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The Categorical Distinction between Adolescents and Adults: The Supreme Court’s Juvenile Punishment Cases—Constitutional Implications for Regulating Teenage Sexual Activity

Martin R. Gardner*

I. Introduction

It is well established that the United States Supreme Court has never developed a systematic theory of young people’s rights.1 Indeed, a leading commentator recently questioned whether the Court “is capable of developing a coherent, consistent policy with respect to children’s rights.”2 Such a task is complicated by the fact that three sets of interests—the child’s, her parents’, and the state’s—routinely coalesce and require accommodation. Moreover, explicating the theoretical grounds for the rights of juveniles is further made difficult because the Court has seemingly given support to two conflicting theories of rights in its case law.3 In the more predominant of the two, the Court has often taken the

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3. See infra text and notes at 77–151.
position that young people are entitled to paternalistic care and protection and not to the array of autonomy rights available to adults. At the same time, some cases appear to grant adult rights of constitutional personhood in some contexts.

These two inconsistent concepts of rights are founded on competing underlying empirical assumptions about the nature of childhood. The protectionist tradition assumes that children, even adolescents, are uniquely vulnerable, dependent, and less competent decision makers than adults. Personhood theorists, on the other hand, rely on social science data supporting the view that adults and adolescents are equally competent in making important decisions.


6. See text and notes at 107–151.

7. The Court’s embrace of these inconsistent rights is vividly evidenced by consideration of two cases delivered the same day. In Parham v. J.R., 442 U.S. 584, 603 (1979), a case denying procedural protections to minors admitted to state mental hospitals at the behest of their parents or guardians, the Court expressed a clearly protectionist view: “Most children even in adolescence, simply are not able to make sound judgments concerning many decisions . . . . Parents can and must make those judgments.” Yet, in the other case, Fare v. Michael C., 442 U.S. 707 (1979), the Court appeared to give its blessing to personhood theory in holding that minors are not entitled to any special protections, such as access to parents or legal counsel, as preconditions to valid waivers of Miranda rights granted to subjects of police interrogation. The Court stated:

[The] totality-of-the-circumstances approach is adequate to determine whether there has been a waiver even where interrogation of juveniles is involved. We discern no persuasive reasons why any other approach is required where the question is whether a juvenile has waived his rights, as opposed to whether an adult has done so.

Id. at 725.

8. Wald, supra note 1, at 259.

9. The Supreme Court has not as yet recognized this research.

10. See infra text and notes at 55–61.
While sometimes attending to empirical studies, the Court has most often simply reached its conclusions, either in protectionist or personhood terms, without direct appeal to available studies indicating underlying differences or similarities between young people and adults. Recently, however, in a series of cases disallowing certain harsh punishments as cruel and unusual when applied to juveniles tried within the criminal justice system, the Court expressly appealed to research identifying differences between average teenagers and adults. Based on these studies, the Court concluded that adolescents up to the age of eighteen are categorically distinct from adults in terms of their ability to make mature choices, to think and act as independent agents, and in terms of their unique transitory personality traits. These distinctions led the Court to conclude that young people lack adult culpability.

The Court’s distinction between adults and adolescents is obviously significant as an Eighth Amendment matter. But recognition of the distinction could have a broader impact. The punishment cases mark the Court’s clearest expression yet given of the fact that adolescents are a constitutionally distinct class from adults. Moreover, it supports this conclusion by its most direct and extensive appeal to social science evidence in all of its juvenile law cases. Indeed, the Court may have finally answered Bruce Hafen’s concern that the “sensible . . . assertion that adolescents through age eighteen generally lack some fun-

11. See, for example, Safford Unified School District #1 v. Redding, 557 U.S. 364, 374–75 (2009), where the Court referred to social science research documenting the negative psychological effects of strip searches on young people as support for finding that a strip search of a public school student violated the Fourth Amendment.

12. See, for example, Bellotti v. Baird, 443 U.S. 622, 635 (1979), where the Court stated the following without support of empirical evidence: “[D]uring 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.” For criticism of the Bellotti Court’s failure to attend to scientific studies contrary to the Court’s conclusions, see Rhonda Gay Hartman, Adolescent Autonomy: Clarifying an Ageless Conundrum, 51 HASTINGS L. J. 1265, 1348 (2000). For a criticism of the Court’s reliance on “the pages of human experience” rather than on current social science in its Parham decision, supra note 7, see Gary B. Melton, Children’s Competence to Consent in Children’s Competence to Consent, 1, 9–11 (Gary B. Melton et al. eds., 1983).

damental forms of capacity” is a proposition in need of empirical support.\textsuperscript{14}

The Court’s finding is clearly protectionist in nature—adolescents must be protected from harsh punishments imposed on their more criminally responsible adult counterparts. This scientifically grounded support of protectionism suggests a possible theoretical basis for a systematic and coherent theory of juvenile rights.\textsuperscript{15}

Without fully considering that question, I undertake in this article the more modest task of exploring the impact of the punishment cases in resolving one particular controversial family law issue involving the possible existence of a juvenile’s constitutional right to engage in sexual conduct prohibited by the state and against the wishes of that juvenile’s parents. While the Supreme Court has seldom decided cases involving direct claims by children of constitutional rights disfavored by their parents,\textsuperscript{16} assertions by minors of constitutionally protected sexual liberty have become more prevalent of late in light of the Supreme Court’s recognition in \textit{Lawrence v. Texas} of a constitutionally protected right, at least for adults, to privately engage in consensual sexual intimacy.\textsuperscript{17}

I will examine \textit{Lawrence}’s possible applicability to minors, taking into account the Supreme Court’s punishment cases, in an assessment of the constitutionality of fornication statutes applied to juveniles. I will show that prior to the Court’s pronouncement of its categorical adolescent/adult distinction in the punishment cases, the post-\textit{Lawrence} constitutionality of regulating teenage sexual behavior under fornication statutes was uncertain. With the guidance of the punishment cases, however, such statutes are clearly constitutional.

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\textsuperscript{14} Bruce C. Hafen, \textit{The Learning Years: A Review of The Changing Legal World of Adolescence}, 81 Mich. L. Rev. 1045, 1062 (1983) [hereinafter Hafen, \textit{The Learning Years}]. Dean Hafen raises the concern as a reaction to Franklin Zimring’s proposal, unsupported by empirical data, recommending defining the age of majority at age eighteen in certain circumstances.

\textsuperscript{15} Dean Samuel Davis, along with others, notes “the law’s need of a consistent, coherent position regarding the circumstances under which children ought to be regarded as adults.” DAVIS, supra note 2, at 28.

\textsuperscript{16} See infra text and notes 97–102 for an example of such a case.

\textsuperscript{17} See infra text and notes 240, 245–48.
\end{flushright}
I begin with a brief sketch of the personhood and protectionist theories with attention to underlying social science support. I then discuss the law’s traditional treatment of young people, noting the role played by chronological age rules, followed by a brief review of the Supreme Court’s case law defining the constitutional rights of children and their parents respectively. This review reveals the Court’s general espousal of protectionism, with rare apparent acknowledgements of juveniles as full-fledged constitutional persons. A discussion of the punishment cases then describes the Court’s affirmation of a now scientifically grounded concept of protectionism. I conclude by relating the punishment cases to post-Lawrence arguments regarding the constitutionality of state prohibitions of fornication by minors, concluding that such prohibitions reasonably promote legitimate state and parental interests and are therefore constitutional.

II. Protectionism and Personhood: Two Theories of Rights

While most forms of life embody a process where infants over time become adult members of the species, human infants are unique, at least among primates, in their lengthy period of vulnerability and dependence. Therefore, childhood for humans constitutes a comparatively long time frame during which young people gradually acquire the competencies of adulthood. Everyone agrees that very young children must be treated paternally by the law.20 While the age of majority21 is generally set at age eighteen,22 some argue that young people as early as age fourteen,
often viewed as the beginning of “adolescence,” should enjoy full rights of adulthood. Therefore, advocates of personhood rights generally limit their applicability to adolescents. Protectionists, on the other hand, usually agree that setting the age of majority at eighteen is a defensible basis for distinguishing those entitled to full legal rights and responsibilities from those too immature to enjoy full legal personhood.

A. Protectionism

1. The protectionist concept

Protectionist theory is premised on the idea that children, even adolescents, are different from adults in ways sufficiently significant to justify denial of rights of autonomy and personhood. The differences entail, among other things, immature mental competence, and unique vulnerability and dependence. Given these differences, juveniles are entitled to protection, including rights to receive care, affection, discipline, and guidance, thus enabling their development into mature, responsible adults. Also included are rights to be supported, maintained, educated, and provided legal remedies consistent with a minor’s best interests when obligated caretakers fail to provide the juvenile the protection to which he or she is entitled.

23. Hartman, supra note 12, at 1266–67 (designating “adolescence” as ages approximately 14 through 17 years).
24. See infra text and notes 44–52.
25. Id.
27. See H. Foster & D. Freed, A Bill of Rights for Children, 6 Fam. L.Q. 343, 347 (1972). While Foster and Freed develop their “bill of rights” from the premise that children are “persons,” the rights they identify in the text are more at home with protectionist, rather than personhood, philosophy.
28. The court in People v. Scott D., 315 N.E. 2d 466, 469 (N.Y. 1974) offered this summary of protection rights philosophy: “Children may not be equated with adults for all . . . purposes . . . . Their natural limitations, varying with age, and the obligation of those, in whose charge they are, to protect, guide, and if need be, discipline them, are recognized in every kind of society.”
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Defenders of protectionism argue that the denial of full personhood rights is actually essential to a young person’s maturation into responsible adulthood. Bruce Hafen puts the matter this way, using the term “choice rights” rather than “personhood rights” as described in this paper:

The development of the capacity to function as a mature, independent member of society is essential to the meaningful exercise of the full range of choice rights characteristic of the individual tradition. Precisely because of their lack of capacity, minors should enjoy legally protected rights to special treatment (including some protection against their own immaturity) that will optimize their opportunities for the development of mature capabilities that are in their best interest. Children will outgrow their restricted state, but the more important question is whether they will outgrow it with maximized capacities. An assumption that rational and moral capacity exists, when in fact it does not exist, may lead to an abandonment of the protections, processes, and opportunities that can develop these very capacities. In this sense, the concept of restricting certain choice rights is in fact an important form of protection rights. For these reasons, some distinction between rights of protection and rights of choice must be preserved.29

Professor Joseph Goldstein notes the value of parental guidance as a function within the protectionist tradition:

The right to family privacy and parental autonomy, as well as the reciprocal liberty interest of parent and child in the familial bond between them, need no greater justification than that they comport with each state’s fundamental constitutional commitment to individual freedom and human dignity. But the right of parents to raise their children as they think best, free of coercive intervention, comports as well with each child’s biological and psychological need for unthreatened and unbroken continuity of care by his parents. . . . There is little doubt that . . . breaches in the familial bond will be detrimental to a child’s well-being.30

29.  Hafen, *Children’s Liberation*, supra note 5, at 650. Franklin Zimring makes a similar point. “[Eighteen]-year-olds are in the process of becoming adult . . . . To impose full responsibility . . . is much like expecting every new bride to be an instant Betty Crocker. It isn’t realistic and it isn’t fair.” FRANKLIN E. ZIMRING, AMERICAN JUVENILE JUSTICE 20 (2005).

Professor Michael Wald adds that “[c]linicians . . . claim that adolescents benefit from having parental restraints available.” He explains:

Such restraints allow adolescents to challenge authority and to explore new areas with the realization that “wise” parents will stop them if they act in harmful ways. While parents often do not act wisely, removing the authority structure may be more detrimental than unwise parental actions . . .

Even if adolescents could make some (or all) decisions without harming themselves significantly, we still might not give autonomy to children because of its disruption of the family system.

2. Empirical underpinnings

As mentioned above, the Supreme Court until very recently embraced protectionism without any appeal to social science data. The idea that juveniles lack adult competency and maturity was apparently so widely accepted that empirical support was deemed unnecessary. However, in the latter half of the 20th century protectionism was called into question with the emergence of the children’s liberation movement, propelled by research suggesting that adolescents cannot

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*Autonomy*, 86 YALE L.J. 645, 649 (1977). Professor John Coons expresses a similar view:

One may liberate children from the law of man, but the law of nature is beyond repeal. There is no way to send an eight-year-old out of the sovereignty of the family and into a world of liberty. For he will there be introduced to a new sovereignty of one kind or another. It may be a regime of want, ignorance, and general oppression; it may be one of delightful gratification. The ringmaster could be Fagin or Mary Poppins. Whatever the reality, it will be created by people with more power, and by the elements. Children—at [least] small children—will not be liberated; they will be dominated . . . .

This is also true even of mature teenagers who might have a ripened capacity for autonomy or at least for autonomy in regard to specific activities such as driving . . . .


32. *Id.* See also Robert J. Levy, *The Rights of Parents*, 1976 BYU L. REV. 693, for an argument that granting greater rights to adolescents risks upsetting traditional values of family privacy.
33. See *supra* note 12.
34. The movement is extensively described in Hafen, *Children’s Liberation*, *supra* note 5.
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be distinguished from adults in terms of decision-making competence,\textsuperscript{35} prompting calls for granting full personhood rights for adolescents.\textsuperscript{36}

Such calls are controversial, however, in light of recent studies supporting the opposite view that, in general, adolescents differ from average adults in legally significant ways. This evidence, relied upon by the Supreme Court in the punishment cases,\textsuperscript{37} can be summarized as follows:

Scientific evidence indicates that teens make less competent decisions compared with adults because they are developmentally immature.\textsuperscript{38} Adolescents lack the capacity for “autonomous choice, self-management, risk perception and calculation of future consequences” when compared to adults; these traits lead to risky behavior.\textsuperscript{39} Adolescence is also a developmental period in which personal identity and character fluctuate “through a process of exploration and experimentation.”\textsuperscript{40}

Moreover, adolescents tend to respond to peer influence more than adults.\textsuperscript{41} Indeed, adolescents succumb to peer influence both “directly,” when subjected to peer-pressure to conform behavior, and “indirectly,” when seeking peer approval in decision making.\textsuperscript{42}

\textsuperscript{35.} See infra text and notes 53-61.

\textsuperscript{36.} Id.

\textsuperscript{37.} See infra notes 162-206 and accompanying text.

\textsuperscript{38.} Elizabeth S. Scott & Laurence Steinberg, Blaming Youth, 81 Texas L. Rev. 799, 801 (2003).

\textsuperscript{39.} Id.

\textsuperscript{40.} Id. The social science literature on the subject of adolescence is considerable. This Article addresses only a small sample of the data.

\textsuperscript{41.} Elizabeth S. Scott, et al., Evaluating Adolescent Decision Making in Legal Contexts, 19 Law & Hum. Behav. 221, 230 (1995). See also Christopher Slobogin, et al.; A Prevention Model of Juvenile Justice: The Promise of Kansas v. Hendricks for Children, 1999 Wisc. L. Rev. 185, 196-200 (summarizing evidence supporting the view that adolescents are excessive risk-takers, focus more on short-term consequences of actions and less on long-term impacts than do adults, and are more susceptible than adults to peer influence). This research suggests that “the average adolescent . . . differs from the average adult in ways that diminish willingness to pay attention to the criminal law.” Id. at 196.

\textsuperscript{42.} See Scott et al., supra note 41, at 230. See infra, note 231, referencing the direct/indirect peer pressure distinction.
Because they tend to feel invulnerable, adolescents also engage in riskier behavior than adults in activities such as "criminal conduct, unprotected sex, and speeding." That the Supreme Court has blessed such evidence of youthful immaturity in the punishment cases constitutes a significant affirmation of the protectionist tradition.

B. The Personhood Rights

1. The personhood conception

Advocates of personhood rights routinely focus on data suggesting that the average adolescent’s cognitive development and moral reasoning skills correspond with the average adult’s. Therefore, because adolescents utilize adult reasoning capabilities, they should, on this view, enjoy adult rights enforceable against their parents as well as the state. Professor Robert Batey argues:

From the assumption that adolescents lack the capacity to make moral choices affecting their own lives, Anglo-American jurisprudence has drawn the conclusion that the adolescent’s parents have the right to make those choices. The conclusion that parents have the right to make the adolescent’s moral choices must be rejected, however, because, as studies indicate, the law’s underlying assumption that adolescents lack the capacity to make moral choices is incorrect. Because a large majority of adolescents do have the moral reasoning capacities of adults, the law should accord the considered choices of competent adolescents the same treatment it accords similar choices of adults . . .

