

WHAT THE LAW SHOULD (AND SHOULD NOT) LEARN FROM CHILD DEVELOPMENT RESEARCH

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I. INTRODUCTION

Our legal tradition has always distinguished between children and adults and justified those distinctions in developmental terms. Only relatively recently, however, has that development been extensively studied by psychologists and still more recently, by neuroscientists. Conventional wisdom among children's rights scholars holds that law should take account of this growing body of science and social science, and should assign rights and responsibilities that more accurately reflect the assessments of children's capacities documented in the scientific research. In this Article I will argue that a more sophisticated understanding of child development counsels against an approach to children's law that treats children's capacities at certain ages as ascertainable and fixed. Instead, the law should recognize the contingent nature of children's capacities and, as important, identities, and the role law inevitably plays in fostering or thwarting children's growth.

Over the course of the twentieth century, both psychology and law refined their approach to children and the distinctions they drew between children and adults. In the course of that refinement, the fields took an increasing interest in one another. Academics and advocates in both fields called for reform in legal rights for children that better reflected the findings of the developmental psychologists, and this has led to increased legal attention to the details of children's capacities. This attention has improved our understanding of childhood, but it has also exacerbated some problems with our analysis of children's rights. Both of these tendencies are evident in *Roper v. Simmons*,¹ the most significant children's rights case thus far in the twenty-first century.

An increased reliance on scientific assessments of children's capacities creates a number of problems for our analysis of children's legal rights. First, capacity is endlessly complicated and incompletely studied, making it difficult for the law to "fit" the social science with any

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1. 543 U.S. 551 (2005).

accuracy. Second, when social-scientific accounts of children's capacities are offered to distinguish the law's treatment of children from that of adults, these accounts tend to produce an increasingly subtle depiction of children that is contrasted with a static and idealized caricature of adults. The contrast is particularly jarring because the social science inevitably calls attention to the gap between adult ideal and actual adult functioning. Third, a focus on capacity has distorted the pursuit of real coherence in children's law by suggesting that a consistent account of children's capacities across legal categories is all that matters. And fourth, tying our analysis of children's rights to their current capacities fails to capture the extent to which our different treatment of children reflects not just our accommodation of their present selves, but also our aspiration for their future selves. An increasingly sophisticated attention to children's current capacities runs the risk of locking in a developmental status quo and suggesting that the law is helpless in affecting how children develop.

The heavy focus in children's rights analysis on children's capacities reflects the influence of Piaget and his cognitive developmental followers, who have charted a relatively fixed pattern of development rooted in human biology. Less attended to are competing theories that place greater emphasis on the role of society in shaping development. Also largely ignored are the developmental theories that focus on identity formation, the process by which an individual develops a sense of his own values, interests, and abilities, and an understanding of how he relates to his broader world.

Shifting focus from achieved capacities to the process through which both capacities and identities are achieved tells a more complete story of children's development and, more importantly, attends more particularly to the interconnection between law and development. Expanding the law's focus beyond developmental "facts" (what can children do at what ages?) to developmental effects (how can the law spur or thwart children's achievements?) can improve children's rights analysis in many ways. First, it presses courts to take responsibility for the societal choices reflected in their rights allocations rather than suggesting that case outcomes are determined by scientifically established facts. Second, it creates the possibility of a more coherent body of children's rights law organized around our aspirations for children's development as rights holders, rather than around the elusive promise of perfectly described and coherently applied capacities. Third, it helps avoid the awkward juxtaposition in rights analysis between subtly described children and simplistically idealized adults. And fourth,

it encourages the law to nudge its developing citizens in the direction of that unrealized adult ideal.

My argument is not that children's capacities are irrelevant to their status at law, nor that the law currently disregards developmental effects in all contexts. Clearly, capacity matters both in justifying children's different treatment from adults in general terms and in assessing some of the developmental effects on which I focus. And, of course, law routinely aims to shape development by establishing school curricula, constraining parental behavior, and the like. My criticism is more narrowly pointed at attempts in the law, primarily through its courts, to justify the granting or denying of specific adult rights or responsibilities to children. Most of this analysis considers the application of the Constitution to children. In this context, developmental effects may count heavily in the court's assessment of the state interests at stake, but they rarely play a role in justifying constitutional limits on the state's authority over children.

Although a more concrete understanding of how a consideration of developmental effects would change the legal analysis awaits further discussion below, it should be apparent from this general description that this effects-focused approach would give less deference to the developmental scientists. Where legal positions are built on developmental capacities, the claim of the analysis is that developmental facts drive the legal conclusions. The developmental effects approach, in contrast, clearly puts law in the driver's seat. It suggests that rights analysis can and should expressly engage courts in considering the connection between the law's treatment of children and the adult citizens they become.

II. THE EVOLUTION OF CHILDREN'S LEGAL TREATMENT

A. Our Historical Antecedents

In considering the origins of our distinct treatment of children at law, two lines of authority are particularly useful. The first line includes the writings of some of the political theorists who exercised considerable influence over the founding and evolution of our liberal democratic system of government. The second line consists of the actual laws applied by our various legal ancestors, most significantly, early common law. Both political theorists and lawmakers called for a different treatment of children that reflected their understanding of children's development as well as their expectations for adults.

1. Children's Place in Liberal Theory

John Locke expressly exempted children from the “men” who he declared equal “by nature,” and entitled to freedom from subjection to the will of another.² Children, he explained, were not born “in [a] full state of equality,” but they were born “to” that state.³ This is of course a developmental conception, focused on whom children are becoming. Children, in Locke’s view, were required to be subject to their parents’ will because they began “weak and helpless, without knowledge or understanding.”⁴ With the acquisition of “age,” and, with it “reason,” their bonds to their parents would “drop quite off,” at which point they would be ruled by “the law of reason,” and therefore also subject to society’s laws.⁵

This theme, that children’s lack of “reason” justifies subjugating them to others’ control, typically parents,’ is a common one among political theorists.⁶ And while “reason” is only very loosely defined (and rarely attached to a specific chronological age), it appears to mean some combination of logical thinking processes, experience, and understanding that tend to produce choices consistent with the community’s conception of individuals’ self-interest with some regularity.⁷ In identifying what children *lack* that excludes them from the adult regime of rights and responsibilities, these theories also highlight what they assume adults *possess* that qualifies them for these rights and responsibilities.

One of the most prominent of such accounts is that offered by John Stuart Mill in the opening pages of his essay *On Liberty*.⁸ Here, he

2. JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT 28 (J.W. Gough ed., Macmillan 1956) (1690).

3. *Id.*; cf. ARISTOTLE, POLITICS bk. I, ch. xiii, at 19, 21 (J.L. Ackrill & Lindsay Judson eds., Trevor J. Saunders trans., Oxford Univ. Press 1995) (noting that, while children are appropriately “ruled” by their fathers in their youth, that rule is temporary, and “from children come those who participate in the constitution”).

4. LOCKE, *supra* note 2, at 28-29.

5. *Id.*

6. See ARISTOTLE, *supra* note 3, at 19 (noting that children have an “undeveloped deliberative element”); JEREMY BENTHAM, *Principles of the Civil Code*, in 1 THE WORKS OF JEREMY BENTHAM 342, 347-48 (Jeremy Bowring ed., Edinburgh, William Tait 1838) (citing children’s compromised “intellectual faculties” to justify parental control of children); see also 1 WILLIAM BLACKSTONE, COMMENTARIES *441 (“[T]he power of a father . . . ceases at the age of twenty one: for they are then enfranchised by arriving at years of discretion, or that point which the law has established (as some must necessarily be established) when the empire of the father . . . gives place to the empire of reason.”).

7. See LOCKE, *supra* note 2, at 29.

8. See JOHN STUART MILL, ON LIBERTY 81 (David Bromwich & George Kateb eds., Yale Univ. Press 2003) (1859).

justifies excluding children from the reach of his general doctrine of liberty:

It is, perhaps, hardly necessary to say that this doctrine is meant to apply only to human beings in the maturity of their faculties. We are not speaking of children, or of young persons below the age which the law may fix as that of manhood or womanhood. Those who are still in a state to require being taken care of by others, must be protected against their own actions as well as against external injury.⁹

This brief passage is notable in many respects. First, Mill feels compelled to acknowledge that the exclusion of children is so obvious it almost does not bear mentioning. Second, he speaks of “mature faculties” without explaining what the relevant faculties are. What he does emphasize is children’s dependence, their need “to be taken care of,” and their need for protection against their own actions, which distinguishes them from the adults whom he considers the best identifiers of their own interests. While Mill suggests that the basic distinction between those to whom his doctrine applies and those to whom it does not is based on developmental, or “maturational” differences, he defers to the law, not nature, to “fix” the line between the two.¹⁰ In doing so, he suggests an important elision between the role of development in shaping the law and the role of law in shaping development. Under Mill’s vision, an individual’s crossing of the line set by law from childhood to adulthood dramatically alters his control over his own actions, a change that will have significant developmental effects.

2. Children’s Place in Our Legal History

Children’s distinct treatment at law can be organized, for the most part, into four broad legal categories—parental rights over children, civil rights held by children, the criminal law’s response to children, and state actions taken on behalf of children—each with a distinct legal history. Parental rights, which give parents special authority over their children, have been enshrined in law since ancient times, and have gradually weakened. Civil liberties, which afford persons protection against state exercises of power, have only recently been expanded to apply, albeit in a limited fashion, to children.¹¹ Criminal law, through which the state

9. *Id.*

10. *See id.*

11. Parental rights are commonly conceived as a form of civil liberty, but the distinction, here, is the place of the child in the analysis of the legal categories. Where children are the objects of parental rights, they are also the potential subjects possessing civil rights (including parental rights of their own).

regulates anti-social behavior, has long sought to take children's differences into account, through changing means over time. While state actions taken on behalf of children have affected all three of these other legal categories, this did not occur until the twentieth century, which awaits discussion in Part B, below.¹²

Parental rights over children date back famously to at least ancient Roman law, which gave fathers the authority, infrequently exercised, to kill their children.¹³ Noting law's abandonment of this right to kill, William Blackstone catalogued parents' still considerable authority over their children in eighteenth-century England in his Commentaries.¹⁴ Blackstone emphasized that these rights went hand in hand with parental duties of protection, support, and education, acknowledging further that natural affection played a greater role than the law in ensuring that these duties were met.¹⁵ These aspects of the British common law were imported in large part into the American system and remained the authority for parental rights until the twentieth century, when the core of these rights were constitutionalized and extensive state intervention in child rearing was authorized by statute.¹⁶

Other civil rights of individuals developed for centuries under the assumption, voiced in the political theory noted above, that these rights applied to adults alone. Thus, for much of our legal history, the distinct treatment of children in this area was pervasive, but rarely expressed in the law. The one modest exception to this general pattern was children's right to contract which was clearly addressed in law and not completely denied. At common law, children were permitted to enter contracts, but those contracts could not generally be enforced against them.¹⁷ This protected children from their own bad bargains, but also generally warned potential contracting partners away from children, leaving them with only a weak version of the adult right. Beyond the right to contract, courts did not apply adult rights to children and tailor rights in child-specific ways until the second half of the twentieth century.

12. See *infra* Part II.B.

13. BLACKSTONE, *supra* note 6, at *440.

14. *Id.*

15. *Id.* at *435 (describing the father's legal obligation of maintenance and noting "though providence has done it more effectually than any laws, by implanting in the breast of every parent that . . . insuperable degree of affection, which not even the deformity of person or mind, not even the wickedness, ingratitude, and rebellion of children, can totally suppress or extinguish").

16. See G.W. FIELD, THE LEGAL RELATIONS OF INFANTS, PARENT AND CHILD, AND GUARDIAN AND WARD 57-58 (Rochester, N.Y., Williamson & Higbie 1888); 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 270-71 (John M. Gould ed., Boston, Little, Brown, & Co., 14th ed. 1896); Andrew Walkover, *The Infancy Defense in the New Juvenile Court*, 31 UCLA L. REV. 503, 514-15 (1984).

17. FIELD, *supra* note 16, at 2-3.

The law did, however, have specific rules for child offenders, whose crimes brought them to the attention of the legal system and called for some response. The common law's basic approach to criminal responsibility reflected an early age-graded conception of childhood. As far back as the fourteenth century, persons younger than seven were irrebuttably presumed incapable of forming criminal intent, and by the seventeenth century persons ages seven through thirteen were rebuttably presumed incapable of that intent, whereas those fourteen and older were presumed to have "criminal capacity."¹⁸ This basic distinction followed the common law to America, and although until fairly recently this sorting of culpability by age represented the only adjustment the law made for children accused of crimes, it was a significant one.¹⁹

While the distinctions the law drew centuries ago between children and adults were fewer and the justifications offered fairly thin, the law has long reflected the view that the youngest humans should be treated differently, and some of the lines drawn still make good developmental sense. Gone is the armor that is said, in the twelfth century, to have justified an adult age of twenty-one (when males were predictably strong enough to wear it, ride a horse, and fight),²⁰ but still justified by modern developmental scientists is an age line of young to mid-twenties for many rights and responsibilities.²¹ And even more striking is the match between the common law's spectrum of criminal culpability and modern accounts of basic cognitive milestones (at roughly seven and roughly fourteen).²² These older laws were clearly built, at least in part, on contemporary assessments of young people's capacities, but the lack of empirical grounding allowed for a blurring of any notion of intrinsic, age-based capacity and legally created norms.

18. *Id.* at 34; Walkover, *supra* note 16, at 509-10 & n.20, 511.

19. Arnold Binder, *The Juvenile Justice System: Where Pretense and Reality Clash*, 22 AM. BEHAV. SCIENTIST 621, 625 (1979) (noting that age could provide an exemption from criminal liability, which produced an acquittal, but, where no such exemption applied, children were convicted and sentenced according to adult rules).

20. GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, HOW OLD IS OLD ENOUGH?: THE AGES OF RIGHTS AND RESPONSIBILITIES 7-8 (1989) [hereinafter GROUP FOR THE ADVANCEMENT OF PSYCHIATRY] ("Although motivations are often lost to the historians, and no one seems to know exactly why the age of majority rose so swiftly from 15 to 21, one suggestion has been preferred: that this swift upward move came about because 12th century knights required far greater strength and skill to manage their increasingly heavier arms and armor on horseback than did the 11th century warriors who fought on foot.")

21. See *infra* note 119 and accompanying text.

22. GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, *supra* note 20, at 7 (noting that the nodal ages of seven, fourteen, and twenty-one represent significant legal lines in different legal traditions over many centuries).

B. Twentieth-Century Developments

The twentieth century saw major changes in the law's treatment of children beginning with the proliferation of laws designed to help and protect them and ending with a heightened interest in children's rights and responsibilities. The same century saw, in its early years, the birth of the field of developmental psychology and, at its end, the emergence of brain-imaging techniques that allowed neuroscientists to study the developing brain. As these fields in law and science grew, they became increasingly interested in how the developmental sciences should influence law.

1. The Progressive Movement

At the turn of the twentieth century, the progressive movement made the treatment of children a target of reform. As with all aspects of the movement, the legal changes progressives promoted on behalf of children were grounded on early social-scientific understandings of the problems facing the poor. Separate juvenile courts were created to shield children from the harsh, destructive treatment of the adult criminal system and to help abused, neglected, and delinquent children to grow up to be productive, law-abiding members of society.²³ Child labor laws and compulsory education laws kept children away from dangerous and unhealthy adult employment and in schools.²⁴

This conception of the state as child protector, authorized to intervene to help secure healthy upbringing was new, and while it amplified the law's attention to the special circumstances of childhood, it in no way undercut accepted notions of childhood incapacity. The state, through its laws, was to act as a "kind and just parent," to fill in, according to the accepted child rearing practices of the time, where a child's parents were adjudged to have fallen short.²⁵ In at least two senses, the progressive reforms served to reinforce notions of childhood difference. First, they emphasized children's relative innocence when

23. See Franklin E. Zimring, *The Common Thread: Diversion in the Jurisprudence of Juvenile Courts*, in A CENTURY OF JUVENILE JUSTICE 142, 144-45 (Margaret K. Rosenheim et al. eds., 2002) (identifying the two primary aims of the juvenile court movement as "interventionist," aimed at rehabilitation, and "diversionary," aimed at separating children from the adult system, and suggesting, contentiously, that the diversionary aim has always predominated (emphasis omitted)).

