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The Law's Role in Raising Children

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"Children's Law" is not a single body of law with a coherent set of organizing principles.[1] It is constitutional law, torts, and contracts.[2] It is criminal law and civil law; substantive law and procedure.[3] Children's Law is in a sense a version of what scholars have facetiously called the "Law of the Horse"—one subject to which numerous distinct bodies of law can be applied.[4] There is, however, one common theme that extends across the many bodies of law that apply to children. The common theme that has predominated for centuries, unsurprisingly, is developmental.[5] The law recognizes that children's differences associated with their ongoing development justifies distinct treatment in a wide variety of contexts.

Until the twenty-first century, the law's conception of development was grounded in life experience and social conventions. Conventional understandings about children's lesser capacities justified special legal rules

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1. Emily Buss, *What the Law Should (and Should Not) Learn from Child Development Research*, 38 HOFSTRA L. REV. 13, 18-19 (2009) (dividing the law's distinct treatment of children into four broad categories).

2. *Id.* at 19, 24.

3. *Id.* at 18.

4. Frank H. Easterbrook, *Cyberspace and the Law of the Horse*, 1996 U. CHI. LEGAL F. 207 (1996) (citing Gerhard Casper as coining the expression "law of the horse," to argue against specialized or niche legal studies that lacked underlying unifying principles, advocating instead the "study of general rules" as the best means of learning the law applicable to specialized contexts).

5. *See* Buss, *supra* note 1, at 13.

for children.[6] In recent years, however, the law has looked to developmental science—developmental psychology and neuroscience—to justify the distinct treatment of children.[7] This new reliance on developmental science has not, however, significantly changed the focus of the law's developmental inquiry. The law continues to ask primarily how children's capacities differ from those of adults and how those differences affect children's rights and responsibilities under the law.[8] I have elsewhere argued that this *capacity* focused developmental inquiry is too constrained, that the law should also take into account its own potential developmental *impact*.[9] In this scholarship, I have explored how taking account of this impact might alter the law affecting children in various ways.[10] Here, I continue that exploration with the aim of doing the same social scientific updating of this inquiry into developmental impact that has been embraced in updating the law's inquiry into children's capacities. Psychologists' growing understanding of what makes for successful parenting can be applied to consider how best to shape the law's inevitable child rearing role.

I liken the law to a parent, not to be cute. As someone who has represented children in the gravest of circumstances and whose scholarship is devoted to taking young people seriously, I dislike all appearances of sentimentality in these discussions. Mine is a serious suggestion that the law, in affording and circumscribing children's rights, in assigning to designated third parties authority over various aspects of children's experiences, and in shaping the context in which children live in a myriad of ways, necessarily has an important effect on how children grow up. As with any parent, the law can execute that role in ways that benefit or harm children.

I begin in Part I by setting out the history of the law's special treatment of children over the centuries, ending with an account of the twenty-first century Supreme Court cases that shifted the developmental analysis from lived experience to developmental science. Throughout this history, these distinctions in treatment have been grounded in our understanding of distinctions in capacities relevant to law, understandings that have been validated by developmental science in recent years. In Part II, I shift the focus from developmental capacities to developmental effects. I first consider what

6. See, e.g., John Stuart Mill, On Liberty 81 (David Bromwich & George Kateb eds., Yale Univ. Press 2003) (1859) ("It is, perhaps, hardly necessary to say that this doctrine [on liberty] 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.").

7. *See*, *e.g.,* Roper v. Simmons, 543 U.S. 551 (2005); *Graham v. Florida*, 560 U.S. 48 (2010).

8. *See* Buss, *supra* note 1, at 14.

9. *Id.* at 13.

10. *Id.* at 14.

developmental ambitions the law holds for its citizens and then go on to set out psychological insights about how childrearing can support or undermine achievement of these ambitions. In this part, I set out the attributes of what has been termed "authoritative parenting," which has been shown in innumerable studies to be most effective in helping children transition to pro-social and independent adulthood. In Part III, I apply this more sophisticated understanding of the dynamics of child-rearing to a consideration of how the law itself can help or harm a child's transition to adulthood. I offer examples of how this understanding might alter the analysis and even the outcomes of the law affecting children.

PART I. CAPACITY-BASED DISTINCTIONS IN THE LAW'S TREATMENT OF CHILDREN

A. The History of Children's Distinct Treatment at Law

Our law has always drawn distinctions between its treatment of children and adults and justified these distinctions by pointing to differences in children's capacities relevant to law. Children are understood to lack some of the qualities adults are assumed to possess, and the distinct treatment ends when children are expected to have acquired these qualities. "[T]he power of a father . . . ceases at the age of twenty-one," William Blackstone explained in his eighteenth century Commentaries on the Laws of England, "for [individuals] 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."[11]

Reason can be understood to capture the ability to engage in self-interested decision-making in a rational, intelligent manner, an ability presupposed in any system of law that gives individuals considerable control over their own financial and personal affairs. But why twenty-one? There is much interesting history, and some uncertainty about how the age of majority came to be set, and rest, at twenty-one for almost 500 years.[12] A favored account ties the age increase (it was formerly much younger throughout Europe) to the additional strength and skill required to wear the heavier armor and engage in battle in the eleventh and twelfth centuries, changes associated with the shift from battle on foot to battle on horseback. This suggests that, at least for a time, both physical and cognitive capacities played a role in the law's sorting between children and adults.

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11. William Blackstone, 1 COMMENTARIES ON THE LAWS OF ENGLAND 441 (1765).

12. T. E. James, *The Age of Majority*, 4 AM. J. OF LEGAL HIST. 22, 26 (1960); see also *How Do They Decide the Age When You Become An Adult?*, TODAY I FOUND OUT (Aug. 10, 2016), http://www.todayifoundout.com/index.php/2016/08/age-become-adult/.

For centuries, before individuals crossed the line into adulthood, their fate was largely in the control of their parents.[13] The common law imposed important duties on parents in exchange for the authority it gave them over their children—the duties of education, maintenance, and protection[14]—but until recently, these duties came with very little means of enforcement.[15] Put another way, the law played only a very weak role in ensuring that these parental duties were actually fulfilled. It relied on parents' "insuperable degree of affection" and the intertwined self-interest between parent and child to ensure that children were well raised. [16] Today, this common law hands-off approach is often criticized as anti-child,[17] but there is much to be said for this deferential approach, exercised intelligently with some limits.[18]

Children also had, for centuries, a special right against the state under criminal law—a right to be protected from criminal prosecution for crimes committed before the age of seven.[19] This "infancy defense" was also capacity based.[20] It was grounded on an understanding that young children lacked the mental capacity to form criminal intent.[21] Between the ages of seven and fourteen, the law presumed that the criminal intent was still lacking, but that presumption could be overcome.[22] The infancy defense offered a significant, but limited, protection.[23] If the defense did not apply, children were subject to the same criminal process and punishments as adults.[24] The protection ran out long before the other special rules of

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13. *See* Blackstone, *supra* note 11, at 440.

