

The Gap in Law between Developmental Expectations and Educational Obligations

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The law routinely differentiates between minors and adults, and modifies the rights and responsibilities of minors to account for their incomplete development. It is the clear expectation of the law that children are different from adults in important ways and that, between minority and majority, individuals will acquire what they previously lacked in the experience, wisdom, and capacities required for full autonomy and culpability. But while the law is thick with expectations that children will be transformed into fully competent and culpable adults, it is thin in its account of how this transformation will occur. It fails to assign responsibility for assisting children with their transformation or to make anything hinge on whether needed assistance is provided. This inattention creates a legal regime that predictably underprepares individuals for the rights and responsibilities of adult citizenship. And when the clock runs out at the stroke of legal adulthood, the erstwhile child is left bearing the costs of any educational failings.

The aim of this Article is to explore the gap between developmental expectations and educational obligations reflected in our law. I use the term “education” broadly to describe all actions taken to shape minors’ development toward ends society expects its citizens to achieve. To be sure, some portion of this development occurs without assistance as a product of genetically determined biological processes. But much development, particularly the development that matters to individuals’ exercise of rights and responsibilities under law, depends on outside influences—environmental, experiential, and instructional—which minors cannot be expected to engender or control. Children have educational needs whenever they are expected to develop skills, experience, wisdom, or capacities that they cannot be expected to develop without help. It is

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my contention, here, that every instance in which the law treats children differently from adults raises questions about how children are expected to change and who is responsible for that change. For the most part, however, these questions go unanswered.¹

In Part I, I consider two cases, *Graham v Florida*² and the Yearning for Zion Protective Services Cases³ (“the YFZ Cases”), which, in very different legal contexts, illustrate the gap between developmental expectations and educational obligations present in our law. In *Graham*, the implicit expectation detached from educational accountability concerns children’s development into fully culpable actors. In the YFZ Cases, the implicit expectation detached from educational accountability concerns children’s development into fully autonomous sexual beings. In Part II, I consider the extent to which the law imposes educational obligations on parents and the state, and the limits of those obligations. In particular, I highlight our failure to take educational responsibility for some aspects of development singled out as especially important in law. I then go on, in Part III, to explore how we might improve our accountability for children’s development in law. In Part IV, I briefly consider the proposal’s limitations and conclude.

I. ILLUSTRATING THE GAP

A. How Do Young Offenders Become Fully Culpable?

In *Graham v Florida*, the Supreme Court held that adolescent offenders are categorically less culpable than adult offenders and

¹ Many scholars have taken as their subject the education required to prepare children for citizenship. See, for example, John Dewey, *Democracy and Education: An Introduction to the Philosophy of Education* 41–53 (Macmillan 1916); Amy Gutmann, *Democratic Education* 19–22 (Princeton 1987). For recent examples in legal scholarship, see Vivian E. Hamilton, *Immature Citizens and the State*, 2010 BYU L Rev 1055, 1119–42; Anne C. Dailey, *Developing Citizens*, 91 Iowa L Rev 431, 432–36 (2006). Here, I come at this same issue from another direction. I suggest that the very design of our legal regime—our two-tiered structure that routinely treats children differently from adults—depends for its coherence on some account of what we expect to change and how that change will occur.

² 130 S Ct 2011 (2010).

³ The disposition of this large collection of related cases is set out in a number of sources, including *In re Texas Department of Family and Protective Services*, 255 SW3d 613, 613–15 (Tex 2008); Order Vacating Temporary Managing Conservatorship and Additional Temporary Orders, *In the Interest of Minor Children from the YFZ Ranch*, Cause Nos 2779–2902, 2905, 2908, *1 (Tex 51st Judicial Dist June 2, 2008) (“Order Vacating Conservatorship”), online at http://www.dfps.state.tx.us/documents/about/pdf/2008-06-02_Court%20Order.pdf (visited Oct 18, 2011); Texas Department of Family and Protective Service, *Eldorado Investigation* 6–16 (Dec 22, 2008), online at http://www.dfps.state.tx.us/documents/about/pdf/2008-12-22_Eldorado.pdf (visited Oct 18, 2011) (recounting the entire course of proceedings from the initial investigation through the final resolution of the cases).

therefore could not, under the Eighth Amendment, be sentenced to life without parole for nonhomicide offenses.⁴ Echoing its analysis in *Roper v Simmons*,⁵ which invalidated the imposition of the death penalty for offenses committed by minors, the Court identified a number of psychosocial distinctions between adolescents and adults that render adolescents less culpable: “[C]ompared to adults,” the Court found, adolescents “lack [] maturity,” have an “underdeveloped sense of responsibility,” and “are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure.”⁶ The Court noted that these behavioral findings were supported by recent “brain science” that showed that adolescent brains are less developed in areas believed responsible for behavioral control.⁷ The Court also emphasized that adolescents’ characters are less fixed. Adolescents, the Court explained, are “more capable of change than are adults,” and therefore juvenile offending is “less likely to be evidence of ‘irretrievably depraved character.’”⁸

In *Graham*, the Court grounded its description of adolescent differences, and the potential for change, in social science and neuroscience.⁹ Here, I take no position on whether this grounding is appropriate. Rather, I take the Court’s reasoning at face value and consider its implications. If culpability is reduced by psychosocial impairments, as understood by developmental science, what does that developmental science tell us about how those impairments can be addressed? *Graham* is particularly fruitful for this inquiry because the interdisciplinary team of scholars, Laurence Steinberg and Elizabeth Scott, who appear to have had the most influence with the Court in its analysis of adolescents’ immaturity, have also considered, at some length, what is required to transform adolescent offenders into productive, nonoffending adults.¹⁰

⁴ 130 S Ct at 2034.

⁵ 543 US 551 (2005).

⁶ *Graham*, 130 S Ct at 2026, quoting *Roper*, 543 US at 569–70.

⁷ *Graham*, 130 S Ct at 2026.

⁸ *Id.*, quoting *Roper*, 543 US at 570.

⁹ 130 US at 2026–27.

