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THE WAYNE LAW REVIEW

VOLUME 52

SPRING 2006

NUMBER 1

COGNITIVE DISSONANCE REVISITED: *ROPER v. SIMMONS* AND THE ISSUE OF ADOLESCENT DECISION-MAKING COMPETENCE

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I. INTRODUCTION

Responsibility is a double-edged sword. When an individual is considered responsible for a certain decision or action, we think it proper that he or she bear the burden of any negative consequences. When that decision leads to a criminal act, punishment is fully deserved. In this context,

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responsibility is roughly synonymous with blame.

Yet, responsibility is also used in a positive sense, to denote sufficient capacity to be trusted to make decisions and act autonomously. A person might claim to be responsible as a justification for being given the right to make some decision or take some action. For example, an adolescent might claim to be sufficiently responsible to be trusted with the family car or with babysitting duties.

These two aspects of responsibility are connected. The claim of responsibility in the positive sense leads to the individual being given decision-making power. When that power leads to negative consequences, blame, and perhaps punishment, is then fully deserved. On the other hand, one may avoid blame and punishment by establishing a lack of responsibility, perhaps owing to a deficient capacity to act or decide. For many years, the law has wrestled with questions concerning responsibility, capacity, blame, and punishment on a range of issues concerning minors, especially adolescents.

If law and social science could neatly divide people into two distinct categories, adults and children, there would be little difficulty in designing appropriate rules. An adult would be fully responsible in both senses of the word, both entitled to make autonomous choices and rightfully blamed and punished for choices and acts harmful to society. A child would be denied such autonomy, but also largely absolved from the same degree of blame and punishment meted out to an adult.

However, for some time now, modern American society has recognized that there is no sharp child-adult dichotomy. Instead a transitional period, known as adolescence, has attracted increasing attention,¹ especially as more young people extend their student years beyond high school, delay marriage, and perhaps even live with parents into their twenties.² These trends, and the recognition of their significance, pose difficulty to a legal system that prefers clear categorical rules. Can we simply set an age, whether it be eighteen, twenty-one, or any other number of years, as the point at which responsibility automatically falls on an individual? Recently,

1. See JOSEPH F. KETT, RITES OF PASSAGE: ADOLESCENCE IN AMERICA 1790 TO THE PRESENT 217-273 (1977); LOUISE J. KAPLAN, ADOLESCENCE: THE FAREWELL TO CHILDHOOD 52-81 (1984); See generally THOMAS HINE, THE RISE AND FALL OF THE AMERICAN TEENAGER (1999).

2. See generally SUSAN LITWIN, THE POSTPONED GENERATION: WHY AMERICAN YOUTH ARE GROWING UP LATER (1986).

the question of adolescent responsibility has been posed in two legal areas. The first question involves criminal law, specifically, the question of whether adolescent criminals should be subject to the same types and degrees of punishment as adult offenders. The juvenile justice system that arose in the early twentieth century rejected the earlier approach of presenting only the two alternatives of no culpability and full adult responsibility when dealing with adolescents.³ Instead, the alternative of a less harsh, more rehabilitation-oriented regime was introduced.⁴ Recently, however, a sharp rise in the public perception of dangerous adolescent crime led many states to change course and subject juvenile offenders to full adult criminal penalties.⁵

The second question of adolescent responsibility posed involves the right of non-delinquent adolescents to make a range of autonomous choices and to exercise a range of rights denied to minors. While this question included such diverse issues as the extent of first amendment rights held by high school students⁶ and the acceptable minimum drinking age,⁷ perhaps the sharpest disputes arose concerning adolescent choices involving

3. See Margaret May, *Innocence and Experience: The Evolution of the Concept of Juvenile Delinquency in the Mid-Nineteenth Century*, in 3 CRIME AND JUSTICE IN AMERICAN HISTORY: DELINQUENCY AND DISORDERLY BEHAVIOR 46, 47-48 (Eric H. Monkkonen ed., 1991) [hereinafter CRIME AND JUSTICE].

4. See Robert M. Mennel, *Attitudes and Policies toward Juvenile Delinquency in the United States: A Historiographical Review*, in 3 CRIME AND JUSTICE, *supra* note 3, at 85-93. Douglas Rendleman sees the advent of the juvenile justice system as a piece of a larger package of "child-saving" reform during the Progressive era, see Douglas R. Rendleman, *Parents Patriae: From Chancery to the Juvenile Court*, in 3 CRIME AND JUSTICE, *supra* note 3, at 119-73.

5. See Marygold S. Melli, *Juvenile Justice Reform in Context*, 1996 WIS. L. REV. 375, 390-95.

6. See, e.g., *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988) (holding that school officials may regulate the content of a school sponsored newspaper); *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675 (1986) (holding that student may be disciplined for "lewd speech" at a high school assembly).

7. The federal government, through the threat of withholding 5% of the federal highway funds due to the states, put pressure on the states to uniformly adopt a minimum drinking age of twenty-one. See *South Dakota v. Dole*, 483 U.S. 203 (1987) (upholding the conditional spending provision).

reproductive rights,⁸ abortion,⁹ and other health care issues.¹⁰ While these issues were not decided by legislatures and courts in a uniform manner, it is generally true that the last decades of the twentieth century saw a greater level of respect in the legal system for the right of autonomy for adolescents,¹¹ especially in controversial health care matters involving reproductive issues.¹²

In setting a degree of punishment, legal systems take into account not merely the act committed, but also the extent to which the actor is responsible for his actions. While deterrence is, without a doubt, an important goal of criminal law, to some degree retribution is always present as well.¹³ It is hard to defend the position of seeking retribution against one who, because of mental defect or age, is not fairly seen as responsible for his choices.¹⁴ To insist upon full adult penalties for adolescent offenders is to take the position, at least implicitly, that an adolescent is fully responsible for his criminal choices and that his age does not lessen that responsibility.

Similarly, in deciding whether to extend a right of autonomy to adolescents, the legal system evaluates adolescents' capacity to exercise those rights in a responsible manner. To justify extending the right of autonomy to adolescents one must conclude that they have approximately

8. See *Carey v. Population Servs., Int'l*, 431 U.S. 678 (1977) (striking down a New York statute prohibiting the distribution of contraceptives to minors under age sixteen).

9. See *Bellotti v. Baird*, 443 U.S. 622 (1979) (reaffirming that a state may require parental consent or notification only if an alternative judicial procedure allows a mature minor to bypass the requirement). *Accord* *Planned Parenthood Ass'n. v. Ashcroft*, 462 U.S. 476 (1983); *Hodgson v. Minnesota*, 497 U.S. 417 (1990); *Ohio v. Akron Ctr. for Reprod. Health*, 497 U.S. 502 (1990).

10. See *In re E.G.*, 549 N.E. 2d 322 (Ill. 1989) (holding that a mature minor has an autonomy right to refuse medically necessary treatment); see also Jennifer L. Rosato, *The Ultimate Test of Autonomy: Should Minors Have a Right to Make Decisions Regarding Life-Sustaining Treatment?*, 49 RUTGERS L. REV. 1 (1996).

11. See, Bruce C. Hafen, *Children's Liberation and The New Egalitarianism; Some Reservations About Abandoning Youth to their 'Rights,'* 1976 B.Y.U. L. Rev. 605, 630-644.

12. See *Carey*, 431 U.S. 678; *Bellotti*, 443 U.S. 622. See also William Adams, "But Do You Have to Tell My Parents?" *The Dilemma for Minors Seeking HIV-Testing and Treatment*, 27 J. MARSHALL L. REV. 493 (1994).

13. For an overview of the history of retribution, and the philosophy supporting its legitimacy, see MARVIN HENBERG, *RETRIBUTION* (1990).

14. "Attribution of responsibility to a person for inadequate performance of a social task becomes meaningless if performance was impossible due to circumstances beyond that person's control." EDGAR BODENHEIMER, *PHILOSOPHY OF RESPONSIBILITY* 9 (1980).

the same capacity to exercise that right as adults.

In light of this conclusion, one might expect two positions on adolescent autonomy to emerge, with one side taking the position that adolescents as a group are sufficiently indistinguishable from adults in their capacity to make important decisions and the other side taking the opposite view. One would expect the former group to advocate assigning full adult penalties to adolescent criminal offenders and extending adult autonomy rights to adolescents in cases involving reproductive rights and other health care issues. The latter group, skeptical of adolescent decisionmaking, would advocate a separate, more lenient treatment of juvenile offenders and a denial of the right of autonomy, for fear that those rights would be exercised irresponsibly by adolescents.

While there are, without doubt, some who hold to each of these positions, it should be immediately evident that many people in today's political arena do not. The "liberal" position would extend autonomy rights but limit criminal penalties for adolescents. The "conservative" position would insist on full adult punishments, yet deny full autonomy rights. On the surface, each of these positions creates a dissonance. In one context, an adolescent is viewed as a fully responsible decision-maker, in the other context, his capacity and responsibility is disparaged.

Several years ago I published an article commenting on these developments, and particularly focusing on an apparent, and serious, inconsistency in the positions of both the typical liberal and the typical conservative toward them.¹⁵ In this earlier article I pointed out this dissonance and suggested that much further thought, both by social scientists and those in the legal system, might be required either to resolve the dissonance, or to explain why the surface dissonance is deceptive. The U. S. Supreme Court's recent decision in *Roper v. Simmons*,¹⁶ invalidating the imposition of the death penalty for a murder committed by one under age eighteen,¹⁷ allowed the Justices to weigh in on the question of adolescent responsibility. It also provides an opportunity to examine how far, if at all, legal thought and other disciplines have come in recent years to resolving this question.

15. Donald L. Beschle, *The Juvenile Justice Counterrevolution: Responding to Cognitive Dissonance in the Law's View of the Decision-Making Capacity of Minors*, 48 EMORY L.J. 65 (1999).

16. 543 U.S. 551 (2005).

17. *Id.* at 556.

This article begins with an analysis of *Simmons* and the various opinions of the Justices. It also looks at those the same Justices' positions on adolescent choice in non-criminal contexts, particularly the controversial and recurring issue of the imposition of a parental notification requirement on adolescents seeking to have an abortion. The next section reviews some recent social science and biological research on adolescent decision-making. The final section of the Article makes some suggestions on how the legal system's apparent dissonance on the question of adolescent decision-making might be resolved.

II. ROPER V. SIMMONS: INVALIDATING THE DEATH PENALTY FOR ADOLESCENT MURDERERS

In *Simmons*,¹⁸ the U. S. Supreme Court revisited the question of whether the death penalty is constitutionally permissible as punishment for first-degree murder committed when the defendant was a minor.¹⁹ In 1989, the Court held, in *Stanford v. Kentucky*,²⁰ that the Fifth Amendment prohibition on cruel and unusual punishment did not bar execution of killers who were over age fifteen at the time of their crime, but would bar the execution of any younger offender.²¹

Since the Court overturned its ruling that the death penalty itself was constitutionally suspect²² and gave states the power to impose capital punishment within constitutional boundaries,²³ those boundaries have

18. *Simmons*, 543 U.S. 551.

19. *Simmons* was a seventeen-year-old high school junior when he planned and executed a brutal murder, apparently for the thrill of it. *Id.* at 556-57.

20. 492 U.S. 361 (1989).

21. *Id.* at 380. *Stanford*, upholding the constitutionality of the death penalty as applied to a juvenile murderer of age sixteen or seventeen, came one year after *Thomson v. Oklahoma*, 487 U.S. 815 (1988), invalidating a death sentence of a juvenile who was fifteen at the time he committed murder. The Court in *Thomson*, by plurality opinion, concluded that the execution of anyone who was under age sixteen at the time of the offense violated the Eighth Amendment. *Thomson*, 487 U.S. at 838.

