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AUTONOMY FOR VULNERABLE POPULATIONS: THE SUPREME COURT'S RECKLESS DISREGARD FOR SELF-DETERMINATION AND SOCIAL SCIENCE

DONALD N. BERSOFF, J.D., PH.D.*

CONSIDER for a moment the plight of one W. F. Skinquist, famous psycholegal scholar. In the morning he is informed that his seventy-three year old widower father refuses to consent to an amputation of his left arm that will save his life. His father explains he wants to remain whole so that when he dies he will be able to hug his late wife in Heaven who, he says, is expecting him to have all four of his limbs when she greets him. In the evening, his seventeen year old daughter announces she is about to accept the marriage proposal of a thrice-married, forty year old, graduate of the joint J.D./Ph.D. program in law and psychology at Hahnemann University and Villanova Law School. W. F., growing grimmer by the minute, observes, "You realize those dual degree people are weird and can never find gainful employment." "I know," replies the daughter, "but Stevie is so cute and I like all those impressive initials after his name."

Should our overburdened subject take actions to force his father to have the life-saving operation? Should he exercise parental authority and forbid his daughter from marrying this clearly inappropriate potential son-in-law?

Silly examples aside, poor W. F. is faced with one of the great moral, ethical, and legal dilemmas of our time: How to resolve the conflict between two oftentimes competing principles—paternalism and autonomy. Defined in terms most favorable to each and looking at it from the perspective of Professor Skinquist, paternalism means acting in the beneficial best interests of those who cannot act in their own interest;¹ autonomy means forebear-

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¹ See Tom L. Beauchamp & James F. Childress, Principles of Biomedical Ethics (2d ed. 1983); Dan Brock, Paternalism and Promoting the Good, in Paternalism, supra, at 237-38 ("Paternalism is action by one person for another's good, but contrary to their present wishes or desires, and not justified by the

(1569)
ing from interfering in the expression of self-determination by those who wish to make decisions for themselves. The conflict becomes a societal concern when the government volunteers or is called upon to select which of these competing principles it will exercise in a particular case involving one of its people. The choice becomes particularly poignant when one of its citizens is a member of what I am calling a vulnerable population, loosely defined for purposes of this Article as a group of persons that has been traditionally viewed, at times presumptively, as incapable of deciding and making important life decisions for themselves. These populations include children, mentally ill and mentally retarded people, the elderly, and, in some instances, it is hoped more historical than current, women.

When government seeks to override the individual choice of a member of one of these populations, the manner in which a court resolves the dilemma tells us a great deal, not only about how the legal system views these populations, but about whether that system will treat all of us with dignity. After all, we are merely part of that shifting majority known as the temporarily able-bodied and temporarily sound-minded.

At the outset, I should reveal where I stand with regard to the conflict. I am a card-carrying autonomist. I believe that one of government’s overriding social goals should be to promote other’s past or present consent.”); Gerald Dworkin, Paternalism, Some Second Thoughts, in PATERNALISM 105, 107 (Rolf Sartorious ed., 1983) (“Usurpation of decision-making” is necessary component of paternalistic treatment).

2. Crain v. Kreibel, 443 F. Supp. 202, 208 (N.D. Cal. 1977). The Supreme Court has recognized that there is an “interest in independence in making . . . important decisions.” Id. (quoting Whalen v. Roe, 429 U.S. 589, 599-600). “This right to autonomy is recognized as the generalized ability of individuals to determine for themselves whether to perform certain acts or to undergo certain experiences.” Id. (quoting Note, Roe v. Paris: Does Privacy Have a Principle? 26 STAN. L. REV. 1161, 1163 & n.17 (1974)).

3. Incapability of making important life decisions serves as the cornerstone of determinations of incompetency, which courts use to justify exercise of the parens patriae power of the state. See Bruce J. Winick, Competency to Consent to Treatment: The Distinction Between Assent and Objection, 28 HOUS. L. REV. 15, 16 n.3 (1991). “The parens patriae power of the state allows government to engage in decision-making in the best interests of persons who by reason of age or disability are incapable of making such decisions for themselves.” Id. at 16 n.3.

4. See, e.g., Parham v. J.R., 442 U.S. 584 (1979) (upholding state commitment law allowing parents to admit their children to mental institutions); Buck v. Bell, 274 U.S. 200 (1923) (sexual sterilization of mentally retarded inmates is within power of State under Fourteenth Amendment); Rogers v. Commissioner, 458 N.E.2d 308, 322 (Mass. 1983) (involuntarily committed mental patient “may be treated against his will to prevent the ‘immediate, substantial, and irreversible deterioration of a serious mental illness’” quoting Guardianship of Roe, 421 N.E.2d 40 (1981)).
human dignity and individual autonomy. Each individual should have the right to decide how to live his or her life, and more particularly, what types of intrusions each will allow on their bodily integrity. Our society should be committed to respecting each individual’s right to choose his or her own fate—even if the choices the individual makes do not serve, in some objective sense, what the majority would consider to be in the individual’s best interest. In short, each individual should have a right to make mistakes, and not to have those mistakes forcibly corrected or overridden by the State. To use Robert Burt’s more felicitous translation of this idea, “[a]utonomy in a democratic society might be defined as an adult’s capacity to choose what his parents might not have chosen for him or for themselves.”

There is undoubtedly a role for government in carrying out its *parens patriae* responsibilities, that is, its role as a beneficent and loving parent. I do not dispute that the State has an interest in caring for those of its citizens incapable of caring for themselves. This interest does not, however, justify every good faith effort to intrude, interfere, intervene, or become involved (the reader may choose his or her own verb) in individual decisionmaking, even when the government truly believes that its involvement is for the individual’s own good. As Justice Brandeis stated, and his statement is so often quoted that it has become trite, but is so singularly apt that I feel compelled to repeat it: “Experience should teach us to be most on our guard to protect liberty when the Gov-

5. The principle that a competent person may make decisions for him or herself, no matter how foolish the decisions may be, has substantial support in the decisions of many federal and state courts. *See, e.g.*, *Tune v. Walter Reed Army Medical Hosp.*, 602 F. Supp. 1452, 1455 (D.D.C. 1985) (patient ultimately decides whether to receive treatment); *In re Estate of Brooks*, 205 N.E.2d 435, 442 (Ill. 1965) (holding that absent clear and present danger, patient’s views must be respected, even if considered unwise); *Lane v. Candura*, 376 N.E.2d 1232, 1235-36 (Mass. App. Ct. 1978) (irrationality of patient’s decision does not justify determination of legal incompetence); *In re Yetter*, 62 Pa. D. & C.2d 619, 623 (1973) (asserting “constitutional right of privacy includes the right of a mature competent adult to refuse . . . medical recommendations that may prolong one’s life” and commitment to a mental hospital does not mean loss of this right).


