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INCREMENTAL INDEPENDENCE: CONFORMING THE LAW TO THE PROCESS OF ADOLESCENCE

ABSTRACT

This Note examines the legal inconsistencies arising from the modern application of the child/adult dichotomy to age of majority and proposes the creation of a distinct legal category of adolescence. After reviewing historic and cross-cultural approaches in conferring “adulthood,” this Note examines the evolution of the modern U.S. legal system into the “hodge-podge” of policies affecting adolescents today. This landscape of inconsistencies was dramatically shifted in 2005 when the U.S. Supreme Court in *Roper v. Simmons* categorically struck down capital punishment for all defendants who were under the age of eighteen at the time of the offense. Extending the Court’s reliance on developmental psychology and scientific research, this Note proposes a bifurcated framework balancing adolescent capacity with the level of risk to society (and self) in six milestone activities. Finally, in applying this new bifurcated framework, the author proposes that we raise the age of full majority to twenty-one, lower the voting age to include at least sixteen-year-olds, and adopt legal flexibility for adolescent milestones in between sixteen and twenty-one, including extending licensing provisions beyond driving to include alcohol, tobacco, and firearm use. Such an approach would reward and encourage teenage responsibility as well as empower parents to make individualized assessments of their child’s adult capacity.

INTRODUCTION

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INTRODUCTION

There has been considerable recent legal scholarship,¹ as well as judicial notice,² of the web of inconsistent laws and policies we have for individuals in late adolescence.³ Under the common law, the age of majority was generally twenty-one and applied evenly across various areas of contract law.⁴ Historical developments⁵ led to the Children's Rights Movement in the 1960s and 1970s that sought to expand the government's role as *parens patriae*⁶ to protect abused or

1. See 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, 277 (2006) (discussing the historical development of the current laws that govern children in America); see also Donald L. Beschle, *The Juvenile Justice Counter-revolution: Responding to Cognitive Dissonance in the Law's View of the Decision-Making Capacity of Minors*, 48 EMORY L.J. 65, 67 (1999) (arguing that a paternalistic attitude towards youth in criminal matters remains appropriate despite increasing autonomy given to American youth in noncriminal matters); Rhonda Gay Hartman, *Adolescent Autonomy: Clarifying an Ageless Conundrum*, 51 HASTINGS L.J. 1265, 1266-67 (2000) (discussing the contrast between minors who are treated as adult criminals but are still considered legally incapable of making medical decisions); Kimberly M. Mutcherson, *Minor Discrepancies: Forging a Common Understanding of Adolescent Competence in Healthcare Decision-Making and Criminal Responsibility*, 6 NEV. L.J. 927, 927-28 (2006) (arguing that if adolescents are treated as adults in criminal matters, there is little justification for denying rights to teenagers in other legal contexts); Jacqueline Cuncannan, Note, *Only When They're Bad: The Rights and Responsibilities of Our Children*, 51 WASH. U. J. URB. & CONTEMP. L. 273, 275-76 (1997) (discussing the state law trend towards stricter punishment of juvenile delinquents as compared to laws which assume adolescents incapable of independent decision making in noncriminal matters); Jon-Michael Foxworth, Note, *An Unjust Act: The Schizophrenic State of Maturity and Culpability in Juvenile Justice and Minor Abortion Rights Law; Recent Trends in Virginia and Nationally*, 9 WM. & MARY J. WOMEN & L. 495, 495-96 (2003) (discussing "contrary evocations of adolescence as adulthood in criminal law and adolescence as childhood" in abortion laws).

2. *Roper v. Simmons*, 543 U.S. 551 (2005) (barring the application of the death penalty in cases where the defendant was under eighteen years old at the time of the offense).

3. *Id.* at 569, app. D at 585-87.

4. Cunningham, *supra* note 1, at 290, 296.

5. Landmark cases from the U.S. Supreme Court, most notably *In re Gault* and *Tinker v. Des Moines Independent Community School District*, significantly altered the legal landscape for minors amidst the overall social realignment of the 1960s. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969) (extending individual First Amendment political liberties to minors); *In re Gault*, 387 U.S. 1, 1-2 (1967) (extending individual constitutional due process protections to minors, specifically the right to counsel in a criminal proceeding); see MARTIN GUGGENHEIM, *WHAT'S WRONG WITH CHILDREN'S RIGHTS* 5-7 (2005) (describing the context within which the children's rights movement developed).

6. FRANKLIN E. ZIMRING, *THE CHANGING LEGAL WORLD OF ADOLESCENCE* 31 (1982). The Progressive era at the turn of the twentieth century launched the first wave of children's rights, emphasizing child labor laws and promotion of education, with the state acting as *parens patriae* to supplement the protection afforded children by families. See GUGGENHEIM, *supra* note 5, at 1, 6.

neglected children and offer greater protections for all children.⁷ At the same time, frustration with the war in Vietnam and the military draft fueled the 1971 enactment of the Twenty-Sixth Amendment to the U.S. Constitution, which lowered the minimum voting age from twenty-one to eighteen,⁸ and later fueled the lowering of the legal age to purchase and consume alcohol from twenty-one to eighteen.⁹ In the 1980s and 1990s the pendulum shifted away from allowing adolescents increased autonomy to increasingly holding them responsible as adults for their missteps in using their new freedoms.¹⁰ Since this shift, states and courts have carved out a myriad of exceptions and methods to accommodate the needs of adolescents in their daily lives, accommodations which the law does not directly provide.¹¹

In an attempt to conform the law to the realities of adolescence that these exceptions acknowledge, this Note first reviews the philosophical and historical backdrop underlying our current "hodge-podge"¹² of policies concerning the rights and responsibilities of adolescents. Second, this Note examines the current inconsistencies in state policies concerning juvenile capacity in light of modern scientific research. From this mix of theories emerges a new framework for envisioning adolescence as a process,¹³ requiring more nuanced steps than the categorical adult/minor dichotomy.¹⁴ "Indeed, it is arguable that citizenship is constituted by a cluster of rights and duties that can be acquired progressively rather than all at once."¹⁵ This certainly is reflected in adolescents' prolonged economic dependence on their parents,¹⁶ which, coupled with the lengthened path of educational achievement¹⁷ and age of onset of major psychiatric illness,¹⁸ indicates that the law should recognize adolescence as lasting

7. See Mary Pat Treuthart, *Lowering the Bar: Rethinking Underage Drinking*, 9 N.Y.U. J. LEGIS. & PUB. POL'Y 303, 307 (2006) (discussing the link between alcohol-related age restrictions and a heightened paternalistic relationship between the state and youth).

8. Cunningham, *supra* note 1, at 295-96; National Youth Rights Association, *Minors Should Have the Right to Vote*, in DO CHILDREN HAVE RIGHTS? 74, 75 (Jamuna Carroll ed., 2006).

9. Cunningham, *supra* note 1, at 297.

10. *Id.* at 314-15.

11. *Id.* at 286-87, 293, 315-16.

12. *Id.* at 286, 311.

13. ZIMRING, *supra* note 6, at 89-96, 103-05.

14. *Id.* at 105-15.