22. *Furman v. Georgia*, 408 U.S. 238 (1972) (invalidating the death penalty statutes then in force in thirty-nine states, on the grounds that those statutes permitted the penalty to be imposed in an arbitrary and nearly random manner. The five to four decision left open the question of whether, properly administered, capital punishment might be constitutional).

23. *Gregg v. Georgia*, 428 U.S. 153 (1976), addressed the question left open in *Furman*, and held that capital punishment was constitutionally permissible under a system

generally attempted to insure that only the most clearly blameworthy criminals are executed. Thus, the Court has indicated that the death penalty may not be imposed for any crime other than homicide²⁴ and that a mandatory death penalty, even for first-degree murder, cannot be sustained.²⁵ Rather, the aggravating and mitigating factors in each case must be considered.²⁶ While declaring a broad category of felons subject as a group to the death penalty is clearly impermissible, declaring a category of killers *ineligible* as a group, however, might be warranted.

In the years following *Stanford*, a number of states chose to prohibit the execution of defendants who had killed before reaching eighteen²⁷ and the international consensus against such punishments solidified.²⁸ The Supreme Court itself reconsidered the Eighth Amendment's "evolving standards of decency" in another context.²⁹ In *Atkins v. Virginia*,³⁰ the Court held that the Eighth Amendment barred the execution of a mentally retarded defendant.³¹ On the same day the Court decided *Stanford* in 1989,

"that ensures that the sentencing authority is given adequate information and guidance" in determining which offenders deserve such punishment. *Gregg*, 428 U.S. at 195. In other words, consideration must be given to specific aggravating or mitigating factors about the crime or the offender. *Id.*

24. See *Coker v. Georgia*, 433 U.S. 584, 592, 597-98 (1977) (holding that "[s]hort of homicide, [rape] is the 'ultimate violation of self,'" but nevertheless held that capital punishment was "an excessive penalty for the rapist who . . . does not take human life.").

25. *Woodson v. North Carolina*, 428 U.S. 280, 287 n.7 (1976) (invalidating a statute providing for a mandatory death penalty, although the Court left open the question of whether such a statute could be upheld for "an extremely narrow category of homicide, such as murder by a prisoner serving a life sentence). See further, *Sumner v. Sherman*, 483 U.S. 66, 77-78 (1987) (holding that an individualized inquiry was required even in such a narrow category of cases).

26. *Woodson*, 428 U.S. at 303-05.

27. At the time of the Court's decision in *Stanford*, twenty-five states authorized the death penalty for seventeen-year-old offenders, and twenty-two states authorized it for sixteen-year-old offenders, *Simmons*, 543 U.S. at 562-63. In the fifteen years after *Stanford*, five states that had permitted the execution of juvenile offenders prohibited such use of the death penalty. *Id.* at 565.

28. See *id.* at 574-78 (noting "the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty").

29. *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

30. 536 U.S. 304 (2002).

31. *Id.* at 321. Writing for the Court, Justice Stevens begins his opinion by noting: [t]hose mentally retarded persons who meet the law's requirements for criminal

it rejected the claim that the mentally retarded, as a group, were ineligible for capital punishment.³² The Court's reversal in *Atkins*, along with developments at the state and international levels, made it unsurprising, if not inevitable, that the Court would revisit the issue of the permissibility of execution of teenage offenders. Justice Kennedy, writing for the Court in *Simmons*, penned three distinct lines of argument to establish that *Stanford* should be overruled and replaced with a constitutional prohibition on the execution of offenders whose crimes occurred prior to their eighteenth birthday.³³

Kennedy's first point is directed at the concept of "evolving standards" under the Eighth Amendment.³⁴ The post-*Stanford* trend of states rejecting the execution of offenders under age eighteen establishes, according to Justice Kennedy, the emergence of a national consensus that such use of capital punishment is cruel and unusual.³⁵ Justice Scalia and the other dissenting Justices took issue with Justice Kennedy, both on the question of when a trend can be said to represent a national consensus³⁶ and also the broader question of whether judicial perception of such a consensus should determine the scope of the Eighth Amendment.³⁷ The extent to which

responsibility should be tried and punished when they commit crimes. Because of their disabilities in the areas of reasoning, judgment, and control of their impulses, however, they do not act with the level of moral culpability that characterizes the most serious adult criminal conduct . . .

Id. at 306.

32. *Perry v. Lynaugh*, 492 U.S. 302 (1989), overruled by *Atkins*, *supra* note 30.

33. *Simmons*, 543 U.S. at 1192-2000. Also note that two of these lines of argument, while both of interest and significance not only on this issue, but on a wider range of constitutional questions, do not relate to the subject matter of this article and are therefore not discussed.

34. *Id.*, 543 U.S. at 563-69.

35. Justice Kennedy added the twelve states that reject the death penalty entirely to the eighteen states [that allow the death penalty] but bar its application to juvenile offenders to find that a total of thirty states have rejected the death penalty for those under age eighteen. *Id.* at 563. He also notes that only a handful of the twenty states that permit the execution of juvenile offenders have actually imposed the penalty to a juvenile offender in the years since *Stanford*. *Id.*

36. *Simmons*, 543 U.S. at 607-12 (Scalia, J., dissenting) (contending that considering states that have no death penalty as part of the calculation is inappropriate and that the more pertinent inquiry is how many states treat sixteen and seventeen-year-old offenders as eligible for full adult penalties).

37. *Id.* at 1217.

courts should lead in defining constitutionally unacceptable behavior or defer to other branches of government is, of course, a perennial issue.³⁸

A somewhat more contemporary issue is raised by Justice Kennedy's second line of argument. In support of his conclusion that evolving standards of decency demand invalidation of the death penalty for juvenile offenders, he points to the law of other nations and articulated international standards that clearly reject such punishment.³⁹ In response, Justice Scalia repeats his contention, clearly voiced in other cases,⁴⁰ that foreign or international legal sources have no place in the interpretation or application of the United States Constitution.⁴¹

These points of dispute between Justice Kennedy and Justice Scalia are significant and will no doubt be the subject of a considerable amount of commentary. Yet, this article focuses on the third line of argument employed by Justice Kennedy. The Court has made it clear that the death penalty must be reserved for those who not only commit the most objectively offensive forms of homicide, but who also can be seen as bearing a particularly high degree of culpability.⁴² Can it be said that adolescents as a group, by reason of lack of full maturity, fall short of the necessary degree of personal responsibility required to justify capital punishment?

Justice Kennedy concluded that, indeed, "[t]he differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive the death penalty despite insufficient culpability."⁴³ This conclusion was supported by studies demonstrating that adolescents, as a group, exhibit less maturity and greater irresponsibility than adults⁴⁴ while at the same time having character traits that are less fixed

38. On the role of the courts, legislatures, and public opinion in effecting serious social change, see generally GERALD N. ROSENBERG, *THE HOLLOW HOPE* (1991).

39. See *Simmons*, 543 U.S. at 574-578.

40. See, e.g., *Printz v. United States*, 521 U.S. 898 (1997). Justice Scalia states for the Court, "we think such comparative analysis inappropriate to the task of interpreting a constitution." *Id.* at 921 n.11.

41. *Simmons*, 543 U.S. at 621-28.

42. "Because the death penalty is the most severe punishment, the Eighth Amendment applies to it with special force . . . Capital punishment must be limited to those offenders who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution,'" *Id.* at 568, quoting *Atkins*, 536 U.S. at 319.

43. *Id.* at 572.

44. *Id.* at 569-76. See also *infra*, notes 117-147, and accompanying text.

and, therefore, more open to correction.⁴⁵ Justice Kennedy pointed out that the difference between adult and adolescent levels of maturity were seemingly evident to lawmakers in every state, who have for decades enforced a significant number of limitations on the activity of those under age eighteen, placing such things as voting rights, jury service, and marriage without parental consent off limits.⁴⁶

In his dissent, Justice Scalia took issue with this contention on several grounds. First, he noted that a number of studies existed that concluded, contrary to those relied on by Justice Kennedy, that the decision-making capacity of older adolescents was essentially similar to that of adults.⁴⁷ While conceding the validity of the studies cited by Justice Kennedy, Justice Scalia argued that the conclusion that the average adolescent, or the majority of adolescents, have insufficient decision making capacity says nothing about the capacity of a particular juvenile offender.⁴⁸ The penalty phase of a capital case could be used to determine maturity levels in any individual case, making a blanket rule unnecessary and overbroad.⁴⁹

In addition, while states clearly restrict adolescent behavior in a significant number of ways that indicate skepticism of teenage maturity levels, Justice Scalia notes that recent Supreme Court jurisprudence has not only accepted, but also insisted upon, a degree of respect for adolescent decision-making.⁵⁰ Specifically, Justice Scalia contrasts the Court's

45. *Id.* at 570 ("[f]rom a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed.").

46. *Id.* at 569. As appendices to the Court's opinion, Justice Kennedy attaches the list of states' minimum age to vote. *Simmons*, 543 U.S. at 581, Appendix B. Also attached is the states' minimum age for jury service and state statutes setting the minimum age for marriage without parental consent. *Id.* at 583-85. Appendix C, D. However, perhaps the most exhaustive compilation of state age requirements for various activities, ranging alphabetically from abortion to wills, can be found at the website of the Juvenile Law Center. The Juvenile Law Center, *available at* www.jlc.org/agerequirements (last visited, Apr. 3, 2006).

47. *Simmons*, 543 U.S. at 617-18 (Scalia, J., dissenting). See *infra* notes 87-114, and accompanying text.

48. *Simmons*, 543 U.S. at 617-618 ("At most, those studies conclude that, *on average* or *in most cases*, persons under eighteen are unable to take moral responsibility for their actions. Not one of the cited studies opines that all individuals under eighteen are unable to appreciate the nature of their crimes.").

49. *Id.* at 617-20.

50. *Simmon* at 620 (Scalia, J., dissenting).

interpretation of adolescent decision-making capacity in *Simmons* with the view implicit in its 1990 decision of *Hodgson v. Minnesota*.⁵¹

In *Hodgson*, the Court held that a state statute that requires parental notification prior to the performance of an abortion on a minor was valid only if the statute provided a judicial bypass option that allowed the minor to establish that she was sufficiently mature to make the abortion decision on her own.⁵² The decision in *Hodgson*, and earlier cases involving parental consent and notification statutes,⁵³ were supported by social science findings that concluded that adolescents generally have the ability to make significant life decisions in a competent manner.⁵⁴ To Justice Scalia, this exposes a jarring inconsistency in the Court's position.⁵⁵ If adolescents are sufficiently responsible to make decisions about matters as significant as abortion and reproduction, doesn't it follow that they are sufficiently responsible to bear the full consequences of a decision to commit serious crime?

Of course, Justice Scalia's claim that the majority's reasoning is inconsistent can be easily turned on him as well. As a dissenter both in *Simmons* and *Hodgson*, Justice Scalia inconsistently finds that juvenile offenders are sufficiently mature to bear full responsibility for their criminal acts, while also arguing pregnant adolescents as insufficiently mature to choose an abortion without involving their parents in the decision.⁵⁶

51. 497 U.S. 417 (1990).

52. *Id.* at 497 (Kennedy, J., concurring in the judgment in part and dissenting in part). The key vote was provided by Justice O'Connor. *Id.* at 458-61 (O'Connor, J., concurring in part). Four justices would have invalidated Minnesota's two-parent notice requirement even with a judicial bypass option. *Id.* at 455-58 (Stevens, J.); *id.* at 461-79 (Marshall, J., concurring in part, concurring in the judgment in part, and dissenting in part). Four justices would have upheld the requirement even without such an option. *Id.* at 488-97 (Kennedy, J., concurring in judgment and dissenting in part).