7. For an in-depth treatment of the vicissitudes of situations in which the state seeks to exercise control over an individual, the reader is referred to the excellent assortment of essays collected by Sartorius. *See Paternalism, supra* note 1.

ernment's purposes are beneficent."9

The Supreme Court has at least paid lip service to autonomy as a social value.10 The Court has repeatedly held that "'[a]mong the historic liberties' protected by the Due Process Clause is the 'right to be free from . . . unjustified intrusions on personal security.'"11 The individual's firmly embedded common law "right to determine what shall be done with his own body,"12 is without question "implicit in the concept of ordered liberty" and therefore protected by the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution.13 The Supreme Court has also made clear that this right to personal security and bodily integrity encompasses a fundamental interest "in independence in making certain kinds of important decisions" about what will be done to one's body and mind.14

Recently, the Supreme Court in three landmark decisions,

9. Olmstead v. United States, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting). Making the case more strongly, John Stuart Mill stated:

"[O]ne very simple principle, as entitled to govern absolutely the dealings of society with the individual in the way of compulsion and control . . . . That principle is, that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any one of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant.

JOHN STUART MILL, ON LIBERTY 13 (1956).

10. See, e.g., Riggins v. Nevada, 112 S. Ct. 1810 (1992) (State not allowed to forcibly administer antipsychotic drugs to defendant over course of trial without finding that no less intrusive methods of control exist, that medication is appropriate, and that it is essential for defendant's safety or safety of others); Foucha v. Louisiana, 112 S. Ct. 1780 (1992) (insanity acquittee cannot be confined after mental illness absent proof of—both evidence of mental illness and dangerousness to self or others necessary for continued commitment); Cruzan v. Director, Missouri Dep't of Health, 497 U.S. 261, 278 (1990) ("a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment"); Washington v. Harper, 494 U.S. 210, 220-27 (1990) (discussing liberty interest in not being forced to take antipsychotic medications — interest subsequently held insufficient to preclude forcible administration in light of administrative needs); Vitek v. Jones, 445 U.S. 480 (1980) (convicted felon serving sentence has liberty interest in not being transferred to mental institution without appropriate commitment procedures).

11. See, e.g., Vitek, 445 U.S. at 492.


13. Cf. Palko v. Connecticut, 302 U.S. 319, 324-25 (1937) (listing rights protected under Due Process Clause of the Fourteenth Amendment and noting that common link underlying rights protected by the Due Process Clause and within concept of ordered liberty is that their abolition would mean violation of a "principle of justice so rooted in the traditions of conscience of our people as to be ranked as fundamental").


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Washington v. Harper,\footnote{15} Zinermon v. Burch,\footnote{16} and Cruzan v. Director, Missouri Dep't of Health,\footnote{17} reiterated these longstanding principles. In 
\textit{Cruzan}, the Court reinforced eight decades of prior decisions when it said that "a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment."\footnote{18} In Harper, the Court specifically noted that the "forcible injection of medication into an nonconsenting person's body represents a substantial interference with that person's liberty."\footnote{19}

Nonetheless, when it comes to applying these rhetorically ringing principles in particular cases, the Supreme Court, and the lower courts they guide, honor these principles more by breaching them than by following them.\footnote{20} In doing so, courts very often make assertions, many times unequivocally, that appear to have empirical support, or at the very least, should have such empirical support.\footnote{21}

of penumbras in the Bill of Rights as a basis for claiming a constitutionally protected "zone of privacy." \textit{Id.} at 598-99 n.23 (citing \textit{Palko}, 302 U.S. at 325).

\section*{Footnotes}
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\item 15. 494 U.S. 210 (1990). For a discussion of the facts involved in this case, see \textit{infra} notes 33-39 and accompanying text.
\item 16. 494 U.S. 113 (1990). For a brief look at the facts of Zinermon, see \textit{infra} note 80.
\item 17. 497 U.S. 261 (1990). For a discussion of Cruzan, see \textit{infra} note 18 and accompanying text.
\item 18. Cruzan, 497 U.S. at 278. The Cruzan court actually went so far as to say that a competent person could refuse artificial hydration and nutrition, even if such refusal would mean their certain death. \textit{Id.} at 279. Cruzan involved the question as to whether a vegetative automobile accident victim, who had been deemed incompetent, could be taken off of artificial hydration and nutrition upon the request of the patient's parents. \textit{Id.} at 269. Although the Court stated that an incompetent person should technically have no less right to refuse such ministrations than a competent person, and recognized that a surrogate, such as a parent, may act for the patient in deciding to withdraw life-sustaining treatment, the Court nonetheless upheld as constitutional a Missouri statute that required proof of the incompetent person's desire for cessation of life-support by "clear and convincing evidence." \textit{Id.}
\item 19. Harper, 494 U.S. at 229.
\item 20. Indeed, this was the case in Harper, where the Court articulated the nature of the inmate's liberty interest in refusing involuntary psychotropic medication, but nonetheless held that such rights may be suspended by a non-judicial tribunal, in a non-judicial process, by a potentially biased fact-finder and with absolutely no legal representation. \textit{See} Harper, 494 U.S. at 229-33. For a more complete discussion of the infirmities of such procedures, see Donald N. Bersoff, \textit{Judicial Deference to Nonlegal Decisionmakers: Imposing Simplistic Solutions on Problems for Cognitive Complexity in Mental Disability Law}, 46 \textit{SMU L. Rev.} 329 (1992) \textit{[hereinafter Judicial Deference].}
\item 21. \textit{In Harper}, for example, the Court stated: "The purpose of the drugs is to alter the chemical balance in a patient's brain, leading to changes, intended to be beneficial . . . ." 494 U.S. at 229. In fact, in a great many of such involuntary treatment cases, courts rely on the purportedly beneficent purpose of the treatment to distinguish the case from other forcible conditions. The beneficence of these intentions, however, is by no means settled and is in fact a matter of con-
In many of these cases, the American Psychological Association (APA) has attempted to provide methodologically sound social science evidence to educate courts and at times, to advocate for a particular position so that the courts, it is hoped, will render more informed decisions. Primarily, this evidence reaches the court through the APA’s role as a friend of the court, that is as an amicus curiae.22 As general counsel for the APA, I was most proud

of the APA's role as an amicus during the 1980s, precisely because the APA consistently supported self-determination. Working on these cases has, however, also been the source of great frustration because of the Supreme Court's seemingly increasing antagonism to social science evidence.

Two classes of cases very clearly exemplify the conflict between paternalism and autonomy. The first class involves the rights of mentally disabled adults; the second, the rights of children.

