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THE JUVENILE JUSTICE COUNTERREVOLUTION:
RESPONDING TO COGNITIVE DISSONANCE IN THE LAW'S
VIEW OF THE DECISION-MAKING CAPACITY OF MINORS

Donald L. Beschle*

INTRODUCTION

The dramatic recent decrease in the overall incidence of crime\(^1\) has not re-
duced the level of public anxiety over juvenile crime.\(^2\) Indeed, there seems to
be a clear nationwide trend, fueled by public outrage, toward toughening the
legal system's approach toward the prosecution and punishment of juvenile
offenders. The rehabilitative model of juvenile justice that was adopted
by most states around the turn of the century is under attack, and a growing num-er of states now provide that certain juveniles, classified either by their age or
the seriousness of their offense, will be subject to the full severity of the adult
criminal legal system.\(^3\) Defenders of the juvenile justice alternative have been
largely unsuccessful in preventing the erosion of its jurisdiction.

Why has the defense of the separate juvenile justice system been so ineffecti-
ve? It seems clear that the public has largely lost faith in the
rehabilitative ideal as a foundation for any penal system, adult or juvenile.\(^4\)

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\(^1\) From 1992 through 1996, the annual number of criminal offenses reported by law enforcement agen-
cies nationwide was down by 6.7%; the rate per 100,000 inhabitants was down 10.3%. See FED. BUREAU OF
INVESTIGATION, U.S. DEP'T OF JUSTICE, CRIME IN THE UNITED STATES 1996: UNIFORM CRIME REPORTS 7
(1997). Violent crime is down more sharply. Id. at 12.

\(^2\) Erich Lotke wrote:

The headlines create the impression of a nation in crisis. *Juvenile homicide hits all-time high,*
they declare. *Scourge of youth violence sweeping the nation.* Politicians lament the death of our
youth and vow to keep neighborhoods safe. Teachers warn students to shun attractive clothing,
fearing they will be shot by children who plan to make it their own. Rarely have alarm bells
rung so loudly or so long: even good news like the recent decline in juvenile homicide was fol-
lowed by warnings that the worst is yet to come.


\(^4\) Thus, the 1980s saw a paradigm shift in public and legislative opinion that had at its center the pre-
sumption that "[c]rime was not committed by offenders who were sick, but by criminals who made free-will
But what has replaced rehabilitation in the public mind as the overriding goal of the juvenile justice system? Many would say deterrence. If this were so, we would expect debate over the optimal system of juvenile (or adult) justice to proceed along rational, empirical lines, with people's opinions open to modification in light of the evidence provided concerning the presence or absence of the deterrent effect of various penal approaches. But empirical evidence seems curiously ineffective in softening public attitudes toward punishment. This is nowhere more evident than in the ongoing debate over the death penalty. The lack of evidence of its deterrent effect has not led to a decrease in public support of executions. While death penalty proponents may continue to express confidence in its deterrent effect in spite of contrary evidence, it seems more likely that what is actually happening is a resurgence of support for the concept of retribution, the idea that a crime demands punishment commensurate with the guilt of the offender, regardless of its wider deterrent effects, and regardless of its rehabilitative potential. While the prominence of retributive thought may be most evident in the death penalty debate, there is no reason to doubt that it exerts power elsewhere, including the debate over appropriate forms of juvenile justice.

A sophisticated retributionism does not mindlessly pattern the punishment after the criminal act; it also takes into account the level of culpability of the criminal. Thus, an individual or society committed to the notion of retribution decisions to commit crime.” Alida V. Merlo & Peter J. Benekos, Adopting Conservative Correctional Policies to the Economic Realities of the 1990s, 6 CRIM. JUST. POL. REV. 1, 3 (1992). The new paradigm rejected rehabilitation as “coddling of criminals.” Id. 5 The weight of the evidence fails to demonstrate any positive correlation between the presence or frequency of executions and the achievement or maintenance of low murder rates. See, e.g., KILMAN SHIN, DEATH PENALTY AND CRIME 1-71 (1978); FRANKLIN E. ZIMRING & GORDON J. HAWKINS, DETERRENCE: THE LEGAL THREAT IN CRIME CONTROL 186-90 (1973). Yet majorities continue to favor the death penalty, at least in the abstract. See William J. Bowers et al., A New Look at Public Opinion on Capital Punishment: What Citizens and Legislators Prefer, 22 AM. J. CRIM. L. 77, 89 (1994). Bowers and his colleagues are critical of the methodology of these surveys, and demonstrate that when people are asked specifically to compare the death penalty to life imprisonment with no chance of parole, support for capital punishment falls off sharply. See id. at 90-91. 6 Although a decidedly minority view, there has been some social science support for the proposition that the death penalty is an effective deterrent. See Isaac Ehrlich, The Deterrent Effect of Capital Punishment: A Question of Life and Death, 65 AM. ECON. REV. 397 (1975); Isaac Ehrlich, Deterrence: Evidence and Inference, 85 YALE L.J. 209 (1975). But empirical evidence is most likely less significant than the strong intuition that capital punishment must deter. Ernest van den Haag, for example, has written: “Even though statistical demonstrations are not conclusive . . . I believe that capital punishment is likely to deter more than other punishments because people fear death more than anything else. . . . Whatever people fear most is likely to deter most.” Ernest van den Haag, The Death Penalty Once More, 18 U.C. DAVIS L. REV. 957, 965-66 (1985). 7 Thus “responsibility is as a general rule tied to culpability . . . . Attribution of responsibility to a
could nevertheless justify leniency toward an offender who lacked full capacity to appreciate the criminality and consequences of his act.\textsuperscript{8} To the extent that minors are regarded as less than fully capable, they can also be regarded as less than fully culpable. A paternalistic approach to juvenile crime may comfortably coexist with the retributive impulse. But if the legal system, in a wide variety of contexts, rejects paternalism toward adolescents, and respects their right to make significant life choices, it becomes much more difficult to maintain that an adolescent choice to engage in crime should be met with anything other than the response given to a similar decision made by an adult. A lesser response would be inappropriately paternalistic, and demonstrate a lack of respect for the young criminal himself.

This Article will explore the possibility that as the legal system recognizes more and more autonomy rights belonging to teenagers in a wide range of non-criminal matters, it inevitably creates a dissonance with the idea that in the criminal sphere, paternalism is still appropriate. This dissonance is evident at both ends of the political spectrum. The stereotypical liberal calls for expanded recognition of adolescents’ rights in a wide range of civil contexts, while defending a juvenile justice system that is based on the premise that an adolescent’s choice to commit a crime is rendered less culpable because of the adolescent’s age. In contrast, the stereotypical conservative will call for full application of adult penalties to adolescent criminals, but will deny the right of teenagers to make decisions that must be respected by the law in a wide variety of other contexts, presumably on the grounds that one so young cannot be fully capable of making such significant choices.

Many legal commentators remain focused on their own special area of expertise. They take little notice of how trends in other fields may impact on their own, or how their own positions on specific issues may spill over into other fields. But it seems unlikely that the legal system as a whole, or even the public opinion upon which it largely rests, can easily be comfortable with a significant amount of dissonance. Social science has demonstrated that individuals are made uncomfortable when they hold two inconsistent

\textsuperscript{8} Punishment of one who did not exercise free will in choosing to commit the offense may be justified, but only by resort to some sort of consequentialist theory. \textit{See Bodenheimer, supra} note 7, at 15-17.
opinions. They react, consciously or unconsciously, to resolve the conflict and make their overall world view consistent. Society at large, and its legal system, must feel the same pressure. Thus, we must face the possibility that the movement away from a separate juvenile justice system based upon the ideal of rehabilitation may be accelerated, if not caused, by the overall increase in the willingness of the legal system to recognize adolescent autonomy. Perhaps it is time to face the dissonance in the typical liberal and conservative positions on adolescent autonomy. If teenagers are accorded autonomy rights on the assumption that they are capable of making choices as well as adults, then perhaps there is little justification for a separate juvenile justice system. And conversely, if an adolescent’s choice to commit a crime should be “respected” by subjecting it to the same treatment given an adult’s decision, there is little justification for denying autonomy rights to teenagers in other legal contexts. This Article explores this problem.

First, Part I of this Article sets out a brief overview of the history of the legal system’s treatment of juvenile crime, and Part II discusses the various rationales behind society’s response to crime in general, with a particular focus on the recent revival of interest in the notion of retribution. Then, Part III gives a brief overview of the law’s treatment of adolescent autonomy claims outside of the criminal context. Part IV explores the existing social science evidence on whether there is an empirical difference in the capacity of adolescents and adults to make significant life choices—a difference that might support paternalistic treatment of those decisions by adolescents when such treatment for adults would be rejected. Unfortunately, while the existing evidence is suggestive and somewhat helpful, it is not conclusive. Finally, Part V of this Article discusses implications of these questions for the future, and the need for further evidence on the subject of adolescent capacity and further thought by citizens and lawmakers about the implications of that evidence on the question of how paternalistic the legal system, including but not limited to the juvenile justice system, should be.

9 This theory of “cognitive dissonance” was developed largely by Leon Festinger. See generally LEON FESTINGER, A THEORY OF COGNITIVE DISSONANCE (1957).

10 See id. at 2-3. This theory has been applied within a number of legal contexts, such as the tendency of workers to underestimate the risks involved in their chosen employment, see George A. Akerlof & William T. Dickens, The Economic Consequences of Cognitive Dissonance, 72 AM. ECON. REV. 307, 307-08 (1982), and the tendency of potential criminals to downplay the risks and harms involved in their chosen offenses, see Elliot Aronson & J. Merril Carlsmith, Effect of the Severity of Threat on the Devaluation of Forbidden Behavior, 66 J. ABNORMAL & SOC. PSYCHOL. 584 (1963).
I. JUVENILE JUSTICE—REFORM AND COUNTERREFORM

Before the last years of the nineteenth century, there was no separate system of juvenile justice. The common law and early statutory schemes classified people as those capable of forming criminal intent, who were subject to the full force of the criminal law, and those incapable of forming such intent, who were outside the reach of the penal system.\(^{11}\) With respect to age, a bright line was drawn at the "age of reason." Children under the age of seven were held legally incapable of criminal intent.\(^{12}\) Children over the age of fourteen were held fully responsible for their acts.\(^{13}\) Those between the ages of seven and fourteen would be presumed incapable of forming criminal intent, but the state was permitted to rebut this presumption.\(^{14}\) But the choice, whether based upon age alone or a case-by-case determination, was limited to either the complete absence of criminal responsibility or treatment indistinguishable from that given to adult offenders.\(^{15}\)

In the second half of the eighteenth century and the early decades of the nineteenth, a considerable amount of thought was devoted to the general topic of penology. Enlightenment thinkers argued, with some success, that the primary goal of the criminal law and the penal system should be rehabilitation, rather than mere retribution or deterrence.\(^{16}\) While this led to one major

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\(^{11}\) Thus, Bracton wrote, in the thirteenth century:

[A] crime is not committed unless the will to harm be present . . . . And then there is what can be said about the child and the madman, for the one is protected by his innocence of design, the other by the misfortune of his deed. In misdeeds we look to the will and not the outcome.

NORMAN J. FINKEL, INSANITY ON TRIAL 8 (1988). Finkel also explains the influence of the Church's definition of sin upon the common law's concept of crime. See id. at 3-12.


\(^{13}\) See id.

\(^{14}\) See id.