53. See, e.g., *Planned Parenthood Ass'n v. Ashcroft* 462 U.S. 476 (1983) (upholding parental consent statute when accompanied by judicial bypass option); *Bellotti v. Baird*, 443 U.S. 622 (1979).

54. Justice Scalia notes that in its amicus brief in *Hodgson*, the American Psychological Association, "which [in *Simmons*] claims . . . that scientific evidence shows persons under eighteen lack the ability to take moral responsibility for their decisions," attested to have found "'a rich body of research' showing that juveniles are mature enough to decide whether to obtain an abortion without parental involvement," *Simmons*, 543 U.S. at 617 (Scalia, J., dissenting).

55. *Id.*

56. Thus, in the context of abortion, Justice Scalia joins Justice Kennedy's opinion

Valid or not, Justice Scalia's criticism brings to the surface a significant issue. Does consistency demand that a legal system that respects an adolescent's right to make significant life choices also hold an adolescent fully responsible for the negative consequences of those choices, justifying severe criminal punishment? Does a legal system that mitigates criminal punishment for juvenile offenders, to maintain consistency, need to deny those adolescents the right to exercise full autonomy?

Before examining the social and biological science findings on the question of adolescent decision-making competence, it is useful to take a brief look at whether the justices who have addressed the question have, in fact, been acting inconsistently. Actually, the apparent inconsistency of the Court in *Simmons* and *Hodgson* may be the result of Justices acting consistently with several different principles, rather than making inconsistent result-oriented decisions. The apparent inconsistency of the Court masks at least four different types of consistency in the thinking of four Justices.

A. Justice Kennedy

While Justice Scalia's criticism of the inconsistency of the Court in its decisions of *Simmons* and *Hodgson* might be valid, there is no inconsistency in Justice Kennedy's views. Justice Kennedy is not one of the Court's staunch opponents of the recognition of an abortion right, rather he was one of the three co-authors of the crucial joint opinion in *Planned Parenthood of Southeastern Pennsylvania v. Casey*⁵⁷ which reaffirmed the basic right established by *Roe v. Wade*.⁵⁸

However, Justice Kennedy has also supported state efforts to regulate the abortion right at its margins, including requirements for parental notification in cases involving minors.⁵⁹ Thus, his support of Minnesota's parental notification requirement in *Hodgson*⁶⁰ is entirely consistent with his

stating "[a]ge is a rough but fair approximate of maturity and judgment," *Hodgson*, 457 U.S. at 483 (Kennedy, J., concurring in part and dissenting in part).

57. 505 U.S. 833 (1992).

58. 410 U.S. 113 (1973).

59. In defending Minnesota's two-parent notification statute in *Hodgson*, Justice Kennedy notes, "[a]ge is a rough but fair approximation of maturity and judgment". *Hodgson*, 497 U.S. at 483 (Kennedy, J., concurring in the judgment in part and dissenting in part). See also Justice Kennedy's opinion for the Court in *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502 (1990), upholding Ohio's parental notification statute.

60. *Hodgson*, 497 U.S. at 483.

opposition to the death penalty for juvenile offenders in *Simmons*. In each case, his opinion implicitly or explicitly takes the position that adolescent decision-making is suspect to an extent that will justify categorical limitations on the respect that government owes to that decision and its consequences.

B. Justice O'Connor

In her separate dissent in *Simmons*, Justice O'Connor agrees with the majority "that juveniles as a class are generally less mature, less responsible, and less fully formed than adults, and that these differences bear on juveniles' comparative moral culpability."⁶¹ She disagrees, however, with the conclusion that these differences are sufficient to warrant a categorical rule barring the imposition of the death penalty on adolescent offenders.⁶² Instead, she sees a case-by-case analysis of each offender's level of culpability as sufficient to satisfy the Eighth Amendment.⁶³ Such a case-by-case inquiry will presumably make the execution of juvenile offenders a rare event, but will leave the door open for individual exceptions.⁶⁴

In *Hodgson*, Justice O'Connor took an analogous approach on the issue of parental involvement in a minor's decision to obtain an abortion.⁶⁵ She provided a decisive vote in maintaining that a parental notification requirement is permissible, but only if the state provides the pregnant adolescent the option of seeking judicial approval to forego notification or consent.⁶⁶ Such approval is granted where the court finds that either the adolescent is mature enough to make the decision by herself, or that regardless of the maturity level of the adolescent, proceeding with the abortion without parental involvement would be in the best interests of the

61. *Simmons*, 543 U.S. at 599 (O'Connor, J., dissenting).

62. *Id.* at 598-602.

63. *Id.*

64. "I would not be so quick to conclude that the constitutional safeguards, the sentencing juries, and the trial judges upon which we place so much reliance in all capital cases are inadequate in this narrow context." *Id.* at 603-604.

65. 497 U.S. at 458-61 (O'Connor, J., concurring in part and concurring in the judgment in part).

66. See *Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. at 468-70 (O'Connor J., dissenting), discussing the judicial bypass option for mature minors faced with parental notification or consent requirements.

minor.⁶⁷

Justice O'Connor's consistency is her rejection in each case of categorical rules regarding adolescent decision-making capacity, in favor of a position requiring case-by-case consideration of the issue. Such a position eliminates any need to decide whether adolescent decision-making is always sufficiently similar to adult decision-making for the law to regard them as equally deserving of respect. Justice O'Connor was the recent Court's most consistent advocate of case-by-case balancing approaches to a variety of constitutional issues.⁶⁸ Her rejection of categorical rules here should come as no surprise.

C. Justice Scalia

Justice Scalia charges the *Simmons* majority with inconsistency on the question of adolescent decision-making in light of its earlier position in *Hodgson*.⁶⁹ But on the surface, Justice Scalia can be charged with the same degree of inconsistency. While he would support states in their attempts to limit adolescent decision-making regarding abortion in cases such as *Hodgson*,⁷⁰ he would allow states to hold adolescent offenders fully responsible for their criminal choices, even to the point of imposing capital punishment.

However, this apparent inconsistency is necessary in order to permit Justice Scalia to adhere to his own brand of consistency; when text, history, or precedent place no clear limitations on state authority to regulate or punish conduct, deference to legislative judgment is required, even if those judgments might not be entirely consistent with each other. The position of Justice Scalia (and Chief Justice Rehnquist) in *Hodgson* can also be

67. See generally Sue Ganske Graziano, *Parental Notification and a Minor's Right to an Abortion After Hodgson & Akron II*, 170 OHIO N.U. L. REV. 581 (1991); Abortion--Parental Notification Statutes, 104 HARV. L. REV. 247 (1990).

68. See NANCY MAVEETY, SANDRA DAY O'CONNOR: STRATEGIST ON THE SUPREME COURT (1996). Professor Maveety describes Justice O'Connor as a "jurisprudential accomodationist," who uses "flexible, contextual, and fact specific" approaches to balance interests. *Id.* at 3. For a broader look at the 'minimalist' approaches of Justice O'Connor and some of her colleagues, see CASS R. SUNSTEIN, ONE CASE AT A TIME (1999).

69. See *supra*, notes 50-55.

70. See *Hodgson*, 497 U.S. at 479-80 (Scalia, J., concurring in the judgment in part and dissenting in part); *Id.* at 480-501 (Kennedy, J., joined by Rehnquist, C.J., White, J., and Scalia, J., concurring in the judgment in part and dissenting in part).

explained by their fundamental disagreement with *Roe*'s recognition of a due process right to abortion.⁷¹ Yet, in a broader sense, what holds the dissents in both *Hodgson* and *Simmons* together is the support of deference to legislative judgments.

D. Justice Stevens

Justice Stevens presents the reverse image of Justice Scalia on these issues. In joining the majority of the court both in prohibiting the execution of juvenile offenders and in supporting the right of adolescents to exercise the abortion right without necessarily involving their parents in the decision,⁷² his positions are on the surface inconsistent, but with conclusions opposite those of Justice Scalia. In addition, Justice Stevens' willingness to override legislative judgments in each case stands in opposition to the deference of Justice Scalia.

The consistency in Justice Stevens' positions would appear to be a desire to protect adolescents from state-imposed negative consequences of their actions, at least consequences that are unduly harsh. Where a decision to commit homicide would otherwise lead to the imposition of the most severe and irreversible punishment, the youth of the offender should serve to mitigate responsibility and, therefore, the harshness of the state's response.⁷³ Where the practical effect of the state's action would be to require an adolescent to assume the role of teenage mother against her wishes, her decision to avoid that fate is to be respected.⁷⁴ Although abortion opponents can be expected to contest the conclusion that childbirth is a worse alternative than abortion, Justice Stevens seems to be acting

71. See *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 532 (1989) (Scalia, J., concurring), where Justice Scalia states his view that *Roe* should be explicitly overruled.

72. See *Simmons*, 543 U.S. at 587 (Stevens, J., concurring); *Hodgson*, 497 U.S. at 455-58 (Stevens, J., dissenting in part).

73. *Simmons*, 543 U.S. at 587 (Stevens, J., concurring).

74.

[T]he right to make this decision 'do[es] not mature and come into being only when one attains the state-defined age of majority.' Thus, the constitutional protection against unjustified state intrusion into the process of deciding whether or not to bear a child extends to pregnant minors as well as adult women.

Hodgson, 457 U.S. at 434-35, quoting *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 74 (1976).

consistently in both *Hodgson* and *Simmons* to protect adolescents from what he sees as the excessive use of state power.

These four Justices show that it is possible to take positions that are, on their face, inconsistent on the issue of how much respect is due to decisions made by adolescents, yet are nonetheless required in order to maintain consistency toward another principle. Still, to the extent that courts and legislatures will continue to frame rules and statutes based upon assumptions regarding adolescent decision-making competence, the question remains, to what extent is that competence equivalent to that of an adult? Can we make reliable general conclusions? Will the answer vary depending on the type of adolescent or the context of the decision? Before answering these questions, it will be necessary to review the most recent findings of social and biological science on these issues.

III. ADOLESCENT DECISION-MAKING CAPACITY: EVIDENCE FROM SOCIAL AND BIOLOGICAL SCIENCE

For more than a century, American law has regarded adolescents as less capable of making important decisions than adults and, therefore, has acted both to limit their capacity to make decisions, and shield them from at least some of the consequences. Classic examples include limitations on a minor's capacity to commit to a binding contract,⁷⁵ child labor laws,⁷⁶ and minimum ages for marriage without parental consent.⁷⁷

But this has not been a uniform trend, especially in recent decades. Longstanding minimum age requirements for such things as the purchase

75. See, e.g., ALA. CODE §§ 7-3-305(a)(1) (West 1975) (allowing infancy as a defense in contract action); ALA. CODE § 26-1-1 (defining the age of majority as nineteen); CAL. COM. CODE § 3305(a)(1) (West Ann. 2006) (allowing infancy as a defense in contract action); CAL. FAM. CODE § 6710 (West Ann. 2006) (allowing a minor to disaffirm a contract); CONN. GEN. STAT. ANN. § 42a-3-305 (a)(1) (West Ann. 2006) (allowing infancy as defense in contract action); and § 1-1d (West Ann. 2006) (defining infant as a person under age eighteen).

76. See *Selected State Child Labor Standards Affecting Minors Under 18 in Non-farm Employment*, a compilation of state restrictions on child labor at the website of the U.S. Dept. of Labor available at <http://www.dol.gov/esa/programs/whd/state/nonfarm.htm> (2004) (last visited, Apr. 1, 2006).

