently does little to promote the health of adolescents and the welfare of society, and has no obvious advantage over the binary classification found in minors' consent statutes under which adolescents are simply treated as legal adults.

The experience with abortion regulation reinforces the theme with which we began. Although psychologists recognize adolescence as a distinct developmental period, for the most part, the law's tendency to ignore this transitional stage does not seem to have harmful effects. The rather simplistic approach of binary classification, under which the transition to adulthood is effected through a series of bright line legal rules, seems to serve the collective purpose of facilitating young citizens' development to healthy adulthood. Adolescents can drive at age 16, and vote and execute contracts at age 18, but they remain children until age 21 for the purposes of purchasing alcohol and (in some states) receiving child support while they attend college. The societal and developmental costs of delaying these rights and responsibilities do not appear to outweigh the benefits of such an approach.

RECOGNIZING ADOLESCENCE IN JUVENILE JUSTICE POLICY

There is one context in which policies that recognize the unique developmental status of adolescence would serve to promote both the interests of youth and of society. In juvenile justice policy, lawmakers have followed the conventional approach, treating young offenders either as children or as adults during different historical periods. As the following account will suggest, neither of these approaches has worked satisfactorily. Scientific knowledge about adolescence can serve as the basis of a legal regime that is fair to young offenders and at the same time promotes social welfare (Scott & Steinberg, 2008).

Contrasting Portraits of Adolescent Offenders

The Era of Wayward Children— The Traditional Juvenile Court

The establishment of the juvenile court at the turn of the twentieth century was part of a broader Progressive reform agenda that expanded the boundaries of childhood, and dramatically reshaped the relationship between families and the state (Kett, 1977; Levine & Levine, 1970; Tiffin, 1982). With the creation of compulsory school attendance laws, the prohibition of child labor, and the establishment of a child welfare system, government assumed a far more active role in the supervision and even preemption of parental authority in the upbringing of children. Progressive reformers pursued a fundamental objective of improving the experience of childhood and expanding its boundaries, with a goal of shaping youth into productive citizens. In the rhetoric of this era, adolescents were described as children who required the care and protection of their parents, or of the state if parents were not up to the task. A reformer and juvenile court judge, Miriam Van Waters (1926) described the underlying theory of the new juvenile court, which was a core component of the Progressive program, in the following terms:

> [T]he child of the proper age to be under the jurisdiction of the juvenile court is encircled by the arm of the state, which, as a sheltering, wise parent, assumes guardianship and has power to shield the child from the rigors of the common law and from the neglect and depravity of adults. (p. 9)

In an era in which teens often assumed adult roles and responsibilities, reformers used several strategies to create a new image of adolescents. First, as the statement by Waters suggests, advocates described the youth who would benefit from Progressive policies in

terms that emphasized their vulnerability, innocence and dependence. For example, dramatic stories of horrendous working conditions in factories bolstered the arguments for the need for protection through compulsory school attendance and child labor laws (Bremner, 1974). The solution to exploitation of children was a government ready to intervene to provide what the Progressives thought parents failed to provide—firm guidance and benevolent protection from harm.

The paternalistic rhetoric and protectionist agenda was readily accepted as applied to children who were subject to parental maltreatment, but reshaping the image of delinquent youth was more of a challenge. An important focus of Progressive reform was the establishment of a separate court that would respond to the needs of children who were subject to abuse and neglect by their parents and would also deal with juvenile offenders up to 16 or 18 years of age. Young offenders would not be subject to criminal punishment, but instead would receive rehabilitative treatment that would guide them on the path to productive adulthood. A second rhetorical "strategy" employed by the reformers was to downplay distinctions between young offenders and child victims of parental abuse, by arguing that abuse, neglect, and delinquency were *all* manifestations of inadequate parenting (Fox, 1967). Thus, young offenders were portrayed as children whose parents had failed them, and the state's role in both delinquency and maltreatment cases was "to intervene in the spirit of a wise parent" (Van Waters, 1926, p. 11) to provide care and rehabilitation. Advocates and judges related stories of young offenders—boys and girls, younger and older teens, committing minor and more serious offenses—who came before the juvenile court and responded favorably to paternalistic interventions designed only to promote their welfare (Lindsey & O'Higgins, 1909).

Although the child labor and school attendance reforms effectively shifted the boundary of childhood, the Progressive efforts in the area of juvenile justice were less successful. The romanticized accounts of young offenders as innocent children wronged by their parents ignored the crucial distinction between delinquents and maltreated children—that criminal conduct causes harm to others. Thus, the system's pretense that delinquency proceedings were solely to promote the welfare of the child before the court ignored the state's legitimate interest in protecting society from crime. Moreover, acceptance of the rehabilitative model was likely always premised on the success of rehabilitative interventions in reforming young offenders and protecting society, and over time, confidence in the effectiveness of rehabilitation waned.