15. DAVID ARCHARD, *CHILDREN: RIGHTS AND CHILDHOOD* 98 (2d ed. 2004).

16. Elizabeth S. Scott, *The Legal Construction of Adolescence*, 29 HOFSTRA L. REV. 547, 564-66 (2000).

17. *Id.*

18. Onset of schizophrenia occurs in late adolescence for males and early adulthood for females. Frances J. Lexcen & N. Dickon Reppucci, *Psychology and the Law: Effects of Psychopathology on Adolescent Medical Decision-Making*, 5 U. CHI. L. SCH. ROUNDTABLE

at least until age twenty-one. However, to balance an extended period of adolescence, this Note proposes a new framework expanding behavioral autonomy during adolescence.

This framework offers a bifurcated application of *parens patriae* in which six central milestones are divided into two stages of public adulthood. The first stage includes the cognitive-based activities of which teens between fifteen and sixteen years of age are capable and which have minimal adverse social impact: voting and entering into contracts.¹⁹ The second stage includes the socio-emotional judgment-based activities that require more maturity, self-regulation and impulse control in addition to cognitive ability, some of which pose a far greater risk of adverse social impact: driving, use of guns, and consumption of alcohol.²⁰ Other activities in this group require greater maturity and judgment, but are private decisions enacted through the public sphere; these activities include medical decision making, particularly decisions regarding abortion, marriage, and whether to have children.²¹ Finally, this Note applies this framework to six areas of law that capture discrete moments along the road to adulthood: voting, entering a binding contract, driving, alcohol/firearm/tobacco use, medical decision making, and marriage.²² This Note proposes

63, 84-85 (1998). Initial symptoms of bipolar disorder may manifest in adolescence, although accurate diagnosis of bipolar disorder during adolescence is difficult because of the overlap of symptoms with other psychiatric disorders. *Id.* at 86.

19. The impact of each adolescent's vote is diluted by the overall pool of voters where an overwhelming majority exists. ARCHARD, *supra* note 15, at 98. Though there may be some risk for both adolescents and others regarding contracts, it is more likely that adolescents will gradually develop their commercial acumen. See Hartman, *supra* note 1, at 1302-03 (discussing the "disaffirmance rule" that allows minors to void contracts under the guise that they are mentally incompetent to bargain in good faith); see generally Cunningham, *supra* note 1, at 287-94 (exploring the history of the infancy defense to legal contracts).

20. The risks arising from guns and driving are self-evident. The risk associated with alcohol consumption is correlated with other events, most notably traffic accidents from driving under the influence. See *infra* notes 135-36 and accompanying text.

21. See Cunningham, *supra* note 1, at 317-19; Hartman, *supra* note 1, at 1266.

22. Juvenile culpability for criminal acts is the subject of significant debate and legal scholarship in its own right. See, e.g., Beschle, *supra* note 1, at 65-66 (discussing the prominence of retributive thought in the debate surrounding juvenile justice); Richard E. Redding, *Juveniles Transferred to Criminal Court: Legal Reform Proposals Based on Social Science Research*, 1997 UTAH L. REV. 709 (1997) (discussing multiple reform proposals for juvenile justice); Cuncannan, *supra* note 1, at 273-75 (discussing the growing dissatisfaction with the traditional juvenile justice system). However, this Note focuses on developing a coherent legal framework for normative adolescent development, while criminally involved juveniles require intervention for non-normative behavior. Nevertheless, the theoretical underpinnings of juvenile criminal culpability intertwine with these areas of civil law in that criminal sanctions are the "stick," with civil rights and privileges as "carrots," in the proverbial "carrot and stick" analogy describing behavioral motivation.

realistic and consistent policies tailored to the scientifically documented needs of children while allowing flexibility in decision-making capacity for juveniles whose lives require it. Most importantly, this Note calls for adolescents fifteen or sixteen years of age to be granted the right to vote as the first step in their path to public adulthood.

I. HISTORICAL AND THEORETICAL APPROACHES

Western societies have historically treated a child's development according to nodal ages (seven, fourteen, and twenty-one) that appear consistently across cultures.²³ "Full spiritual maturity is considered by both the Jewish and Christian faiths to arrive at 13 or 14 years of age."²⁴ A "landmark" age of fourteen, plus or minus a year, is roughly the onset age of puberty and enhanced cognitive capacities.²⁵ As steps toward adulthood, these nodal ages corresponded with physical development, such that "[p]hysical capability was more the ruling factor than was time already spent on earth."²⁶

In the Roman Empire, "a boy was presumed to be able to understand the law at age 14"²⁷ and in Northern Europe from the ninth century through the eleventh century, the age of majority was fifteen.²⁸ Then suddenly, for reasons that have been "lost to the historians," the English age of majority jumped from fifteen to twenty-one.²⁹ The age of majority remained twenty-one for several centuries, thus establishing the British common law rule (on which the U.S. legal system was founded)³⁰ that a child was an "infant" until the age of twenty-one.³¹

"It appears that the timing of massive transitions in society's thinking about ages and rights has less to do with real chronological

23. Give or take one year of age. COMM. ON CHILD PSYCHIATRY, GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, REP. NO. 126, HOW OLD IS OLD ENOUGH?: THE AGES OF RIGHTS AND RESPONSIBILITIES 7-9 (1989).

24. *Id.* at 9. The rite of Bar Mitzvah at age thirteen marks acceptance into the adult congregation for Jewish youth. *Id.* at 10.

25. *Id.* at 9.

26. *Id.* at 6.

27. *Id.* at 7.

28. *Id.*

29. *Id.* A preferred theory is that knights needed greater strength and agility because of the shift in warfare from fighting on foot to the use of heavy armor and weapons on horseback. *Id.* at 7-8.

30. See 1 DONALD T. KRAMER, LEGAL RIGHTS OF CHILDREN 980 (rev. 2d ed. 2005) (detailing the traditional observance of the British common law age of majority at twenty-one in most American states until the passage of the Twenty-Sixth Amendment); see also Cunningham, *supra* note 1, at 290 (tracing the legal definition of infancy for contract purposes back to the thirteenth century).

31. COMM. ON CHILD PSYCHIATRY, *supra* note 23, at 7.

ages than it does with the needs of society and the skills, maturation, and volition the society perceives in and expects of its individual children and adolescents.”³² The United States followed the English common law until the late nineteenth century, using the “rule of sevens”³³ to assign criminal and civil liabilities³⁴ and establishing twenty-one as the age at which individuals could exercise other rights and privileges under civil law.³⁵ Under this regime, children under age seven are presumed incapable of criminal intent or negligence, children age seven to fourteen enjoy a rebuttable presumption that they are not capable of negligence or criminal culpability, and juveniles age fourteen and older are presumed capable of negligence and criminal culpability.³⁶ Often, adult standards are applied to minors (including those fourteen and older) if they are involved in particularly dangerous or “adult” activities.³⁷

In this regime, the age of fourteen continued to carry legal significance, as both British and U.S. apprenticeship laws³⁸ and U.S. child labor and compulsory schooling laws³⁹ used the age of fourteen (or thirteen) to regulate the labor market participation of juveniles.⁴⁰ Fourteen was also commonly the age at which courts would consider a child’s preference in U.S. custody cases.⁴¹

Despite the role that physical capacity played in constructing social stages of maturity,⁴² examining these nodal ages — seven, fourteen, and twenty-one — from a human development perspective

32. *Id.* at 8.