14. *Id.* AT 434.

15. See, e.g., Bd. Of Education v. Purse, 28 S.E. 896 (1897) (citing Blackstone and noting that early American common law followed the English common law in that "the child, at the will of the parent, could be allowed to grow up in ignorance, and become a more than useless members of society, and for this great wrong, brought about by the neglect of his parents, the common law provided no remedy").

16. *See* Blackstone, *supra* note 11, at 435.

17. *See, e.g.*, James G. Dwyer, *Parents' Religion and Children's Welfare: Debunking the Doctrine of Parents' Rights*, 82 CAL. L. REV. 1371, 1426-39 (1994); Samantha Godwin, *Against Parental Rights*, 47 COLUMBIA HUMAN RIGHTS L. REV. 2, 3 (2015).

18. For discussions of the value, to children, of affording parents' considerable control over their children's upbringing, *see, e.g.*, Emily Buss, *Adrift in the Middle*: *Parental Rights After Troxel v. Granville*, 200 SUP. CT. REV. 279, 284 (2000); Elizabeth Scott & Claire Huntington, *Conceptualizing Legal Childhood in the Twenty-First Century*, 2019 MICH. L. REV. 1, 4 (2019).

19. *See* Blackstone, *supra* note 11, at 452.

20. *See id.* An interest in affording children and adolescents greater protections against the harsh consequences of the adult criminal justice system led to the creation of a separate juvenile justice system, first in Illinois in 1899, and soon thereafter throughout the country. *See* 1899 Illinois Juvenile Court Act, 1899 Ill. Laws 131. The creation of this system largely displaced reliance on the infancy defense. *But see* RESTATEMENT OF THE LAW, CHILDREN AND THE LAW §15.10 (AM. LAW INST., Council Draft No. 2, 2017) ("A juvenile who has not attained the age of 10 is conclusively presumed to lack the cognitive capacity requisite for being held legally accountable.").

21. *See* Blackstone, *supra* note 11, at 452-53.

22. *Id.*

23. *Id.*.

24. *Id.*

minority, presumably because the law adjudged the capacity required for criminal intent to develop at an earlier age.[25]

In the nineteenth century, the states took on a new obligation—the obligation to provide a free education to children.[26] This move was inspired by a concern that, without this education, children would not grow up with the knowledge and values required for self-governance in the young American Republic.[27] With this commitment to education came new laws forcing parents to send their children to school, a requirement that many parents resisted as an incursion into their authority over their own children.[28] The shift in the law represented by the Common School Movement marked the beginning of a trend that grew in the twentieth century to insert the state into the business of raising children. The state relied upon its *parens patriae* power, Latin for "parent of the country" to justify interventions on behalf of children that parents opposed in addition to compulsory education, including compulsory vaccinations, limits on child labor, and child welfare interventions.[29] In this essay, I aim to apply this *parens patriae* concept one level up—to cast the law itself in a quasi-parental role.

The twentieth century also saw the emergence of individual constitutional rights for adults, and, eventually, an application of those rights, with significant modification, to children. The limitations imposed on children's exercise of these rights have again been expressly tied by the courts to their diminished decision-making capacities. So, for example, the Supreme Court has recognized a pregnant minor's right to obtain an abortion without parental notification or consent, but allows states to require a minor to pursue approval through another process, usually a judicial process.[30] In these "by-pass" procedures, the adjudicator is charged with first assessing the minor's capacity to make a mature decision on her own and, if this capacity is found lacking, with making its own assessment of the minor's best interests.[31] Limitations in children's decision-making capacity also serve as

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25. *Id.*.

26. CARL F. KAESTLE, PILLARS OF THE REPUBLIC, COMMON SCHOOLS AND AMERICAN SOCIETY 1780-1860 186 (1983).

27. *See, e.g.*, LAWRENCE A. CREMIN, AMERICAN EDUCATION, THE NATIONAL EXPERIENCE 1783-*1876 103 (1980) ("No theme was so universally articulated during the early decades of the Republic as the need of a self-governing people for universal education.");* KAESTLE, *supra* note 26, at preface; THOMAS JEFFERSON, BILL FOR THE MORE GENERAL DIFFUSION OF KNOWLEDGE (1779), *reprinted in* THE THOMAS JEFFERSON READER 40-46 (2003).

28. *See, e.g.*, State v. Bailey, 61 N.E. 730, 731-32 (1901) (rejecting parents' claim that compulsory attendance law constituted an unauthorized invasion of the natural rights of the parent).

29. *See* Prince v. Massachusetts, 321 U.S. 158, 166 (1944) ("Acting to guard the general interest in youth's well being, the state as *parens patriae* may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor and in many other ways. . . . Thus, he cannot claim freedom from compulsory vaccination for the child more than for himself on religious grounds.").

30. Bellotti v. Baird, 443 U.S. 622, 650 (1979).

31. *Id.* at 643-44.

the primary justification for other rights being denied to minors altogether, including the right to marry, to vote, and to serve on a jury.[32] Several constitutional procedural rights were also granted to children in the 20th Century, particularly criminal procedural rights, and the Court has called for an adaptation of these rights to account for children's limited capacities as well.[33]

Children's constitutional rights have also been recognized, and much modified in special contexts, particularly the contexts of schools and juvenile courts. In these contexts, the connection between children's development and their rights limitations is less directly expressed; the law modifies children's rights, not to expressly accommodate their differences, but rather to ensure the successful functioning of these institutions[34] which themselves are justified in developmental terms. It is in these contexts, I will argue, where the state is playing an active, direct role in children's development, that the law's child rearing responsibility becomes especially important.

B. Developmental Science's Account of Distinctions in Capacity

Although the law has long grounded its treatment of children on a rough, commonsensical understanding of how children differ developmentally from adults, it was not until the 21st Century that the law expressly tied children's rights to a sophisticated and detailed understanding of developmental psychology and neuroscience. In a series of cases applying the Eighth Amendment's prohibition against cruel and unusual punishment to young offenders, the Supreme Court relied heavily on this developmental science to first outlaw the juvenile death penalty in *Roper v. Simmons*[35] and then, in *Graham v. Florida*[36] and *Miller v. Alabama*,[37] to sharply restrict the imposition of life without parole sentences on juvenile offenders. The Court invoked common sense understandings as well, what "any parent knows"[38]

32. Roper v. Simmons, 543 U.S. 551, 569 (2005) ("In recognition of the comparative immaturity and irresponsibility of juveniles, almost every State prohibits those under 18 years of age from voting, serving on juries, or marrying without parental consent").

33. *See* Gallegos v. Colorado, 370 U.S. 49, 54 (1962) (noting a teenager being interrogated by the police "cannot be compared with an adult in full possession of his senses and knowledgeable of the consequences of his admissions"); Haley v. Ohio, 332 U.S. 596, 599 (1948) (At age 15, a boy "cannot be judged by the more exacting standards of maturity. That which would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens.").