Criticism of the juvenile court came from those who thought the system failed to control juvenile crime, but it also came from liberals who cared about the welfare of young offenders. Advocates for youth became disenchanted, because young offenders were not receiving treatment and yet they were processed without the procedural protections and guarantees that were provided to adults in criminal court (Allen, 1964). In 1967, the U.S. Supreme Court agreed a landmark opinion holding that juveniles facing the deprivation of their liberty in delinquency proceedings were entitled to many of the rights accorded to adult criminal defendants under the Due Process Clause of the Constitution—most importantly, the right to an attorney (*In re Gault*, 1967).

In the view of many observers, *Gault* marked the beginning of the end of the traditional juvenile court. Although it was at least 2 more decades before the idea that juvenile offenders should be subject to more lenient treatment in the juvenile system was seriously challenged, *Gault* dealt a severe blow to the already faltering rehabilitative model. More importantly, perhaps, although thoughtful reforms were proposed in the 1970s and 1980s, no coherent contemporary rationale for maintaining a separate juvenile justice system took hold (American Bar Association, 1982; Zimring, 1978). Youth continued to be

processed in the juvenile system, but it was not clear what its purposes should be or how it should differ from the adult system.

Contemporary Reform and Young Criminals

Conservative critics ridiculed the leniency of the juvenile justice system and, as violent juvenile crime rates rose in 1980s and early 1990s, they intensified their attacks. In sharp contrast to the Progressive depiction of young offenders as children, these punitive reformers argued that youth who commit serious crimes should be tried and punished as adults. This modern reform movement has led to sweeping statutory changes over the past decade or so (Torbet & Szymanski, 1998). The explicit goals of this crusade were public safety and punishment, and little concern was expressed about the welfare of young wrongdoers or hope for their reform. The historical depiction of delinquents as wayward children has been replaced by a modern archetype of the savvy young criminal who is a serious threat to society. Modern advocates of tough policies have denied any psychological distinctions between youth and adults that are relevant to criminal responsibility; the mantra of the movement is "adult time for adult crime" (Ellis, 1993; Regnery, 1985).

Contemporary reformers have accomplished the transformation of children charged with crimes into legal adults through several legislative strategies. First, the age at which juveniles can be transferred to adult court has been lowered for many crimes (Torbet, Gable, Hurst, Montgomery, Szymanski, & Thomas, 1997). The juvenile court has always used transfer to adult court as a safety valve for those juveniles ill suited to its jurisdiction. Traditionally, transfer required a judicial inquiry into a juvenile's appropriateness for juvenile court that considered a broad set of criteria, including the youth's maturity and development. Recent reforms have not only lowered the age of transfer and expanded the range of crimes that can trigger a transfer hearing, they have also narrowed the scope of the transfer inquiry to focus only on offense seriousness and prior record (Wagman, 2000). In combination, these changes facilitate the transfer of greater numbers of juveniles.

Moreover, reliance on judicial hearings in which transfer decisions are made on a case-by-case basis by judges has yielded in many states to other avenues to criminal court adjudication and punishment of juveniles. Legislative waiver categorically excludes from juvenile court jurisdiction large classes of young offenders, usually defined by age and offense category. Thus, a 13-year-old charged with armed robbery may be statutorily defined as an adult and simply not eligible for juvenile court treatment at all. Moreover, "direct file" statutes confer discretion on prosecutors to charge youth as juveniles or as adults for certain crimes (Snyder & Sickmund, 2006). In addition, youth sentenced in juvenile court under blended sentencing schemes serve time in adult facilities once they exceed the age of juvenile corrections jurisdiction. Through these mechanisms, the modern reformers have transformed the legal landscape by lowering the age of adult prosecution and punishment for a broad range of juvenile offenders. Although no national statistics exist, researchers estimate that over 200,000 youth are tried annually as adults (Sickmund, Snyder, and Poe-Yamagata, 1997).

The reforms have resulted in more punitive treatment of youth in the juvenile system as well. Incarceration plays a much larger role in the disposition of juveniles today as a result of the "get-tough" reforms of the 1990s. A study in Washington State found that confinement rates in that state's juvenile system increased by 40% during the 1990s—period when serious crime rates fell by 50%. In the late 1980s, out of each 1,000 Washington youth, 2.5 youth were confined in juvenile facilities; a decade later the confinement rate had increased to 3.5 youth per 1,000 (Aos, Phipps, Barnoski, & Lieb, 2001). Two changes have led to increased confinement of juveniles across the country. First, juveniles who would have received community sanctions in an earlier era are sent to

secure facilities today. Moreover, incarceration periods are much longer than they once were.