¹⁰ Laurence Steinberg, a developmental psychologist, and Elizabeth Scott, a law professor, have joined forces on a number of articles and most recently a book, Elizabeth S. Scott and Laurence Steinberg, *Rethinking Juvenile Justice* (Harvard 2008). In *Roper*, the Court expressly relied upon one of their articles, Laurence Steinberg and Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 Am Psych 1009 (2003). *Roper*, 543 US at 569. And the Court’s list of “three general differences” between juveniles and adults in *Roper* and *Graham* tracks Steinberg and Scott’s analysis. Compare *Roper*, 543 US at 569–70 (stating that the “[t]hree general differences” between juveniles and adults are (1) a “lack of maturity and an underdeveloped sense of responsibility,” (2) a heightened susceptibility to “negative influences and outside pressures,” and (3) a “not as well formed” character); *Graham*, 130 S Ct at 2038,

In their comprehensive review of the developmental and neuroscientific literature, Scott and Steinberg conclude that while some change between adolescence and young adulthood is biologically determined, much of the expected development requires assistance.¹¹ Brain science, and related accounts of hormonal changes, suggest that adolescents are inherently different from adults in ways likely to affect their exercise of judgment and impulse control.¹² And while the brain can be expected to mature as a simple product of physiological maturation, even those most organic of transformations can be affected by environment and experience.¹³ Moreover, brain development alone will not produce social and behavioral maturation. Scott and Steinberg emphasize the important role played by “social context” in determining the direction and pace of offenders’ change.¹⁴ In particular, Scott and Steinberg single out three “crucial” conditions broadly and consistently found in the scientific literature to encourage the development of psychosocial maturity.¹⁵ First is the presence of an adult, whether parent, teacher, or coach, who is involved and invested in the young person’s life and who is able effectively to monitor, support, and supervise the adolescent. Second is engagement with prosocial peers, and third is participation in activities that encourage the adolescent to “develop and practice autonomous decision-making and critical thinking.”¹⁶

The process of aging may universally be a process of fixing character, behavior, and identity, but what gets fixed will be significantly affected by what, if any, schooling, social supports, and opportunities are provided. These factors are surely more in the control of family, communities, and government than of the (admittedly immature) adolescents themselves. But under our current legal regime, once they are adults, offenders bear full responsibility for subsequent offenses, whether or not that assistance

with Steinberg and Scott, 58 *Am Psych* at 1011, 1012, 1014–15 (cited in note 10) (discussing juveniles’ “psychosocial immaturity,” “susceptibility to peer influence,” and “unformed . . . character[]” as mitigating culpability).

¹¹ See Scott and Steinberg, *Rethinking Juvenile Justice* at 56–57 (cited in note 10).

¹² See *id.* at 44–49 (summarizing current scientific understanding of brain and related hormonal development in adolescents).

¹³ See, for example, B.J. Casey, et al, *Imaging the Developing Brain: What Have We Learned about Cognitive Development?*, 9 *Trends Cog Sci* 104, 108 (2005) (drawing the connection between life experience and brain development); Daniel P. Keating, *Cognitive and Brain Development*, in Richard M. Lerner and Laurence Steinberg, eds, *Handbook of Adolescent Psychology* 75 (Wiley 2d ed 2004) (noting that there is “neural evidence that the adolescent brain is primed for a critical period during which environments and activities will shape function, especially prefrontal functions”).

¹⁴ See Scott and Steinberg, *Rethinking Juvenile Justice* at 55–56 (cited in note 10).

¹⁵ *Id.* at 56–57.

¹⁶ *Id.*

was provided. More coherent would be a scheme that imposed obligations and consequences for failing to meet those obligations on those in a position to provide the needed assistance or that discounted adult culpability assessments to reflect educational deprivation.

B. How Do Potential Child Abuse Victims Become Freely Consenting Adults?

The second case I offer as an example is, more accurately, a large set of cases in which the Texas Department of Family and Protective Services (DFPS) removed, and subsequently returned, over four hundred children living in a secluded Fundamentalist Church of Jesus Christ of Latter-Day Saints (FLDS) community at the Yearning for Zion Ranch near Eldorado, Texas. While the various courts that addressed the *YFZ Cases* did not, like *Graham*, expressly take up the developmental differences between children and adults, their dispositions were, like *Graham*'s, grounded on age-based legal distinctions that anticipated children's later maturation. Whereas in the context of *Graham* that maturation was expected to render individuals fully culpable, in this context, the maturation was expected to render them fully competent to exercise sexual autonomy.

In the *YFZ Cases*, the core child protection concern was that pubescent girls were marrying and having sex with designated older men because they were told by their parents and church leaders that it was their religious duty to do so. This sex qualified as sexual abuse by virtue of the girls' age, alone.¹⁷ The Texas Supreme Court ultimately concluded that the original removal of the children did not satisfy Texas's statutory requirements.¹⁸ But the holding in no way questioned the legitimacy of the Texas law that defined adult men's sex with minors as sex abuse. The Supreme Court encouraged the trial judge to consider what ongoing supervision and conditions

¹⁷ See Tex Fam Code Ann § 261.001(E), which defines child abuse to include

sexual conduct harmful to a child's mental, emotional, or physical welfare, including conduct that constitutes the offense of continuous sexual abuse of young child or children under Section 21.02, Penal Code, indecency with a child under Section 21.11, Penal Code, sexual assault under Section 22.011, Penal Code, or aggravated sexual assault under Section 22.021, Penal Code.

Tex Penal Code Ann §§ 21.02, 21.11, 22.011, 22.021 (defining the scope of sexual offenses identified in the Family Code).

¹⁸ See *In re Texas Department of Family and Protective Services*, 255 SW3d 613, 615 (Tex 2008) ("On the record before us, removal of the children was not warranted.").

should be imposed on family members to ensure that girls did not have sex with adult men on their return.¹⁹

On remand, the trial court imposed conditions on the return of the children, including a requirement that their parents cooperate with DFPS's ongoing child abuse investigations. DFPS, in turn, required mothers to sign "safety plans" for all girls ages ten through seventeen, agreeing that the mothers would not allow their daughters to marry or have any contact with men who had been involved as participants or facilitators of underage marriages.²⁰ The order returning the children, with conditions, coincided (not coincidentally) with the announcement, by the YFZ community's religious leader, Willie Jessop, that "[i]n the future, the church commits that it will not preside over any marriage of any woman under the age of legal consent in the jurisdiction in which the marriage takes place."²¹ With the exception of the cases involving a few families who refused to sign the safety plans, all the cases were soon "non-suited." The trial court understood its role to be the protection of children from sexual abuse, and, once the available evidence suggested that sex with "underage" girls was no longer occurring,²² it terminated its involvement.