To me, the paradigmatic case concerning mentally disabled adults is the right to refuse psychotropic medications. The case usually arises when a person is diagnosed as mentally ill. Next, there is a determination that the person is also either dangerous to himself or herself or others, and, as a result, the person is involuntarily committed to a hospital. At some point after commitment, hospital medical personnel determine that the best course of treatment is some form of psychotropic medication, which the patient then refuses.

This issue was before, but left undecided by, the Supreme Court in Mills v. Rogers. The Mills court left it to the state...
The U.S. Supreme Court did decide a similar issue in the related context of a convicted felon being treated in a special unit for seriously mentally ill prisoners. That case, decided over two years ago, is *Washington v. Harper*. For civil libertarians and self-determinists the outcome was anything but heartening.

As usual, the Court began its opinion by asserting that Mr. Harper, the mentally ill prisoner in this case, had "a significant liberty interest in avoiding the unwanted administration of antipsychotic drugs under the Due Process Clause of the Fourteenth Amendment." However, using a reasonableness test, rather
than a fundamental rights analysis, the six-three majority held it was not unconstitutional for the State to forcibly medicate him as long as the compelled treatment was in the prisoner's medical interests and met the legitimate needs of the institution. The Court found no constitutional requirement that the State seek a judicial determination of either incompetence or the need for compelled treatment. Rather, the Court agreed with the State that a mentally ill inmate's interests "are adequately protected, and perhaps better served, by allowing the decision to medicate to be made by medical professionals rather than a judge." Thus, the Court upheld the right of the State to allow the decision to involuntarily medicate to be made by an administrative tribunal composed of a psychiatrist, a psychologist, and the Associate Superintendent of the prison, all of whom could be employed by the institution, rather than by an independent judicial officer, as Harper had argued for.

35. Id. at 224. Distinguishing the constitutional standard given the average citizen from an institutionalized one, the Court stated that "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." Id. (quoting Turner v. Safley, 482 U.S. 78, 89 (1987)). Use of the "reasonable relation to legitimate penological interests" standard represents a compromise the Supreme Court has made in prison inmate cases. See Turner, 482 U.S. at 84-85. This standard in prison cases "was based upon the need to reconcile our longstanding adherence to the principle that inmates retain at least some constitutional rights despite incarceration with the recognition that prison authorities are best equipped to make difficult decisions regarding prison administration." Harper, 494 U.S. at 223-24 (citing Turner, 482 U.S. at 84-85). In deciding these cases, the Court has weighed two considerations: the diminished, although not entirely absent, claim of the inmate to constitutional rights, and the administrative needs of the institution. Id. Thus, mere invocation of the Harper case cannot justify the forcible administration of medications for civilly committed individuals, since they cannot be said to have given up constitutional rights to the extent that a prison inmate has. See Harper, 494 U.S. at 227 (distinguishing prison context from other situations).

36. Harper, 494 U.S. at 227. The Court offered case law justifying diminished protection of prisoner's rights, but overlooked its observation in 1942 that, "[f]reedom to think is absolute of its own nature; the most tyrannical government is powerless to control the inward workings of the mind." Jones v. Opelika, 316 U.S. 584, 618 (1942) (Murphy, J., dissenting), rev'd, 319 U.S. 103 (1943). The Court no longer appears to advocate this position.


38. For an analysis questioning the accuracy of this hypothesis from the perspectives of cognitive and social psychology, particularly with regard to the inadequacies of clinical decisionmaking by mental health professionals, see Judicial Deference, supra note 20.

39. Harper, 494 U.S. at 229. The Court notes that this is the "primary point of disagreement." Id. The only protection given under the policy is that "[n]one of the committee members may be involved, at the time of the hearing, in the inmate's treatment or diagnosis." Id.
As I noted, the Supreme Court has yet to rule squarely on the issue of forcible administration of psychoactive medication to involuntarily committed mental patients. There remain, thankfully, at least some differences between how the Court scrutinizes the constitutional rights of a hospitalized mental patient and how it scrutinizes the same rights of a convicted felon. In Mills, for example, the Court assumed "for the purposes of . . . discussion" that the committed mentally ill "do retain liberty interests protected directly by the Constitution . . . and that these interests are implicated by the involuntary administration of antipsychotic drugs." This statement, in and of itself, does not end the matter. Courts go on to balance such constitutionally protected interests against the interests of the State. In addition to exercising such police power interests as protecting society against purportedly dangerous individuals, the State is seen as having an interest in fulfilling its duty to treat the medical and other health care needs of those persons in its custody.

On this essentially paternalistically-oriented principle, the APA and its counterpart, the American Psychiatric Association, take fundamentally opposite views. Psychiatry takes the position expressed both in Harper and in an earlier court of appeals decision in the fourth circuit, United States v. Charters, that "the Constitution . . . cannot be stretched" into "protecting an involuntarily committed mentally ill patient’s preferences about the medication". Psychiatry takes the position expressed both in Harper and in an earlier court of appeals decision in the fourth circuit, United States v. Charters, that "the Constitution . . . cannot be stretched" into "protecting an involuntarily committed mentally ill patient’s preferences about the medication".

40. The Supreme Court has considered the issue of forced medication in the pretrial phase of a criminal law hearing. In Riggins v. Nevada, 112 S. Ct. 1810 (1992), defendant Riggins, facing the death penalty and asserting an insanity defense, argued that the involuntary administration of antipsychotic medication deprived him of his right to a fair trial. The Court held that such forced administration of medication was unconstitutional absent evidence that the medication was appropriate, that no less intrusive alternatives existed, and that the medication was essential for the sake of Riggins’ safety and for the safety of others. Id. at 1815.


42. In Harper for example, the Court “determined that state law recognizes a liberty interest, also protected by the Due Process Clause, which permits refusal of antipsychotic drugs” and that this interest was “not insubstantial.” 494 U.S. at 228-29. The Court then proceeded, however, to “virtually ignore[] the several dimensions of that liberty” in permitting the prisoner’s will to be overborne. Id. at 237 (Stevens, J., concurring in part and dissenting in part).


sort of medical treatment, if any, he is to receive." Thus, in Charters and Harper, organized psychiatry took the position that courts should override self-determination when psychiatrists conclude, in the exercise of professional judgment, that it is in the committed mental patient's best interest to be medicated.

Organized psychology has taken a different view. The APA acknowledges a strong interest in preserving appropriate professional discretion in the treatment of mental illness. The APA does not, however, endorse giving relatively unbridled discretion to mental health professionals, particularly those employed by the government in state or federal mental health facilities, as is argued for by psychiatry. The APA does recognize the positive benefits of judiciously administered psychotropic drugs. The APA believes, however, that the benefit must be balanced against the inherently profound violation of bodily integrity entailed in such forcible administrations, as well as against the difficulty of accurately calculating the risk-benefit analysis of being medicated.