77. See, e.g., FLA. STAT. ANN. § 741.0405 (West Ann. 2006); N.Y. DOM. REL. LAW § 7 (McKinney 1999); 23 PA. CONS. STAT. § 1304 (prohibiting marriage without parental consent for minors under eighteen).

of alcohol⁷⁸ or cigarettes,⁷⁹ gambling,⁸⁰ and the possession of firearms⁸¹ have been joined by such concerns as limiting adolescent ability to obtain tattoos,⁸² body piercing,⁸³ or even artificial tanning⁸⁴ without parental consent. But this has been accompanied by a clear legislative trend in response to public pressure to create tougher penalties for juvenile crime, with more juvenile offenders being dealt with in the adult system.⁸⁵ Also courts and legislatures have carved out areas of health care decisions, most notably reproduction and abortion, where at least some adolescent decisions are entitled to respect.⁸⁶

Simmons weighs in on the side of skepticism toward adolescent decision-making capacity. It is unclear, however, whether this will be just

78. *See, e.g.*, GA. CODE ANN. § 3-3-23 (2005) (prohibiting purchase or sale of alcohol to anyone under age twenty-one). *Accord* 235 ILL. COMP. STAT. 5/6-16 (2006); MINN. STAT. § 340 A. 503 (2004).

79. *See, e.g.*, CAL. PENAL CODE § 308 (West Ann. 2006) (barring the purchase of cigarettes by anyone under age eighteen); *accord* GA. CODE ANN. § 16-12-171 (2005); MICH. COMP. LAWS ANN. §§ 722.641-.642 (West Ann. 2006).

80. *See, e.g.*, N.Y. TAX LAW § 1610 (McKinney 2006) (prohibiting persons under the age of eighteen from purchasing lottery tickets); 230 ILL. COMP. STAT. ANN. 25/2 (2006) (prohibiting persons under the age of eighteen from participating in bingo); 4 PA. CONS. STAT. ANN. § 325.228 (barring persons under the age of eighteen from placing pari-mutuel bets) (1995).

81. *See, e.g.*, N.Y. PENAL LAW § 265.16 (McKinney 2006) (prohibiting sale delivery of certain firearms to anyone under age nineteen); CONN. GEN. STAT. ANN. § 29-34 (West Ann. 2006) (restricting sale or delivery of certain firearms to anyone under age twenty-one); DEL. CODE ANN. tit. 24 §903 (2006).

82. *See, e.g.*, CAL. PENAL CODE §653 (West Ann. 2006) (prohibiting youth under age eighteen from obtaining a tattoo without parental consent); GA. CODE ANN. § 16-5-71 (2005); MINN. STAT. ANN. § 609.2246 (West 2006).

83. *See, e.g.*, CONN. GEN. STAT. ANN. §19a-92g (West Ann. 2006) (prohibiting body piercing of persons under age eighteen without parental consent); ILL. COMP. STAT. 5/12-10.1 (2005); VA. CODE ANN. §18.2-371.3 (Michie 2006).

84. *See, e.g.*, CAL. BUS & PROF. CODE §22706 (West Ann. 2006) (prohibiting persons under the age of eighteen from using artificial tanning devices without parental consent); MICH. COMP. LAWS ANN. §333.13407 (West Ann. 2006); TEX. HEALTH & SAFETY CODE ANN. §145.008 (Vernon 2006). For an exhaustive compilation of statutes imposing age requirements on a wide range of activities see the Juvenile Law Center *available at* www.jlc.org/agerequirements (last visited, Apr. 1, 2006).

85. *See Melli, supra* note 5.

86. *See generally* Walter Wadlington, *Medical Decision-Making For and By Children: Tensions Between Parent, State and Child*, 1994 U. ILL. L. REV. 311.

another piece of an inconsistent picture, or whether *Simmons* will push the law toward a more consistent position. If the latter, we might find that apart from the death penalty, the full imposition of adult penalties for juvenile offenders becomes suspect. But if that is the case, will that simultaneously lead to less respect for adolescent decision-making in other areas, such as reproduction and other health care choices?

What do social science and biological science tell us about adolescent decision-making? Do they support the *Simmons* view of impaired competence, or the implicit view of *Hodgson* respecting adolescent decision-making? Have the findings themselves been consistent?

A. Early Social Science Studies

Much of the early social science work on adolescent decision-making capacity came at a time when this question involved medical, and particularly reproductive, choices.⁸⁷ At the outset, any study of decision-making capacity must face the question of how to evaluate decision-making competence. A study that evaluates decisions on the basis of whether the correct choice was made is problematic in any context in which legitimate differences of opinion might arise as to which choice was correct. In light of this, early studies generally worked from the premise that decision-making capacity would be evaluated through tests of cognitive abilities of the decision-maker.⁸⁸ Cognitive abilities include the ability to understand information, such as the potential consequences of certain acts and the likelihood of such consequences, and the ability to process that information to a conclusion.⁸⁹ If these types of competencies are present, then the fact

87. Elizabeth Scott and her colleagues wondered whether researchers' support of the reproductive rights of adolescents may have led them, consciously or not, to exaggerate the strength of their findings of adolescent decision making competence. Elizabeth S. Scott et al., *Evaluating Adolescent Decision Making in Legal Contexts*, 19 LAW & HUM. BEHAV. 221, 224, n.2 (1995).

88. *Id.* at 223-24. This "informed consent" test was used in these studies "as a general proxy of competence in evaluating adolescent decision making." *Id.*

89.

Although the emphasis varies depending on the test, modern constructs focus on the following elements: an understanding of relevant disclosed information . . . an ability to appreciate its relevance to one's own situation . . . and an ability to use the information in comparing alternative options and in weighing their risks and benefits in making a

that the decision-maker's choice might diverge from the adult norm or from what the researcher or others would regard as the correct choice, would be irrelevant. These studies largely concluded that the cognitive abilities of at least older adolescents were indistinguishable from those of adults, leading the researchers to conclude that there was little, if any, reason to deny legal weight to adolescent decisions where the same decision by an adult would be respected.⁹⁰

An early example of this cognitive approach was a study conducted by Thomas Grisso to determine a juvenile offender's capacity to waive *Miranda* rights.⁹¹ Grisso asked juveniles of different ages, as well as adults, to paraphrase in their own words each of the *Miranda* warnings,⁹² to define certain words in the standard warning,⁹³ and to explain what was happening in a picture of a police interrogation.⁹⁴ Sufficient comprehension would presumably lead to a competent waiver decision; insufficient comprehension would indicate lack of competence.⁹⁵

Grisso found that while the comprehension abilities of younger teenagers were clearly inferior to those of adults, adolescents at least sixteen-years-old were indistinguishable from adults in performing these

choice Tests of competence under the informed consent doctrine focus on the process of decisionmaking and exclude emphasis on outcome A strong norm supports the proposition that choices about treatment should reflect the subjective values and preferences of decision makers, and that no objective (external) measure of outcome is appropriate.

Id. at 224.

90. See, e.g., Bruce Ambuel and Julian Rappaport, *Developmental Trends in Adolescent's Psychological and Legal Competence to Consent to Abortion*, 16 LAW & HUM. BEHAV. 129 (1992); Lois A. Weithorn and Susan A. Campbell, *The Competency of Children to Make Informed Treatment Decisions*, 53 CHILD DEVELOPMENT 1589 (1982); Catherine C. Lewis, *How Adolescents Approach Decisions: Changes Over Grades Seven to Twelve and Policy Implications*, 52 CHILD DEVELOPMENT 538 (1981).

91. Thomas Grisso, *Juveniles' Capacities to Waive Miranda Rights: An Empirical Analysis*, 68 CAL. L. REV. 1134 (1980).

92. *Supra* note 91 at 1144-46. "A response that indicated adequate understanding did not require a sophisticated explanation as long as the basic meaning of the warning statement was conveyed." *Id.*

93. *Id.* at 1146-47 (using the words "consult," "attorney," "interrogation," "appoint," "entitled" and "right").

94. *Id.*, at 1147-48.

95. *Id.* at 1143.

tasks.⁹⁶ Although Grisso advocated disallowing *Miranda* waivers by older adolescents in light of the fact that even adults showed significant inability to fully understand their rights,⁹⁷ his research does challenge the notion that older adolescents lack adult decision-making capacity.

A similar, cognitive, approach can be seen in a 1981 study by Catherine Lewis, assessing adolescent decision-making in the context of health care.⁹⁸ Subjects who ranged in age from twelve to nineteen-years-old were presented with a situation in which a peer was considering cosmetic surgery.⁹⁹ The teenage subjects were then asked to advise this teenager. The advice was scored to assess the degree to which the subject demonstrated awareness of such things as the risks involved, the future consequences of each choice, and whether advice from others would be suspect due to a vested interest, such as a recommendation in favor of surgery coming from a doctor who would profit from it.¹⁰⁰ Professor Lewis found sharp differences in cognitive ability between seventh or eighth grade students, on the one hand, and twelfth grade students, on the other.¹⁰¹ While this study did not include a comparison group of adults, it suggested that older adolescents possess significant decision-making skills.

Lois Weithorn and Susan Campbell compared the decision-making capacity of adolescents and adults in the context of a hypothetical treatment decision.¹⁰² Adolescents as young as sixteen were found to have the ability to absorb information about treatment alternatives and their consequences comparable to adults.¹⁰³ Weithorn and Campbell cautioned that adolescent performance might differ from that found in the laboratory setting when the subject was faced with the stress of a real decision,¹⁰⁴ but the cognitive capabilities of adolescents still appeared significant.

Bruce Ambuel and Julian Rappaport conducted a study of adolescent competence to choose abortion that was designed to answer criticism of

96. *Id.* at 1160.

97. *Id.* at 1164-66.

98. *See* Lewis, *supra* note 90.

99. *Id.* at 540. The operation was described as one to have "this ugly thing like a bump on my cheek" removed, an operation that "won't make me healthier," but "would make me look better."

100. *Id.* at 540-41.

101. *Id.* at 541-43.

102. Weithorn & Campbell, *supra* note 90.

103. *Id.* at 1595-96.

104. *Id.* at 1596.

earlier studies based on the fact that those earlier studies either did not sample adults as a comparison group, or tested adolescents who were addressing a hypothetical rather than a real-life choice.¹⁰⁵ Seventy-five participants ranging in age from thirteen to twenty-one were recruited from a women's medical clinic.¹⁰⁶ The participants, all of whom arrived at the clinic seeking a pregnancy test, completed a questionnaire and participated in an interview about their pregnancy and their choice for or against abortion.¹⁰⁷

The questionnaire sought to determine the participant's level of factual knowledge about pregnancy, childbirth, abortion and adoption¹⁰⁸ and their general level of reading and reasoning skills.¹⁰⁹ The interview sought to determine the extent to which the participant felt she was making the choice of her own volition, whether she could explain the reasoning behind her decision in a comprehensible way, and whether she considered both long and short-term consequences.¹¹⁰ The "richness" of her reasoning was assessed based on her consideration of both material and psychological consequences to herself, the unborn child, and third parties.¹¹¹

Ambuel and Rappaport found no meaningful differences in the competence of minors ages fifteen to eighteen as compared to the young women aged eighteen to twenty-one.¹¹² This study, "in a real, socially and emotionally complex setting,"¹¹³ concluded that "[b]y middle or later adolescence, minors have the capacity to reason abstractly about hypothetical situations, reason about multiple alternatives and consequences, consider multiple variables, combine variables in more complex ways, and

105. Ambuel & Rappaport, *supra* note 90. The authors noted that previously there had been no study that "directly compares the decision making of adolescent minors with a criterion group of legal adults." *Id.* at 130.

