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SPECIAL FEATURE:

SPRING 2006 CHILDREN AND THE LAW SYMPOSIUM

THE HISTORICAL LINKS BETWEEN CHILDREN, JUSTICE, AND DEMOCRACY[1]

Holly Brewer[2]

To modern social workers, judges, or child advocates, old struggles over children's legal status might seem irrelevant. Yet, understanding how and why assumptions about children have changed and the philosophical principles underlying them, are critical to our current debates. So bear with me as I lead you into a very different world, one whose different norms have everything to teach us about our own.

In sixteenth-century England, children over age seven were of "ripe age" to marry.[3] I have found examples of children

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[1] This paper was presented at Hamline University School of Law's Spring 2006 symposium. Holly Brewer, The Historical Links Between Children, Justice, and Democracy, presented at the Hamline University School of Law Symposium: Reassessing the Past, Present and Future Role of Children and Their Participation and Protection in American Law (May 2006). It is a summary of my book, *By Birth or Consent: Children, Law, and the Anglo-American Revolution in Authority*, which charts a transformation in children's legal status in England and America over three centuries, between 1550 and 1830 and links that shift to changes in the broader basis of political authority. HOLLY BREWER, BY BIRTH OR CONSENT: CHILDREN, LAW, AND THE ANGLO-AMERICAN REVOLUTION IN AUTHORITY (UNC Press 2005). *By Birth or Consent* is densely argued, heavily footnoted, and prize-winning. *Id.* (winning the J. Willard Hurst Prize from the Law and Society Association for the best book in legal history published in 2005, and also is a finalist for the 2006 Cromwell Prize from the American Society for Legal History). This essay seeks to make the heart of that analysis more accessible to modern practitioners, and also, to explain how the common law arguments about that transformation can inform modern debates about children's legal status. *See infra,* notes 3-11 and accompanying text.

[2] Holly Brewer is Associate Professor of Early American History at North Carolina State University. In addition to her work on the legal status of children, she has worked extensively on early American property law and is interested in broad questions of justice and democracy in the Anglo-American world.

marrying as young as two and three.[4] Four year olds could make wills to give away their goods and chattels. Children of any age could bind themselves into apprenticeships and be bound by those contracts until age twenty-four, and, indeed, sometimes imprisoned until they signed such labor contracts. Eight year olds could be hanged for arson or any other felony. The first statutory rape law, passed under Queen Elizabeth, concerned only girls and set the age below which consent was irrelevant at ten. Teenagers were routinely elected to Parliament, children who owned sufficient property could vote, and parental custody as we know it did not exist because guardianship existed only for heirs. For example, in 1667, at age thirteen, Christopher Monk made a critical floor speech to Parliament. These norms applied not only in England, but to varying degrees in the colonies as they were founded during the seventeenth century, which relied extensively on the English common law and English legal guides. Although modified by Massachusetts and Pennsylvania at their founding, those norms changed even more in England over the next two centuries, a change accelerated in America by the Revolution. Still, laws that accepted children's consent, and even in some cases their broader authority, had not changed completely in England or its former colonies by the early nineteenth century. In Pennsylvania in 1811, two year old Phoebe Stuart still placed her mark at the bottom of an apprenticeship contract, indicating that she consented to her indenture.[5]

But in the seventeenth and eighteenth centuries a fundamental shift occurred in the legal assumptions about childhood, adulthood, and responsibility at the same time as a broad transformation occurred in the importance of the principle of

[3] Children under age seven could contract only "espousals," or betrothals, which were formal promises to marry in the future, legally binding, but also breakable in some circumstances, and supposed to be followed by a formal marriage.

[4] In those cases, the children were carefully prompted through the words of the ceremony.

[5] *See* BREWER, BY BIRTH OR CONSENT, *supra* note 1.

consent to government. It was those shifting norms that had the potential to rebalance the scales of justice. This paper explains why children consented then and what that consent meant, but mostly it explains why that consent began to seem absurd. In doing so, the paper focuses on the key common law reformers who reshaped the understanding of "informed consent" in the law: Coke, Hale, and Blackstone. It will also acknowledge the reasons behind their reshaping of the common law, which had roots in enlightenment and what we would now call "democratic thought."[6] These debates have been lost for centuries, and uncovering them has great relevance for current debates about children's legal status, whether for their criminal accountability or their ability to drink, drive, or form contracts.