47. See id. In the Charters case, the government sought an order to permit medical personnel to forcibly administer anti-psychotic medication to an involuntarily committed psychiatric patient over the patient's strong objections. United States v. Charters, 863 F.2d 303, 304 (4th Cir. 1988). Although Mr. Charters had been found incompetent to stand trial and was legally confined pursuant to a federal statute, there had been no determination that he lacked the capacity to make a competent decision about his medical care. Id. Asserting that confined patients are not stripped of their rights, the Fourth Circuit nonetheless reasoned that those rights must yield to "the legitimate incidents of his institutionalization," and held that those rights would be sufficiently protected against "arbitrary and capricious" violation by letting medical personnel make baseline determinations about the need for medication, leaving the local district court in the role of reviewer. Id. at 306-08.
48. Amicus Curiae Brief for the American Psychological Ass'n 29, Washington v. Harper, 494 U.S. 210 (1990) (No. 88-599) (State's demand for forcible medication should be subject to review either by court or by unbiased administrative body).
49. Id. ("These drugs appear to be effective in alleviating the symptoms of certain medical disorders.").
50. For a discussion of the multiplicity of autonomy violations implicit in forcible medication, see Stephan Beyer, Comment: Madness and Medicine: The Forcible Administration of Psychotropic Drugs, 1980 Wts. L. Rev. 497 (1980) (asserting forced psychotropic medication violates liberty interests in mental autonomy, bodily autonomy, mental integrity and bodily integrity). See also Sheldon Gelman, Mental Hospital Drugs, Professionalism and the Constitution, 72 Geo. L.J. 1725, 1729 (1984) ("[C]ourts generally have agreed that mental patients enjoy a constitutionally protected right to refuse drugs and that states can override this right under certain conditions."); Michael H. Shapiro, Legislating the Control of Behavior Control: Autonomy and the Coercive Use of Organic Therapies, 47 S. Cal. L. Rev. 237, 253 (1974) (discussing statutes which attempt to "balance freedom from coercive therapy against freedom from the debilitation of mental illness").
with antipsychotic drugs in a particular case.\textsuperscript{51}

When the patient has been institutionalized as mentally ill, the forced administration of antipsychotic drugs infringes on the patient's constitutional rights.\textsuperscript{52} It has been the APA's view that a state's failure to respect a patient's competent decision compromises principles of personal security and individual dignity.\textsuperscript{53} Government's power should be most restricted where the decision to administer medication raises the possibility of serious risks to an individual's health and has no clear and predictable outcome.\textsuperscript{54} Thus, a patient's competent decision to refuse medication is entitled to be respected even if that conclusion differs from the one recommended by the treating physician. A competent adult should not be forced by government to submit to unwanted, intrusive medical procedures that entail significant risks.\textsuperscript{55} The refusal to take unwanted psychotropic drugs should only be overridden by a court or by a properly constituted administrative tribunal, not a body of professionals.\textsuperscript{56}

The APA's position, as outlined above, has been submitted to various courts since 1982 in the form of five \textit{amicus} briefs. In \textit{Harper}, the APA reiterated its position concerning forcible administration of drugs but for the first time opined that a panel of mental health professionals could be used to override a compe-


\textsuperscript{52} See Alexander D. Brooks, \textit{The Constitutional Right to Refuse Antipsychotic Medications}, 8 \textit{Bull. Am. Acad. Psychiatry & L.} 179 (1980) (comparing two cases which recognize right of mentally ill to refuse treatment under certain conditions, but also providing instances where this right may be overridden).


\textsuperscript{54} For the APAs view of government respect for competent patient decisionmaking, see \textit{supra} note 53.

\textsuperscript{55} For a discussion of precedent regarding respect of a competent individual's decisions, see \textit{Winick}, \textit{supra} note 3, at 21-22 n.17.

\textsuperscript{56} Until \textit{Harper}, it was the American Psychological Association's position that only courts possessed the social, moral, political and legal perspectives to decide such ultimate questions as whether an individual's right to self determination should be overborne. For the APAs position on an individuals right to self determination, see \textit{supra} note 53. \textit{See also Judicial Deference, supra} note 20; Stephen J. Morse, \textit{Treating Crazy People Less Specially}, 90 W. Va. L. Rev. 353, 359 (1987) ("Social and legal decisionmakers cannot abdicate their responsibility to decide normative issues by mistakenly assuming that the issues are medical rather than moral and legal.").
tent refusal to consent to the medication.\textsuperscript{57} I believe that the APA's agreement with the American Psychiatric Association on that particular issue made it easier for the majority of the Supreme Court to arrive at its ultimate opinion—a significant and regressive decision that threatens the civil liberties of us all.

The Due Process right at stake in these cases is not merely the right to be free from the arbitrary administration of antipsychotic drugs. Rather, it is the right of a competent adult to make treatment decisions for himself or herself, even if they are in some sense deemed unwise by mental health professionals or judges.\textsuperscript{58}

This position requires the social sciences to address at least two matters that are essentially empirical. In striking the balance between autonomy and paternalism, one is confronted first with the question of whether psychotropic medication is both intrusive and risky.\textsuperscript{59} The APA believes there is significant evidence to support the conclusion that psychotropic medication is both intrusive and risky.\textsuperscript{60} In contrast, psychiatry, while acknowledging the risks, argues that antipsychotic medication is not as intrusive or as potentially dangerous as psychology argues.\textsuperscript{61} Despite the plethora of research on this topic,\textsuperscript{62} it is clear that more definitive, methodologically sound research, performed by psychopharmacologists, physicians, and social scientists, is still needed.

I find the second issue more intriguing from the perspective of law and social science. The exercise of self-determination is dependent on a presumption or a finding that the person exercising that right is competent.\textsuperscript{63} The problem is that there has never been a satisfactory consensus as to the definition of compe-

\textsuperscript{57}. Amicus Curiae Brief of the American Psychological Ass'n at 22, Washington v. Harper, 494 U.S. 210 (1990) (No. 88-599) (panel may be composed of "professionals who are not employees of the prison, and who represent a variety of disciplines.").

\textsuperscript{58}. See Winick, supra note 3, at 21.

\textsuperscript{59}. For a discussion of the extent of intrusiveness and riskiness of psychotropic drugs, see supra note 21.

\textsuperscript{60}. For a listing of briefs in which the APA has asserted this position, see supra note 53.


\textsuperscript{62}. For a discussion of the research on antipsychotic medication, see supra note 21.