34. *See, e.g.*, *Morse v. Frederick*, 551 U.S. 393, 396-97 (noting that children's constitutional rights in schools are not coextensive with adults and "must be 'applied in light of the special characteristics of the school environment'"); *see also* McKeiver v. Pennsylvania, 403 U.S. 528 (1971) (holding that children tried in juvenile court were not entitled to a jury, and noting the likely negative impact of juries on the achievement of the special goals of juvenile court).

35. 543 U.S. at 578.

36. 560 U.S. 48, 82. (2010).

37. 567 U.S. 460, 489 (2012).

38. *Roper*, 543 U.S. at 568.

about teenagers' limitations, but it was the force of the developmental science that drove the Court's rulings and has inspired reforms in juvenile law that extend far beyond the express holdings of the Court.

To support its conclusion that juvenile offenders were less culpable than adults, the Supreme Court relied on a series of amicus briefs submitted by various professional organizations with expertise in child development—including the American Psychological Association, the American Medical Association, the American Psychiatric Association, and the American Society of Adolescent Psychiatry.[39] These briefs in turn drew heavily upon the interdisciplinary collaboration of lawyers, developmental psychologists, and criminologists that had allowed lawyers over the years to frame questions for the social scientists, who in turn engaged in research that the lawyers could draw upon to in making legal arguments.[40] This collaborative work reflects the most comprehensive, sophisticated interdisciplinary work applied to the law affecting children to date and it is ongoing and now of international scope.[41] While the behavioral research continues, the brain imaging research has become increasingly central to the legal analysis of child culpability.[42] The demonstrable gap between the early development of the sensation seeking centers of the brain (in the mid teen years) and the much later development of the prefrontal cortex, responsible for controlling impulses and engaging in longer term planning and other executive functions (continuing well into the twenties), has added the comfort of hard science to our general understanding that children are different in ways that matter to law.[43]

Relying on this developmental science and increasingly on neuroscience, the Supreme Court concluded that the immaturity of young people's brains and behavior accounted for much of their criminal conduct. Because much of their offending reflected "unfortunate yet transient immaturity"[44] rather

39. Br. of Am. Psychological Ass'n et al., as Amici Curiae Supp. Resp't, Roper v. Simmons, 543 U.S. 551 (2005) (No. 03-633) at 7; Br. of the Am. Med. Ass'n et al., as Amici Curiae in Supp. of Resp't, Roper v. Simmons, 543 U.S. 551 (2005) (No. 03-633) at 22.

40. Br. of Am. Psychological Ass'n et al., as Amici Curiae Supp. Resp't, *supra* note 39, at 29-30; Br. of the Am. Med. Ass'n et al., as Amici Curiae in Support of Respondent, *supra* note 39, at 2.

41. Grace Icenogle et al., *Adolescents' Cognitive Capacity Reaches Adult Levels Prior to their Psychosocial Maturity: Evidence for a "Maturity Gap" in a Multinational, Cross-Sectional Sample*, 43 *L. & HUM. BEHAVIOR 69, 71 (2019).*

42. Sara B. Johnson, Robert W. Blum, & Jay N. Giedd, *Adolescent Maturity and the Brain: The Promise and Pitfalls of Neuroscience Research in Adolescent Health Policy*, 45 NAT'L INST. OF HEALTH 216, 216 (2010).

43. *See, e.g.*, Richard J. Bonnie & Elizabeth S. Scott, *The Teenage Brain: Adolescent Brain Research and the Law,* 22 CURRENT DIRECTIONS IN PSYCHOL. SCI. 158, 159 (2013).

44. *Roper*, 543 U.S. at 573.

than irretrievable depravity,[45] the Court concluded that young offenders should be protected from the most severe punishments of death and, in most cases, life without parole. In *Roper*, the Court offered three reasons why child culpability for crimes should be less than adult culpability for similar crimes, all tied to adolescents' psycho-social immaturity. First, "a lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions."[46] Second, "juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure."[47] Finally, "the character of a juvenile is not as well formed as that of an adult," and therefore offenses reflect less meaningfully on a juvenile's character.[48]

In the cases following *Roper*, the Court emphasized, in addition to adolescents' lesser culpability based on their psycho-social immaturity, their greater capacity to change. This was framed as another capacity distinction, this time a capacity *advantage* associated with youth.[49] That said, the cases focused not on how the law might shape young people's development in light of their special capacity to change, but only on young people's right to be assessed for that change sometime in the future.[50] In this essay, I suggest that this capacity to change underscores the significance of any interventions authorized or proscribed by law.[51] In the myriad ways that the law shapes children's experience, it plays an important, often overlooked, role in raising children.

What soon became known as the Supreme Court's new "developmental approach" ignited reforms throughout the juvenile justice system.[52] Reform minded states have begun to change their legislation and policies to reduce the transfer of juvenile offenders to the adult criminal justice system and to reduce the reliance on incarceration in the juvenile justice system.[53] Arrests and entry into the juvenile justice system have been significantly reduced as

45. *Id.* at 570 ("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.").

46. *Id.* at 569.

47. *Id.* at 569.

48. *Id.* at 570.

49. See Miller v. Alabama, at 479 (noting that juvenile sentences should take into account "children's diminished culpability and heightened capacity for change").

50. Graham at 560 U.S. at 51 ("A State is not required to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide crime. What the State must do, however, is give defendants like Graham some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.").

51. See *infra* Part II.

52. RICHARD J. BONNIE ET AL., REFORMING JUVENILE JUSTICE: A DEVELOPMENTAL APPROACH 241 (2013) (summarizing juvenile justice reforms that have been initiated in recent years).

53. *Id.* at 242.

well in many states.[54] States are also initiating changes in interrogation procedures that take children's special vulnerability to coercion into account, including adding requirements that a concerned adult or even a lawyer be present at the time of the interrogation or that interrogations be video recorded.[55] Moreover, the capacity-based developmental approach has been offered as a justification to alter children's rights in other contexts as well.[56]

The idea that, in the words of Justice Kagan, "youth matters"[57] to the criminal law is not new; what is new is the suggestion that the details of how it matters can be determined with a sort of scientific precision. I have elsewhere considered the dangers of deferring to social science to answer the moral questions that should be reserved to law and of building too fixed a set of legal rules upon social and neuroscience, which we can expect to continue to change.[58] In this essay, however, I focus on the positive implications of our advancing and increasingly sophisticated understanding of child development for law and argue that the same sophistication should be applied to a consideration of law's impact on children's development.