Based on the information available about life within the YFZ community, we have every reason to expect that, absent some intervention from outside, the influences on these girls would remain constant, and that, when they came "of age," they would agree to sex with the same men for precisely the same reasons as they (or their cohort) had previously done at fifteen.²³ But the legal response to this

¹⁹ See *id.* ("[T]he Family Code gives the [trial] court broad authority to protect children short of separating them from their parents and placing them in foster care. The court may make and modify temporary orders 'for the safety and welfare of the child.'").

²⁰ Order Vacating Conservatorship at *3-5 (cited in note 3); *Eldorado Investigation* at 11-13 (cited in note 3) (recounting requirement that parents sign safety plans).

²¹ Richard Stewart and Dale Lezon, *Return to Eldorado; Sect Pledges to Change as Its Families Reunite; FLDS Promises to Stop Marrying Underage Girls*, Houston Chron A1 (June 3, 2008).

²² I note that the record is not clear whether the relevant line for the FLDS community or the state of Texas was eighteen, seventeen, or sixteen. The FLDS statement ambiguously commits not to preside over the marriage of "any woman under the age of legal consent in the jurisdiction in which the marriage takes place." *Id.* In Texas, the legal age of consent is seventeen, see Tex Penal Code Ann § 21.11(a), unless a girl is officially married, which she can do with her parents' permission at sixteen if the man she marries is not already married to someone else. See Tex Fam Code Ann §§ 2.101-2.102. The DFPS's report limits those reported as sexually abused to those fifteen and under but describes safety plans developed for all girls between the ages of ten and seventeen. See *Eldorado Investigation* at 5, 14 (cited in note 3). The analysis is the same at whatever age the law draws the line between childhood and adulthood for these purposes.

²³ This is a consistent picture derived from both neutral journalistic accounts and critical accounts of life within the FLDS community. Marriages were understood to be divinely

sex changes completely with age. Whereas girls who submit to sex with older men to whom they feel no romantic attachment or sexual attraction because they have been raised to believe it is their religious duty are treated as victims and the sex treated as a crime,²⁴ young women who submit to sex with older men to whom they feel no romantic attachment or sexual attraction because they have been raised to believe it is their religious duty are treated as fully autonomous adults and their sex is protected.

While not set out in the *YFZ Cases*, the distinct treatment of minors and adults who agree to engage in sex with adults has long been justified in large part in developmental terms. As a general matter, sex is understood to cause legally cognizable harm only when engaged in with someone who did not consent. Where lack of consent is proven, sex is prohibited, regardless of age.²⁵ For minors, however, a lack of consent is presumed, without regard to proof in most contexts.²⁶ This presumption covers a wide range of actual views and levels of understanding, from complete opposition or confusion, to the FLDS members' devout and dutiful submission, to enthusiastic participation in some cases of statutory rape. The concern justifying the presumption even where teenagers manifest some indication of consent is that minors (1) may lack the understanding and decision-making capacity required for this consent and (2) are vulnerable to the power differential between adult and child that can lead a self-interested adult to manipulate the minor's choice.

As in *Graham*, the distinct treatment of children reflects an expectation that they will grow into something different, here adults who have the capacity to assess and act on their own interests in matters of sex and reproduction. And as with culpability, there is a risk that some individuals will not be given the assistance they need to develop as the law anticipates. There is a certain irresponsibility in granting individuals "full autonomy" at eighteen when we have done nothing to prepare them to act autonomously. While our commitment to individual liberty likely rules out adjusting the

ordained and communicated to FLDS members through church leaders. See Carolyn Jessop, *Escape* 19, 327–32 (Broadway 2007) (criticizing the religious community for compelling girls and young women into loveless marriages with men with high standing in the FLDS church); Scott Anderson, *The Polygamists*, *Natl Geo* 34, 34 (Feb 2010) (describing the link between the FLDS faith and the assignment of multiple wives to men).

²⁴ See Tex Penal Code Ann § 21.11(d).

²⁵ See, for example, Tex Penal Code Ann § 22.011.

²⁶ See *Davis v United States*, 873 A2d 1101, 1105 (DC 2005) (describing the "longstanding rule that a child is legally incapable of consenting to sexual conduct with an adult," and explaining that sexual conduct between adults and children was viewed as "inherently coercive due to the age difference between the participants").

freedoms afforded to adults to account for these developmental failures, it does not answer the question considered here: namely, whether the state can and should intervene to help address whatever impairments compromise minors' ability to act autonomously before they are left to their own devices at adulthood.

Two sorts of legal constraints appear to have operated to foreclose the trial court's consideration of the girls' interest in being prepared to exercise procreative autonomy in adulthood, one statutory and one constitutional. The first constraint under which the juvenile court operated was understood to be imposed by the child abuse laws, which defined the scope of the trial court's jurisdiction. The focus of the case was sexual abuse and not what we might characterize as developmental harm.²⁷

The second constraint that prevented the court and administrators from giving serious consideration to the children's interest in preparation for autonomous action was likely constitutional. This piece of the story requires a lot of reading between the lines, but it is worth considering the constitutional issues, even if they were not explicitly taken into account in the decision of the courts and administrators. The DFPS's original decision to remove all children, male and female, regardless of age, from the compound was justified as necessary to protect all children from the short- and long-term harms that would come from their ongoing exposure to the FLDS community's "pervasive system of beliefs" that encouraged girls to submit to sexual abuse and boys to develop into perpetrators.²⁸ This justification was criticized on appeal, because the long-term shaping of harmful behavior and attitudes did not create an "immediate" threat to the "physical health and safety" of the children justifying emergency removal.²⁹ It was also cited by the parents' attorneys as evidence that the DFPS was motivated by religious animosity, rather than concern for the

²⁷ See *In re Texas*, 255 SW3d at 614–15.