33. J. Shoshanna Ehrlich, *Shifting Boundaries: Abortion, Criminal Culpability and the Indeterminate Legal Status of Adolescents*, 18 WIS. WOMEN’S L.J. 77, 99 (2003).

34. KRAMER, *supra* note 30, at 742-45; Ehrlich, *supra* note 33, at 99.

35. The right to vote and legal age for purchase or consumption of alcohol was twenty-one until the 1970s when the military draft of the Vietnam War highlighted the illogic of sending eighteen-, nineteen-, and twenty-year-olds to war, yet deeming them incapable under the law to vote or drink alcohol. *See* Cunningham, *supra* note 1, at 297; Treuthart, *supra* note 7, at 308.

36. KRAMER, *supra* note 30, at 742-43. For example, West Virginia courts follow the rationale “that children between the ages of seven and [fourteen] are incapable of negligence [because] such children usually lack the intelligence, maturity, and judgmental capacity to be held accountable for their actions.” *Id.* at 745. However, a child as young as eight was considered an adult for criminal culpability in England until 1780. COMM. ON CHILD PSYCHIATRY, *supra* note 23, at 10.

37. “More often than not, the activity is one which requires the minor to have a license (such as a license to drive automobiles).” KRAMER, *supra* note 30, at 747-48.

38. COMM. ON CHILD PSYCHIATRY, *supra* note 23, at 12.

39. *Id.* “Like school law, child labor law directly reflects changing social modes, financial conditions, and industrial practices. Here, chronological age is probably less crucial a factor in setting standards than physical fitness and adeptness for work . . .” *Id.* at 11.

40. *Id.* at 11-12.

41. *Id.* at 10.

42. *Id.* at 6, 11.

confirms that these demarcations also generally make sense when one considers cognitive and emotional development.⁴³ One of the most influential theories of human development was outlined by Jean Piaget, for whom “the state of adult maturity is defined in logico-scientific terms as the capacity for formal operational, that is, abstract and hypothetical, thinking.”⁴⁴ In Piaget’s framework children develop through four cognitive stages and achieve “adult-like reasoning abilities by age 15.”⁴⁵ Research has refined and added nuance to Piaget’s theories,⁴⁶ and cross-cultural studies have confirmed the general soundness and universality of his framework.⁴⁷ Moreover, a central component of Piaget’s framework is that despite the three major transitional periods between the four cognitive stages, “[t]he beginning and end of a period is not sudden, but gradual, and the periods merge one into the other.”⁴⁸

Additionally, Piaget’s framework includes “parallel factors of emotional development that color cognitive performance”⁴⁹ which make psychoanalytic theory “an important framework for understanding how a child uses various cognitive skills in emotionally tinged situations — the very same kinds of situations about which the law and society are so concerned.”⁵⁰ Considering cognitive and emotional development in tandem is a more realistic approach to examining adolescence as a process.⁵¹

“The conscience as a mental structure is new to 7- and 8-year-olds, and it tends to take a harsh ungiving hold upon the child’s attitudes and behaviors.”⁵² Hence, children eight to nine years old tend

43. *Id.* at 15-16.

44. ARCHARD, *supra* note 15, at 42.

45. Cunningham, *supra* note 1, at 282. Infants and toddlers learn about the world through their physical, “‘sensorimotor,’” experiences. *Id.* Children ages two through seven learn communication and social skills in the “‘preoperational stage.’” *Id.* From ages seven through twelve, children experience heightened ordered learning ability in the “‘concrete operational stage.’” *Id.* Starting at around age twelve, in the “‘formal operational stage,’” children’s cognitive capacity expands to include abstract reasoning; abstract reasoning allows them to engage in advanced logical reasoning, including the ability to weigh multiple options in predicting a likely outcome. *Id.* By age fifteen, most children will have “‘amassed an adult-like cognitive ability.”” *Id.* at 282-83.

46. COMM. ON CHILD PSYCHIATRY, *supra* note 23, at 20.

47. *Id.*

48. *Id.* at 21.

49. *Id.* at 20.

50. *Id.* at 21.

51. “Childhood is defined as that which lacks the capacities, skills and powers of adulthood. To be a child is to be not yet an adult. Adulthood is something which is gained” ARCHARD, *supra* note 15, at 39. Further, “[c]hildren are understood as ‘becoming’, a stage, rather than as ‘being’, a state. A child is an ‘unfinished’ adult” *Id.* at 41-42 (citation omitted).

52. COMM. ON CHILD PSYCHIATRY, *supra* note 23, at 26-27.

to be very rule oriented and may express rigidities in thinking;⁵³ "the stronghold that the conscience establishes loosens considerably by ages 10-12" and children begin exhibiting more flexible coping strategies.⁵⁴ Piaget's framework indicates that formal thought begins shortly before age fourteen, and "[a]ll things considered, 14 [give or take a year] is quite a good landmark age for the expectation by society that children use abstract reasoning skills, and thus, that they be given increased responsibility."⁵⁵

Amidst their expanded cognitive capacities, adolescents "suffer[] intense emotional assaults from burgeoning drives"⁵⁶ associated with "sexual and aggressive urges" brought on by the physical and hormonal changes of puberty.⁵⁷ Emotional and experiential factors influence actual understanding of a given situation,⁵⁸ as "a person's cognitive capacities may often be subject to distortion by internal fantasy and external stress."⁵⁹ Taking a multitude of factors into account,

the degree to which [adolescents] may display the expected "formal" maturity of thought may be influenced by tumultuous emotion, peer pressure, and family turmoil. Social coercion (the peer group) often dictates teenagers' behavior Adolescence is clearly the time of life when emotional withdrawal from the family and movement toward the peer group may have a stronger influence on behavior than does the capacity to reason.⁶⁰

Herein lies the challenge of conforming laws and policies to afford increased responsibility and autonomy to adolescents, given that "the tumultuous mental life of the 13-14-year-old is very important when the differences between 14 and 21 are considered. By 18, certainly by 21, we expect the emotional turmoil and bothersome intrusive fantasy life of adolescence to be somewhat resolved."⁶¹

53. *Id.* at 26.

54. *Id.* at 27.

55. *Id.* at 29. In a review of developmental psychology research, only one study was found that distinguished the reasoning of fourteen-year-olds from that of eighteen-year-olds, though in some studies the eighteen-year-olds exhibited more "savvy" than pure abstract reasoning. *Id.*

56. *Id.* at 32.

57. *Id.*

58. *Id.* at 32.

59. *Id.* at 34.

60. *Id.* at 35.

61. *Id.* at 32.