II. SHIFTING ATTENTION FROM DEVELOPMENTAL CAPACITY TO DEVELOPMENTAL IMPACT

The conventional developmental approach, even as updated by developmental psychology and neuroscience, focuses near exclusively on developmental *status*, on the current capacities of the children in question. It assesses how a young person's brain, behavior, emotions, and understandings differ from those of an average adult and how rights should be altered to reflect those differences. What this status focus overlooks is that development is an ongoing process, increasingly understood to be influenced by children's experiences—what roles they assume, in what contexts they live, and how they are supported or undermined by the adults around them.[59] The law, in regulating these experiences and interactions, necessarily plays

54. *Id.* at 241-43.

55. Laurel LaMontagne, *Children Under Pressure: The Problem of Juvenile False Confessions and Potential Solutions*, 41 W. ST. U. L. REV. 29, 52-53 (2013) (summarizing various reforms designed to protect youth in the interrogation setting).

56. *See, e.g.*, D.V. v. State *ex rel.* D.V., 265 P.3d 803, 808 (Utah Ct. App. 2011) ("the placement language and contempt section may be sufficient to put an adult on notice of what is expected. But applying such unclear terms to a child is problematic due to the child's youth and does not ensure that the child would have a sufficient level of understanding"); Wayne R. Barnes, *Arrested Development: Rethinking the Contract Age of Majority for the Twenty-First Century Adolescent,* 76 MD. L. REV. 405, 442 (2017) (arguing that individuals should not be bound by their contracts until the age of 21 based on developmental science and sociological developments).

57. Transcript of Oral Argument in Mathena v. Malvo, No. 18-217 (October 16, 2019) p. 10, line 22 (case dismissed in February 2020).

58. Buss, *supra* note 1, at 15.

59. BONNIE ET AL., *supra* note 52, at 120-21.

an important role in shaping how children grow up, a quasi-parental role. We might think of the law's general disregard for its own impact on children as a sort of legal parental neglect.

Where a capacity focused developmental approach considers which capacities are relevant to the law in question and modifies rights and responsibilities to reflect changes in capacity with age, an impact focused developmental approach considers what developmental ambitions the law has for its citizens and modifies the law in question to best facilitate achievement of those developmental aims. And this impact focused approach, like the capacity focused approach, can benefit from an application of developmental science to the inquiry: Psychological research on childrearing can tell us a lot about how the law's treatment of children can shape children's development for good or for ill.

In this part, I begin by setting out some of the developmental ambitions that are reflected in our law. I then go on to consider what the developmental research tells us about how adults raising children can most effectively achieve these ambitions. In the next part, Part III, I consider the role the law itself plays in shaping how children are raised and how we might alter the law to better reflect the developmental psychologists' childrearing wisdom.

A. The Law's Developmental Ambitions

What developmental ambitions does the law hold for its citizens? In answering this question, we can learn a lot from the cases that afford rights to adults and that limit those rights when applied to children. We afford greater autonomy rights to adults than to children because we assume adults have the cognitive skills and the life experience that children lack, which will allow them to make rational decisions among options with a good understanding of likely short and long term consequences and the relevant trade-offs involved.[60] Similarly, we allow only adults to marry and vote because we think the exercise of both of these responsibilities demands knowledge, wisdom, judgment, and some deliberative skills.[61] We impose

60. *Bellotti*, 443 U.S. at 635 ("States validly may limit the freedom of children to choose for themselves in the making of important, affirmative choices with potentially serious consequences. These rulings have been grounded in the recognition that during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them."); Parham v. J.R., 442 U.S. 584, 602 (1979) ("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.").

61. Ginsberg v. New York, 390 U.S. 629, 649-50 (1968) (Stewart, J., concurring) (contrasting with the adult's First Amendment right to "decide for himself what he will read and to what he will listen," the child's more limited right based on the fact that "a child . . . 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.").

"full" criminal responsibility on adults, unlike juveniles, because we expect them to have acquired the psycho-social maturity to control their impulses and resist negative influences and to extricate themselves from criminogenic contexts.[62] All these expectations that justify assigning rights and obligations to adults that we do not assign to children can be restated as developmental ambitions for our children.

Also relevant to our articulation of developmental ambitions for our children are the ideals our law reflects about the limitations the law imposes on the power of state actors. If we are to have a state that does not engage in unreasonable searches and seizures, respects and protects a broad array of speech and religious expression, and affords due process of law to all individuals before it deprives them of life, liberty, or property, we must raise children not only to assert rights to enforce these constraints, but also to assume state roles in a rights-respecting manner. As Justice Stevens warned in the context of constitutional challenges to the exercise of state power in schools, "[t]he 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."[63]

Finally, the law expects children to grow up to see themselves as part of the community that participates in its governance and economy and that respects the laws that regulate them. This basic acceptance of the rules of the game is a fundamental aspect of social identity development on which the healthy functioning of our society depends.

All told, the developmental expectations the law holds for children are weighty. It is broadly shared conventional wisdom that these ambitions are only imperfectly achieved and adults repeatedly manifest limitations in their ability to make important decisions in a well-informed and thoughtful manner. For example, many adult criminals manifest psycho-social immaturity and difficulties extricating themselves from criminogenic contexts. Similarly, we see state actors who overstep their authority and citizens who do not appear to be guided by any felt obligation to conform with society's rules. In the sections that follow, I consider how we might modify the law to better assist children to grow up to meet the law's expectations.

62. *Roper*, 543 U.S. at 569-70 (identifying a lack of impulse control and vulnerability to peer influence and a related inability to extricate themselves from criminogenic settings among the aspects of psycho-social immaturity that distinguish juveniles from adults and justify finding them less culpable).

63. *New Jersey v. T.L.O.*, 469 U.S. 325, 385-86 (Stevens, J., dissenting).

B. Developmental Science's Account of Successful Childrearing

There is a rich body of psychological research on the efficacy of various approaches to childrearing, and a remarkable degree of uniformity among the conclusions the research reaches.[64] Here, I focus on those aspects of the findings that are most relevant to our inquiry and that translate most coherently from an analysis of parenting within the private family to the childrearing function of the law itself. For similar reasons, I focus on adolescents, whose encounters with the law will be more frequent and more salient than those of younger children.

Psychological literature singles out what has been called "authoritative" parenting as the style of parenting that best prepares children to develop skills of self-efficacy and competence to function productively and pro-socially in adulthood.[65] Psychologists have also found that the authoritative parenting approach best facilitates the development of an attitude toward legal authority built on reason and an expectation of fairness rather than coercion.[66] Authoritative parenting has been shown to be more effective in these contexts than either "permissive" parenting, with its lack of parental limits and engagement, or "autocratic" parenting, with its focus on obedience enforced through harsh punishment.[67] In this section, I briefly describe the impact of authoritative parenting in facilitating both decision-making competence and legal socialization before addressing, in the next Part, how these insights can be applied to our consideration of the law's own impact on these aspects of children's development.