²⁸ Affidavit in Support of Original Petition for Protection of a Child in an Emergency and for Conservatorship in Suit Affecting the Parent-Child Relationship, *In the Interest of a Child*, *5 (Tex 51st Judicial Dist Apr 6, 2008), online at <http://messengerandadvocate.files.wordpress.com/2008/04/flds-affidavit.pdf> (visited Oct 19, 2011) (stating that a "pervasive pattern and practice of indoctrinating and grooming minor female children to accept spiritual marriages to adult male members of the YFZ Ranch" resulted in their being sexually abused, and that the same pattern of indoctrination and behavior resulted in boys "becoming sexual perpetrators").

²⁹ *In re Steed*, 2008 WL 2132014, *3 (Tex App):

Even if one views the FLDS belief system as creating a danger of sexual abuse by grooming boys to be perpetrators of sexual abuse and raising girls to be victims of sexual abuse as the Department contends, there is no evidence that this danger is "immediate" or "urgent" as contemplated by section 262.201.

children, which became the focus of the public outcry about the government's handling of the case.³⁰

In likely response to the criticism it received on this issue, the DFPS went out of its way in its final report about the case to explain that “[f]or the Department of Family and Protective Services, the Yearning for Zion case is about sexual abuse of girls and children who were taught that underage marriages are a way of life. . . . [I]t has never been about religion.”³¹ While nothing in the appellate court’s ruling prevented the trial court or DFPS from taking the YFZ community’s “pervasive belief system”³² into account in designing services to protect the children from harm once they were returned to the ranch, the constitutional delicacy of the issue likely discouraged the court and agency from considering any move in this direction.

Following a straightforward understanding of the relevant child abuse laws, the trial court did not address whether it had the authority in the context of the child protection proceedings to interfere with the FLDS parents’ preparation of their daughters for adult sex. The action justifying intervention was sex abuse, defined by statute to end with childhood. But the details of the case raise questions about the developmental expectations reflected in the distinct treatment of girls’ and women’s sexual decisions. To the extent it reflects an expected transformation between childhood vulnerability and adult competence, we should ask who bears what responsibility for ensuring that the transformation occurs.

II. WHO BEARS WHAT RESPONSIBILITY FOR CHILDREN’S DEVELOPMENT?

The law has long recognized the responsibility of parents and the state to “educate” children in the broad sense of preparing them for successful life in adulthood. But when this broad responsibility is translated into more concrete legal obligations, little attention is paid to the developmental expectations reflected in our law. Enforceable obligations to educate, to the extent they exist, are generally limited

³⁰ Response to Petition for Writ of Mandamus, *In re Texas Department of Family and Protective Services*, No 08-0391, *5–6 (Tex filed May 29, 2008) (available on Westlaw at 2008 WL 2307380) (arguing that DFPS’s “reliance on practices that do not involve sex abuse constitutes direct evidence of intentional religious discrimination prohibited by [the Constitution]” and that DFPS “is not merely alleging sex abuse or toleration of it; it is alleging that the religious beliefs of the parents themselves are improper”). See also Brooke Adams and Kristen Moulton, *Judge Says FLDS Children Will Stay in Custody, Orders DNA Tests*, Salt Lake Trib (Apr 19, 2008), online at http://www.sltrib.com/ci_8981942 (visited Oct 19, 2011).

³¹ *Eldorado Investigation* at 5 (cited in note 3).

³² *Id.* at 7.

to conventional issues of schooling, such as school attendance, curriculum, funding, and the like. While these issues have some bearing on the bigger question of how we prepare children for the legal rights and responsibilities of adulthood, the lack of express attention in law to that question is striking, in light of its apparent importance to our legal design.

In his *Commentaries on the Laws of England*, William Blackstone described parents' duty to give children "an education suitable to their station in life" and to prevent them from "grow[ing] up like [] mere beast[s], to lead a life useless to others, and shameful to [themselves]."³³ This understanding of the parental duty of education was imported into the common law of the United States,³⁴ and when the United States Supreme Court interpreted the Constitution to protect parents' right to control the upbringing of their children in *Pierce v Society of Sisters*,³⁵ it tied that right to "the high duty to recognize and prepare [their children] for additional obligations."³⁶

The state's responsibility for children's successful development is also recognized in law. As the Supreme Court explained in *Prince v Massachusetts*,³⁷

The state's authority over children's activities is broader than over like actions of adults. . . . A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies.³⁸

This authority was grounded, the Court explained, on the doctrine of "*parens patriae*,"³⁹ literally "parent of the country," a doctrine that recognizes the state's "imperative duty . . . to protect and provide for the comfort and well-being of such of its citizens as, by reason of infancy, . . . are unable to take care of themselves."⁴⁰ While both parent and state are obligated, by law, to prepare

³³ William Blackstone, 1 *Commentaries on the Laws of England* 438–39, 440 (Chicago 1979) (emphasis omitted) ("The power of parents over their children is derived from the former consideration, their duty; this authority being given them, partly to enable the parent more effectually to perform his duty, and partly as a recompence for his care and trouble in the faithful discharge of it.").

³⁴ See G.W. Field, *The Legal Relations of Infants, Parent and Child, and Guardian and Ward* 57–58 (Williamson & Higbie 1888); James Kent, 2 *Commentaries on American Law* 195–96 (Little, Brown 8th ed 1854).

³⁵ 268 US 510 (1925).

³⁶ *Id.* at 535.

³⁷ 321 US 158 (1944).

³⁸ *Id.* at 168.

³⁹ *Id.* at 166.

⁴⁰ *County of McLean v Humphreys*, 104 Ill 378, 383 (1882).

children for a successful, productive adulthood, that obligation does not translate into the assignment of any more specific responsibility for achieving the developmental progress anticipated in law. Indeed, as both *Pierce* and *Prince* illustrate, these broad obligations are generally articulated as justifications for granting authority rather than for enforcing duties.