\textsuperscript{63}. Winick, supra note 3, at 21. (law generally treats competency as prerequisite to ability to provide informed consent).
tence. First, standards for determining competence change with the context in which it is considered. For example, the legal system has developed somewhat dissimilar rules for determining competency of adults to stand trial, to plead guilty, to be executed, to make enforceable contracts, to execute a will, or to refuse medical treatment. To the federal court of appeals that decided Charters, however, the distinction between competence to stand trial and competence to make health care decisions is a difference “of such subtlety and complexity as to tax perception by the most skilled medical or psychiatric professionals.” Although this is not my own belief, it certainly represents an empirical assertion that can, and should, be tested.

Second, a judgment that a person is incompetent typically permits others to exercise the right of informed decisionmaking that would otherwise be left to the patient. As Macklin & Sherwin stated, “[n]eglecting to seek informed consent . . . indicates a . . . failure to recognize autonomy and hence, the humanity of the [individual].” As a result of the numerous implications, how one

64. Alan M. Tepper & Amiram Elwork, Competence to Consent to Treatment As a Psycholegal Construct, 8 L. & HUM. BEHAV. 205 (1984).
66. See, e.g., Ogloff et al., supra note 65 (articulating disparate standards of competency to stand trial, plead guilty, sustain execution and waive counsel).
67. United States v. Charters, 863 F.2d 302, 310 (4th Cir. 1988). The court minimized the importance of requiring competency in the first place. Id. Instead of seeing competency as a barrier to the forcible administration of drugs, the Fourth Circuit instead viewed competency as “properly treated as simply another factor in the ultimate medical decision to administer the medication involuntarily.” Id. at 311-12.
Moreover, the court’s minimization of the difference between competence to stand trial and competence to make decisions about one’s medical treatment, although perhaps rhetorically sonorous, is completely in error. In fact, the mental health professions have, for the last 15 years or so, been working to define the differences between various forms of competencies. See, e.g., Ogloff, supra note 65 (describing various standards for competence in different criminal situations); Roth, supra note 65 (describing five basic tests of competency); see also Stephen J. Anderer, A Model for Determining Competency in Guardianship Proceedings, 14 MENTAL & PHYSICAL DISABILITY LAW Rptr. 107 (1990) (proposing functional analysis to determine specific competencies in elderly persons being considered for guardianship).
68. See Winick, supra note 3, at 16-17.
defines competency assumes great significance.\textsuperscript{70}

One way to determine competence is to look at the outcome of a decision.\textsuperscript{71} If the decision is perceived as reasonable, then the patient is considered competent to make the treatment decision.\textsuperscript{72} Thus, no matter how delusional or otherwise crazy the basis on which the decision was made, the decision to accept psychotropic medication would be deemed competent.\textsuperscript{73} Conversely, no matter how rational the process used to decide to refuse such medication, a person diagnosed as mentally ill and judged by a psychiatrist as in need of medication, who does refuse, would be deemed incompetent.\textsuperscript{74} For example, in Charters, the state psychiatrist testified that her finding of incompetence was not based on Charters' inability to respond in an appropriate way or on his expression of non sequiturs.\textsuperscript{75} Instead, she found Charters incompetent because he refused treatment that she considered to be demonstrably in his interest.\textsuperscript{76}

Alternatively, one can define competence not on the basis of outcome, but on the basis of process.\textsuperscript{77} Under this model, if the cognitive steps one takes in arriving at the decision are deemed reasonable, then the decision, whatever it is, will be deemed competent.\textsuperscript{78} Conversely, if the patient agrees to take medication on a basis that is considered unreasonable, for example, when a patient states, "it will make me Jesus," the person will be deemed incompetent.\textsuperscript{79} Of course, courts will rarely be confronted by the incompetency decision in this second instance because, as long as the patient complies with the physician's treatment plan, it is unlikely that the physician will challenge the decision.\textsuperscript{80} However,
like the first definition, the process-based definition of competence places a great deal of emphasis on the judgment by an observer of the perceived reasonableness of the patient. These definitions, therefore, can be considered paternalistic or "best interest" perspectives that fail to consider mental patients' equally important, or even overriding interests in autonomy, self-determination and bodily integrity.

A third way to define competence is to view it as the capacity to comprehend the objectively disclosed risks and benefits of a proposed treatment and to indicate a decision about whether the individual wishes to undergo the proposed treatment. Judgment of the observer here is a great deal more limited. Reasonableness as to process or outcome is not considered. Instead, the only questions to be answered are whether the person can assimilate the risks and benefits and whether the person can make a decision.

It would be my guess that if this third option were used, more people would be accorded the dignity of self-determination. However, this is also an empirical question and social scientists have yet to focus on definitions of competence and what real-life differential effects they would yield, if any. This is a fertile field for future investigation that remains unharvested.

Finally, although some research has been done on the effects of giving mental patients the right to refuse antipsychotic medication, we know very little about the effects this would have on hospital administration, and even less about effects on the doctor-patient relationship. Two psychiatrists, Appelbaum, and Lidz at least an implied preference for this second definition of competence. See id. at 116-17.


82. See, e.g., Roth, supra note 65, at 281.

83. Because the test evaluates the ability of the subject to comprehend, this can be assessed by objective measures of comprehension, thus leaving less room for the discretion of the evaluator. See Thomas Grisso & Paul S. Appelbaum, Mentally Ill and Non-Mentally Ill Patients' Abilities to Understand Informed Consent Disclosures for Medication: Preliminary Data, 15 L. & Hum. Behav. 337 (1991) (applying objective assessment of patients' ability to comprehend risks and benefits of medication).

84. See Roth supra note 65, at 281.

85. There are those who claim that this would cause tremendous difficulties for administrators of hospitals, as they could not at any time predict patient refusal rates, related disruptive behavior, or the need for additional staff. Very little research on the impact of various competency criteria has been attempted. See, e.g., Paul S. Appelbaum, The Right to Refuse Treatment with Antipsychotic Medi-
and their attorney-collaborator, Meisel, have encapsulated the conflict as follows:

Patient's refusal[s] are among the most difficult situations physicians must handle. They must come to grips with the limits on their authority to order interventions and on their power singlehandedly to combat disease and restore health. Even physicians who are generally supportive of the idea of informed consent may balk at its implications when patients refuse care physicians believe to be highly beneficial. The reality, however, is that no human being is omnipotent. We must all face real limitations on our power to pursue our goals and advance our values. Having done what they can to insure informed decision making by patients who are refusing treatment . . . physicians can do no more. Their moral and legal obligations have been fulfilled. If in consequence patients are not treated precisely the way their physicians would have desired, that is the price we pay as a society for supporting individual freedom of choice.  