If parents can force decisions on adolescents, the courts should provide some mechanism to enable competent adolescents to overturn those decisions. Similarly, if parents can veto decisions made by their adolescent children, those children should be able to obtain judicial assistance in overriding such vetoes, unless the parents can demonstrate that the child did not make a mature choice . . . . Recognition of the adolescent’s capacity for adult moral reasoning . . . requires . . . the court [to] enjoin the parents from interfering unless

43. See Scott et al., supra note 41, at 230; Slobogin, supra note 41, at 198.
44. See Scott et al., supra note 41, at 230.
45. See infra notes 162–206 and accompanying text.
the parents can establish that the adolescent has made an immature judgment.\(^{46}\)

Batey is not alone in espousing the proposition that “the law should accord the considered choices of competent adolescents the same treatment it accords similar choices of adults.”\(^{47}\) In *Wisconsin v. Yoder*\(^ {48}\)—a case holding that the religious practice rights of Amish parents entitled them to withdraw their children from public schools in violation of state compulsory education laws in order for the children to live full time in the Amish religious community—Justice William Douglas observed in his dissenting opinion that “children . . . have constitutionally protected interests.”\(^ {49}\) Relying on “substantial agreement among child psychologists and sociologists that the moral and intellectual maturity of the 14-year-old approaches that of the adult,”\(^ {50}\) Justice Douglas concluded:

> If the parents in this case are allowed a religious exemption, the inevitable effect is to impose the parents’ notions of religious duty upon their children. Where the child is mature enough to express potentially conflicting desires, it would be an invasion of the child’s rights to permit such an imposition without canvassing his views. . . . [I]f an Amish child desires to attend high school, and is mature enough to have that desire respected, the State may well be able to override the parents’ religiously motivated objections.\(^ {51}\)

Douglas went on to claim that children should be “masters of their own destiny,” at least so far as educational choices are concerned.\(^ {52}\) Similarly, other personhood theorists have argued for such things as a “right to emancipation from the parent-child relationship when that relationship has broken down and the child has left home due to . . .

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Some personhood advocates go even further than Batey. Richard Farson, for example, argues that children should receive full civil rights at birth. Farson’s views are noted in Franklin E. Zimring, *The Changing World of Legal Adolescence* 23 (2005).

\(^{47}\) Batey, *supra* note 46, at 373.


\(^{49}\) *Id.* at 243 (Douglas, J., dissenting in part).

\(^{50}\) *Id.* at 245, n.3.

\(^{51}\) *Id.* at 242.

\(^{52}\) *Id.* at 245.
serious family conflict,” as well as a right for adolescents to be sexually active as a matter of “personal autonomy in making strategic life decisions.”

2. Empirical underpinnings

As noted above, personhood advocates rely on studies suggesting that nothing distinguishes adolescent decision making competency from adults. A commentator summarized the existing social science literature as follows:

[The] studies . . . suggest that adolescents, aged 14 and older, possess the cognitive capability to reason, understand, appreciate, and articulate decisions comparable to young adults. Perhaps more significantly, there is a paucity of scientific or social science study that supports the present legal view of adolescent incapacity. Despite the statistical and scientific evidence, which merits serious consideration by policy makers, the principle of decisional incapacity is the raison d’être for law and the lack of a coherent legal approach for accommodating adolescent issues. A backward glance over the twentieth century reveals a promising legacy for the recognition of adolescent autonomous rights. Realizing more meaningful exercise of those rights should be a legacy for the twenty-first century.

The studies suggest that when presented with difficult problems of moral reasoning, adolescents perform better than younger children and roughly on a par with adults.

For some, these findings mean that the law’s conclusions that adolescents generally differ from adults in the exercise of moral reasoning skills are “simply . . . wrong.” One social scientist has argued the following concerning the legal consequences that should result from

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54. Richards, supra note 18, at 54–55. For an argument espousing a presumption of adolescent “decisional ability” rather than inability, see generally Hartman, supra note 12.
55. Hartman, supra note 12, at 1286.
56. See, e.g., Batey, supra note 46, at 364–70.
57. For a clear statement of the traditional view that adolescents differ from adults in reasoning skills, see the quote from the Parham case, supra note 7.
58. Batey, supra note 46, at 369.
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these studies:
I am arguing that adolescents’ personhood should be recognized by policymakers. Insofar as denial of autonomy has been based on assumptions of incompetence, current psychological research does not support such an age-graded distinction. Moreover, . . . recognition of personhood might facilitate adolescents’ personal individuation. . . . [T]here seems to be ample basis for reversal of current presumptions in favor of a view of adolescents as autonomous persons possessed of independent interests regarding liberty and privacy.59

Personhood advocates sometimes cite empirical evidence questioning the scientific support for other commonly assumed differences between adolescents and adults. For example, some claim that the “prevailing myth” of excessive adolescent risk taking has been “debunked by researchers” who have supposedly established that risk-taking activities of adolescents do not exceed those of adults.60 Along the same lines, some urge that feelings of invulnerability, a precursor to risk-taking actions, are “no more pronounced among adolescents than among adults.”61

C. Protectionist and Personhood Rights?

Recently, commentators have begun to argue that adolescents possess protectionist rights in some contexts and personhood rights in others. From the studies showing that, by the early teen years, adolescents’ general cognitive abilities are essentially indistinguishable from those of adults, some maintain that in situations requiring “logical reasoning about moral, social, and interpersonal matters,” adolescents should therefore be treated as legal adults.62 Supposedly, such a view does not dispute the validity of the studies demonstrating the develop-

mental immaturity of adolescents regarding propensities for risk-taking and extraordinary peer influence. Hence, in situations where rash decisions are made, adolescents often act immaturesly and thus should not be considered adults for legal purposes. Consequently, in spur of the moment situations like those involved in most juvenile crime, adolescents lack adult culpability necessitating protection from harsh punishments imposed on adults. On the other hand, in situations where deliberate decision making is involved, in deliberations about healthcare for example, adolescents arguably function as autonomous persons.

D. Summary

The above discussion demonstrates that attention to social science studies on the nature of adolescence may lead to two different conceptions of rights. First, protectionism finds support from studies showing adolescents uniquely prone to risk-taking behavior, to be more susceptible to peer-pressure, and less able to assess the future consequences of their actions than adults. Second, personhood advocates justify their position by appeal to studies showing adolescent/adult equivalence in competently making decisions in contexts of unhurried deliberation.

III. Constitutional Rights of Adolescents and Their Parents

Throughout the history of Anglo-American law, young people have been treated as a distinct class for legal purposes. At common law, an “infant” was any person under the age of twenty-one. Chronological age rules defined the status of minority without regard to individualized characteristics such as physical maturity, mental capacity, education, experience, or accomplishment. Such rules continue to be the primary vehicle for determining adult legal status, although the age

63. Id.
64. Id. at 593.
65. Id. at 592.
66. GARDNER, supra note 26, at 3–4.
of majority is not defined by a single age for all purposes. With the passage of the Twenty-Sixth Amendment allowing eighteen-year-olds the right to vote, most states have statutorily reduced the general age of majority to age eighteen.

Defining legal adulthood in terms of chronological age standards is controversial for some. Everyone agrees that arriving at adulthood is a process and not the function of reaching a particular birthday. Not all young people become mature and responsible adults at the same age. Moreover, the emergence of the social science data on adolescent decision making discussed above has led to a call in some quarters to abandon chronological rules in favor of individualized assessments of competency as the means for determining adult legal status. Nevertheless, while current law does employ a few manifestations of the individualized approach, legal adulthood continues to be determined almost exclusively by chronological age rules. Thus, it is most often in the context of such rules that the Supreme Court has addressed constitutional claims of young people, which occasionally conflict with the desires of their parents.

In determining the constitutional rights of children and parents respectively, it is helpful to be sensitive to how the three parties—state, parent, and child—align. For instance, when the interests of the parent and the child are united against the state whose action is found unconstitutional, it is sometimes difficult to tell whether the right denied is

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69. For example, states generally permit young people to operate motor vehicles at an earlier age than the general age of majority while not allowing them to consume alcohol until age twenty-one. See Gardner, supra note 26, at 4.

70. “The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied. . . .” U.S. Const. amend. XXVI.


72. See supra notes 55–61 and accompanying text.

73. See supra note 46 and accompanying text.

74. Individualized assessments of competency are routinely made by juvenile court judges in making decisions whether to transfer jurisdiction from juvenile to criminal court. See Davis, supra note 2, at 335–41. See also the discussion of “judicial bypass” mechanisms in abortion cases infra at notes 135–36 and accompanying text. For a criticism of the judicial bypass approach, see Hafen, The Learning Years, supra note 14, at 1059.

75. For a defense of the chronological age rule approach, see Hafen, The Learning Years, supra note 14, at 1059. See also infra at notes 172, 188, 276.
that of the parent, or the child, or both.\textsuperscript{76}

The following discussion of Supreme Court cases is not intended to be exhaustive. The sample sufficiently demonstrates, however, the predominance of the protectionist point of view, and the rare exceptions that arguably recognize personhood rights.

\textit{A. Protectionism}

As early as its 1923 decision in \textit{Meyer v. Pierce},\textsuperscript{77} the Supreme Court has alluded to the fact that children have constitutional rights. In invalidating a statute that forbade the teaching of any language other than English until the eighth grade, the \textit{Meyer} Court opined that constitutionally protected liberty included not only the right of teachers to “engage in any of the common occupations of life,” and parents to “bring up children,” but also the right of the individual [presumably including children] to acquire useful knowledge.\textsuperscript{78} Twenty-one years after \textit{Meyer}, the Court in \textit{Pierce v. Society of Sisters}\textsuperscript{79} declared unconstitutional a statute requiring children between ages eight and sixteen to attend public schools rather than private parochial or military schools. In language similar to \textit{Meyer}, the \textit{Pierce} Court found the statute an unreasonable interference “with the liberty of parents and guardians to direct the upbringing and education of children.”\textsuperscript{80}

If \textit{Meyer} gave a nod in the direction of constitutional rights of children, \textit{Prince v. Massachusetts}\textsuperscript{81} decided in 1944 made clear that certain

\begin{itemize}
  \item \textsuperscript{76} See, e.g., the discussion of the \textit{Meyer} case, infra text and notes 77–78.
  \item \textsuperscript{77} \textit{Meyer v. Pierce}, 262 U.S. 390 (1923).
  \item \textsuperscript{78} \textit{Id.} at 399. Assuming that \textit{Meyer} does articulate an independent right in children to “acquire knowledge,” the right could be understood as a protectionist right. Education of children is a necessity in the maturation process toward adulthood. Consistent with the idea, the \textit{Meyer} Court noted that it was “the natural duty of the parent to give his children education suitable to their station in life.” \textit{Id.} at 400. The Supreme Court would later hold, however, that education is not a “fundamental right” entitled to strict constitutional scrutiny. San Antonio Public School Dist. v. Rodriquez, 411 U.S. 1 (1973).
  \item \textsuperscript{79} \textit{Pierce v. Society of Sisters}, 268 U.S. 510 (1925).
  \item \textsuperscript{80} \textit{Id.} at 534–35. The Court added that the “child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty to recognize and prepare him for additional obligations.” \textit{Id.} at 535.
  \item \textsuperscript{81} \textit{Prince v. Massachusetts}, 321 U.S. 159 (1944).
\end{itemize}
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rights available to adults are not granted to children. It is cardinal . . . that the custody care and nurture of the child reside first in the parents, the Prince Court held that a Jehovah’s Witness aunt could constitutionally be punished for permitting her nine-year-old niece to attempt to sell religious literature on a public street in violation of a state child labor statute prohibiting aiding a “girl under eighteen” in selling or offering to sell “any article” in a public place. Even though both the aunt and niece were ordained ministers and were engaging in a religious exercise by attempting to sell the literature, the Court found no violation of the Free Exercise Clause. While recognizing that the aunt had a constitutional right to proselytize on the street, the niece had no similar right, as explained by the Court:

Street preaching . . . for adults . . . cannot be wholly prohibited. . . . The zealous though lawful exercise of the right to engage in propagandizing the community, whether in religious, political or other matters, may and at times does create situations difficult enough for adults to cope with and wholly inappropriate for children, especially of tender years, to face. Other harmful possibilities could be stated, of emotional excitement and psychological or physical injury. Parents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves.

82. Various other Supreme Court cases recognize the proposition that juveniles are not entitled to the same constitutional rights as adults. See, e.g., Ginsberg v. New York, 390 U.S. 629 (1968) (upholding a juvenile obscenity statute proscribing material that would not be obscene for adults); McKeiver v. Pennsylvania, 403 U.S. 528 (1971) (denying the right to trial by jury in juvenile court delinquency adjudications while such right exists in adult criminal trials); New Jersey v. T.L.O., 469 U.S. 325 (1985) (applying the “reasonable suspicion” Fourth Amendment standard to searches of school students rather than the more rigorous “probable cause” test often required for searches outside schools).

83. Prince, 321 U.S. at 166.

84. Id. at 160–61, 170–71.

85. Id. at 170.

86. Id. at 169–70. Notwithstanding its language that children are too young “to make the choice” to practice religion, the Prince Court mentioned “the rights of children to exercise their religion and of parents to give them religious training and to encourage them in the practice of
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The obvious protectionism of *Prince*\(^7\) is carried forward in most of the Supreme Court’s decisions addressing the constitutional rights of juveniles.\(^8\) For example, in *Wisconsin v. Yoder*\(^9\) the Court reiterated “the interest of parents in directing the rearing of their offspring”\(^10\) in holding that a state statute, requiring parents to enroll their children in public or private school until age sixteen, could not be applied to Amish parents who withdrew their children from school at age fourteen for religious purposes.\(^11\) The Court dismissed the argument that exempting Amish children from the compulsory education requirement denied a “right of the Amish child to a secondary education,” emphasizing that it was the parents who were subject to prosecution under the statute.\(^12\)

In response to Justice Douglas's claim in dissent that the wishes of the Amish children should be assessed before their parents were permitted to withdraw them from school,\(^13\) the Court suggested that the

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\(^7\) The *Prince* Court noted that “the state as *parens patriae*” may act to “guard . . . the wellbeing” of youth, even sometimes where the state action restricts a parent’s control. *Id.* at 166. The Court emphasized that its “ruling does not extend beyond the facts the case presents.” *Id.* at 171.

\(^8\) For a thorough documentation of the Court’s virtually exclusive adherence to protectionism in cases decided during the first three quarters of the Twentieth Century, see generally Hafen, *Children’s Liberation*, supra note 5. See also, Hafen, *Constitutional Status*, supra note 4, at 511 (“Most of the Court’s children’s rights cases have dealt with . . . “protection rights” rather than “choice rights”). Dean Hafen has concluded that the “cases recognizing a choice [personhood] right for minors are essentially limited to those dealing with abortion.” Hafen, *Constitutional Status*, supra note 4, at 512.


\(^10\) *Id.* at 213.

\(^11\) *Id.* at 235–36.

\(^12\) *Id.* at 229–30.

\(^13\) *Id.* at 230–31, 241–46. Douglas intimated that the children should be able to assert their claims against their parents:
children’s opinions were irrelevant:

Our holding in no way determines the proper resolution of possible competing interests of parents, children, and the State in an appropriate state court proceeding in which the power of the State is asserted on the theory that Amish parents are preventing their minor children from attending high school despite their expressed desires to the contrary. Recognition of the claim of the State in such a proceeding would, of course, call into question traditional concepts of parental control over the religious upbringing and education of their minor children recognized in this Court’s past decisions. It is clear that such an intrusion by a State into family decisions in the area of religious training would give rise to grave questions of religious freedom . . . On this record we neither reach nor decide those issues.\textsuperscript{94}

The Court was content to rest its decision on the “liberty of parents and guardians to direct the upbringing and education of children under their control” under \textit{Meyer}\textsuperscript{95} and on the “rights of parents to direct religious upbringing of their children” under \textit{Pierce}.\textsuperscript{96}

In \textit{Parham v. J.R.}, a rare case of a minor asserting a constitutional claim against his parent, the Court considered whether an adversary proceeding was required where a parent sought her child’s admission to a state mental hospital.\textsuperscript{97} While recognizing that such children pos-

\begin{flushright}
On this important and vital matter of education, I think the children should be entitled to be heard. While the parents, absent dissent, normally speak for the entire family, the education of the child is a matter on which the child will often have decided views. He may want to be a pianist or an astronaut or an oceanographer. To do so he will have to break from the Amish tradition.
\end{flushright}

\textit{Id.} at 244–45.

94. \textit{Id.} at 231–32.
95. \textit{Id.} at 232–33. The Court found that living under the Amish way of life was in no way harmful to Amish children, in fact, their system of “learning-by-doing” prepared with an ideal vocational training. \textit{Id.} at 223–25.
96. \textit{Id.} at 233.
ness constitutionally protected liberty interests in not being unnecessarily confined, the Court found that the parental interest in obtaining mental health care for their children predominated. Noting the “traditional presumption that parents act in the best interests of their child,” the Court took a clearly protectionist stance in stating that “[m]ost children, even in adolescence, simply are not able to make sound judgments concerning many decisions, including their need for medical care or treatment. Parents can and must make those judgments.” Moreover, the Court was reluctant to require adversarial proceedings, which would entail the child, through counsel, “to probe the motives” of her parents, thus involving the Courts in “private family matters” in determining whether the child should be admitted to the hospital.

A final example of the Court’s commitment to protectionism is reflected in its cases granting procedural rights to defendants in juvenile court waiver and adjudication proceedings. In imposing procedural protections on a juvenile justice system historically eschewing virtually all procedural formalities, the Court did not equate juveniles with adults, but instead recognized that minority status did not justify adjudication in “kangaroo courts.” Indeed, the Court eventually gave

98. Id. at 600. The Court noted that a child has a “substantial liberty interest in not being confined unnecessarily for medical treatment” which might produce “adverse social consequences for the child” through being stigmatized as one having been hospitalized for psychiatric care.