\(^{15}\) As May stated:

Age by itself gave no right to special treatment . . . . Young offenders were liable for all the main forms of punishment . . . though individual magistrates might exercise a compassionate discretion [in reducing the severity of punishments]. But such clemency was only a variant of a policy applied to all offenders in the early nineteenth century in the face of the stringent penal code.

Id. at 48.

\(^{16}\) These arguments tended to have strong religious, as well as rationalist, overtones: the rehabilitation of criminals would entail their religious conversion. See Randall McGowan, The Well-Ordered Prison: England 1780-1865, in THE OXFORD HISTORY OF THE PRISON 79, 85-97 (Norval Morris & David J. Rothman
enduring change, the replacement of physical punishment by prison as the normal form of criminal sanction, the rehabilitative ideal failed to maintain its prominence and began to fade as early as the second half of the nineteenth century. Several reasons may be cited for this change of heart. No doubt the expense of operating a rehabilitative penal system and the failure of the rehabilitative model to produce clear results played a prominent role. But on a deeper level, the failure of the rehabilitative model to satisfy the nearly universal instinct that culpable wrongdoing calls for a response that is unambiguously punitive, rather than principally therapeutic, may have played just as important a role. Although penologists and others would continue to give at least lip service to the rehabilitative ideal well into the twentieth century, it seems clear that the basic response of the contemporary penal system when dealing with adult offenders is to calibrate punishment so that it reflects the seriousness of the offense, rather than the degree of rehabilitation required by the offender.

But as the rehabilitative ideal faded in mainstream penology, it retained strength, and was able to carve out a separate niche, in the development of the

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17 See Pieter Spierenburg, The Body and the State: Early Modern Europe, in THE OXFORD HISTORY OF THE PRISON, supra note 16, at 49. Physical punishment, not only of criminals, but also of children, wives, military and naval personnel, and others, was the target of sustained attack by social reformers in the early nineteenth century. See generally MYRA C. GLENN, CAMPAIGNS AGAINST CORPORAL PUNISHMENT (1984).


19 See id.

20 Thus, even an advocate of rehabilitation such as Norval Morris has advocated separating rehabilitative programs—that is, programs whose purpose is to change the offender for the better, from punishment, which is meant to deter and indicate the community’s sense of justice. Morris contends that rehabilitation is likely to succeed only when given to those who volunteer and show a willingness to reform. Thus, while prisons can and should provide opportunities for rehabilitation, their purpose is not to rehabilitate. See NORVAL MORRIS, THE FUTURE OF IMPRISONMENT 12-20 (1974).

21 The “optimism and ... relative prosperity of the 1950s,” coupled with relatively low crime rates through the early 1960s, gave rise to a revival of rehabilitative emphasis in corrections in the 1950s and 1960s. See Rotman, supra note 18, at 189-91. Surveys have found continuing public support for rehabilitative approaches, at least toward certain types of offenders. See Francis T. Cullen et al., Public Support for Correctional Treatment: The Tenacity of Rehabilitative Ideology, 17 CRIM. JUST. & BEHAV. 6 (1990).

22 As a result of “get tough” policies, the prison population in the United States has more than doubled since the mid-1980s. See TCD D R. CLEAR & GEORGE F. COLE, AMERICAN CORRECTIONS 462-69 (1994). Kathlyn Taylor Gaubatz finds a puzzling public consensus: “[I]n an era of falling crime rates and increased tolerance toward other forms of deviance and social change, still the vast majority of the American public supports harsh penal policies.” KATHLYN TAYLOR GAUBATZ, CRIME IN THE PUBLIC MIND 155 (1995).
juvenile court system. In the last decade of the nineteenth century and the early years of the twentieth, states established separate judicial systems to deal with criminal offenses committed by minors. With rehabilitation as their stated goal, these courts were empowered to act in a way that combined the perceived advantages of procedural informality and individualized tailoring of remedies. Juvenile court judges were typically given broad discretion to use probation, referral to a social services agency, or institutional commitment to deal with offenders; even the harshest treatments would typically last only until the juvenile offender became an adult. Juvenile offenses, unlike the typical adult offense, would ultimately be expunged from the adolescent's record, leaving no permanent criminal stigma. The system was so distinct from the normal criminal proceeding that it was common to classify delinquency proceedings as civil, rather than criminal, in nature. The role of the state, it was said, was not prosecutorial adversary of the juvenile, but rather parens patriae.

This system prevailed for more than six decades, but in 1967, the Supreme Court initiated a serious reconceptualization of juvenile justice in In re Gault. While the paternalism that formed the basis of the juvenile justice system often worked to the benefit of young offenders by mitigating their punishments, the flexibility that it provided to courts and law enforcement personnel often put juveniles at a severe disadvantage during the stages of the proceedings prior to

24 See id. at 290-328.
25 See id. at 328-33. As early as their 1950 book, Teeters and Reinemann note the presence of political attempts to limit the jurisdiction of juvenile courts on the grounds that juvenile court procedures and punishments constituted "coddling" of young criminals. Id. at 338-42.
26 See U.S. Dep't of Justice, Standards for the Administration of Juvenile Justice 145-67 (1980). "Confidentiality of records pertaining to juveniles and closely controlled access to them have been endorsed by all of the major standards groups and model legislation which have addressed the problem." Id. at 149.
27 See Douglas R. Rendleman, Parens Patriae: From Chancery to the Juvenile Court, in 3 Crime and Justice, supra note 12, at 119. Revisionist historians see the juvenile court largely not as a benevolent institution, but rather as a tool of behavior control exerted by the middle and upper classes upon lower class children. Professor Rendlemen acknowledges that there is some truth to this, but also maintains that there is still value in the original parens patriae goals of the juvenile court. See id. See also Lamar T. Empey, The Progressive Legacy and the Concept of Childhood, in Juvenile Justice: The Progressive Legacy and Current Reforms 3-33 (Lamar T. Empey ed., 1979).
29 The typical juvenile justice system had jurisdiction only until the juvenile's 21st birthday. Thus, custodial sanctions for most serious crimes would nevertheless end no later than that date, and sometimes sooner. See U.S. Dep't of Justice, supra note 26, at 337.
the determination of a remedy. These disadvantages could include the fact that juveniles could be brought before juvenile courts for offenses that would not violate any law if committed by an adult, and also the fact that juveniles were commonly not accorded the same procedural rights during the adjudicatory process that adults were required to receive under provisions of state and federal constitutions.

Gault focused on the latter type of disadvantage. Fifteen-year-old Gerald Gault was adjudicated delinquent for making offensive and indecent telephone calls under Arizona juvenile court procedures that did not provide for such basic rights as the right to counsel, the right to confront and cross-examine witnesses, the privilege against self-incrimination, and other guarantees that have been recognized as fundamental in adult criminal proceedings. The state of Arizona defended its procedural informality as benefiting the juvenile defendant, allowing "a fatherly judge" to tailor his benevolent paternal approach to the necessities of the individual case. The Supreme Court, cutting through the rhetoric of the civil, remedial nature of the juvenile justice system, held that the reality of the juvenile court process was sufficiently adversary and its consequences sufficiently punitive to require adherence to at least "the fundamental requirements of due process." While this might not require full compliance with all procedural rules applied in the prosecution of adults, it would at least require such things as sufficient notice of the charges, a privilege against self-incrimination, and the right to confront and cross-examine witnesses.

To most members of the Court, and probably to most advocates of children's rights, Gault was a clear victory. The Court maintained that its insistence upon formal procedural guarantees during the adjudication process for juveniles was not incompatible with the humanitarian, rehabilitative aspects of

30 These non-criminal "status offenses" have long been a major part of the juvenile court's jurisdiction. See Paul Lerman, Delinquency and Social Policy: A Historical Perspective, in 3 CRIME AND JUSTICE, supra note 12, at 23.
31 For an overview of juvenile court procedures on the eve of Gault, see Joel F. Handler, The Juvenile Court and the Adversary System: Problems of Function and Form, 1965 Wis. L. Rev. 7.
32 387 U.S. at 4-8. Gault was, at that time, still subject to probation for a prior incident involving the theft of a wallet from a woman's purse. See id. at 4.
33 See id. at 9-10.
34 Id. at 25-26.
35 Id. at 19.
36 See id. at 31-34.
37 See id. at 34-42.
38 See id. at 42-57.
the juvenile justice system. Indeed, the Court noted that providing a less arbitrary system might advance rehabilitative goals: "[T]he appearance as well as the actuality of fairness, impartiality and orderliness—in short, the essentials of due process—may be a more impressive and more therapeutic attitude so far as the juvenile is concerned."\textsuperscript{40} Gault could be seen as giving the juvenile the best of both worlds: something resembling adult levels of due process protection in the determination of delinquency and the less punitive consequences of the juvenile system for those found delinquent.\textsuperscript{41} In a prescient dissent, however, Justice Stewart saw insistence on strong due process safeguards as the first step in the rejection of the entire juvenile justice model.\textsuperscript{42} If states are compelled "to impose the Court's long catalog of requirements upon juvenile proceedings,"\textsuperscript{43} the temptation to revert entirely to the adult model would be inevitable; Gault would serve to "invite a long step backwards into the nineteenth century."\textsuperscript{44}

A number of post-Gault decisions moved the protections available in delinquency proceedings closer to the procedural protections provided to adults, but the Supreme Court never entirely abandoned the notion that juvenile justice was unique. Thus trial by jury was held not to be constitutionally required in the juvenile system,\textsuperscript{45} and pretrial detention of juveniles based upon the likelihood that the juvenile would commit additional offenses while awaiting trial was condoned\textsuperscript{46} at a time when no authority existed under federal law for comparable detention of adults.\textsuperscript{47} In addition, even when the Court has held that minors are within the protection of a

\begin{itemize}
  \item \textsuperscript{39} "The observance of due process standards, intelligently and not ruthlessly administered, will not compel the States to abandon or displace any of the substantive benefits of the juvenile process." \textit{Id.} at 21.
  \item \textsuperscript{40} \textit{Id.} at 26.
  \item \textsuperscript{41} \textit{Id.} at 22-25.
  \item \textsuperscript{42} \textit{See id.} at 78-81 (Stewart, J., dissenting).
  \item \textsuperscript{43} \textit{Id.} at 79 (Stewart, J., dissenting).
  \item \textsuperscript{44} \textit{Id.} In describing that century, Justice Stewart said:

  In that era there were no juvenile proceedings, and a child was tried in a conventional criminal court with all the trappings of a conventional criminal trial. So it was that a 12-year-old boy named James Guild was tried in New Jersey for killing Catharine Beakes. A jury found him guilty of murder, and he was sentenced to death by hanging. The sentence was executed. It was all very constitutional.

  \textit{Id.} at 79-80 (Stewart, J., dissenting).
  \item \textsuperscript{45} \textit{See} McKeiver v. Pennsylvania, 403 U.S. 528 (1971).
  \item \textsuperscript{46} \textit{See} Schall v. Martin, 467 U.S. 253 (1984).
\end{itemize}
constitutional provision, it has often adopted a different standard than that applied to adults. For example, while the Fourth Amendment applies in the public school environment, the standard for determining the scope of a reasonable search of a student within that environment is less protective than that applied in most adult contexts. In contrast, in applying the *Miranda* restrictions on police interrogation, the Supreme Court has ignored situational differences between adults and juveniles. The Court has rejected the contention that a juvenile’s request to speak to a trusted adult is equivalent to an adult’s request for a lawyer, which requires the police to cease interrogation. Cases such as this suggest a pattern that cannot be encouraging to advocates of children’s rights. The flexibility that *Gault* permits in the extension of procedural rights to juveniles can be used to take notice of relevant differences between adults and adolescents when those differences lead to narrowing the scope of the right in question, but this flexibility can be used to ignore such differences when acknowledging them would lead to expanding the right.