On one level, these reforms are consistent with some other policies that have lowered the age boundary to define adolescents as adults. Advocates for minors' consent statutes and alcohol restrictions, for example, argue that these policies respond to harmful conduct by adolescents in ways that promote social welfare. Unlike these other policies, however, the modern juvenile justice reforms make little pretense that punishing young offenders as adults will benefit the juveniles themselves. Their advocacy rests solely on a claim that punitive policies will reduce the social costs of youth crime and promote social welfare. In its lack of regard for the welfare of young persons, juvenile justice policy is unique and anomalous in the legal regime of youth regulation. Shortly, we will review the growing research base that challenges this claim and argue that social welfare and youth welfare are undermined by modern juvenile justice reforms.

Enthusiasm for punishing young criminals seems to have abated in recent years as policy makers and the public are having second thoughts about a justice system in which age and immaturity often are ignored in calculating criminal punishment. Rates of violent juvenile crime decreased steadily beginning for since the mid-1990s (Snyder, 2005; Torbet & Szymanski, 1998), and legislatures have begun to realize that harsh sanctions are costly to taxpayers. In several states, punitive statutes adopted in the 1990s are being moderated or repealed (National Juvenile Defender Center, 2007). There is also evidence that public support for harsh policies is weaker than conventional wisdom presumed (Nagin et al., 2005). Courts and legislatures are beginning to pay attention to arguments by critics of contemporary policies that holding young offenders fully responsible for their crimes violates well-accepted principles that define just punishment in the criminal law (Scott & Steinberg, 2003; Steinberg & Scott, 2003). In this calmer climate, many observers argue that a reexamination of punitive justice policies is in order (Scott & Steinberg, 2008; Zimring, 1998).

A Developmental Model of Juvenile Justice Policy

Both the history of the traditional juvenile court and the account of contemporary justice policies under which youth often are classified as adults suggest that the standard approach to legal regulation of adolescence—binary classification as either children or adults—has not worked well in the context of crime policy. Instead, a system that treats adolescence as an intermediate legal category between childhood and adulthood and that is based on scientific knowledge about this developmental stage is likely to be more satisfactory than either the traditional or the contemporary approach. Juvenile crime regulation based on developmental knowledge has two important advantages over the alternatives. First, it is more compatible with principles of fairness that shape the constitutional contours of criminal punishment and procedures. Second, a system based on scientific knowledge of adolescence is more likely to promote social welfare by reducing the social costs of juvenile crime (Scott & Steinberg, 2008).

Traditional juvenile justice policy, although its tone was benign, did more harm than good. Even assuming that the Progressive reformers had pure intentions (an assumption that some have challenged; Platt, 1977), the myth of offenders as vulnerable children was implausible when applied to older youth charged with serious crimes. It undermined the credibility of the system, leading many to believe that public safety and accountability did not get adequate attention (Feld, 1999). Moreover, as the Court recognized in *Gault*, young offenders themselves were harmed because the juvenile court operated without the procedural constraints that protect adult criminal defendants, whose interest was always understood to be in conflict with that of the state. Further, because the ostensible purpose of intervention was to rehabilitate rather than punish the child, the court

and correctional system had virtually unbridled discretion in fashioning dispositions, unconstrained by the principles limiting criminal punishment (Allen, 1964; Scott & Steinberg, 2003). Thus, because punishment and public protection were important but hidden forces at work in the disposition of young offenders, the reality of the juvenile justice system was that many youth got little rehabilitation in prison-like correctional facilities. A return to traditional juvenile justice policy is not the solution to the excesses of the recent punitive reforms.

Modern reformers make several empirical assumptions in justifying punitive policies—assumptions that the scientific evidence does not support. First, they assume that adolescents are not different from adults in any way that is important to criminal responsibility and thus deserve the same punishment for their offenses as their adult counterparts. Second, they assume that youth who are tried in criminal proceedings are as capable as adults of functioning adequately as defendants and meet the constitutional mandate that criminal defendants must be competent to stand trial (*Pate v. Robinson,* 1966). Finally, conservative reformers also assume (and argue) that punishing young offenders as adults is essential to protect society from juvenile crime. The empirical evidence from developmental psychology challenges all of these assumptions.