99. Id. at 604.

100. Id.

101. Id. at 603. The Court offered no empirical support for its conclusion and made no reference to the emerging data regarding the cognitive competence of adolescents. See supra text and notes 53–59; Melton, supra note 12.

102. Parham, 442 U.S. at 605.

103. For a summary of these decisions, see Martin R. Gardner, Punitive Juvenile Justice and Public Trials by Jury, Sixth Amendment Applications in a Post-McKeiver World, 91 Neb. L. Rev. 1, 25–34 (2012) [Hereinafter Gardner, Punitive Juvenile Justice].

104. Hafen, Constitutional Status, supra note 4, at 511–12.

105. See e.g., In re Gault, 387 U.S. 1, 28 (1967) (“[T]he condition of a boy does not justify a kangaroo court”).
its blessing to a continuation of a juvenile court system dedicated to addressing the unique needs of young people.106

B. Protectionist or Personhood?

Unlike the cases just discussed, some of the Court’s cases are ambiguous, suggesting either a protectionist or personhood interpretation. Tinker v. Des Moines School District107 represents such a case.108 Tinker involved a group of parents who organized an effort to protest the Vietnam War, encouraging their children to participate by wearing black armbands to school in violation of a school regulation forbidding such activity.109 The students were suspended from school for violating the rule and defended their actions by arguing that the rule violated their First Amendment rights to free speech.110 The Supreme Court agreed, stating that students as “persons” under our Constitution “do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”111

Tinker has generally been understood as a case granting personhood rights to students to express political viewpoints at school.112 Some, however, read the case as a parents’ rights case implicating both the child-rearing and free speech rights of the parents.113

106. In McKeiver v. Pennsylvania, 403 U.S. 528, 547 (1971), a plurality of the Court noted that it was “reluctant to say that . . . [the juvenile court system] still does not hold promise.” The plurality encouraged the states to “seek in new and different ways the elusive answers to the problems of the young.” Id.


108. The ambiguous nature of Tinker is no better illustrated than by noting Dean Samuel Davis’s interpretation(s) of the case. On the one hand, Davis characterizes the case as the Supreme Court’s “first ‘pure’ children’s rights case.” Davies, supra note 2, at 45. On the other hand, Dean Davis observes that the case could be viewed as “a parents’ rights or family rights case . . . .” Id. at 47.

109. Tinker, 393 U.S. at 504.

110. Id. at 504-05.

111. Id. at 511.

112. Id. at 506.


114. Given the fact that the views of the students mirrored those of the parents in Tinker, “one might ask whether the Court would be as protective of children’s rights if their views were
If *Tinker* is a personhood rights case, its significance as such has waned with subsequent decisions. *Tinker* has been characterized as the “high-water mark in children’s rights in the Supreme Court.” In subsequent school cases the Court has expressed protectionist principles in denying student free speech claims in contexts of student assemblies, school newspapers, and a student’s display of a controversial banner during the 2002 Olympic Torch Relay. Similarly, in contrary to parental wishes.” *Davis*, supra note 2, at 47. See also *Hafen*, *Constitutional Status*, supra note 4, at 512 (“[B]oth childrearing and the free speech rights of the *Tinker* parents were arguably implicated in the case.”).


116. *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675 (1986). The *Fraser* Court rejected the claims of a student (Fraser) who argued that his rights to free speech were violated when school officials suspended him for giving a speech deemed inappropriate during a school assembly. The speech, presented to nominate a fellow student for a student government office, was laced with sexual innuendo that the officials viewed as violative of a school rule providing “conduct which . . . interferes with the educational process is prohibited, including the use of obscene, profane language or gestures.” *Id.* at 678. The Court distinguished *Tinker* as a case involving political discourse, unlike Fraser’s speech, and found that the school had an interest in preparing students for citizenship by inculcating “habits and manners of civility.” *Id.* at 681. The Court further observed that school authorities act *in loco parentis* in protecting its student body “from exposure to sexually explicit, indecent, or lewd speech. *Id.* at 634. *See*, Anne Proffitt Dupre, *Should Students Have Constitutional Rights? Keeping Order in the Public Schools*, 65 GEO. WASH. L. REV. 49 (1996), and Bruce C. Hafen, *Developing Student Expression Through Institutional Authority: Public Schools as Mediating Structures*, 48 OHIO ST. L.J. 663 (1987), for defenses of student rights as grounded in protectionism rather than personhood.

117. *Hazelwood Sch. Dist. v. Kuhlmeir*, 484 U.S. 260 (1988). In *Kuhlmeir*, the Court upheld the actions of a school principal who exercised editorial control over the contents of articles written by student staff members for their school newspaper. *Id.* at 263–64. The Court rejected First Amendment claims of the students after the principle deleted the articles, viewing them as offensive and inappropriate, in an attempt to protect immature students who were part of the audience for the newspaper. *Id.* at 267–73.

118. *Morse v. Frederick*, 551 U.S. 393 (2007). The *Morse* Court upheld the actions of a principal who suspended students who refused to take down a banner reading “BONG HITS 4 JESUS,” which the principal considered to advocate illegal drug use. *Id.* at 397–98. The Court found that the principal had a responsibility to protect students from speech that reasonably could be regarded as advocating illegal drug use, a responsibility that outweighed the students’ claims that the banner constituted protected speech. *Id.* at 408–10.
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school search and seizure cases the Court has accorded less than full
Fourth Amendment protection to students, recognizing broad power
in educators to oversee the school environment.119

Like Tinker, Carey v. Population Services International120 is a case that
some understand as recognizing personhood rights but others see as
grounded in protectionism. In Carey, the Supreme Court struck down
a New York statute banning, inter alia, distribution of contraceptives
to anyone under age sixteen.121 The Court rejected the State’s argu-
ment that prohibiting access of contraceptives constituted a constitu-
tionally permissible regulation of promiscuous sexual activity among
the young.122 A plurality of Justices noted that “[s]tate restrictions in-
hibiting privacy rights of minors are valid only if they serve . . . ‘[a]
significant state interest that is not present in the case of an adult.’”123
Finding that the “right to privacy in connection with decisions affect-
ing procreation extends to minors as well as to adults,”124 the plural-
ity125 ruled that the statute could not reasonably achieve the State in-
terest of deterring sexual activity.126 However, the Court left open the

119. See New Jersey v. T.L.O., 469 U.S. 325 (1985) (holding that the Fourth Amendment
applies to schools but is subject to a “reasonable suspicion” standard rather than the traditional
“probable cause” test, in part because students enjoy lesser privacy expectation). See Martin R.
Gardner, The Fourth Amendment and the Public Schools: Observations on an Unsettled State of Search
and Seizure Law, 36 CRIM. L. BULL. 373, 374–380 (2000), for an argument that T.L.O. grants
broad deference to school officials to search students and minimal privacy protection to students.

See also Vernonia Sch. Dist. v. Acton, 515 U.S. 646 (1995) (upholding random urinalysis
searches of all athletes at a high school). The Acton Court found minimal student privacy interests
involved in the case and saw the school as the temporary custodian of its students which for many
purposes “act[s] in loco parentis.” Id. at 655; Board of Educ. v. Earls, 536 U.S. 822 (2002) (uphold-
ing a requirement for all students participating in any extracurricular activity to consent to a
strip search of student violates Fourth Amendment).

121. Id. at 681–82.
122. Id. at 691–96.
123. Id. at 693 (quoting Planned Parenthood v. Danforth, 428 U.S. 52, 74 (1976), discussed
infra at text accompanying notes 128–134).
124. Id.
125. Only Justices Brennan, Stewart, Marshall, and Blackmun recognized the privacy right
extension to minors. Id. at 691 n.12.
126. Id. at 695.
question of whether discouraging sexual activity of minors was itself an unconstitutional infringement of protected privacy, observing that its “decision proceeds on the assumption that the Constitution does not bar state regulation of the sexual behavior of minors.”

At the same time the Court noted that access to contraceptives “is essential to exercise of the constitutionally protected right of decision in matters of childbearing.” Thus, the Court was clear that minors have a constitutional right to possess contraceptives, which they may or may not have a constitutional right to use. Concurring Justices White and Stevens specified where they stood on whether minors have a privacy right to engage in premarital sexual activity, viewing as “frivolous” the argument that a minor has a constitutional right “to put contraceptives to their intended use notwithstanding the combined objection of both parents and the State.”

While some interpret Carey demonstrating the Court’s support of a minor’s “right to decide whether or not to beget a child,” others see the case as grounded in protectionism, claiming that Carey reflects the Court’s belief that the statute did not grant a “right to procreation,” but rather failed to deter sexual activity of minors. On this view, the “real fear” in Carey was that the denial of contraceptives left sexually active minors unprotected from the risks of “unwanted preg-

127. Id. at 694 n.17.
128. Id. at 688. In a dissenting opinion in a later case, Justices Brennan, Marshall, and White noted that “[i]n minors, . . . enjoy a right of privacy in connection with decisions affecting procreation,” claiming that “it is not settled that a State may rely on a pregnancy-prevention justification to make consensual sexual intercourse among minors a criminal act.” Michael M. v. Superior Court, 450 U.S. 464, 491 n.5 (1981) (upholding California’s statutory rape provision punishing only males against an equal protection challenge) (Brennan, J., dissenting).
In the context of an adult attack on a state fornication statute, one court remarked that “[i]n necessarily implicit in the right to make decisions regarding childbearing is the right to engage in sexual intercourse.” Doe v. Duling, 603 F. Supp. 960, 966 (E.D. Va. 1985), rev’d on other grounds, 782 F. 2d 1202 (4th Cir. 1986).
129. Id. at 702–03 (White, J., concurring, quoting Stevens, J., concurring at 713).
130. See, e.g., DAVIS, supra note 2, at 88.
131. See, e.g., Hafen, Constitutional Status, supra note 4, at 512.
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nancy and venereal disease”132 thus rendering Carey a “protection rights case.”133

C. Personhood Rights—the Abortion Cases

It is widely understood that certain cases granting minor women the right to terminate their pregnancies constitute the clearest, if not the only, examples of Supreme Court recognition of juvenile personhood rights.134 The leading case is Planned Parenthood v. Danforth in which the Court invalidated a state statute that, inter alia, conditioned a minor’s ability to obtain an abortion on the consent of her parent.135 Viewing the case as “an anticipated corollary to Roe v. Wade,”136 the Planned Parenthood Court found that “[m]inors as well as adults . . . possess constitutional rights.”137 The Court rejected the argument that permitting a minor to obtain an abortion without the counsel of an adult having responsibility for the child would be an abdication of “the State’s duty to protect the welfare of minors,”138 declaring that “[c]onstitutional rights do not mature and come into being magically only when one attains the state-defined age of majority.”139 Permitting minors to obtain abortions without parental consent posed no threat to parental authority or family unity in the eyes of the Court. Judging the privacy right of the minor to be at least the equivalent of her parents’ rights to rear their child, the Court proclaimed: “Any independent interest the parent may have in the termination of the minor daughter’s

132.  Id. at 512–13 (quoting Carey v. Population Services International, 431 U.S. at 715 (Stevens, J., concurring in part)).
133.  Id. at 513.
134.  See, e.g., id. at 514: “[T]he right of minors to obtain abortions without parental consent has become the major exception to the Court’s overall posture [against] granting [personhood] rights to minors.”
136.  Id. at 55. Roe v. Wade, 410 U.S. 113 (1973) (recognizing an unfettered right of privacy for pregnant women to decide with her physician to terminate her pregnancy during the first trimester of the pregnancy).
137.  Planned Parenthood, 428 U.S. at 74.
138.  Id. at 72–73 (quoting Brief for Appellee Danforth at 44).
139.  Id. at 74.
pregnancy is no more weighty than the right of privacy of the competent minor mature enough to have become pregnant.\textsuperscript{140}

\textit{Planned Parenthood} did not establish that every minor, regardless of age or maturity, is entitled to give effective consent for termination of her pregnancy. In \textit{Bellotti v. Baird}, the Court recognized that some pregnant minors may in fact be too immature to make the abortion decision.\textsuperscript{141} Therefore, the Court authorized a procedure for a pregnant minor to bypass her parents and obtain judicial consent for an abortion by demonstrating either that (1) she is sufficiently mature to make an informed decision to terminate her pregnancy or (2) that even if she is incapable of making her own decision an abortion would be in her best interests.\textsuperscript{142}

Despite \textit{Bellotti}'s seeming recognition of personhood rights, Justice Powell in his plurality opinion for the Court observed that while minors are “not beyond the protection of the constitution,” their “peculiar vulnerability[,] their inability to make critical decisions in an informed, mature manner[,] and the importance of the parental role in child rearing” meant that “the constitutional rights of children cannot be equated with those of adults.”\textsuperscript{143} Further justifying the need for judicial oversight of the abortion decision, the Court voiced a view sim-

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\textsuperscript{140} Id. at 75. The Court’s views are in sharp contrast to those taken in the \textit{Parham} case. See supra text and notes 68–73. \textit{Planned Parenthood} may appear at first glance as a clear accommodation to “pro-choice” advocates of abortion rights. However, had the case recognized a parent’s right to veto their daughter’s decisions to terminate her pregnancy, it would follow that a corresponding parental right would exist to impose an abortion on a daughter desiring to have her baby. See Hartman, supra note 12, at 1346–47. Such a situation would clearly be offensive to “pro-life” interests. For a case holding that a mother could not invoke state status offense jurisdiction over “incorrigible, ungovernable, and habitually disobedient” children because of her daughter’s refusal to have an abortion, see \textit{In re Mary P.}, 444 N.Y.S. 2d 545 (N.Y. Fam. Ct. 1981). The Court found that \textit{Planned Parenthood}'s privacy protections extend not only to a right to abort but also to “the decision to give birth.” Id. at 547.


\textsuperscript{142} Id. at 643–44, 647–48.

\textsuperscript{143} Id. at 633–34. For criticism of these views as “dubious in light of scientific studies suggesting adolescent decisional ability,” see Hartman, supra note 12, at 1348; see also supra text accompanying notes 55–61.

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ilar to that later expressed in Parham, again with no empirical support:144 “[A]dolescent[s] . . . often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them.”145

Bellotti thus blest a system that assessed, on a case-by-case basis,146 the maturity of minors seeking to terminate their pregnancies. Those found sufficiently mature are granted the personhood right to make their own decision, while those deemed immature are protected by a judicial judgment promoting “her best interests.”147

Significantly, the Bellotti Court suggested that recognition of a minor’s personhood rights might be limited to the abortion context, noting that the abortion decision “differs in important ways from other decisions that may be made during minority.”148 Unlike other rights, such as marriage that are denied minors only temporarily, “a pregnant adolescent cannot preserve . . . for long the possibility of aborting, which effectively expires in a matter of weeks after the onset of pregnancy.”149 Moreover, “unwanted motherhood may be exceptionally burdensome for a minor,” given likely lack of education, employment skills, financial resources, and emotional maturity.150 “In sum,” noted the Court, “there are few situations in which denying a minor the right to make an important decision will have consequences so grave and indelible.”151

D. Parental Rights

As the above discussion makes clear, the Supreme Court has long recognized parents’ rights to raise their children and to make decisions

144. See supra text accompanying notes 97–102
146. Such an individualized assessment of maturity constitutes a sharp break from the traditional appeal to chronological age as defining adulthood. See supra text accompanying notes 68–73.
148. Id. at 642.
149. Id.
150. Id.
151. Id.
in their behalf.152 Except in the contexts of abortion,153 and state interventions made necessary in cases of parental neglect or abuse,154 these rights are generally honored as essential to the child’s maturation to responsible adulthood. In summarizing its case law, the Court observed that “constitutional interpretation has consistently recognized that the parents’ claim to authority in their own household to direct the rearing of their children is basic in the structure of our society.”155 Even in the context of abortion, where states have imposed parental notification requirements prior to a minor’s abortion, the Court has recognized a parental role in participating in the abortion decision as consistent with “the important considerations of family integrity and protecting adolescents.”156

In a case dealing with the rights of an unwed father to a parental relationship with his children, impeded by a statute making the children wards of the state upon the death of their mother,157 the Court said:

The private interest here, that of a man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection. It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children “come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements.”158

152. See supra text accompanying notes 77–80, 89–102.
153. See supra text accompanying notes 134–140.
154. See DAVIS, supra note 2, at 165–75.
156. Id. at 411. The Court made the statement assuming that minors were “immature and dependent.” Id. See also Ohio v. Akron Center for Reproductive Health, 497 U.S. 502 (1990) (upholding a parental notification statute which provided a judicial bypass procedure for pregnant minors who establish that (1) they are sufficiently mature to make an intelligent decision to terminate their pregnancies without notice to their parents or (2) that they have suffered abuse at the hands of their parents).
158. Id. at 651.
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In a subsequent case, the Court described parental rights as the “care, custody, and control of their children” as “perhaps the oldest of the fundamental liberty interests recognized by this Court.” Such statements, as well as the general protectionist tenor of the Court’s juvenile rights cases, make clear that a child faces substantial difficulties in successfully asserting constitutional claims that conflict with her parents’ reasonable attempts to care for, protect, and control the child.