24. See Michael Grossberg, *Changing Conceptions of Child Welfare in the United States, 1820-1935*, in A CENTURY OF JUVENILE JUSTICE, *supra* note 23, at 3, 29-32 (describing the concerns motivating compulsory education and child labor laws).

25. See WILLIAM AYERS, A KIND AND JUST PARENT: THE CHILDREN OF JUVENILE COURT 23 (1997); see also John Dewey, *The School and Social Progress*, in THE CHILD AND THE CURRICULUM AND THE SCHOOL AND SOCIETY 6, 7 (Univ. of Chi. Press 1956) (1899) ("What the best and wisest parent wants for his own child, that must the community want for all its children.").

contrasted with adult offenders or even their corrupt or at least degraded parents. What this meant, primarily, was not that children were naturally good, but that children were amenable to change, open to positive influence, in a way that adults were not.²⁶ Second, the laws drew age lines (generally between sixteen and eighteen), and these age lines helped reinforce the significant legal divide between children and adults.²⁷

These progressive laws gave states the authority to intervene to a considerable degree in parents' upbringing of their children, and legal challenges to these laws brought by parents were largely unsuccessful.²⁸ In introducing these limitations on parental authority and in establishing a legal forum for children in juvenile court, these laws planted the seed for the ultimate emergence of children's rights, asserted against parents, but also against the state.

2. The Constitution's Protection of Parents' Rights

In considerable tension with this general trend was the Supreme Court's recognition of constitutionally protected parental rights in two cases, *Meyer v. Nebraska*²⁹ and *Pierce v. Society of Sisters*,³⁰ both decided in the 1920s. While *Meyer* threw out a foreign language prohibition that was, even back then, hard to justify in pedagogical or social engineering terms,³¹ the significance of *Pierce* was far reaching. States could require that parents obtain an education for their children, but they could not, the Court held, require parents to send their children to public schools.³² Thus, *Pierce* gave parents broad rights of control over what and how children learn and, at least as important, with whom they associate.

26. See LE ROY ASHBY, *ENDANGERED CHILDREN: DEPENDENCY, NEGLECT, AND ABUSE IN AMERICAN HISTORY* 80 (1997) (quoting boy's club organizer, J.F. Atkinson, as warning that "'If we do not pull him up,' . . . the street waif . . . 'will pull us down'"); see also ANTHONY M. PLATT, *THE CHILD SAVERS: THE INVENTION OF DELINQUENCY* 51 (2d ed. 1977) (describing the preoccupation of correctional workers at the turn of the century with the question, "'How can we reach the germ and prevent its development into self-perpetuating evil?'").

27. Grossberg, *supra* note 24, at 23, 29-30 (describing the interrelationship between compulsory attendance and child labor laws and reformers' interest in safeguarding an extended period of childhood, distinct from the experiences and responsibilities of adulthood).

28. See, e.g., *State v. Bailey*, 61 N.E. 730, 730, 732 (Ind. 1901) (rejecting parents' challenges to state compulsory attendance laws); *Parr v. State*, 157 N.E. 555, 555-56 (Ohio 1927) (upholding the constitutionality of compulsory education laws in Ohio, explaining that "the natural rights of a parent to the custody and control of his infant child are subordinate to the power of the state").

29. 262 U.S. 390 (1923).

30. 268 U.S. 510 (1925).

31. 262 U.S. at 400-03.

32. *Pierce*, 268 U.S. at 534-35.

The justification for the Courts' rulings in *Meyer* and *Pierce* sounded in political theory, not social science. Echoing William Blackstone, the Court wrote that parents, who were responsible for a child's "nurture," also had the "right, coupled with the high duty, to recognize and prepare him for additional obligations."³³ In *Pierce*, the Court warned against the state's "standard[ization]" of its children,³⁴ and in *Meyer*, it invoked the specter of Plato's "Ideal Commonwealth," where "children are to be common, and no parent is to know his own child, nor any child his parent."³⁵ Clearly, the Court's rulings were inspired by a general vision of a preferred allocation of authority between state and individuals, rather than any assessment of the particular developmental value to children of public schooling.

In its next significant parental rights decision, *Prince v. Massachusetts*,³⁶ the Court qualified this allocation of authority and recognized the state's quasi-parental, or *parens patriae*, role in seeing "that children [are] both safeguarded from abuses and given opportunities for growth into free and independent well-developed men and citizens."³⁷ In upholding a guardian's criminal conviction for allowing her niece to sell religious pamphlets on the street, the Court cited to research documenting risks to children associated with exposure to the "diverse influences of the street."³⁸ Thus, research reporting actual harmful effects on children helped justify the Court's limitation of parental control.

Three decades later, in *Wisconsin v. Yoder*,³⁹ the Court struck down the convictions of three Amish fathers who had refused to send their children to high school, in violation of compulsory attendance laws.⁴⁰ While the Court recognized the state's important interest in ensuring that all children were educated, in the end it could not identify a sufficient

33. *Id.* at 535; see BLACKSTONE, *supra* note 6, at *440 ("The power of parents over their children is derived from the former consideration, their duty [of maintenance, protection and education]; this authority being given them, partly to enable the parent more effectually to perform his duty, and partly as a recompence for his care and trouble in the faithful discharge of it.").

34. 268 U.S. at 535.

35. 262 U.S. at 401-02.

36. 321 U.S. 158 (1944).

37. *Id.* at 165.

38. *Id.* at 159-60, 168 & n.3 (citing CHILDREN'S BUREAU, U.S. DEP'T OF LABOR, PUBL'N NO. 227, CHILDREN ENGAGED IN NEWSPAPER AND MAGAZINE SELLING AND DELIVERING 20 (1935) (confirming survey findings "that newspaper selling is an unsuitable and unwholesome occupation for young children"); EDWARD N. CLOPPER, CHILD LABOR IN CITY STREETS 9 (1912) (encouraging the State to protect children from "all forms of exploitation"); NETTIE P. MCGILL, CHILDREN'S BUREAU, U.S. DEP'T OF LABOR, PUBL'N NO. 183, CHILDREN IN STREET WORK 23 (1928) (suggesting a correlation between selling newspapers and a child's educational progress)).

39. 406 U.S. 205 (1972).

40. *Id.* at 207, 234.

harm to *Amish children in particular*, of depriving them of two years of high school.⁴¹ This was because, the Court concluded, the education they received was sufficient to prepare them for life in the Amish community, and there was no empirical evidence suggesting that large numbers of Amish children left the community, or that those who did leave were unable to support themselves.⁴²

What *Yoder's* harm analysis captures is that how the law defines harm is entangled with how the law treats children. The more we recognize children as individual rights holders, the more we are troubled by a delegation of control to another over how a child develops and, therefore, what future choices she will be in a position to make.⁴³ Justice Douglas tried to get at this important issue in his dissent, calling for a separate consideration of the Amish children's views on the subject of their schooling (and presumably their religion).⁴⁴ Notably, he defended his position as consistent with these children's cognitive capacities.⁴⁵ There "[was] nothing in [the] record to indicate that the moral and intellectual judgment demanded of the student by the question in this case is beyond his capacity," he argued, and, citing to a long line of developmental psychologists including Piaget and Kohlberg, he concluded that there "[was] substantial agreement among child psychologists and sociologists that the moral and intellectual maturity of the 14-year-old approaches that of the adult."⁴⁶

Douglas's approach suffers from some of the infirmities I will suggest are typical of those who tie their analysis of children's rights too tightly to a simple assessment of capacity. But his approach clearly represents an advancement to the extent it insists on framing the analysis to take account of children's independent rights.

41. *Id.* at 221-22 ("It is one thing to say that compulsory education for a year or two beyond the eighth grade may be necessary when its goal is the preparation of the child for life in modern society as the majority live, but it is quite another if the goal of education be viewed as the preparation of the child for life in the separated agrarian community that is the keystone of the Amish faith.").

42. *Id.* at 224.

43. See Joel Feinberg, *The Child's Right to an Open Future*, in WHOSE CHILD?: CHILDREN'S RIGHTS, PARENTAL AUTHORITY, AND STATE POWER 124 (William Aiken & Hugh LaFollette eds., 1980) (arguing that parental rights should be circumscribed to ensure that children have the opportunity to make their own autonomous choices about how they live their lives, when they become adults); Vivian E. Hamilton, *Immature Citizens and the State*, 2010 BYU L. REV. (forthcoming 2010) (manuscript at 52, on file with the Brigham Young University Law Review) (arguing that *Yoder* was wrongly decided and that depriving Amish adolescents of an education through secondary school "tends toward foreordaining their futures and unacceptably narrows their options").

44. *Yoder*, 406 U.S. at 244-46 (Douglas, J., dissenting).

45. See *id.* at 245 n.3.

46. *Id.*

3. The Emergence of Children's Constitutional Rights

Even before *Yoder*, the Court had begun to extend a broad range of civil rights to children. In 1943, the Supreme Court held in *West Virginia State Board of Education v. Barnette*⁴⁷ that compelling children to salute the flag violated the First Amendment.⁴⁸ The *Barnette* Court did not sharply distinguish between the rights of children and their parents, but the language of the opinion made clear that it was the experience of the children that was the focus of the Court's concern.⁴⁹ Then in 1967, in *In re Gault*,⁵⁰ the Supreme Court more explicitly declared that the Constitution applied to children as well as adults.⁵¹ *Gault* inspired an explosion of children's rights litigation, leading to the Court's recognition of children's constitutional rights of due process, free speech, and reproductive choice, among others.⁵²

In *Gault*, as in subsequent cases, the Court offered no justification for children's inclusion within the Constitution's protections. The Court simply declared, in an intriguing use of the negative, that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone."⁵³ Presumably children's personhood was sufficient to qualify them as constitutional rights holders. But children's rights have, from the outset, looked different from adults' rights, and the Court has made some effort to account for these differences.

In the last decades of the twentieth century, the Court's various opinions describing and limiting children's constitutional rights offered a range of accounts for children's distinct constitutional treatment. In general, the Court pointed to some mix of children's reduced capacity, children's greater vulnerability, and children's beneficially entangled relationship with their rights-holding parents to justify imposing limits on children's rights they would not impose on adults. All three of these justifications for modifying children's rights reflected the Court's conception of child development and, in the case of parental dependence, the law's response to children's special limitations and needs. Despite the developmental grounding of the analysis, the

47. 319 U.S. 624 (1943).

48. *Id.* at 642.

49. *See id.* at 624-25.

50. 387 U.S. 1 (1967).

51. *Id.* at 55.

52. *See, e.g.,* *Goss v. Lopez*, 419 U.S. 565, 576 (1975) (recognizing students' due process rights when faced with school suspension); *Tinker v. Des Moines Indep. City Sch. Dist.*, 393 U.S. 503, 513 (1969) (recognizing children's speech rights in school); *Bellotti v. Baird*, 443 U.S. 622, 650 (1979) (recognizing qualified right of adolescents to seek abortions without their parents' consent).

53. *In re Gault*, 387 U.S. at 13.

twentieth-century Supreme Court rarely relied on social science to support or refine its claims.⁵⁴ Instead, the Court rested its developmental account on conventional wisdom, as reflected in our legal traditions.

To anyone who has a more sophisticated social-scientific understanding of child development, the Court's accounts were disturbingly thin and annoyingly incomplete. The "impaired decision-making capacity" that sometimes justified rights restrictions was simply asserted with no support, and with no attempt to distinguish children's capacity by age, or by decision-making context. Moreover, the concept of decision-making capacity lumped together cognitive ability, knowledge, experience, values, and behavior in a manner that obscured which elements were relevant and how. In addition, this capacity to make decisions was often treated as the only capacity that mattered, taking no account of emotional and social capacities that might bear directly on the legal issue at stake. And finally, the Court's statements about capacity gave no attention to the important gap between capacity and performance that can be so important in contexts where children's rights are implicated.

In *Parham v. J.R.*,⁵⁵ a case in which minors' capacity limitations appear to play a decisive role in limiting their right to challenge their mental health institutionalizations, the Court wrote only two sentences on the subject. First, the Court explained: "The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions."⁵⁶ Three paragraphs later, the Court added: "Most children, even in adolescence, simply are not able to make sound judgments concerning many decisions, including their need for medical care or treatment."⁵⁷

The first of the sentences, while it speaks about capacity in broad unsupported terms, has the virtue of focusing on legal conventions, which it accurately summarizes. The second sentence, however, is more troubling, as it seems to be a bald, unsupported claim about the actual capacities of children and adolescents. As such it is probably wrong, as "simply not able," grossly undersells adolescents' decision-making capacity.

54. *But see supra* notes 43-45 and accompanying text (discussing Justice Douglas's dissent in *Yoder*).

55. 442 U.S. 584 (1979).

56. *Id.* at 602.

57. *Id.* at 603.

Similarly, in *Bellotti v. Baird*,⁵⁸ the central early case considering adolescents' abortion rights, a Court plurality listed children's "inability to make critical decisions in an informed, mature manner," among the three justifications generally relied upon by the Court in curtailing children's rights, but then engaged in an obscure explanation of this justification.⁵⁹ The Court offered *Ginsberg v. New York*,⁶⁰ a case about regulating the sale of "girlie magazines" to children, as its illustration of the Court's attention to children's impaired decision-making capacity.⁶¹ In fact, neither the majority opinion in *Ginsberg* nor the illustrative summary in *Bellotti* says anything about capacity, an omission made only a little less glaring by *Bellotti*'s inclusion, in a footnote, of the following statement from Justice Stewart's concurrence in *Ginsberg*:

"[A]t least in some precisely delineated areas, a child—like someone in a captive audience—is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees. It is only upon such a premise, I should suppose, that a State may deprive children of other rights—the right to marry, for example, or the right to vote—deprivations that would be constitutionally intolerable for adults."⁶²

This language shows up repeatedly in the Court's opinions.⁶³ What Justice Stewart supposes, in concurrence, is the best the Court can muster on this purportedly central question of capacity.

Later in its opinion, the *Bellotti* plurality addressed minors' decision-making capacity in the abortion context.⁶⁴ In this discussion, it noted without support that "immature minors often lack the ability to make fully informed choices that take account of both immediate and long-range consequences,"⁶⁵ and repeated another assertion of Justice Stewart's, from another concurrence, that the decision whether or not to bear a child was "a grave decision, and a girl of tender years, under emotional stress, may be ill-equipped to make it without mature advice

58. 443 U.S. 622 (1979).

59. *Id.* at 634.

60. 390 U.S. 629 (1968).

61. *Parham*, 443 U.S. at 636-37 (citing *Ginsberg*, 390 U.S. at 631).

62. *Id.* at 635 n.13 (quoting *Ginsberg*, 390 U.S. at 649-50 (Stewart, J., concurring) (citations omitted)).

63. See, e.g., *Thompson v. Oklahoma*, 487 U.S. 815, 822-24 (1988); *Carey v. Population Servs. Int'l*, 431 U.S. 678, 705 (1977); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212-14 (1975).

64. 443 U.S. at 640-41.