By Birth or Consent is the result of more than fifteen years of research on the historical links between democracy and children's justice that has uncovered a wealth of new information. My project began with questions about why the most important democratic theorists of the early modern period spoke so much about children. I then queried how the issues they raised about children and justice affected the legal status of real children. In laying out answers, my research became much broader than I had originally intended but led to some fundamental insights into how the norms that circumscribe children's lives developed, and most of all, revealed the debates underlying those rules. In a nutshell, I argue that in the late medieval common law, the principle of informed or meaningful consent was not present to nearly the same degree as now. Force and overt influence were often considered valid, as was the consent of children. Consent could be hereditary, and indeed many norms about status and society were hereditary, including most political authority. Hobbes' world–where consent could be binding on future generations, where children could consent, and where forced consent was binding–bore great

[6] I have identified "democratic thought" as the belief that just and fair authority should be based on the consent of the governed, as opposed to hereditary status. BREWER, BY BIRTH OR CONSENT, *supra* note 1, at 13-14.

similarity to the real one. Children had authority and could "consent" because this was a society where birth status was paramount. I argue that children were so important to the thinking of early modern writers about justice and democracy because it was through children that they could most effectively challenge the older ways of thinking about political power and obligation.

In other words, if one is born to a place in society, consent plays very little role in structuring that society, birth status is more important. If consent can be forced and openly influenced, and children can consent, a society can emerge that is based on consent, but it is not a democracy as we would recognize it. Fundamental to the emergence of modern democracy, then, are principles of meaningful consent. The Age of Reason was really about the age of reason, which Kant, for example, defined as a person's coming of age.[7]

In historical terms, these arguments were worked out in England and the continent in the debates over church membership that emerged with the protestant reformation. They asked questions such as, was a person born a member of a church or should that person be able to choose membership? These were life and death questions–whose answers could determine whether one could justifiably be burned alive for heresy. In England, where church and state were knit together, they had peculiar potency.

These questions focused, by definition, on the power to choose, and when the power could be valid. What qualities did one need to have in order to make an informed decision upon which one could be bound by the law? These debates spilled over into the political and legal arena, transforming, in the process, not only the whole structure surrounding the legal status of children, but the larger order of society.

Regardless of where one looked, the ability of a child to consent to marriage, to testify, to be guilty of a crime, to be elected or hold an elected office, to serve on a jury, to hold a political appointment, all changed. Guardianship became a much more

[7] BREWER, BY BIRTH OR CONSENT, *supra* note 1, at 8, 352.

important and universal system for all children as a result of their newly understood incapacities and parental power became much more important, as that of Lords declined.[8] All of this was central to transforming the very basis of authority from birthright to consent.

Many of the changes in children's legal status occurred legislatively. For example, setting twenty-one as the age to vote or hold higher office, or to sit on a jury, as well as some of the rules surrounding consent to marriage or labor. In England, at the beginning of the seventeenth century, Puritan reformers began urging that there should be a minimum age to vote, which they thought should be twenty-one. While they argued for this in Parliament in the 1620s, it did not pass. When they founded Massachusetts Bay, however, they first set the minimum voting age at twenty, and later changed it to twenty-one. Meanwhile, when the Puritans gained control in England during the English Civil War of the 1640s, they made twenty-one the minimum age to vote, a change that was repealed with the restoration of Charles I in 1660. Only after England's second Revolution of that century, the Glorious Revolution of 1688, were laws passed requiring voters and elected officials to be twenty-one.