First, the evidence indicates that adolescent psychosocial immaturity distinguishes young lawbreakers from adults in ways that are very likely to affect their understanding and judgment in making criminal choices. Thus, holding them fully accountable for their crimes violates the principle of proportionality, which defines fair criminal punishment. Second, research shows that younger teens are likely to be less capable than adults of functioning competently in the trial setting, raising questions about whether they meet the constitutional mandate of trial competence (Grisso, et. al., 2003; Scott & Grisso, 2005). Finally, the claim that harsh punishment promotes social welfare does not stand up to empirical scrutiny. Research comparing youth retained in juvenile court with those prosecuted as adults indicates that harsh policies may aggravate recidivism rates (Bishop & Frazier, 2000; Fagan, 1996). Moreover, recent research on developmental pathways indicates that the most adolescent offenders desist from offending as part of their life course development and are not likely to become career criminals unless the justice system pushes them in that direction (Moffitt, 1993; Piquero, Farrington, & Blumstein, 2003). This, together with research showing the importance of social context for the accomplishment of critical developmental tasks, suggests that correctional interventions can play an important role in the whether young offenders continue in lives of crime or become productive (or at least noncriminal) adults (Steinberg, Chung & Little, 2004). Thus, policies based on utilitarian goals must consider the long-term consequences of punishment in addition to the direct costs of juvenile crime.

Criminal Responsibility in Adolescence

The criminal law assumes that most offenders make rational autonomous choices to commit crimes, and that the legitimacy of punishment is undermined if the criminal decision is coerced, irrational, or based on a lack of understanding about the meaning of the choice (Bonnie, Coughlin, Jeffries, & Low, 2004). Punishment must be proportionate to blameworthiness, which is mitigated if the individual's decision-making capacity is seriously compromised.

Historically, developmental immaturity has been deemed irrelevant to criminal responsibility because juveniles were processed in a separate court and correctional system that ostensibly did not impose punishment at all (Scott & Steinberg, 2003; Walkover, 1984). Thus, the question of how the criminal law should take immaturity into account in deciding fair punishment got little attention. Recently, the role of immaturity in the determination of criminal responsibility has become important, as younger and younger offenders are processed in adult court. There is a pressing

need for theory and research regarding how developmental immaturity should be considered in determining criminal responsibility and punishment.

Psychological research supports the hypothesis that developmental factors influence youthful judgment and (ultimately) decision making in ways that could be relevant to criminal choices. Several authors have reviewed how aspects of adolescent cognitive and, particularly, psychosocial development might implicate youth's capacities as defendants (e.g., Scott et al., 1995; Scott & Steinberg, 2008; Scott & Grisso, 1997; Cauffman & Steinberg, 2000; Steinberg & Cauffman, 1996; Woolard, 2002).

Capacities for reasoning and understanding improve significantly from late childhood into adolescence, and by mid-adolescence, most teens are close to adults in their ability to reason and to process information (what might be called pure cognitive capacities), at least in the abstract (Keating, 2004). The reality, however, is that adolescents are likely less capable than adults are in *using* these cognitive capacities in making real-world choices partly because of lack of experience and partly because teens do not tend to learn from experience as effectively as adults (Reyna & Farley, 2006; Ward & Overton, 1990).

Psychosocial maturation lags behind cognitive development, however, and psychosocial immaturity may contribute to decisions about involvement in criminal activity, in several ways. First, adolescents are more responsive to peer influence than are adults. Peer conformity and compliance are powerful influences on adolescent behavior and likely play an important role in delinquent conduct as well (Berndt, 1979; Costanzo & Shaw, 1966; Gardner & Steinberg, 2005). In contrast to adult offending, most juvenile crime occurs in groups, and peer influence may be an important motivating factor (Reiss & Farrington, 1991). Adolescents also generally have a foreshortened temporal perspective; they tend to identify and focus on short-term consequences more readily than those in the future (Nurmi, 1991; Greene, 1986; Steinberg et al., in press). Developmental differences in future orientation may be linked to differences in risk preferences: it is well documented that youth tend to engage in risky behaviors more often than adults. They also appear to calculate and weigh risks and benefits somewhat differently than adults, tending to focus more on rewards and less on risks than do adults (Reyna & Farley, 2006; Steinberg, 2004; Byrnes, 1998; Furby & Beyth-Marom, 1992; Gardner, 1992). Adolescents' capacities *for risk perception are almost as good as adults* in laboratory studies, but teens' abilities are diminished in social contexts where emotion, experience, willingness, and opportunity for risk behavior interact (Reyna & Farley, 2006; Steinberg, 2004). Finally, the limited research that exists suggests that adolescents are more impulsive than adults, that they tend to be subject to more rapid and extreme mood changes, and that they may be more reactive to environmental cues and temptations—although the relationship between impulsivity and moodiness is unclear (Reyna & Farley, 2006; Steinberg & Cauffman, 1996).