To the extent any concrete and enforceable obligations to educate are imposed on parents or the state, these obligations are more narrowly focused on the conventional business of schools. Even within this narrower focus, educational obligations are thin, and only weakly enforced. While compulsory attendance laws require parents to send their children to school, the requirement commonly ends at age sixteen or seventeen—short of high school graduation, and well short of the education generally required for conventional adult success in our society.⁴¹ And even those school attendance requirements are readily waived where parents choose to teach their children at home. For home-schooled children, state oversight of that home education is generally minimal, and decreasing.⁴²

For states, too, enforceable obligations are minimal and school-focused. State constitutions are the primary source of states' affirmative educational obligations, and efforts to enforce these obligations have focused on the equality and adequacy of school funding.⁴³ The success of these efforts has been mixed. While there are some important examples of states in which educational obligations have been enforced through a combination of court-ordered reforms and court-compelled legislative deliberation and

⁴¹ National Center for School Engagement, *Compulsory Attendance Laws Listed by State* (2003), online at <http://www.schoolengagement.org/TruancyPreventionRegistry/Admin/Resources/15.pdf> (visited Oct 19, 2011). One prominent measure of conventional adult success is earning ability, which is significantly lower for those whose education stops at high school or before. See, for example, Bureau of Labor Statistics, *Usual Weekly Earnings of Wage and Salary Workers Fourth Quarter 2011* table 1 (Jan 24, 2012), online at <http://www.bls.gov/news.release/pdf/wkyeng.pdf> (visited Feb 3, 2012) (reporting a median weekly income of \$459 for those without a high school diploma, compared with \$636 for high school graduates (no college) and \$1,152 for those holding at least a bachelor's degree).

⁴² See Kimberly A. Yuracko, *Education off the Grid: Constitutional Constraints on Homeschooling*, 96 Cal L Rev 123, 128–30 (2008) (noting that, in response to political and legal pressure, home-schooling regulations have become increasingly lenient, with only half the states requiring any specific curriculum or test of educational achievement of home-schooled students and ten states not even requiring homeschooling parents to notify the state of their intention to homeschool).

⁴³ See Scott R. Bauries, *Is There an Elephant in the Room? Judicial Review of Educational Adequacy and the Separation of Powers in State Constitutions*, 61 Ala L Rev 701, 705 (2010) (describing the evolution of school finance litigation from an inequality to an absolute inadequacy theory).

action,⁴⁴ other states have found the affirmative educational obligations set out in their constitutions nonjusticiable.⁴⁵ And while those nonjusticiability findings are based on separation of powers principles and the superior competence of legislatures to set educational policy, they contemplate no alternative, legislative mechanism of enforcement for the state's educational obligations, other than citizens' expected interest in their achievement.⁴⁶ For the most part, like parents' educational obligation, the state's constitutional obligation to provide each child with an education is articulated in broad terms, but translates into a small, weakly enforceable duty.

The more serious limitation to state's and parents' educational obligations is the lack of connection between those obligations and the developmental expectations manifest in law. To the extent parents and state have any enforceable obligation to educate their children, that obligation is defined in narrow terms of academic achievement that are insufficient to prepare them for those adult rights and responsibilities they will be expected to undertake at eighteen. The difference, according to the Court in *Graham*, between a psychosocially immature sixteen- or seventeen-year-old who cannot be held fully culpable for his crimes, and a mature eighteen-year-old who can be so held, is impulse control, maturity of judgment, and independence of decision making and action,⁴⁷ but neither state nor parent has a legally enforceable obligation to provide the assistance required to enable this prosocial maturation to occur. And the difference between an immature fifteen-year-old, who cannot determine for herself whether she wants to have church-mandated sex with men, and a mature eighteen-year-old who can so choose, is presumably some difference in life experience, self-understanding, and capacity to think and act on her own behalf, but neither state nor parent has any legal obligation to help a child acquire these skills, experiences, or self-understanding.

⁴⁴ See, for example, *Rose v Council for Better Education, Inc.*, 790 SW2d 186, 212–13 (Ky 1989) (finding that children have a fundamental “right to an adequate education,” that the Kentucky General Assembly failed to meet its constitutional mandate to provide this education, and directing the legislature to “recreate and redesign” a system that will develop in children seven identified capacities).

⁴⁵ See, for example, *Committee for Educational Rights v Edgar*, 672 NE2d 1178, 1183 (Ill 1996) (finding the question of whether Illinois's system of education meets the constitution's requirement of a “high quality” education nonjusticiable, and leaving the assessment to the political process).

⁴⁶ See *id.*

⁴⁷ 130 S Ct at 2026.

To be sure, it is within the broad vision of our expectations for parents that they will help their children develop mature, independent, and prosocial behavior and judgment that will prevent them from committing crimes, but no law compels parents to do so or imposes any consequences on them for their failures.⁴⁸ And while the state, too, undertakes efforts to develop children's psychosocial skills and decision-making competence, its educational successes and failures are never accounted for in these terms. Responsibility for developing the skills and knowledge required for autonomous decision making is even more thinly attended to in law. Parents are, at least in some contexts, affirmatively shielded from any obligation to prepare their children to act autonomously, and the obligation of the state to pick up the slack generally goes unaddressed. In any particular context, we might determine that the problems created by state intervention outweigh the benefits, but this conclusion should *follow* an analysis of children's developmental needs, not preempt it.

III. EDUCATIONAL ACCOUNTABILITY IN LAW

If we are to take greater responsibility for children's achievement of our developmental expectations, every child-specific legal rule should trigger some reflection. We should ask what changes we expect children to undergo before they are subject to the adult rules and how those changes will occur. That reflection might occur within a single case or throughout the lawmaking process. I will offer some illustrations of both of these possibilities after considering some common issues.

A. Defining Developmental Expectations

If we are to do a better job of assigning educational responsibility, we need to begin by articulating the changes we expect minors to undergo as they approach adulthood. But these changes, anticipated obliquely in our distinct treatment of children, defy precise definition. *Graham* tells us, for example, that minors are "less" culpable because they have a "lack of" maturity and an "underdeveloped" sense of responsibility, because they are "more vulnerable" to negative influences including peer pressure, and because their characters are "not as well formed."⁴⁹ But the Court

⁴⁸ States sometimes impose fines and other sanctions on parents for their children's offenses, see, for example, Linda A. Chapin, *Out of Control? The Uses and Abuses of Parental Liability Laws to Control Juvenile Delinquency in the United States*, 37 Santa Clara L Rev 621, 629-31, 639-54 (1997), but never for the offenses of adult children they could have helped to avoid criminal behavior through better parenting.

⁴⁹ 130 S Ct at 2026.

does not match these impaired states with an account of the comparison group. What is enough gaining of maturity, developing of responsibility, shedding of vulnerability, and fixing of character to qualify one for the adult rules?