In light of these developments, children’s rights advocates unsurprisingly have continued to call for the expansion of constitutional protection for children in delinquency proceedings. But once again, these calls raise the question that Justice Stewart saw as an inevitable consequence of *Gault*: Beyond narrow questions of procedure, is the juvenile court approach to delinquency, particularly its commitment to rehabilitation and its tendency to mitigate the severity of punishment, something worth preserving? The answer to this question is by no means clear, whether examined from the standpoint of

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48 In *New Jersey v. T.L.O.*, 469 U.S. 325 (1985), the Court reasoned: “Although the underlying command of the Fourth Amendment is always that searches and seizures be reasonable, what is reasonable depends on the context within which a search takes place.” *Id.* at 337. The Court further held:

[T]he accommodation of the privacy interests of schoolchildren with the substantial need of teachers and administrators for freedom to maintain order in the schools does not require strict adherence to the requirement that searches be based on probable cause to believe that the subject of the search has violated or is violating the law.

*Id.* at 341.

49 In *Miranda v. Arizona*, 384 U.S. 436 (1966), the Court held that a suspect in custody must be told of the right to remain silent, the right to consult an attorney, the right to have an attorney present during questioning, and the right to have an attorney appointed if the suspect cannot afford one.

50 See *Fare v. Michael C.*, 442 U.S. 707 (1979) (holding request to talk to juvenile’s parole officer not equivalent to request to speak with an attorney); United States *ex rel. Riley v. Franzen*, 653 F.2d 1153 (7th Cir. 1981) (finding request to talk to parent not equivalent to request to speak with an attorney). But see *People v. Castro*, 462 N.Y.S.2d 369 (Sup. Ct. 1983) (holding request to speak with parent equivalent to request for an attorney).
the juvenile or the community as a whole. Certainly most minors convicted of crimes would prefer shorter periods of confinement, and confinement in humane institutions with less emphasis on pure punishment and more on rehabilitation. With respect to the length of confinement, the indeterminacy of juvenile sentencing stands in sharp contrast to the clear trend in adult corrections toward more determinate sentencing. But, in light of the fact that juvenile confinement typically must end at age eighteen or twenty-one, this leads to mixed results. In some cases, juveniles will be detained for longer periods than adult offenders for similar offenses—in other cases (typically involving the most serious crimes) for much shorter sentences. Much has been written in support of the contention that, despite the rhetoric of rehabilitation, juvenile facilities are in practice no more humane than adult facilities. Still, it would be difficult to argue that the adult correctional system is a more humane alternative. Thus, despite its shortcomings and its failure to fulfill the rehabilitative goals that inspired its creation, the juvenile court system is generally defended by children’s rights advocates, at least as against the alternative of referring juveniles to the adult criminal system.

From the standpoint of the community at large, the relative merits of a separate juvenile justice system seem even less convincing. Juvenile crime, particularly violent crime, rose dramatically from the mid-1980s to the mid-1990s. Most social science research has been skeptical of the rehabilitative

52 See supra note 29.
53 The indeterminacy of juvenile sentencing could mean that someone such as Gerald Gault could serve a sentence of several years for what would be a misdemeanor for an adult. See In re Gault, 387 U.S. 1, 8-9 (1967). Conversely, a juvenile who committed an offense for which an adult could receive more than 20 years imprisonment would receive only a few years of custodial detention. See U.S. DEP’T OF JUSTICE, supra note 26, at 336-39.
54 See Steven Schlossman, Delinquent Children: The Juvenile Reform School, in THE OXFORD HISTORY OF THE PRISON, supra note 16, at 363-89. Schlossman traces the attempts over the years, occasionally successful, to create a genuinely rehabilitative model for juvenile institutions, but concludes that, on the whole, “[t]he rehabilitative ideal was virtually denied, for children as well as adults, as a legitimate or feasible purpose of corrections.” Id. at 384. Rehabilitative goals continue to be pursued to some extent in non-institutional treatment programs, but the reform school itself is merely a “mini-prison” for children. Id. at 383-87.
55 In 1985, just over 1.7 million arrests were made of those under age 18; just over 70,000 were for violent crimes. See FED. BUREAU OF INVESTIGATION, U.S. DEP’T OF JUSTICE, CRIME IN THE UNITED STATES 1985: UNIFORM CRIME REPORTS 174 (1986). In 1995, slightly over 2 million arrests were made of those under age 18, and arrests of juveniles for violent crime had increased more sharply, to just over 115,000. See FED. BUREAU OF INVESTIGATION, U.S. DEP’T OF JUSTICE, CRIME IN THE UNITED STATES 1995: UNIFORM CRIME REPORTS 224 (1996).
effect of the juvenile justice system. Of course, this falls short of establishing that subjecting juveniles to the adult correctional system would have produced better results. Nevertheless, the last decade has seen a clear trend toward, if not abolishing the separate juvenile court system, at least seriously curtailing its jurisdiction.

In the last decade, a large majority of states have enacted provisions that make it easier to subject juveniles to the jurisdiction of adult criminal courts. States have either completely removed juvenile court jurisdiction over certain classes of cases, based upon the age of the adolescent, the gravity of the crime, or both, or created presumptions in favor of referring individual cases out of juvenile court, reversing prior presumptions in favor of juvenile jurisdiction. On the federal level, Congress has moved not only to expand the prosecution of adolescents as adults in federal court, but also to condition federal grants on a state’s willingness to try violent adolescents as adults. In light of the longstanding acceptance of the separate juvenile justice system, the strength and swiftness of this counterreform has been remarkable. Defenders of the juvenile justice system have been largely ineffectual in defending its jurisdiction. At first glance, this might be explained as a purely utilitarian result, a consequence of the public’s frustration with perceived and actual increases in the incidence of juvenile crime. But that explanation may be too simple. A more interesting explanation may become evident when we examine the recent revival of retributionism as a basis for criminal justice, and how it intersects with the legal system’s increased willingness to regard adolescents as autonomous rights-bearing individuals.

See Richard J. Lundman, Prevention and Control of Juvenile Delinquency (1984). Lundman’s review of social science evidence indicates that institutionalization may reduce the incidence of juvenile crime, but through simple incapacitation or deterrence, rather than rehabilitation. See id. at 187-214. He also finds, however, that at least for many juveniles, community-based treatment programs are as effective as institutionalization in reducing recidivism. See id. at 156-82. Evidence on the effect of “scared straight” programs is mixed. See id. at 150-52. The clear trend toward increasing the population of juvenile detention centers seems to indicate a movement toward theories of deterrence, retribution, or incapacitation rather than rehabilitation. See Ira M. Schwartz & Deborah A. Willis, National Trends in Juvenile Detention, in Reforming Juvenile Detention 13 (Ira M. Schwartz & William H. Barton eds., 1994).


See id.

See id.

See id. at 438-39.
II. PATERNALISM, AUTONOMY, AND INDIVIDUAL RESPONSIBILITY IN JUVENILE JUSTICE

The approach that a society takes toward issues involving juvenile justice will likely be related to more general attitudes toward the entire subject of criminal justice. The standard list of purposes of a criminal justice system includes incapacitation of the offender, deterrence of others, rehabilitation of the offender, and satisfying the community's need for retribution. The type and severity of punishment that society favors will vary depending on the relative weight given to each of these purposes. And if society is to react in substantially different ways to different categories of crimes or criminals, those different approaches will likely be justified by presumed differences in the effectiveness of adopting various approaches in achieving one or more of those goals.

As we have seen, the classic rationale for a separate juvenile justice system has primarily focused on rehabilitation. The young, and therefore young criminals, are thought to be more malleable, less fixed on a life of crime, and therefore the expense and effort called for by a rehabilitative approach is thought likely to be effective, at least more so than in the case of adult criminals. As a goal for the overall criminal justice system, rehabilitation has been in decline for some time. One might, then, explain the recent shift in attitudes regarding juvenile justice by noting the overall loss of faith in rehabilitation, and arguing that it has become strong enough to finally invade the one area of criminal law where rehabilitation had continued to command respect. While this is certainly plausible, this Article maintains that something more complex is also going on.

63 See Julian W. Mack, The Juvenile Court, 23 HARV. L. REV. 104 (1909). Judge Mack's article is the classic early statement and defense of the concept of a separate, rehabilitative juvenile court system.
64 As Norval Morris has stated:

'Rehabilitation,' whatever it means and whatever the programs that allegedly give it meaning, must cease to be the purpose of the prison sanction. This does not mean that the various developed treatment programs within prisons need to be abandoned; quite the contrary, they need expansion. But it does mean that they must not be seen as purposive in the sense that criminals are to be sent to prison for treatment. There is a sharp distinction between the purposes of incarceration and opportunities for the training and assistance of prisoners that may be pursued within those purposes.

MORRIS, supra note 20, at 14.
Considering the differences between the juvenile and adult legal systems in light of the goal of incapacitation will contribute little to our understanding. It seems clear that the extent to which a punishment incapacitates bears little relation to the age of the criminal. The efficacy of various approaches to punishment in fulfilling the goal of incapacitation has never been advanced as a justification for a separate juvenile justice system. In every case, more severe punishment (i.e., longer periods of detention) leads to more incapacitation. Debate and disagreement over the appropriate approach to juvenile crime will clearly turn on other considerations.

In recent decades, general deterrence has probably been the most frequently discussed rationale for justifying a system of criminal sanctions.\(^{65}\) It seems unlikely, however, that examining deterrence will provide us with the key to understanding the change in public attitudes toward juvenile justice. The juvenile justice system was not created because of a belief that a system of less harsh penalties would prove to be more of a deterrent to juvenile crime. It is also unlikely that general deterrence was any less powerful a consideration in past decades than it is now. If deterrence is more prominent as a goal to be pursued by the juvenile justice system, it is probably due less to any change in the absolute value that society places on deterrence, and more to the previously discussed loss of faith in rehabilitation.

Finally, we turn to retribution. For some time, retribution, thought of as essentially indistinguishable from revenge, was not only subordinated to deterrence and rehabilitation in the minds of most commentators, but was regarded as highly suspect, perhaps entirely illegitimate, as a rationale for criminal punishment.\(^{66}\) But in recent years, retribution has undergone something of a revival. To some extent, this can be attributed to the realization that deterrence alone, even where its efficacy can be demonstrated, cannot satisfactorily serve to justify punishment. This is strikingly illustrated by the hypothetical situation where the state has the opportunity to punish one who is innocent of the crime charged, but whom the community believes, or can be

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\(^{66}\) Thus, in his concurring opinion in Furman v. Georgia, 408 U.S. 238 (1972), which invalidated the then prevalent forms of death penalty statutes, Justice Thurgood Marshall not only rejected the legitimacy of retribution as a goal of criminal justice, but stated that in contemporary America, "no one has ever seriously advanced retribution as a legitimate goal." Id. at 363.
led to believe, is guilty. In such a case, punishment might well serve as a
deterrent to others, but regardless, few would find such a practice tolerable.
Similarly, because more severe punishments can be expected to always deter
more effectively than lesser sanctions, deterrence alone cannot explain why all
crimes are not punished with equal harshness. Legal history gives us an
example of a time when this was largely the case; as late as the eighteenth
century, a remarkably wide range of crimes, including some that barely rise to
the level of a felony today, were punishable by death. This severe and single-

minded pursuit of the goal of deterrence we now regard as intolerable;
proportionality of punishment to the crime is considered a constitutional
requirement. While deterrence surely is an important goal of the criminal
justice system, it must at least share the stage with other considerations.