These psychosocial attributes of adolescence may be linked to neurological development. Recent studies of adolescent brain development show that important structural change takes place during this stage in the frontal lobes of the brain, most importantly in the prefrontal cortex. This region is central to "executive functions" and self-regulation—advanced thinking processes that are employed in planning, regulating emotions, the anticipation of future consequences, and weighing the costs and benefits of decisions before acting (Dahl, 2004; Giedd, 2004; Spear, 2000). Researchers believe that the prefrontal cortex does not fully develop until one's early 20s. Thus, the immature judgment of teens to some extent may be a function of hard wiring that creates a disjunction between heightened sensitivity to reward and regulatory capacity (Steinberg, 2004).

Adolescents, due to their psychological immaturity, are less blameworthy than adult offenders for another reason. The criminal law

presumes that a criminal act reflects the actor's bad character. Thus, offenders who can show that their criminal conduct was out of character (by offering evidence that they generally are persons of good character) may be able to get a reduced sentence. This source of mitigation applies to adolescents as well, not because they can demonstrate good character, but because their characters are unformed. As psychologists since Erik Erikson have observed, an important developmental task of adolescence is the formation of personal identity (Erikson, 1968). During this stage, identity is fluid; values, plans, attitudes, and beliefs are likely to be tentative as teens struggle to figure out who they are. This process involves a lot of experimentation, which for many adolescents means engaging in risky activities, including crime. Research supports that much juvenile crime stems from experimentation typical of this developmental stage rather than moral deficiencies reflecting bad character. Thus, it is not surprising that 17-year-olds commit more crimes than any other age group and that the rate declines steeply thereafter (Piquero et al., 2003).

Developmental research is consistent with theories about cognitive and psychosocial differences between adolescent offenders and adults, but only a few empirical studies exist that deal even indirectly with decision making about criminal activity. (That little research deals *directly* with these matters is easy to understand.) Fried and Reppucci (2001) evaluated the influence of several psychosocial factors on criminal decision making using videotaped vignettes of a series of decisions resulting in a crime. Age-based differences in psychosocial capacities followed a U-shaped function with mid-adolescents (ages 15–16) scoring lower on maturity than their younger (ages 12–14) and older (ages 17–18) counterparts. A possible explanation for this pattern is that the responses of younger teens, who have not yet undergone individuation, may reflect their parents' values. Cauffman and Steinberg (2000) examined age differences between adolescents and adults on a series of hypothetical vignettes describing various criminal behaviors. They also found age differences in psychosocial factors, which in turn predicted decision outcomes. Higher psychosocial maturity was associated with more socially responsible decisions in the vignettes. Age did not remain a significant predictor once psychosocial maturity was taken into account.

Although limited in scope, this research provides initial support for the hypothesis that developmental factors contribute to immature judgment in ways that may differentiate adolescent criminal decision making from that of adults. These studies provide the impetus for continued research into developmental capacities that are relevant to legal assessments of culpability. The findings are consistent with the notion that adolescent offenders should be considered less blameworthy than adults but not blameless, as an insane defendant or a child might be. In short, developmental arguments support adoption of a mitigation model in the regulation of juvenile crime—a model that recognizes the adolescents generally are less culpable than adults (Scott & Steinberg, 2008; Steinberg & Scott, 2003).

The U.S. Supreme Court has recognized that adolescent immaturity mitigates culpability in a landmark case holding that imposing the death penalty for crimes committed by juveniles is a violation of the Constitutional prohibition against cruel and unusual punishment (*Roper v. Simmons*, 2005). Adopting the mitigation framework offered by Scott and Steinberg in an *American Psychologist* article (Steinberg & Scott, 2003), the Court pointed to the diminished decision-making capacity of adolescents, which leads them to make "impetuous and ill-considered decisions," and also to youthful vulnerability to peer pressure. Justice Kennedy, writing for the majority, also emphasized transient nature of the traits that contribute to youthful criminal conduct. He opined that the unformed nature of adolescent character make it "less supportable to conclude that even a heinous crime [by an adolescent] was evidence of an irretrievably depraved character" (p. 570).