II. MODERN VIEW OF CAPACITY: *ROPER V. SIMMONS*

“The significance of childhood for our time is more pronounced than for previous societies. It is seen as meriting a clear separation of adult and child worlds.”⁶² Our modern view is that

childhood is a stage or state of incompetence relative to adulthood. The ideal adult is equipped with certain cognitive capacities, rational, physically independent, autonomous, has a sense of identity and is conscious of its beliefs and desires, and thus able to make informed free choices for which it can be held personally responsible. It is on account of these dispositions that an adult is thought able to work for its living, be accountable at law for its actions, make sexual choices and help to choose the government of its community. It is because the child lacks these adult dispositions that it may not participate in this adult world.⁶³

One can consider adulthood either as a state or as a process; if considered a process, “there can be no obvious line of division between [adulthood] and childhood.”⁶⁴

In 2005, the U.S. Supreme Court revisited the question of whether juveniles who committed a capital offense while under the age of eighteen could be treated categorically when considering the constitutionality of the death penalty.⁶⁵ In *Roper v. Simmons*, the Court expressly abrogated *Stanford v. Kentucky*, a case decided fifteen years earlier in which the Court had considered the same question and reached the opposite result.⁶⁶ The *Roper* Court’s analysis relies on many sources from which we draw our modern conception of “capacity.”⁶⁷

In *Roper*, the Court juxtaposed the jurisprudence regarding the death penalty for juveniles with that concerning the death penalty for the mentally retarded and asked whether juveniles, as a group, possess sufficient capacity to be held criminally culpable and subject

62. ARCHARD, *supra* note 15, at 31.

63. *Id.* at 30.

64. *Id.* at 36-37 (citation omitted).

65. *Roper v. Simmons*, 543 U.S. 551, 551 (2005) (holding that execution of juveniles who were under eighteen at the time of the offense is unconstitutional under the Eighth and Fourteenth Amendments).

66. *Id.* at 552, 575; *Stanford v. Kentucky*, 492 U.S. 361, 361 (1989).

67. *Roper*, 543 U.S. at 561, 569-70 (drawing on state-determined “evolving standards of decency,” experiences of parents, “scientific and sociological studies,” and developmental psychology research and theory, including the work of noted developmental psychology theorist Erik Erikson); *see also* Foxworth, *supra* note 1, at 501-02 (noting that the *Thompson* Court relied on developmental psychology studies in finding that younger adolescents did not have the capacity to develop criminal intent).

to the maximum penalty of execution.⁶⁸ In *Thompson v. Oklahoma*, the plurality of the Court determined that standards of decency prohibited execution of individuals who were under sixteen at the time of the crime.⁶⁹ The *Thompson* Court also observed that

[t]he conclusion that it would offend civilized standards of decency to execute a person who was less than 16 years old at the time of his or her offense is consistent with the views that have been expressed by respected professional organizations, by other nations that share our Anglo-American heritage, and by the leading members of the Western European community.⁷⁰

The *Thompson* Court explained that “[t]he reasons why juveniles are not trusted with the privileges and responsibilities of an adult also explain why their irresponsible conduct is not as morally reprehensible as that of an adult.”⁷¹ The following year, however, the Court held in *Stanford* that execution of offenders under eighteen years of age at the time of the offense was not categorically unconstitutional.⁷² On the same day, the Court ruled in *Penry v. Lynaugh* that execution of the mentally retarded was also constitutional.⁷³ In *Penry* and *Stanford*, “the Court also ‘emphatically reject[ed]’ the suggestion that the Court should bring its own judgment to bear on the acceptability of the juvenile death penalty.”⁷⁴ The Court considered only whether the number of states that had adopted such policies were numerous enough to constitute a consensus indicative of a national normative standard.⁷⁵

In 2002, the Court revisited the question as to the constitutionality of the death penalty for the mentally retarded.⁷⁶ In *Atkins v. Virginia*, the Court “returned to the rule, established in decisions predating *Stanford*, that ‘the Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment.’”⁷⁷ The Court found that mental retardation diminished culpability, making the death penalty less defensible as a retributive measure and less effective as a deterrent.⁷⁸

68. *Roper*, 543 U.S. at 552, 569.

69. *Id.* at 561 (citing *Thompson v. Oklahoma*, 487 U.S. 815, 815 (1988)).

70. *Id.*

71. *Id.*

72. *Id.* at 562 (citing *Stanford v. Kentucky*, 492 U.S. 361, 361 (1989)).

73. *Id.* (citing *Penry v. Lynaugh*, 492 U.S. 302, 305 (1989)).

74. *Id.* (citing *Stanford*, 492 U.S. at 377-78).

75. *Id.* at 562-63.

76. *Atkins v. Virginia*, 536 U.S. 304 (2002).

77. *Roper*, 543 U.S. at 563 (citing *Atkins*, 536 U.S. at 312).

78. *Id.* (citations omitted).

In *Roper*, the Court considered the extent to which a national consensus could be found by looking at the number of state legislatures that had barred such executions or whose governors had altered state policy by commuting death sentences to life in prison.⁷⁹ Though the number of states moving to prohibit such executions was found to be fewer than those analyzed in *Atkins*, the *Roper* Court found a similar and significant trend indicating a growing national consensus against such executions.⁸⁰ Using the language of the *Atkins* Court concerning the mentally retarded, the Court in *Roper* found “that today our society views juveniles . . . as ‘categorically less culpable than the average criminal.’”⁸¹

III. POST-*ROPER* INCONSISTENCIES REMAIN

The Court’s landmark ruling in *Roper* eliminated only the most obvious and troubling tension reflected by the hodgepodge of laws and policies governing adolescents.⁸² Before *Roper*, the strongest argument for increased rights and autonomy for adolescents was the inherent dissonance between adolescents’ possible criminal liability — including capital punishment — and the range of behavior from which they were precluded because of presumptive lack of decisional capacity.⁸³ Though less glaring, this dissonance continues after *Roper* in the trend of holding delinquent juveniles responsible as adults for their misdeeds,⁸⁴ including life sentences for crimes committed as minors.⁸⁵

79. *Id.* at 564-67.

80. *Id.* at 565-66.

81. *Id.* at 567 (citing *Atkins*, 536 U.S. at 316). A key factor, perhaps under-acknowledged by the Court itself, that likely influenced the Court’s analysis in *Roper* was the parallel between the organic brain limitations of the mentally retarded and the brain immaturity of adolescents; the amicus curiae brief submitted by the American Medical Association (AMA) discussed this parallel. See Keely A. Magyar, *Between and But Being Booted Nonetheless: A Developmental Perspective on Aging Out of Foster Care*, 79 TEMP. L. REV. 557, 579-85 (2006). Magyar relies on the AMA’s amicus brief in *Roper* to explain how recent medical research indicates that processes of “synaptic pruning” and “myelination” in the prefrontal cortex and cerebellum continue at least until age twenty-one, and likely longer, thus delaying adolescents’ ability to control impulses and weigh the consequences of their actions in an adult manner. *Id.*

82. See Nicole A. Saharsky, Note, *Consistency as a Constitutional Value: A Comparative Look at Age in Abortion and Death Penalty Jurisprudence*, 85 MINN. L. REV. 1119, 1120, 1134, 1146-49 (2001) (calling for the end of capital punishment for juveniles because both the Eighth and the Fourteenth Amendments demand consistent treatment of juvenile offenders and juvenile women seeking abortions).

83. *Id.* at 1119, 1135.

84. See Beschle, *supra* note 1, at 65 (noting that the rehabilitative model of juvenile justice is diminishing, with more states now holding juveniles accountable as adults for their crimes); Cuncannan, *supra* note 1, at 288-91 (noting that under these policies “children are considered most competent when they are most delinquent” as the level of adult responsibility imposed correlates with the degree of violence of the delinquent act).