The most prominent of these additional considerations, of course, is a sense
of fairness or justice. Punishment must not be merely efficacious; it must be
deserved. Modern defenders of the notion of retribution point to this crucial
idea to distinguish retribution from mere revenge. Revenge calls forth im-
ages of unthinking, reflexive, perhaps unlimited payback for harm done.
Even if limited by some sense of proportionality, revenge focuses over-
whelmingly, perhaps exclusively, on the damage done by the criminal, rather
than the level of guilt or personal responsibility underlying the criminal act.

A more sophisticated retributionism takes account not only of the act
committed, but also the extent to which the actor was fully responsible for his
actions. To what extent did the actor have criminal intent, actual control over
his actions, and appreciation of the consequences? This more sophisticated

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67 For a list of dozens of crimes, in addition to murder, that were punishable by death, see the excerpt
from P. Colquhoun (1800) reprinted in 1 BASIL MONTAGU, THE OPINIONS OF DIFFERENT AUTHORS UPON THE
PUNISHMENT OF DEATH 80-83 (1809).

68 See Edmund v. Florida, 458 U.S. 782 (1982) (holding death penalty may not be imposed upon par-
ticipant in felony who neither killed nor intended that anyone be killed); Coker v. Georgia, 433 U.S. 584
(1977) (holding death penalty may not be imposed upon rapist who neither killed nor attempted to kill). But
see Tison v. Arizona, 481 U.S. 137 (1987) (holding felon who displays "reckless indifference to human life"
may warrant death penalty).

69 See HENBERG, supra note 7, at 17-29.

70 "Retribution is a measured return of evil according to some notion of what an agent (or group) is
perceived to deserve. Revenge, on the other hand, is an unmeasured return of evil that may or may not con-
nect to desert." Id. at 18.

71 Vengeance, then, is generally associated with passion; a sophisticated retributionism can be de-
fended on rational grounds. See id. at 158-64.

72 See BODENHEIMER, supra note 7, at 31. "The recognition of responsibility does not mean that human
beings are held responsible by the law for every objectively unlawful act which they commit . . . . Any

retributionism, while more easily defensible, is also much more difficult to implement. Beyond a narrow range of obviously deranged or otherwise incompetent individuals (including, of course, very small children), who can be said to be less than fully responsible for their actions and to what degree?

One approach to this dilemma is to work from a strong presumption that all are fully responsible for their acts, and to exempt only the most obvious and extreme cases of incompetence. This was the law's dominant approach prior to the twentieth century; aside from children under the age of seven, some but not all children between seven and fourteen, and those found insane under the strict standard that become known as the McNaughton rule, few were regarded as less than fully responsible.

But during the twentieth century, medicine and social science recognized and publicized ways in which individuals were less fully in control of their acts than previously imagined. Inevitably, the criminal law would have to take account of such developments. During the middle decades of the century, more liberal definitions of the insanity defense and related notions mitigating individual criminal responsibility gained support.

In recent years, however, there has been a negative reaction to this increased willingness to mitigate punishment because of a perceived social or biological influence that made an offender less than fully responsible. While perhaps not returning fully to common law standards, the current trend is clearly in the direction of treating most people (at least most adults) as fully responsible, and therefore fully culpable, for their criminal acts. To some, system of law resting on the notion of responsibility will draw a distinction between voluntary and involuntary acts of wrongdoing." Id.

73 See supra notes 11-15 and accompanying text.
74 See Daniel McNaughton's Case, 8 Eng. Rep. 718 (1843). This case established a rigorous test for a defendant to meet in order to sustain a defense of insanity. The accused had to establish that he either was not conscious of the nature of the act he was committing, or that he could not appreciate that it was considered wrongful.
75 The American Law Institute, in its Model Penal Code, advocates expansion of the traditional test to include a defendant who "as a result of mental disease or defect . . . lacks substantial capacity . . . to conform his conduct to the requirements of law." MODEL PENAL CODE § 4.01 (Final Draft 1962). Such a test "acknowledges that volitional as well as cognitive impairments" may relieve one of criminal responsibility. State v. Johnson, 399 A.2d 469, 476 (R.I. 1974).
77 The acquittal of John Hinckley, by reason of insanity, in his 1982 trial for the attempted assassination of Ronald Reagan, created a significant backlash against invocation of the insanity defense.
this trend appears to be a move away from a criminal justice system primarily concerned with deterrence and toward one based upon retribution. Deterrence, with its overtones of rational calculation, is seen as compatible with medical or social science theories that argue for the mitigation of guilt. However, the increasing rejection of mitigating defenses can just as easily be seen as prompted by a concern for deterrence that overpowers the fairness concerns that must exist in any defensible, sophisticated retributive system.

After decades of analyzing the extent to which we freely choose our actions and the extent to which they are determined for us by biology or social influence, perhaps the best we can do is to state that the overwhelming majority of human acts result from some combination of choice based upon more or less rational calculation and predispositions beyond individual control. The criminal justice system, and perhaps society as a whole, has little, if any, control over those predispositions. Nevertheless, the system does have some degree of control over the outcome of a potential criminal’s rational calculation. While neither the measurement of the efficacy of deterrence nor the measurement of the degree of individual responsibility is an exact science, deterrence can at least appear to be reflected in a decrease in crime rates. Its failure, conversely, might be indicated by their increase. A focus on deterrence, then, gives us some sense of control over events, regardless of the difficulty of reliably assessing cause and effect.

A focus on the individual responsibility of a criminal for his actions, apart from deterrence, as the basis for punishment, provides us with neither this sense of control nor any real standard for establishing the validity of our individual assessments. As growing bodies of knowledge in the fields of biology and psychology suggest a more prominent role for predispositions and a lesser role for free choices, the entire enterprise of criminal punishment becomes less defensible. Understandably, then, deterrence, with its focus on influencing

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78 Thus Sanford Kadish has written:

Social deprivation may well establish a credible explanation of how the defendant has come to have the character he has. But it does not establish a moral excuse any more than a legal one, for there is a difference between explaining a person’s wrongful behavior and explaining it away . . . Otherwise, there would be no basis for moral responsibility.


79 Thus, the debate over the death penalty focuses to a great extent on the presence or absence of hard evidence of deterrence. See supra notes 5-6.
future behavior, however imperfectly, will seem to many to be a far better basis for constructing a criminal justice system.

Still, the central importance of the concepts of individual responsibility and degrees of guilt can hardly be denied. While the public takes pleasure in the recent reports of falling crime rates, questions of individualdegrees of guilt remain prominent. The recent backlash in public opinion against ready acceptance of excuses that seek to diminish individual responsibility80 would seem to be primarily a rejection of the notion that free choice is not a prominent factor in criminal behavior as an empirical proposition, rather than a rejection of the notion that criminal punishment is justified insofar as it responds to a criminal’s freely chosen antisocial act.

In earlier decades, retribution, seen simply as the vindication of an irrational urge for vengeance, could readily be dismissed in favor of the apparently rational and scientific approaches of deterrence and rehabilitation.81 But faith in science has peaked; it may well be waning.82 Therefore, the recasting of retribution as being grounded, not merely in the victim’s or the community’s need for revenge, but rather in the notion that a free choice to do harm must include a willingness to accept the negative consequences of punishment, makes retribution consistent with trends in the law that recognize and defer to individual autonomy to a greater degree than ever. In a wide range of contexts, including reproductive rights,83 medical care, the control of one’s own death,84 speech and other First Amendment concerns,85 claims that personal choice must be respected have proliferated. Opponents of these claims of autonomy often argue that the individuals involved are causing themselves, as well as others, harm, that their choices are not sufficiently well-

80 See supra note 77.
81 See supra note 66.
informed or free, and that therefore, society need not respect these choices.\textsuperscript{86} Defenders of autonomy will respond by downplaying the extent to which individuals choose to act as the result of external constraints.\textsuperscript{87} As a result, any attempt to justify interference with individual autonomy in order to save the individual from the negative consequences of his or her own acts will be described as impermissibly paternalistic.\textsuperscript{88} Much has been written recently on the question of whether respect for the model of the autonomous individual has become too dominant in legal culture,\textsuperscript{89} but normative assessments aside, it can hardly be denied that the value society places upon individual autonomy has grown substantially. In recent decades, an increased level of respect for autonomous individual choices has generally been associated with liberal politics. This is no doubt due to the extent to which the contested matters involving these choices have assessed claims running contrary to long-standing moral norms, perhaps most prominently in matters involving sexual and reproductive behaviors.\textsuperscript{90} However, political conservatives have also eagerly embraced the language of respect for autonomous choices in matters such as economic and property rights\textsuperscript{91} and parental control over the education and discipline of children.\textsuperscript{92} Both the libertarian and anti-libertarian strain can be found in the camps of self-described liberals and of conservatives. Of course, while there are consistent libertarians and consistent anti-libertarians, a large

\textsuperscript{86} This argument is quite prominent in cases involving the "right to die." See, e.g., Yale Kamisar, \textit{When Is There a Constitutional "Right to Die"? When Is There No Constitutional "Right To Live"?}, 25 GA. L. REV. 1203 (1991).

\textsuperscript{87} The response to arguments such as Professor Kamisar's is to focus on assisted suicide as a matter of "patient empowerment." Robert A. Sedler, \textit{Constitutional Challenges to Bans On "Assisted Suicide": The View From Without and Within}, 21 HASTINGS CONST. L.Q. 777, 781 (1994).

\textsuperscript{88} See generally ROLF SARTORIUS, PATERNALISM (Rolf E. Sartorius ed., 1983). Most of the contributors to this collection are generally critical of paternalistic policies.

\textsuperscript{89} See, e.g., MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE (1991). Glendon stated:

As various new rights are proclaimed or proposed, the catalog of individual liberties expands without much consideration of the ends to which they are oriented, their relationship to one another, to corresponding responsibilities, or to the general welfare. \ldots Saturated with rights, political language can no longer perform the important function of facilitating public discussion of the right ordering of our lives together.

\textit{Id.} at xi.

\textsuperscript{90} See \textit{supra} note 83.


\textsuperscript{92} See generally Barbara Bennett Woodhouse, "Who Owns the Child?": Meyer and Pierce and the Child as Property, 33 WM. & MARY L. REV. 995 (1992) (tracing history of right of parental control and criticizing use of concept of individual rights to justify control of one person over another).
number of people, perhaps a majority, find themselves more or less respectful of autonomous individual choices on different issues. How should one's attitudes toward individual autonomy affect one's position on the nature of criminal punishment?

Whether accurate or not, the stereotypical liberal position in contemporary American politics combines a heightened respect for individual autonomy on a broad range of social issues with positions on criminal justice that not only favor greater procedural protections for the accused, but more important for our purposes, a greater willingness to mitigate punishment. This is either because of a rejection of retributionist goals in favor of rehabilitation or deterrence, or because of a belief that much crime is the consequence not of reasoned antisocial choice, but rather of influences largely beyond the control of the criminal. At the other end of the political spectrum, the stereotypical conservative simply reverses these positions. To the conservative, individual choice is not to be respected where it conflicts with long-standing social norms. Punishment for crime should be severe, either because severe consequences must follow the antisocial choices made by the criminal, or because future criminals must be deterred. Criminal transgressions will be deterred by rational awareness of the dire consequences that await criminals if they are apprehended. Is either set of positions entirely consistent?