Answers to these questions are necessarily elusive. The law does not require individuals to demonstrate a specific level of maturity, or understanding, or self-control, or decision-making capacity to qualify them for the rights and responsibilities of adulthood, and it seems like a very bad idea to try to move in this direction. These are not characteristics that lend themselves to assessment and quantification. Moreover, at least where individual freedoms are at stake, any attempt to impose conditions on adults would be antithetical to our liberal-democratic commitments.

But this sensible resistance to imposing developmental conditions reveals an oddly lopsided picture: we premise children's special treatment on their important developmental differences from a group whose developmental achievements are undefined. In a sense, this one-sided comparison presents real problems for any attempt to assign educational responsibility: How can we assign responsibility for helping children develop into beings whose qualities elude description? In another sense, this lopsidedness underscores the problem I am trying to tackle: a two-tiered legal regime premised on expected change between the two tiers demands some account, if only an idealized one, of what we expect to change and how that change will occur. The trick is to articulate general aspirational qualities of adult citizenship without in any way converting those qualities into conditions. Our legal regime should attempt to set out these expectations precisely so that we can help children to develop toward the adult ideal. The failure of the law to try to get at this question, to do more to articulate what we hope children will become, helps to keep potential educators off the hook and limits our ambitions for our children.

B. Identifying the Mechanisms of Change

Attention to developmental endpoints, even loosely defined, invites greater attention to the mechanisms of developmental progress. If we expect cognitively competent decision makers, then we should consider how we develop cognitive competence. If we expect group identification and connection, whether within a defined community or with all citizens of the state, then we should consider how we facilitate the development of these connections. If we expect psychosocial maturity of the sort anticipated in *Graham*, then we should consider what adolescents need to develop impulse control

and good judgment and how to help them disentangle themselves from their antisocial peers.

A consideration of developmental mechanisms would also allow us to identify those aspects of development that are likely wholly or partly biologically determined. Where this is believed to be the case, there would be no educational responsibility to identify and assign, and the law's role could be limited to drawing the age line at roughly the right place. But to the extent that interventions can be expected to have developmental effects, positive or negative, it is incumbent upon us to consider our developmental expectations in assessing which interventions to pursue.

It is important to emphasize that in calling for a consideration of developmental expectations and mechanisms, I in no way intend to direct the methods used or answers reached. These answers can be as general or specific as the relevant lawmaker deems appropriate. They can be grounded in social science, brain science, legal precedent, or common sense. They can remain the same over centuries, or adapt to new-found knowledge or ways of thinking about the world. What is important is that the analysis of expectations, mechanisms, and responsibility is consistent with any distinctions in treatment drawn, and the developmental justifications that underlie those distinctions.

C. Assigning Educational Responsibility

An articulation, even a rough one, of the law's developmental expectations and children's need for assistance in fulfilling these expectations would allow the law to take better account of how those expectations will be achieved. While the trigger for the accounting—the distinct treatment of children—would always be the same, how and where this accounting occurs would necessarily vary with context. In some legal contexts, where the focus is already on children's education, assigning responsibility for children's achievement of these developmental expectations can fit within conventional analysis. In other contexts, attention to developmental expectations will dramatically change the analysis. In some contexts, the distinct treatment, the developmental expectations, and the responsibility for developmental assistance could all be considered together. In others, each of those questions would need to be addressed separately, in different forums and at different times.

To illustrate the range of ways in which the developmental accounting could occur, I begin with *Wisconsin v Yoder*,⁵⁰ the central

⁵⁰ 406 US 205 (1971).

case addressing the proper allocation of educational authority between parent and state under the United States Constitution. Even in this case, where the Court's focus is on the link between children's education and their preparation for adult life, the education required to prepare them to exercise the central, anticipated rights goes unaddressed. I will then return to my two primary case examples, the *YFZ Cases* and *Graham*, to illustrate what taking greater account of children's expected development might entail.

In *Yoder*, the Court considered how to allocate educational authority between a state that wanted Amish children to attend two years of high school, and Amish parents, who wanted their children to stay home and learn to farm.⁵¹ While the issue was not directly before it, the Court took for granted the appropriateness of applying special legal rules to children, whether those rules required children (and not adults) to go to school or allowed parents to keep their children (but only while they were minors) at home. Presumably this child-specific deference to the educational choices of some combination of parent and state reflects the law's judgment that children are not yet ready to make these educational choices for themselves. When they reach adulthood, it is understood that they will be expected to make their own decisions about their faith, their education, and their associations.

Yoder failed, however, to take account of this expected change from dependent child to autonomous adult in assessing the Amish children's educational needs. It confined its analysis to the educational needs associated with the Amish children's two potential endpoints: life on an Amish farm and life outside the Amish community, and considered what is required to prepare Amish children for each of these fates.⁵² What the Court did not consider is what education is required to best prepare children to choose between these fates. Children's development is assumed, and the pathway of development ignored.

Had the Court considered the level of competence and experience required to prepare children to choose their life course in adulthood, it might have reached any number of conclusions. The Court might have concluded that critical reasoning skills were

⁵¹ Id at 230–34.

⁵² Id at 222–25 (concluding that an eighth grade education, followed by farming experience, is adequate “if the goal of education be viewed as the preparation of the child for life in the separated agrarian community,” and going on to note that “[t]here is no specific evidence of the loss of Amish adherents by attrition, nor is there any showing that upon leaving the Amish community Amish children . . . would become burdens on society because of educational shortcomings”).

necessary and therefore a curriculum designed to develop those skills, whether at home or school, was essential.⁵³ Or the Court might have decided that critical reasoning skills were necessary, but that eight years of education, or perhaps even biological development combined with life experience, was enough to develop these skills.⁵⁴ The Court might have decided that an understanding of the broader world with its wide array of values, experiences, and opportunities was essential and therefore that exposure to a range of students in high school was particularly valuable,⁵⁵ or the Court might have decided that the single most important preparation for adult decision making on such questions was the development of deep attachments to family and community best nurtured by parents shielded from state intrusions. More likely, the Court would have identified the importance of a number of these forms of preparation, and struggled to map those developmental aims onto the competing claims of parents and state.