65. *Id.* at 640.

and emotional support.”⁶⁶ The opinion did make note of expert testimony offered at trial, but this testimony merely supported the unremarkable conclusion, disconnected from the question of capacity, that “parental involvement in a minor’s abortion decision, if compassionate and supportive, was highly desirable.”⁶⁷

The point of all this is not to suggest that the Court was wrong to conclude that children’s capacities are relevant to an analysis of children’s rights, but that the Court did so little either to define the relevant capacities or to connect those capacities to the rights questions at issue. Later, I will argue that even a more sophisticated consideration of children’s capacities carries risks for the legal analysis of children’s rights.⁶⁸

The relevance of children’s special vulnerabilities to the scope of children’s rights has also been only thinly analyzed in the Court’s decisions. *Bellotti* offered this special vulnerability as another on its list of three reasons children’s constitutional rights were not coextensive with adults.⁶⁹ To expand upon this reason, *Bellotti* offered the single example of the juvenile court, and the lack of the jury right in that court system.⁷⁰ This right was denied, the Court explained, in order to allow the state “to adjust its legal system to account for children’s vulnerability and their needs for ‘concern, . . . sympathy, and . . . paternal attention.’”⁷¹ An example, to be sure, but hardly an explanation, and the *Bellotti* Court made no effort to tie this justification into its limitation on minor’s abortion rights. Perhaps the best example of a rights adjustment tied expressly to a child’s special vulnerability is the Court’s direction in *New Jersey v. T.L.O.*⁷² to take a student’s age (and sex) into account in determining whether a school search was reasonable.⁷³ While this framing seems to suggest that children’s vulnerability would justify, if anything, enhanced rights in the school search context, the Court said nothing beyond this one phrase to explain or account for this age-graded right.

For the most part, the Court’s account of children’s greater vulnerabilities shows up in its assessment of the state interests that weigh against the granting of rights to children. All the school speech

66. *Id.* at 641 (quoting *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 91 (1976) (Stewart, J., concurring)).

67. *Id.* at 640 & n.20.

68. See *infra* notes 143-44 and accompanying text.

69. See 443 U.S. at 634.

70. *Id.* at 635.

71. *Id.*

72. 469 U.S. 325 (1985).

73. *Id.* at 342.

and search cases that denied students constitutional protection fall into this category. At times, the identified state interest is in protecting minors from harm, whether through drug use or exposure to sexually offensive speech.⁷⁴ At other times, the state's interest is said to be in providing some affirmative benefit to children, such as education or the inculcation of values, without which children would be harmed.⁷⁵ These are all, of course, developmental aims, and the children's rights being pursued are generally seen as in conflict with these aims.

Less attended to are the direct developmental effects associated with the law's treatment of children, particularly the granting and denying of rights and the children's experience of those grants and denials. On occasion, the Court has addressed the connection between children's legal treatment and their emerging views of their government and their rights and responsibilities as citizens. In *West Virginia State Board of Education v. Barnette*,⁷⁶ Justice Jackson rejected the argument that schools were entitled to special deference that severely limited the reach of the First Amendment within them:

The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures—Boards of Education not excepted. These have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.⁷⁷

This particular language was invoked by the Court again in *Tinker v. Des Moines Independent Community School District*,⁷⁸ when it upheld school children's right to wear black armbands to protest the United States' military involvement in Vietnam,⁷⁹ and in *T.L.O.*, when it

74. See, e.g., *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 661 (1995) ("School years are the time when the physical, psychological, and addictive effects of drugs are most severe."); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 274-75 (1988) ("It was not unreasonable for the principal to have concluded that such frank talk [including graphic accounts of sexual activity] was inappropriate in a school-sponsored publication distributed to 14-year-old freshmen and presumably taken home to be read by students' even younger brothers and sisters.").

75. See, e.g., *Hazelwood*, 484 U.S. at 272 (noting the school's interest in setting high standards for the student writing produced in its journalism class); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986) ("[S]chools must teach by example the shared values of a civilized social order.").

76. 319 U.S. 624 (1943).

77. *Id.* at 637.

78. 393 U.S. 503 (1969).

79. *Id.* at 507, 513 (quoting *Barnette*, 319 U.S. at 637).

acknowledged the applicability of the Fourth Amendment to school searches.⁸⁰ Concluding that the Court did not go far enough in protecting children's rights in *T.L.O.*, both Justices Brennan and Stevens emphasized the connection between children's treatment at the hands of school authorities and their emerging understanding of their rights as citizens.⁸¹ Justice Brennan focused on the developmental risks associated with a rights-denying approach:

[T]his principle is of particular importance when applied to schoolteachers, for children learn as much by example as by exposition. It would be incongruous and futile to charge teachers with the task of imbuing [sic] their students with an understanding of our system of constitutional democracy, while at the same time immunizing those same teachers from the need to respect constitutional protections.⁸²

Justice Stevens, in contrast, emphasized the developmental benefits that could come from a rights-enforcing approach that was visible to students:

Schools are places where we inculcate the values essential to the meaningful exercise of rights and responsibilities by a self-governing citizenry. If the Nation's students can be convicted through the use of arbitrary methods destructive of personal liberty, they cannot help but feel that they have been dealt with unfairly. The application of the exclusionary rule in criminal proceedings arising from illegal school searches makes an important statement to young people that "our society attaches serious consequences to a violation of constitutional rights," and that this is a principle of "liberty and justice for all."

. . . .

The schoolroom is the first opportunity most citizens have to experience the power of government. Through it passes every citizen and public official, from schoolteachers to policemen and prison guards. The values they learn there, they take with them in life.⁸³

As these cases reflect, this sort of analysis has generally been offered to justify extending rights to children. But in at least one case, *Bethel School District No. 403 v. Fraser*, the Court suggested that denying rights served "to teach[] students the boundaries of socially

80. *New Jersey v. T.L.O.*, 469 U.S. 325, 334 (1985) (quoting *Barnette*, 319 U.S. at 637).

81. *Id.* at 353-54 (Brennan, J., concurring in part and dissenting in part); *id.* at 373-74 (Stevens, J., concurring in part and dissenting in part).

82. *Id.* at 354 (Brennan, J., concurring in part and dissenting in part).

83. *Id.* at 373-74, 385-86 (citations omitted).

appropriate behavior,” that “[e]ven the most heated political discourse in a democratic society” should respect.⁸⁴ Either way, an analysis focused on how the contours of children’s rights affect their development into adult rights holders asks an important question often ignored by the Court.

The third category of justification identified by the Court for its special treatment of children’s rights—the special relationship of dependence and authority that exists between children and parents—tends to fold back on the justifications of lesser capacities and greater vulnerabilities. Thus, *Parham* explains that “[t]he law’s concept of the family rests on a presumption that parents possess what a child lacks”;⁸⁵ *Ginsberg* endorses legislative determination that “parents . . . who have . . . primary responsibility for children’s well-being are entitled to the support of laws [including laws that restrict their children’s access to certain speech] designed to aid discharge of that responsibility”;⁸⁶ and *Bellotti* explains that “[l]egal restrictions on minors, especially those supportive of the parental role, may be important to the child’s chances for . . . full growth and maturity.”⁸⁷ Although the demands of that special parent-child relationship offer a distinct justification for treating children’s rights differently, they are built on the same thinly analyzed developmental assumptions discussed above.

The flimsiness of the Court’s account of its special treatment of children’s rights has inspired many scholars and advocates to look to developmental psychology to improve the law in this area. Psychologists and lawyers alike have challenged the lack of consistency or coherence in the law’s assignment of rights and have offered a more subtle and empirically supported vision of children’s development which they have applied to relevant legal contexts with increasing sophistication.⁸⁸ These

84. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986).

85. *Parham v. J.R.*, 442 U.S. 584, 602 (1979).

86. *Ginsberg v. New York*, 390 U.S. 629, 639 (1968).

87. *Bellotti v. Baird*, 443 U.S. 622, 638 (1979).

88. *See, e.g.*, GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, *supra* note 20, at 2 (lamenting that “[o]ur expanding body of knowledge about child development often directly bears upon legal decisions in the area of children’s rights, yet, more often than not, it is ignored” and proposing developmentally based reforms for many areas of the law affecting children); Donald N. Bersoff, *Autonomy for Vulnerable Populations: The Supreme Court’s Reckless Disregard for Self-Determination and Social Science*, 37 VILL. L. REV. 1569, 1594 (1992) (“What is particularly galling to me, as well as others, is that the Court justifies its differential treatment of children on the unsupported assumptions [about adolescents’ vulnerabilities and immature decision-making ability, when] . . . it is very much open to doubt whether [these assumptions are] true about adolescents.”); Donald L. Beschle, *The Juvenile Justice Counterrevolution: Responding to Cognitive Dissonance in the Law’s View of the Decision-Making Capacity of Minors*, 48 EMORY L.J. 65, 103-05 (1999) (suggesting that the law’s increasing recognition of children’s autonomy rights is in conflict with the law’s traditionally paternalistic approach to juvenile justice and calling for additional research

scholars have had the benefit of a growing body of child development research, some of which has been expressly designed to address particular issues raised by the Court's decisions.⁸⁹ This research, and the commentary that has connected the research to the law, has focused heavily on the question of children's capacities.⁹⁰ Before considering the effect this interdisciplinary work has and can have on the law, there is one more chapter to tell in the twentieth-century evolution of children's legal status.

on children's capacities that could guide future law reform efforts); Larry Cunningham, *A Question of Capacity: Towards a Comprehensive and Consistent Vision of Children and Their Status Under Law*, 10 U.C. DAVIS J. JUV. L. & POL'Y 275, 369 (2006) (proposing the creation of a codified Model Children's Code to resolve the inconsistencies in the law's assumptions about child development); Gary B. Melton, *Toward "Personhood" for Adolescents: Autonomy and Privacy as Values in Public Policy*, 38 AM. PSYCHOL. 99, 101-02 (stating that "the Court has wavered numerous times in its perception of whether minors are fully persons entitled to basic legal rights," and arguing that many legal rules are based upon false assumptions about children's capacities); Elizabeth S. Scott, *The Legal Construction of Adolescence*, 29 HOFSTRA L. REV. 547, 576-80 (2000) (noting that the law's conceptions of childhood and adulthood are fairly clear, but that, particularly in the area of juvenile justice, a failure to recognize a third, transitional, category of adolescence produces troubling and developmentally inappropriate results).

89. See generally THOMAS GRISSO, JUVENILES' WAIVER OF RIGHTS: LEGAL AND PSYCHOLOGICAL COMPETENCE (1981) (reporting the results of studies designed to assess juveniles' competence to waive *Miranda* rights); GARY B. MELTON ET AL., CHILDREN'S COMPETENCE TO CONSENT (1983) (identifying and addressing developmental questions concerning children's decision-making competence raised by the law's treatment of children); see also Elizabeth Cauffman & Laurence Steinberg, *(Im)maturity of Judgment in Adolescence: Why Adolescents May Be Less Culpable Than Adults*, 18 BEHAV. SCI. & L. 741, 758 (2000) (finding that "psychosocial characteristics continue to develop during late adolescence, and that these changes result in significant declines in anti-social decision-making," and concluding that "the age differences observed . . . are appreciable enough to warrant drawing a legal distinction"); Thomas Grisso & Linda Vierling, *Minors' Consent to Treatment: A Developmental Perspective*, 9 PROF. PSYCHOL. 412, 413 (1978) (examining "developmental psychological research regarding the abilities that would seem to be required to meet a legal standard for competent consent"); Catherine C. Lewis, *A Comparison of Minors' and Adults' Pregnancy Decisions*, 50 AM J. ORTHOPSYCHIATRY 446, 447-51 (1980) (finding few age-related differences between minors and adults' understanding of the issues or the reasoning process employed in making pregnancy-related decisions).

90. See, e.g., Cunningham, *supra* note 88, at 277-78 (arguing that "[t]he law of children has developed in a patchwork and inconsistent fashion" and calling on "[l]awmakers [to] draw upon" the "rich body of psychological literature" about children's developing capacities "to create laws that cohesively and logically deal with children's rights and responsibilities"); Melton, *supra* note 88, at 99-101 (noting that the Court's analysis of minor's rights focuses on their competencies and has substantially underestimated those competencies, as demonstrated in empirical studies); Elizabeth S. Scott, *Judgment and Reasoning in Adolescent Decisionmaking*, 37 VILL. L. REV. 1607, 1609 (1992) (suggesting that, in addition to the cognitive capacities of understanding and reasoning, the law should take into account children's capacity to exercise judgment in assigning children rights and responsibilities).

4. The Increasing Salience of Juvenile Crime

In the 1980s and early 1990s, a spike in violent juvenile crime inspired a wave of public panic and a heavy political response.⁹¹ Criminologist John DiIulio famously dubbed these juvenile offenders “super-predators” and warned of worse to come.⁹² Politicians and policy makers responded with boot camps, longer periods of confinement, and, most significantly, adult prosecutions. First only targeted at the most serious, violent offenses, states gradually expanded the range of offenses and the age of offenders who qualified for “transfer” to adult court.

The public enthusiasm for this get-tough trend was captured in the refrain “adult time for adult crime.”⁹³ The core message of this slogan was, of course, a simple call for retribution: Punishments should match misdeeds, no exceptions. But the language inevitably carried a developmental message as well: In the eyes of the law, criminal conduct turned minors into adults.

The explosion of adult prosecutions of juveniles inflamed the debate about children’s legal treatment and generated extensive research and analysis with implications for children’s rights in other contexts. The MacArthur Foundation convened a Research Network on Adolescent Development and Juvenile Justice and funded extensive research and interdisciplinary collaboration aimed at improving juvenile crime policy.⁹⁴ The network, in turn, encouraged a group of developmental psychologists to focus their attention on these issues.⁹⁵ At

91. See ELIZABETH S. SCOTT & LAWRENCE STEINBERG, *RETHINKING JUVENILE JUSTICE* 109 (2008) (describing the response to the rise in juvenile crime as a “moral panic,” in which “the public, the media, and politicians reinforce each other in an escalating pattern of intense and disproportionate concern in response to a perceived social threat posed by a particular group of individuals”); Elizabeth S. Scott, Keynote Address at Temple University James E. Beasley School of Law, Law and Adolescence Symposium: Adolescence and the Regulation of Youth Crime (Mar. 18, 2006), in 79 *TEMP. L. REV.* 337, 351 (2006).

92. John J. DiIulio, Jr., *The Coming of the Super-Predators*, *WKLY. STANDARD*, Nov. 27, 1997, at 23, 23.

93. See Scott, *supra* note 91, at 351 n.54.

94. MacArthur Found., Research Network on Adolescent Development & Juvenile Justice, www.adjj.org/content/index.php (last visited Mar. 15, 2010).