England had two revolutions in the seventeenth century, during which they argued over the basic principles of government and the basis of authority. Much of the thinking and writings on which the American Revolution was based came out of reformist writings from those two revolutions. Two examples of reformist writers are: (1) Matthew Hale, from the English Civil War which began in 1642; and (2) John Locke, a famous writer, whose ideas

[8] Lords were those individuals who had hereditary titles and actually sat in the upper house of government (the House of Lords). Lords were also lesser gentlemen (and ladies) who owned extensive lands with or without lesser titles that allowed them also to control those who lived upon that land, whether as renters, or in the earlier period, as villeins or serfs. Especially before 1660, those designated as "Lords," were the primary locus of rights under the common law.

were profoundly influential on the Enlightenment and the American Revolution.

Many of the other changes in children's legal status, however, occurred within the common law, and were masked by the reformers who made them. During this time, activist judges were a major driving force of change to children's legal status. For example, Sir Matthew Hale, former head of Oliver Cromwell's commission to reform the laws of England in 1653 and, subsequently, a former Chief Justice of England under Charles II, was an extremely influential common law reformer. Hale's influence formed a crucial bridge between Puritan reformers during the English Civil War and the restoration.

Hale's commission to reform the laws of England as a member of Parliament under Cromwell in 1653 failed, and the few laws that were passed, were firmly revoked during Charles II's restoration in 1660. By a variety of flukes, however, Hale went on to become Chief Justice. At his death, he left many writings which were published in the years after his death. His writings, *Pleas of the Crown* and *Historia Placitorum Coronae: History of Pleas of the Crown* in particular, formed the basis for modern evidence law, along with new procedures in criminal trials. By the middle of the eighteenth century, or eighty years after Hale's death, his writings were perceived as what the common law was, rather than what it should be.[9] Hale's role as a reformer was completely forgotten. In an essay on *Alteration of Amendment of the Laws* however, he laid out his strategy for legal reform.[10] He urged judges to make reforms "without troubling a parliament."[11] While he admitted

[9] MATTHEW HALE, PLEAS OF THE CROWN; OR, A BRIEF, BUT FULL ACCOUNT OF WHATSOEVER CAN BE FOUND RELATING TO THAT SUBJECT (London 1678); MATTHEW HALE, HISTORIA PLACITORUM CORONAE: THE HISTORY OF THE PLEAS OF THE CROWN (Sollom Emlyn ed., 2d ed. 1778).

[10] Matthew Hale, *Considerations Touching the Amendment or Alteration of Lawes*, A COLLECTION OF TRACTS 253, 266, 271-273 (1st ed., Francis Hargrave ed., Dublin 1787).

[11] *Id.*

that legal reform should be "very cautiously and warily . . . undertaken," he saw the province of legal reform as lying mostly with judges.[12] His justification for these reforms, and masking them, was simple: reformers had a bad name and he was simply urging, as he put it, "the amendment of things amiss" in the law.[13]

Hale was only one important common law reformer of this period. Others were Sir Edward Coke, Sir William Blackstone, and our own Chancellor James Kent, in the early nineteenth century. Tracing these reformers' efforts is easiest when examining particular issues in their writings. In a nutshell, these common law compilers gradually laid out a new set of norms about children's legal status that aimed for consistency, despite the many different facets of legal capability. They focused on the issue of how much reason created legal capability and responsibility and what age of the child that should correspond to. While my broader work discusses issues of political power and of contract law–relating to necessaries, land, property, labor, and marriage–this essay focuses only on the part of my argument that deals with criminal law, particularly on the ability of children to be witnesses and the much more difficult question of their responsibility for crimes. In the early seventeenth century, children of any age could be witnesses in criminal cases. Legal guides and actual cases confirm this ability, providing examples of children testifying and the court placing no restrictions on such testimony. One striking case allowed the testimony of an eight year old about the murder of her brother that had happened four years before. Her testimony was the basis for the murder conviction of two people, both of whom were subsequently hanged.[14]

[12] Hale, *supra* note 10 at 253, 266, 271-273.

[13] *Id.*

[14] THE HORRIBLE MURTHER OF A YOUNG BOY OF THREE YERES OF AGE, WHOSE SISTER HAD HER TONGUE CUT OUT (1606). Additional information regarding the case is available in *By Birth or Consent*. *See* BREWER, BY BIRTH OR CONSENT, *supra* note 1, at 155-156.