106. *Id.*

107. *Id.* at 134-39.

108. *Id.* at 136. "Knowledge . . . was assessed by a 12-item true/false test of simple factual information about abortion, adoption, parenthood and pregnancy." *Id.*

109. *Id.* at 137.

110. Ambuel & Rappaport, *supra* note 90, at 138.

111. *Id.* Relevant third parties would include such persons as the child's father, the interviewee's parents, or the adoptive parents, should she choose adoption. *Id.* at 138, table 2.

112. *Id.* at 145-46.

113. *Id.* at 148.

use information systematically in arriving at a decision.”¹¹⁴ In short, “minors remain competent decision makers when facing an emotionally challenging, real-world decision.”¹¹⁵

The conclusions of these and similar studies were employed to advocate legal respect for adolescent choices in cases such as *Hodgson*.¹¹⁶ However, to the extent that they support a generalized view recognizing the maturity of at least older adolescents and their competence at decision-making, they also support a view that these adolescents bear full responsibility for the consequences of their decisions. This would be consistent with the movement in favor of full adult responsibility for juvenile crime and would cast doubt on a decision such as *Simmons*, declaring the age of the offender to present a constitutional ban to severe punishment.

B. More Recent Social Science

Not everyone in the fields of psychology or sociology was convinced by the conclusions of these earlier studies. Even some who generally support the legal rights of adolescents to make reproductive choices found the evidence of equivalent adolescent and adult decision-making skill to be weak.¹¹⁷ In addition to pointing to things like small sample size, the failure to test under “real world” conditions, or the failure to include adult participants for comparison evident in some of the studies, these critics wondered whether the significance of the studies’ findings might have subtly been influenced by the researchers’ own views concerning the policy implications of supporting or rejecting the contention that adolescents share a level of decision-making skill with adults in the area of health care choice.¹¹⁸ These earlier studies, limiting themselves to evaluating the

114. *Id.* at 147.

115. Ambuel & Rappaport, *supra* note 90, at 148.

116. *See supra*, note 54.

117. *See, e.g.*, William Gardner, David Scherer & Maya Tester, *Asserting Scientific Authority: Cognitive Development and Adolescent Legal Rights*, 44 AM. PSYCHOLOGIST 895 (1989). The authors begin with a discussion of the limits of psychology, or other science, in legal discourse. “A lawyer in an adversarial system of justice has an ethical duty to be an effective partisan . . . Responsible lawyers write to persuade. A responsible scientist, however, will strive for disinterested prose, addressing all evidence and theory on a topic. Arguments within briefs that claim scientific authority sharply focus this tension, as they must satisfy the ethics governing both legal and scientific discourse.” *Id.* at 895.

118. *Id.* at 897-99 “[I]t is vital to rigorously distinguish between egalitarian political

cognitive skill behind a decision, placed little or no significance on the ultimate outcome of the adolescent subject's choice. But some social scientists were troubled by the fact that while exercising apparently similar cognitive abilities, adolescents as a group might come to noticeably different conclusions than adults in a number of contexts including the choice to engage in criminal activity.¹¹⁹ Pursuing an explanation for this discrepancy, recent research has concluded that adolescents, as a group, differ in significant ways from adults in their decision-making capabilities. Recent findings, in quick summary, point to several significant differences. While adolescents are able to recognize costs and benefits of alternative courses of action, they attach different subjective values to these perceived consequences than adults.¹²⁰ Adolescents place heavier weight on short-term consequences than adults.¹²¹ In addition, adolescents are more likely to accept risk,¹²² more likely to respond to aggressive impulses,¹²³ and less likely to understand a situation from the perspective of others.¹²⁴ To the

commitments and our epistemic attitudes . . . in scientific research." *Id.* at 899.

119. Elizabeth Scott and her colleagues point to the "strong norm [that] supports the position that choices . . . should reflect the subjective values and preferences of decision makers, and that no objective (external) measure of outcome is appropriate." Scott, *supra* note 87, at 224. But, of course, the law, unlike pure science, is often in the business of imposing external evaluation measures. See *infra* note 135. Certainly with respect to some types of decisions, particularly those involving criminal activity, the incidence of youthful decisions that are seen as antisocial will weigh in the evaluation of whether that decision is held to be the product of competent choice, when that evaluation is made by a court. Thus, debates over whether juveniles should be tried as adults "are usually triggered by a particularly heinous crime," that is, the objective harm of the offense, Ira Schwartz, *Juvenile Crime Fighting Policies: What the Public Really Wants*, in *Juvenile Justice and Public Policy* 214, 221 (1992) (Ira Schwartz, ed.).

120. See generally Christopher Slobogin et al., *A Preventive Model of Juvenile Justice: The Promise of Kansas v. Hendricks for Children*, 1999 WIS. L. REV. 185, 196-200.

121. See, e.g., Jari-Erik Normi, *How Do Adolescents See Their Future? A Review of the Development of Future Orientation and Planning*, 11 DEVELOPMENTAL REV. 1 (1991).

122. See, e.g., Jeffrey Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 DEVELOPMENTAL REV. 339 (1992); Lita Furby & Ruth Beyth-Mason, *Risk Taking in Adolescence: A Decision-Making Perspective*, 12 DEVELOPMENTAL REV. 1 (1992).

123. See, e.g., Elizabeth Cauffman & Laurence Steinberg, *(Im)maturity and Judgment in Adolescence: Why Adolescents May Be Less Culpable Than Adults*, 18 BEHAV. SCI. & LAW, 741 (2000).

124. *Id.* at 751-54.

extent that adolescents respond to the views of others, they are more vulnerable than adults to peer pressure,¹²⁵ which makes it more likely that outside influence will heighten, rather than diminish, these adolescent biases.¹²⁶

Representative of these studies is the investigation by Elizabeth Cauffman and Laurence Steinberg into the maturity of adolescent judgment.¹²⁷ Consistent with earlier studies, Cauffman and Steinberg note that "maturity of judgment" relates to the process, rather than the outcome, of decision-making.¹²⁸ "The question is not whether robbing a liquor store is a bad decision. The question is whether this decision arose from factors that put adolescents, relative to adults, at an inherent disadvantage when faced with choices in potentially antisocial situations."¹²⁹ Since the term "decision-making" is so closely related to cognitive ability alone, the authors prefer the term "judgment" to reflect a mixture of cognitive and psychosocial abilities.¹³⁰

During Cauffman and Steinberg's research, over a thousand subjects were sampled, including minors from eighth to twelfth grade, and college students, both under and over age twenty-one.¹³¹ The subjects were administered a set of widely accepted tests to assess personal responsibility ("feelings of internal control and the ability to make decisions without extreme reliance on others"),¹³² perspective (the ability to see both long and short term consequences, and to take the perspective of other people into account),¹³³ and temperance (impulse control and restraint of aggressive behavior).¹³⁴

In addition, subjects completed the Youth Decision-Making

125. See, e.g., Peggy C. Giordano et al., *Changes in Friendship Relations Over the Life Course: Implication for Desistance From Crime*, 41 CRIMINOLOGY 293 (2003).

126. See, e.g., Terence D. Thornberry et. al., *Delinquent Peers, Beliefs and Delinquent Behavior: A Longitudinal Test of Interactional Theory*, 32 CRIMINOLOGY 47 (1994).

127. Cauffman & Steinberg, *supra* note 123.

128. *Id.* at 743.

129. *Id.*

130. *Id.* at 745.

131. *Id.* at 745-46.

132. Cauffman & Steinberg, *supra* note 123, at 748. The Psychosocial Maturity Inventory responsibility subscale measures feelings of self-reliance, self-esteem and pride in one's work. *Id.* at 747-48.

133. *Id.* at 748.

134. *Id.* at 748-49.

Questionnaire, a set of hypothetical situations requiring a choice between an antisocial course of action and one approved by society.¹³⁵ In contexts indicating negative consequences to self, no such consequences, or uncertainty, subjects were asked to rate how likely they were to smoke marijuana, shoplift, joy-ride in a stolen car, cheat on a test, or lie to an employer.¹³⁶

Some of Cauffman and Steinberg's findings are not surprising. For example, subjects of all ages were more likely to engage in antisocial behavior when no negative consequences to themselves would follow,¹³⁷ and, in general, one's level of psychological maturity, as demonstrated by levels of responsibility, perspective and temperance, was a better predictor of the likelihood of antisocial behavior than age itself.¹³⁸

Nevertheless, despite the existence of "psychosocially mature 13-year olds [who] demonstrate less antisocial decision-making than psychosocially immature adults,"¹³⁹ the authors conclude that "the average adolescent is less responsible, more myopic, and less temperate than the average adult."¹⁴⁰ The steepest increase in maturity of judgment seems to occur between ages sixteen and nineteen, with little difference evident of further development between nineteen and twenty-one.¹⁴¹ Late adolescence, then, "marks an important transition point in psychosocial development that is potentially relevant to debates about the drawing of legal boundaries between adolescence and adulthood."¹⁴²

The Cauffman and Steinberg study points to differences between adults and adolescents in responsibility, perspective, and temperance. An earlier study of juvenile offenders in London points to the likely effect of peers on

135. *Id.* at 749-50. While the norms of social science generally call for avoiding the label of "good" or "bad" with respect to choices, the authors here acknowledge that while "in theory, the maturity of a decision is independent of its social acceptance . . . [o]ur decision to equate 'good' decision-making with socially accepted behavior is consistent with everyday practice in the courts, and we have taken care to ensure that the 'right' and 'wrong' choices in the scenarios used for this measure are not the sort that might be subjected to reasonable debate." Cauffman & Steinberg, *supra* note 123, at 750.

136. *Id.* at 750.

137. *Id.* at 752.

138. *Id.* at 756.

139. *Id.* at 757.

140. Cauffman & Steinberg, *supra* note 123, at 757.

141. *Id.* at 756.

142. *Id.*

adolescent decisions to engage in antisocial behavior.¹⁴³ Albert Reiss and David Farrington collected data concerning the delinquency history of 411 boys from working class neighborhoods in London.¹⁴⁴ The data was examined as to the type of offense and whether the offender acted alone or with others.¹⁴⁵ With the exception of crimes of violence, a clear pattern emerged.¹⁴⁶ Prior to age twenty, most offenses were committed with others; after age twenty, a significant majority were committed alone, a percentage that steadily grew to over 80% by the offender's late twenties.¹⁴⁷ At least in the context of clearly antisocial decisions, this real-world study strongly suggests that peers have a greater influence on the decision-making of adolescents.

By going beyond cognitive factors to include additional psychosocial factors, this more recent wave of social science research has moved toward a position more consistent with perhaps the stereotypical view of non-specialists. That is, there are significant differences between the decision-making capacity of adolescents and adults, and these differences make adolescent decisions less fully responsible and less deserving of respect.

C. Biological/Anatomical Studies

The accuracy of social science findings is often criticized as being influenced (consciously or unconsciously) by the researcher's own policy preferences.¹⁴⁸ Thus, one might regard the early, cognition-based, social science findings of adolescent competence as suspect insofar as this research was conducted in the context of healthcare decisions (particularly those concerning reproductive care), when the researchers' support of adolescent decision-making rights might skew their findings.¹⁴⁹ Similarly, the recent studies emphasizing differences between adolescents and adults has

143. Albert J. Reiss, Jr. & David P. Farrington, *Advancing Knowledge About Co-Offending: Results From a Prospective Longitudinal Survey of London Males*, 82 J. CRIM. L. & CRIMINOLOGY 360 (1991).