95. These developmental psychologists included Laurence Steinberg, Distinguished University Professor at Temple University; Jennifer Woolard, Assistant Professor of Psychology at Georgetown University; and Elizabeth Cauffman, Associate Professor of Psychology at the University of California-Irvine. Thomas Grisso, a Clinical (rather than developmental) Psychologist at the University of Massachusetts, who has focused much of his research on adolescents and juvenile justice, was also associated with the MacArthur Network. For a description of their professional profiles, see Temple University Department of Psychology, Laurence Steinberg, Ph.D., <http://www.temple.edu/psychology/lids/> (last visited Apr. 8, 2010); Georgetown University Center for Research on Adolescence, Women, and the Law, Jennifer L. Woolard, Ph.D., <http://crawl.georgetown.edu/woolard.html> (last visited Apr. 8, 2010); University of California-Irvine School of Social Ecology, Elizabeth Cauffman Profile, <http://socialecology.uci.edu/faculty/>

the same time, brain imaging techniques were emerging that allowed scientists to document relevant changes in the human brain between adolescence and adulthood.⁹⁶ Taken together, the psychological and brain research was offered to show that adolescents, as a part of their normal development, were less able than adults to control their impulses, resist peer pressure, and consider the longer term consequences of their actions, and were less fixed in their identities and therefore less culpable for their crimes.⁹⁷

B. *Roper and its Risks*

By the turn of the twenty-first century, juvenile crime had dropped considerably, for reasons that may have had little to do with the harsh legal responses of the previous decade.⁹⁸ But many of the transfer laws (and related political attitudes) remained, and the interdisciplinary efforts to challenge the laws in courts and before legislatures continued. These efforts gained the attention of the Supreme Court when it reconsidered the constitutionality of the juvenile death penalty in *Roper v. Simmons*⁹⁹ in 2005, and the Court's embrace of this interdisciplinary analysis captures both the value and the hazards of this approach.¹⁰⁰

In *Roper*, the Court ruled that the Eighth Amendment's prohibition of cruel and unusual punishment prevented states from imposing the death penalty for offenses committed before the offender's eighteenth birthday.¹⁰¹ *Roper* reversed the Court's relatively recent decision in *Stanford v. Kentucky*,¹⁰² and relied, in large part, on changes in the legal

cauffman (last visited Apr. 8, 2010); and UMass Medical School, Center for Mental Health Services Research, Thomas Grisso Profile, <http://www.umassmed.edu/cmhsr/faculty/Grisso.cfm> (last visited Apr. 8, 2010).

96. See Terry A. Maroney, *The False Promise of Adolescent Brain Science in Juvenile Justice*, 85 NOTRE DAME L. REV. 89, 97-99, 105 (2009) (describing the emergence of magnetic resonance imaging techniques in the 1990s that allowed for the increasingly sophisticated observation of human brains in living people, including young people).

97. See Cauffman & Steinberg, *supra* note 89, at 759; Maroney, *supra* note 96, at 93, 105, 116-18 (describing scholars' and advocates' reliance on the neuroscience, joined with the findings of developmental psychology, to challenge laws that treated juvenile offenders as adults); Scott, *supra* note 88, at 591-92.

98. See HOWARD M. SNYDER & MELISSA SICKMUND, JUVENILE OFFENDERS AND VICTIMS: 2006 NATIONAL REPORT, at iii (2006) (reporting a steady drop in juvenile violent crime arrests since 1994, down to 1970s levels); SCOTT & STEINBERG, *supra* note 91, at 181-205 ("[S]tudies that have examined the impact of punitive policies on youth crime report mixed results, offering little solid support for the claim that declining crime rates are due to the enactment of harsher laws.").

99. 543 U.S. 551 (2005).

100. See *id.* at 568-70.

101. *Id.* at 568.

102. 493 U.S. 361, 380 (1989) (holding that capital punishment of murders committed by sixteen and seventeen year olds does not violate the Eighth Amendment).

and social-scientific landscape to justify the change.¹⁰³ Writing for the Court, Justice Kennedy concluded that state legislative trends, an improved understanding of adolescent development, and sharpening international norms all suggested that our “evolving standards of decency” now rendered the juvenile death penalty cruel and unusual.¹⁰⁴ While all three aspects of the Court’s analysis have inspired considerable discussion, the analysis of adolescent differences, which carried much of the weight of the decision, is our focus here.¹⁰⁵

The *Roper* Court, “exercising [its] independent judgment,” determined that the death penalty was a “disproportionate punishment” for all individuals under eighteen years of age because, by virtue of their incomplete development, they could not fall within the most blameworthy category worthy of our most severe punishment.¹⁰⁶ The Court pointed to three differences between adolescents (defined as younger than eighteen) and adults (defined as eighteen and older) that lessened juveniles’ culpability for their offenses: First, adolescents had inferior impulse control, bad judgment, and were less responsible; second, they were more vulnerable to negative influences such as peer pressure and less able to extract themselves from negative social situations; and third, their characters were less fixed.¹⁰⁷

Notably, Justice Kennedy prefaced this developmental analysis with the Court’s conventional nod to common sense. He began by invoking what “any parent knows,” and he cited to two other death penalty cases that comment on children’s immaturity without resort to social science.¹⁰⁸ But the overall sense of the analysis is that it speaks in the language and with the authority of the developmental psychologists whose writings are the only sources cited for all three of the differences identified.¹⁰⁹ Indeed, the core of the analysis tracks the arguments offered in amicus briefs filed on behalf of several professional organizations of psychiatrists and psychologists, among others.¹¹⁰

103. *Roper*, 543 U.S. at 568-70, 574-75.

104. *Id.* at 560-61, 565, 569-70, 575.

105. *See id.* at 588 (O’Connor, J., dissenting) (“[T]he rule decreed by the Court rests, ultimately, on its independent moral judgment that death is a disproportionately severe punishment for any 17-year-old offender.”); *id.* at 615 (Scalia, J., dissenting) (“Of course, the real force driving today’s decision is not the actions of four state legislatures, but the Court’s “own judgment” that murderers younger than 18 can never be as morally culpable as older counterparts.” (citation omitted)).

106. *Id.* at 569-70.

107. *Id.* at 564, 568.

108. *Id.* at 569-70.

109. *See id.*

110. *See* Brief for Am. Psychol. Ass’n & Missouri Psychol. Ass’n as Amici Curiae Supporting Respondent at 4-13, *Roper v. Simmons*, 543 U.S. 551 (2005) (No. 03-633); Brief for Am. Med.

Roper was heralded by legal and child development scholars alike as an important step forward in the interdisciplinary integration of child development and the law.¹¹¹ At last, a Supreme Court decision that made intelligent use of the most sophisticated, context-specific developmental research. But the very quality of the Court's interdisciplinary analysis serves to highlight some serious hazards with the approach, hazards only avoided by shifting our understanding of the proper interplay between the two disciplines.

The Court's analysis in *Roper* flags four interrelated hazards associated with the law's reliance on child development research that go beyond the general hazards of relying on social science to make law, and all of these special hazards stem from the heavy focus on an assessment of capacities. First, any rights built upon developmental research are vulnerable to attack if the match between research findings and legal age lines is not complete. Second, a reliance on this research to formulate rights for children raises serious questions about our approach to various adult rights. Third, the analysis calls into question our approach to other rights for children, particularly autonomy rights. And fourth, declaring adolescents less responsible for their own actions sends a message that is both politically and developmentally counterproductive.

1. The Quality and Stability of Developmental Findings

Before turning to the specific hazards associated with relying on child development research, I note some more general problems with the law's reliance on social science which have already been widely recognized.¹¹² First is the problem that courts and lawyers have little

Ass'n et al. as Amici Curiae, Supporting Respondent at 4-10, *Roper v. Simmons*, 543 U.S. 551 (2005) (No. 03-633). Notably, the Court cited to the psychological literature included in these briefs, but not to the neuroscientific studies of brain development. For a comprehensive consideration of the brain science's potential effect on the *Roper* decision, see Maroney, *supra* note 96, at 105-08.

111. See, e.g., Elizabeth S. Scott, *Adolescence and the Regulation of Youth Crime*, 79 TEMPLE L. REV. 337, 339 (2006) (applauding *Roper's* consideration of developmental research in assessing juvenile culpability and noting that it represents a departure from previous practice); Donna M. Bishop & Hillary B. Farber, *Joining the Legal Significance of Adolescent Developmental Capacities with the Legal Rights Provided in In re Gault*, 60 RUTGERS L. REV. 125, 126 (2007) (describing *Roper* as "offer[ing] an important corrective to what came before"); see also Cyn Yamashiro et al., *Report of the Working Group on Representing Children as Members of Communities*, 6 NEV. L.J. 670, 677 (2006) ("The Supreme Court's decision in *Roper v. Simmons* affirms that children are different and that attorneys representing children have an obligation to learn about those differences and utilize the existing social and psychological research in the representation of their clients." (citations omitted)).

112. For a sobering reminder of how social science can be used to support legal conclusions now universally condemned on moral as well as social-scientific grounds, see Alan J. Tomkins & Kevin Oursland, *Social and Social Scientific Perspectives in Judicial Interpretations of the*

ability to assess the quality and applicability of social science, particularly when it has not been tested through the adversarial process. Second is the danger that courts, litigants, and scholars will pick and choose among the sources to find the research that supports their own predilections (what Justice Scalia calls “look[ing] over the . . . crowd and pick[ing] out its friends” in his *Roper* dissent).¹¹³ Third is the likelihood (even the expectation) that the science will continually change, threatening either the stability or the legitimacy of the law. These are real concerns that can only partially be addressed by a commitment to a rigorous and exhaustive assessment of the research. For purposes of my analysis, however, I set them aside and focus on concerns unique to the law’s reliance on developmental research.

2. Imperfect Matches Between the Child Development Research and the Law

Analysis that ties legal requirements to age-based findings about capacities inevitably calls into question many aspects of the law that do not match the reported age distribution. Any time a single age line is set by law it will inevitably underestimate the capacities of some of its targets and overestimate the capacities of others. We generally justify these bright lines in practical terms: It is too messy to set multiple, contingent lines or to make individualized assessments about each person’s readiness to vote or enter a contract, or the like.¹¹⁴ If these bright lines are backed up by child development research, it is only in the aggregate, preserving for law the role of choosing whether and where to draw a line.

But in *Roper*, the Court leaned on the research more heavily than this, suggesting that in all but perhaps a very few cases, the line of

Constitution: A Historical View and an Overview, 15 L. & HUM. BEHAV. 101, 110-14 (1991) (tracing the Court’s statement’s about blacks’ inferiority to the social-scientific “wisdom” of the times), and Richard E. Redding, *How Common-Sense Psychology Can Inform Law and Psycholegal Research*, 5 U. CHI. L. SCH. ROUNDTABLE 107, 111-16 (1998).

113. *Roper*, 543 U.S. at 617 (Scalia, J., dissenting).

114. See Scott, *supra* note 88, at 561 (“The upshot is that a categorical approach that treats individuals below a designated age as legal minors for most purposes works well, despite some inevitable distortion of the developmental capacities of young persons, as long as that age corresponds roughly to some threshold of developmental readiness to assume the responsibilities and privileges of adulthood.”). In fact, many of these lines leave room for various forms of individualized assessment: Sixteen year olds have to take a written and a driving test before they get a license to drive, doctors and judges are given authority to evaluate minors’ readiness to make various medical decisions for themselves, and individuals can consider the likelihood that minors will back out of their voidable contracts in determining whether to enter into a contractual arrangement in the first place. That being said, the general point holds, that in many legal contexts, a single age line that only roughly captures relevant distinctions determines whether or not an individual will have the right or responsibility in question.

eighteen is, in fact, with some suggestion of precision, developmentally significant. The Court recognized, “but by no means concede[d] the point” that it “can be argued . . . [t]hat a rare case might arise” in which a juvenile murderer was mature enough (and his crime otherwise heinous enough) to be considered fully culpable for his acts.¹¹⁵ But in general, the Court explained that the “differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive the death penalty despite insufficient culpability.”¹¹⁶

This suggestion that there is a categorical distinction, in fact, between (nearly) all individuals under eighteen and those over eighteen is reinforced by the Court’s conclusion that the assessment of an offender’s maturity, and related culpability, cannot be left to the sentencer in an individual case.¹¹⁷ In general, capital sentencing is designed to be a highly individualized process, where the sentencer, commonly a jury, is allowed to consider all relevant evidence about the defendant and the circumstances of the crime in mitigation.¹¹⁸ In cases involving juveniles, there is no reason this evidence could not (indeed should not) include expert testimony of developmental psychologists, who could also tie the developmental literature to case-specific circumstances of the crime and the accused. This introduction of social-scientific evidence through expert testimony is the standard mechanism employed to give legal decision-making the benefit of interdisciplinary research. But in *Roper*, the Court refused to take the risk of leaving decision-making to juries. In rejecting juries’ ability to sort the sufficiently mature and culpable minor from the immature, less culpable, minor, even with the help of experts explaining the typical attributes of adolescent immaturity, the *Roper* Court underscored the extent to which the law was deferring to developmental science in this context. In

115. *Roper*, 543 U.S. at 572.

116. *Id.* at 572-73.

117. A rejection of this categorical approach is the thrust of Justice O’Connor’s dissent and one prong of Justice Scalia’s dissent. *See id.* at 599 (O’Connor, J., dissenting) (“[T]he Court adduces no evidence whatsoever in support of its sweeping conclusion . . . that it is only in ‘rare’ cases, if ever, that 17-year-old murderers are sufficiently mature and act with sufficient depravity to warrant the death penalty.” (citation omitted)); *id.* at 620 (Scalia, J., dissenting) (characterizing the majority’s conclusion that “juries cannot be trusted” to make individualized judgments about whether a young person’s youth mitigated his culpability “undermines the very foundations of our capital sentencing system, which entrusts juries with ‘mak[ing] the difficult and uniquely human judgments that defy codification and that ‘buil[d] discretion, equity, and flexibility into a legal system.’” (quoting H. KALVEN & H. ZEISEL, *THE AMERICAN JURY* 498 (1966))).

118. *See Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982) (reaffirming *Lockett v. Ohio*, 438 U.S. 586 (1978) (plurality opinion)); *Lockett*, 438 U.S. at 605 (1978) (establishing that a state may not prevent the capital sentencing authority from giving independent mitigating weight to aspects of the defendant’s character and record and to circumstances of the offense proffered in mitigation).

insisting on applying a categorical age line in a context in which the law provides for highly individualized assessments, the Court suggested that, in assigning blame to juvenile murderers, the fit between age and relevant development was unusually close and consistent, and the conventional legal processes were especially ill-designed to identify the outliers.

The Court's suggestion that a categorical line of eighteen accurately divides the mature from the immature, along the relevant dimensions, is particularly troubling, because age eighteen may not even be the right place to draw the line for the most typical child. Much of the developmental research suggests that the qualities highlighted by the Court, described together as psycho-social immaturity, continue to apply to individuals into their twenties, even mid-twenties or beyond.¹¹⁹ Further complicating the picture, the pace of maturity appears to diverge predictably and consistently between girls and boys, with girls maturing in many respects relevant to law at an earlier age than boys.¹²⁰ Thus, a system of laws designed to track children's psycho-social maturity as accurately as possible would need to push back the assignment of full blame, at least for boys, into their twenties, and should blame girls more fully at an earlier age than boys.

The Court does not take up the question of gender-based developmental differences,¹²¹ but it does, briefly, acknowledge that

119. See Jeffrey Jensen Arnett, *Emerging Adulthood: A Theory of Development from the Late Teens Through the Twenties*, 55 AM. PSYCHOL. 469, 474-75 (2000) (describing a distinct developmental phase of "emerging adulthood," from eighteen to twenty-five, during which much identity formation occurs and certain high-risk behaviors are at their peak); Laurence Steinberg et al., *Are Adolescents Less Mature Than Adults?: Minors' Access to Abortion, the Juvenile Death Penalty, and the Alleged APA "Flip-Flop,"* 64 AM. PSYCHOL. 7, 590 fig.1, 591 & fig.2 (2009) (presenting research findings suggesting that, while cognitive maturation levels off by approximately sixteen, psycho-social maturation, which affects individuals' impulse control and sensation-seeking behavior, as well as their ability to resist peer pressure and consider future consequences, continues through the twenties); Maroney, *supra* note 96, at 152 (noting that "though estimates vary, many scientists have opined that structural brain maturation is not complete until the mid-20s").