Sir Matthew Hale himself presided over a witchcraft trial in which young girls testified in 1664, during which he also admitted hearsay evidence from them. In the trial, the testimony of nine year old Deborah and eleven year old Elizabeth Pacey was crucial for conviction. But upon his death just over a decade later, Hale's writings contained strong arguments against not only hearsay evidence, but against letting any person under the age of fourteen to testify. However, Hale allowed in some circumstances, children between the ages of nine and thirteen to testify. His writings would be repeated again and again, becoming a staple of the common law. By the time Sir Geoffrey Gilbert wrote his popular treatise on the Law of Evidence in the mid-Eighteenth Century, Hale's guideline had become widely accepted: children under the age of fourteen should be barred from testifying for "want of skill and discernment," because they lack "common knowledge" and because they "are perfectly incapable of any sense of truth."[15] All of Gilbert's citations–and he had ten authorities–can be traced back to Hale.[16]

Hale's guidelines about witness testimony caused problems, however, for the children themselves, especially when they themselves were the victims. One respected legal compiler openly challenged Hale's guidelines in 1772 by stating: "In cases of foul Facts done in secret, where the Child is the Party injured, the repelling their Evidence entirely is, in some Measure, denying them the protection of the Law; yet the Levity and want of Experience in Children, is undoubtedly a Circumstance which goes

[15] GEOFFREY GILBERT, THE LAW OF EVIDENCE 146-47 (2d ed., London 1760).

[16] A TRYAL OF WITCHES AT THE ASSIZES HELD AT BURY ST. EDMONDS FOR THE COUNTY OF SUFFOLK (London 1682) (1664). The trial was held before the court of Sir Matthew Hale and then heard by the Lord Chief Baron in the Court of Exchequer. HALE, PLEAS OF THE CROWN, *supra* note 9, at 224; GEOFFREY GILBERT, THE LAW OF EVIDENCE 146-147 (2d ed. 1760).

greatly to their Credit."[17] Blackstone challenged Hale in a milder way in the first edition of his *Commentaries on the Laws of England*, in which Blackstone urged that even if the child could not be heard under oath (and the child's word alone should not convict), they should be heard.[18] "Infants of any age are to be heard; and if they have any idea of an oath, to be also sworn: it being found by experience that infants of very tender years often give the clearest and truest testimony."[19] During the nineteenth century more challenges to Hale's guideline arose but it remained the standard advice. Hale's standard, along with the uneven pattern of implementing reforms in children's legal status, led to bizarre situations. For example, in a 1784 case in Virginia, twelve year old Susanna Brown was raped by her tutor and coerced into marriage. When her father sought to have her rapist prosecuted, the judges deemed her old enough to marry, but too young to testify about the rape.[20]

Hale's role in setting new standards for children's criminal liability was equally profound and has also been completely lost from the historical record because of the way he hid his reforms, claiming that he was merely transcribing what had always been

[17] FRANCIS BULLER, INTRODUCTION TO THE LAW RELATIVE TO TRIALS AT NISI PRIUS 288-289 (London 1772).

[18] WILLIAM BLACKSTONE, 4 COMMENTARIES ON THE LAWS OF ENGLAND 370, 374 (Univ. of Chicago Press 1979). Blackstone changed his Commentaries significantly in his eight published revised editions during his lifetime. Blackstone's last edition was published in 1778. Even after his death, his Commentaries went through many revisions (without attribution) with every edition, of which there were dozens, in both England and the new United States. The legal scholar should be very careful to use editions published during Blackstone's own life in order to understand his opinions and his impact. The University of Chicago facsimile reprint of the London 1769 first edition, done in 1979 is excellent for these purposes.

[19] *Id.* at 214. This challenge to Hale disappears in later editions.

[20] *See* BREWER, BY BIRTH OR CONSENT, *supra* note 1, at 150-155.

practiced. Yet a careful review of cases and older legal guides reveals his role in transforming the law.