IV. The Juvenile Punishment Cases

In sharp contrast to the cases discussed in the previous section—where the Supreme Court made no attempt to ground its decisions in social science data—in a series of cases deciding Eighth Amendment issues, the Court directly appealed to empirical data in finding adolescents to be categorically different from adults for purposes of Cruel and Unusual Punishments Clause analysis. The following review of the punishment cases will describe the Court’s view of the nature of adolescence and address whether that view may extend beyond the context of criminal punishment to other areas of juvenile law.

A. The Death Penalty Cases

In the first in a series of cases questioning the constitutionality of imposing the death penalty on criminal defendants who committed murder while juveniles, the Court in Thompson v. Oklahoma held that the Cruel and Unusual Punishments Clause of the Eighth Amendment forbids inflicting capital punishment on offenders who commit murder when fifteen-years-old or younger. In finding that children that young

161. The cases all involve criminal, rather than juvenile, court convictions. For a discussion of various mechanisms for waiving jurisdiction from juvenile to criminal court, see GARDNER, supra note 26, at 188–90.
are not capable of acting with sufficient culpability to justify the ultimate penalty, the Court\(^\text{163}\) appealed to “the experience of mankind” as evidence of the differences that exist between young people and adults, which must be acknowledged in determining the rights and duties of minors and adults respectively.\(^\text{164}\) The Court observed that there is “broad agreement” that adolescents are “less mature and responsible than adults.”\(^\text{165}\) They are also “more vulnerable, more impulsive and less self-disciplined than adults.”\(^\text{166}\) Thus, less culpability should attach to a crime committed by a juvenile than to a comparable crime committed by an adult. While the basis for this conclusion was “too obvious to require extended explanation,”\(^\text{167}\) the Court nevertheless explained “[i]nexperience, less education, and less intelligence make the teenager less able to evaluate the consequences of his or her conduct while at the same time he or she is much more apt to be motivated by mere emotion or peer pressure than is an adult.”\(^\text{168}\) Interestingly, the Court footnoted a host of social science data supporting its conclusions about adolescents but did not directly relate the studies to its analysis.\(^\text{169}\)

The social science data referenced in Thompson burst to the forefront in Roper v. Simmons,\(^\text{170}\) which held that the Eighth Amendment prohibits execution of offenders who were under age eighteen at the

\(^{163}\) A four-justice plurality issued the opinion for the Court.

\(^{164}\) Thompson, 487 U.S. at 824–25. In addition to its conclusion that adolescents are less culpable than adults, the Court also grounded its holding on the “evolving standards of decency” as reflected by the reluctance of state legislatures and juries to impose the death penalty on offenders under age sixteen who commit capital crimes. Id. at 821–31.

\(^{165}\) Id. at 834.

\(^{166}\) Id. (quoting 1978 Report of the Twentieth Century Fund Task Force on  Sentencing Policy Toward Young Offenders as quoted in Eddings v. Oklahoma, 455 U.S. 104, 115 n.11 (1982)).

\(^{167}\) Thompson, 487 U.S. at 835.

\(^{168}\) Id.

\(^{169}\) “The . . . decision in Thompson does not speak explicitly in the language of adolescent development or support its arguments with scientific research on adolescents’ capacities.” Lawrence Steinberg & Elizabeth S. Scott, Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty, 58 AM. PSYCHOLOGIST 1009, 1013 (2003).

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time they committed capital crimes.\textsuperscript{171} The infrequency of state imposition of the death penalty on juveniles,\textsuperscript{172} coupled with empirical evidence suggesting differences between adolescents and adults, convinced the Court that juveniles are “categorically less culpable” than average adult offenders,\textsuperscript{173} thus rendering them immune from the death penalty.

Appealing directly to recent studies, the Court identified three general characteristics of adolescents that differentiate them from adults: (1) “[a] lack of maturity and underdeveloped sense of responsibility”\textsuperscript{174} manifesting itself in propensities to engage in reckless behavior and impetuous and ill-considered actions and decisions; (2) a vulnerability and susceptibility to negative influences and outside pressures, including peer pressure; and (3) less character development than adults with more transitory, and fewer fixed, personality traits.\textsuperscript{175} Rejecting traditional arguments in favor of case-by-case assessments in assessing culpability in administering the death penalty,\textsuperscript{176} the Court concluded: “The differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive the death penalty despite insufficient culpability.”\textsuperscript{177}

In addition to lack of culpability, the Court emphasized that due to the transitory nature of their character development, adolescent offenders are uniquely amenable to rehabilitation. The Court noted that “it would be misguided to equate the failings of a minor with those of

\textsuperscript{171} Between the time of \textit{Thompson} and \textit{Roper}, the Court decided \textit{Stanford v. Kentucky}, 492 U.S. 361 (1989), which upheld imposition of the death penalty for murderers who were sixteen or seventeen-years-old at the time of their crimes. Justice Scalia dismissed as "ethicscientific" an array of evidence similar to that cited in Thompson showing the differences between adolescents and adults. \textit{Id.} at 377–78. On the other hand, Justice Brennan in dissent was persuaded by studies showing that adolescents have less capacity than adults "to think in long range terms," while having "little fear of death," and possessing "a profound conviction of their own . . . immortality." \textit{Id.} at 404–05 (Brennan, J., dissenting).

\textsuperscript{172} \textit{Roper}, 543 U.S. at 564–67.

\textsuperscript{173} \textit{Id.} at 567.


\textsuperscript{175} \textit{Id.} at 569–70.

\textsuperscript{176} \textit{Id.} at 572.

\textsuperscript{177} \textit{Id.} at 572–73.
an adult, for a greater possibility exists that a minor’s character deficiencies will be reformed.”

In fashioning its categorical rule, the Court argued that fixing the line for eligibility for the death penalty at age eighteen was not an arbitrary choice, noting that in light of the transitory personality development of adolescents, psychiatrists are subject to a rule forbidding them from diagnosing any patient under age eighteen as having a personality disorder. Moreover, the “age of eighteen is the point where society draws the line for many purposes between childhood and adulthood.”

Justice Scalia in dissent called into question the Court’s appeal to social science evidence. In addition to raising questions about possible methodological problems with the studies, Scalia cited the studies described above—for him contradicting the Court’s conclusion that adolescents lack the ability to take moral responsibility for their decisions—showing 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.” Scalia also chided the Court for its categorical rule, claiming that the studies cited by the Court offer “scant support” for a categorical prohibition, showing at

178. Id. at 570.

179. Observing that “the relevant differences between “adults” and “juveniles” appear to be a matter of degree rather than of kind,” Justice O’Connor in dissent disagreed:

Chronological age is not an unfailing measure of psychological development, and common experience suggests that many 17-year-olds are more mature than the average young “adult.” In short, the class of offenders exempted from capital punishment by today’s decision is too broad and too diverse to warrant a categorical prohibition. Indeed, the age-based line drawn by the Court is indefensibly arbitrary—it quite likely will protect a number of offenders who are mature enough to deserve the death penalty and may well leave vulnerable many who are not.

Roper, 543 U.S. at 600–02 (O’Connor, J., dissenting).

180. Id. at 573.

181. Id. at 574.

182. Id. at 617 (Scalia, J., dissenting).

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most that “on average . . . persons under 18 are unable to take responsibility for their actions,” and not that “all individuals under 18 are unable to appreciate the nature of their crimes.”\footnote{184} Citing \textit{Bellotti} and \textit{Planned Parenthood},\textsuperscript{185} Scalia observed that “at least some minors will be mature enough to make difficult decisions that involve moral considerations,” concluding that “[w]hether to obtain an abortion is surely a much more complex decision for a young person than whether to kill an innocent person.”\textsuperscript{186}

\textbf{B. The Mandatory Life Imprisonment Cases}

Five years later, in \textit{Graham v. Florida}, the Court reiterated the \textit{Roper} categorical distinction between adolescents and adults in holding unconstitutional mandatory life imprisonment sentences for offenders committing non-homicide crimes when under eighteen-years-of-age.\textsuperscript{187}

After finding a national consensus against the use of mandatory life sentences for juveniles committing crimes other than homicide,\textsuperscript{188} the Court addressed the question of juvenile culpability. Reaffirming the \textit{Roper} three-component recognition of adolescent/adult differences,\textsuperscript{189} the Court noted that “developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds.”\textsuperscript{190}

The Court again emphasized that juvenile offenders manifest a unique “capacity for change,” which makes them “most . . . receptive to rehabilitation.”\textsuperscript{191} A sentence of life without parole eliminates the possibility of rehabilitation.\textsuperscript{192} Given the limited culpability of juveniles and the severity of life-without-parole sentences, coupled with juvenile

\begin{itemize}
\item \textsuperscript{184} \textit{Roper}, 543 U.S. at 618 (emphasis omitted).
\item \textsuperscript{185} \textit{See supra} notes 135–147 and accompanying text.
\item \textsuperscript{186} \textit{Roper}, 543 U.S. at 620.
\item \textsuperscript{187} \textit{Graham v. Florida}, 130 S. Ct. 2011, 2030 (2010).
\item \textsuperscript{188} \textit{Id.} at 2023–27.
\item \textsuperscript{189} \textit{Id.} at 2026–27. \textit{See supra} notes 175–177 and accompanying text.
\item \textsuperscript{190} \textit{Graham}, 130 S. Ct. at 2026.
\item \textsuperscript{191} \textit{Id.} at 2030.
\item \textsuperscript{192} \textit{Id.}
\end{itemize}
offenders’ amenability to rehabilitation, the Court concluded that such sentences constituted cruel and unusual punishment.\textsuperscript{193}

As in Roper, the Graham Court defended the “clear line” of age eighteen as the basis for distinguishing juveniles and adults, repeating Roper’s reliance on that age as “the point where society draws the line.”\textsuperscript{194} In defense of its “categorical” rejection of mandatory sentences, the Court downplayed a case-by-case sentencing approach, noting that even if we were to assume that some juvenile non-homicide offenders might have “sufficient psychological maturity and at the same time demonstrate sufficient depravity” to merit a life-without-parole sentence, it does not follow that courts taking a case-by-case proportionality approach could, with sufficient accuracy, distinguish the few incorrigible juvenile offenders from the many that have the capacity for change.\textsuperscript{195}

In a concurring opinion, Chief Justice Roberts agreed with the majority that “Roper’s conclusion that juveniles are typically less culpable than adults has pertinence beyond capital cases,”\textsuperscript{196} but opposed a categorical rule outside the death penalty context.\textsuperscript{197} Treating life sentences as analogous to capital punishment was, for Roberts, “at odds with [the] longstanding view that ‘the death penalty is different from other punishments in kind rather than degree.’”\textsuperscript{198}

Shortly after Graham, the Court in Miller v. Alabama\textsuperscript{199} again extended Eighth Amendment protection in finding it cruel and unusual punishment to impose mandatory life sentences without parole for those committing murder when under age eighteen at the time of their crimes.\textsuperscript{200} The Court once more emphasized the Roper/Graham posi-

\textsuperscript{193} Id.
\textsuperscript{194} Id.
\textsuperscript{195} Id. at 2032 (quoting Roper, 543 U.S. at 572) (citations omitted).
\textsuperscript{196} Id. at 2039 (Roberts, C.J., concurring).
\textsuperscript{197} Id. at 2038–39, 2041–42.
\textsuperscript{198} Id. at 2038–39 (quoting Solem v. Helm, 463 U.S. 277, 294 (1983)). Justice Thomas, in dissent, agreed. See Graham, 130 S. Ct. at 2046–49 (Thomas, J., dissenting).
\textsuperscript{200} Id. at 2475.
tion that “children are constitutionally different from adults for purposes of sentencing,” finding in fact that the science supporting those differences had become “even stronger,” while observing that the logic of Graham was not limited to non-homicide cases. “[N]one of what [Graham] said about children—about their distinctive . . . mental traits and environmental vulnerabilities—is crime specific.” The Court concluded that sentencing a juvenile to mandatory life without parole precludes consideration of his chronological age and its hallmark features—among them “immaturity, impetuosity, and failure to appreciate risks and consequences,” as well as “the possibility of rehabilitation.” As in Graham, Chief Justice Roberts dissented in Miller. Identifying the principle behind the majority’s decision to be “that because juveniles are different from adults, they must be sentenced differently,” Roberts saw no logical way to avoid the eventual unconstitutionality of all criminal punishment of juveniles under that principle.

C. The Adolescent/Adult Distinction: Implications Beyond Punishment Contexts

The punishment cases constitute an unambiguous expression of protectionist rights. Moreover, the cases constitute the Court’s first attempt to identify the dissimilarity between adults and juveniles through the use of social science evidence. A leading commentator

201. Id. at 2464.
202. Id. at 2465, n.5.
203. Id. at 2465.
204. Id. at 2468.
205. Id. at 2482 (Roberts, C.J., dissenting).
206. Id. at 2482. One year prior to Miller, the Court referred to Roper and Graham in concluding that juveniles “are more vulnerable or susceptible to . . . outside pressures than adults.” J.D.B. v. North Carolina, 131 S. Ct. 2394, 2403 (2011) (holding that age is a relevant factor to be taken into account when deciding whether a suspect is in “custody” for purposes of deciding whether or not Miranda warnings must be given).
207. Samantha Schad, Adolescent Decision-making: Reduced Culpability in the Criminal Justice System and Recognition of Complexity in Other Legal Contexts, 14 J. HEALTH CARE L. & POL’Y 375, 388 n.124 (2011) (“Roper was the first time the Supreme Court applied psychological studies to the area of juvenile law”).
has observed that “the Court has broken new ground in a scientific venture to decipher the young minds of those who violate the law.”

While the cases are clearly significant in criminal, and arguably juvenile, justice areas, it is unclear how wide-ranging their precedential value will be.

Three possibilities appear: (1) the protectionist concept expressed in the punishment cases could be limited to responsibility assessments of juveniles in punishment regimes; (2) the concept could extend beyond issues of juvenile responsibility to any determination of the rights of juveniles; or (3) the concept could extend outside punishment contexts to some, but not all, identifications of juvenile rights and responsibilities. The following discussion suggests that if the Court continues to be influenced by extant social science, the third possibility is the most likely.

1. Punishment only

The three adolescent characteristics identified by the Court in the punishment cases—(1) propensity to engage in reckless (risky) behavior, (2) susceptibility to peer pressure, and (3) transitory character development—all speak directly to culpability issues and amenability to rehabilitation within the criminal and juvenile justice systems. The first two characteristics suggest that the retributive and deterrent goals of punishment are less applicable to minors than to adults, while the third consideration supports the view that the interest of punitive systems in lengthy incapacitation of dangerous offenders is less applicable to juveniles given their unique potential for rehabilitation. Apart from the context of state regulation of sexual activity discussed later in this paper, it is difficult to imagine other juvenile law settings where all

209. See Justice Roberts’s observation, supra text accompanying note 206.
210. See Denno, supra note 208, at 396; Schad, supra note 207, at 388 (“In the future, support for neuroscience and psychology will most likely continue to influence the Court’s reasoning regarding juvenile punishment, and may also begin to affect other areas of juvenile law.”).
212. Graham, 130 S. Ct. at 2029. See supra text accompanying notes 177, 191–193, and 204.
three of the characteristics the Court found so relevant to punishment issues would be equally apposite.213

Yet, the import of the punishment cases seems to extend beyond punishment contexts to any situation in which the three characteristics (or any of them?) are relevant in deciding the given controversy. As one commentator noted, “[t]o the extent that researchers can reliably identify contexts in which adolescents are likely to make competent decisions, and others in which they are less likely to do so, developmental science might usefully inform law or policy.”214 Another observed that the “possible applications of the ‘kids are just different’ argument [of the punishment cases] abound” in a variety of contexts including such things as the ability to enter into contracts.215

2. Universal protectionism

At the other extreme, it could be argued that the Court has finally settled on a thoroughgoing recognition of protectionist rights, based on sound social science and applicable to all contexts of juvenile law, thus answering the call for a systematic and “coherent, consistent policy with respect to children’s rights.”216 To the extent that the punishment cases recognize immutable characteristics of adolescence, the cases suggest that once and for all the Court has embraced the view that “juveniles, as a class, have unique needs for protection and guidance that are greater than and different from the needs of adults.”217

213. Professor Emily Buss has cautioned that the research utilized in the punishment cases “may be most useful, and least dangerous, whereas in the context of juvenile antisocial behavior, it confirms conventional wisdom and therefore supports policies safely within the mainstream.” Emily Buss, Rethinking the Connection between Developmental Science and Juvenile Justice, 76 U. CHI. L. REV. 493, 494 (2009). See infra notes 258–365 and accompanying text, for a discussion of the constitutionality of fornication statues applied to minors.


216. See supra text accompanying note 2.

217. Marsha Levick et al., The Eighth Amendment Evolves: Defining Cruel and Unusual Punishment through the Lens of Childhood Adolescence, 15 U. PA. J.L. & SOC. CHANGE 285, 292, 297 (2012) (commenting that the scientific research utilized in the punishment cases “fully back[s]” the view that “kids are different”).
Such a finding would appear to preclude recognition of personhood rights for juveniles.