85. EQUAL JUSTICE INITIATIVE, CRUEL AND UNUSUAL: SENTENCING 13- AND 14-YEAR-OLD

This dissonance in the decisional capacity attributed to adolescents in the juvenile justice system and other legal areas arose in large part because the two systems evolved separately⁸⁶ and with differing underlying public policies.⁸⁷ Juvenile courts emerged in the early twentieth century with the goal of rehabilitation for juvenile criminal offenders.⁸⁸ However, through a series of cases starting in the late 1960s, the Supreme Court replaced the paternalism and lack of adversarial process of the juvenile justice system with due process rights for juveniles equal to those of adults.⁸⁹ This began the reversion of juvenile courts back to the adult penal model.⁹⁰

The juvenile justice system has the simultaneous purposes of punishment,⁹¹ protecting society,⁹² and rehabilitating the juvenile in preparation for a law-abiding adulthood.⁹³ In contrast, the status of minors as legally incompetent in other legal matters serves the purposes of protecting children from their own bad judgment⁹⁴ as well as from outside exploitation⁹⁵ and preserving parental authority.⁹⁶

CHILDREN TO DIE IN PRISON 4 (2007), available at <http://www.eji.org/eji/files/20071017cruelandunusual.pdf>. Following *Roper*, efforts have begun to eliminate life sentences without possibility of parole for crimes committed in early adolescence. *Id.* at 3.

86. See Cuncannan, *supra* note 1, at 282-85 (discussing the Supreme Court's tendency to keep issues regarding rights of minors in criminal matters separate from matters outside the criminal context and discussing the Court's recognition of juveniles' right to basic due process protections).

87. Juvenile justice was separated from other juvenile issues in order to provide rehabilitation and guidance for delinquent youth whose parents would not or could not do so. Cunningham, *supra* note 1, at 313. The presumption of juvenile incapacity in civil matters was to protect children from being "tak[en] advantage of . . . due to their inexperience in the marketplace." *Id.* at 291.

88. Beschle, *supra* note 1, at 69-71; Scott, *supra* note 16, at 578, 580; Foxworth, *supra* note 1, at 498, 505.

89. *In re Gault* is generally considered the turning point after which juveniles were afforded the same essential due process protections as adults in the criminal justice system. *In re Gault*, 387 U.S. 1, 1 (1967); see Beschle, *supra* note 1, at 71-73 (noting that *Gault* was a victory for advocates of children's rights); Scott, *supra* note 16, at 578-81 (noting that juvenile delinquents are often "indistinguishable from adult criminals"); Cuncannan, *supra* note 1, at 283-84 (noting that the Supreme Court enhanced procedural protections for juveniles in *Gault*, a case which the Court relied on to further extend procedural protections for juveniles); Foxworth, *supra* note 1, at 499-500, 505-06 (explaining the procedural safeguards *Gault* provided for juveniles).

90. Beschle, *supra* note 1, at 70-73; Hartman, *supra* note 1, at 1281; Scott, *supra* note 16, at 579, 587-88; Cuncannan, *supra* note 1, at 284-85; Foxworth, *supra* note 1, at 498-500.

91. Scott, *supra* note 16, at 549.

92. *Id.*

93. See *id.* at 578-80 (noting that the goal of the juvenile justice system is rehabilitation rather than punishment); Foxworth, *supra* note 1, at 498 (describing the rehabilitative focus of the juvenile justice system a century ago).

94. See Scott, *supra* note 16, at 550-51, 553 (describing parents' responsibilities as protectors of their children).

95. *Id.* at 551, 553.

96. *Id.* at 550-52 (noting that "[t]raditionally, policy debates . . . have focused on the

Moreover, states have tended to defer to the interests of parents in noncriminal juvenile matters⁹⁷ both because of parents' constitutionally protected rights in determining how to rear their children⁹⁸ and for the potential responsibility that may pass to parents from the acts of their children.⁹⁹

Scholars surveying the inconsistencies in the legal treatment of adolescents call for using a developmental model¹⁰⁰ to balance the interests of parents, society, and adolescents.¹⁰¹ This model would acknowledge the mature cognitive capacity of older teens¹⁰² and nurture their decisional sophistication.¹⁰³ The arguments in favor of using a developmental model rely on Piaget's multi-stage model of cognitive development¹⁰⁴ and historical patterns.¹⁰⁵ Of note is the significant research examining adolescent decision making that confirms Piaget's model¹⁰⁶ and these historical customs.¹⁰⁷

Specifically, the accumulation of research examining adolescent decisional capacity "suggest[s] that adolescents, aged 14 and older, possess the cognitive capability to reason, understand, appreciate, and articulate decisions comparable to young adults."¹⁰⁸ In a study of the reasoning of nine- to fourteen-year-olds as subjects of child

allocation of authority between parents and the state," but not the liberty and autonomy of the child).

97. Cuncannan, *supra* note 1, at 285.

98. Scott, *supra* note 16, at 551 (noting that "parental 'rights' [can be viewed] as legal compensation for the burden of responsibility that the law imposes on parents").

99. Cuncannan, *supra* note 1, at 298-99.

100. See Cunningham, *supra* note 1, at 369 (calling for a Model Children's Code developed jointly by the fields of law and psychology); see also Hartman, *supra* note 1, at 1355-56 (calling for a model recognizing the decisional ability of adolescents rather than focusing on decisional incapacity); Cuncannan, *supra* note 1, at 298-300 (noting the lack of effectiveness in the current juvenile justice system). But see Scott, *supra* note 16, at 560-61 (acknowledging that the "bright line rule" of the age of majority "ignores individual variations in developmental maturity as well as varying maturity demands across the range of legal rights and responsibilities," but concluding that the alternative of "customized age grading" on a case-by-case basis would be too costly and impracticable).

101. Scott, *supra* note 16, at 558.

102. Hartman, *supra* note 1, at 1355 (calling for "[a]n adolescent autonomy model recogniz[ing] decisional ability, as opposed to decisional incapacity"); Cuncannan, *supra* note 1, at 295-99 (calling for an individualized approach implemented through a rebuttable presumption of competence for delinquent and nondelinquent minors age fourteen and older).

103. See Hartman, *supra* note 1, at 1268-69 (noting the benefits of a shift in focus to the decisional ability of adolescents).