During the sixteenth and early seventeenth centuries, in both England and America, the age of the accused was rarely an issue in criminal trials. Age was almost never mentioned, although status was always mentioned, right after the name. When age can be traced, it is clear that very young children were often prosecuted and convicted and punished for crimes even as young as eight years of age, as the standard guidebooks, such as Dalton, recommended. "Eight years of age, or above, may commit Hom[i]cide, and shall be hanged for it."[21] Eight year old John Dean was executed for burning two barns in 1629.[22] Four year old Dorcas Good spent six months in jail for witchcraft in Salem in 1692.[23] Even in the late seventeenth century, young girls of eight and nine years of age were hanged for picking pockets in London. The full extent of such trials and executions are almost impossible to fathom–in England or its colonies–given the irrelevance of age to the actual cases.

Hale's *Pleas of the Crown* laid down new guidelines for accountability that were significantly higher than those contained in earlier English treatises.[24] Hale urged that at a minimum, fourteen should be the age limit for criminal responsibility, and that the age for criminal responsibility should be twenty-one– the age being pushed for political responsibility at that time.[25] Hale argued that the qualities needed for political responsibility, in

[21] MICHAEL DALTON, THE COUNTREY JUSTICE 215 (1975) (1618).

[22] HALE, HISTORIA PLACITORUM CORONAE, *supra* note 9, at 25. Case information is available in notes compiled by Sollum Emlyn, Hale's editor. The Abingdon records that originally recorded this case have since been destroyed.

[23] THE SALEM WITCHCRAFT PAPERS: VERBATIM TRANSCRIPTS OF THE LEGAL DOCUMENTS OF THE SALEM WITCHCRAFT OUTBREAK OF 1692 (Paul Boyer & Stephen Nissenbaum, eds., 1977).

[24] HALE, PLEAS OF THE CROWN, *supra* note 9, at 35.

[25] *Id.* at 16-29.

terms of the ability to reason and act, were the same as those for forming criminal intent.[26] He urged that even at fourteen, "it is necessary that very strong and pregnant evidence ought to be to convict one of that age, and to make it appear he understood what he did."[27] Still, Hale was worried about the consequences of setting such a high standard. He argued that many crimes were committed by those between the ages of fourteen and twenty-one. Hale claimed:

> Experience makes us know, that every day murders, bloodsheds, burglaries, larcenies, burning of houses, rapes, clipping and counterfeiting of money, are committed by youths above fourteen and under twenty-one; and if they should have impunity by the privilege of . . . their minority, no man's life or estate should be safe.[28]

Hale's writings were profoundly influential on the criminal law. While in a few scattered cases, children under fourteen were convicted and executed during the late eighteenth and early nineteenth century, the presumptions about guilt had clearly changed, as a brief review of the cases themselves–and the increasing attention paid to age in the criminal records–reveal. The last case of a child under fourteen being officially executed that I could find was of a twelve year old black slave in New Jersey in 1828. Even in that case, Hale's guidelines had clearly become the standard that had to be challenged. The judge had to hold that the child was more intelligent than most white boys of his age in order to secure the conviction. (Making this argument was ironic given that one of the main justifications for slavery offered

[26] HALE, PLEAS OF THE CROWN, *supra* note 9, at 16-29.

[27] HALE, HISTORIA PLACITORUM CORONAE, *supra* note 9, at 26-27.

[28] *Id.* at 25.

by whites in the early nineteenth century was intellectual inferiority). In the long term, the principles first set in motion by Hale led to the differential treatment of juvenile offenders and the creation of separate Juvenile courts. Yet somehow we have lost track of the set of principles that set the base for these changes, and even of the changes themselves. Particularly, we have lost any sense of how the principles of criminal culpability relate to our political principles and to broad questions of human development and of human rights. It is fascinating that once the discussion with regards to the requisite level of understanding necessary for a child to vote and that necessary to be responsible for a crime were explicitly linked.