Interpreting the social science conclusions buttressing the punishment cases as committing the Court exclusively to an immutable protectionist concept of juvenile rights may be mistaken, however, for several reasons. In the first place, no scientific data ever settles anything indefinitely. As Emily Buss points out, even the most careful reliance on the best developmental research is subject to change over time.218 Overreliance on scientific evidence runs the risk that the law “will lock in a development status quo” that might eventually turn out to be misguided.219 Moreover, Professor Buss notes that “context clearly plays a role in minors’ development, and expectations and experiences can accelerate or slow down minors’ progress toward maturity.”220 Therefore “there is nothing inherent about an adolescent’s blameworthiness however well we understand the progress of their development, and it is up to the law, not developmental science, to assign that blame,” in light of not just scientific, but also legal and moral, considerations.221

Additional considerations argue against unlimited extension of the rationale of the punishment cases. While the cases provide scientific support for traditional protectionist principles holding that adolescents are different from adults, as mentioned above, other research—reflected in the Supreme Court’s abortion case law—indicates no differences, at least in contexts such as medical treatment decision making.222 Thus, in the words of one commentator, “the state can, does, and should distinguish between the competence necessary to have an abortion—and the relative moral blameworthiness and capacity for change that justifies differential treatment when accused of a crime.”223

219. Id. at 508–09.
220. Id.
221. Id. at 510. Professor Vivian Hamilton adds: “Policy making . . . often requires definite, clearly bounded categories. Developmental science may usefully inform but cannot determine these.” Hamilton, supra note 214, at 1117.
222. See supra text accompanying notes 53–57, 126–137.
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However, this seeming conflict between the protectionism of the punishment cases and the personhood underpinnings of the abortion context can be explained, if not reconciled, by viewing the abortion decisions as *sui generis.* Thus, juveniles would possess protectionist rights in all situations except abortion decision making.

Whatever the legal and policy merits of such a view, leading social scientists argue that sound empirical data provides the basis for a broader recognition of personhood rights while, at the same time, embracing the science underlying the protectionism of the punishment cases. They argue that no contradiction is involved in holding that adolescents function like adults in some contexts and differently in others:

[W]e believe that the . . . seemingly contradictory positions in [abortion decision making] and [culpability for criminal offenses] are in fact quite compatible with research on age differences in cognitive and psychosocial capacities. More specifically, our findings, as well as those of other researchers, suggest that whereas adolescents and adults perform comparably on cognitive tests measuring the sorts of cognitive abilities [entailed in abortion decisions], abilities that permit logical reasoning about moral, social and interpersonal matters—adolescents and adults are not of equal maturity with respect to the psychosocial capacities listed by [the Court] in *Roper*—capacities such as impulse control and resistance to peer influence. Not only were the legal issues different in the . . . cases, but so are the circumstances surrounding abortion decisions and criminal behavior, and therefore, the relevant dimensions along which adolescents and adults should be compared differ as well. Unlike adolescents’ decisions to commit crimes, which are usually rash and made in the presence of peers,

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224. See the Court’s comments in *Bellotti v. Baird* 443 U.S. 622 (1979), *supra* notes 141–144 and accompanying text. Professor Elizabeth Scott argues that “many . . . features distinguish abortion from routine medical decisions, and give rise to arguments that pregnant teens should be deemed adults in this context.” Elizabeth S. Scott, *The Legal Construction of Adolescence*, 29 HOFSTRA L. REV. 547, 569–70 (2000). In addition to noting the concerns expressed in *Bellotti*, Professor Scott suggests a protectionist element involved in permitting minors to make abortion decisions: “[G]iven the health risks of pregnancy and childbirth, and the consequences for the girl’s future welfare, the paternalistic argument for making abortion available to minors is a powerful one.” Id. at 570.
adolescents’ decisions about terminating a pregnancy can be made in an unhurried fashion and in consultation with adults.225

On this view, the boundary between adolescence and adulthood should be drawn differently for some purposes than for others.226 For decision-making contexts that allow for unhurried logical reflection, adolescents might generally and justifiably be treated as adults.227 At the same time, in situations involving emotional arousal, pressure from peers, or risky and impulsive behavior, the protectionism embodied in the punishment cases should prevail.228

225. Laurence Steinberg et al., supra note 62, at 586. Professor Vivian Hamilton adds: [T]he ability to reason reaches mature levels by mid-adolescence, around age sixteen. . . . The heightened vulnerability to risk taking that peaks in middle adolescence before declining is normative; to the extent that it has a neurobiological basis, efforts to reduce risk taking through education will have limited success. While adolescents have the cognitive capacities to make rational decisions, real-world contexts and stressors will continue to confound their capacities and impede their decision-making. So far, only aging (and, presumably, the neural development that attends it) reliably and significantly correlates with decreases in adolescent risk taking. As a result of this ongoing development, adolescents’ decision-making abilities will be both age dependent and context specific.


226. Steinberg et al., supra note 62, at 592.

227. Id. See also Schad, supra note 207, at 399 (arguing that adolescents in “structured circumstances,” such as those involved in end of life decisions, should be free to give their own informed consent).

228. Steinberg et al., supra note 62, at 592; Hamilton, supra note 214, at 1109–10 (adolescents engage in higher rates of risky behavior than do adults when in “emotionally charged” or “pressured situations” despite being as knowledgeable, logical, reality-based, and accurate when thinking about risky activity as their elders). It may often be difficult to determine whether a given case constitutes one of “unhurried logical reflection,” where adolescents could enjoy personhood rights, or one of “emotional arousal” influenced by peer pressure, where protectionism prevails. Consider, for example, a situation where a juvenile asserts a right to be emancipated from her parents over their objection. While “unhurried logical reflection” may be present, emancipating oneself from one’s parents may be deemed a heady matter for many teenagers, thus generating peer influence to seek emancipation. For a case where an eighteen-year-old filed for emancipation over the objection of her parents, see Ort v. Ort, 42 A.3d 1072 (N.J. Super. Ct. Ch. Div. 2012). See also, In re Snyder, 532 P.2d 278 (Wash. 1975) (sixteen-year-old petitioned court
3. Contextual protectionism

Assuming the validity of the social science described above, it is fair to say that the scientific rationale of the punishment cases extends beyond culpability issues within the criminal or juvenile justice contexts, while not necessarily mandating protectionism throughout the whole of juvenile law. While it is not readily apparent how extensive the precedential value of the punishment cases will be, they seem clearly relevant in cases assessing constitutional rights of juveniles in contexts involving risky conduct. The punishment cases are arguably also applicable in situations involving decisions and actions by juveniles that are not risky in nature, but that might nevertheless be influenced by desires to gain peer approval or to avoid peer rejection.

To illustrate their potential impact on issues other than juvenile culpability, the next section relates the punishment cases to a hypothetical situation of a juvenile asserting a claim of a constitutional right to engage in acts of sexual intimacy, in violation of state statute and against the wishes of her parents. Although the case is hypothetical, it is derived from fact situations of actual lower court cases.

V. The Punishment Cases and State Prohibitions of Fornication between Juveniles

The Supreme Court has rarely addressed constitutional controversies where the interests of parents and the State align against a juvenile.

to declare her an “incorrigible child,” over objection of her parents, in order to be removed from her parents’ custody).

229. See supra text and notes 222–225.

230. The Court has already referenced the punishment cases in a situation not dealing with culpability issues. See J.D.B. v. North Carolina, 131 S. Ct. 2394 (2011). It remains to be seen whether the Court will eventually recognize the studies equating adolescent and adult cognitive capabilities. See supra, notes 222–225 and accompanying text. Such recognition may suggest a wider recognition of personhood rights and a rethinking of some prior cases. See, e.g., discussion of the Parham case, supra notes 97–98 and accompanying text.

231. Peer influence affects adolescent judgment through “direct” peer pressure, as when they are induced to take risks they might otherwise avoid, and also “indirectly” through the desire for peer approval, and consequent fear of rejection, even without direct coercion. ELIZABETH S. SCOTT & LAURENCE STEINBERG, RETHINKING JUVENILE JUSTICE 38–39 (2008).

232. Id. See, e.g., the emancipation example, supra note 228.
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However, a possible candidate that could reach the Court in the near future concerns the unsettled question of whether fornication statutes can constitutionally be applied to adolescents who engage in private consensual sexual activities with other adolescent partners. This section will analyze that issue, taking into account the impact of the Court’s recent punishment cases. The discussion will show that application of those cases leads to a decisive finding of constitutionality, which would be uncertain without their precedent.

A. Kathy’s Case: Framing the Issue

Suppose a mother and father have a fifteen-year-old daughter, Kathy. The mother hears a noise in Kathy’s bedroom at 3:00 in the morning on a school day. The mother opens the bedroom door, enters the room to check on Kathy, and immediately notices that a bedroom window is open wide enough for a person to enter. Upon turning on the bedroom light, the mother discovers Kathy engaged in sexual intercourse with a young man, Mike, also fifteen-years-old, whom Kathy had secretly invited into her room. The mother, who has taught Kathy the virtues of sexual abstinence prior to marriage, is shocked, surprised, and upset by her discovery.

Having experienced a long history of rebellion by Kathy against a variety of family rules, Kathy’s parents decide to elicit state assistance in governing their child. They request that Kathy be adjudicated a child in need of supervision.

233. The facts in the text correspond roughly to those of In re J.M., 575 S.E. 2d 441 (Ga. 2003), discussed in detail, infra note 263 and accompanying text.

both Kathy and Mike with an act of delinquency for violating the state fornication statute. Kathy’s parents support the delinquency action,

235. Fornication, in the context of penal law, is the crime of voluntary sexual intercourse between unmarried parties. A HANDBOOK OF CRIMINAL LAW TERMS 279 (Bryan A. Garner, ed. (2000)). While now constitutionally suspect, see infra notes 239–258 and accompanying text, fornication prohibitions still exist in roughly a quarter of the states. See FLA. STAT. ANN. § 798.02 (West 2012); IDAHO CODE ANN. §18-6603 (West 2001); MASS. GEN. LAWS ANN. ch. 272, §18 (West 2012); MICH. COMP. LAWS ANN. §750.335 (West 2012); MINN. STAT. ANN $609.34 (West 2012); MISS. CODE ANN. §97-29-1 (West 2012); N.C. GEN. STAT. ANN. §14-184 (West 2012); OKLA. STAT. ANN. tit. 21, §1120 (West 2012); S.C. CODE ANN. §16-15-60 (2012); UTAH CODE ANN. §76-7-104 (West 2012); VA. CODE ANN. §18.2-344 (West 2012) (held unconstitutional when applied to adults, see infra notes 251–258 and accompanying text). It should be noted that Kathy’s arguably immoral and possibly unhealthy sexual conduct could also have triggered a status offense petition under commonly-enacted language imposing juvenile court jurisdiction for such things as a juvenile behaving in a manner “injurious to [her] health or morals.” See, e.g., NEB. REV. STATS. § 43-247(3) (Reissue 1998) (extending juvenile court jurisdiction to juveniles who “deport [themselves] so as to injure or endanger seriously [their morals or health]”); OHIO REV. CODE ANN. § 2151.022 (Anderson Supp. 1995) (same) E.S.G. v. State, 447 S.W. 2d 225 (Tex. Civ. App. 1969) (upholding the quoted language against a void-for-vagueness attack). See also, infra notes 313–320 and accompanying text for a discussion of the status offense/delinquency distinction. In my hypothetical, I chose to have Kathy’s case brought as a delinquency matter in order to raise the issue of the constitutionality of fornication statutes as applied to minors. In addition to being governed by a fornication statute or as a juvenile status offense measure, in some jurisdictions the sexual conduct of both Kathy and Mike could theoretically be punished under gender-neutral statutory rape laws. For example, an Arizona statute provides: “A person commits sexual conduct with a minor by intentionally or knowingly engaging in sexual intercourse . . . with any person who is under eighteen years of age.” ARIZ. REV. STAT. ANN. § 13-1405 (2012). The Supreme Court has suggested that such provisions “permit prosecution of both minor females and minor males [presumably for the same act of sexual intercourse] for engaging in mutual consensual conduct.” Michael M. v. Superior Court, 450 U.S. 464, 493 (1981) (rejecting an equal protection challenge to a California statutory rape statute punishing only males). Similarly a Utah statute defines “rape of a child” as follows: “A person commits rape of a child when the person has sexual intercourse with a child who is under the age of 14.” UTAH CODE ANN. § 76-5-402.1(1) (2003). Thus where a thirteen-year-old girl had “consensual” sexual relations with a 12-year-old boy, under “the literal language of the statute . . . both [parties] could [be] adjudicated delinquent for rape of a child.” State ex rel. Z.C., 165 P.3d 1206, 1208 n.2 (Utah 2007). Although the Utah Supreme Court declared that such an interpretation of the statute constituted an “absurd” result and was therefore not permitted, id. at 1211, the court proclaimed that the conduct of both parties could be punished under the state fornication statute. Id. at 1212.
believing that it may have beneficial consequences for their daughter. At the adjudication proceeding, Kathy admits violating the fornication statute, but argues that the statute unconstitutionally denies her right to engage in acts of sexual intimacy. The prosecution argues that the statute constitutionally protects legitimate state interests aimed at protecting the welfare of minors as well as providing a basis for enforcing parental interests in inculcating the values of sexual abstinence in the lives of their children.

The following discussion will show that Kathy’s claim is strengthened considerably by the widely held view that adults now possess a constitutional right to engage in consensual sexual intimacies in private. I will assess whether such a right extends to Kathy, first without taking the Supreme Court’s juvenile punishment cases into account. That analysis provides Kathy a strong argument that is subsequently discredited by my consideration of the impact of the punishment cases demonstrating the constitutionality of the fornication statute.

236. In most jurisdictions, delinquency adjudications are aimed at providing rehabilitative assistance to youthful violators of criminal statutes. See Martin R. Gardner, Punitive Juvenile Justice and Public Trials by Jury: Sixth Amendment Applications in a Post-McKeiver World, 91 NEB. L. REV. 1, 7–10 (2012). While the rehabilitative effectiveness of juvenile court dispositions has come under severe criticism, see generally, id., the Supreme Court has expressed a modicum of optimism that the juvenile court movement may eventually live up to its promise of benefitting those adjudicated delinquent. McKeiver v. Pennsylvania, 403 U.S. 528, 547 (1971) (holding that jury trials are not constitutionally required in delinquency adjudications). The most common disposition for adjudicated delinquents is probation, with court-imposed conditions. Davis, supra note 2, at 394–97. Commitment to an institution is possible but “is increasingly viewed as a last resort.” Id. at 394.

237. A similar situation existed in Ginsberg v. New York, 390 U.S. 629, 639–40 (1968), where the U.S. Supreme Court upheld an obscenity statute directed only to minors as a constitutionally permissible vehicle for aiding both state and parental responsibilities to promote the well-being of juveniles.

238. See infra notes 239–248 and accompanying text.
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B. Constitutionality of Fornication Statutes Applied to Adults

Although the Supreme Court has not addressed the matter, it is widely assumed that fornication statutes are unconstitutional when applied to adults239 in light of a series of cases culminating in the Court’s 2003 decision, Lawrence v. Texas.240 Without attempting a full account of these cases, I provide a brief summary of several which will suffice for present purposes.

In Griswold v. Connecticut241 the Supreme Court recognized that sexual intimacies of married couples are protected by a right to privacy beyond the scope of government regulation.242 “If the right to privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”243 Aspects of this right were extended to juveniles in the Carey, Planned Parenthood, and Bellotti cases discussed earlier.244


242. See also Roe v. Wade, 410 U.S. 113 (1973), supra note 136 and accompanying text.

243. Eisenstadt v. Baird, 405 U.S. 438, 440 (1972) (holding a Massachusetts statute criminalizing the dispensing of contraceptives to unmarried persons violated equal protection). Because Eisenstadt was decided on equal protection grounds, the statement quoted in the text expressing a substantive right to privacy is technically dicta.

244. See supra notes 120–151 and accompanying text.
Finally, in Lawrence, a case described by Laurence Tribe as “laying down a landmark that opens vistas rather than enclosing them,” the Court struck down a Texas statute criminalizing same-sex sodomy as violating constitutionally protected liberty applicable to “certain intimate conduct.” The Court held that the state’s asserted interest in maintaining traditional moral standards constituted an insufficient basis to support the statute. Indeed, in concluding that the “Texas statute furthers no legitimate state interest” the Court apparently held that no possible justification could outweigh the privacy intrusion inherent in the statute.

While addressing homosexual sodomy, Lawrence is widely understood as recognizing a broader reach that encompasses “a right for all people, both gay and straight, to engage in private intimate conduct free from government intrusion” Lawrence’s holding thus solidifies


246. Lawrence v. Texas, 539 U.S. 558, 562 (2003). The statute infringed on “a right to liberty under the Due Process Clause.” Id. at 578.

247. The Lawrence Court saw the central issue in the case as whether the “majority may use the power of the state to enforce [moral] views on the whole society through operation of the criminal law.” Id. at 571. The Court found that moral aversion to homosexual sodomy failed to constitute a “legitimate state interest which can justify its intrusion into the personal and private life of the individual.” Id. at 578.