104. Cunningham, *supra* note 1, at 282-84; Hartman, *supra* note 1, at 1285-86; Cuncannan, *supra* note 1, at 292-93.

105. Cunningham, *supra* note 1, at 290; Hartman, *supra* note 1, at 1271-72; Cuncannan, *supra* note 1, at 293-94.

106. Hartman, *supra* note 1, at 1285-86.

107. See *id.*

108. *Id.* at 1286.

custody dilemmas, fourteen-year-olds performed as well as eighteen-year-olds when asked about "real-life" hypothetical problems.¹⁰⁹ Studies also confirm Piaget's model concerning the age at which minors can participate effectively in their medical decisions.¹¹⁰ When compared with young adults of eighteen and twenty-one years of age, fourteen-year-olds expressed similar reasoning as to medical decisions, whereas nine-year-olds in the same study did not.¹¹¹ Similarly, in a study of teenagers faced with unplanned pregnancies, teens "14 to 17 appear to be similar to legal adults in both cognitive competence and volition" and were "competent decision makers" despite the highly emotional context.¹¹²

In the criminal context, research has shown that with regard to understanding their Miranda rights and the significance of waiving such rights, teens younger than fifteen "manifested significantly poorer comprehension than adults of comparable intelligence," while teens fifteen and older "understood their constitutional rights, along with the consequent waiver of those rights, in a manner comparable to adults."¹¹³

Modern technology, however, has advanced research concerning the physical capacity of adolescents to translate this adult-like cognitive capacity into mature behavior.¹¹⁴ Significantly, the areas of the brain that regulate "mature reasoning and self-control," the temporal lobes and prefrontal cortex, "do not fully develop until late adolescence."¹¹⁵ In fact, emerging research indicates that brain maturation related to impulse control and judgment continues into young adulthood.¹¹⁶ This may account for the findings of other researchers that, despite their comparable cognitive capacity, "adolescents' outcomes differ from adults because of peer influence and different perceptions of risk and time."¹¹⁷ This realization that adolescents are less able

109. *Id.* at 1290 (noting that the nine- and ten-year-olds responded as reasonably and rationally as the fourteen- to eighteen-year-olds).

110. *Id.* at 1320.

111. *Id.* (confirming prior research indicating "little evidence that minors age 15 and above as a group are any less competent to provide [medical] consent than are adults" (citation omitted)).

112. *Id.* at 1351-52 (citation omitted).

113. *Id.* at 1300 (citation omitted).

114. Jay D. Aronson, *Brain Imaging, Culpability and the Juvenile Death Penalty*, 13 PSYCHOL. PUB. POL'Y & L. 115, 116-17 (2007); Magyar, *supra* note 81, at 579-85; see also Cunningham, *supra* note 1, at 281 (describing the impact of modern technology on researching the cognitive capacity of adolescents).

115. Cunningham, *supra* note 1, at 281; see also Magyar, *supra* note 81, at 579-85.

116. See Aronson, *supra* note 114, at 121 (noting that "many important regions of the brain continue to develop through adolescence and into adulthood"); Magyar, *supra* note 81, at 579-85.

117. Cunningham, *supra* note 1, at 284.

than adults to use their mature cognitive capacity because of their greater “susceptibil[ity] to psychosocial factors such as peer influence and lack of impulse control”¹¹⁸ led scholars to call for the construction of adolescence as an intermediate category in the law, thus capturing “the modern view that this group has greater cognitive abilities than children, but less self-control than adults.”¹¹⁹

IV. THE NEED TO EXTEND LEGAL ADOLESCENCE TO AT LEAST TWENTY-ONE

In addition to the legal inconsistencies facing adolescents today, several factors suggest the need to return to the common law age of twenty-one as the age of majority.¹²⁰ First, the age of “adulthood” has historically fluctuated based upon societal needs and what is required of children and adults.¹²¹ Today, educational paths to adult occupations or professions extend for longer periods of time.¹²² Additionally, the transition from adolescent to young adult is extending as adolescents remain economically dependent on their parents into their early twenties.¹²³ State laws requiring health insurance companies to allow college students to remain on their parents’ policies reflect this lengthened financial dependence.¹²⁴ Tax codes and financial aid policies also consider college students as dependents.¹²⁵

118. *Id.* at 316-17.

119. *Id.* at 317.

120. Cunningham, *supra* note 1, at 290; see also Magyar, *supra* note 81, at 601-05 (advocating extension of federally funded foster care until age twenty-one and noting the range of activities for which states have re-adopted twenty-one as the age of majority).

121. See COMM. ON CHILD PSYCHIATRY, *supra* note 23, at 8 (noting that society’s perception of age and associated rights fluctuates according to society’s needs and volition rather than with actual chronological age).

122. Magyar, *supra* note 81, at 587-91 (discussing social science research documenting the economic, educational, and societal changes that have altered trajectories into adulthood and contributed to “the now widely accepted notion that adolescents are neither children nor adults”).

123. *Id.* at 591-95; see Scott, *supra* note 16, at 564-66 (noting the extended length of parents’ financial obligations to their children in recent decades).

124. Kelly L. Wright, Comment, *College Students Beware: Problems and Pitfalls in Student Health Insurance*, 7 U. MIAMI BUS. L. REV. 531, 534 (1999).

125. Karin McAnaney, Note, *Finding the Proper Balance: Protecting Suicidal Students Without Harming Universities*, 94 VA. L. REV. 197, 204 (2008). For example, the state of Virginia considers students dependents until age twenty-four and bases in-state status for admission and tuition at Virginia’s public universities on parents’ residency. Susan Kinzie, *The University of Uncertainty: Va. Children of Illegal Immigrants Lack In-State Status*, WASH. POST, Mar. 14, 2008, at B01. The Virginia Attorney General recently had to clarify this policy when the University of Virginia initially denied in-state status to a U.S. citizen born to illegal immigrants because his parents could not establish legal Virginia residency. Susan Kinzie, *UPDATE: U-Va. Accepts Residency Claim*, WASH. POST, Mar. 24, 2008, at B05.

Second, late adolescence is the age of onset for major mental illnesses, including bipolar disorder and schizophrenia.¹²⁶ Although older adolescents are generally deemed to have decisional capacity to make certain medical decisions,¹²⁷ these mental illnesses by definition affect decisional capacity.¹²⁸ Particularly at onset, an individual's decisional capacity may be impeded to the extent that he or she will not receive treatment without involuntary intervention.¹²⁹ However, if medical professionals effectively treat early onset symptoms, they can educate patients about their condition and minimize the disruption to their patients' development.¹³⁰ Extending the legal category of adolescence would facilitate parents learning of their child's mental illness and participating in early and effective intervention.¹³¹

Finally, the illogic of the inconsistencies related to adolescent decisional capacity is not lost on the adolescents themselves,¹³² and it undermines their developing "sense of responsibility" and "accountability . . . [as] emerging adult[s]."¹³³ Political forces drove the reduction of the age of "adulthood" to eighteen in order to match the age at which young men were being drafted and sent to war.¹³⁴ Political forces again intervened to reinstate the legal age for purchase and consumption of alcohol to twenty-one in an attempt to reduce traffic fatalities caused by teens driving under the influence.¹³⁵ The change in policy has, in fact, reduced traffic accidents and fatalities involving teens; however, correlation has been substituted for causality without examination into adolescents' decisional capacity regarding

126. Lexcen & Reppucci, *supra* note 18, at 84, 86.

127. See Hartman, *supra* note 1, at 1309-11 (identifying several exceptions to the presumption of decisional incapacity for minors, specifically voluntary consent for treatment of substance abuse, mental health, sexually transmitted diseases, and contraception).

128. See Rachel A. Scherer, Note, *Toward A Twenty-First Century Civil Commitment Statute: A Legal, Medical, and Policy Analysis of Preventive Outpatient Treatment*, 4 IND. HEALTH L. REV. 361, 375-76 (2007) (explaining that individuals with mental illness often do not realize they suffer from any disorder).

129. *Id.*

130. See Lexcen & Reppucci, *supra* note 18, at 106 (discussing the interaction between psychopathology, development, and decisional capacity).