The issues of age for testimony and culpability–about which I have much more evidence than that presented here–are only two parts of a very large debate about children's legal status that was central to the political and philosophical debates of the reformation and enlightenment. The logic behind Hale's ideas was explained best by John Locke in his powerful and extremely influential *Essay Concerning Human Understanding.*[29] In his essay, Locke laid out the process by which human beings gain understanding and become able to make binding decisions for which they should be held responsible.[30] Locke's ideas are the foundation of modern democratic theory and of modern thinking about how humans gain reason. The broadly accepted theories of Jean Piaget, for example, which are so central to modern psychological principles about competency and reason, derive from Locke's thinking about human development and its emphasis on stages of gaining reason. Locke's thinking is closely tied to his political philosophy as laid out in his *Two Treatises of Government*, which Jefferson named as the most influential writing

[29] JOHN LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING (Alexander Campbell Fraser ed., New York 1959) (1690).
[30] *Id.*

on his writing of the Declaration of Independence.[31] In Locke's effort to distinguish competent consent from consent that was forced and influenced, he excluded children from the ability to consent, giving the power to act on their behalf, temporarily to parents, as long as the parent acted in the child's best interest. Thus he wrote,

> [c]hildren, I confess, are not born in this full state of Equality, though they are born to it. Their Parents have a sort of Rule and Jurisdiction over them . . . but it is but a temporary one . . . . The Power, then, that Parents have over their Children, arises from that Duty which is incumbent on them, to take care of their Off-spring, during the imperfect state of Childhood. To inform the Mind, and govern the Actions of their yet ignorant Nonage, till Reason shall take its place . . . .[32]

While Hale did not himself read Locke–he died too soon–Locke's principles came out of the same political and religious debates with which Hale was intimately involved and upon which Hale wrote. Indeed, in some of his religious writings he suggested broadly comparable principles about reason to those of Locke: both were building on fundamental debates of the seventeenth century.

Hale was of course only one of the common law reformers, aiming to fix as he put it, what was imperfect in the common law. Sir William Blackstone, the first professor of Law at Oxford in the 1760s, was probably the other most important of the common law reformers. In Blackstone's *Commentaries on the Laws of*

[31] *See generally* LOCKE, TWO TREATISES OF GOVERNMENT (Peter Laslett ed., Cambridge 1988); *see also* BREWER, BY BIRTH OR CONSENT, *supra* note 1, at 90-93.
[32] *See* LOCKE, *supra* note 31, at 304-306; *see also* BREWER, BY BIRTH OR CONSENT, *supra* note 1, at 90-93.

England,[33] he cited Locke and other natural law thinkers repeatedly as he reshaped and systematized the common law into a form that becomes very recognizable to a modern audience. His writings are still cited by the Supreme Court, and were profoundly influential in America in the wake of the American Revolution. Unlike Locke's writings, which were cited mostly in the American newspapers of the 1770s, Blackstone was mostly cited in the 1790s, during the critical period of nation-building and setting American precedents. Blackstone was the one to lay down the principle that under the age of twelve a child could not marry because consent under that age was legally void. Even though Blackstone was in some ways a reformer, in other ways his interpretation of the common law could be seen as reactionary, and it was the reactionary role that was played in the new United States.

Indeed, with respect to the issue of children, Blackstone fits this tension. In some ways his principles accorded with the fundamental ideas of the American Revolution and John Locke's tenets about meaningful consent that are essential to democracy as we know it. If one is bound by an action to which one is forced or to which one assents at age one or two, obviously that is unfair. That is not "real" consent and can lead to an absolute monarchy. But at what age can a child consent? And how much authority should be given to others to temporarily "consent" for them? Blackstone gave parents greater authority than did Locke, even granting parents a property right in their children, which he compared to the property right that masters have in servants. Locke gave parents a much more conditional power, which rested on the assumption that parents tended to naturally care for their children and act in their best interest. Thus, while the issue of reasonable consent was critical to the founding fathers–especially

[33] BLACKSTONE, *supra* note 18 (Blackstone references Locke throughout the four volumes); *see also* DAVID LIEBERMAN, THE PROVINCE OF LEGISLATION DETERMINED: LEGAL THEORY IN EIGHTEENTH CENTURY BRITAIN Ch. 1 (Cambridge, United Kingdom 1989).

in terms of who should be able to govern–the question of how much power parents should have, was contested by various influential thinkers. The conflict between the two was a tension that continued into actual legal practice, wherein the common law–so deeply influenced by Blackstone–gave parents stronger powers than the political principles underlying the Revolution and the principles of the consent of the governed and of inalienable rights laid down in the Declaration of Independence.