120. See, e.g., Cauffman & Steinberg, *supra* note 89, at 741 (finding that females lead males by at least two years in their psycho-social maturation); Jeffrey Arnett, *Sensation Seeking: A New Conceptualization and a New Scale*, 16 PERSONALITY & INDIVIDUAL DIFFERENCES 289, 293-94 (1994) (finding that adolescents were higher in sensation seeking than adults, and males higher than females among adolescents as well as adults); Maroney, *supra* note 96, at 156-58 (citing studies that suggest that girls' brains mature along the dimensions believed relevant to criminal offending earlier than boys).

121. While doctrinal distinctions in our Equal Protection law would allow us to find the data sufficient to support an age line (rationally related to a legitimate state purpose), *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307 (1976), but not a gender line (substantially related to an important government purpose), *Craig v. Boren*, 429 U.S. 190 (1976), we might question the

maturation often continues after age eighteen. And at this point in the opinion, the Court retreats to conventional language about the inaccuracy, but practical necessity, of bright line rules:

The qualities that distinguish juveniles from adults do not disappear when an individual turns 18. By the same token, some under 18 have already attained a level of maturity some adults will never reach. For the reasons we have discussed, however, a line must be drawn. . . . The age of 18 is the point where society draws the line for many purposes between childhood and adulthood. It is, we conclude, the age at which the line for death eligibility ought to rest.¹²²

The Court's retreat to more conventional, law-controlled analysis when justifying its refusal to draw the line between childhood and adulthood any later than eighteen reads, at first, like a rejection of all the developmental analysis that came before it in the opinion. Less schizophrenically, the Court might be suggesting that age eighteen is the (current) legally defined boundary between childhood and adulthood, and that its developmental analysis appropriately applies only to legal distinctions within the legally defined category of childhood. Put another way, the law might be understood to define the space within which developmental analysis is permitted. Similarly, the law might further limit the distinctions the developmental analysis legitimately can explore, even within that space (so the correlation between life experience and development might be legitimately explored, but not the correlation between gender, or race, and development).

The law-driven approach, in which developmental science plays an important, but secondary, role, is worth considering. Indeed, I endorse a version of this approach in Part III. But there is no evidence that *Roper* is actually taking this approach. The thrust of the analysis clearly focuses on the developmental findings, not on legal or cultural conventions. More plausibly, the Court invoked this brief generic language about legal conventions and the need for bright line rules to avoid confronting the difficult and complex implications of its developmentally driven approach. It is to these difficult and complex implications that I now return.

Court's reliance on data that we are not prepared to describe as "substantially related to an important government objective," to determine at what age individuals can be executed.

122. *Roper v. Simmons*, 543 U.S. 551, 574 (2005).

3. The Subtle Developing Child and the Frozen Caricature of an Adult

Where legal lines are justified in developmental terms, we should be concerned, not only that we draw the line in the right place, but also that the logic of the analysis works on both sides of the line. How can we make sense of an increasingly subtle empirically based justification for treating children differently from adults because of their capacity and performance limitations, when our treatment of adults takes so little account of their actual capacities and performance?

If we follow the developmental analysis of youthful offending into adulthood, we would likely conclude that most of those who continue offending after their mid-twenties either have an underlying mental disorder (raising questions of culpability at least equal to those raised by your standard impulsive adolescent) or were seriously disserved by those responsible for raising and educating them out of their reckless immaturity (raising questions about the culpability of parents, communities, and the state).¹²³ Similarly, an extension of the reasons offered to enhance certain criminal procedural rights or limit certain autonomy rights might be applied to adults, too, who can readily be shown to perform at a level below the law's idealized expectations.¹²⁴

Such adjustments in our understanding of adult performance and our related allocation of adult rights might well make sense in certain situations. If, for example, as one psychologist's research concluded, a significant portion of adults do not understand *Miranda* warnings any better than most sixteen year olds (and that is not very well), this probably should affect the way we shape these warnings for both groups.¹²⁵ Or, we might want to extend this qualification of adults' capacities throughout the law, expressly lowering our standards from

123. See Terrie E. Moffitt, *Adolescent-Limited and Life-Course-Persistent Antisocial Behavior: A Developmental Taxonomy*, 100 *PSYCHOL. REV.* 674, 679 (1993) (concluding that an interaction between "neuropsychological vulnerabilities and a criminogenic environment" account for the small proportion of offenders who do not grow out of their antisocial behavior by their mid-twenties); see also SCOTT & STEINBERG, *supra* note 91, at 184 ("The research also shows that social context is crucially important to the successful completion of developmental tasks that are essential to the transition to conventional adult roles associated with desistance from crime.").

124. See, e.g., CAROL K. SIGELMAN & ELIZABETH A. RIDER, *LIFE-SPAN HUMAN DEVELOPMENT* 205 (2008) (summarizing studies that indicate that a significant portion of adults do not perform at the highest "formal operational" level, the level of problem solving generally assumed to be employed in the adult exercise of autonomous decision-making, and suggesting that education and context play an important role in developing these cognitive skills).

125. See Thomas Grisso, *Juveniles' Capacities to Waive Miranda Rights: An Empirical Analysis*, 68 *CAL. L. REV.* 1134, 1160 (1980) (finding, in a study that compared adolescents to adults, that between one-quarter and one-third of the adults did not understand some aspects of the *Miranda* warnings and that "over 40% of adult ex-offenders misperceived the extent to which the right to silence provides protection throughout all later proceedings").

unrealized ideal to our “close enough” reality, although this, I will argue, could have a corrosive effect on rights over time.¹²⁶ What makes less sense is a two-part legal analysis, where the differences in rights of those defined as children are grounded on increasingly sophisticated social-scientific understandings of their capacities and performance, and the rights of the adults to whom they are being compared take no account of those factors.

4. Should We Treat a Less Culpable Child as a Less Capable Child?

Another form of inconsistency we need to worry about is inconsistency across legal rights for children. A clearer understanding of children’s capacities might lead the Court to a better, more coherent account of children’s rights overall. Many scholars have suggested as much.¹²⁷ But the treatment of capacities as fixed facts about the trajectory and pace of child development has created problems for those seeking to defend both adolescent autonomy rights (particularly abortion rights) and reduced penalties for juvenile offenders, because the capacity justifications point in opposite directions on these two issues.¹²⁸ While some scholars have offered a more nuanced account that distinguishes between the relevant adolescent capacities in the two contexts,¹²⁹ these

126. See discussion *infra* notes 160-63 and accompanying text.

127. Hamilton, *supra* note 43, at 56 (“[T]he young should receive those liberties which they have the capacity to exercise competently.”); Donald L. Beschle, *The Juvenile Justice Counterrevolution: Responding to Cognitive Dissonance in the Law’s View of the Decision-Making Capacity of Minors*, 48 EMORY L.J. 65, 95 (1999) (arguing that courts should look to the social science bearing on capacity to determine what rights to afford to children, rather than “muddl[ing] along” with its current reliance on “anecdotal evidence and personal impressions”); Larry Cunningham, *A Question of Capacity: Towards a Comprehensive and Consistent Vision of Children and Their Status Under Law*, 10 U.C. DAVIS J. JUV. L. & POL’Y 275, 365-69 (2006).

128. For a discussion of the criticisms generated by the American Psychological Association’s support for adolescent abortion rights in one amicus brief, and opposition to the juvenile death penalty in an amicus brief filed in *Roper*, see generally Steinberg et al., *supra* note 119. See also Bersoff, *supra* note 88, at 1593 (suggesting that the Court’s opinions holding minors to adult decision-making standards in the criminal context are at odds with the Court’s decisions requiring parental involvement in decisions related to mental health and abortion).

129. Steinberg et al., *supra* note 119, at 10-11 (noting that “[b]y age 16, adolescents’ general cognitive abilities are essentially indistinguishable from those of adults, but adolescents’ psychosocial functioning, even at the age of 18, is significantly less mature than that of individuals in their mid-20s,” and concluding that “the skills and abilities necessary to make an informed decision about a medical procedure are likely in place several years before the capacities necessary to regulate one’s behavior under conditions of emotional arousal or coercive pressure from peers”); Kimberly M. Mutcherson, *Minor Discrepancies: Forging a Common Understanding of Adolescent Competence in Healthcare Decision-Making and Criminal Responsibility*, 6 NEV. L.J. 927, 958-64 (2006) (noting the tension between the arguments of adolescent capacity in the abortion context, and incapacity in the criminal context, and suggesting that the distinction can be defended on the ground that adolescent offending occurs in informal settings, and healthcare decision-making occurs in

distinctions cannot erase the problem entirely, in part because many aspects of capacity bear on decision-making in both contexts, and in part because the law, the proverbial blunt instrument that establishes rules and resolves cases, will inevitably exert some generalizing effect on any social-scientific findings it incorporates.

Although the legal issue of culpability for crimes is clearly distinct from the issue of capacity for decision-making that has been the focus of children's autonomy rights, the interdisciplinary legal analysis has had the tendency to bring the two issues together, focusing in both contexts on what minors (as distinct from adults) can and cannot do. And while the relevant attributes of development in the two contexts are not identical—culpability analysis focuses more on “psycho-social” development (impulse control, response to peer pressure, etc.) and autonomy rights analysis focuses more on cognitive development (the ability to weigh the options and choose among them rationally)—there is considerable overlap. The ability to understand relevant information and to reason in a logical fashion certainly matters for both, and the way these abilities can be compromised by peer pressure, reckless impulses, or under-regulated emotions, while perhaps most salient in the typical criminal scenario, clearly can affect children's choices about what to say in school, whether to seek out an abortion, or whether to declare opposition to one's community's religious faith in open court, as well.¹³⁰ Moreover, the same fluidity of identity that might counter any judgment that a criminal offense committed by a juvenile reflects a “bad character,”¹³¹ might also undermine any claim that a child's choices warrant respect and protection as her “own.”¹³²

formal contexts); Donald L. Beschle, *Cognitive Dissonance Revisited: Roper v. Simmons and the Issue of Adolescent Decision-Making Competence*, 52 WAYNE L. REV. 1, 40 (2006) (suggesting that we can justify affording less respect to adolescent decision-making in contexts, such as the criminal context, where their decisions are likely to subject them to long-term harm).

130. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 678 (1986) (considering whether the First Amendment protected an adolescent's speech in school that was full of sexual innuendo and was delivered in an auditorium full of students, many of whom “hooted and yelled,” or “simulated the [described] sexual activities” during the speech). See generally Emily Buss, *What Does Frieda Yoder Believe?*, 2 U. PA. J. CONST. L. 53 (1999) (arguing that Justice Douglas's assertion that fourteen year olds are mature enough to form and express their own views fails to take account of the distortion and stress that would likely be imposed on an Amish child who disagreed with her parents when called upon to testify to her beliefs in court with her Amish family and community members in attendance).

131. See SCOTT & STEINBERG, *supra* note 91, at 137 (arguing that, because an adolescent's identity is still in the process of formation, “an important component of culpability in the typical criminal act—the connection between the bad act and morally deficient character—is missing in [the adolescent's] conduct, just as it is in the adult who provides evidence of good character”).

132. See Tamar Schapiro, *Childhood and Personhood*, 45 ARIZ. L. REV. 575, 588 (2003) (justifying a child's diminished legal rights on the ground that a child is “incapable of making [her]

Even to the extent we can distinguish between the developmental issues relevant to the two legal questions (should the minor be afforded the same autonomy rights as adults and should the minor be given an adult punishment for his offense), the progress of the interdisciplinary analysis from original empirical research to legal scholarship to advocacy in litigation to court decisions can be expected to filter out some subtly along the way.¹³³ The findings of the developmental scientists have all the limitations common to this sort of empirical work (limited sample size, the difficulty of controlling for other variables, the sensitivity of the data to context, just to name a few), limitations the researchers are the first to acknowledge. But these limitations tend to be minimized when they are incorporated into legal analysis, even where scholars are taking considerable care not to misread or overstate the data. The very fitting together of the disciplines, the making legal use of empirical findings, inevitably has some of this generalizing effect. Needless to say, the effect will be exaggerated when advocates rely on the interdisciplinary research to try to win cases.¹³⁴ While courts will have an interest in tempering the conclusions drawn from the science by the advocates, their own interest in writing compelling and legally coherent opinions will push the court to draw general (and legally relevant) ideas from the science. In the less subtle portrayal of child development that is articulated in court opinions, we can expect the accounts of children's capacity for autonomous decision-making and their culpability for criminal offending to converge.

This convergence would be less troubling if we believed that demonstrated capacities are all that matter. But, in fact, the critics are right in assuming that, for many of us, the inclination to favor greater adolescent autonomy rights and lesser adolescent culpability is driven, not by a cold calculation of what they can and cannot do, but by an interest in designing laws to serve minors well. We sometimes argue for autonomy rights not so much because adolescents "are ready" to exercise them, but because they need practice to learn how to exercise their rights well. Similarly, we sometimes defend reduced sanctions for juveniles, not so much because they "are less culpable" but because they

own choices, good or bad," until she completes the process that Kant describes as "constitut[ing] herself as the authority under whose jurisdiction she falls." (emphasis added)).

133. See, e.g., Scott, *supra* note 111, at 339 (noting that the *Roper* Court drew upon an article she co-authored with Laurence Steinberg to justify adolescents' lesser culpability, but omitted the discussion that tied the particular attributes of adolescent development to traditional grounds for mitigation in criminal law).

134. Maroney, *supra* note 96, at 160 ("The realities of advocacy, in which nuance and complexity are difficult to convey without compromising effectiveness, often cause advocates to oversimplify.").

would benefit from being given a second chance.¹³⁵ A purely capacity-focused analysis runs the risk of failing to account for some of the real reasons we support special rights and protections for children, and threatens to overlook other dimensions along which the law should aspire to consistency and coherence.

5. Expressing the Wrong Message

The final problem suggested by *Roper*'s developmental analysis is of a different sort. Where the problems of mismatches between social-scientific findings and law, child-adult disjunction, and inconsistency across children's rights are all problems of incoherence, the last concern focuses on the expressive significance of law. *Roper*'s message that "adolescents are less culpable" as a matter of developmental fact has expressive significance independent of the case outcome.¹³⁶ Part of the problem is that in the end, culpability is necessarily a legal judgment, not a psychological one, so the suggestion that developmental findings determine culpability is just misleading. But beyond this, a message of lesser responsibility is not the message the public wants to give, with considerable justification. Even among those optimistic about young people's chances for reform and willing to give them another chance, sending a message of "lesser responsibility," may seem morally and developmentally inappropriate. Indeed, it is not a message many parents would choose to send to their own child who has committed a grave moral error, and the public expects at least as serious a message to be expressed by the law. The way we reflect our parental aspirations for our teenage children, our confidence in their ability to improve, and our respect for them as emerging adults, is often to tell them "we expect more of you," not less. In effect, we hold adolescents "fully responsible" as a means of helping them become so.

This is not to say that the Supreme Court's analysis in its opinions will be communicated in any meaningful way to juvenile murderers, or young people generally. If we are to take seriously the law's role in

135. For a detailed and insightful discussion addressing the interest in designing rights to help prepare adolescents for adulthood, while minimizing the harms caused by their decisions, see generally FRANKLIN E. ZIMRING, *THE CHANGING LEGAL WORLD OF ADOLESCENCE* (1982).

136. There is an extensive body of scholarship that considers the expressive function of law, that is the role law plays in communicating norms and values. See generally Cass Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021 (1996) (exploring the expressive function of law, and distinguishing between the norm-shaping value of law and other expressive values); Richard H. McAdams, *An Attitudinal Theory of Expressive Law*, 79 OR. L. REV. 339 (2000) (discussing the law's potential to communicate social attitudes). Here, my focus is on the values expressed by the Court, as a mouthpiece for society, as manifest through our constitutional commitments.

teaching children and shaping their development, we will need to alter the process of their legal interactions as well as the substance of the laws applied. I will take up the developmental potential of procedural reform in Part III. Here, I focus on the distinct interest of our citizenry in laws that reflect their views about the proper messages to convey to children.