131. See McAnaney, *supra* note 125, at 203-04 (discussing the legal restrictions and confusion that universities face in trying to help a student with emerging mental illness, including that "[o]nce a student reaches the age of eighteen, the rights accorded to the student's parents, including permission requirements for access to records, are transferred to the student only").

132. See, e.g., Treuthart, *supra* note 7, at 304-06 (discussing the high rate of underage alcohol consumption despite the uniform law prohibiting the consumption of alcohol by individuals under twenty-one, leading to "disrespect for the legal system").

133. Hartman, *supra* note 1, at 1304.

134. See Cunningham, *supra* note 1, at 277; Treuthart, *supra* note 7, at 308.

135. Treuthart, *supra* note 7, at 308-12.

alcohol.¹³⁶ While acknowledging the seriousness of the priorities underlying such policies, this Note seeks to provide a more consistent and reasoned framework for adolescent milestones.

V. THE NEW BIFURCATED FRAMEWORK

This Note proposes a bifurcated framework whereby adolescents are allowed incremental decisional autonomy according to the capacity required for mature execution of decisional autonomy, balanced against the potential personal or public risk associated with a particular behavior. By redefining “capacity”¹³⁷ as a mix of cognitive ability and socio-emotional judgment,¹³⁸ this new framework provides a logical and more consistent ordering of gradually increasing adolescent autonomy. Among the areas of law that require mature cognitive capacity, but carry low personal or social risk, are voting and entering into contracts.¹³⁹ On the other hand, activities that require mature socio-emotional judgment, in conjunction with mature cognitive capacity, can be further divided into activities conducted in the public sphere that pose personal risk solely to the adolescent,¹⁴⁰ versus those public activities that pose significant risk to others as well.¹⁴¹

A. Voting

The most concrete proposal of this new framework advocates granting the right to vote to fifteen- or sixteen- year-olds. Using a conservative reading of the research,¹⁴² the general framework presumes that by age fifteen, adolescents have the requisite cognitive maturity to understand each of these activities and articulate reasonable decisions.¹⁴³ This research, however, also indicates that each activity must be evaluated to examine the potential for socio-emotional factors to interfere with appropriate application of mature cognitive capacity.¹⁴⁴

136. See Cunningham, *supra* note 1, at 297-98.

137. Traditionally, “capacity” has been defined as “competency,” a common definition of which refers to an individual’s “capacity to understand the material information, to make a judgment about the information in light of their values, to intend a certain outcome, and to communicate freely their wishes to care givers or investigators.” Cunningham, *supra* note 1, at 279 (citations omitted).

138. See Hartman, *supra* note 1, at 1303-05.

139. See *supra* note 19 (explaining that the vote of each adolescent is diluted by the total pool of voters and that only “some risk” exists for adolescents entering into contracts).

140. Such activities include marriage, medical decision making, abortion, and use of tobacco.

141. Such activities include driving, drinking alcohol, and use of firearms.

142. See *supra* notes 108-13 and accompanying text.

143. See *supra* note 108 and accompanying text.

144. See *supra* notes 114-18 and accompanying text.

Also included in the balance of socio-emotional judgment are activities that carry a risk of severe negative outcomes that could result from immature behavior by the adolescent.¹⁴⁵ Arguably, voting carries the least potential for socio-emotional interference¹⁴⁶ and the potential damage of an adolescent's bad voting judgment is quite minimal.¹⁴⁷

Aside from this logic for granting fifteen- or sixteen-year-olds the right to vote, the pro-social civic engagement of voting is an appropriate first step in adolescents' adult participation in society. "Children should not only be educated for their eventual citizenship, but actively be educated in citizenship at every available opportunity."¹⁴⁸ Indeed, "[i]n a democracy, suffrage is the mark of citizenship."¹⁴⁹

As with other privileges withheld from adolescents, the law denies adolescents the right to vote on the grounds that they lack the required criteria¹⁵⁰ "allegedly possessed by adults but not children."¹⁵¹ Competence for voters "is normally defined as a capacity to make rational decisions about alternative parties or policies in the light of available information about them."¹⁵² Specifically, "[t]he competence required of a voter is a minimal rationality, an ability to distinguish between parties, candidates and policies in terms of interests, aims and goals which can be identified as worth promoting. . . . It cannot be required (though it can be desired) of voters that they make wise choices."¹⁵³ Yet, scientific research into adolescent decision making clearly indicates that many teens by age fourteen,¹⁵⁴ and certainly most teens by fifteen or sixteen,¹⁵⁵ possess mature cognitive capacity on par with young adults.¹⁵⁶

Importantly, "research shows many young people to be interested in politics and to be keen to express their views on those matters

145. *See supra* note 141.

146. The privacy of the voting booth and the anonymity of each person's vote will likely minimize any of the effects of peer pressure.

147. Although

many political scientists and theorists have pointed to the limited utility of the vote in many democratic contexts . . . [for example], the extra vote of any one person in an overwhelming majority carries little, if any, extra weight.

Nevertheless, the possession of a right to vote is central to citizenship, and it is a symbolic affirmation of one's political status even when it seems to have little instrumental value for an individual.

ARCHARD, *supra* note 15, at 98.

148. *Id.* at 104.

149. *Id.* at 98.

150. Scott, *supra* note 16, at 562.

151. ARCHARD, *supra* note 15, at 99.

152. *Id.*

153. *Id.* at 101.

154. *See supra* notes 55, 108-12 and accompanying text.

155. *See supra* notes 55, 108-12 and accompanying text.

156. *See supra* notes 55, 108-12 and accompanying text.

affecting them.”¹⁵⁷ Findings of a study examining schoolchildren’s capacity for understanding political issues show that children as young as eleven understand the vocabulary and ideas required for electoral participation as well as most adults.¹⁵⁸ “This finding does not conclusively show that 11-year-olds have the basic competence of adult voters. But it does suggest that, to adopt a ready and convenient age, teenagers could be thought capable of voting.”¹⁵⁹ Notably, the voting age is sixteen in Brazil, Croatia, and Cuba and is fifteen in Iran.¹⁶⁰

Moreover, once the myth of adolescent incapacity is dispelled, it is “inconsistent for a jurisdiction to hold a given age group responsible at law for their actions, but not mature enough to play any part in the process whereby that law is shaped and validated.”¹⁶¹ If parents and society seek responsible citizenship from our children, they cannot ignore this inconsistency and must afford adolescents full civic participation in line with their capacity.

B. Flexibility

For the remaining activities that carry some risk to teens and/or others, this framework proposes the expansion of existing mechanisms providing individualized evaluations of adolescents’ capacities. A key factor in considering such a new framework is distinguishing between inherently social activities¹⁶² and activities that are private in nature, in which state intervention only arises if the decisions of adolescents conflict with parental authority.¹⁶³ Thus, for inherently social activities, this framework proposes creating a licensing process similar to that used for granting driving privileges. The licensing process for driving requires teens to complete certain educational and training components before earning a license to drive.¹⁶⁴ Furthermore, the recent trend of conditionally licensing teen drivers with gradually decreasing restrictions¹⁶⁵ and tightened state oversight

157. ARCHARD, *supra* note 15, at 101.

158. *Id.* at 103 (citation omitted).

159. *Id.*

160. *Id.*

161. *Id.* at 100.