Authoritative parenting is characterized by three attributes: warmth, supervision, and the allowance of children's gradually increasing decision-making control.[68] By giving children gradually increasing control over decision-making in a manner that allows parents to remain involved in order to offer support and help their children learn from the consequences of their decisions, authoritative parents facilitate their children's development of competence as independent decision makers.[69] Key, also, to the authoritative approach is warmth, the conveying of a caring attitude both in the setting of

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64. LAURENCE STEINBERG, THE TEN BASIC PRINCIPLES OF GOOD PARENTING 14 (2004) ("the study of parenting is an area of research in which the findings are remarkably consistent . . .").

65. LAURENCE STEINBERG, AGE OF OPPORTUNITY: LESSONS FROM THE NEW SCIENCE OF ADOLESCENCE 147-48 (2014), *available at* https://www.scribd.com/book/367558834/Age-of-Opportunity-Lessons-from-the-New-Science-of-Adolescence.

66. TOM R. TYLER & RICK TRINKNER, WHY CHILDREN FOLLOW RULES; LEGAL SOCIALIZATION AND THE DEVELOPMENT OF LEGITIMACY (2017).

67. STEINBERG, *supra* note 65, AT 146.

68. Laurence Steinberg et al., *Impact of Parenting Practices on Adolescent Achievement: Authoritative Parenting, School Involvement, and Encouragement to Succeed*, 63 CHILD DEVELOPMENT 1266, 1267 (1992); *see also* STEINBERG, *SUPRA* NOTE 65, AT 135-40.

69. STEINBERG, *supra* note 65, AT 147-48.

limits and the judicious relinquishment of some control.[70] Lead developmental psychologist Laurence Steinberg emphasizes how well documented the benefits of the authoritative approach is to facilitating the development of healthy, independently functioning adults, and the harms that can come to children raised by permissive parents, who give their children too much unrestrained freedom to make their own choices without support and supervision, or autocratic parents, who deprive their children of any opportunities to gain experience making decisions while they still have their parents' protection and support.[71]

Steinberg also draws the connection between the well-documented psychological understandings of the benefits of authoritative parenting and our growing understanding of adolescent brain development:

> [Authoritative parents engage in "scaffolding," that is,] giving kids slightly more responsibility or autonomy than they're used to—just enough so that they'll feel the benefits if they succeed but not suffer dire consequences . . .
>
> Scaffolding strikes the right balance between what the child can already handle and what she will soon be ready to handle. At a neurobiological level, [parental scaffolding ensures that] the brain circuits that regulate self-control have been engaged and sufficiently strengthened to make self-regulation easier and more automatic . . . Puberty may open the window of plasticity in the prefrontal cortex [nature], but how the plastic brain is molded depends largely on the environment [nurture].[72]

Authoritative parenting has also been shown to have a positive influence on children's emerging understanding of legal authority and their place in a society of laws. In their seminal book, *Why Children Follow Rules*,[73] exploring children's legal socialization, psychologists Tom Tyler and Rick Trinkner highlight the superiority of the authoritative parenting approach for instilling the right values about authority in children.[74] Tyler and Trinker

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70. *ID.* AT 146.

71. In his recent work on adolescence and the opportunity it offers to shape development, Laurence Steinberg explains:

Without warmth, a child will likely perceive firmness as harsh, unfair, and overly punitive, and these perceptions may provoke disobedience, defiance, or feelings of helplessness. . . Autocratic parents have adopted a "Do it because I say so" attitude toward their child, and they discipline by asserting their power and control, often in cold and punitive ways. . . Research clearly shows that autocratic parenting does not foster healthy development. . .

ID. at 145-46.

72. *ID.* at 142, 149.

73. TYLER & TRINKNER, *supra* note 66.

74. *Id.* at 153.

particularly contrast the attributes of authoritative parenting with those associated with an autocratic approach, and describe the developmental impact of these two styles on children's attitudes about rules.[75] Parents who rely on coercion and harsh punishment to secure their obedience raise children who "adopt an instrumental approach to rules and authorities and come to define their relationship with authority figures in negative and coercive terms . . . They have been socialized to understand the authority relationship in terms of dominance-submission, coercion and power."[76] In contrast, the authors promote the alternative authoritative parenting approach, "where children are socialized in ways that lead them to adopt supportive civic attitudes and legal values."[77]

> Here, . . . [parents'] aim is to . . . teach them responsibilities and appropriate behavior while also stimulating their personal autonomy and self-reliance. . . . These parents value the consistent and rule-based application of rules, encourage discussions with their children, and are careful to provide adequate explanations to their children concerning their authority. Children raised this way define their relationship to rules and authority in personally compelling ways. Acquiescence and deference to authority and rules is not driven by rewards and punishments, but rather by the incorporation of rules into a child's sense of self.[78]

This connection between identity development and legal socialization is important. Adolescence, in particular, is a time of identity development and an important aspect of that identity development is social. Adolescents ask, not only "Who am I?" but also "Who cares about me?" and "With whom do I belong?" and their experiences interacting with others provide the primary source for their answers.[79]

In the context both of decision-making and legal socialization, psychologists note that the value of these parenting approaches to children's development carries over to the actions of other adults who interact with children in an instructional or mentoring role. Laurence Steinberg explains:

> The power of authoritative parenting is so strong that its basic tenets even apply to people who aren't parents—to teachers, coaches, and work supervisors. An authoritative approach to dealing with

75. *Id.* at 131.
76. *Id.* at 156.
77. *Id.* at 156-57.
78. *Id.* at 157.
79. *See* Richard D. Ashmore et al., *Social Identity, Intergroup Conflict, and Conflict Reduction*, 3 RUTGERS SERIES ON SELF AND SOC. IDENTITY v, 6, 139 (2001).

> adolescents in the classroom, on the playing field, and in the workplace helps students learn, athletes excel, and employees succeed.[80]

Similarly, Tyler and Trinkner argue that the same value for legal socialization created by authoritative parenting can be reinforced, or undermined, by children's treatment by teachers, police officers, and judges.[81] In Part III, I consider how these childrearing insights can be applied by the law in assigning roles to the adults who engage with children in juvenile courts and in schools.

III. APPLYING CHILDREARING INSIGHTS TO THE LAW

A. Improving the Developmental Impact of Juvenile Court

Many children never experience court procedures, but those who do are among our most vulnerable. Children who are involved in the juvenile justice and child welfare systems, charged with crimes or removed from their parents based on allegations of abuse and neglect, go to court repeatedly and a judge makes a series of important decisions affecting their home, relationships with family members, and education, among other issues central to their lives. Here, I focus on young people charged with crimes in the juvenile justice system, but much of the analysis applies to children in the child welfare system as well.

A consideration of these young people's developmental *capacities* draws our attention to the difficulty a child will likely have understanding their rights and the legal process itself and their corresponding difficulty consulting with their legal counsel or participating in the proceedings.[82] A consideration of developmental *impact* draws our attention to how a young person's experience in court can enhance or impair his development of decision-making competence and how that experience can shape his understanding of legal authority, himself, and the relationship between the two.