It would be intriguing to pursue more fully the consequences to health care, patient treatment, and patient's rights of adopting the position of these authors.

There is one consequence of a self-deterministic position that deserves mention. While it may be obvious, the point at least needs to be underscored. The more one argues for autonomy in adults, particularly the mentally disabled, the more accountability one must vest in these populations. I abhor the death penalty under any circumstances and believe it serves no justified societal purpose. Nevertheless, I am in essential agreement with the Supreme Court's judgment in *Penry v. Lynaugh*, 492 U.S. 302 (1989) that the Eighth Amendment's cruel and unusual punishment clause should not be used as an absolute bar to the death penalty with mentally retarded defendants who murder, as long the Supreme Court con-
continues to hold that the death penalty is, in some circumstances, a constitutional punishment.\textsuperscript{88}

In \textit{Penry}, the Court found it unconstitutional to omit instructions to the jury that it could consider a defendant’s mental impairment as a possibly mitigating factor during the penalty phase of a homicide prosecution.\textsuperscript{89} At the same time, however, the court rejected the use of mental age as an absolute barrier to execution,\textsuperscript{90} stating that “reliance on mental age to measure the capabilities of a retarded person for purposes of the Eighth Amendment could have a disempowering effect if applied in other areas of the law.”\textsuperscript{91} The Court pointed out that if the death penalty could be barred on the basis of mental age alone, “a mildly mentally retarded person could [also] be denied the opportunity to enter into contracts or to marry by virtue of the fact that he had a ‘mental age’ of a young child.”\textsuperscript{92} As dispiriting as the \textit{Penry} decision may be to the protectors of mentally impaired persons, it does provide the ever-important reminder that beneficence mod-

\textsuperscript{88}. See \textit{id.} See also Gregg v. Georgia, 428 U.S. 153 (1976) (death penalty itself is not per se “cruel and unusual punishment”).

\textsuperscript{89}. \textit{Penry v. Lynaugh}, 492 U.S. 302 (1989). The defendant in \textit{Penry}, a 22 year old parolee with a mental age estimated at six and a half, admitted to, and was convicted of, the murder of a woman who was “brutally raped, beaten, and stabbed with a pair of scissors in her home.” \textit{id.} at 307. At the sentencing phase of the trial, the Texas state court permitted imposition of the death penalty upon the jury’s answering “yes” to the following three interrogatories:

(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;

(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and

(3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

\textit{id.} at 310.

Defense counsel’s objections to these instructions included, \textit{inter alia}, that they “failed to ‘authorize a discretionary grant of mercy based upon the existence of mitigating circumstances’” and “failed to instruct the jury that it may take into consideration all of the evidence whether aggravating or mitigating in nature.” \textit{id.} at 311.

After denial of relief by both the district court, as well as the Fifth Circuit, the Supreme Court granted certiorari and held that the sentencing court’s failure to instruct and allow the jury to consider defendant’s mental retardation as mitigating his culpability denied defendant protection of the Eighth and Fourteenth Amendments. \textit{id.} at 328.

\textsuperscript{90}. \textit{id.} at 339-40. The Court in fact remanded the case for resentencing in order to allow a jury to consider the death penalty while at the same time considering the mitigating effects of defendant’s mental retardation. \textit{id.} at 340.

\textsuperscript{91}. \textit{id.}

\textsuperscript{92}. \textit{id.}
els, although seeking to protect vulnerable populations in one situation, may have the unintended effect of undercutting independence and self-determination in others.\footnote{3}

The same principle that applies to the mentally handicapped applies as well to children.\footnote{4} The APA did not enter an \textit{amicus} brief in \textit{Thompson v. Oklahoma}\footnote{5} nor in \textit{Stanford v. Kentucky},\footnote{6} two recent cases concerning the applicability of the Eighth Amendment to the execution of fifteen and seventeen year-olds, respectively.\footnote{7} As was true with the mentally retarded, the Court in \textit{Stanford} refused to find that the cruel and unusual punishment clause absolutely banned the death penalty for these minors.\footnote{8} Putting aside the fact that one must question the decency of any society that permits the execution of any one of us,\footnote{9} but particularly minors and the mentally disabled, it does seem reasonable to argue that each person must be individually assessed regarding

\footnote{93. See, e.g., Zinermon v. Burch, 494 U.S. 113 (1990) (holding voluntary assent of mental patient to treatment void if patient deemed incapable of consent); Muller v. Oregon, 208 U.S. 412 (1908) (holding that to protect women because of their capacity for bearing children adversely contributed to discrimination against women in the workplace). \textit{But see}, e.g., International Union, UAW v. Johnson Controls, 111 S. Ct. 1196 (1991) (excluding women with child-bearing capacity from lead-exposed jobs creates facial classification based on gender and explicitly discriminates against women on basis of sex).}


\footnote{95. 487 U.S. 815 (1988).}

\footnote{96. 492 U.S. 361 (1989).}

\footnote{97. In \textit{Thompson}, the fifteen year-old defendant participated in the brutal murder of his brother-in-law, who was shot in his throat and chest, cut in the abdomen, chained to a concrete block and thrown into a river, where the body remained for four weeks. \textit{Thompson}, 487 U.S. at 819. Defendant's counsel, as well as several \textit{amicis}, urged the Court to "draw a line" that would prohibit the execution of any person who was under the age of 18 at the time of the offense." \textit{Id}. at 838. The Court, however, stated that the case could be decided without addressing the 18-year-old cutoff point. \textit{Id}. In its place, the Court created a 16-year-old cutoff, stating that "the Eighth and Fourteenth Amendments prohibit the execution of a person who was under 16 years of age at the time of his or her offense." \textit{Id}.}

\footnote{98. Stanford v. Kentucky, 492 U.S. 361, 379-90 (1989). The Court actually went so far as to say that execution of 16 and 17 year-olds is not cruel and unusual punishment. \textit{Id}. at 379-80 (emphasis omitted).}

his or her culpability or responsibility. This permits us to argue with equal vigor that there should be no conclusive presumption that all mentally handicapped people or all children are incapable of making decisions regarding their own health care or other life-important matters.