In the wake of the Revolution, age limits varied by category of legal competency, and were set highest with regard to the question of who should be able to hold political authority. When the founding fathers debated the ages for holding political office (25, 30, and 35 for House of Representatives, Senate, and President) these issues were at the forefront of their discussions–and led to much higher age restrictions than had existed in England.[34] These high ages were set partly in order to limit hereditary authority. By setting such high ages, it was less likely that the incompetent son would be elected to fill his father's place, simply because of his name.

These changes in children's status were intimately connected to the broad transformation in political authority that had begun in England in the seventeenth century (during their two revolutions) and was pushed farther by the Revolution in America. By denying hereditary authority and obligation, the new United States laid the basis for a very different society and order, one which did not privilege or damn those children-in principle at least–who were born the children of kings or of slaves. We replaced the old norms about birth status with principles of equality and competency that encouraged education and the gaining of reason, for everyone. This transition also privileged the rights of parents above those of Lords and masters. These changing ideals were left painfully incomplete in practice –for enslaved

[34] England's allowance of teenagers to be elected to Parliament is exemplified by the fact that more then forty teenagers were elected to Parliament between 1660 and 1690. *See* BREWER, BY BIRTH OR CONSENT, *supra* note 1, at 18-44.

families in the southern region of new United States especially—in the immediate wake of the Revolution. Undoubtedly, these transitions were generally for the best. Still there were big questions that were fiercely argued over and ultimately left unresolved, as even this brief review suggests. When is a person competent? Is not denying a person the ability to contract denying him/her full rights, even if it is under the guise of protecting him/her? What are the limits on parents' (or guardians') powers and should they indeed possess a kind of property right in them? Is the reasoning required to fully understand the consequences of an individual's actions in a criminal case comparable to the reasoning required to vote, as Hale implicitly suggested? Arguably, the Supreme Court would have benefited from Hale's discussion on that question in their decision in *Roper v. Simmons,* 543 U.S. 551 (2005), which held that those under the age of eighteen should not be executed. The Court would have had a much stronger argument for setting the age at eighteen, since it is also the current age to vote. The same logic is internal to the common law and squares neatly with the belief that the understanding necessary for voting and for full legal responsibility for crimes is the same. Instead, the Court referred to modern social science studies that viewed children under the age of eighteen as being immature in their judgment.[35] The Court additionally reasoned that setting the minimum age to be sentenced to death at eighteen was in accordance with emerging national and international opinion.[36] The Court's reasoning and logic in its decision remains unsatisfying to many critics.

While it is surely ironic that the exclusion of children from competency was crucial to modern democratic principles and practices, it is clear that thinkers such as Locke did not intend thereby to deny their humanity and their rights, but to protect them. Locke advocated protection of children from being bound by

[35] *See generally* Roper v. Simmons, 543 U.S. 551 (2005).
[36] *Id.*

a labor contract they might "sign" at age four, for example, or a marriage they might contract at age two. Where, then does this leave us?

I would urge that understanding the origins of the principles of competency–and the debates left unresolved–helps us to not take the norms for granted and to understand the contingent nature of those arguments. Hale, for example, did not fully think through the consequences of his admonitions against children testifying, or consider whether the ability to testify was really comparable to the ability to consent. There are difficult and subtle questions here that he did not even begin to explore. Likewise, we have a much more graduated set of punishments then they did in the seventeenth century that could allow Hale's suggestions about teenagers' potential threat to society to square with his concerns that under the age of political majority, teenagers should not be fully culpable. While we cannot ignore the central link between competency and responsibility that is so important to our political and legal system, we need to find ways to protect children's rights that make up for the ways in which that guideline can literally disenfranchise them.