248. Id. Thus, in the view of a court interpreting Lawrence, even an asserted interest in protecting public health would have been insufficient to sustain the Texas statute. See Martin v. Zikerl, 607 S.E. 2d 367, 370 (Va. 2005), discussed in detail, infra at note 251 and accompanying text.


249. Allender, supra note 248, at 1839. “[T]he complete rationale for the decision supports a right of all unmarried adults to engage in whatever private, consensual sexual activity they will—free of criminal sanction.” Ricks, supra note 239, at 279; “Lawrence . . . suggests a right . . . to an
the *Eisenstadt* dictum and extends constitutional privacy protection beyond decisions regarding procreative choices to any context involving private consensual intimate conduct. While broad in scope, the *Lawrence* Court did attempt to place some limitation on the reach of the case, declaring that, among other things, “the present case does not involve minors.” Such language, while clearly dicta, is also ambiguous. It is not clear whether it addresses cases where minors engage in consensual sexual intimacies with adults, or with other minors, or with both.

Regarding its impact on fornication statutes, at least one court has concluded that *Lawrence* renders such statutes unconstitutional when applied to adults. In *Martin v. Ziherl*, the Virginia Supreme Court considered the constitutionality of the state fornication statute and found “no relevant distinction” between the sexual activity at issue in *Lawrence* and that prohibited by the Virginia statute. Finding heterosexual intercourse to constitute “an element of a personal relationship . . . within the liberty interest of persons to choose,” the court concluded that subjecting that private conduct of two consenting adults to criminal penalties constituted a violation of liberty protected under the Due Process Clause. The *Martin* court read *Lawrence* as ruling out any attempt to justify the fornication statute in terms of such traditional state interests as protecting public health and assuring that children are not born out of wedlock. For the *Martin* court, these interests “are insufficient to sustain the statute’s constitutionality.” Finally, the *Martin* court allowed that the fornication statute might be

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250. *Lawrence*, 539 U.S. at 578.


252. *Id.* at 370.

253. *Id.*

254. *Id.* at 370–71. The Utah Court of Appeals intimated that the State’s fornication statute may also be unconstitutional under *Lawrence*. Berg v. Utah, 100 P.3d 261, 263, n.3 (Utah Ct. App. 2004). The Court did not address the merits of the constitutional claim because the person attacking the statute lacked standing to assert his claim.

255. See *supra* note 248 and accompanying text.


257. *Id.*
constitutional when applied to juveniles, stressing that it is “important to note that this case does not involve minors” while observing that *Lawrence* leaves open the possibility of minors and adults possessing different privacy rights.\(^{258}\)

**C. Constitutionality of Fornication Statutes Applied to Juveniles**

Assuming that fornication statutes are now unconstitutional when applied to adults, Kathy will claim that she is entitled to the same protection. As I will show, recognition of her claim may well depend on whether or not the protectionist principles of the punishment cases extend to her situation.

1. Kathy’s claim without appeal to the punishment cases

Apparently no cases yet address the impact of *Lawrence* on the constitutionality of fornication statutes applied to juveniles. Even before *Lawrence*, however, some courts recognized that minors enjoy a state constitutional right to engage in sexual intimacies. For example, in *B.B. v. Florida*,\(^ {259}\) a sixteen-year-old was charged in juvenile court with “unlawful carnal intercourse” with a consenting partner, also sixteen years old. The statute prohibited such conduct with anyone of previous “chaste character” under eighteen years old.\(^ {260}\) The court found that enforcing the statute denied the minor’s state constitutional right to privacy, violation of which could not be justified in terms of state interests in protecting the “health and quality of life” of those involved in “minor-minor” sexual activity.\(^ {261}\) Noting that a minor’s privacy right could not be used to penetrate the “shield” of statutes protecting minors from sexual exploitation by adults,\(^ {262}\) the court declared that enforcement of the minor-minor statute could not be used as a “weapon to adjudicate a minor delinquent,” even in light of “the real-life crisis of children having children,” the “plague of AIDS,” and “the rampant

\(^{258}\) *Id.* at 371.

\(^{259}\) *B.B. v. Florida*, 659 So. 2d 256 (Fla. 1995).

\(^{260}\) *Id.* at 257.

\(^{261}\) *Id.* at 258–59.

\(^{262}\) *Id.* at 259–60.
spread of serious communicative disease which is the sad product of sexual promiscuity.”

While B.B. is binding only in Florida, it does suggest a basis for recognition of a similar federal right to privacy for minors under existing case law, especially if Lawrence is applicable. Moreover, even without Lawrence, Kathy has a plausible argument that application of the fornication statute violates her right to make “decisions whether to bear or beget a child” under Carey.

Whether Lawrence applies to minors is unclear. Although the Lawrence Court noted that the case did not “involve minors,” the statement is clearly dicta and not binding on subsequent courts. Moreover, even if minors are exempted from Lawrence’s scope, it might only be in situations where young people risk being victimized by more powerful sexual partners, rather than in situations like Kathy and Mike’s where consensual sexual intimacies are shared by partners of roughly the same age with neither posing a particular risk of exploiting the other.

263. Id. The Georgia Supreme Court similarly found that a sixteen-year-old charged with the crime of fornication enjoyed a state constitutional right to privacy that protected his private, consensual, sexual intercourse with his sixteen-year-old girlfriend. In re J.M., 575 S.E.2d 441 (Ga. 2003). The court concluded that because sixteen was the age of consent for state statutory rape purposes, the minor was “sufficiently old to decide whether to engage in sexual intercourse” and therefore fell within the protection of the state constitutional privacy right, which outweighed the government’s asserted interest in “regulating the behavior of ‘minors.’” Id. at 444. The Georgia Supreme Court had previously held that the state privacy provision prevented the state from criminalizing “private, unforced, non-commercial acts of sexual intimacy between persons legally able to consent,” thus exempting the parties in J.M. from criminal liability. Id. at 443.

264. See supra text accompanying notes 124–126.

265. At least one court has, however, interpreted Lawrence as inapplicable to statutes punishing minors for acts of sodomy. See In re R.L.C., 643 S.E. 2d 920 (N.C. 2007), upholding the delinquency adjudication of a fourteen-year-old who participated in acts of fellatio with his twelve-year-old girlfriend in violation of the state “crimes against nature” statute. The court found Lawrence inapplicable “by [its] very language,” quoting the dictum that “the present case does not involve minors.” Id. at 925 (quoting Lawrence, 539 U.S. at 578).

266. Some people argue, however, that “consensual” sexual relations between teenagers are inherently coercive, as girls often appear to “consent” while being influenced by a variety of factors, including a desire for male attention, thus entering into “painfully one-sided” bargains. Michelle Oberman, Regulating Consensual Sex with Minors: Defining a Rule for Statutory Rape, 48 Buff. L. Rev. 703, 709, 714 (2000).
Kathy will argue that the empirical data establishes that as an adolescent she is a functional adult,\textsuperscript{267} entitled to the protections of \textit{Lawrence},\textsuperscript{268} that render fornication statutes unconstitutional.\textsuperscript{269} She will also rely on the principle articulated in \textit{Carey} that minors enjoy the same privacy rights as adults unless “significant” state interests, unique to minors, justify denial of the rights.\textsuperscript{270} Kathy will point out that the health and risk of pregnancy issues found wanting by the Virginia court in \textit{Martin}\textsuperscript{271} are exactly the same interests at stake in assessing the constitutionality of fornication statutes when applied to juveniles, are not unique to minors, and therefore cannot override her privacy rights.\textsuperscript{272}

One aspect of Kathy’s case is uniquely different from the adult issues addressed in \textit{Martin}, however. The statute not only protects state interests, but assists her parents in their attempts to instill the values of chastity in her life.\textsuperscript{273} Kathy will respond by pointing out that even some pre-\textit{Lawrence} courts have held that adolescents possess privacy rights that are beyond the power of parents to affect through invoking

\textsuperscript{267} See \textit{supra} notes 55–61 and accompanying text.

\textsuperscript{268} At least one serious commentator agrees. See Arnold H. Loewy, \textit{Statutory Rape in a Post-\textit{Lawrence} v. Texas World}, 58 S.M.U.L. Rev. 77, 81, 88 (2005) “[I]f [a] State had absolutely precluded [a seventeen-year-old’s] sexual expression . . . it should be held unconstitutional”.

\textsuperscript{269} See \textit{supra} notes 239–258 and accompanying text.

\textsuperscript{270} See \textit{supra} text at note 123. “[I]f minors enjoy the same privacy rights as adults when making procreation decisions, the protections of \textit{Lawrence} should also be extended to minors.” Claudio J. Pavia, \textit{Constitutional Protection of “Sexting” in the Wake of \textit{Lawrence}: The Rights of Parents and Privacy}, 16 Va. J.L. & Tech. 189, 208–209 (2011). See also Mehta, \textit{supra} note 239, at 142 (implicit in a minor’s right to decide matters involving childbearing is “the corresponding right to engage in sexual intercourse”).

\textsuperscript{271} See \textit{supra} notes 251–258 and accompanying text.

\textsuperscript{272} Some commentators agree. See \textit{supra} note 261. See also, Pavia, \textit{supra} note 270, at 198: “Teens should be free from governmental control over private sexual activity when there is no exploitation or direct harm.”

The claim in the text that there are no interests unique to juveniles assumes, of course, that the factors differentiating adolescents and adults recognized in the Supreme Court’s punishment cases are not taken into account. As will be shown in the next section, when those factors are considered, Kathy’s claim is refuted.

\textsuperscript{273} See \textit{supra} text at note 234. For a discussion of the possible futility and damage to parent-child relations when parents report their child’s sexual activities to law enforcement authorities, see Susan S. Kuo, \textit{A Little Privacy Please: Should We Punish Parents for Teenage Sex?} 89 Ky. L. J. 135, 192–95 (2000).
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the power of the state. She will refer, for example, to a New York case holding that a mother’s attempt to have her fifteen-year-old daughter adjudicated a person in need of supervision because of the daughter’s refusal to stop associating with a twenty-one-year-old lesbian violated the daughter’s “right of privacy to decide and pursue her own sexual orientation.”

In addition to legal arguments, Kathy will raise a variety of policy considerations to support her claim. She will point out that her conduct with Mike would not be a crime in a substantial majority of states. Where statutes do prohibit the conduct, they are virtually never enforced, making their ability to deter the sexual activity virtually non-existent. On the other hand, if prosecutions for fornication were regularly brought, the courts could be flooded given the high incidence of teenage sexual activity, with widespread jury nullification arguably a possible result. Moreover, the threat of enforcement, even if remote, could discourage offenders from seeking access to contraceptives or medical care for sexually transmitted diseases through

274. In re Lori, 496 N.Y.S.2d 940, 941 (N.Y. Fam. Ct. 1985). The court did instruct the minor not to have sexual relations with the older woman, conduct which would offend state law prohibiting persons over the age of twenty-one from engaging in “deviate sexual intercourse with a person less than seventeen years of age.” Id. at 942.


276. Id.

277. The possibility of rigorous enforcement of fornication statutes is made difficult in light of the fact that evidence is seldom obtainable given the private, consensual nature of the conduct.


279. Phillis, supra note 278, at 296. Studies show that a majority of the American public has moved away from viewing voluntary sexual activity between teenagers as a crime. Phipps, supra note 275. If so, juries would likely be reluctant to convict minors in fornication cases. But see infra notes 310–320, 344–345 (fornication prosecutions will occur in juvenile court where juries are seldom utilized) and accompanying text.
fear of legal consequences.\textsuperscript{280} Finally, some argue that far from harmful, the conduct engaged in by Kathy and Mike is a healthy aspect of normal maturation.\textsuperscript{281}

2. Kathy’s claim and the punishment cases

Whatever the credibility of Kathy’s claim to a personhood right to engage in private consensual intimate relations with Mike without government interference, the merits of her position virtually vanish when assessed in light of the categorical rule promulgated by the Supreme Court in the punishment cases. That the rule extends to cases outside the context of punishing juveniles has been urged earlier.\textsuperscript{282}

The punishment cases recognize that adolescents under age eighteen are categorically less competent decision makers than adults\textsuperscript{283} due

\begin{itemize}
\item \textsuperscript{280} Phipps, supra note 275, at 438. One court expressed the concern this way: “To the extent that any successful program to combat venereal disease must depend upon affected persons coming forward for treatment, [fornication statutes] operate . . . as a deterrent to such voluntary participation. The fear of being prosecuted for the ‘crime’ of fornication can only deter people from seeking such necessary treatment.” State v. Saunders, 381 A.2d 333, 342 (N.J. Sup. Ct. 1977). \textit{But see infra} text and notes 347–348.
\item \textsuperscript{281} “[S]ixty-three percent of the American public believes that adolescent sexual exploration is a natural part of growing up”. Kuo, \textit{supra} note 273, at 136. David Richards observes:
\begin{quote}
If adolescents’ sexual conduct is governed by principles of equal concern and respect, there can be, I believe, no principled ethical objection to it. In contrast, the moralistic condemnation of all forms of sexual activity among adolescents encourages fears and misunderstandings of sexuality instead of facilitating sexual self-esteem and the sense of ethical discriminations that should rule all human relations.
\end{quote}
Richards, \textit{supra} note 18, at 55. “[S]ubstantial numbers of doctors and other health professionals believe that [voluntary sexual intercourse] is a healthy part of an older adolescent’s development into adulthood.” Loewy, \textit{supra} note 268, at 86.
\item \textsuperscript{282} \textit{See supra} notes 229–231 and accompanying text.
\item \textsuperscript{283} Discussing the virtues of categorical age rules defining the point at which legal rights and responsibilities are triggered, Professor Elizabeth Scott has noted that “there is little evidence that . . . the interests of adolescents are harmed by a regime of binary classification.” Scott, \textit{supra} note 224, at 577. Any argument that the law should expand the traditional binary distinction of child/adult reflected in the punishment cases by adding a third category of “adolescence,” with case-by-case assessments of maturity, would not be worth the administrative costs. \textit{Id. See also} Buss, \textit{supra} note 213, at 505 (bright line rules “are necessarily inexact, excluding young people prepared to behave competently and including some not ready to do so, but [the] lines make
to: (1) youthful propensities to engage in risky behavior; (2) unique susceptibility of adolescents to peer pressure; and (3) transitory character development of juveniles manifesting itself in exceptional amenable
tability to rehabilitation. These factors become relevant “in emotionally charged or pressured situations” where adolescents “tend to make bad decisions” and “struggle to control impulses that lead to undesirable behavior.” In such situations, the protectionist principles of the punishment cases should obtain. All three factors distinguishing adolescents from adults are clearly relevant when assessing the constitutionality of fornication statutes applied to minors.

**a. Fornication as risk taking.**

There is little question that unprotected sexual intercourse is risky behavior and that adolescents engage in such conduct in disproportionately large numbers. Sensation-seeking is a higher priority for adolescents than adults and is more prevalent during adolescence than in any other developmental period. A common manifestation of adolescent sensation seeking is sex without contraception, reflect-

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284. See supra notes 175–177 and accompanying text.


286. See infra notes 292–302 and accompanying text.

287. See supra note 278 and accompanying text. By age seventeen, approximately two-thirds of all adolescents have engaged in consensual sexual activity. Allender, supra note 248, at 1828; Margherita Adeline Hagood, Note, *South Carolina's Sexual Conduct Laws After Lawrence v. Texas*, 61 S.C.L. REV. 799, 814 (2010) (estimated 90% of men and 80% of women have premarital sex before age nineteen); Hamilton, supra note 214, at 1108 (adolescents more likely than adults to have casual sex). Professor Kuo has characterized this situation as an “epidemic of teenage sex.” Kuo, supra note 273, at 161. See also Phipps, supra note 275, at 436 (describing high incidence of teenage sexual activity).