In declaring juveniles less responsible, we forego an opportunity to say what we, as a society, want to say to juveniles. To be sure, tying arguments for leniency to adult conventions of mitigation was the most conservative path to the Court's legal result. It might well have been the only way the Court could get five votes to abolish the juvenile death penalty. But the approach came at a cost. At best, the cost is merely the cost of underselling the public's condemnation of horrific murders committed at the hands of juveniles; at worst, this stifling of the message could render the *Roper* outcome less stable. In failing to separate blame from outcome, the Court encourages those inclined to level full blame on juveniles to conclude that it follows that it is constitutional to execute them.

In tying legal outcomes to level of blame, *Roper* missed an opportunity to tailor both outcome and message to minors' ongoing development. As analyzed in *Roper*, a message of "full responsibility" must be coupled with "full" (adult-style) punishment. But an appreciation of children's ongoing development suggests that this coupling is what does not make sense for them. We might well want to articulate children's rights in this context in a manner that assigns full blame, but gives them some form of second chance.

To do this, the Court would have had to depart more significantly from adult doctrine when, pursuant to precedent, it employed its "independent judgment" to consider whether executing juvenile offenders comported with our "evolving standards of decency" under the Eighth Amendment.¹³⁷ It would have had to conclude that the relevant difference between juveniles and adults reflected in our law was not simply a difference in capacities, but also a difference in potential and the law's commitment to nurturing that potential. Some of the language of *Roper* tilts in this direction: Juveniles have a "greater claim . . . to be forgiven," a "greater possibility . . . that their character deficiencies will be reformed," and cannot be deemed, on the basis of their crimes, to have an "irretrievably depraved character." But in the end, the opinion connects their special legal status to who they *are*, not who they may

137. See *Roper v. Simmons*, 543 U.S. 551, 574-75 (2005) (noting that the Court's exercise of its "independent judgment" in assessing the proportionality of specific applications of the death penalty was sanctioned by the Court in several earlier decisions, including *Atkins v. Virginia*, 536 U.S. 304 (2002), from which *Roper* most directly followed).

become. While either approach would build upon social-scientific understandings of child development, the latter would demand more of law. The claim in *Roper* is that a better understanding of adolescents provided by developmental science reveals that they *are less blameworthy* under conventional, adult understandings of the law. But an approach that assigns them a full measure of blame, but nevertheless punishes them less, requires an articulation of our aspirations for children and a manifestation of our commitments to children through law. After laying some additional developmental groundwork, I will return to this theme of rights designed to further developmental aims and to the expressive value of taking this approach to rights.

III. SHIFTING ATTENTION FROM CURRENT CAPACITIES TO POTENTIAL

All of the problems raised by *Roper*'s reliance on the child development literature stem, at least in part, from the Court's (and the amici's) suggestion that children's development at any particular age is a biological fact that dictates legal conclusions. This analysis fails to give adequate attention to the dynamic relationship between development and law. What we know about child development should surely affect how we shape the law, but we should also expect law, as an aspect of our culture with important behavior and norm-shaping effects, to shape development. When the law defers to scientific findings about children's current developmental trajectories, however robust those findings, it runs the dual risk of abdicating responsibility for important moral and legal choices and freezing the developmental status quo.

Although the Court also invoked the limits of children's capacities in earlier children's rights cases, the thin, unsupported nature of the Court's developmental conclusions in those cases diluted their significance. Already noted is the problem with these conclusions: The Court's characterization of children is incomplete, unsophisticated, and sometimes likely wrong. But with this vice comes a virtue: The Court's reliance on common wisdom reflected in legal precedent makes clear that the decisions rest on legal, not psychological authority.

The risks and benefits of the more developmentally sophisticated approach reflected in *Roper* are the mirror image of these. Clearly, the approach ensures that the law will reflect a more intelligent grasp of the aspects of capacity relevant to an allocation of children's rights. But just as clearly, the approach risks shifting authority away from law toward social science. The risk is not ultimately that law will learn too much from the child development literature, but that it will learn too little. A

broader understanding of the field can help ensure that the shape of children's rights remains in the hands of the law.

A. Beyond Piaget

The law's reliance on child development research, while increasingly sophisticated in some respects, has remained stuck in a mid-twentieth-century developmentalist's mindset. In the field's early years, Jean Piaget's cognitive developmental theory predominated.¹³⁸ This theory charted out various childhood stages from the infant's sensorimotor stage to the adolescent's "formal operations."¹³⁹ At the outset, Piaget described these stages as rigid and universal, suggesting that all children with normally developing brains progressed from one stage to the next in all domains and under all circumstances at close to the same age.¹⁴⁰ Over time, Piaget and his followers loosened up these characterizations, discovering context and child-specific variations in the pace of children's developmental progress.¹⁴¹ Nevertheless, the basic idea stayed the same: Cognitive development (and this was largely the focus of all the research) was internally driven by biological forces, and while the developing individual needed to have experience interacting with his environment in order to progress, the role others played in shaping development was minimized under this "constructivist" approach.¹⁴²

This, in large part, is the conception of development pressed by scholars and advocates seeking to integrate child development research into law, and it is the conception of development embraced by the Court in *Roper*. And while much of the more recent scholarship has shifted attention from Piaget's target—cognitive development—to "psycho-social" development,¹⁴³ the research and writing still aims to study and stage American children's developmental status quo. The recent explosion of interest in brain imaging research has reinforced a conception of development that is largely uniform and biologically

138. For a summary of Piaget's theory and its development over time, see generally LAURA E. BERK, *CHILD DEVELOPMENT* (8th ed. 2009).

139. See generally JEAN PIAGET & BÄRBEL INHELDER, *THE PSYCHOLOGY OF THE CHILD* (1969) (comprehensively setting out Piaget's stage theory of cognitive development).

140. BERK, *supra* note 138, at 224-25.

141. See *id.* at 257-58 (summarizing subsequent modifications of Piaget's theory).

142. *Id.* at 224 ("Because Piaget viewed children as discovering, or 'constructing,' virtually all knowledge about their world through their own activity, his theory is described as a constructivist approach to cognitive development.").

143. Cauffman & Steinberg, *supra* note 89, at 742-43; Laurence Steinberg & Elizabeth Cauffman, *Maturity in Judgment in Adolescence: Psychosocial Factors in Adolescent Decision Making*, 20 L. & HUM. BEHAV. 249, 249-50 (1996).

determined. Indeed, this hardening of the science is seen as a source of great hope for those opposing adult treatment of juvenile offenders, and a parallel threat to children's autonomy rights.¹⁴⁴

Largely omitted from this approach is any consideration of the role parents, teachers, communities, and, most broadly, culture, play in defining children's developmental ends and shaping children's developmental progress toward those ends. Other developmental theories have given considerable attention to these social and cultural influences, and two are particularly valuable to our consideration of children's rights. The first is the socio-cultural theory of Lev Vygotsky and his followers, which focuses on how others facilitate children's acquisition of higher capacities. The second is the psycho-dynamic theory of Erik Erikson and his followers, and, more particularly, their focus on identity formation in adolescence. In different ways, both of these theories suggest that law, as a regulator of individual behavior, structurer of relationships and interactions, and as a conveyor of norms and values, can play an important role in shaping children's development, for better or for worse.

Lev Vygotsky's "socio-cultural" theory of development focuses more on how adults (and more expert peers) facilitate children's movement from one level of functioning to another than on what children can accomplish at any particular age.¹⁴⁵ Vygotsky described a "Zone of Proximal Development," in which adults, through language and other means of interaction, provided "scaffolding" to children, which the adults gradually removed, stepping back, as children gained increasing competence.¹⁴⁶ A contemporary of Piaget, Vygotsky wrote in Russian, and his works were not translated into English and discovered by western psychologists until the last decades of the twentieth century. Since its introduction in the West, Vygotsky's socio-cultural theory of development has inspired a significant following with important implications for education and child-rearing.¹⁴⁷ Among his followers is

144. See Maroney, *supra* note 96, at 103-04 (describing advocates' reliance on brain imaging studies to argue for reduced culpability and sanctions for juvenile offenders, and expressing concern that this reliance could translate into arguments against granting decision-making authority to adolescents in other areas).

145. For a summary of Lev Vygotsky's socio-cultural theory, see BERK, *supra* note 138, at 264-71.

146. LEV S. VYGOTSKY, MIND IN SOCIETY: THE DEVELOPMENT OF HIGHER MENTAL PROCESSES 84-91 (1978). In fact the term "scaffolding," coined by Jerome Bruner, see David Wood et al., *The Role of Tutoring in Problem Solving*, 17 J. CHILD PSYCHOL. & PSYCHIATRY 89, 89-100 (1976), was never actually used by Vygotsky, but his theory is commonly associated with the term. See, e.g., BERK, *supra* note 138, at 266.

147. See BERK, *supra* note 138, at 267-71 (describing the influence of Vygotsky's work on educational theory).

Barbara Rogoff, who has focused her research on the role culture plays in defining developmental goals as well as in helping children achieve them.¹⁴⁸

In general terms, the socio-cultural approach acknowledges that children's development of capacities is influenced by their interactions with social, cognitive, and cultural authorities in their world. Under the theory, the role of law in shaping development—as an enforcer of community norms, an allocator of rights and responsibilities, and a mediator of interpersonal disputes—is evident. Taking these insights into account suggests that courts, in analyzing the proper scope of children's rights, should consider not only what an average American teenager can do, today, but what proficiencies those rights could be designed to nurture.

Where Vygotsky's theory of development shares with Piaget's theory a focus on how children acquire increasingly sophisticated capacities, particularly cognitive capacities, over the course of development, Erikson's theory focuses more on emotional growth. Building on his training in both psychoanalysis and developmental theory,¹⁴⁹ Erikson pioneered the study of identity formation, which he identified as the primary developmental project of adolescence.¹⁵⁰ Followers of Erikson have refined his theory of "crisis" and resolution, continuing to emphasize the importance of experience and exploration in consolidating a coherent and continuous sense of self.¹⁵¹ Like Vygotsky, Erikson and his followers emphasized the importance of social interaction to development, but as a psycho-dynamic theory, the nature of the influence was understood in very different terms. According to these theorists, children's experience in relationships gives them an opportunity to try on various identities through their social interactions, to learn about themselves as reflected through their social interactions

148. See generally BARBARA ROGOFF, *THE CULTURAL NATURE OF HUMAN DEVELOPMENT* (2003).

149. GALE ENCYCLOPEDIA OF PSYCHOLOGY 182-84 (Bonnie Strickland ed., 2d ed. 2001).

150. ERIK H. ERIKSON, *CHILDHOOD AND SOCIETY* 227-29 (1950) [hereinafter ERIKSON, *CHILDHOOD*]; ERIK H. ERIKSON, *IDENTITY YOUTH AND CRISIS* 128 (1968) [hereinafter ERIKSON, *IDENTITY*].

151. James Marcia, *Identity in Adolescence*, in *HANDBOOK OF ADOLESCENT PSYCHOLOGY* 159, 161 (Joseph Adelson ed., 1980) (setting out four identity statuses that reflect the presence or absence of a decision-making period, or "crisis," and the presence or absence of personal investment or "commitment"); see also Wim Meeus & Maja Dekovic, *Identity Development, Parental and Peer Support in Adolescence: Results of a National Dutch Survey* 30 *ADOLESCENCE* 931, 932 (1995) (following the "convention" to replace the term "crisis" with the term "exploration").

and to define themselves in terms of their relationships with others.¹⁵² Through relationships, and their reflection on these relationships, children come to understand themselves as individuals with habits, tastes, values and beliefs, and as members of families, social partnerships and groups, and political and religious communities.

An understanding of the identity formation process has several implications for the assignment of children's rights, some better understood than others. Prominent in legal analysis is a recognition that individuals' identities are not well formed until late adolescence, or even early adulthood, and a consideration of what this implies. *Roper* suggests that an unformed identity diminishes the link between bad acts and bad character, and therefore reduces the culpability of the offender.¹⁵³ *Bellotti*'s invocation of childhood vulnerability seems to refer at least in part to children's lack of fixed identity and their openness to negative influences, although this is less clearly stated.¹⁵⁴ But generally absent from the analysis is any consideration of the identities we hope our children will achieve. Where the courts' analysis of developing *capacities* hypothesizes an idealized adult level of functioning that may never be achieved, the courts' analysis of developing *identities* appears to be completely agnostic about the endpoint of that development.

In fact, how individuals define themselves, and how they perceive their relationship with their society and their government, may matter more, for the successful functioning of our legal regime and the effective exercise of individual rights, than their acquisition of certain higher level

152. See ERIKSON, CHILDHOOD, *supra* note 150, at 228 (“[T]he sense of ego identity, then, is the accrued confidence that the inner sameness and continuity are matched by the sameness and continuity of one’s meaning for others.”); RUTHELLEN JOSSELYN, FINDING HERSELF: PATHWAYS TO IDENTITY DEVELOPMENT IN WOMEN 7-8 (1987) (suggesting that women’s identity development is focused on their relationships with others); Jari-Erik Nurmi, *Socialization and Self-Development: Channeling, Selection, Adjustment, and Reflection*, in HANDBOOK OF ADOLESCENT PSYCHOLOGY 85, 95 (Richard M. Lerner & Laurence Steinberg eds., 2d ed. 2004) (“Although socialization and self-development . . . are often described as an individual development, they are closely embedded in the adolescent’s interpersonal relationships.” (citation omitted)); see also Emily Buss, *The Adolescent’s Stake in the Allocation of Educational Control Between Parent and State*, 67 U. CHI. L. REV. 1233, 1270 (2000) (summarizing some of the literature discussing how adolescents use their relationships with peers to explore possible identities). In work that also draws heavily on the constructivist theory of Piaget and others, Robert Selman has studied how children develop the ability to take others’ perspectives and to coordinate their perceptions of self with these distinct perspectives. See generally ROBERT L. SELMAN, THE GROWTH OF INTERPERSONAL UNDERSTANDING: DEVELOPMENTAL AND CLINICAL ANALYSES (1980).

153. *Roper v. Simmons*, 543 U.S. 551, 570 (2005) (“The reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character.”).

154. *Bellotti v. Baird*, 443 U.S. 622, 635 (1979) (“[T]he State is entitled to adjust its legal system to account for children’s vulnerability and their needs for ‘concern, . . . sympathy, and . . . paternal attention.’”).

capacities. While liberal democratic theory anticipates that individuals will grow up to embrace a broad range of views, beliefs, and values, and counsels agnosticism about these individual choices, it also assumes that individuals will share a common understanding of how they fit within our system of government.¹⁵⁵ But there is no guarantee that children will come to understand themselves, and their relationship to society, in this way. Some individuals, in fixing their identities, will form views of themselves and their relationship with society that are subtly or profoundly different from the liberal democratic vision. In a milder form, some will misunderstand their rights and how those rights relate to, and limit, government authority. At the extreme, some will perceive themselves as completely outside the legal and social community that governs them.¹⁵⁶ These differences in perception of self in relationship to society and its laws can produce a disinclination to participate among its citizens, whether out of a sense of injustice or apathy, or, in stronger form, a complete disrespect or disregard for the law. It should be the aim of the law, not only to develop the capacities of its democratic participants, but also to cultivate a sense of self and relationship to society that motivates our adult citizens to exercise these capacities in a way consistent with our democratic vision.