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80. *See* STEINBERG, AGE OF OPPORTUNITY, *SUPRA* NOTE 65, at 148.

81. *See* TYLER & TRINKNER, *supra* note 66, at 9 (summarizing the argument that the "styles of authority practiced by . . . parents, teachers, school resource officers, police officers, and judges . . . can . . . support or undermine the formation of attitudes and legal values [and] communicate either positive or negative views about authorities and institutions").

82. Thomas Grisso et al., *Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants*, 27 L. & HUMAN BEHAVIOR 333, 356 (2003).

Juvenile justice proceedings commonly take on a quasi-parental tone.[83] Once adjudicated (most juvenile defendants plead guilty),[84] young offenders are before the court to be censured for engaging in a serious rule violation, a censure aimed to punish and discourage reoccurrence. In the vast majority of cases, the parental tone is an autocratic one—severe, formal, distanced, with harsh punishment threatened if not imposed.[85] At best, this style foregoes a unique opportunity to offer young offenders a developmental benefit, at worst, it can do affirmative harm. After setting out these potential harms and benefits, I discuss a pilot project I implemented in collaboration with a juvenile court judge in Milwaukee which aimed to improve the developmental value of young people's involvement in juvenile court.

Years in court representing children followed by many more years observing cases in juvenile court has convinced me that a serious danger of our juvenile court processes is that it reinforces a destructive anti-social identity development in the young people who are subject to the court's jurisdiction. Everything about the traditional courtroom process, which is only magnified by the informal, cliquish interactions among the professionals engendered in juvenile court, sends young defendants the message that they do not belong. This process makes young people feel as though the entire courtroom team, including their own lawyers, are on the inside, and they are on the outside. This particularly matters because the "inside" is clearly associated with the law. The routinized theatre of court proceedings thus carries a message to young defendants that they are outside, rather than part of, the community that makes and enforces the law.[86]

The young person's experience of alienation occurs even when dedicated and hardworking judges and lawyers are doing their best to serve the system well. The experience is unavoidable under current procedures, which necessarily impose a distance between the professionals and the young defendant.[87] Consistent with the outcome of autocratic parenting, children in the juvenile justice system can be expected to learn that legal authority is a harsh, external, coercive power that should be dealt with in an instrumental

83. I base my characterization of the court's tone on years of observation in juvenile courts in multiple states, first as counsel for young people in Maryland and Pennsylvania, and then when conducting court observation research in Illinois, Iowa and Wisconsin.

84. Allison D. Redlich et al., *To Plead or Not to Plead: A Comparison of Juvenile and Adult True and False Plea Decisions*, 40 L. & HUMAN BEHAVIOR 611, 611 (2016).

85. Cf. Jeffrey A. Butts et al., *Brick by Brick: Dismantling the Border Between Juvenile and Adult Justice*, *in* BOUNDARY CHANGES IN CRIMINAL JUSTICE ORGANIZATIONS 171 (2000) (noting the increasing harshness of juvenile court).

86. EMILY BUSS, *The Developmental Stakes of Youth Participation in American Juvenile Court*, *in* INTERNATIONAL PERSPECTIVES AND EMPIRICAL FINDINGS ON CHILD PARTICIPATION 312-315 (Oxford 2015) (Benedetta Faedi Duramy & Tali Gal, eds.) (describing young people's experience in Juvenile Court in more detail).

87. *Id.* at 312-315.

fashion. Such an experience is likely to exacerbate the developmental risks already manifested in the life circumstances that brought them into the juvenile justice system. A different approach to court proceedings, built upon the insights about the value of the authoritative parenting model, can create a special opportunity for young people to develop a connection with the society that polices them.[88]

In an effort to counter the destructive impact of traditional court proceedings, I worked with a juvenile court judge in Milwaukee to pilot a court process designed to enhance the relationship between the judge and young person in juvenile felony cases and to offer these young people an opportunity to engage in meaningful, supported decision-making in juvenile court.[89] The changes implemented in the pilot were simple: The judge took off her robe and came down off the elevated bench to sit at a table with the young offender as well as the whole court team including the public defender, the prosecutor, the probation officer, family members, and various other involved individuals. The team sat so close that they often knocked knees. The core of the conversation in these pilot proceedings was between the judge and the young person. Moreover, unlike the traditional hearings, in which the discussion consisted of serial two-person dialogues between the judge and various court participants, the hub of the exchanges in the pilot proceedings was the young person, who remained an active participant throughout. Snacks were offered and made a material difference in the quality of the conversation—reflecting simple, timeless parental wisdom about the value of food in conveying caring, brought to bear in the courtroom.

The pilot aimed to replicate the insights gained from the study of authoritative parenting at dispositional hearings and throughout the young person's period of probation. The judge, of course, continued to set limits—the limits imposed by the young offender's probationary status—and the offender's ongoing efforts to conform with those limits were central to the discussions. But by including young people more centrally and comfortably in those discussions, they were given an opportunity to build the skills that would be required for them to successfully assume pro-social adult roles. The team presence allowed for the supervision and support for the young person's choices, and discussion helped transform adult direction into teen-driven decision-making with a particular emphasis placed on the young person's goals and on the problem solving required to achieve them. These discussions were also convened far more frequently than traditional probation reviews—roughly once per month—creating an opportunity for the youth and

88. *Id.* at 315.

89. Professor Emily Buss is currently in the process of drafting a paper on this topic, information on the program is available from the author.

judge to get to know each other and to respond swiftly when problems arose. Finally, the manifestation of caring achieved through the pilot procedure—caring manifested through the warmth conveyed not only by the judge but by all the other professionals, including the prosecutor, around the table was, by the offenders' own account, extremely meaningful to them.[90] When they ended their probationary period, the pilot subjects reported feeling valued as people, taken seriously, and supported in their efforts to achieve their goals and move forward in a pro-social direction.

The aim of the pilot was to provide the sort of experience that the Procedural Justice literature suggests could have a significant longer term developmental impact on young people, altering their perceptions of the law's legitimacy and their own obligation to obey the law.[91] But the pilot, modest in size and duration, did not test these longer term outcomes, focusing instead on the offenders' experience during the court process. What is clear from our observation and interview data is that the pilot process transformed a negative experience with hearings that silenced young people and reinforced the distance between court personnel and young people into a positive experience with hearings that facilitated the increasingly comfortable engagement of the young people in short and long term decision-making and planning monitored and supported by a team of adults. Reducing the harm done by the state is, itself, an important victory for the law in its upbringing role.