If the approach taken by either the liberal or conservative is merely consequentialist, then these positions may surely be seen as consistent. The conservative values both a low incidence of youth crime and a strict adherence to traditional morality, and chooses a set of positions designed to bring about both ends. The liberal, also valuing low crime rates, but disagreeing about the effectiveness of severe punishment in bringing them about, and placing less of a value on enforcing traditional morality, will choose a different set of policies. But if either of these sets of positions is evaluated from a perspective of retributive, rather than consequentialist, justice, significant problems emerge.

The classic philosophical defense of retributionism was set forth by Immanuel Kant, who maintained that a punishment that closely mirrored the crime itself (i.e., the death penalty for murder) was required in order to actually

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94 See IMMANUEL KANT, THE PHILOSOPHY OF LAW 196 (W. Hastie trans., 1887).
respect the criminal and his own moral choice to commit the crime. By committing the crime, the criminal declares by his actions that he has chosen a moral universe in which such an act is permitted. Logically, the act must be permitted to others, not merely to him. When society exacts the same toll against the criminal that he has already taken against another, it is merely respecting his choice to create his own moral regime and to live with its consequences.

Under this theory, to refuse to punish or even to unduly mitigate punishment becomes less an act of disregard for the victim of the crime than a mark of disrespect for the criminal. To mitigate punishment, or to choose a course of non-punitive rehabilitation, is to engage in a form of paternalism, a term that has become something of an epithet in a society more and more committed to autonomy. Respecting individual choice, in this view, necessarily means respecting the choice to live with the consequences of an act. Mitigating the consequences demeans the individual’s choice; it says, in effect, that the criminal did not realize what he was doing.

While this view of retributive justice is most obviously relevant in matters involving criminal law, it resonates elsewhere in the legal system as well. A striking and obvious example is the recent history of tort litigation involving tobacco companies. The long string of courtroom victories for cigarette manufacturers in lawsuits brought by smokers or their estates can largely be attributed to the strength of the companies’ argument that the smokers voluntarily chose to smoke and assumed the consequences of doing so. Even though this defense is maddeningly inconsistent with the simultaneous industry assertion that the dangers of smoking are unproven and merely speculative, the argument that the “autonomous choices” of the individual smokers should be “respected” seemed to strike a chord with juries. It was only when the

95 See id.
96 See id.
97 See supra note 88.
99 “[T]he most salient theme in [recent tobacco] litigation has been freedom of choice.... [T]obacco litigation is a last vestige of a perhaps idealized vision of nineteenth century tort law as an interpersonal morality play.” Id. at 870-71.
100 Professor Rabin points out that the tobacco companies’ argument that causation had not been established has never been convincing to juries, but its persistence has “worked to [the industry’s] advantage principally by imposing an enormous cost burden on its adversaries in waging a battle of the experts.” Id. at 860.
plaintiffs became individuals or entities that did not themselves choose to smoke, but were nevertheless harmed by smoking by others, that the tide turned against the tobacco companies.\textsuperscript{101}

If one assumes the position, with respect to criminal law, that an individual decision to commit a crime must be "respected" by subjecting the criminal to the negative consequences of his acts, rigorous retributionism becomes a matter of respect for individual autonomy. One would expect that this would lead to analogous positions in other areas of the law, such as support of the defense of assumption of risk. In matters of individual rights involving autonomous choices, it should lead, then, to respect for such choices, at least to the extent of refusing to veto them on the paternalistic grounds that the individual is incapable of making these choices or should be spared the consequences of those choices.

To be sure, there are a number of serious flaws in this view of autonomy. Even if we put aside controversial matters such as genetic predispositions or predispositions ingrained as a consequence of early experience,\textsuperscript{102} individuals act within a web of social influences for a variety of motives that make the model of the rational individual coolly maximizing his own welfare an obvious oversimplification.\textsuperscript{103} Even to the extent that the individual seeks to act that way, problems of limited knowledge, as well as attempts of others to persuade by supplying misleading information, loom large.\textsuperscript{104} Again, the example provided by cigarette smokers is instructive. When a neophyte chooses to smoke, he does so in the face of the tobacco companies' insistence that the overwhelming scientific consensus concerning the potential dangers is false. At

\textsuperscript{101} This explains the success of state attorneys general in securing settlements from tobacco companies in lawsuits brought to reimburse public coffers for the cost of treating tobacco-related illness. See Mark Curriden, \textit{A Texas Turnaround: Fear of Disclosures and Sky-High Verdicts May Be Prompting Big Tobacco's Sudden Rush to Settle}, 84 A.B.A. J. 24 (1998).


\textsuperscript{103} See generally Richard Delgado, "Rotten Social Background": \textit{Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation?}, 3 LAW & INEQ. J. 9 (1985). Of course, to recognize the effect of social influence is not necessarily to excuse the individual's behavior. See Kadish, supra note 78. The issue of autonomy, of course, arises apart from the issue of criminal responsibility. See Donald L. Beschle, \textit{Autonomous Decisionmaking and Social Choice: Examining the "Right to Die"}, 77 KY. L.J. 319 (1988-89).

\textsuperscript{104} A prime example is the effort of the tobacco industry to rebut evidence linking smoking with disease. See \textit{RONALD J. TROXER & GERALD E. MARKLE, CIGARETTES: THE BATTLE OVER SMOKING} 91-106 (1983).
the same time, image advertising promotes the product by sending largely non-rational messages about the social desirability of cigarettes. After the smoker has begun the habit, the decision of whether to continue or quit must be made against the background of the addictive qualities of nicotine.

This Article will not attempt to resolve, or even to further the debate over the validity of the model of the rational autonomous individual, as opposed to the socially constrained and often non-rational actor, as a preferred basis for legal decision-making. Much has been said on this topic, and no doubt more will be said in the future. What is important is to point out the contrasting positions. One may be committed to a strong defense of the autonomy of the individual. Autonomous choices, generally reflections of rational choice and individual values not subject to social second-guessing, should be respected. This leads to the conclusion, it would seem, that the individual should live with (perhaps is even entitled to live with) the consequences of those choices and values, whether those consequences are beneficial or harmful. On the other hand, one may be deeply skeptical of the model of rational autonomous choice. Individual choice is often the product of social influence, lack of accurate information, or the inability, for some reason, to rationally process information and decide on a course of action. Thus, individual choices should not receive automatic deference. When they are overridden, it is not always merely to advance the good of others. Sometimes, in short, paternalism is justified. This will mean that we are justified in mitigating the negative consequences of an individual’s acts, including acts that are criminal, in recognition of the extent to which the individual is not fully responsible.

Of course, one may be generally committed to the model of the autonomous individual, yet make exceptions for individuals or categories of individuals whose choices seem in some way to fall short of the model of the rational decision-maker. Thus, coerced choices, or those choices made by the mentally ill, may not be respected. In deciding whether to respect the choices of an individual or a category of individuals, we should feel a need to be consistent with respect to that individual or category. In other words, if we feel obligated

105 The “Marlboro Country” campaign, one of the most successful in advertising history, used non-rational imagery to create a dominant brand at the very time that the health effects of smoking were becoming widely known. See Richard Kluger, Ashes to Ashes 292-97 (1996).

106 See id. at 740-47.

107 See generally Alan Wertheimer, Exploitation (1996). Wertheimer discusses exploitation in a number of contexts and notes that even libertarian thinkers will classify relationships as exploitative if someone “is coerced, is defrauded, or cannot reason effectively.” Id. at 13.
to refrain from paternalism with respect to one of the individual's choices, we
should at least feel dissonance if we act paternalistically with respect to an-
other choice by that same person.

The law has always regarded infancy as one of the conditions justifying an
exception to the general principle of individual responsibility.\textsuperscript{108} Such an ex-
ception may justify a paternalism that shields a child from full responsibility
for the harm he has caused others, or a paternalism that frustrates the child's
choice to engage in activity that is permitted for adults. But when is this pa-
ternalism justified? If it is clearly justified with respect to a five-year-old, is it
also justified with respect to a fifteen-year-old? And if paternalism toward a
fifteen-year-old is justified with respect to some decisions, such as those in-
volving criminal responsibility, must it also be justified in other contexts? Be-
fore surveying what social science can tell us about the relative abilities of
teenagers and adults to make significant life decisions, it will be helpful to ex-
amine the ways in which the law has come to treat the ability of teenagers to
make these decisions in areas outside of the criminal law context.

III. AUTONOMY, PATERNALISM, AND TEENAGERS: TRENDS OUTSIDE OF
CRIMINAL LAW

How competent are minors to make significant decisions concerning their
own lives? To what extent may the state intervene to limit the choices made
by adolescents on the grounds that teenagers are to some extent incapable of
making choices that may have grave consequences for both themselves and
others? After an adolescent makes an unfortunate choice, to what extent can
and should the state intervene to protect him or her from the consequences of
that ill-advised decision? These questions have been raised in a wide variety
of legal contexts. Very often, however, discussions of these questions limit
themselves to one narrow field, either a specific matter before a court or the
particular area of interest to a commentator. To put walls between different
areas of the law obscures the obvious connection between them.

If the position of the criminal law toward juvenile offenders in the early
twentieth century can be described as paternalistic, and as one that in theory
took the position that teenagers should not be regarded as fully responsible for
their actions and their consequences, it was hardly inconsistent with the law's
approach to minors in other areas. In almost all states, minors could freely

\textsuperscript{108} See supra notes 11-15 and accompanying text.
disaffirm their contracts. The theory, of course, was that the child's inexperience made him an easy mark for unscrupulous adults. Tort law imposed upon minors a standard of care that was less than that expected of adults; again, the rationale was that age and inexperience would at least partially interfere with minors' ability to foresee the potential consequences of their acts. Minors, including those as old as nineteen and twenty, were not permitted to vote. Once again, the notion that age brought the maturity necessary to make these significant decisions held sway.

The parent, not the minor, was the source of decisions regarding medical care. A child could not consent to medical treatment against the wishes of a parent, and conversely, the minor could not veto a parental decision in favor of such treatment. When statutes limiting child labor were proposed and adopted, they were justified in part by the child's inability to weigh the long-term relative benefits of full-time work during the early teenage years on the one hand and formal education on the other. When judges decided to strike down these statutes on grounds of interference with personal liberty, it was often the liberty of parents to choose how best to further the interests of the family, rather than the liberty of the child to make autonomous decisions, that

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110 Even where there was no fraudulent manipulation, "a child may show poor judgment in making a particular contract, and it is protection against his own ignorance and immaturity—not merely the advantage-taking of others—that the law affords." Anthony T. Kronman, Paternalism and the Law of Contracts, 92 YALE L.J. 763, 789 (1983).
111 See RESTATEMENT (SECOND) OF TORTS § 283A (1965).
113 In Oregon v. Mitchell, 400 U.S. 112 (1970), the Court invalidated a congressional attempt to use its Fourteenth Amendment powers to require states to extend the vote to those age 18 and above in state elections, but upheld federal power to extend the vote in federal elections. In 1971, the Twenty-Sixth Amendment was adopted, providing that voting rights shall not be denied to any citizen age 18 or older. U.S. CONST. amend. XXVI.
114 See, e.g., Zoski v. Gaines, 260 N.W. 99 (Mich. 1935) (finding assault where surgery was performed without parental consent); Moss v. Rishworth, 222 S.W. 225 (Tex. Comm'n App. 1920) (same).
115 In Parham v. J.R., 442 U.S. 584 (1979), the Court imposed only minimal due process requirements where parents sought to commit children to state operated mental health facilities. The Court noted the parents' duty "to recognize symptoms of illness and to seek and follow medical advice. The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions." Id. at 602.
was paramount. The child’s voice was largely unheard in custody disputes. The common law rule of paternal right to custody was succeeded by the “tender years” presumption in favor of maternal custody, but neither left much room for the child’s preference. Curfews, minimum drinking ages, and other restrictions were fairly consistent in their portrayal of minors, even relatively mature minors, as incapable of making important decisions and accepting their consequences. Counterexamples are few—perhaps only the usually low marriage age is prominent. Even here, the age of consent to marriage was initially framed in a world in which marriages were largely the product of parental choice, rather than the choice of the young couple. Efforts to raise the age for consent to marriage, while not universally accepted, evidence the general attitude of the late nineteenth and early twentieth centuries, among progressives as well as conservatives, that minors were usually incapable of making significant life choices.