144. *See id.* at 368.

145. *Id.* at 369.

146. *See id.* at 370-72.

147. *Id.* at 370-76.

148. *See generally* Gardner et al, *supra* note 117.

149. *See supra*, notes 87 and 117.

arisen in contexts when the most salient political issue affected is whether juvenile offenders should be subject to full adult criminal penalties.¹⁵⁰ Again, one might be skeptical of research conclusions that conveniently support the researchers' own preferences for less draconian approaches to juvenile justice.

The finding of biological studies would seem less open to such skepticism, being presumably less vulnerable to criticisms concerning such things as sample size, the value of self-reported views as opposed to real world situations, and other problems that persist in social science research. While social science work on the decision-making capacity of adolescents dates back a few decades,¹⁵¹ a line of inquiry based in biology and anatomy has emerged only recently.

Before the development of magnetic resonance imaging (MRI), anatomical studies of the brain depended on post-mortem examination.¹⁵² For obvious reasons, this limitation made it impossible to follow the development of an individual brain over time. MRI technology, however, allows researchers to follow such development. Recent longitudinal studies lend significant weight to the later social science studies concluding that adolescent and adult capacities are significantly different.¹⁵³ These studies have observed "dramatic maturation" in the structure of the brains of the average child and adolescent over time.¹⁵⁴ Specifically, these studies have found that the regions of the brain, located in the frontal cortex, that are associated with moral reasoning, risk assessment, and impulse control do not fully develop until late adolescence.¹⁵⁵ Accordingly, the typical adolescent will depend more than the typical adult on the amygdala, the region of the brain associated with triggering impulses such as anger, fear, and

150. See Melli, *supra* note 5.

151. See *supra*, notes 87-147 and accompanying text.

152. See MICHAEL GAZZINIGA et al., COGNITIVE NEUROSCIENCE: THE BIOLOGY OF THE MIND 63 (W.W. Norton & Co., 2nd ed. 2002).

153. See *infra*, notes 154-56.

154. Elizabeth R. Sowell et al., *Mapping Cortical Change Across the Human Life Span*, 6 NATURE NEUROSCIENCE 309 (2003). A number of recent brain studies were collected and cited in the amicus brief of the American Medical Association et al. in *Simmons* at 9-20.

155. See Jay N. Giedd et al., *Brain Development During Childhood and Adolescence: A Longitudinal MRI Study*, 2 NATURE NEUROSCIENCE 861 (1999); Thomas Paus et al., *Structural Motivation of Neural Pathways in Children and Adolescents: In Vivo Study*, 283 SCIENCE 1908 (1999).

aggression.¹⁵⁶ These recent biological and anatomical studies combined with the recent social science findings stressing psychosocial maturity in addition to cognitive factors provide substantial support for the Supreme Court's conclusion in *Simmons* that adolescent killers are less fully responsible for their acts than adult killers and therefore, imposition of the death penalty on such juvenile offenders is unconstitutional. But how far should this rationale extend beyond the narrow confines of capital punishment? Does it require adoption of a different penal approach to adolescent crime beyond the prohibition of the death penalty? And, outside of the context of criminal punishment, does it seriously undermine the basis for respecting adolescent choice in reproductive and other healthcare matters? Finally, is a consistent position on respect for adolescent decision-making necessary or are there good reasons to tolerate the apparent tension between *Simmons* and cases such as *Hodgson*?

IV. ADOLESCENT DECISION-MAKING RESPONSIBILITY AFTER *SIMMONS*

The social and biological research on adolescent decision-making competence provides only part of the foundation for the Supreme Court's decision in *Simmons*. As debate continues over the proper role of the Court in assessing evolving community standards of acceptable punishment and the relevance, if any, of international norms in interpreting rights under the United States Constitution,¹⁵⁷ adolescent decision-making abilities may recede as a point of contention.

Still, although *Simmons* may have little effect beyond the narrow confines of capital punishment law, the Court's recognition of the relevance of adolescent decision-making capacity suggests that it cannot be completely ignored in the consideration of future legal issues. These issues can be divided into those, like *Simmons*, involving criminal law questions, and those, like *Hodgson*, presenting issues relating to the recognition of adolescent autonomy rights.

156. See L.P. Spear, *The Adolescent Brain and Age-Related Behavioral Manifestations*, 24 NEUROSCIENCE & BIOBEHAVIORAL REVS. 417 (2000).

157. See *supra*, notes 27-38, and accompanying text. See A.E. Dick Howard, *The Indeterminacy of Constitutions*, 31 WAKE FOREST L. REV. 383, 402-06 (1996) for a discussion of the virtues and limitations of "borrowing" from other nations' constitutions.

A. Criminal Law Issues

Simmons raises obvious questions concerning the punishment of juvenile offenders beyond the narrow confines of capital punishment. The Court's recognition of limitations in decision-making capacity that mitigate the responsibility of juvenile killers would appear equally relevant in cases involving lesser crimes. Considering the Court's recognition of these limitations, to what extent does this threaten the recent trend of states to subject more juvenile offenders to the same procedures and punishments as adults?¹⁵⁸

For centuries, criminologists and legal experts have debated the goals of criminal punishment. To what extent should we punish in order to deter others, to incapacitate the offender, or to seek retribution?¹⁵⁹ And what place does rehabilitation have in the hierarchy of goals? A sophisticated theory of retribution will recognize that retribution is something more than mere vengeance. Instead, retribution is based on the notion that punishment must be calibrated to reflect the seriousness of the offense, not merely in terms of the effect of the act, but also the responsibility of the offender.¹⁶⁰ And with the term so defined, retribution becomes an essential part of the justification for punishment. But the principle not only justifies punishment, it also limits it. We cannot punish to a degree excessive in light of the offender's responsibility. For example, to knowingly punish someone who is entirely innocent cannot be justified on the grounds that, by pretending he is guilty, we can achieve significant effects in deterring others from

158. See Melli, *supra* note 5.

159. See generally ALAN W. NORRIE, *LAW, IDEOLOGY AND PUNISHMENT* (1991); PHILOSOPHICAL PERSPECTIVES ON PUNISHMENT (Gertrude Ezorsky, ed., 1977); see also H.L.A. HART, *PUNISHMENT AND RESPONSIBILITY* 3 (Oxford Univ. Press 1968) ("[W]hat is most needed is *not* the simple admission that instead of a single value or aim (Deterrence, Retribution, Reform or any other) a plurality of different values and aims should be given as a conjunctive answer to some *single* question concerning the justification of punishment. What is needed is the realization that different principles . . . are relevant at different points in any morally acceptable account of punishment.").

160. See generally MARVIN HENBERG, *RETRIBUTION: EVIL FOR EVIL IN ETHICS, LAW AND LITERATURE* (Temple Univ. Press 1990); see also HERBERT PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 66 (Stanford Univ. Press 1968) ("It is wrong to say that we should punish persons simply because they commit offenses under circumstances that we can call blameworthy. It is right to say that we should not punish those who commit offenses unless we can say that their conduct is blameworthy.").

crime.¹⁶¹

An understanding of retribution that requires punishment to be calibrated to the level of responsibility of the actor, in addition to merely the consequences of the punished act, clearly requires that the offender's decision-making capacity be taken into account. But, *Simmons*, and the social and biological science supporting it also require that we look at the goal of rehabilitation. Support for rehabilitation as a goal of the penal system has waxed and waned over the years.¹⁶² At least with respect to adult offenders, rehabilitative goals seem to have receded in recent decades, but those goals have never fully been abandoned. So, the question remains: to what extent, if any, is rehabilitation a necessary component of any system of criminal punishment? Does the answer to this question vary when dealing with different types of offenders? Are juveniles, as a group, entitled to greater consideration of rehabilitation in sentencing than adult offenders?

One argument against capital punishment focuses on the fact that the penalty has no rehabilitative component.¹⁶³ It implicitly denies the possibility of the offender reforming sufficiently to rejoin the community. At least one European court extended this rationale, holding that a life sentence with no reasonable hope of parole violates fundamental principles of human dignity.¹⁶⁴ Of course, American courts have not gone so far. While the

161. See Hart, *supra* note 159, at 11-12. See also Margaret Jane Radin, *Proportionality, Subjectivity and Tragedy*, 18 U.C. DAVIS L. REV. 1165, 1170 (1985) ("A pure utilitarian would argue that we should execute whomever, and however many, we need to in order to deter the 'right' amount . . . [w]hether someone is guilty of a crime or deserves to die for it is not of concern to the pure utilitarian. But no one in her right mind is a pure utilitarian.").

162. The rise and fall of the rehabilitative ideal is discussed in Randall McGowan, *The Well-Ordered Prison: England 1780-1865*, in THE OXFORD HISTORY OF THE PRISON 79-109 (Norval Morris & David J. Rothman, eds., 1995) and David J. Rothman, *Perfecting the Prison: United States 1789-1865*, in THE OXFORD HISTORY OF THE PRISON, *supra* at 111-29. See Steven Schlossman, *Delinquent Children: The Juvenile Reform School* in THE OXFORD HISTORY OF THE PRISON, 363-69 for a discussion of the rehabilitative ideal in juvenile corrections.

163. In religious terms, Christian abolitionists argue that "[c]apital punishment is defeatist because it shows that society is prepared to make no allowance for a saving change of heart on the part of the people condemned." TOM SORRELL, MORAL THEORY AND CAPITAL PUNISHMENT 124 (Open Univ. 1988). See HUGO ADAM BEDAU, KILLING AS PUNISHMENT 160-62 (Northeastern Univ. Press 2004) for a somewhat similar argument, without explicit religious overtones.

164. Life Imprisonment Case, 45 BVerG GE 187 (Federal Const. Court, Germany) (1977), excerpted and translated in NORMAN DORSEN et. al, COMPARATIVE

Supreme Court has not specifically held that rehabilitation is not an essential element of criminal punishment, its Eighth Amendment jurisprudence, particularly its capital punishment cases, clearly suggest as much.¹⁶⁵ Deterrence and retribution may justify a punishment that, by its terms, rejects the possibility of rehabilitation.¹⁶⁶

If we conclude that adolescents are still in a stage of development regarding factors such as reasoning, risk-taking, and self control, then it would seem to follow that they are, as a group, more likely to be successfully rehabilitated. Rehabilitation has receded in importance among the goals of criminal law for a number of reasons,¹⁶⁷ but one prominent reason is a lack of faith in the efficacy of rehabilitation programs directed at criminal offenders.¹⁶⁸ However, if there is reason to distinguish the likelihood of rehabilitation of juvenile offenders from that of adult offenders, a case can be made that a punishment regime that excludes a genuine possibility of reform is insufficiently rational.¹⁶⁹ By no means does this exclude even severe punishment of serious juvenile crime, but it does suggest that punishment of juveniles, whatever its other justifications, must include a stronger commitment to reform than might be necessary when dealing with adults.

Of course, as a matter of constitutional law, *Simmons* may have little if any effect beyond its narrow confines in limiting the punishment of juvenile offenders. The Supreme Court has often recognized that under the Eighth Amendment, and the Due Process Clause, "death is different."¹⁷⁰ Limitations on government power to impose capital punishment will not

CONSTITUTIONALISM: CASES AND MATERIALS 515-18 (2003).

165. See *Gregg v. Georgia*, 428 U.S. 153, 183 ("Retribution is no longer the dominant objective of the criminal law, but neither is it a forbidden objective") (citing *Williams v. New York*, 337 U.S. 241, 248 (1949)).