The basic idea that children's rights should be designed in a way to help children grow up to be competent and successful adult citizens is familiar to anyone who has read Frank Zimring's seminal work, *The Changing Legal World of Adolescence*.¹⁵⁷ In this book, written three decades ago when *Bellotti* and *Parham* were just decided, Zimring argued that adolescents' rights should be designed to protect a period of "semi-autonomy," where children could learn from their experience making choices, with minimal detrimental consequences.¹⁵⁸ Zimring drew on the same sort of common sense understandings of child development relied upon by the courts, but he improved upon the analysis with his focus on developmental *effects*. Despite the power of his argument and his influence on academics in the field, Zimring's analysis appears to have had very little influence on the evolution of children's rights in the courts.

155. See, e.g., JOHN RAWLS, A THEORY OF JUSTICE 397-98 (rev. ed. 1999) (1971) (characterizing a "well-ordered society as one . . . effectively regulated by a public conception of justice . . . [which] implies that its members have a strong and normally effective desire to act as the principles of justice require").

156. See TRAVIS HIRSCHI, CAUSES OF DELINQUENCY 16 (Transaction Publishers 2002) (1969) (describing the social control theory that holds that delinquency results when the bonds between an individual and society are broken).

157. See *supra* note 135.

158. ZIMRING, *supra* note 135, at 99-101.

My call to apply socio-cultural and psycho-dynamic developmental theory to the development of children's rights can be understood, in part, as an attempt to give the same interdisciplinary credentials to Zimring's work as the *Roper* Court gave to the theorists with a more conventional current-capacity focus. But my ultimate aim differs from Zimring's in two respects. Where he conceived the law largely as creating the context in which children honed their capacities (an essentially Piagetian concept of development), I am interested in considering the effects of law on developing identities as well as capacities. Moreover, I conceive of the law, not only as a context within which development takes place, but also as an active participant in the developmental process. In the next Part, I explore how this role for law might be achieved.

B. The Law as Scaffolding

Applying theories that focus on external influences on development to our analysis of children's rights and responsibilities encourages us to shift from asking *Roper*-like questions about who children "are," to asking what we want children to become and how we might help them get there. Framing our legal inquiry in these terms allows us to avoid the problems identified with the *Roper* approach: First, because we are not claiming that rights are dictated by developmental facts, we need not worry about the mismatches that come from misaligning rights and capacities. Instead, age lines would be drawn with a view not only to what children, in the aggregate, can already do, but also to the role we expect the law to play in enhancing their development. Second, our focus on what children will become allows us to separate our analysis of children's rights and responsibilities from our fictitious accounts of current adult performance. Indeed, under this approach, we can assess the capacities, performance, and self-conception of actual adults and shape children's rights with the aim of improving upon adult deficiencies. Third, what look like inconsistencies across children's legal rights when we consider only our understanding of current capacities may make sense as pieces of the law's developmental design, and, if they do not, an articulation of this developmental design which takes account of, but is not controlled by, capacity assessments should guide our reforms. Where, for example, children are equally qualified to engage in decision-making in two contexts, we might nevertheless defer to their choices in one context and not in another, to further the law's broader developmental aims. And, finally, we can use the law to express aspiration and expectation rather than developmental resignation. In designing rights to achieve developmental ends, this approach

recognizes a role for the courts in articulating societal child-rearing aims.

Of course, we already do design much of our law affecting children to influence how they grow up. We require them to go to school, we provide enhanced health care, we monitor parental behavior, to name just a few examples. But to the extent these developmental effects are considered in the Court's analysis of children's rights, they are offered as a counterweight, a manifestation of important state interests that argue against rights. On the more abstract question of whether children qualify as rights holders and under what circumstances, the focus shifts to their current capacities. This focus has a long pedigree which the developmental research has served to reinforce. But what it fails to capture is the value to children, as developing citizens, and to society, as the safeguarder of its rights, of affording children an opportunity to develop an understanding of their rights and gain proficiency in their exercise.

One might object that courts lack the institutional competence to assess the developmental effects of the law's treatment of children. Better leave such speculative policymaking to the legislatures who can hold hearings and who can change their minds (or be voted out of office) more readily (and democratically). It is true that courts have no special expertise in the area, but the same competence issues apply to their assessments of capacity, and while most such decision-making, whether focused on current capacity or developmental effects, should be left to the legislative process, courts will necessarily be involved when constitutional rights are at stake. When a court is called upon to consider the limits the Constitution imposes on legislative or other government actions affecting young people, an intelligent inquiry about children must consider not only what they gain from those actions, but also how they will experience the granting or denying of the rights that are at issue.

If anything, we might worry less about a court's relative competence when it shifts its focus from current capacities to effects for two reasons. First, under the effects approach, we should be particularly skeptical of the democratic process's ability adequately to protect children's interests. Attempts to cast children as "discrete and insular minorities," powerless in the political process and therefore entitled to special judicial protection have failed, in large part because children are said to be adequately represented by those who used to be children and

are now politically empowered adults.¹⁵⁹ This analysis works best if adults are presumed to be those idealized caricatures described in the cases. But the more we recognize, as the developmental effects approach allows us to do, that our current adult citizens tend to reflect suboptimal development themselves, the less confident we should be that they will make good surrogates in determining how the law should shape children's development in the future. Court intervention is generally deemed most justified when the democratic process can be expected to overlook or oppose the interests of an unrepresented group.

The second reason we might worry less about the courts' institutional competence under an effects-based approach is that the effects inquiry brings to the fore the law's role. Courts need not suggest that they are "getting it right," as they should when they invoke conclusions about current capacity to justify rights and restrictions. Rather, in considering developmental effects, they need to clearly articulate the aims and aspirations of the law. Embracing the potential of law to help shape development, Justice Jackson's words in *Barnette* had some value simply because they were expressed. By building this aspiration into our rights and justifications for rights, we help to make it so.

It is useful to offer an example in the context of adult rights to help capture the link between aspiration and achievement and to illustrate how the effects approach might connect its children's rights analysis to its adult parallel. Take the example of Justice Holmes's exhortation (in dissent) in *Abrams v. United States*:¹⁶⁰

But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.¹⁶¹

This passage has had a tremendous effect on our First Amendment law and on popular conceptions of our First Amendment rights. It is not, however, particularly supported by our behavior. Adults rarely shop at

159. See *City of Cleburne, Tex. v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 472 n.24 (1985) (Marshall, J., concurring in part and dissenting in part) (rejecting classification of minor children as a discrete and insular minority, and suggesting that legislators would act in the best interest of children because "[they] were once themselves young, typically have children of their own, and certainly interact regularly with minors").

160. 250 U.S. 616 (1919).

161. *Id.* at 630.

the marketplace of ideas, except in stalls where they are already very comfortable with the merchandise.¹⁶² Roughly half of us do not vote, which may be just as well, because we have been shown to be grossly ignorant of the facts, even on issues broadly recognized as important.¹⁶³ It is easy to establish that we fall short of our ideals of self-government and fail to exercise our rights in accordance with their idealized use, but this does not suggest that we should repudiate Holmes's language or curtail the rights the language justifies. To the contrary, we hope the language will point us, however subtly, toward the ideal. Every time the Court invokes the marketplace of ideas, it reflects and bolsters the power of Holmes's words, and the familiarity of the phrase bespeaks its migration into popular culture.

Building developmental aims into our rights for children can be seen, both as a version of this aspirational law-making and as an opportunity to improve upon our aspirations. To the extent even a brief reflection suggests that we fall short of the aspirations articulated in our adult rights, we might want to try to design the child's versions of these rights with the aim of cultivating improved adult achievement.

We can consider how this analysis might play out in the Court's student speech cases. The argument in favor of protecting speech is particularly weighty in *Tinker*, which considered the suspension of students for wearing black armbands to protest the United States' involvement in Vietnam, because protecting students' controversial political speech in school encourages them, as both speakers and listeners, to gain experience engaging in the sort of political discussions and deliberations we hope they will actively pursue as adult citizens. The Court's refusal in *Bethel* to protect crude speech which would be protected among adults might also be justified, as, the Court noted, children need to be taught to engage civilly with one another in order to engage in an effective deliberative process.¹⁶⁴ Indeed, the *Bethel* Court might have drawn a sharper distinction for students between the

162. In his book, *Republic.com*, Cass Sunstein suggests that the Internet has exacerbated this tendency to customize one's sources of information to conform to one's views. See generally CASS SUNSTEIN, *REPUBLIC.COM* (2001).

163. See G. Bingham Powell, Jr., *American Voter Turnout in Comparative Perspective*, 80 AM. POL. SCI. REV. 17, 23-24 (1986); Ilya Somin, *Voter Ignorance and the Democratic Ideal*, 12 CRITICAL REV. 413, 417 (1998); National Voter Turnout in Federal Elections: 1960-2008, <http://www.infoplease.com/ipa/A0781453.html> (last visited Apr. 8, 2010).

164. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986) ("The undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior. Even the most heated political discourse in a democratic society requires consideration for the personal sensibilities of the other participants and audiences.").

protection afforded for political and sexual speech than has been drawn for adults.¹⁶⁵ This child-specific distinction could be justified in terms of developmental effects: While we want children to develop the ability to achieve self-fulfillment through expression (a primary justification for protecting adult's sexually explicit speech),¹⁶⁶ we need not worry that curtailing children's public sexual speech in high school will thwart that expressive development. We might well be concerned, however, based on our current adult track record, that children will not develop skills, appetites, or habits to engage in effective deliberative politics unless those patterns and skills are developed at an early age, in contexts like schools, in which that deliberation will be meaningful.¹⁶⁷

All that being said, *Bethel* remains, under any approach, an extremely hard case. While the speech was highly sexualized, and the audience may have focused its attention on the sex, the speech was given in the context of student elections in support of a particular candidate running for office. Moreover, the punishment administered by the school included not just a suspension, but also a prohibition of future public speaking (speaking at graduation). This sort of "prior restraint" is anathema to our free speech principles generally, and is particularly troubling here, because it shifts regulation from specific problematic content to the speaker himself. Even assuming it was appropriate to punish the student for his offensive speech in school, that punishment should not have carried with it any message about the student's value as a speaker.

A developmental effects-focused analysis might be particularly critical of the Supreme Court's more recent student speech cases, *Hazelwood School District v. Kuhlmeier*¹⁶⁸ and *Morse v. Frederick*,¹⁶⁹ which fail to give any attention to the effect the school's actions and the Court's endorsement of those actions might have on students' emerging understanding of their rights. In *Hazelwood*, the principal pulled two entire pages (comprising six articles) out of the school newspaper to

165. Cf. *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 209 (1975) ("[W]hen the government, acting as censor, undertakes selectively to shield the public from some kinds of speech on the ground that they are more offensive than others, the First Amendment strictly limits its power.").

166. See David A.J. Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 U. PA. L. REV. 45, 67-70 (1974).

167. See generally Constance A. Flanagan, *Volunteerism, Leadership, Political Socialization, and Civic Engagement*, in HANDBOOK OF ADOLESCENT PSYCHOLOGY, *supra* note 152, at 721 (suggesting that gaining experience with group membership and rights exercise are important to young people's political development).

168. 484 U.S. 260 (1988).

169. 551 U.S. 393 (2007).

prevent two articles he found objectionable from being published.¹⁷⁰ The Court made much of the curricular nature of the speech and the value of a rigorous instruction in journalism, but gave no consideration to what could be thought of as the curricular content of its own decision or the lessons learned by the student litigants and future students who experience censorship. The fact that the journalism class published an apparently school-sanctioned statement that the school paper “accepts all rights implied by the First Amendment. . . . Only speech that ‘‘materially and substantially interferes with the requirements of appropriate discipline’’ can be found unacceptable and therefore prohibited,’’ might well have fostered some cynicism among students about the seriousness of such government promises.¹⁷¹

Even if the Court did not deem these developmental effects weighty enough to counterbalance legitimate state concerns with the particular content of the articles in question, it should have been troubled by the lack of any process designed to inform the students of the action the school was taking and why it was doing so, let alone why such action was consistent with the journalism program’s express First Amendment commitments. The Court should also have been troubled by the lack of efforts made to minimize the censorship and thereby communicate the value of the students’ speech. Under an effects-attentive approach, the Court might have concluded that the school had a legitimate interest in exercising some control over the content of the school paper, but that the particular means chosen by the school to exercise control—wholesale removal of entire pages of the paper by the principal unilaterally—was not sufficiently narrowly tailored to that interest to survive a First Amendment challenge.

Similarly, an effects-focused analysis of *Morse*, in which a student challenged his suspension for unfurling an apparently pro-marijuana banner outside his school in front of his classmates, his principal, and some television cameras,¹⁷² might have found that the likely harm caused to student discipline by letting the banner wave (surely the students would not have been confused about the school’s disapproval?) was outweighed by the likely benefit to student education about the power of the First Amendment (again, because there would have been no doubt that the principal disapproved of the message). “Might” is important here, because adding a consideration of developmental effects to the Court’s rights analysis does not dictate results. It does, however,

170. 484 U.S. at 264.

171. 484 U.S. at 277 (Brennan, J., dissenting) (alteration in original) (citation omitted) (quoting *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 513 (1969)).

172. The student’s banner read: “BONG HiTS 4 JESUS.” 551 U.S. at 397.

change the inquiry and calls on courts to pay more attention to the influence, both direct and indirect, that their decisions can be expected to have on children's developing understanding of their rights and their relationship with their government.

As this hypothetical reworking of student speech rights suggests, the relative salience of capacity-building and identity-shaping effects, while clearly interrelated, will vary with the case. Protecting controversial student speech against school regulation can always be expected to give students some sense of the value ascribed to them as speakers and the limits of authority figures' control over their expression. But some cases, such as *Morse*, could make this point especially starkly, because the speech in question so clearly flouts the values and rules articulated by the school.¹⁷³ Conversely, the denial of speech protection will be more likely to generate student cynicism about the value of their speech in some cases, such as *Hazelwood*, where the circumstances of the case focused students' attention on their speech rights.

The capacity-building potential of speech will also vary from case to case. The circumstances of *Tinker*, for example, offer a particularly good opportunity for practice, because the speech involved in that case captures the ideals of political speaker and political audience that we hope our children will manifest when they become adult citizens. In contrast, the message in *Morse*, so cryptic that it was hard to know what it was even saying, was unlikely to inspire any sort of productive engagement about its content among those before whom it was displayed.¹⁷⁴

Despite these distinctions, capacity-building effects and identity-forming effects are likely to blur together in our First Amendment analysis, because the value of self, as a speaker, is discovered through opportunities to practice this role (and the complementary role of listener), and the usefulness of the practice depends on students' appreciation of their role as speakers and how their speech connects them to the community in which they speak. In our analysis of other rights, however, only one of these two developmental effects may be relevant. Under the Fourth Amendment, for example, a court's

173. The starkness of this message can be compared to the message conveyed by the protection of the Nazis' right to march in Skokie, a community with a large Jewish population, many of whom were Holocaust survivors. See *Collin v. Smith*, 578 F.2d 1197, 1206 (1978); Arnold H. Loewy, *Freedom of Speech as a Product of Democracy*, 27 U. RICH. L. REV. 427, 431 (1993) ("Unless all ideas are protected, no ideas are protected.").

174. 551 U.S. at 401 ("The message on Frederick's banner is cryptic. It is no doubt offensive to some, perhaps amusing to others. To still others, it probably means nothing at all. Frederick himself claimed 'that the words were just nonsense meant to attract television cameras.'").

consideration of students' "reasonable expectations of privacy" in school invites a consideration of what expectations of privacy, as an aspect of self-concept, we want to foster in our children.¹⁷⁵ But curtailing school searches should not be expected to enhance students' rights-related capacities, as protecting privacy rights does not readily translate into affording students an opportunity to practice any set of skills associated with the right. Conversely, affording adolescent girls some control over the outcome of their pregnancies can be expected to help develop their capacities to make the sort of life choices our Constitution gives us the right against the state to make, but it is unlikely to inform their understanding of their relationship, as rights holders, with and against their government, because their immediate competitor for decision-making authority in these cases is their parents, not the state.