288. Cauffman & Steinberg, supra note 61, at 1773.

289. Id.

290. Buss, supra note 213, at 495.
ing the relatively high value adolescents place on the immediate rewards of risky behavior while heavily discounting its future costs.\textsuperscript{291}

The risks entailed in teenage sexual activity are well known. The United States has an alarmingly high rate of teenage pregnancy,\textsuperscript{292} the most common outcome of which is single motherhood\textsuperscript{293} with all its associated problems.\textsuperscript{294} Also of considerable concern is the incidence of sexually transmitted disease (STD), described as an “epidemic” by the United States Center for Disease Control.\textsuperscript{295} Young people are disproportionately represented, with half of the twenty million yearly infections affecting people ages fifteen to twenty-four.\textsuperscript{296} Of teenagers having sex, one in four will contract an STD prior to adulthood\textsuperscript{297} while one in two sexually active young people will be infected with an STD by the age of twenty-five.\textsuperscript{298} One of the long-term consequences of this epidemic is a high rate of infertility each year because of untreated STDs.\textsuperscript{299} Finally, mental health is also jeopardized by teenage sexual activity. In encouraging sexual abstinence for all school age chil-

\begin{enumerate}
\item \textsuperscript{291} \textit{Id.}
\item \textsuperscript{292} Mehta, supra note 239, at 123.
\item \textsuperscript{293} Poncz, supra note 215, at 321. It is estimated that 40% of teenage pregnancies end in abortion. \textit{Teen STD Rates Rise, Despite High Condom Use}, http://townhall.com/news/religion/2012/07/05/teen_std_rates_rise_despite_high_condom_use (last visited Oct. 29, 2013).
\item \textsuperscript{294} “Studies [show] that women who become parents as teenagers are at greater risk of social and economic disadvantage than those who delay childbearing until adulthood.” Mehta, supra note 239, at 123. “They are . . . likely to have larger families, raise their children in poverty, rely on welfare, and are less likely to complete high school, to be married, to have employment prospects, and to earn high wages.” \textit{Id.} See also Poncz, supra note 215, at 321–22.
\item \textsuperscript{296} \textit{Id.}
\item \textsuperscript{299} \textit{Teen STD Rates Rise}, supra note 293.
\end{enumerate}
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dren, Congress has declared that “sexual activity outside of the context of marriage is likely to have harmful psychological effects.”\(^{300}\)

Experts attribute the high rate of reckless sexual activity in part to the characteristic tendency of adolescents to believe that they are immune from long-term consequences of their actions.\(^{301}\) Such attitudes were, of course, a factor in the Supreme Court’s conclusion that adolescents are categorically different from adults for purposes of imposing punishment.\(^{302}\)

\(b\). Fornication and peer pressure.

That teenage sexual activity is influenced by peer pressure also needs little discussion. One commentator summarized a study of the issue by concluding that “the driving force behind teen sexual activity is peer pressure,”\(^{303}\) both in the “direct” sense of being pressured into sexual activity by a sexual partner\(^{304}\) and “indirectly” by imitating sexual behavior thought to be normative of the teen peer group.\(^{305}\) One need only recall the “pregnancy pact” entered into by at least eighteen girls in a Massachusetts high school\(^{306}\) to understand the power of adolescent peer pressure to influence sexual activity.

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\(^{300}\) 42 U.S.C. § 710(2)(B),(E)(2012). See also Benjamin J. Cooper, Loose Not the Floodgates, 10 CARDOZO WOMEN’S L.J. 311, 317 (“[C]hildren succumbing to the pressure to have sex can lead to significant psychological damage”).

\(^{301}\)  Teen STD Rates Rise, supra note 293.

\(^{302}\)  See supra note 175 and accompanying text.

\(^{303}\)  Kuo, supra note 273 at 188.


\(^{305}\)  See Cauffman & Steinberg, supra note 61 at 1773 (“[S]ocial status appears to be an important factor to many adolescents” contributing to risky decision-making regarding sexual activity); Kuo, supra note 273, at 188 (“[S]udents who believed that most of their peers have had sex were 2.5 times more likely . . . to report a high intention to initiate [sexual intercourse] in the upcoming school year”) quoting B. Kinsman et al., Early Sexual Initiation: The Role of Peer Norms, 102 PEDIATRICS 1185 (Nov. 1998). The distinction between “direct” and “indirect” peer pressure is noted supra note 231.

\(^{306}\)  Discussed at Phillis, supra note 278, at 272–75.
As with the tendency to engage in risky behavior, the influence of peer pressure on adolescent sexual behavior is of the very kind discussed in the Supreme Court’s punishment cases.\(^\text{307}\) Indeed, it is likely that peer pressure is an even more powerful influence of sexual behavior between teenage sexual partners—where the conduct is often legal and, for many, morally ambiguous—than it is in the context of criminal activity considered in the Court’s Eighth Amendment cases.\(^\text{308}\)

c. Fornication and transitory character development.

The protectionism manifested in the punishment cases is also in part a consequence of the Court’s conclusion that juveniles are uniquely amenable to rehabilitation due to their transitory character

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307. See infra text and notes 164–168. Cauffman and Steinberg observe:

One might be tempted to conclude . . . that given their priorities, adolescent risk-takers make perfectly reasonable decisions. But while such decisions may be cognitively reasonable, they do not necessarily reflect maturity of judgment.

Consider, for example, a hypothetical adolescent male who is deciding whether to engage in unprotected sex. If he does, there are possible negative consequences (e.g., a sexually transmitted disease, his partner’s pregnancy) and possible positive consequences (e.g., physical pleasure, excitement, improved status among peers, future relationship with partner). From a purely cognitive point of view, if, in the adolescent’s mind, the possible positive consequences outweigh the possible negative consequences, then he should say “yes.” But this is precisely where the difference between decision-making competence and maturity of judgment is crucial. If the adolescent is responsible, peer pressure will not be a major factor in his decision, by virtue of his autonomy. If the adolescent has perspective, he will recognize that the relationship does not hinge on this single decision. And if the adolescent is temperate, the importance of “living for the moment” will be minimized. Thus, maturity of judgment reflects a particular disposition towards the weighting of possible outcomes in a decision-making scenario.

Cauffman & Steinberg, supra note 61, at 1773–74.

308. Because the criminal conduct involved in the punishment cases (serious felonies) is proscribed by regularly enforced statutes, universally supported by the moral sentiments of society, fewer “peers” are likely to encourage colleagues to commit those crimes than to engage in sexual conduct. Moreover, while committing serious felonies may be deemed normative in some subcultures and thus subject to “indirect” peer pressure, see supra note 305 and accompanying text, the widespread incidence of teenage sexual activity is much more likely to be imitated by teens in general than is the commission of serious felonies.
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development. This amenability contributed to the conclusion that criminal sentences for juveniles with no possibility of rehabilitation are unconstitutional.

As with risk-taking and vulnerability to peer pressure, the rehabilitation factor is likewise directly relevant when assessing the constitutionality of fornication statutes applied to juveniles. As Kathy’s case illustrates, enforcement of fornication statutes occur in juvenile court, where the customary aim of the preceding is to rehabilitate the offender. Indeed, if fornication statutes are unconstitutional for adults, a violation of such statutes by a minor would not, strictly speaking, constitute an act of “delinquency” but instead would technically manifest a “status offense,” and as such would almost certainly be limited to juvenile court jurisdiction. In addition to prosecution under fornication statutes, the conduct proscribed therein may also be

309. See supra note 178.

310. See discussion of the B.B. case, supra notes 259–263 and accompanying text; In re L.A.N., 623 S.E.2d 682 (Ga. Ct. App. 2005) (upholding fornication statute as applied to juveniles under sixteen-years-old). Prior to the Lawrence case, there may have been in some jurisdictions a theoretical possibility of a juvenile fornication case being waived to criminal court. However, virtually all waiver criteria consider, among other things, the “seriousness of the offense,” that factor (along with prior history of the juvenile) weighed most heavily by judges making waiver decisions. Davis, supra note 2, at 334. Given the ubiquity of the conduct governed by fornication statutes and the acceptance of the conduct by much of the public, see supra note 281, it is hard to imagine a juvenile court judge ever waiving a fornication case to criminal court. After Lawrence, however, fornication statutes can be enforced only against juveniles, and then most likely in juvenile court. See infra notes 256–258 and accompanying text (discussing the implications of the likely unconstitutionality of fornication statutes when applied to adults). If such statutes are unconstitutional, there could be no adult punishment for such conduct, thus eliminating adult criminal court jurisdiction.

311. See, e.g., In re N.A., 539 S.E.2d 899, 900 (Ga. Ct. App. 2000) (upholding adjudication of a twelve-year-old girl for committing “the delinquent act of fornication” who was therefore “in need of treatment and rehabilitation”). See also infra notes 316–322.

312. See supra notes 239, 251–257 and accompanying text.

313. “Delinquency” matters are those juvenile court proceedings where the conduct of the offender would be a crime if committed by an adult. Davis, supra note 2, at 359. “Status offenses” involve state intervention in situations unlawful only for minors. Id. at 93. “The juvenile court . . . has jurisdiction over so called “status offenses.” Id. at 258. At the beginning of the twentieth century, progressive reformers created juvenile courts to exercise jurisdiction over noncriminal misconduct by youth. Barry C. Feld, The Transformation of the Juvenile
seen as violating status offense provisions. As mentioned above, prosecutors may choose to treat sexual activity by minors as a threat to their “health or morals”\textsuperscript{314} or under other such language characteristic of many status offense statutes.\textsuperscript{315} Adjudication as either a status offender or a delinquent usually results in structured probation aimed at rehabilitating the juvenile.\textsuperscript{316} While institutional confinement is a theoretical possibility,\textsuperscript{317} it is increasingly viewed as a last resort,\textsuperscript{318} and in some jurisdictions cannot be imposed unless the court is convinced that all less drastic dispositional alternatives have been exhausted.\textsuperscript{319} Even if a court imposes an institutionalized commitment, its purpose is almost always rehabilitative, at least in part.\textsuperscript{320}

The Supreme Court’s recognition in the punishment cases that juveniles are categorically different from adults, due in part to their unique amenability to rehabilitation, is the very premise of the juvenile court movement.\textsuperscript{321} If it is unconstitutional to deny juveniles rehabilitation through the imposition of death and mandatory life imprisonment, it is difficult to see how it could be unconstitutional to afford

\begin{footnotes}
\item[314] See supra note 235. See also E.S.G. v. State, 447 S.W. 2d 225 (Tex. Civ. App. 1969), for an example of likely sexual activity being addressed through status offense language prescribing conduct “injurious to [the defendant’s] health or morals.”
\item[315] For a case illustrating how conduct can be conceptualized either as a delinquency situation or a status offense matter, see In re Spalding, 332 A.2d 246 (Md. 1975) (drug and sexual activity of minor with adults initially considered acts of delinquency but ultimately treated as a status offense matter).
\item[316] See supra note 236. Probation conditions could include, among other things, educating the offender regarding the risks of sexual activity and the values of sexual abstinence.
\item[317] Davis, supra note 2, at 388.
\item[318] Id. at 394.
\item[319] Id.
\item[320] See Gardner, Punitive Juvenile Justice, supra note 103, at 6–25, discussing the emergence of punishment as an additional goal to rehabilitation in some delinquency dispositions.
\item[321] See Id. at 6–12.
\end{footnotes}
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them the possible rehabilitative protections of the juvenile court when they engage in risky sexual conduct.\footnote{322}

d. Summary.

It is clear that the same factors that distinguish adolescents from adults in administering punishment also distinguish them from adults when determining the constitutionality of governmental regulation of sexual conduct. This similarity could mean that the adolescent/adult distinction—which precludes juveniles from being held to adult responsibility for the punitive consequences of certain crimes—is itself sufficient to deny adult rights to engage in consensual, private acts of sexual intimacy. Juveniles would thus be denied personhood rights in both the punishment and fornication contexts,\footnote{323} and instead granted the protectionism characteristic of the Court’s historical view of juvenile rights.\footnote{324} Yet, there might still remain a question about whether the adolescent/adult distinction in and of itself provides an adequate basis for dismissing entirely the possible impact of the \textit{Lawrence} case. I therefore turn to the specific question of whether the privacy rights of \textit{Lawrence} extend to juveniles.

\footnote{322}{ For many, the “rehabilitative protections of the juvenile court” are illusory. \textit{See}, e.g., Janet E. Ainsworth, \textit{Re-Imagining Childhood and Reconstructing the Legal Order: The Case for Abolishing the Juvenile Court}, 69 N.C.L. REV. 1083 (1991); Barry C. Feld, \textit{Abolish the Juvenile Court: Youthfulness, Criminal Responsibility, and Sentencing Policy}, 88 J. CRIM. L. \\& CRIMINOLOGY 68 (1997). I take no position in this Article as to the effectiveness of the juvenile court system in rehabilitating adjudicated offenders. For a case upholding a fornication statute attacked by a juvenile as violating state constitutional privacy protections, see \textit{In re L.A.N.} 623 S.E.2d 682 (Ga. Ct. App. 2005).


\footnote{324}{ \textit{See supra} notes 116–124 and accompanying text.}
3. Kathy’s claim and Lawrence

As noted above, the Lawrence Court declared in ambiguous dicta that “the present case does not involve minors.”325 While some have interpreted this statement to mean that the privacy protections spelled out in the case are simply inapplicable to minors in any possible context,326 others read the case as not only relevant to constitutional privacy claims by minors but in fact extending to them the rights identified in the case.327 Assuming for the sake of argument, that Lawrence might be applicable to Kathy’s case, it then becomes necessary to determine whether the punishment cases provide a basis for distinguishing Lawrence when assessing the constitutionality of fornication statutes applied to minors.

The Lawrence Court invalidated the Texas sodomy statute because no legitimate state interest supported the statute.328 Thus, the statute was unconstitutional under even minimal, “rational basis,” review.329 Assuming that Kathy’s attack of the fornication statute under Lawrence would also be subject to rational basis review,330 the statute would be

325. See, e.g., supra note 242 and accompanying text. “Lawrence’s application to consensual teen sexual activity is not . . . certain.” Pavia, supra note 270 at 201.

326. See, e.g. supra note 265 discussing the R.L.C. case. Some commentators agree. See, e.g., Ricks, supra note 239 (Lawrence “covers only the conduct of adults”).

327. See, e.g., supra note 260.

328. See supra notes 247–248 and accompanying text.

329. See supra note 248 and accompanying text. The Cornell University Law School Legal Information Institute defines “rational basis review” as follows:

The level of judicial review for determining the constitutionality of a federal or state statute that does not implicate either a fundamental right or a suspect classification under the Due Process Clause and the Equal Protection Clause of the Constitution. When a court concludes that there is no fundamental liberty interest or suspect classification at stake, the law is presumed to be Constitutional unless it fails the rational basis test. Under the rational basis test, the courts will uphold a law if it is rationally related to a legitimate government purpose. The challenger of the constitutionality of the statute has the burden of proving that there is no conceivable legitimate purpose or that the law is not rationally related to it. Rational Basis Test, CORNELL UNIVERSITY, http://www.law.cornell.edu/wex/rational_basis_test (last updated Aug. 19, 2010).

330. The Martin court, see supra notes 251–252 and accompanying text, applied the “reasoning of Lawrence” in finding no legitimate state interest to support the fornication statute struck
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The categorical distinction between adolescents and adults constitutional unless Kathy could show that the statute did not “reasonably” promote some “legitimate” state interest. 331

The adolescent/adult distinction established by the Court in the punishment cases means that legitimate governmental interests may well be different for juveniles than for adults. Indeed, while interests in preventing out of wedlock pregnancy and STDs may not constitute legitimate state interests when fornication statutes are applied to adults, 332 those interests become legitimate when the same statutes are enforced against minors, given teenage propensities for rampant unprotected sex encouraged by widespread peer influence. Sexual activity by minors thus poses a special danger, unique to them, to which the state may legally respond. 333 The question then becomes whether fornication statutes reasonably promote these legitimate state interests. Kathy’s points about the minimal enforceability of fornication statutes down under rational basis scrutiny. Martin v. Ziherl, 607 S.E. 2d 367, 370–71 (Va. 2005). See also Justice Scalia’s view, supra note 248 (the Lawrence Court applied an “unheard of” form of rational basis review).

331. See supra note 329.

332. See Martin, 607 S.E.2d at 370 (finding that Lawrence finds any and “all manner of states’ interests . . . insufficient” to justify intrusions upon a person’s “private, consensual sexual conduct”).

333. The state has historically invoked its parens patriae power to intervene in the lives of minors in efforts to protect their welfare. DAVIS, supra note 2, at 95, n. 14. Indeed, the parens patriae concept constituted the historical justification for the juvenile court movement, which saw young people as lacking adult culpability while being uniquely capable of being rehabilitated. DAVIS, supra note 313, at 1–3. As to the “legitimacy” of regulating sexual activity of minors, a Wisconsin court made these comments in an unpublished post-Lawrence opinion: “This state has a long tradition of honoring its obligation to protect its children from themselves. Among the many significant interests of the state are the dangers of pregnancy, venereal disease, damage to reproductive organs, the lack of considered consent, heightened vulnerability to physical and psychological harm, and the lack of mature judgment.” State v. Pryes, 320 Wis.2d 705, 2009 WL 1606746, 2 (Wis.Ct. App.) (emphasis added).

The recognition of “significant” interests in regulating teenage sexual activity should satisfy even the Carey plurality’s caution that only a “significant state interest,” unique to minors, would justify state denials of the “privacy rights of minors.” Carey v. Population Servs., Int’l, 431 U.S. 678, 693 (1977). It must be remembered that only a plurality of the Court in Carey recognized a privacy right applicable to juveniles. Id. Moreover, the Court assumed that the “Constitution does not bar state regulation of the sexual behavior of minors,” id. at 694, n. 17, thus calling into question the applicability of the Lawrence privacy right to juveniles.
and their potential to discourage acquiring contraceptives and medical care for STDs\textsuperscript{334} pose questions about the rationality of such statutes. It must be remembered, however, that under rational basis scrutiny the statute need not be “narrowly tailored” to meet the state’s interest nor be the “least restrictive alternative available.”\textsuperscript{335} The statute need only “arguably” protect those interests in a manner that is not totally arbitrary.\textsuperscript{336}

It is unlikely that fornication statutes will ever be rigorously enforced. Obtaining evidence sufficient for conviction is notoriously difficult\textsuperscript{337} and even when available, prosecutors often decline to bring charges.\textsuperscript{338} As a consequence, the deterrent effect of the statutes is min-

\textsuperscript{334} See supra notes 269–275 and accompanying text.