As this litany of possibilities should make clear, interjecting a consideration of our obligations to prepare children for adult citizenship does not simplify a difficult case. Far from it. Rather, it brings into focus what is especially hard about *Yoder* and what has inspired much of the criticism of the case.⁵⁶ While the Court was right to balance children's educational needs against other interests protected by the Constitution and to appreciate the interrelationship between the interests of parents and children, it was wrong to take such a narrow view of children's educational needs, and particularly wrong not to consider the educational needs generated by its own (if implicit) expectations. And while a strong commitment to parental

⁵³ See Richard Arneson and Ian Shapiro, *Democratic Autonomy and Religious Freedom: A Critique of Wisconsin v. Yoder*, in Ian Shapiro, ed, *Democracy's Place* 137, 139 (Cornell 1996) (criticizing *Yoder* for failing to recognize the importance of "education to an age when critical reason is developed and can be fully deployed").

⁵⁴ See Martha C. Nussbaum, *Liberty of Conscience: In Defense of America's Tradition of Religious Equality* 145 (Basic Books 2008) (noting the importance of educating children to engage in critical reasoning but concluding that education through the eighth grade is probably sufficient to achieve that aim).

⁵⁵ See *Konrad v Germany*, App No 35504/03, *4 (Eur Ct Hum Rts 2006) (denying parents' right to home school, and recognizing the state's interest in the "education of responsible citizens who participate in a democratic and pluralistic society" through the "acquisition of social skills in dealing with other persons who [have] different views").

⁵⁶ Gutmann, *Democratic Education* at 29 (cited in note 1) (noting that the Amish parents in *Yoder* present an extreme example of parents denying their children the "skills necessary for rational deliberation"); Arneson and Shapiro, *Democratic Autonomy and Religious Freedom* at 139 (cited in note 53) ("[P]arents' claims should not displace a democratic state's requirement of compulsory education to an age when critical reason is developed and can be fully deployed.").

liberty might ultimately determine the outcome of the case, it should not prevent a deep consideration of all that is at stake for the child.

The *YFZ Cases* are not, like *Yoder*, “about” education. But for purposes of our analysis, they raise a very similar educational question. Like *Yoder*, the *YFZ Cases* considered the appropriateness of state intervention on behalf of children that was opposed by their parents and believed to threaten their parents’ way of life.⁵⁷ And, as in *Yoder*, the courts and protective service administrators in the *YFZ Cases* omitted consideration of children’s need to be prepared for adult decision making from its assessment of children’s needs and the state’s responsibility in meeting those needs. As noted in Part I.B., the account taken of children’s educational needs was likely limited by the court and administrators’ understanding of their authority under the child abuse laws and of the strength of the FLDS parents’ constitutional rights. While these constraints might properly affect the forum in which the girls’ need for developmental assistance was considered, or the ultimate outcome of a balancing of relevant interests, neither constraint should have prevented consideration of the question altogether.

It is not clear, on the face of the statute, that child abuse could not have been read to encompass the sort of developmental harm analyzed here. Texas defines emotional abuse as the “mental or emotional injury to a child that results in an observable and material impairment in the child’s growth, development, or psychological functioning.”⁵⁸ But even if the law, as written, could not be read to prohibit the inculcation of a belief in girls that they are required, by God, to marry and have sex with middle-aged men for whom they have no independent feelings of love or attraction, the court could nevertheless have identified this potential harm, and invited the legislature to consider the appropriateness of state intervention to prevent or reduce it.

As in the *Yoder* context, taking children’s developmental needs into account would not have made the case easier. The court would have needed to grapple with difficult questions: What development does the law expect of its adult procreative-rights exercisers? How does that development occur? How effective can the state be in facilitating that development? Moreover, the court would still need to consider the competing claims pressed in the case, most particularly the right of parents to control these very aspects of

⁵⁷ See *In re Texas Department of Family and Protective Services*, 255 SW3d 613, 615 (Tex 2008).

⁵⁸ Tex Fam Code Ann § 261.001(1)(A).

development, which they perceive as at the heart of their religious instruction of their children.⁵⁹

That being said, my criticism of the court and administrators' failure to consider the developmental harm done to children by their exclusive exposure to their parents' beliefs is not about the outcome. Rather, I find fault with the courts and administrators in the case for failing to take up the question at all. In finding the original removal of all the children unlawful, the Supreme Court of Texas explained that it was "premature" to address the "important, fundamental issues concerning parental rights and the State's interest in protecting children."⁶⁰ But on remand, the issue slipped through the trial court's fingers. A case in which removal of children was excessive soon became a case in which any state involvement was unjustified. In failing to consider whether any affirmative obligation should be imposed on the state to temper the FLDS parents' shaping of their children's understanding of their opportunities for sex, love, and marriage, it left unaddressed the gap between the law's developmental expectations and the girls' ability to achieve them.

These first two illustrations call on judges, already deliberating upon children's needs, to add to that consideration what the law suggests they will need in order to undertake the rights and responsibilities of adulthood. But there are many other ways we might take these developmental expectations into account, in addition to or in lieu of expanding the frame of a preexisting judicial inquiry. And in some legal contexts, the assignment of educational responsibility may need to be addressed in a separate proceeding, whether judicial, legislative, or otherwise, from that in which the developmental expectations are revealed.

In *Graham* and its predecessor, *Roper*, for example, the Court engaged in an extensive analysis of adolescents' developmental

⁵⁹ These competing claims can be framed as the parents' assertion of a right to create adaptive preferences in their children. A great deal has been written about the concept of adaptive preferences and the extent to which the law should or should not defer to such preferences in ordering legal rights. Less addressed is the special question of the extent to which we should permit parents to facilitate their children's adaptation of their preferences, by showing them a limited set of options and preventing them from developing the awareness and skills required to develop other preferences. Because the parents' interest in cultivating their children's adaptive preferences often flows out of the parents' own commitment (whether derived from adaptive preferences or not) to a set of religious beliefs that restricts options, a state interest in avoiding the development of adaptive preferences would pull against a conventional commitment to affording special protection to the inculcation of religious beliefs in their children. While the stakes of intrusion are clearly high, the *YFZ* courts made a mistake in rejecting any consideration of harm associated with the children's exclusive exposure to their parents' pervasive system of beliefs.