Adolescent Competence as Criminal Defendants

The punitive juvenile justice policies of the past generation implicate another issue of constitutional importance. The Supreme Court has held that under the Due Process Clause of the 14th Amendment to the Constitution, criminal defendants cannot be subject to criminal adjudication unless they are competent to stand trial. The competence standard that is applied to criminal trials focuses on the defendant's "rational as well as factual" understanding of the proceedings against him and his capacity to assist his attorney in his defense (*Dusky v. United States,* 1960). This requirement was developed to ensure that mentally disabled (adult) defendants are dealt with fairly in the justice system: fundamental fairness requires that an individual facing the deprivation of his or her liberty in a criminal proceeding must understand the purposes and consequences of the trial and be capable of participating effectively. Only recently have courts and legislatures begun to recognize that the competence requirement also applies to defendants whose competence may be questionable due to developmental immaturity (National Juvenile Defender Center, 2007; Scott & Grisso, 2005). As increasing numbers of juveniles are transferred to the adult system and subject to criminal prosecution, the question arises of whether they are competent under the standards applied to adult criminal defendants. The concern, of course, is particularly great for younger teens, who today are eligible for adult treatment for a broad range of crimes. A second concern relates to the standard of trial competence to be applied in delinquency proceedings.

As the boundaries between the adult and juvenile justice systems became more porous in the 1990s, the need for a comprehensive study comparing the capacities of juveniles and adults to function as trial defendants became apparent. The MacArthur Adjudicative Competence Study was conducted in response to that need (Grisso et. al., 2003). Conducted in four sites and involving almost 1,400 participants between the ages of 11 and 24 from the community and from the justice system, this study aimed to examine whether and how adolescent immaturity affected abilities that are important in the trial setting. The study employed several measures, including an instrument that had been developed and validated independently to measure reasoning and understanding relevant to the trial context: the MacArthur Competence Assessment Tool–Criminal Adjudication (MacCAT-CA) (Poythress et al., 2002). A cut-off score denoting significant impairment was derived by administering the test to thousands of defendants, including a large group that had been found incompetent to stand trial. The researchers also used an instrument developed for the study to assess psychosocial capacities as they affect judgment in decision making in the trial context: the MacArthur Judgment Evaluation instrument (MacJEN).

The study confirmed that competence-related abilities improve with age during adolescence. On average, youth aged 11–13 performed significantly more poorly than adults on the competence measures. The performance of approximately one-third of this age group evidenced significant impairment, comparable to adults found incompetent to stand trial. Approximately 20% of youth ages 14 and 15 showed substantial impairment. Adolescents aged 16 and 17 performed comparably to adults. Younger youth also performed less well on the measures of psychosocial maturity. For example, 11- to 13-year-olds were much more inclined to waive their constitutional rights and admit their crimes than were older participants, suggesting that they are more vulnerable to coercion by adult authority figures (e.g., the police). They also were less inclined to consider the future consequences of their decisions (regarding interrogation and accepting a plea agreement) than older participants.

This study raises a significant constitutional challenge to the adjudication of younger teens as adults and supports the conclusion that, at a minimum, competence should be evaluated

whenever younger teens are transferred (and perhaps that trying young teens as adults generally risks unfairness and inefficiency) and implications for remediation be considered (see Viljoen & Grisso, 2007). Just as importantly, the study raises a question of what the standard for competence should be in *juvenile* delinquency proceedings. Courts have recognized that the requirement of trial competence applies to these proceedings, but have been uncertain about whether the adult (*Dusky*) standard applies (*People v. Carey*, 2000). The MacArthur study suggests that a more relaxed standard should be applied—to avoid a large number of younger youth being found incompetent to be tried in *any* court. Under constitutional Due Process principles, however, a more relaxed competence standard is acceptable only if the stakes that juveniles face in delinquency proceedings are substantially different from sentences imposed by criminal courts. This suggests a need to rethink the trend toward sanctions in the juvenile system that is similar to adult punishment (Scott & Grisso, 2005).

Adolescent Development and the Social Costs of Crime

In reality, although the scientific evidence of adolescent immaturity is compelling, principle alone will not dictate juvenile crime policy, any more than it has dictated policy governing minors' access to abortion. Ultimately, the most compelling argument for a separate, less punitive, system for dealing with young criminals rests on utilitarian grounds. In this section, we draw on developmental and criminological research to challenge the claim offered by proponents of the recent reforms that punitive policies are the best means to achieve public protection and minimize the social cost of youth crime. These ends can better be served by policies that attend to the developmental needs of young offenders as adolescents.

The utilitarian argument for tough sanctions has a superficial appeal; after all, youth who are in prison cannot be on the street committing crimes. It seems likely, indeed, that the expanded use of incarceration has contributed to the decline in juvenile crime through incapacitation, at least in the short term. But researchers directly examining the impact of statutory change have not found that reform laws have a deterrent effect. For example, a few researchers have studied the effect of automatic transfer statutes, either by comparing two similar states with different laws, or by examining crime rates in a single state before and after a legislative reform (Singer & McDowell, 1988; Jensen & Metsger, 1994). These studies have found that punitive reforms have little effect on youth crime. Only one substantial study has found that crime rates appear to decline under harsh statutes (and the methodology of that study has been sharply criticized) (Doob & Webster, 2003; Levitt, 1998). Interview studies find that many incarcerated youth express intentions to avoid harsh penalties in the future, but the extent to which these intentions result in behavior change is unclear (Schneider & Ervin, 1990).