My argument with the Supreme Court is that, when it comes to children, the Court is at best ignorant and at the worst, fraudulent and duplicitous. I am willing to settle, however, for the proposition that it is confused and unprincipled. The child advocacy movement has been one of the more forceful and publicized in recent history. It has focused primarily on the right of children to be protected from the choices or misconduct of others. This child-protection function is best exemplified by the passage of child abuse reporting statutes in all American jurisdictions. Children remain, however, like Ralph Ellison's hero, Invisible Persons whose views are infrequently invoked and whose wishes are rarely controlling. Children's right to choose "is not viewed as presently existing . . . but as maturing in the future." Parents as custodians, the state as protector, and advocates who seek to act in what they perceive to be the best interests of children represent them only in the sense of taking care of another. They are acting merely "in behalf of," that is, in the interest of, or for the benefit of, another. Those who act "in behalf of" are

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100. See, e.g., ROBERT H. MOOKIN & D. KELLY WEISBERG, CHILD, FAMILY AND THE STATE (1989) (legal text, central question: Who decides for children?); Hillary Rodham, Children Under the Law, 43 HARV. EDUC. REV. 487 (1973) (under law, children are generally considered incapable of knowing what is in their best interest); Drive for the Rights of Children, U.S. NEWS & WORLD REPORT, Aug. 5, 1974, at 42 (describing movement to extend legal rights afforded adults to children); Gregory's Divorce, WALL ST. J., Sept. 28, 1992, at 312 (Florida court allows 12-year-old boy to "divorce" his parents and be adopted by foster parents—first time child allowed to bring legal action in his own right).

101. For a discussion of more recent advances in the child advocacy movement, see infra notes 102, 108.


105. See HANNAH PITKIN, THE CONCEPT OF REPRESENTATION 126-27 (1967) (discussing difference between acting "in behalf of" and "on behalf of").
under no obligation to consult with those they take care of or to abide by their wishes. Such a role is different from acting "on behalf of," which connotes that the advocate is acting on the part of, or as the one represented might act. If we are genuinely to urge the expanded rights of children, such advocacy must include the right of children to full-fledged participation in the decision-making process when their significant interests and future hang in the balance.

Whether children will ever exercise the independent right to self-determination depends a great deal on how the Supreme Court allocates power among parents, children, and the various arms of federal and state government. In this regard, the future does not look good for autonomy. The Court has consistently held the view, as Justice Powell reiterated in Bellotti v. Baird, that "[s]tates validly may limit the freedom of children to choose for themselves in the making of important, affirmative choices with potentially serious consequences." That power, he said,

106. See id. 107. Id. 108. The ability of minors to make informed judgements on such matters, at least as assessed by courts, is vastly underestimated. See, e.g., Patricia I. Carter & Janet S. St. Lawrence, Adolescents' Competency to Make Informed Birth Control and Pregnancy Decisions: An Interface for Psychology and Law, 3 BEHAVIORAL SCI. & L. 309 (1985) (proposing research design to study competency of adolescent to make informed decisions about pregnancy issues); Melvin J. Guyer, Developmental Rights to Privacy and Independent Decision-Making, 21 J. AM. ACADEMY CHILD PSYCHIATRY 298 (1982) (asserting that parents could do more to foster independent decision making abilities and courts should do more to recognize them); Jeffrey C. Savitsky & Deborah Karras, Competency to Stand Trial Among Adolescents, 19 ADOLESCENCE 349 (1984) (demonstrating progressive increase in competency to stand trial throughout adolescence); Lois A. Weithorn & Susan B. Campbell, The Competency of Children and Adolescents to Make Informed Treatment Decisions, 53 CHILD DEVELOPMENT 1589 (1982) (finding no difference between 14 year-olds and adults on one measure of competency to consent to treatment); Bruce Ambuel & Julian Rappaport, Developmental Trends in Adolescents' Psychological and Legal Competence to Consent to Abortion, 16 L. & HUM. BEHAV. 129 (1992) (finding adolescents who considered abortion no less competent than legal adults to make decisions); Donald N. Bersoff, Children as Participants in Psychoeducational Assessment, in CHILDREN'S COMPETENCY TO CONSENT 149 (Gary Melton et al. eds., 1983) (asserting adolescents no less competent as decision makers compared to adults). 109. 443 U.S. 622, 635 (1979). 110. Id. Bellotti involved a question as to the constitutionality of a Massachusetts statute that required pregnant minors to obtain consent from both of their parents in order to procure an abortion. Id. at 625. The statute also provided that if either the parent or designated guardian refused to consent, such consent could be "obtained by order of a judge . . . for good cause shown." Id. The Court struck down the statute because it deemed unconstitutional the blanket requirement that all minors first check with their parents before an abortion, and stated that it felt that the appropriate procedure would be to allow the minor to circumvent that step and "go directly to a court without first consulting
was "grounded in the recognition that, during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them." Although acknowledging that children have constitutional rights and that the requirement of veto-like parental consent in all minor abortion cases unduly abridged those constitutional rights, Justice Powell asserted that "the State is entitled to adjust its legal system to account for children's vulnerability and their needs for 'concern, . . . sympathy, and . . . paternal attention.' " In Parham v. J.R., then Chief Justice Burger, announcing for the Court that minors did not have the right to a precommitment hearing when parents seek their admission to a hospital for treatment of behavioral disorders, repeated the Court's belief that "[m]ost children, even in adolescence, simply are not able to make sound judgments concerning many decisions, including their need for medical care or treatment." "Parents," he stated, "can and must make those judgments." 

Thus, the law considers children generally incapable of knowing and deciding what is best for themselves. In their salutary goal to protect families from unreasonable state interference and in a more questionable desire to protect children from immature and potentially harmful autonomous decisions, courts have presumed that parents, as preferred caregivers, are competent to represent their children's interests and when parents fail, that the State is.

Although the right of parents to control the upbringing of their children has strong foundations in tradition and in the Constitution's preference for minimal state interference in family

111. Id. at 635 (emphasis added).
112. Id. (quoting McKeiver v. Pennsylvania, 403 U.S. 528, 550 (1971) (plurality opinion)). The Court enumerated "three reasons justifying the conclusion that the constitutional rights of children cannot be equated with those of adults: the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing." Id. at 634.
114. Id. at 603. But see Weithorn & Campbell, supra note 108 (finding that children are capable of making mature and informed decisions regarding their health); Ambuel & Rappaport, supra note 108 (finding that adolescents who considered abortion appeared as competent as adults).
116. See id. at 602-03 ("[P]ages of human experience . . . teach that parents generally . . . act in the child's best interests.")

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life, that right, as a Harvard Law Review article pointed out a decade ago, "is nevertheless unusual among constitutional rights in that it protects the ability to control another person." Ordinarily, constitutional rights do not protect an individual's power to control someone else.