166. See *Gregg*, 428 U.S. at 207-26 (White, J., concurring).

167. See Rothman, *supra* note 162; see also Packer, *supra* note 160 at 57-58.

168. See, e.g., Robert Martinson, *New Findings, New Views: A Note of Caution Regarding Sentencing Reform*, 7 HOFSTRA L. REV. 243, 252-57 (1979).

169. A conviction that juveniles were more amenable to rehabilitation was at the heart of the movement for separate systems of juvenile justice and corrections. See Schlossman, *supra* note 162; see also Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104 (1909).

170. The phrase, first used in *Gregg*, 428 U.S. at 188, has been used so often as to give rise to Justice Scalia's derisive comment that the Court, in limiting imposition of the death penalty, has invented "a death-is-different jurisprudence." *Atkins v. Virginia*, 536 U.S. 304, 337 (Scalia, J., dissenting).

necessarily carry over to other, even severe, types of punishment.¹⁷¹ Still, the reasoning underlying *Simmons* supports not only courts, but legislatures that might conclude that a less severely punitive approach to juvenile crime is appropriate beyond merely taking the possibility of execution off the table.

B. The Impact of Simmons Outside of Criminal Law

Data supporting the conclusion that adolescent decision-making capacity falls short of that of adults supports a juvenile justice system less punitive and more committed to rehabilitation than the adult system. But does the data also undermine arguments in favor of extending autonomy rights to adolescents? The wide range of statutes and local ordinances that limit adolescent activity more strictly than the general restrictions on adults seem to demonstrate general public skepticism about the maturity of adolescent decision-making, a skepticism reinforced by social and biological science.¹⁷² Courts have often upheld limitations on the freedom of minors to act in ways that, were they applied to adults, would at least raise serious constitutional problems.¹⁷³ But adolescent autonomy has been recognized as entitled to constitutional protection in other contexts, most notably and controversially, in cases involving reproductive rights and other types of healthcare decisions.¹⁷⁴

Many who would applaud the invocation of the *Simmons* rationale to limit the harshness of criminal law as applied to juveniles would object to the use of the same rationale to limit adolescent autonomy in those non-criminal contexts. To what extent should acceptance of *Simmons* compel the

171. Although the Eighth Amendment has been held to include a principle of proportionality in punishment, the Supreme Court has been reluctant to apply it to invalidate even the most severe noncapital sentences. See *Harmelin v. Michigan*, 501 U.S. 957 (1991) (upholding life sentence for possession of 672 grams of cocaine); *Ewing v. California*, 538 U.S. 11 (2003) (upholding sentence of 25 years to life under “three strikes” law; third offense was theft of golf clubs).

172. See *supra*, notes 75-84, and accompanying text.

173. See, e.g., *Ginsberg v. New York*, 390 U.S. 629 (1968) (permitting the state to prohibit the sale to minors of material that does not meet the standard of ‘obscenity’ that would justify prohibiting its sale to adults); *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988) (giving school authorities wide discretion to control content of student publications); *Ingraham v. Wright*, 430 U.S. 651 (1977) (holding corporal punishment in public schools does not violate due process or eighth amendment rights).

174. See *supra*, notes 8-10.

rejection of claims of adolescent autonomy?

In response to this question, it is initially helpful to divide the broad range of restrictions on the behavior of minors into two categories. The first and largest category includes those restrictions that merely delay, rather than ultimately deny, the choice to act in a certain way. These activities, which are either forbidden to minors or permissible only with parental consent, include things that are seen as relatively trivial, such as the decisions to obtain a tattoo;¹⁷⁵ decisions of enormous importance, such as the decision to marry;¹⁷⁶ and many types of decisions in between. The key characteristic of the restriction that places them in this category is not the weightiness of the decision, but the fact that the restriction merely postpones rather than completely deprives the adolescent of the decision.

If we have reason to believe that an adolescent's decision-making capacity is still developing, and that the passage of time might either change the adolescent's decision or, if not, satisfy us as to the maturity of the decision, there exists a strong case for a legal restriction that postpones the choice. To be sure, there is some cost here to the autonomy of a minor who does possess a mature level of decision-making skill, but to postpone the exercise of a right is less severe than to entirely deny it. Here, one may draw a rough, although imperfect, analogy to the recent debates over the right of an adult to exercise a "right to die," either by withdrawing medical treatment or obtaining affirmative assistance in ending a terminal patient's life.¹⁷⁷

Even most proponents of a legal right to assisted suicide concede that in order to determine whether the request is a temporary desire or the product of careful reflection, a reasonable time period is appropriate between the patient's first request and the provision of such assistance.¹⁷⁸ While

175. See *supra* note 82.

176. See *supra* note 77.

177. See *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261 (1990) (permitting the state to apply "clear and convincing" test to evidence of patient's desire to withdraw life-saving treatment); *Washington v. Glucksberg*, 521 U.S. 702 (1997) (allowing state to prohibit assisted suicide).

178. See RAPHAEL COHEN-ALMAGOR, *THE RIGHT TO DIE WITH DIGNITY* 158-80 (2001), for a discussion of the Oregon Death With Dignity Act; see also William A. Landman, *A Proposal for Legalizing Assisted Suicide and Euthanasia in South Africa*, in 67 *PHILOSOPHY AND MEDICINE: PHYSICIAN-ASSISTED SUICIDE: WHAT ARE THE ISSUES?* 203-223 (Loretta M. Kopelman & Kenneth A. DeVille eds., 2001) (stating that requests should be well-considered with an opportunity to re-evaluate).

there are obvious differences between this situation and that of the adolescent, not least of which is that the time frame involved may be days instead of years,¹⁷⁹ the basic idea remains the same. For this category of decisions, where we have reason to suspect impairment of a decision-maker in the exercise of judgment and where the passage of time will make us more confident in the validity of the judgment, delaying the exercise of an autonomy right is appropriate.

The second category of decisions presents a more difficult question. Certain decisions simply cannot be postponed; a failure to decide is effectively a decision. The decision to undergo an abortion or any other pressing medical treatment must be made in the present, or the opportunity to choose such a procedure is lost. Under these circumstances, we should be more cautious in deciding whether adolescent autonomy is inappropriate.

One alternative, in cases where the stakes are high and the decision cannot be postponed is to resort to a case-by-case inquiry into the maturity of the individual adolescent. Individual assessment of decision-making competency imposes significant costs on the judicial system; such an approach is hardly worth the cost where the stakes are not high. One would certainly not look forward to judges assessing the competence of countless adolescent decisions to undergo body piercing.¹⁸⁰ When the question is abortion, however, the cost of individual decision-making required by the currently imposed judicial bypass options is far more justifiable.¹⁸¹ But as Justice O'Connor points out in her *Simmons* dissent, the same is true in cases involving the juvenile death penalty.¹⁸² If assessing the maturity of the adolescent choosing an abortion calls for case-by-case consideration, isn't the pre-*Simmons* case-by-case analysis of the responsibility of the adolescent offender sufficient to identify the rare cases where capital punishment might be appropriate?

179. There is a fifteen-day waiting period under the Oregon Act between a terminal-patient's first oral request and the writing of the prescription, see COHEN-ALMAGOR, *supra* note 179, at 167.

180. See CONN. GEN. STAT. ANN. § 19a-92g (2004); 720 ILL. COMP. STAT. 5/12-10.1 (2005); VA. CODE ANN. § 18.2-371.3 (2006) for examples of states that prohibit persons under eighteen from body piercing without parental consent.

181. Elizabeth S. Scott, *The Legal Construction of Adolescence*, 29 HOFSTRA L. REV. 547 (2000), notes the inefficiency of "individualized assessments of maturity" as opposed to categorical rules and observes that "[b]ecause such a strategy is costly and burdensome, predictably it is only employed when the stakes are high." *Id.* at 561.

182. *Simmons*, 543 U.S. at 1212-14 (O'Connor, J., dissenting).

A case-by-case inquiry into adolescent decision-making capacity is less inconsistent with *Simmons* than a categorical rule accepting the maturity of adolescent decision-making in the health care context, but it is nonetheless inconsistent with categorical denial of that capacity. We will still need some basis for supporting this inconsistency. Is it possible that different types of choices might be more or less subject to the specific types of problems that research has shown to be common in adolescent decision-making?

As a starting point, rather than simply working from a conclusion that adolescent decision-making is deficient in some overall, global sense, we can focus attention on the specific ways in which adolescent choice differs from adult choice. As discussed above, studies indicate that adolescents are: (a) prone to risk-taking behavior;¹⁸³ (b) likely to overvalue short-term results as opposed to long-term consequences;¹⁸⁴ (c) more aggressive;¹⁸⁵ and (d) more responsive to peer pressure than adults.¹⁸⁶ These differences can lead adolescents, as a group, to make significantly different conclusions despite the apparent equivalence of adolescent and adult cognitive skills.¹⁸⁷

Although research on decision-making skills attempts to focus on the process of decision-making and not on the outcome itself, it is hardly realistic to assess decisions without some attention to the substance of the choice. Indeed, we can assume that one of the key factors making researchers skeptical of the early social science showing equivalent adult and adolescent decision-making skills was the fact that the two groups produced significantly different types of choices. And while a rigid scientific reluctance to assign normative value to decisions—to label one type of choice as good and another as bad—might have its advantages when social

183. See Arnett, *supra* note 122.

184. See Normi, *supra* note 121.

185. See Cauffman & Steinberg, *supra* note 123.

186. See Giordano et al., *supra* note 125.

187. Elizabeth S. Scott and Laurence Steinberg, *Blaming Youth*, 81 TEX. L. REV. 799, 816 (2003).

As the typical adolescent matures into adulthood, he becomes a more experienced and competent decision maker; susceptibility to peer influence attenuates, risk perception improves, risk averseness increases, time perception expands to focus more on long-term consequences, and self-management improves. These developments lead to changes in values and preferences. As adolescents become adults, they are likely to make different choices from their youthful selves, choices that reflect more mature judgment.

Id.

science has an effect on social policy, it is unrealistic to avoid some normative judgments.¹⁸⁸

For example, if social science found that a noticeable difference exists between adolescent and adult decision-making, but that those differences led adolescents to systematically favor choices seen as socially desirable, the findings would be interesting but would obviously lead to an entirely different type of debate about adolescent decision-making than when choices are skewed in the opposite direction. If we want to avoid simple labeling of choices as good or bad and the accusation of imposing our own biases, we might defer to the community at large and label choices as pro-social, antisocial, or either neutral or contested. Do the biases present in adolescent decision-making lead to a greater likelihood of antisocial choice than choices that are pro-social or unclear?

Apart from a few eccentric views, it is safe to assume that a consensus exists that the decision to commit a crime, at least a serious crime, is an antisocial choice. Most would agree that such a choice is also, on balance, harmful to any adolescent making such a choice. But far less consensus exists with respect to adolescent healthcare decisions. While many would regard an adolescent decision to obtain an abortion as harmful to society as well as to the adolescent,¹⁸⁹ many others would regard the decision as neutral at worst and perhaps even beneficial to both society and the adolescent, when compared to the alternative of teenage motherhood.¹⁹⁰

Similar disagreement exists on the question of adolescent access to contraceptives. Some see this as an incentive to engage in irresponsible teenage sexual activity, which poses obvious risks to the welfare of the community and the individuals involved.¹⁹¹ Others see such access as necessary to minimize harmful consequences of inevitable teenage sexual experimentation.¹⁹² When we consider health care decisions outside the

188. See Cauffman & Steinberg, *supra* note 123.

189. See, e.g., several of the essays in *THE PSYCHOLOGICAL ASPECTS OF ABORTION* (David Mall & Walter F. Watts, eds. 1979).