William Blackstone, in discussing the relationship of the father and child at English common law, pointed to the connection between the power given to parents and the correlative duty they had to protect the child from, among other things, the child’s own foolish, immature choices:

117 See Woodhouse, supra note 92, at 1059-68.
119 For most of the twentieth century, most states prohibited the purchase of alcohol by those under age 21. During the 1970s, most states reduced their minimum drinking ages, but in the last 20 years, states, acting under pressure from the federal government, have restored the minimum age of 21. See Michael P. Rosenthal, The Minimum Drinking Age for Young People: An Observation, 92 DICK. L. REV. 649, 649-56 (1988).
120 A child’s decision to run away from home, to avoid school (truancy), or to defy parental control in other ways can lead to intervention by juvenile and family courts. See generally R. Hale Andrews, Jr. & Andrew H. Cohn, Note, Ungovernability: The Unjustifiable Jurisdiction, 83 YALE L.J. 1383 (1974).
121 At common law, “[a]bove the ages of fourteen [for boys] and twelve [for girls] children could contract valid marriages.” HOMER H. CLARK, JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 88 (1988). Of course, this did not mean that marriages by young teenagers were common. Lawrence Stone found that in common-law England, late marriage was the norm. LAWRENCE STONE, THE FAMILY, SEX AND MARRIAGE 37-51 (abridged ed., 1979).
122 Parental control over choice of marriage partners remained strong until the nineteenth century. See STONE, supra note 121, at 127-36.
123 The twentieth century norm in the United States is a legal marriage age of 18 or 21. See CLARK, supra note 121, at 89-90. Clark points out that the fluctuations in the legal age for consent to marry do not seem to have had much of an effect on the ages at which young people have chosen to marry over the years. Id.
[The father] may lawfully correct his child, being under age, in a reasonable manner; for this is for the benefit of his education. The consent or concurrence of the parent to the marriage of his child under age, was also directed by our ancient law to be obtained; but now it is absolutely necessary; for without it the contract is void. And this also is another means, which the law has put into the parent’s hands, in order the better to discharge his duty; first, of protecting his children from the snares of artful and designing persons; and next, of setting them properly in life, by preventing the ill consequences of too early and precipitate marriages. . . . The legal power of the father . . . over the persons of his children ceases at the age of twenty-one; for they are then enfranchised by arriving at years of discretion, or that point which the law has established (as some must necessarily be established) when the empire of the father, or other guardian, gives place to the empire of reason.125

In other words, when the law delegated power to the parent to override a child’s decision, or when it later, in cases such as the prohibition of child labor itself, sought to override decisions of both parent and child, it did so in recognition of the incapacity of the minor to make responsible choices. Against this overall legal background, the basic philosophy of the juvenile court fits well. Indeed, it would be jarringly inconsistent to cordon off criminal law as a separate area in which a minor’s choices are treated as the equivalent of an adult’s, and where our assumptions about the criminal’s free choice to transgress, with full knowledge of both the consequences to others and the risks to his own life, validate society’s insistence on full retribution.

In recent decades, more attention has been given to the rights of children.126 To a large extent, this has meant an emphasis on rights as positive entitlements to such things as education and health care.127 However, there also has been a clear trend toward giving more weight to the significant life decisions of minors, by allowing them to share to some extent in the experience of autonomy rights enjoyed by adults. To be sure, this trend has not eliminated all paternalism from the legal treatment of adolescents. Courts, for example, continue

125 1 WILLIAM BLACKSTONE, COMMENTARIES *440-41.
127 See McSweeney, supra note 126, at 470-71.
to draw distinctions between the First Amendment rights of adolescents and adults to speak and to receive information in some contexts. In isolated cases, such as the reinstitution of twenty-one as the minimum age for purchasing alcohol, a movement away from adolescent autonomy can be seen. However, on the whole, the legal system gives more weight to adolescent autonomy than it did in earlier decades.

In many states, a judge now must consider a child’s preference in custody disputes; in some states, the preferences of older children may be dispositive of the issue. A number of states have now permitted older children to consent to medical treatment without the consent of a parent, either generally or in particular circumstances. Courts and legislatures have significantly expanded the range of contracts by minors that are non-voidable. Perhaps the most visible, and certainly most politically and legally contentious, set of legal issues regarding teenagers’ rights to unilaterally make significant life choices has emerged in the area of contraception and abortion.

When the Supreme Court held that married people have a constitutional right of access to contraceptives, and then extended that right to unmarried adults, it did not inevitably mean that the right would be extended to minors.


129 See, e.g., F.E.C. v. Pacifica Found., 438 U.S. 726 (1978) (holding government may restrict access of minors to some forms of speech that cannot be restricted to an adult audience).

130 See supra note 119.


132 See, e.g., GA. CODE ANN. § 30-127 (1980); TEx. FAM. CODE ANN. § 153.008 (West 1996).

133 See, e.g., MISS. CODE ANN. § 41-41-3(g)-(h) (1993). This statute empowers any emancipated minor, as well as "any unemancipated minor of sufficient intelligence to understand and appreciate the consequences of the proposed surgical or medical treatment" to effectively give consent to any legal medical treatment or procedure. Id.

134 See, e.g., MINN. STAT. ANN. §§ 144.341-347 (West 1998). This statute empowers any minor to give effective consent for treatment related to pregnancy, venereal disease, or alcohol or drug abuse. Id.

135 Thus, a minor may be liable under a contract for "necessaries." See John D. Hodson, Annotation, Infant’s Liability for Medical, Dental, or Hospital Services, 53 A.L.R. 4th 1249, 1254 (1987). In some cases, a minor may be liable for contracts made under a misrepresentation of the minor’s age. See A.D. Kaufman, Annotation, Infant’s Misrepresentation as to His Age as Estopping Him from Disaffirming His Voidable Transaction, 29 A.L.R. 3d 1270 (1970). A few states have gone further. See Stephen Wolfe, Note, A Reevaluation of the Contractual Rights of Minors, 57 U.M.K.C. L. REV. 145, 153-54 (1988).


Cases in other areas of constitutional law had permitted the state greater control over the acts of minors than adults, even where core constitutional rights were at stake. In 1977, the Supreme Court, at least haltingly, extended the right of access to contraception to teenagers by striking down a New York statute that absolutely prohibited anyone from distributing contraceptives to minors under age sixteen, and limited such distribution to persons over age sixteen to licensed pharmacists. This was not an unambiguous declaration of the autonomous rights of minors. Although the plurality opinion suggested that there was little reason to define reproductive rights more narrowly when minors were involved, concurring justices pointed out that the New York statute could also be read as interfering with parents’ rights to make decisions for their own children, as it contained an absolute prohibition on providing contraceptives to those under sixteen, regardless of parental consent. And since 1977, there has been no definitive resolution of the question of whether a state attempt to condition access to contraceptives by teenagers on parental consent would withstand constitutional challenge.

But even if the Constitution gives states an opportunity to condition teenagers’ access to contraceptives on parental consent, it is an opportunity that most states have declined. Most states explicitly grant minors the right to give their own consent for family planning services, and some of those that do not explicitly grant the right have not explicitly denied it. Thus, even when not compelled to do so, more states are giving more deference to minors in the area of reproductive choice. Abortion, of course, is an even more contentious subject than contraception. Since Roe v. Wade established the fundamental

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138 See supra note 128 and accompanying text discussing First Amendment cases. See also supra notes 45-50 and accompanying text.


140 Id. at 693 (“The right to privacy in connection with decisions affecting procreation extends to minors as well as to adults.”).

141 See id. at 708 (Powell, J., concurring) (“His statute would allow the State to ‘enquire into, prove, and punish’ . . . the exercise of this parental responsibility.”); id. at 713 (Stevens, J., concurring) (“I would describe as ‘frivolous’ appellees’ argument that a minor has the constitutional right to put contraceptives to their intended use, notwithstanding the combined objection of both parents and the State.”).

142 Lower courts have held that publicly funded programs that distribute contraceptives to teenagers without parental consent do not violate parents’ rights. See Doe v. Irwin, 615 F.2d 1162 (6th Cir. 1980); but see Alfonso v. Fernandez, 605 N.Y.S.2d 259 (App. Div. 1993) (holding that condom distribution by public schools constituted health service and, under New York law, parents must be provided option of opting out of program for their children).

143 See Rhonda Cohn, Minor’s Right to Consent to Medical Care, 1985 MED. TRIAL TECH. Q. 286, 291-98.

144 See id.

right of access to abortion, one of the most consistently disputed subsidiary issues has been the authority of the state to mandate parental consent or notification. Several decisions over the years have established that states may not permit parents to have an effective veto over their daughter’s abortion decision, while at the same time refusing to recognize, at least explicitly, an unfeathered abortion right of the minor. States are permitted to maintain a system of parental notification or consent if they also permit a minor to “bypass” her parents and gain approval from a judge. The judge is to make an initial determination as to whether the minor is mature enough to make the choice herself; if so, she must be permitted to have the abortion. If the judge determines that the minor is not sufficiently mature, the abortion may be barred, but in practice, it appears that a large majority of minors using the judicial bypass route are found to be mature, and an even larger (something approaching 100%) majority are granted the right to proceed with the abortion.

In Hodgson v. Minnesota, a case involving state-imposed restrictions on the abortion rights of minors, the Supreme Court noted that “the right to make this decision ‘do[es] not mature and come into being magically only when one attains the state-defined age of majority.’” This increased level of deference to adolescent decision-making is apparent not only in matters of reproductive freedom, but in a wide range of contexts, and is being recognized by legislatures as well as courts. When this deference occurs in matters involving reproductive freedom and a range of other issues apart from questions concerning assigning responsibility for criminal activity, political liberals have, for the most part, applauded while political conservatives have been critical.


148 See Bellotti, 443 U.S. at 643 (“If the State decides to require a pregnant minor to obtain one or both parents’ consent to an abortion, it must also provide an alternative procedure whereby authorization for the abortion can be obtained.”).

149 See Bellotti, 443 U.S. at 643-44.

150 See Patricia G. Barnes, Minors Seeking Abortions Find No Court Resistance: Judges Approve 100 Percent of Petitions Sought by Teenagers, NAT’L L.J., March 13, 1995, at A8. This is not surprising, because the judge must approve the petition if either the minor establishes that she is “mature” or, if immature, that the abortion would be in her best interests. See Bellotti, 443 U.S. at 643-44. Thus, if a young woman is mature, the court must defer to her decision; if she is immature, “[i]t is difficult to conceive of any reason... that would justify a finding that [her] best interests would be served by forcing her to endure pregnancy and childbirth against her will.” Hodgson v. Minnesota, 497 U.S. 417, 475 (1990) (Marshall, J., concurring in part, concurring in the judgment in part, and dissenting in part).