More importantly, supporters of tough policies ignore what are likely to be substantial long-term costs of punitive policies, in light of existing knowledge about the developmental patterns of antisocial behavior in adolescence. Rather than reducing crime, prosecuting and sentencing youth as adults and subjecting them to long periods of incarceration may have iatrogenic effects that increase the costs of offending both for individual offenders and for society. Interventions in the juvenile system, however, both in facilities and in community programs, potentially can facilitate the transition of delinquent youth to conventional adult roles.

Developmental knowledge underscores the risks associated with the recent trend toward widespread processing and punishing of adolescents as adults. A major flaw of these policies from a social welfare perspective is that they expand the net of social control well beyond the relatively small proportion of juvenile offenders that research indicates are

on long-term offending trajectories. Many youth engage in some form of delinquency during adolescence, but desist as adulthood approaches (Piquero et al., 2003; Farrington, 1986; Jessor & Jessor, 1977). Indeed, most teenage males participate in some delinquent behavior as part of the experimentation that contributes to identity formation, described earlier. This reality has led Terrie Moffitt, a developmental psychologist, to conclude that delinquent behavior is "a normal part of teen life" (Moffitt, 1993). These youth are not headed toward lives of crime, unless the correctional system pushes them in that direction. Thus, based on her research on developmental trajectories, Moffitt labels most youthful criminal conduct "adolescence-limited" behavior. Her research, which is supported by many other studies, identifies a relatively small percentage of youthful offenders who are at high risk of becoming career criminals, (D'Unger, Land, McCall, & Nagin, 1998; Moffitt, 1993). A number of factors predict the likelihood of belonging to the group that Moffitt has labeled "life-course persistent offenders," most importantly, a pattern of antisocial conduct that often begins in early childhood, but differentiating them from more typical adolescent offenders in a cross-sectional sample of same-aged offenders is an uncertain business and prone to error. Transfer policies driven by age and offense type cannot distinguish serious persistent offenders from those likely to desist with maturity.

The likelihood that typical adolescent offenders will accomplish the transition to adulthood successfully may depend in part on the state's response to their criminal conduct. A policy of imposing adult criminal penalties on young offenders may increase the probability that they will become career criminals, or it may delay desistence. At a minimum, criminal punishment is likely to undermine their future educational and employment prospects and general social productivity as members of society.

Research evidence supports this concern. Prosecution and incarceration in the adult system appear to increase recidivism and limit prospects for a productive future. Young offenders in Florida described the criminal court process in very different terms than their youthful counterparts in juvenile court (Bishop and Frazier, 2000; Bishop, Frazier, Lanza-Kaduce, & White, 1998). Offenders perceived juvenile court in relatively favorable terms, describing the court process and resulting punishment as well intentioned and fair. Transferred offenders, in contrast, felt court officials (including some defense counsel) were disengaged or hostile to their interests; they found the process confusing and the outcomes unfair. Transferred juveniles felt physically and emotionally threatened by staff and other inmates. They also reported learning about crime from other inmates. Although one might reasonably expect that inmates would view incarceration as a negative experience, the distinctions drawn between the inmates in the juvenile and criminal justice systems may be important to the extent that the effectiveness of punishment in reducing recidivism depends in part on perceptions of its legitimacy (Bishop & Frazier, 2000).

Studies also indicate that adult punishment may increase recidivism rates for most offense categories. Studies in Florida (Bishop et al., 1998; Johnson, Lanza-Kaduce, & Woolard, in press; Winner, Lanza-Kaduce, Bishop, & Frazier, 1997) and New York and New Jersey (Fagan, 1996) compared youth adjudicated as adults with those retained in juvenile court for comparable offenses. Both sets of studies used multiple measures of recidivism over short-term and long-term (4–7 years) follow-up periods. Fagan's research found that transfer was associated with higher rearrest and reincarceration among robbery offenders, although not among burglary offenders. Using a matching procedure that paired transferred youth and juvenile system youth on demographic and offense variables, the Florida studies found that transferred youth were more likely to reoffend in five of the seven offense categories studied, and were rearrested more often

and more rapidly than their juvenile court counterparts. Recent analyses of matched pairs of transferred and retained youth suggest that transfer may aggravate recidivism because it "leapfrogs" over a system of graduated sanctions often found in juvenile court (Johnson et al., in press). Repeat offenders in the juvenile justice system who received graduated sanctions had lower recidivism as adults than those in the juvenile justice system who did not receive graduated sanctions (and proceeded directly to incarceration) and those who were transferred to the adult criminal justice system. Transfer status failed to predict recidivism when measures of correctional histories, including graduated sanctions, were included in the analysis.