B. Improving the Developmental Impact of Rights Related Decisions in Schools.

My second example focuses on public schools, and the set of constitutional rights implicated there. Because schools qualify as state actors, many cases addressing children's constitutional rights arise in the school context. Children have constitutional rights there—to express their views,[92] to engage in religious exercise and to be protected from religious establishment,[93] and to be protected from unreasonable searches and seizures,[94] to name some of the more prominent examples. As noted earlier, in the school context, the relevance of child development to the Court's analysis of students' rights is obscured: the primary justification for a modification of children's rights in schools focuses not on the differences between children and adults as rights holders, but on the special demands

90. Their sense that the judge, and the other members of the pilot team, cared about them as people was repeatedly identified, in exit interviews, as the central value of their experience.

91. *See generally* TYLER AND TRINKNER, *supra* note 66, at 184-206.

92. Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 511 (1969).

93. Santa Fe Indep. Schl. Dist. v. Doe, 530 U.S. 290, 316 (2000); Lee v. Weisman, 505 U.S. 577, 631 (1992).

94. *T.L.O.*, 469 U.S. at 347-48.

imposed in the school environment.[95] This failure to address child development in these cases directly is troublesome because it is in the school context that children will have the best opportunity to develop the skills required of them as adult exercisers of rights and as adult protectors of the rights of others.[96]

Students' experiences in school play a central role in developing their values, expectations, and competencies relevant to rights, for several reasons. The first and most straightforward reason is that schools are the primary site, other than the family, for learning in our society. Second, public schools are the only context in which most students interact, continuously, pervasively, and directly with the state. The public school is a microcosm of the state, wielding tremendous power over children, including the power to punish, even to expel, students who fail to conform to its rules. Third, the public school is also a microcosm of society for children—it is in the society of school where children learn to work together, to express themselves as individuals, to learn from one another, and to tolerate differences and disagreement.

The analysis of authoritative parenting suggests that children will learn these lessons best through experience, by being given opportunities to practice exercising their rights, in the supportive context of the school. In its earliest case addressing students' First Amendment rights in school, *West Virginia State Bd. of Educ. v. Barnette*,[97] the Supreme Court acknowledged the importance of students' learning through experience and warned against the danger of inspiring cynicism in students through rights deprivations.[98] In *Barnette,* which upheld the right of Jehovah's Witness students to refuse to salute the flag, the Court cautioned: "[t]hat [schools] are educating the young for citizenship is reason for the 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."[99]

Authoritative parenting also suggests that the supportive engagement of caring adults, where rights are implicated, can greatly enhance the developmental value of the process.[100] This value is likely to be implicated whether the right in question is found to apply to students or is denied. One of the central roles of the authoritative parent in adolescence is the gradual,

95. *See* EMILY BUSS, *Developing the Free Mind*, *in* THE OXFORD HANDBOOK OF U.S. EDUCATION LAW (2020), *available at* https://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780190697402.001.0001/oxfordhb-9780190697402-e-2.

96. *See id.*

97. 319 U.S. 624 (1943).

98. *Id.* at 636-37.

99. *Id.*

100. STEINBERG, *supra* note 65, at 146, 148.

reasoned extension of children's control over their own decision-making.[101] To a large extent, the emphasis in the parenting literature is on allowing adolescents to have the experience of exercising control, which argues, in the school context, for affording children rights while teachers and administrators stay involved to help students work through their decision-making and the consequences of those decisions.[102] However, it also argues for supportive adult involvement where school officials have authority to curtail students' decision-making control.[103] Authoritative parenting teaches not only the value of the supported shifting of control to students, but also of communicating reasons to students when they are denied control in a way that they can understand as fair.[104] An analysis of children's constitutional rights that takes the law's upbringing responsibilities seriously might find that schools have a constitutional obligation to engage students in this way, even, maybe especially, when it holds that students' substantive rights can be curtailed.

To make this point, I offer one example in the context of student expression. In *Hazelwood School District v. Kuhlmeier*, the Supreme Court considered and rejected high school students' First Amendment challenge to a high school principal's exercise of censorship over articles in the school newspaper.[105] From the students' perspective, the articles represented student authored speech intended to give serious attention to sensitive topics of interest to their high school readership (teen pregnancy and divorce), and to communicate what they learned from interviews and other investigative techniques—core aims that have justified particularly strong protection of the press outside the school context.[106]

The school later explained that the censorship was justified to ensure high journalistic standards, citing issues of balance and confidentiality, but at the time of the censorship, from the students' perspective, the principal simply deleted two entire pages of the paper (eliminating four other unobjectionable articles alongside the two objectionable articles) without consulting or even communicating with them.[107] The Supreme Court determined that the

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101. *Id.* at 148.

102. *Id.*

103. *See* TYLER & TRINKNER, *supra* note 66, at 9.

104. STEINBERG, *supra* note 65, at 130-31 (emphasizing the importance of setting rules that are consistent and make sense, and explaining the rules and the reasoning behind them to adolescents).

105. 484 U.S. 260 (1988).

106. *See, e.g.,* Grosjean v. American Press Co., 297 U.S. 233, 250 (1936) ("since informed public opinion is the most potent of all restraints upon misgovernment, the suppression or abridgement of the publicity afforded by a free press cannot be regarded otherwise than with grave concern.").

107. *Hazelwood Sch. Dist*., 484 U.S. at 263-64; *see also Id.* at 285 (Brennan, J., dissenting) ("the principal never consulted the students before censoring their work. They learned of the deletions when the paper was released. . . Further, he explained the deletions only in the broadest of generalities. . .. The

censorship did not violate the students' rights of free speech or press under the First Amendment because the paper was produced as part of a class for grade and credit, with extensive faculty involvement in the selection and editing of articles, and therefore qualified as "school-sponsored speech" over which the school had broad control.[108]

Without taking a position on whether or not some form of censorship was constitutionally permissible in this case, I suggest that, had the Court been attentive to the law's role in shaping children's development as rights holders, it might have allowed the censorship but found the principal's specific actions in executing the censorship unconstitutional. Any impact the school's decision to censor the articles had on the students' perception of their First Amendment rights was surely greatly aggravated by the means by which the censorship was implemented. Had the Court ruled that the school had authority to modify the articles, based on the identified concerns, but had violated the students' First Amendment rights by exercising its editorial authority without making sufficient effort to minimize the suppression of speech (by, for example, first affording the authors an attempt to address the concerns and, if that failed, taking pains to excise only the problematic articles) or maximize the learning associated with the censorship (by, for example, engaging the students in a discussion of the reasons for the principal's actions and the underlying First Amendment implications of his actions), the Court could have shaped the law to provide some support for the students' development as rights holders without unduly constraining the school's exercise of its editorial control.

Put another way, a consideration of developmental impact might impose constitutional constraints on the *process* by which censorship takes place, even when it provides school authorities with considerable *substantive* leeway to censor school-sponsored speech deemed to interfere with its pedagogical purposes. The all-or-nothing assumptions reflected in both the *Hazelwood* majority opinion (protecting the school's authority) and the dissent (arguing that the removal of the articles violated students' First Amendment rights) miss an opportunity to establish a constitutional standard that reinforces the important developmental impact of every school-based rights decision.