152 Id. at 434-35 (quoting Danforth, 428 U.S. at 74).
But this political alignment is largely reversed when the issue is whether the law should treat a minor's decision to commit a crime in the same way that it treats a similar decision by an adult. On the surface, at least, each side seems inconsistent. But before exploring the implications of this inconsistency, perhaps we should pause to address an obvious question. What evidence is there to support or refute the contention that the ability of teenagers to make significant life decisions is noticeably less than that of adults? Is there empirical support for the proposition that minors should be shielded from the consequences of their choices, whether those consequences strike the majority as favorable or unfavorable, in light of their reduced ability to choose responsibly?

IV. HOW WELL CAN ADOLESCENTS MAKE MATURE LIFE DECISIONS?: EMPIRICAL EVIDENCE

As we have seen, the law must, in a variety of contexts, explicitly or implicitly judge the competence of minors to make significant decisions about the course of their lives. To the extent that minors exhibit competence no weaker than that displayed by adults, it would seem to follow that those decisions should be respected, at least no less than similar adult decisions. To respect a decision can mean that we refrain from depriving the decision-maker from enjoying the beneficial consequences of a decision by overriding it on the grounds that those consequences are outweighed by negative consequences either to the decision-maker or to others. But at the same time, to respect a decision can also mean that we refrain from shielding the decision-maker from the negative consequences that will befall him or her arising from the decision. The law's attitude toward the question of whether adolescent decisions should be treated no differently than adult decisions has largely been based on assumptions regarding minors' decision-making competence, yet those attitudes have varied over the years. Can we draw upon social science to provide some reliable answers to questions regarding the relative decision-making competence of adults and adolescents, or are we left to muddle along with anecdotal evidence and personal impressions?

In recent years, a body of work has begun to emerge regarding the quality of adolescent decision-making, and its similarity or difference to that of adults.153 While the work has produced some interesting conclusions, those

153 See Jennifer L. Woolard et al., Theoretical and Methodological Issues in Studying Children's Ca-
conclusions have been criticized as being uncertain, indefinite, and based on imperfect assumptions. Still the work is interesting, as it suggests, if not clear answers, at least avenues for further inquiry.

A number of relatively early studies built on what Elizabeth Scott calls the "informed consent framework," that is, the question of whether teenagers exhibit competence in those aspects of decision-making on which the law has traditionally focused in determining competence, such areas as consent to medical treatment. The informed consent framework works from the premise that the subjective values of the individual may not be questioned. Lack of competence is instead concerned with the extent to which the individual falls short of the model of the rational decision-maker, that is, one who is presented with and understands information relevant to a decision, including its relevance to the individual's own situation, and who can compare the benefits and dangers of alternative choices. In other words, if the process of making a decision resembles that employed by one who is clearly competent (e.g., an adult) then the fact that the choice is quite different than that which would be made by most competent decision-makers is not evidence of incompetence. It is merely evidence of a different set of values, and to interfere on that basis would be inadmissible paternalism.

For the most part, studies limiting themselves to these cognitive elements of decision-making have supported the conclusion that there is little if any difference between the decision-making competence of at least older adolescents and that of adults. These studies have been criticized on several grounds: for example, for relying too much on laboratory simulations instead of real-life situations, for focusing on samples that overrepresent white, middle class teenagers, and for attempting to generalize decision-making competence from an assessment of that competence in a particular narrow

\[ \text{pacies in Legal Contexts, 20 LAW & HUM. BEHAV. 219 (1996). In addition to providing an overview of the issues, the authors collect dozens of social science articles on the subject of juvenile competence as references. See id. at 227-28.} \]

\[ 154 \text{ Elizabeth S. Scott et al., Evaluating Adolescent Decision Making in Legal Contexts, 19 LAW & HUM. BEHAV. 221, 223 (1995).} \]

\[ 155 \text{ See id. at 223-24.} \]

\[ 156 \text{ See id. at 224.} \]

\[ 157 \text{ See id. at 224-26.} \]

\[ 158 \text{ See id. at 226 ("With few exceptions . . . no adequate research compares adolescent and adult performance under conditions that adequately resemble daily life.").} \]

\[ 159 \text{ See id.} \]
Many, perhaps most, of these studies focused on decision-making in the context of medical treatment. The most obvious and immediate legal application of these findings, given their focus on medical decisions, is in the highly contentious area of the legal treatment of reproductive decisions, particularly abortion. Elizabeth Scott has asked if the researchers' eagerness to bolster support for teenagers' rights to elect to have abortions free from parental control may have led them to exaggerate the strength of their findings concerning the competence of adolescent decision-making. Still, despite their flaws, these studies do provide at least tentative support for the proposition that, in terms of cognitive factors, older adolescents are not clearly distinguishable from adults in their decision-making capacity.

Recently, however, several social scientists have challenged the notion that the quality of decision-making should be assessed only by examining the ability to reason and process information. Instead, they contend that a range of other factors might lead adolescents to significantly different outcomes than adults when confronted with significant life choices. The traditional "informed consent" model, defers to the subjective values of the individual decision-maker. It does not permit a large difference in the subjective values of two groups, that leads those groups to significantly different decisions, to act as evidence of one of those groups' relative lack of competence. But if research shows that, as a group, adolescents are likely to disproportionately choose courses of action that most adults would avoid, it may well indicate that these are significant differences in the decision-making processes employed by adults and adolescents. If this is true, there might be good reason to consider

160 See id. at 225 n.3.
161 As Scott and her counterparts said:

In our view, it is unfortunate that the most prominent application of social science research to legal policy in this area has been on the issue of abortion decision making. The ideological and highly controversial nature of this issue has distorted scientific discourse, because opinion on the underlying issue tends to color the response to the use of empirical data.

Id. at 224 n.2. For examples of studies concluding, in the context of abortion, that adolescent decision-making is not significantly different than that of young adults, see Bruce Ambuel & Julian Rappaport, Developmental Trends in Adolescents' Psychological and Legal Competence to Consent to Abortion, 16 Law & Hum. Behav. 129 (1992); Victoria Foster & Norman A. Sprinthall, Developmental Profiles of Adolescents and Young Adults Choosing Abortion: Stage Sequence, Decalage, and Implications for Policy, 27 Adolescence 655 (1992); Lois A. Weithorn & Susan Campbell, The Competency of Children and Adolescents to Make Informed Treatment Decisions, 53 Child Dev. 1589 (1982).

162 See Thomas Grisso, Society's Retributive Response to Juvenile Violence: A Developmental Perspective, 20 Law & Hum. Behav. 229, 233 (1996) ("In general, these studies have found that midadolescents' performance on decision tasks is not remarkably different from that of adults, suggesting that differences in their cognitive capacities to make choices are minimal.").
the necessity of some degree of paternalism in the law's response to adolescent choices.

An examination of non-cognitive factors in adolescent decision-making might focus on a number of possible differences with adult decision-making. It might be hypothesized that adolescents are more subject to external influence in determining their values, depending to a great degree on peer group approval or parental attitudes, either as a model to follow or a set of values to reflexively reject. If so, the extent to which an adolescent can be said to be responsible for his or her decision is diminished, as is the strength of the adolescent's claim to autonomy rights. It might be hypothesized that teenagers are more impulsive and moody than adults. Their relatively high level of participation in risky activity might, then, be not merely the result of rational calculation, but rather a non-cognitive attribute of youth, an attribute likely to diminish with age. Again, this at least raises questions regarding the extent to which the adolescent is fully responsible for significant life choices.

Lawrence Kohlberg and others have argued that moral development is, to some extent, linked to age. These theories generally contend that moral reasoning proceeds in stages, and that an individual will move through these stages in a predictable order, one that generally proceeds from making moral decisions based upon purely selfish concerns to a progressively greater concern with the consequences of the decision on others. While this progression, and its stages, are not linked to any specific age, the concept of moral development does suggest that age and experience, or the lack of it, might well have an impact on the ability to make responsible choices.

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164 See id. at 249-51.
165 See id. at 258 ("The higher prevalence of willful risk taking in adolescence is not because adolescents do not perceive risks where adults see them. Indeed, there is substantial evidence that adolescents are well aware of the risks they take.").
166 See 2 LAWRENCE KOHLBERG, ESSAYS IN MORAL DEVELOPMENT: THE PSYCHOLOGY OF MORAL DEVELOPMENT (1984).
167 See, e.g., CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982); JEAN PIAGET, THE MORAL JUDGMENT OF THE CHILD (2d ed. 1965). Gilligan, while critical of Kohlberg's framework as being insensitive to gender-based differences, does not dispute the fact that individuals grow by moving beyond selfishness to greater concern for others. See GILLIGAN, supra, at 31-63.
168 See KOLBERG, supra note 166, at 44-62, 172-205.
A survey of the existing literature conducted by Lawrence Steinberg and Elizabeth Cauffman on these non-cognitive factors shows results that are tentative and incomplete, but that tend to support the notion that the differences between older adolescents and younger adolescents are more prominent than the differences between older adolescents and adults. Studies focusing on the ability to make decisions independently, that is, free of parental or peer group influence, show that while peer group pressure clearly increases in early adolescence, both peer pressure and parental influence diminish during the high school years. Older adolescents exercise more independent judgment than younger adolescents, but the studies that establish this do not go further and compare older adolescents to younger adults. Thus, as Steinberg and Cauffman note, "we do not know if gains in this aspect of decision making continue to accrue after age [eighteen]."

A number of studies have examined impulsiveness, and sought to validate or refute the common perception that adolescents crave sensation-seeking activity, are moodier and more impulsive, or are subject to the effect of "raging hormones" associated with puberty, all to the detriment of the ability to make rational decisions in the same way as adults. These studies "point in one general direction: Adolescents probably have more difficulty in controlling their impulses than do adults." But the available studies are too sparse to indicate the age at which this difference levels off or declines.

Kohlberg and others have demonstrated that there is a regular pattern in the development of moral reasoning. An individual will begin in a highly egocentric state, with little ability to take a broader perspective on the consequences of his or her acts, and will usually progress to a position where the concerns of others are appreciated, at least to some extent. Critics of Kohlberg have disputed particular aspects of his theories of moral development. Feminists such as Carol Gilligan, for example, maintain that Kohlberg ignores

169 See Steinberg & Cauffman, supra note 163.
170 See id. at 253-54.
171 See id.
172 Id. at 254.
173 See id. at 259-60 (providing citation and discussion of these studies).
174 See id. at 261-62 (providing citation and discussion of these studies).
175 See id. at 260-61 (providing citation and discussion of these studies).
176 Id. at 262.
177 See id.
178 See supra notes 166-67.
179 See KOHLBERG, supra note 166, at 44-62.
significant value differences between men and women in putting forward his
notions of the highest levels of moral reasoning, and does so in a way that un-
duly privileges typically male types of thought.\textsuperscript{180} Yet even Gilligan and other

\textsuperscript{180} critics do not fundamentally contest the notion that moral reasoning is a skill

\textsuperscript{181} that develops over time.\textsuperscript{Yet even Gilligan and other

\textsuperscript{181} critics do not fundamentally contest the notion that moral reasoning is a skill

\textsuperscript{181} that develops over time.\textsuperscript{181} Still, this does not lead us to the point where we can
draw a sharp line between adults and adolescents. This is true not because
moral reasoning typically develops quite rapidly in adolescence, but rather be-
cause, according to Kohlberg, a large majority of adults do not progress be-

\textsuperscript{182} yond “conventional moral thinking,” a stage that most people reach during the
middle high school years.\textsuperscript{182}

Finally, studies have explored time perspective; that is, the ability of indi-

\textsuperscript{183} viduals to appreciate long-term as well as short-term consequences of their ac-
tions.\textsuperscript{183} The research indicates, unsurprisingly, that the ability to assume a

\textsuperscript{184} long-term future orientation “grows gradually from childhood to young adult-

\textsuperscript{184} hood.”\textsuperscript{184} There does not seem to be any particular point at which there is a
sharp increase; rather, the growth process is continuous.\textsuperscript{185}

Overall, Steinberg and Cauffman conclude that there is significant evi-
dence of a difference between early and middle adolescence in terms of judg-
ment-making capacity, but very little hard evidence of differences between late
adolescence and adulthood.\textsuperscript{186} Their tentative policy conclusion is that “there
would appear to be a scientific basis within the psychological literature on
adolescent development for distinguishing under the law between individuals
who have, versus [those who] have not, reached the age of 17.”\textsuperscript{187}

What are we to make of all of this? Does this evidence compel the law ei-

\textsuperscript{187} ther to respect the life choices of adolescents or to refuse to do so? If it does

\textsuperscript{186} neither, does that explain or justify the inconsistency of many people on this
question as they jump from issue to issue? What lies behind the law’s in-

\textsuperscript{185} consistency on this point?