\textsuperscript{335} Such factors are requirements under the “strict scrutiny” standard. See NOLO’S FREE DICTIONARY OF LAW TERMS AND LEGAL DEFINITIONS STRICT SCRUTINY, available at http://www.nolo.com/dictionarystrict_scrutiny_term.html.

\textsuperscript{336} The Supreme Court put the matter this way:

On rational-basis review, a . . . statute . . . comes to us bearing a strong presumption of validity . . . and those attacking the rationality of the legislative classification have the burden “to negative every conceivable basis which might support it.” . . . Moreover, because we never require a legislature to articulate its reasons for enacting a statute, it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature. . . . In other words a legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data.

\textsuperscript{337} See, e.g., Phipps, supra note 275 at 438; MODEL PENAL CODE § 213.6, note on adultery and fornication, at 435 (1980) (“Discovery and proof of [fornication] by means other than self-admission is virtually impossible and is likely to involve surveillance techniques that are unseemly, if not unconstitutional.”).

\textsuperscript{338} Prosecutors presently make “difficult decisions” about culpability when deciding whether to bring charges against minors engaging in sexual activity. Phipps, supra note 275, at 436.
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imized, but so also is the risk of dissuading minors from accessing contraceptives and medical care.

More rigorous enforcement of fornication laws is possible. For example, evidence of the crime is readily available when pregnancy occurs.\(^\text{339}\) If both prospective parents are charged, equal protection problems are minimized.\(^\text{340}\) Widespread enforcement would arguably increase the deterrent effect of the statutes.\(^\text{341}\) Perhaps more significantly, rigorous enforcement would send a clear message to young people that sexual activity is not condoned by society, perhaps providing an objective basis for those attempting abstinence to resist peer pressure to engage in the conduct.\(^\text{342}\)

Rigorous enforcement of fornication statutes against juveniles would entail some costs. Flooding the courts with litigation may indeed result\(^\text{343}\) but the perceived problem of wholesale jury nullification\(^\text{344}\) is a red herring given that juries are seldom utilized in juvenile

\(^{339}\) See Mehta, supra note 2391 at note 121–26 (discussing fornication charges brought in Idaho against pregnant teenagers and their boyfriends). Although such a practice is arguably legal, but see Mehta, supra note 239, at 130–151, it is certainly of questionable wisdom for, among other reasons, the incentive it creates for pregnant minors to terminate their pregnancies rather than risk evidence of their pregnancy providing the basis for a fornication charge. See Traci Shallbetter Stratton, No More Messing Around: Substantive Due Process Challenges to State Laws Prohibiting Fornication, 73 WASH. L. REV. 767, 795 n. 211 (1998).

\(^{340}\) But see Mehta, supra note 239, at 130–34.

\(^{341}\) Phipps, supra note 275, at 435. While the punishment cases found that adolescents are less deterrable than adults, there is no reason to believe that strict enforcement of fornication would have no deterrent effect on any teenager even in light of the tendencies of adolescents to seek instant gratification and be subject to peer influence. After reviewing the empirical data on the subject, Christopher Slobogin summarized the situation as follows: “All [the] evidence supports the proposition that children are less deterrable than adults.” Slobogin, supra note 41, at 200.

\(^{342}\) Phipps, supra note 275. Justice Breyer expressed a similar idea in suggesting that mandatory drug tests of high school students who engage in extracurricular activities provides a basis for students to resist peer pressure to take drugs. The drug testing program “offers the adolescent a nonthreatening reason to decline his friend’s drug-use invitations, namely, that he intends to . . . engage in [one of many] interesting and important [school] activities.” Bd. of Educ. v. Earls, 536 U.S. 822, 840–41 (2002) (Breyer, J. concurring).

\(^{343}\) See supra note 279 and accompanying text.

\(^{344}\) See supra note 280 and accompanying text.
courts. Probably the biggest problem with aggressive enforcement is the possibility of discouraging potential defendants from obtaining contraception or seeking medical treatment for STDs or pregnancy. This risk may be exaggerated, however, because statutes in most states permit adolescents privately to consent to treatment for STDs, to receive contraceptive drugs and devices, and, in some jurisdictions, to consent to medical treatment for pregnancy—all without the knowledge of their parents or anyone else. If fornication statutes were rigorously enforced, these statutory privacy protections would likely become widely known to juveniles, thus minimizing the disincentive to seek medical care for fear of possible fornication charges.


346. See supra note 274 and accompanying text.

347. Hartman, supra note 12, at 1309–10 (treatment for STDs); Davis, supra note 2, at 89 (access to contraceptive drugs and devices (federal rule requiring parental notice of such struck down by the courts) and consent for pregnancy care). Over-the-counter forms of contraception are legally available to teens of any age, and pharmacies do not need to contact parents. Poncz, supra note 215, at 293. In many states, a youth does not need parental approval for prescription contraception. Id. at 293–94. See also Scott, supra note 224, at 567–68 (minors in many states given statutory rights to consent to treatment for STDs, birth control, and pregnancy).


348. As the risk of prosecution would likely become known by word of mouth communications among adolescents, so would word spread from those understanding the minimal risk of evidence discovery from medical professionals to those assuming the existence a high risk of self-incrimination through obtaining medical care. Indeed, competence in making medical care decisions is the classic example of adolescent/adult cognitive equivalence. See, e.g., Scott, supra note 224, at 566–67 (“[D]evelopmental psychology evidence indicates that older minors are mature enough in their cognitive development to make competent medical decisions.”). See also Schad, supra note 207, at 398–99 (“informed consent” situations are “structured” and prevent “impulsive action” by adolescents). Moreover, the state could itself inform the juvenile population that seeking medical care would have no bearing on potential fornication charges.
At the same time, there is little reason to believe that rigorous enforcement of fornication statutes would significantly deter teenage sexual activity. Fornication is the ultimate “crime of passion,” making it highly unlikely that many adolescents, already prone by nature to act impulsively, would be deterred by the threat of prosecution, especially when it is understood that proceedings would be brought under the rehabilitative umbrella of the juvenile court.

349. Leading commentators question whether criminal statutes ever deter their proscribed conduct. See, e.g., Paul H. Robinson & John M. Darly, The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing Its Best, 91 GEO. L.J. 949, 951 (2003). Noting that deterrent predictions are “enormously difficult,” these authors point out that three prerequisites must exist if deterrence is to occur: (1) the potential offender must know the rule; (2) he must perceive the cost of violation as greater than the perceived benefit; and (3) he must be able and willing to bring such knowledge to bear on his conduct decision at the time of the offense. Id. at 952–53. Moreover, “personality types” inclined toward “impulsiveness and toward discounting consequences” interfere with “rational calculation of self-interest by potential offenders,” thus inhibiting deterrence. Id. at 955. Obviously, the characteristics of adolescence detailed by the Supreme Court in the punishment cases, see supra note 269 and accompanying text, reflect “a personality type” unlikely to be deterred, especially from a crime like fornication, where the passion of the moment is likely to override “rational calculation.”

350. The fact that fornication cases will be brought in juvenile court, see supra notes 310-20 and accompanying text, might further minimize the deterrent effect of such prosecutions in light of the fact that rehabilitation, rather than punishment, is generally the dispositional goal. Even so, rehabilitative sanctions sometimes may be sufficiently unpleasant to create some deterrent effect. See Johannes Andenase, The General Preventive Effects of Punishment, 114 U. PA. L. REV. 949, 971 (1966). Furthermore, punitive sanctions—with their inherent impositions of unpleasantness upon offenders aimed in part at least to deter—are increasingly employed within juvenile justice systems. See Gardner, supra note 103, at 6–22 (discussing the distinction between coercive rehabilitation and punishment). Even though minimal deterrence will likely be the result of sporadic enforcement of fornication statutes, the situation is still defensible. In fact, one commentator argues:

The state’s most effective strategy for deterring consensual forms of disreputable conduct is likely to consist of criminalizing this conduct and enforcing the criminal ban sporadically. Excluding the practically infeasible option of super-strong sanctions, all alternative strategies (which include (1) enforcing the law strictly or (2) not enacting any law at all) are likely to deter fewer violators. If this is true, then, contrary to the implication of standard political-economic accounts, states rationally would select a lax enforcement strategy even if enforcement resources were abundant and public opinion was almost uniform.

Appreciable deterrence is not necessary to satisfy rational basis scrutiny, however. There is no reason to believe that enforcement of fornication statutes would have no deterrent effect at all.\footnote{351}{See supra note 341 and accompanying text.} Any deterrence is enough. If policy makers decide that minimal deterrence is worth the costs involved in rigorous enforcement of fornication statutes, that is a choice for them, and not the courts, to make.

But even if it could be shown that no deterrent effect is achieved through enforcing fornication statutes, such enforcement should still be deemed reasonable when it is remembered that juvenile courts have jurisdiction over the matter. It is not unreasonable to believe that some juvenile offenders might be helped after the fact of adjudication. For example, sex education programs, backed by the power of the juvenile court, could induce future abstinence in some offenders, or channel others away from “unsafe” sexual practices. That such benefits might occur only rarely does not negate the fact that they reasonably promote the state interests bottoming fornication statutes.

Rather than rigorous enforcement, a more likely possibility in jurisdictions with fornication statutes is that they will rarely or never be enforced. If so, their existence may counterproductively engender public disrespect for the law and encourage abuses of discretion by law enforcement officials.\footnote{352}{See MODEL PENAL CODE, supra note 337, at 435–36. Unenforced laws, particularly ones like fornication which proscribe conduct widely engaged in by the public, risk delegating power to the police to decide for themselves who shall be subject to penal sanctions and why. Id. at 335.} These downsides are outweighed, however, by several benefits that may flow from seldom enforced fornication statutes.

The underlying purposes of fornication statutes may still be achieved, albeit rarely, with sporadic enforcement. Some deterrence of sexual activity may occur, especially in situations where the mere existence of the statute is appealed to as an objective basis for teens attempting abstinence to resist peer pressure to engage in sexual conduct.\footnote{353}{See supra note 342.} Furthermore, the possible benefits of juvenile court dispositions would be available to the few adjudicated violators of the statutes.
That enforcement of fornication statutes occurs in juvenile court mitigates the problem of potential abuses of law enforcement discretion often associated with seldom enforced statutes. As Kathy’s case illustrates, parents may seek state assistance in discouraging sexual activity by their children through delinquency or status offense interventions. Where law enforcement is initiated by parents, the concerns of police abuse of discretion and excessive governmental snooping in gathering evidence are substantially minimized, if not eliminated altogether.

Furthermore, the presence of fornication statutes provides parents state assistance in their attempts to instill in their children values of sexual abstinence or “safe” sex. While resort to juvenile court intervention may not always yield clear benefits, and may sometimes damage parent/child relationships, allowing parents this alternative is a reasonable state vehicle to grapple with the problem of rampant teenage sexual activity. Such an alternative addresses the concern that “the sexual revolution . . . seem[s] to have made children equal partners . . . with their parents . . . creat[ing] the false illusion that children have the capacity for unrestricted adult experience.” Empowering parents with the resources of juvenile court interventions for violations of fornication statutes reaffirms the parent as a “superior partner” vis-à-vis her child, and renders moot the claim by some personhood advocates that adolescents are “capable of choosing their own morality as long as they do not commit [a violation of the law.]”

354. See infra note 352 and accompanying text.
355. See supra notes 233–236 and accompanying text.
356. One commentator observed that “lawmakers should recognize the indispensable role” that parents play in “preventing their children from engaging in premature sexual experimentation.” Siji A. Moore, Out of the Fire and into the Frying Pan: Georgia Legislature’s Attempt to Regulate Teen Sex through the Criminal Justice System, 52 HOW. L. J. 197, 231 (2008). In arguing that the state should “empower” parents to better protect their children, the commentator claimed that “[i]t is undisputable that a statute [sanctioning] teenagers . . . for sexual experimentation gives parents who find out that their child is sexually active a powerful tool to terminate the activity and deter it from happening in the future.” Id.
357. See supra note 273.
359. Gerald Grant, The Character of Education and the Education of Character, 110
Even as never enforced dead letter law, fornication statutes may still serve appropriate purposes. One commentator has even argued that “[n]on-enforcement of fornication statutes may be desirable” in view of the possible negative impact of enforcement on obtaining health care discussed above. Non-enforced statutes can serve the educative function of signaling inappropriate behavior through announcing prevailing, or inducing new, social norms. Moreover, if existing fornication statutes are repealed, the message—technically that sexual activity between minors is “permitted” and not “protected”—might be interpreted by young people to be that the state and society approve of the conduct previously proscribed by the statute. Finally, total non-enforcement of fornication statutes would not be without some deterrent effect. As mentioned above, the mere existence of fornication statutes could provide a basis for some teens to resist peer pressure to engage in sexual activity.

The above discussion establishes that legitimate state interests are reasonably furthered through proscribing teenage sexual activity through the instrumentality of fornication statutes, whether rigorously, seldom, or never enforced. Whatever the wisdom of enacting such statutes, they are clearly constitutional.

DAEDALUS 135, 146 (1981) (noting the “crisis of authority in the American school”). Bruce Hafen has noted that “[d]enying a portion of parental authority necessarily adds to the authority of children.” Hafen, Children’s Liberation, supra note 5, at 654. The opposite is also true: Denying a portion of authority to children necessarily adds to parental authority.

360. Stratton, supra note 339, at 795.
361. See Cass R. Sunstein, On the Expressive Function of Law, 144 U. PA. L. REV. 2032, 2035 (1996) (arguing that “coercion might be defended as a way of increasing social sanctions” on such risk-taking activity as unsafe sex, with the possible result of producing a “new norm[ ] or new understanding of existing information.”).
362. Hafen, Constitutional Status, supra note 4 at 567.
363. Stratton, supra note 339, at 796.
364. See supra note 342 and accompanying text.
365. At least one post-Lawrence court has recognized the legitimacy of protecting minors from the dangers of STDs through statutes prohibiting sexual contact. See In re R.L.C., 643 S.E.2d 920 (N.C. 2007) (upholding sodomy statute when applied to minors). See also In re L.A.N., 623 S.E.2d 682 (Ga. Ct. App. 2005) (holding that fornication statutes applied to minors are constitutional). Allender, supra note 248, at 1854.
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D. Summary

While fornication statutes are almost certainly unconstitutional when applied to adults under the Supreme Court’s Lawrence decision, the Court’s juvenile punishment cases require differentiating between adults and adolescents when assessing rights to engage in private, consensual sexual intimacies. The adult personhood rights recognized in Lawrence do not apply to the categorically distinct class of adolescents. The very characteristics that protect adolescents from harsh adult punishments also justify state protection of young people from the hazards associated with non-marital sexual activity.

VI. Conclusion

With very few exceptions, the Supreme Court has consistently voiced a protectionist posture when considering constitutional issues involving young people. The Court has traditionally reached its decisions relying on common sense conclusions regarding the differences between children—including adolescents—and adults, without attending to relevant social science data that would arguably have informed the issues at hand. In particular, the Court has disregarded research suggesting that adolescents and adults possess comparable capacities to reason logically when making decisions about moral, social, and interpersonal matters. Prior to the Court’s punishment cases, critics had argued that acknowledgment of this research should cause the Court to shift from its protectionist posture to a broader, if not total, recognition of personhood rights for adolescents.

However, rather than a broader embrace of adolescent personhood, the Court has recently decidedly reinforced its protectionist view by directly appealing, for the first time, to psychological research that shows not the similarities but rather the differences between the mental functioning of adolescents and adults. Relying on the data, the Court found that adolescents are categorically less culpable than adults and must thus be protected under the Eighth Amendment from the harshest penalties imposed on adult criminal offenders. The Court specifically found that when compared to adults, young people under age eighteen manifest unique propensities to engage in reckless behavior and to be influenced by negative peer pressure. Also different from adults, adolescents exhibit underdeveloped and transitory character
development. Such conclusions imply—assuming a continued disregard of the social science supporting recognition of personhood rights—that perhaps the Court has finally laid the empirical foundations for a systematic protectionist theory of rights throughout the whole of juvenile law.

I have argued that, whether or not the punishment cases portend ubiquitous protectionism, the cases do provide important precedential value in contexts outside Eighth Amendment excessive punishment issues. Specifically, I have shown that the Court’s adolescent/adult distinction resolves the otherwise controversial issue of the constitutionality of governmental prohibitions of fornication between teenagers. In demonstrating the constitutionality of such prohibitions, I highlighted ways in which fornication statutes promote legitimate governmental and parental interests, thereby refuting claims that adolescents possess constitutionally protected personhood rights to engage in private, consensual sexual relations.

Such a conclusion may not be of great practical moment, but it is, at least, a symbolically significant advancement in the on-going task of defining the scope of constitutional rights of young people. As shown by this paper’s discussion of teenage sexual activity, the future direction of that task may be dramatically shaped by the Supreme Court’s empirically grounded recognition of the uniqueness of adolescence spelled out in the juvenile punishment cases.