162. These activities include those the state prohibits, despite possible parental approval and oversight, such as driving before age sixteen and purchasing alcohol.

163. These activities include abortion, marriage, and medical decision making.

164. See Cunningham, *supra* note 1, at 334-36 (drawing a parallel between driving and marriage as licensed activities in which the state may allow teens younger than eighteen, with parental permission, to engage).

165. Scott, *supra* note 16, at 577.

and restrictions for misconduct¹⁶⁶ illustrates an incremental approach that rewards responsible teens while retaining state authority to restrict irresponsible adolescents and limiting social risks.¹⁶⁷

For private decisions that require mature socio-emotional judgment, most states employ mechanisms whereby "before a minor is deemed to be capable of either exercising a right or privilege, or to be held responsible for an action, an adult, such as a judge or parent, must determine that the particular minor is sufficiently capable."¹⁶⁸ This "'mature minor'" doctrine may reflect the approach that many parents take in respecting their teens' wishes, after ensuring that they fully understand their options and the consequences of their choices.¹⁶⁹ Thus, public policy exceptions serve as safeguards for adolescents who do not have such functional relationships with a parent or guardian or whose interests conflict with those of their parents.¹⁷⁰ In accordance with psychological research, the mature minor doctrine "essentially carves out a new category of adolescents who, on a case-by-case basis, may have the capacity to give consent for medical treatment."¹⁷¹ Other exceptions that create categories of capable juveniles are minors who have married,¹⁷² emancipated minors,¹⁷³ and juveniles who elect to use a judicial bypass mechanism to obtain an abortion.¹⁷⁴

This new framework proposes expanding the licensing of capable juveniles, thus allowing them to execute contracts and purchase and use alcohol, tobacco, and firearms. Similar to the process for obtaining a driver's license, such conditional licensing would require an educational and training component, competence testing, and restriction by the state for misconduct.¹⁷⁵ As with driver's licenses, any licensing

166. See Cunningham, *supra* note 1, at 335 (noting that "[e]ven after a child passes his or her written and 'road' tests and the state determines that he or she should receive a . . . license, it may still be conditional on the permission of the parents").

167. Scott, *supra* note 16, at 597-98.

168. Cunningham, *supra* note 1, at 323-24.

169. See Scott, *supra* note 16, at 567.

170. *Id.* at 568, 570-71.

171. Cunningham, *supra* note 1, at 324-25 (noting the existence of narrow exceptions for public health reasons when minors are "categorically capable of giving consent"); see also Scott, *supra* note 16, at 567-68 (providing a detailed definition of the mature minor doctrine).

172. Chadwick N. Gardner, Casenote, *Don't Come Cryin' to Daddy! Emancipation of Minors: When is a Parent 'Free at Last' from the Obligation of Child Support?*, 33 U. LOUISVILLE J. FAM. L. 927, 931 (1994).

173. Cunningham, *supra* note 1, at 332-34.

174. *Id.* at 325-27, 330; Scott, *supra* note 16, at 573-76 (describing the judicial bypass hearing as "a unique regulatory scheme" through which the U.S. Supreme Court created an "intermediate category" to address the highly morally charged issue of teenage abortion).

175. See Cunningham, *supra* note 1, at 334-36.

by the state for these activities would still be conditioned on parental approval.¹⁷⁶

In circumstances in which a parent and child conflict, a judicial bypass procedure would be available for the determination of the individual juvenile's capacity. Unlike the traditional judicial bypass procedure, however, which is designed to be used by juveniles afraid of involving their parents in their abortion decision,¹⁷⁷ this framework would allow for parental involvement in the judicial determination of individual capacity for social activities that expose both the teen and society to risks.¹⁷⁸ Under this framework, a teen whose parents do not consent to the conditional licensing may appeal to a state office and prove his or her capacity in order to override the parents' decision.¹⁷⁹

CONCLUSION

By creating a formal intermediate category in the law for adolescence and extending legal adolescence to twenty-one, this framework would resolve many of the inconsistencies that currently exist in U.S. laws.¹⁸⁰ The current system sets the age of majority at age eighteen, with exceptions carved out both above and below eighteen to serve varying policy priorities.¹⁸¹ Inherent in *parens patriae*, the state is tasked with nurturing and promoting development of self-determination, yet "[p]resumptive decisional incapacity damages the life-long development of decision-making ability" of adolescents.¹⁸²

After reviewing the historical and philosophical underpinnings of the common law age of majority of twenty-one, this Note surveyed scientific research and developmental psychology theory. Finding that modern science has confirmed historical and cross-cultural patterns, this Note analyzed several adolescent milestones according to the capacity required of adolescents, rather than the specific policy priority to be served. This analysis divided major adolescent developmental milestones into two categories of required capacity, cognitive

176. *Id.* at 334-35 (noting that driving and marriage are two areas that seem categorical but are individualized in practice because of the exceptions granted with parental consent).

177. See Scott, *supra* note 16, at 568, 570-71.

178. This would essentially expand the parental involvement laws concerning teens seeking abortions. See Foxworth, *supra* note 1, at 495-96 (describing the state of parental involvement in abortion rights law regarding minor teenagers).

179. If such an override were granted, parents would not be obligated to provide economic or other support to the teen in pursuing that activity, including assuming or sharing any legal liability.

180. See generally *supra* note 1 and accompanying text (describing the inconsistencies in U.S. laws regarding adolescents).

181. *Id.*

182. Hartman, *supra* note 1, at 1269.

and socio-emotional judgment. Significantly, from this analysis, this Note calls for adolescents as young as fifteen or sixteen years of age to be granted the right to vote.

For developmental milestones that require socio-emotional judgment — in addition to mature cognitive capacity — the proposed bifurcated framework draws on the example of conditional driver's licenses for adolescents. Under such a regime, "youth welfare and social welfare are both served by the creation of an intermediate category" during which teens have the opportunity to prove their capability and responsibility.¹⁸³ This innovation "allow[s] young persons to gain experience while limiting risk."¹⁸⁴

This kind of innovative approach is needed because "[a]dolescence itself has become increasingly complex" in today's world, and teens "are more sophisticated and have more freedom than ever before . . . [while] dependency extends further into adulthood."¹⁸⁵ Just as a minor's transition from financial and emotional dependence on his or her parent is gradual, such an approach would also build into public policy the "fad[ing]" nature of *parens patriae* "as the minor gets older and [which] disappears upon her reaching adulthood."¹⁸⁶

Finally, the review of historical patterns revealed that the transition from childhood to adulthood is socially constructed based on the needs of society and what society will physically and mentally require of young adults.¹⁸⁷ Notably, "[s]ocial customs have undergone significant change within the past 30 years, and teenagers are much more independent in all areas of their lives."¹⁸⁸ It is time to conform adolescence under the law to the complex realities of teenage lives lived today.

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183. Scott, *supra* note 16, at 577.

184. *Id.* at 597-98.

185. *Id.* at 598.

186. Hartman, *supra* note 1, at 1313 (citation omitted).

187. *Supra* note 29.

188. Hartman, *supra* note 1, at 1308 (citing Angela R. Holder, *Minors Rights to Consent to Medical Care*, 257 J. AM. MED. ASS'N 3400, 3402 (1987)).

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