⁶⁰ *In re Texas*, 255 SW3d at 615.

immaturity, and particularly their immaturity of judgment and vulnerability to negative influences, to reach the conclusion that minors were less culpable than adults. By implication, the law expects adults, who are fully culpable, to be more mature in their decision making and behavior and less vulnerable to negative influences than minors. But *Graham* itself is a poor vehicle for assigning responsibility for helping minors mature, for the legal question raised by the case is limited to the appropriateness of the punishment in question.⁶¹ The Court could certainly speculate in dicta about the proper locus of such responsibility for change, but only in other legal contexts could that responsibility be fleshed out.

Particularly significant decisions such as *Graham* and *Roper*, in which a new account of legally relevant differences between children and adults is announced by the Supreme Court, might generate attention to educational obligations in contexts as far-ranging as juvenile justice policy, criminal sentencing, high school curricular design, labor policy, and the assignment of custodial responsibilities at divorce. With this range of contexts comes a range of legal actors and frames within which to consider the question. In the context of juvenile justice policy, for example, legislators might consider reframing the declaration of purposes to be served by their state's juvenile justice system or using the budgeting process to alter the programming offered to juveniles. An individual juvenile judge might take the expectations reflected in *Graham* into account in developing juveniles' dispositions, and a county court might revise its juvenile court rules in an effort to cultivate the kind of experience that could help a juvenile develop the expected judgment and self-control. This is just one subset of possible responses in one of many legal contexts potentially affected by *Graham's* implicit identification of developmental expectations. In another, the criminal sentencing context, a judge might reduce a sentence based on a finding that an offender was not given the needed assistance to grow out of his antisocial behavior, or direct the provision of such assistance as part of the offender's sentence.

We might go further and link the law's manifest developmental expectations to a child's enforceable right to assistance meeting those expectations. Perhaps a consequence of *Graham* should be the creation of a right of action to compel responsible parties to provide assistance or to compensate an erstwhile child for their failure to do so. Creating an enforceable right of this sort might sharpen our assignment of responsibility, but it would bring with this clarification

⁶¹ 130 S Ct at 2034.

all the hazards previously identified with an insistence on precision. Alternatively, we might recognize the right to assistance meeting the law's developmental expectations but authorize no private enforcement mechanism. A version of this approach has been taken by some of our sister constitutional democracies and by a number of our states. Under these regimes, children's right to education is expressly recognized in law, but the development of educational policy is largely left to the democratic deliberative process of legislative bodies.⁶² Recognizing an equivalent right to the broader sort of education I contemplate here might well serve my aim of fostering reflection among those who make, apply, and analyze the law without dictating any particular approach or outcomes.

IV. DO WE WANT GREATER EDUCATIONAL ACCOUNTABILITY IN LAW?

As my discussion itself makes clear, many limitations encumber the assignment of greater educational accountability in law. Defining the relevant developmental endpoints and the mechanisms for achieving them is a necessarily elusive task. There is no agreed-upon, testable set of experiences, skills, and behaviors that qualifies individuals for adult treatment under law, nor should we aspire to such a state-controlled conception of what qualifies an individual for full citizenship. Equally elusive is any precise account of how development is affected. The influences on development are myriad and interrelated, and any attempt to single out some small subset of these influences will only distort the picture. Enforcing responsibility is also highly problematic, in part because of this necessary lack of precision in the judgments called for and in part because of institutional constraints. While individuals can be given legal means to enforce their right to educational assistance from the state or private parties, we should worry about the limits of the courts' competence to either make broad educational policy or assess a specific child's educational experience.

Nor would this inquiry displace all other concerns of law, concerns that may wash out the significance of the questions considered here. Perhaps our interest in shielding Amish or FLDS

⁶² See Jeffrey Omar Usman, *Good Enough for Government Work: The Interpretation of Positive Constitutional Rights in State Constitutions*, 73 Albany L Rev 1459, 1461, 1496–1505 (2010) (comparing the positive rights, including educational rights, set out in state constitutions to those of other nations, and noting the extent of deference shown to the legislative process under these state regimes); Eric C. Christiansen, *Using Constitutional Adjudication to Remedy Socio-economic Injustice: Comparative Lesson from South Africa*, 13 UCLA J Intl L & Foreign Aff 369, 375 (2008) (noting the rarity of judicial enforcement of socioeconomic rights).

communities from the destructive intrusion of compulsory high school education or protective services intervention is so great, whether grounded in principles of religious freedom, family privacy, or elsewhere, that it trumps any concern we might have that we are underpreparing Amish or FLDS children for an exercise of autonomy. Perhaps our interest in imposing “full” punishments on criminal offenders is so great that it renders insignificant our failure to assist children in prosocial development or even our affirmative contributions to their antisocial development.

But none of these limitations suggests that the inquiry should be abandoned. Rather, they suggest that the inquiry should be framed to reflect these limitations: The idea is not that the distinct legal treatment of children should always be matched with a precise account of developmental expectations and an enforceable mandate for their accomplishment. Rather, the idea is that the distinct legal treatment of children should always prompt an inquiry, an inquiry into those expectations and how they might be accomplished, that labors under all the limitations identified here.

Another potential objection goes deeper. Perhaps the analysis is grounded on a false premise. Perhaps the law’s accommodation of children’s immaturity should not be read to imply any expectation that children will necessarily ever change. It may be inappropriate to read any assumptions of maturity, of a greater-than-childlike acquisition of skills, experiences, and judgment, into our law’s assignment of full rights and responsibilities in adulthood. Perhaps the law simply guards a period of developmental opportunity, leaving to chance children’s development into something else. The mechanisms of development may be so complicated and poorly understood and the law’s interest in protecting individuals’ self-determination so great, that at some point, fairly early in citizens’ lives, the law insists on assigning full rights and responsibilities, without regard to these citizens’ qualifications.

There is something to this point to be sure. I have, for the most part, read in the expectations from the different treatment of children and the justifications offered for this different treatment. At a minimum, I can argue that the difference in treatment raises questions about our expectations and suggests we would do well to reflect upon them. In the end, I am calling, primarily, for this asking of questions, this introduction of greater reflection about the law’s developmental expectations. In this sense, the aim is a modest one. But in another sense, my aim is ambitious. I call for a different sort of accounting than is generally done of the law’s distinct treatment of children. Rather than testing the extent to which we can justify

treating them differently in childhood, I ask who bears responsibility for helping them grow up.