\textsuperscript{182} See Gilligan, supra note 167.

\textsuperscript{181} See id.

\textsuperscript{183} See id.

\textsuperscript{182} Kohlberg, supra note 166, at 44-62.

\textsuperscript{183} See Steinberg & Cauffman, supra note 163, at 266.

\textsuperscript{184} Id.

\textsuperscript{185} Id.

\textsuperscript{186} See id. at 267-69.

\textsuperscript{187} Id. at 268.
V. HOW WELL CAN ADOLESCENTS MAKE MATURE LIFE DECISIONS?: POLICY IMPLICATIONS

The social science data currently available, as we have seen, provides at least tentative, provisional support for the proposition that older adolescents, those aged seventeen and above, have essentially the same capacity to make significant life decisions as adults. Below that age, noticeable differences appear. Surely further research is warranted; these findings are far from conclusive. But as debate continues on public policy issues involving adolescents, including the decision as to whether a separate and less punitive juvenile justice system should continue to exist, the evidence that we have should certainly influence our resolution of these issues.

Paternalism in the American legal system, with its efforts to shield individuals from the negative consequences of their own actions is, wisely or not, widely rejected. Exceptions are made, for the most part, only where the individual or class of individuals involved clearly demonstrates an impaired ability to appreciate the consequences of those actions. The power of these principles seems clear in the debate over extending autonomy rights to adolescents in a wide range of contexts, but it has been much less salient in the area of juvenile justice. In spite of all the overt discussion of deterrence, and to a much lesser extent rehabilitation, in public discussion of criminal justice in general, the central role played by the concept of retribution, the belief that the choice to commit a crime must entail the acceptance of punishment proportionate to the actor's responsibility and the harm done, cannot be ignored. The debate over the future of a separate and less punitive juvenile justice system, however, has largely ignored this, focusing instead on questions of deterrence and the efficacy of rehabilitation.

It would seem likely that the rejection of paternalism toward adolescents in a wide range of legal contexts outside of the criminal law would, consciously or unconsciously, lead to the rejection of paternalism toward adolescents in juvenile justice. A consistent set of findings with respect to the ability of minors to make mature life decisions, then, should create some dissonance for both liberals and conservatives. If adolescents, or at least older adolescents, are no less capable of exercising choice than adults, then conservatives will be hard pressed to defend limiting their autonomy in areas such as reproductive rights.

188 See supra note 88.
189 See supra notes 1-4 and accompanying text.
and abortion, but at the same time, liberals will find it difficult to promote a less punitive system of juvenile justice. A consistent set of findings that adolescents are, in fact, less capable of mature choice will lead to the opposite set of conclusions, but will create an equal amount of dissonance. How can and should this dissonance be resolved? Several approaches suggest themselves.

A. Ignore the Dissonance: Most People Are Merely Consequentialists

Of course, the premise of this Article, that both a rejection of paternalism and support for the value of logical consistency are widely shared in the legal and political system, may simply be incorrect. If so, both liberals and conservatives may merely be acting as consequentialists in pursuit of different values. There may, then, be no real dissonances to resolve.

Despite the recent revival of retributionist thinking in criminal law, there can be little doubt that many people explicitly or implicitly rely on notions of deterrence in forming their opinions on criminal law policies. For such people, if harsh penalties deter others, it may be largely irrelevant that they are not fully deserved by those on whom they are imposed. Similarly, if a consequentialist regards abortion as a horrendous outcome, he will have no hesitation adopting policies that are designed to reduce its incidence; the issue of whether a teenager is as well-positioned as an adult to make the choice will become irrelevant. Given the inability to restrict the freedom of adults, limiting the freedom of minors will be advocated as a partial solution. Similarly, the dissonance of the typical liberal may also be explained by a rejection of the retribution/personal responsibility model in criminal law. If one works from the position that the principal goal of the penal system should be rehabilitation, then one might readily adopt a paternalistic stance in order to justify a rehabilitative approach to juvenile justice. Of course, a rehabilitative model should be applied to adults as well, one might believe. However, because this is clearly unrealistic as a political matter at this time, half a loaf is better than none. Teenage autonomy might then be respected in decision-making contexts without creating much dissonance because of a largely consequentialist conclusion as well—that is, that the harms of outcomes like teenage pregnancy outweigh the harms of things like abortion and ready access to contraception. Respect for autonomy may, then, be less of a true basis for forming positions,

190 See supra notes 69-79 and accompanying text.
191 See supra notes 18-22 and accompanying text.
192 See supra notes 146-48 and accompanying text.
either liberal or conservative, than an argument adopted for the purpose of aiding consequentialist ends, consciously or unconsciously adopted due to its resonance with the longstanding American reverence, at least in our rhetoric, for the autonomy of the individual.

It would be difficult to deny that American law is largely shaped by a pragmatic concern for achieving outcomes thought desirable by majorities or influential minorities, regardless of whether these outcomes can all be reconciled with each other, let alone with some overriding philosophy. Still, most of those involved in the legal system at least like to think of themselves as consistently applying a coherent set of values. To simply disregard the dissonance created by inconsistent treatment of adolescent autonomy would be to ignore something significant.

B. Justify the Dissonance: Some Questions for Further Research

An alternative explanation for the apparent dissonance in the positions of both liberals and conservatives might be an instinct that there really is no single answer to the question of the decision-making competence of adolescents, even adolescents of the same age. Perhaps that competence varies in different contexts, and the ability to make a responsible decision as to things like health care and reproduction issues is noticeably different from the ability to choose to obey or not obey the criminal law. Or perhaps competence varies between subgroups of teenagers. Because most serious crimes committed by teenagers are committed by males and the decision to have an abortion is made by females, if there are gender differences in the age at which adolescents make decisions in a way comparable to adults, there may be reason for varying the degree of the law's paternalism. Similarly, adolescents of different social class and background may mature at different rates.

Making such distinctions would, however, present serious problems. A categorical rule that treats adolescent girls and adolescent boys differently presents obvious Equal Protection Clause problems.193 While treating the class of adolescents who choose to commit crimes differently than those who choose to exercise reproductive freedom does not present the same problems of facial

gender bias, however, the obvious disparate impact surely raises interesting questions, even if it would not invalidate the practice as a matter of constitutional law. Perhaps this leads to the conclusion that categorical rules are therefore inappropriate, and that the degree to which adolescents’ decisions are entitled to respect must be assessed and on an individual basis. This would support case-by-case determinations of whether a juvenile offender should be referred to the adult system, and at the same time, case-by-case consideration of whether an adolescent’s reproductive decisions should be respected. Of course, this is precisely the system that now exists on these issues in many jurisdictions, and yet as we have seen, the political pressures in both cases seem to be leading to more categorical rules. In any event, the question of whether there is social science support for the adoption of different attitudes toward adolescent autonomy for different subgroups or with respect to different types of decisions is one that has yet to be addressed. Of course, it is possible that future research will fail to find significant differences between different types of decisions, and even if these differences are established, it will still appear inconsistent and troubling to many to treat different types of adolescent decisions with different degrees of respect.

C. Resolve the Dissonance: Reconsider Positions on Legal Paternalism Toward Adolescents

As the law extends more respect to the autonomy rights of adolescents, pressure grows to subject teenagers to the full measure of adult criminal responsibility for their transgressions. The consistency of these developments should be obvious, but seems largely ignored by many who oppose one but not the other. Those who favor the maintenance of a separate and less punitive juvenile justice system should give serious thought to the question of whether

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194 Craig and Michael M., both involved statutes that explicitly classified on the basis of gender. The Court has been more accepting of statutes that classify without reference to gender, despite the obvious disparate effect of the statute favoring or disfavoring members of only one gender. See, e.g., Massachusetts v. Feeney, 442 U.S. 256 (1979) (upholding state “veterans preference” in hiring despite fact that it overwhelmingly benefited males); Geduldig v. Aiello, 417 U.S. 484 (1974) (holding that state disability insurance program could exclude pregnancy and childbirth expenses, despite fact that they are incurred only by women).

195 The overwhelming majority of those under age 18 arrested are male. See, e.g., Fed. Bureau of Investigation, supra note 55, at 221, 223. In 1995, for example, almost 1.5 million males under age 18 were arrested, compared to less than 0.5 million females. The disparity is even greater for violent crimes. See id.

196 See Schulhofer, supra note 57, at 435-38.

197 See id. at 438-39.
such a system can be sustained in a legal world that otherwise respects autonomous decisions made by adolescents.

It is difficult to refute the basic idea put forward by a sophisticated theory of retribution that a deliberate, mature, rational decision to break the law warrants a punitive, rather than merely a remedial, response. One can effectively contend, however, that a decision to break the law is not deliberate, mature, and rational. If the legal system regards adolescent decision-making in general as lacking sufficient maturity to deserve respect, it would follow that a decision by an adolescent to break the law should likewise call for a paternalistic, remedial response. But where the legal system, as it has in recent decades, moves sharply in the direction of eschewing paternalism and respecting adolescent autonomy in a wide range of contexts, it is hardly surprising that simultaneously that system should reject paternalism in criminal law. If anything, the failure of the legal system to do so would be something that called out for explanation. It is not the purpose of this Article to decide in favor of or against a consistent position of respect for adolescent autonomy. Nor do I mean to reject either the possibility that there might be some virtue in taking seemingly inconsistent positions on issues of adolescent autonomy as politically prudent compromises in pursuit of some other goal, such as an overall commitment to rehabilitation or deterrence as the highest good of the criminal justice system. However, given the tendency to address issues as if they are completely separate, it is surely worth considering by both sides of the debate on the future of the juvenile justice system, that on a theoretical level, support for adolescent autonomy in a wide range of non-criminal justice contexts clashes with a commitment to a more paternalistic, rehabilitative approach to juvenile crime as compared with adult crime. Conversely, opposition to adolescent decision-making rights concerning reproductive choice conflicts, at least on a theoretical level, with the position that juveniles and adults are equally responsible for their crimes. In contemporary legal discourse, to label something as paternalism is almost always to disparage it. Perhaps this is correct; perhaps it overlooks some virtues of paternalism. But both advocates and opponents of paternalism in one context should understand that their arguments may resonate elsewhere in the legal system, sometimes in ways that they may not find agreeable.

198 This would seem to be the general legal context in which the juvenile justice system was created. See supra notes 23-27, 109-125 and accompanying text.