190. "The physical and emotional and economic burdens of pregnancy are intense, but so are the parallel burdens of parenthood." RONALD M. DWORKIN, *LIFE'S DOMINION* 111 (1993).

191. This is largely the rationale behind federal financial support for "abstinence only" education in public schools. See Elizabeth Arndorfer, *Absent Abstinence Accountability*, 27 *HASTINGS CONST. L.Q.* 585 (2000).

192. See, e.g., James McGrath, *Abstinence-Only Adolescent Education: Ineffective, Unpopular and Unconstitutional*, 38 *U.S.F.L. REV.* 665 (2004).

context of reproduction, such as a decision to refuse aggressive or invasive medical procedures, it is perhaps even less clear that a decision either way is antisocial. In many cases, no consensus will exist on which choice is beneficial to the individual. In terms of their effect on society and the individual, all of these health care decisions stand in contrast to the decision to commit a crime, at least to the extent of presenting no clear consensus.

With this as background, we can now examine the likely impact of the specific ways in which adolescent decision-making appears deficient with respect to different types of adolescent decision making.¹⁹³ The choice to engage in serious criminal behavior will almost always appear riskier than a decision to obey the law. In this context, the adolescent bias works in the direction of clearly antisocial behavior and behavior that also places the individual in danger of harmful consequences. With respect to the abortion decision, the situation is less clear. While the decision to undergo an abortion is certainly not risk-free, either physically or emotionally, the decision give birth and assume the role of teenage mother presents its own serious risks. In this case, the bias toward risk should not systematically favor one decision over the other.

The same lack of clarity appears when we consider the issue of contraceptive access. On one hand, it is logical to assume that the availability of contraceptives might combine with the adolescent bias toward risk to push teenagers in the direction of increased sexual activity. But for teenagers who have decided to experiment, the choice to use contraceptives reduces risk. Since the choice to obtain and use contraceptives can be viewed as either increasing or reducing risk, it is unclear whether that choice is skewed in either direction by the adolescent bias toward risk.

The apparent adolescent bias in favor of aggression¹⁹⁴ presents the same contrast when examined in different decision-making contexts. Certainly, violent crime and certain non-violent crimes are acts of aggression. Few, if any, health care decisions can be classified as aggression. While opponents of abortion might classify this procedure as an act of aggression against the fetus, the similarity to violent crime seems more rhetorical than actual. And other health care decisions carry no hint of aggression toward others. Once again, the adolescent decision-making bias clearly favors an antisocial direction when the decision involves a criminal act, but not in the context of health care.

193. See Arnett, *supra* note 122.

194. See Cauffman & Steinberg, *supra* note 123.

A similar pattern is evident when considering the adolescent bias in favor of short term, rather than long-term, consequences.¹⁹⁵ A decision to commit a crime clearly presents a choice of perceived short-term gain over potential long-term punishment. A bias toward short-term consequences leads, in a consistent way, toward the option that is both antisocial and dangerous to the long-term welfare of the adolescent. A decision with respect to reproduction or other health care issues presents a much more ambiguous picture. When faced with pregnancy, an adolescent may overvalue either the perceived short-term gains of having a child or of having an abortion.¹⁹⁶ Each decision will lead to long-term consequences that one should not disregard or underappreciate, but it would not seem that the bias toward short-term thinking systematically leads in one direction or the other.

The balance between short and long-term consequences of a decision to obtain contraceptives will vary depending on where we begin our inquiry. If we begin with the decision whether or not to engage in teenage sexual activity, then we might logically conclude that the availability of contraceptives makes the short term benefits even more attractive. But if we begin from the perspective of an adolescent who has already decided to engage in sexual activity, the availability of contraceptives would seem at most a neutral factor in determining the frequency of such activity. Indeed, for such an adolescent, the decision to obtain and use contraceptives would appear to be a decision made in spite of, rather than as a consequence of, the adolescent bias in favor of short-term benefits.

Finally, we must consider the effect of peer pressure.¹⁹⁷ Peer pressure is only significant when it acts in conflict with parental or general social norms. Adolescent peers may simply reinforce other norms in certain contexts or in certain communities. But in such cases, peer pressure is not what we generally take the term to mean. Instead, we are concerned about

195. See Normi, *supra* note 121.

196. Since there are no significant legal or political battles raging over the choice of pregnant adolescents to forego abortion and give birth, it can easily be overlooked that such a decision, with all of its consequences, is also being made by an adolescent subject to the same age-based limitations on mature decision-making as those who choose abortion. See Ambuel & Rappaport, *supra* note 90, where the researchers divided their subjects into groups who considered or did not consider abortion as an option. Above age fifteen, there were no differences found in volition or cognitive competence between the two groups. *Id.* at 145.

197. See Giordano et al., *supra* note 125.

the likelihood that the values of the peer group will clash with other influences.

Perhaps isolated exceptions might exist, but for the most part we can assume that parental and community norms oppose juvenile criminal behavior. Thus, peer pressure, when it acts as a counterweight to societal pressure, consistently nudges the adolescent in an antisocial direction. To put it another way, since parental and community influence will essentially always run in a pro-social, anti-crime direction, peer pressure to violate community norms will also essentially always run in one direction as well—one we will always see as harmful.

In the area of health care, particularly abortion and contraception, the picture is less clear. Parents, as well as adolescent peer groups, will have varying views on whether their adolescent daughters should seek an abortion.¹⁹⁸ Where the views of the peer group conflict with parental or community views, they may conflict in urging for or against abortion, and different communities may see either position, as pro-social, antisocial, or essentially neutral. And while we might well assume that general parental and social norms oppose teenage sexual activity and that significant peer pressure pushes adolescents toward such activity, we cannot say the same about the question of contraceptive use by sexually active teenagers. Thus, once we define peer pressure as limited to that which acts in opposition to parental and community norms, we can see a significant difference between the potential effect of peer pressure in the decision of the adolescent to engage in crime and the adolescent decision regarding abortion or contraception. While peer pressure might be a significant factor in each instance, when it affects the adolescent criminal, it acts in a way that we can label as antisocial with little fear of disagreement. Since parental and community norms will differ on questions of abortion and contraception, peer pressure acting to counter those norms in an individual case cannot be classified as antisocial with any degree of confidence.

This is even more clear in the context of health care decisions outside of the reproductive context. Where the decision confronting an adolescent is whether to undergo arguably necessary treatment or to withdraw current treatment, it would not seem that the adolescent biases toward risk-taking,

198. Many adolescents inform at least one parent of an impending abortion regardless of the existence or nonexistence of a parental notification statute. See Robert W. Blum et al., *The Impact of a Parental Notification Law on Adolescent Decision-Making*, 77 AM. J. PUB. HEALTH 619 (1987).

aggression, short term thinking, or responsiveness to peer pressure would point consistently in one direction. And even more so than in the case of reproductive decisions, there is no clear answer to the question of which type of choice is harmful to either the community or the adolescent.

None of this necessarily establishes a solid basis for respecting adolescent decision-making outside of the context of criminal law, while simultaneously regarding adolescents as less than fully responsible for their criminal acts. It does, however, suggest that the apparent dissonance between the treatment of adolescent decision-making in *Simmons* and its treatment in other contexts is explained by the differences between adolescent and adult decision-making and the likely impact in various contexts.

Deciding to treat adolescent decision-making differently in different contexts does not necessarily mean that such treatment must be radically different. Note that *Hodgson* and other health care cases do not simply give adolescents the full equivalent of adult decision-making authority, rather they establish a method for determining maturity in individual cases.¹⁹⁹ Justice O'Connor's contention in her *Simmons* dissent,²⁰⁰ that individual consideration of adolescent responsibility is called for in either a criminal or a health care context, cannot be dismissed in light of the fact that social science is capable only of speaking in terms of averages and probabilities rather than in absolute terms. But if the social and biological data, seen against the background of different decision-making contexts, do show significant differences, then perhaps the dissonance between a categorical rule in one case and a rule of case-by-case balancing in another is the optimal solution.

Respecting an adolescent decision on reproductive or other health care matters will not necessarily be harmful to either the community or the adolescent. Imposing full adult responsibility on an adolescent for his criminal choices, whatever the effect on the community, will certainly harm the adolescent. This illustrates another possible justification for maintaining apparently conflicting standards. *Simmons* and the health care cases are reconcilable on the grounds that the law will be more skeptical of adolescent decision-making where it is clear that the decision is detrimental to the long-term interests of the adolescent.

Such an adolescent-protective approach might seem paternalistic, but

199. See *supra*, notes 51-55 and accompanying text.

200. *Simmons*, 543 U.S. at 1214-15.

it is less paternalistic than denying respect to all adolescent decision-making. And the law by no means rejects all paternalism; as described earlier, a wide range of adolescent choices are invalidated in matters where the stakes are much lower than those presented by the cases considered here.²⁰¹ Few, if any, of the juvenile offenders whose punishments are mitigated under a *Simmons* rationale would likely object, and unless change of paternalism comes from those who would grant adolescents broad decision-making authority in a wide range of matters, it loses much of its force.

V. CONCLUSION

Does *Simmons*, with its recognition of a diminished level of criminal responsibility of adolescent offenders, require reconsideration of the extent to which law should or must respect adolescent choices outside of the criminal context? Conversely, must those who reject *Simmons*, to maintain consistency, support legal respect for adolescent choice in contexts such as reproductive or other health care decisions?

Simmons, of course, may have little or no effect outside the confines of capital punishment law. It may be merely another example of a Court unwilling or unable to declare capital punishment unconstitutional, but sufficiently uncomfortable with it to chip away at the most questionable instances of its application.²⁰² The Supreme Court has placed impediments to execution without necessarily extending the logic behind them to other contexts, at least not without much further thought.²⁰³

201. *See supra*, notes 75-84 and accompanying text. Elizabeth Scott contends that the statutes that permit adolescents to make certain health care decisions are based not so much on assessments of juvenile decision-making competence, but “on the harm of requiring parental consent,” in “situations in which the traditional assumption - that parents can be counted on to respond to their children’s medical needs in a way that promotes the child’s interest - simply might not hold.” Scott, *supra* note 182, at 568.

202. *See supra*, notes 23-25 and accompanying text.

203. The Supreme court held that appointed counsel was required for indigent defendants in capital cases decades before its decision that there was such a requirement in all state felony cases. *See Powell v. Alabama*, 287 U.S. 45 (1932) (requiring counsel in capital cases); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (requiring counsel in all state felony cases). The Supreme Court has recently shown a willingness to seriously evaluate ineffective counsel claims in capital cases. *See Rompilla v. Beard*, 125 S. Ct. 2456 (2005); *Florida v. Nixon*, 125 St. Ct. 551 (2005).

Still, the question of consistency in the legal treatment of adolescent choice remains. It may, however, be possible to resolve the question in an intellectually honest manner without adopting an all-or-nothing approach. While recent social and biological science demonstrates some significant differences in adolescent and adult decision-making, the specific differences would seem to have more relevance to the decision to engage in criminal activity than to exercise choices in other contexts. Most statutes and ordinances that limit adolescent choice do so in ways that can be seen as merely delaying, rather than prohibiting, the choice to engage in certain activity. With respect to that narrow category of significant life decisions that cannot be postponed, a legal regime that conducts a preliminary investigation into the maturity of the individual minor prior to granting the right provides a middle ground between categorical acceptance or rejection of a right of adolescent autonomy.

If we accept, despite charges of paternalism, the legitimacy of the law's attempt to protect adolescents from excessive harm from their own decisions, perhaps a rigid consistency is unwarranted. A limited respect for certain types of adolescent decisions might comfortably co-exist with limits on other types and a mitigation of the most serious negative consequences of the decision to engage in juvenile crime.