In general, rights analysis that takes account of developmental effects would place considerably greater emphasis on process, as I suggested the Court should have done in *Hazelwood* by requiring state efforts to justify its actions to students and to minimize the censorship involved.¹⁷⁶ Children can learn more or less from their interactions with the legal system and with their government operating within that system, and the process through which children's rights are considered and resolved should be designed to enhance children's learning from those interactions. This emphasis on process, in turn, suggests that the developmental effects approach could have a particularly important impact on cases considering children's due process rights.

Children's due process rights are particularly well suited for developmental-effects focused analysis for a number of reasons. First, the Court's due process analysis, with its call for "fundamental fairness," invites a consideration of rights holders' perceptions and experience in assessing what is fair.¹⁷⁷ Moving from a consideration of how children experience their treatment at the hands of government decision-makers

175. Emily Buss, *Constitutional Fidelity Through Children's Rights*, 2004 SUP. CT. REV. 355, 389 ("A developmentally focused analysis of the Fourth Amendment would ask not whether a search is expected to give offense to a student's privacy sensibilities, but, rather, what message the search conveys about the nature and extent of a student's privacy interests against the state.").

176. See *supra* pp. 59-60.

177. See Mark R. Fondacaro, *Toward a Synthesis of Law and Social Science: Due Process and Procedural Justice in the Context of National Health Care Reform*, 72 DENV. U. L. REV. 303, 306 & n.11 (1995) (stating that "[e]fforts to define the parameters of due process and fundamental fairness traditionally have emphasized the importance of 'truth seeking' as well as the promotion of individual and public perceptions that justice has been done" but acknowledging that "[t]he Supreme Court's references to subjective perceptions of fairness have been relatively oblique"); see also *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 172 (1951) (Frankfurter, J., concurring) ("Nor has a better way [than affording due process] been found for generating the feeling, so important to a popular government, that justice has been done.").

to a consideration of what children take from that experience is a relatively modest step. Second, a core value of due process is said to be “participation,” and securing children’s participation can be expected to enhance their competence as participants in future deliberative and decision-making processes.¹⁷⁸ Third, the Court has recognized that due process necessarily varies with context, to take account of the actors, issues, and stakes involved.¹⁷⁹ The plasticity of the right thus invites process innovation that could accommodate our interest in incurring developmental benefits for children. And fourth, and perhaps most important, cases that implicate due process rights threaten children with considerable loss at the hands of the state, whether through school expulsion, institutionalization, or quasi-incarceration.¹⁸⁰ As a result, how children are treated in these cases can be expected to matter more to them than cases implicating other rights.

How children are treated in the juvenile justice system might be particularly important, not only because the stakes for children are particularly high in this context, but also because, for this particular group of children, there may be few if any other opportunities for them to gain experience participating meaningfully in a serious deliberative process with adults in authority, or to cultivate a sense of self and relationship with society and government consistent with our liberal democratic ideals. Young people accused of committing crimes may start off with considerable skepticism about the legitimacy of the legal system that is prosecuting them, and their treatment in connection with the juvenile justice system may reinforce a perception of self that lives outside the law.¹⁸¹ Moreover, the connection between juvenile justice involvement and school failure is high, further limiting these young people’s other opportunities to gain important deliberative and

178. See Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 YALE L.J. 455, 487 (1986) (“The value of participation in the decisionmaking process appears on the list of virtually every author who discusses nonformal approaches to due process.”).

179. *Morrisey v. Brewer*, 408 U.S. 471, 481 (1972) (“[D]ue process is flexible and calls for such procedural protections as the particular situation demands.”).

180. See generally *Goss v. Lopez*, 419 U.S. 565 (1975) (school suspension); *Parham v. J.R.*, 442 U.S. 584 (1979) (institutionalization); *In re Gault*, 387 U.S. 1 (1967) (detention in a juvenile facility).

181. See Jeffrey Fagan & Tom R. Tyler, *Legal Socialization of Children and Adolescents*, 18 SOC. JUST. RES. 217, 236 (2005) (finding that adolescents’ sense of the legitimacy of legal actors and legal institutions is influenced by how they perceive their treatment, and the treatment of others, at the hands of law enforcement).

expressive skills and to form a sense of self as a positive participant in our democratic system of government.¹⁸²

Early research addressing the “legal socialization” of children suggests that how children are treated by legal actors (such as police) and legal institutions (such as courts) affects their sense of the legal system’s legitimacy and their sense of obligation to obey the law.¹⁸³ While this inquiry is closely related to an inquiry about how a young person develops a sense of self as an actor in a legal system, the discussions have largely focused on the effect of young people’s treatment on their offending behavior. Largely unstudied is the related question that interests me more, which is how young people’s experience with law and legal institutions affects their sense of membership in (or alienation from) our government and legal institutions and their inclination (or disinclination) to engage with our political and legal institutions. But the two inquiries are clearly linked, and preliminary conclusions that respectful and fair treatment at the hands of law enforcement affects adolescents’ views about the legitimacy of legal authority suggest that we could redesign our court processes to cultivate among young people a sense of self, and their relationship to society and government, that is more consistent with our ideals. And while there have been no studies assessing the effect of young people’s active participation in court proceedings on their

182. See, e.g., RUTH CURRAN NEILD & ROBERT BALFANZ, CTR. FOR SOC. ORG. OF SCHS., UNFULFILLED PROMISE: THE DIMENSIONS AND CHARACTERISTICS OF PHILADELPHIA’S DROPOUT CRISIS, 2000-2005, at 32, available at http://www.csos.jhu.edu/new/Neild_Balfanz_06.pdf (reporting that 22.6% of male dropouts end up in juvenile justice placements, compared to 2.2% of graduates, etc.). See generally Jön Gunnar Bernburg & Marvin D. Krohn, *Labeling, Life Chances, and Adult Crime: The Direct and Indirect Effects of Official Intervention in Adolescence on Crime in Early Adulthood*, 41 CRIMINOLOGY 1287 (2003) (reporting research findings that suggest that judicial intervention in response to offending hinders school performance).

183. See Fagan & Tyler, *supra* note 181, at 236. There is a much more developed literature about procedural justice for adults, and how perceived fairness in adjudicative decision-making and demonstrations of respect by decision-makers inspires a belief in the legitimacy of the legal system. See generally TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (2006) (arguing, based on a comprehensive interview study, that people’s commitment to legal compliance is heavily influenced by their sense of having been treated fairly by legal authorities). There is every reason to expect that an equivalent experience for young people who are still forming their sense of self and their understanding of how they relate to others could have at least as powerful an effect. But the court experience can only have this value if young people have a sense of process control and respectful treatment, a sense that they are unlikely to gain under current procedures which fail to involve them in any meaningful way. In the absence of such an experience of procedural justice, we can expect the court process to simply confirm young people’s hostility and distance from the system that brought them in. All this is admittedly speculative, as very little research considers the effect of children’s legal experiences on their development. A shift in the Court’s inquiry to focus on the law’s developmental effects would have the additional benefit of encouraging more research in this direction.

decision-making and social competence, a comprehensive literature on extracurricular activities in schools suggests that giving young people experience taking responsibility and exercising decision-making authority can enhance their social, emotional, and cognitive development in ways that help prepare them to assume positions of responsibility in adulthood.¹⁸⁴

As the preceding discussion suggests, my criticism of the law's reliance on developmental science does not lead me to conclude that the law should ignore the science. Indeed, the most modest version of my thesis would simply be that the law should expand its developmental account to consider developmental effects, and developmental scientists should expand their research to consider the developmental effects of the law's treatment of children. But my ambitions for law, through the courts, is greater than this. While an intelligent analysis of legal rights for children should be well informed of the social science addressing both current capacities and potential effects—it should also reflect societal commitments, set out in law, to enhance children's development to better achieve the ambitions reflected in our constitutional rights.

How an effects-attentive approach to due process rights would alter case outcomes would, as with other rights discussed, vary with the case. In the long line of cases analyzing children's due process rights in juvenile court, a consideration of developmental effects would have prevented the Court from focusing so narrowly on the range of specific procedural protections afforded to adults.¹⁸⁵ Instead, the approach would have required the court to engage in a more nuanced assessment of how "fundamental fairness" could be achieved (and so experienced) for adolescents. In the school suspension context addressed in *Goss v. Lopez*,¹⁸⁶ a consideration of developmental effects might have altered the Court's due process analysis in only fairly subtle ways.¹⁸⁷

In the context of *Parham*, where the Court considered a due process challenge to laws that allowed parents to institutionalize their children without the children's consent, the developmental effects approach

184. See Jodi B. Dworkin et al., *Adolescents' Accounts of Growth Experiences in Youth Activities*, 32 J. YOUTH & ADOLESCENCE 17, 20-24 (2003); Jacquelynne S. Eccles et al., *Extracurricular Activities and Adolescent Development*, 59 J. SOC. ISSUES 865, 876 (2003); Joseph L. Mahoney et al., *Promoting Interpersonal Competence and Educational Success Through Extracurricular Activity Participation*, 95 J. EDUC. PSYCHOL. 409, 415-17 (2003).

185. I set out this problem at greater length in Emily Buss, *The Missed Opportunity in Gault*, 70 U. CHI. L. REV. 39 (2003).

186. 419 U.S. 565 (1975).

187. I discuss the difference between informal school process justified as sufficient, and informal process justified as preferable for children in *Constitutional Fidelity Through Children's Rights*. See Buss, *supra* note 175, at 374-75.

might have rejected both the internal informal process challenged by the plaintiffs and the adversarial process offered as an alternative. Whereas an effects-focused approach might share the Court's concern about the problems created for parent, child, and successful mental health treatment by resolving parent-child disputes of this nature through a traditional adversarial process, it might also worry about the problems created, particularly for older adolescents, who are denied any control over a decision concerning their liberty and treatment.

But *Parham* is not a particularly strong case for effects-driven analysis, in part because, like the abortion cases, the dispute over control that is evident to the adolescent is the dispute between child and parent, not between child and state. Related to this, the medical context of the decision-making, while it might produce an angry or even noncompliant patient, is less likely to produce a patient resentful or cynical about his procedural rights. In this sense, *Goss* presses the effects issue much more sharply: The contest, there, is between school authority (experienced by students as quasi-governmental even if not understood as "the state" as it is understood in the law) and the student over liberty- or property-depriving action of the school against the child. So framed, the process draws the student's attention to the treatment he is experiencing at the hands of government authority and we can expect him to draw lessons from this experience which could have behavioral and identity-shaping effects.

IV. CONCLUSION

It is easy to make the case that taking developmental effects into account in shaping the law is a good idea. But my contention, here, is that a consideration of developmental effects, particularly developmental effects that bear on the adult rights-exercising citizens children will become, is required when the courts analyze children's constitutional rights. Beginning, as the Court does, with the assumption that constitutional rights apply to children as well as adults, adjusting for differences in capacity, and not for differences in potential, tells only one half of the story of childhood. If we stop at this half-story, we are guaranteed to fall short of our constitutional aspirations. At best, we will shape our exercise of rights to be a tepid version of our ideals. At worst, we will produce citizens who expect to live outside of those ideals. The Court's obligation to take account of developmental effects is no greater and no less than its general obligation to adapt its rights analysis to the particulars of actors and context. This is always what is required to keep

our articulation of rights coherent, consistent, and true to the purposes that underlie them.

The form in which the Court takes account of developmental effects would necessarily vary with the right at issue and with circumstances of the case. In some cases, where, for example, the due process rights of juveniles in the delinquency system are at issue, the inquiry would focus on how individual rights holders can be expected to experience their treatment in the process and how this bears both on their development of skills of deliberative engagement and on their understanding of themselves as members of a self-governing society. At the other extreme is *Roper*, where the developmental effects at stake (alive or dead?) are so stark, and so rarely implicated, that an effects analysis would necessarily take on a more aspirational, or hortatory tone. In this context, effects-focused analysis will articulate the law's commitment, and perhaps limitations on that commitment, to children's development that are safeguarded through their rights. In most cases, like the First Amendment cases offered as illustrations, an effects-focused analysis would consider a mix of direct effects (how will young people's development into adult, rights-exercising citizens be affected by the resolution of this case?) and indirect effects (what do these rights say about our commitment to children's development into adult rights exercisers?).

This mix of direct and indirect developmental effects is clearly implicated in the two cases challenging the imposition of sentences of life without parole for juvenile offenses, *Graham v. Florida*¹⁸⁸ and *Sullivan v. Florida*,¹⁸⁹ that are currently pending before the United States Supreme Court as this Article goes to print. But *Roper* will offer the Court little help in reaching these issues. This is in part because our Eighth Amendment jurisprudence has assigned a special authority to courts to scrutinize capital sentencing that does not apply to other sentencing.¹⁹⁰ But it is also because Justice Kennedy chose to apply that authority narrowly, departing only from our analysis of adults' Eighth Amendment rights to the extent he claimed he was required to do so by

188. 982 So. 2d 43 (Fla. Dist. Ct. App. 2008), No. 08-7412 (U.S. argued Nov. 9, 2009).

189. 987 So. 2d 83 (Fla. Dist. Ct. App. 2008), No. 08-7621 (U.S. argued Nov. 9, 2009).

190. See, e.g., *Harmelin v. Michigan*, 501 U.S. 957, 994 (1991) (plurality opinion) ("Proportionality review is one of several respects in which we have held that 'death is different,' and have imposed protections that the Constitution nowhere else provides."). The distinction between the Court's application of the Eighth Amendment to capital and non-capital sentencing was the focus of some of the Justices questions at oral argument. See Transcript of Oral Argument at 53, *Graham v. Florida*, No. 08-7412 (U.S. Nov. 9, 2009) (Justice Alito: "Because the Court, up to this point, has said that death is different, and the rules—the Eighth Amendment rules in capital cases are entirely different from the Eighth Amendment rules in—in all other cases.").

social-scientific facts. Had he been prepared to take a more expansive view of how an assessment of proportionality might be adapted, when applied to children, to take account of society's special commitment to children's development, he might have opened the door to a child-specific, rather than (or in addition to) a death-specific, Eighth Amendment analysis.

At oral argument, Graham's attorney shifted between social-scientific claims of "inherent," age-based differences and descriptions of legally established age lines based on societal choices, a confusion encouraged by the Court's analysis in *Roper*.¹⁹¹ While he needed the social-scientific claim to make use of *Roper*, he will need to convince the Court that the societal choices reflected in the age lines we draw in other areas of the law should have some significance for our interpretation of the Eighth Amendment in order to prevail.

Focusing only on capacity has the advantage of keeping things fairly simple. Even without the help of social science, an exclusive focus on capacity limits the number of adjustments to adult rights that need to be considered and on what grounds. With the increased reliance on developmental science, the courts have found the additional comfort of reduced responsibility for these adjustments. But there is something inauthentic about judicial claims that they are adjusting children's rights simply because children are capable of less. This inauthenticity comes out in all the problems reflected in *Roper*: the inaccuracy of the lines drawn, the irrelevance of capacity to adult rights, the inconsistency across children's rights, and the falseness, or at least the incompleteness, of the messages conveyed. In the end, the "real reason" for treating children differently is rarely simply about capacity, and insisting on this limitation in our rights analysis, while it may keep things clear and scientific, disserves the interests that underlie our account of rights and our legal treatment of children.

191. See Transcript of Oral Argument at 5, *Graham*, No. 08-7412 ("We draw the line at 18, the same line that the Court drew in *Roper*. And it's cruel because of the inherent—the inherent qualities of youth."); *id.* at 25 ("[B]ut the line has to be drawn somewhere. And society, as this Court recognized in *Roper*, has generally drawn that line at 18.").