Court's supposition that the principal intended (or the protesters understood) those generalities as a lesson on the nuances of journalistic responsibility is utterly incredible.").

108. *Id.* at 273.

C. Improving the Developmental Impact of Rights by Reducing the Law's Developmental Harm

Both of the previous examples focus on the developmental benefits of changes in process, and particularly changes that allow the involved adults to better support children's emergence as independent decision makers. Another essential aim of the law should be, quite simply, to minimize its developmental harm. Authoritative parents, in determining when to allow their children to control decision-making and when to withhold that control take into account, in addition to any evidence about the quality of their children's decision-making skills, the potential long-term consequences of their children's decisions.[109]

The law's interest in protecting children from harm justifies rules that prevent children from making certain decisions with significant long-term consequences without parental involvement.[110] This same consideration can be understood to explain what appears to be an inconsistency between the Court's recognition of considerable autonomy rights for teens in the area of reproductive decision-making and its conclusion that adolescents' decision-making impairments reduce their responsibility for their crimes.[111] Capacity focused arguments have attempted to distinguish between deliberative decision-making, with its focus on reasoning, and impulsive, action-focused

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109. Steinberg advises:
In situations where your decision about an activity your child wants to engage in can easily go one way or the other, try to maximize your child's autonomy so long as doing so doesn't jeopardize his health, well-being, or future. Ask yourself whether the activity is dangerous, unhealthy, illegal, unethical, or likely to close some doors that are better left open.

STEINBERG, *supra* note 65, at 145.

110. *Bellotti*, 443 U.S. at 637 (The State commonly protects its youth from adverse governmental action and from their own immaturity by requiring parental consent to or involvement in important decisions by minors.)

111. The apparent inconsistency of the American Psychological Association's positions on these two topics, both influential with the Court, was flagged by Justice Scalia in his dissent in *Roper,* 543 U.S. at 617. In that dissent, he compared the American Psychological Association's expert opinion offered in its amicus brief in *Roper* to oppose the juvenile death penalty to its earlier statement in an amicus brief offered in the case of *Hodgson v. Minnesota*, to support minors' right to obtain an abortion without consulting their parents. *Id.* In its *Hodgson* brief, the APA relied upon a "rich body of research" that demonstrated that "by middle adolescence (age 14-15) young people develop abilities similar to adults in reasoning about moral dilemmas, understanding social rules and laws, [and] reasoning about interpersonal relationships and interpersonal problems. . ." to support its conclusion that teenagers were mature enough to obtain abortions without consulting their parents. Brief of Am. Psychological Assn. as Amici Curae, at 18, 20, Hodgson v. Minnesota, 497 U.S. 417 (1990) (Nos. 88-805, 88-1125 and 88-1309), 1989 WL 1127529 at 13-14. In its brief in *Roper*, filed roughly a decade later, the APA cited the research ultimately relied on by the *Roper* Court to demonstrate the teenagers' immaturity impaired their decision-making ability, and therefore rendered them less culpable than adults for their crimes. *Roper,* 543 U.S. at 617-18. Justice Scalia pointed to the apparent contradiction between these two characterizations of adolescent capacities to suggest that the Court (and the social scientists) were simply manipulating the data to achieve the legal ends they preferred. *Id.*

decision-making, with its focus on emotional arousal—a distinction often characterized as a distinction between "cold" and "hot" cognition.[112] But, as I have argued elsewhere, this distinction only gets us so far.[113] To be sure, this deliberative, logical reasoning about moral, social, and interpersonal matters is far more likely to occur in the abortion context, in which an adolescent needs to engage in considerable deliberation even to get to an appropriate medical facility where ongoing decision-making can be supported by adult medical professionals present there, than in the criminal context, where the adolescent engages in a hostile altercation on the street. But a teen seeking an abortion might well be subject to peer pressure (the second *Roper* factor bearing on capacity) in deciding whether or not to have an abortion. Moreover, whether or not to have an abortion is not the only relevant decision potentially allocated to an adolescent in the abortion context. Central also is the question whether the teen will discuss her decision with her parents, a decision that could readily be misanalysed by a panicky teen focused on her (possibly mistaken) fears that her parents would react badly.[114] On the criminal side of things, we can surely find a range in the extent of deliberation exercised. The defendant in *Roper*, himself, Christopher Simmons, seems to have done a great deal of planning and any peer pressure exercised in the commission of his crime appears to have been exercised by him, not upon him.[115]

My point, here, is not to argue that the Court is wrong to protect minors' abortion rights or, on the other hand, to shield minors from the most serious potential consequences of their crimes. The subject of my criticism is the suggestion that differences in decision-making *capacities* in the two contexts best accounts for the two results. This capacity-focused developmental account does not seem like the real or the best reason to treat the cases differently. What matters more than whether the two sorts of adolescent decision-making manifest different levels of maturity is that deferring to adolescent decision-making in the two contexts leads to outcomes that have profoundly different developmental consequences.

In the abortion context, giving teens the right to consent to an abortion ensures that teens who choose not to give birth will not be forced to do so, allowing them to continue to grow up without taking on the massive financial, emotional, and social burdens of teen parenting, particularly unwanted teen parenting. In the criminal context, in contrast, holding teens fully responsible for their actions will lead to criminal consequences that will indisputably

112. Johnson, *supra* note 42, at 218.
113. Emily Buss, *Developmental Jurisprudence,* 88 Temple L. Rev. 741,762-63 (2016).
114. Brief of Am. Psychological Assn., *supra* note 111, at 14.
115. *Roper*, 543 U.S. at 555-57 (describing the steps Simmons took leading up to the murder).

impose on them serious developmental harm. Of course, both criminal justice policy and abortion rights are highly contested and raise many issues that I am setting aside to make a more narrow point here: *If* we want to justify both lesser culpability in the criminal context and greater autonomy over decision-making in the abortion context for adolescents, as many do, we can do so more coherently by focusing on the law's developmental consequences—how these laws will affect how children grow up—than on developmental capacities—how children's current decision-making capacities differ from those of adults.

CONCLUSION

It is useful to end with examples that address controversial areas of the law, as they capture two important points: The first is that to argue that the law should take account of its child-rearing role is not to argue that this role should be understood to be the law's only role or even its paramount role. Whatever other important considerations are reflected in the law's regulation of abortion or in our criminal law, generally, will still be relevant to any analysis of these laws, when applied to children. Second is that, even to the extent legal analysis is focused on the law's child-rearing impact, this focus will not dictate specific results. Identifying and quantifying potential longer-term harms to individuals of affording or denying them decision authority over various decisions will inevitably take the courts into disputed territory. In many instances, the developmental impact of the law will be uncertain and contested. But the difficulty of the inquiry is not a reason to avoid the question. As with all childrearing, the law's obligation is to take the question seriously and to do its best.