Higher recidivism rates are not the only potential social cost of transfer; criminal conviction also harms young offenders' future prospects for productive lives upon release. The research on transfer's effects is scanty at present, but it challenges the claim that punitive legal policies are the optimal response to juvenile offending.

Developmental knowledge reinforces this conclusion. Adolescence is a critical developmental stage during which teens acquire competencies, skills, and experiences essential to success in adult roles (Steinberg et al., 2004). Acquiring necessary skills is a process of interaction between the individual and her social environment, which can enhance or impede healthy development. Correctional facilities and programs constitute this environment for youth in the justice system. If a youth's experience in the correctional system disrupts educational and social development severely, it may irreversibly undermine prospects for gainful employment, successful family formation, and engaged citizenship, and directly or indirectly contribute to reoffending.

The differences between the juvenile and adult systems have blurred a bit in recent years, but, even today, juvenile facilities and programs are far more likely to provide an adequate context for development than adult prison. Prisons are aversive developmental settings. They are generally large institutions with staff whose function is custodial and who generally relate to prisoners as adversaries; educational and counseling programs are sparse, and older prisoners are often mentors in crime or abusive to incarcerated youth (Bishop & Frazier, 2000). The juvenile system, although far from optimal, operates in many states on the basis of policies that recognize that offenders are adolescents with developmental needs. Facilities are less institutional than prisons; staff–offender ratio is higher; staff attitudes are more therapeutic and more programs are available (Forst, Fagan, & Vivona, 1989). A substantial body of research produced over the past 15 years show that many juvenile programs, in both community and institutional settings, have a substantial crime-reduction effect; for the most promising programs that effect is in the range of 20%–30% (Aos et al., 2001; Lipsey, 1995). In general, successful programs are those that attend to the lessons of developmental psychology.

The success of rehabilitative programs does not mean that we should return to the traditional rehabilitative model of juvenile justice, however; punishment is an appropriate purpose when society responds to juvenile crime. Both adult prisons and juvenile correctional programs impose punishment, however, and the juvenile system is better situated to invest in the human capital of young offenders and facilitate the transition to conventional adult roles, a realistic goal for youth who are adolescent-limited offenders. In reality, the future prospects of juveniles in the justice system are not as bright as those of other adolescents. But developmental knowledge reinforces a growing body of empirical research indicating that juvenile offenders more likely to desist from criminal activity and to become noncriminal adults if they are not dealt with as adults, but rather are sanctioned as juveniles in a separate system that is attendant to the needs of adolescents as a special class of offenders.

CONCLUSION

Over the course of the last century, lawmakers have tended to ignore adolescence as a distinctive age period, preferring instead to categorize individuals in this developmental stage as either children or adults depending on the policy context and goals. Presumptions about dependency, vulnerability, and incompetence to make decisions are used to justify a bright line demarcation between childhood and adulthood. In general, this approach has functioned well, providing adolescents with societal protections at relatively low cost to their developmental autonomy. However, in juvenile justice policy, the binary approach has been a failure. Cast alternately as innocent, wayward children or as fully mature predators, juvenile delinquents have been subject to policy initiatives that fail to protect their interests or those of society. A policy approach grounded in a realistic account of adolescence would maximize the likelihood that juvenile offenders could desist from crime and reintegrate successfully into the community.

The twenty-first century may see policy makers paying attention to this transitional stage in other areas. Although, as we have suggested, this move can be costly and should be taken only when binary categories are inadequate, in some contexts, adolescents might benefit from a probationary period in which adult skills can be acquired, with protection from the costs of inexperienced choices. Some states have recently adopted this approach in changing laws governing driving, authorizing adolescents to drive motor vehicles, but imposing restrictions (e.g., no night driving) that do not apply to adults (*California Vehicle Code* §12814.6). On issues as varied as liability for contracts and the weight accorded to teens' preferences in divorce custody disputes, lawmakers have recently taken tentative steps toward recognizing the uniqueness of this developmental stage (Scott, 2000). Developmental research underscores the notion that adolescents resemble both children and adults in many ways, depending on the context and circumstances. The developmental realities of adolescence alone will never dictate legal regulation, but developmental research and theory can provide the empirical foundation for policies that promote a healthy and productive transition from childhood to adulthood.

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