The Court's solicitude for protecting children turns out, in reality, to be a means for restricting them or treating them more onerously than adults. For example, while the Court has held that the physical discipline of adult prisoners violates the Eighth Amendment, it has nonetheless ruled that corporal punishment of school children is not so barred. Additionally, while the Court has deemed pretrial detention for adults to raise significant constitutional issues, it has nonetheless justified restraint of juvenile suspects on the basis of perceived immaturity, stating that "[c]hildren, by definition, are not assumed to have the capacity to take care of themselves." In educational settings, the Court has permitted school officials to restrict the conduct of students that would not be permitted in the case of adults. In *Bethel School District v. Fraser*, the Court upheld the right of school officials to discipline a high school student for presenting a speech to his contemporaries in support of a fellow student's candidacy for student elective office which, while not explicitly obscene, was sexu-

117. 93 Harv. L. Rev. 1156, 1353 (1980).
118. Id.
119. See Ingraham v. Wright, 430 U.S. 651 (1977). For further discussion of Ingraham, see infra note 165 and accompanying text.
120. Schall v. Martin, 467 U.S. 253, 265 (1984). Schall involved a challenge to a New York statute which authorized pretrial detention of an accused juvenile delinquent upon a finding of "serious risk" that the child "may before the return date commit an act which if committed by an adult would constitute a crime." Id. at 255 (quoting Fam. Ct. Act, N.Y. Jud. Law § 320.5(3) (McKinney 1983)). Suit was brought on behalf of all juveniles detained pursuant to the provision. Id. at 255-56. The district court struck down the provision as "permitting detention without due process of law." Id. at 256. The Second Circuit affirmed, opinion that "the detention period serves as punishment imposed without proof of guilt established according to the requisite constitutional standard." Id. (quoting Martin v. Strasburg, 689 F.2d 365, 373-74 (2d Cir. 1982)). Reversing, the Supreme Court concluded that the statute "serves a legitimate state objective, and that the procedural protections afforded pretrial detainees by the New York statute satisfy the requirements of the Due Process Clause of the Fourteenth Amendment to the United States Constitution." Id. at 256-57.

Although the Court stated that it viewed the juveniles' interest in freedom as "undoubtedly substantial," the Court stated that "juveniles, unlike adults, are always in some form of custody," and, as such, could be "subordinated to the State's parens patriae interest in preserving and promoting the welfare of the child." Id. at 265 (quoting Santosky v. Kramer, 455 U.S. 745, 766 (1982)).
121. 478 U.S. 675 (1986).
ally metaphoric.\textsuperscript{122} Virtually trumpeting its willingness to
denigrate the rights of minors compared to adults, the Court
stated that “simply because the use of an offensive form of ex-
pression may not be prohibited to adults making what the speaker
considers a political point, [it does not follow] that the same lati-
tude must be permitted to children.”\textsuperscript{123} Furthermore, in \textit{New
Jersey v. T.L.O.},\textsuperscript{124} the Court permitted searches and seizures of
students’ property without a warrant and on the basis of reason-
able suspicion rather than on the higher standard of probable
cause afforded adult suspects.\textsuperscript{125}

To end this litany, I cannot let go unnoticed that on the same
day in 1979 that the Court in \textit{Parham} decided that the Constitu-

\begin{footnotesize}
\begin{enumerate}
\item[122.] The speech was as follows:
   “I know a man who is firm — he’s firm in his pants, he’s firm in his
   shirt, his character is firm—but most . . . of all, his belief in you, the
   students of Bethel, is firm.

   Jeff Kuhlman is a man who takes his point and pounds it in. If
   necessary, he’ll take an issue and nail it to the wall. He doesn’t attack
   things in spurts—he drives hard, pushing and pushing until finally—he
   succeeds.

   Jeff is a man who will go to the very end—even the climax, for each
   and every one of you.
   So vote for Jeff for A.S.B. vice-president—he’ll never come be-
   tween you and the best our high school can be.”
\textit{Id.} at 687 (Brennan, J., concurring) (quoting student’s speech).
\item[123.] \textit{Id.} at 682. It is noteworthy that the Court was willing to so find while
   at the same time echoing, albeit somewhat hollowly, that “students do not ‘shed
   their constitutional rights to freedom of speech or expression at the schoolhouse
gate.’ ” \textit{Id.} at 3163 (quoting \textit{Tinker v. Des Moines Independent Community
School Dist.}, 393 U.S. 503, 506 (1969)).
\item[124.] 469 U.S. 325 (1985).
\item[125.] \textit{Id.} at 345. In \textit{T.L.O.}, a student was caught smoking in the school lavi-
tory and was reported to the principal. \textit{Id.} at 328. Although her compatriate
   admitted to smoking, T.L.O. denied it, and the principal demanded to see her
   purse, where he found not only cigarettes, but also cigarette rolling papers. \textit{Id.}
   Because “[i]n his experience, . . . [rolling papers were] closely associated with
   the use of marijuana,” he became suspicious and examined the purse further,
   finding “a small amount of marijuana, a pipe, a number of empty plastic bags, a
   substantial quantity of money in one-dollar bills, an index card that appeared to
   be a list of students who owed T.L.O. money, and two letters that implicated
   T.L.O. in marijuana dealing.” \textit{Id.}

   Although the Supreme Court stated that “the [Constitution] protects the
   rights of students against encroachment by public school officials,” \textit{id.} at 334,
   and noted that “a search of a child’s person or of a closed purse or other bag
   carried on her person . . . is undoubtedly a severe violation of subjective expec-
tations of privacy,” \textit{id.} at 339 (footnote omitted), the Court nonetheless pro-
ceeded to hold that “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.” \textit{Id.} at 341. Rather, the court simply per-
mitted the search as long as the rather vague criteria of ‘reasonableness, under
all the circumstances,’ was met. \textit{Id.}
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VULNERABLE POPULATIONS

1992]

tion did not require hearings for children when placed in mental hospitals against their will because they were too immature to make independent decisions, 126 it decided Fare v. Michael C. 127 In that case, a sixteen year old boy was being questioned by the police. 128 After his request to see his probation officer was refused, the boy implicated himself in a murder. 129 The Court held that the boy waived his right to remain silent under the Fifth and Fourteenth Amendments. 130 Although there was evidence that Michael was crying during the interrogation and had relatively little schooling, 131 the Court asserted that he waived his constitutional rights knowingly and intelligently. 132 As the Court said, "[t]here [was] no indication that he was of insufficient intelligence to understand the rights he was waiving, or what the consequences of that waiver would be." 133 In light of Michael C. and the juvenile death penalty cases, 134 to a majority of the Supreme Court, when children commit crimes they magically assume the decisionmaking ability and personal culpability of adults; when they are about to be placed in a mental hospital or seek to secure an abortion without parental or state involvement, they are but immature, unthinking children who must rely on their parents' judgment as to what is in their best interest. 135

126. For a further discussion of Parham, see supra notes 113-115 and accompanying text.
128. Id. at 710.
129. Id. at 711.
130. Id. at 728. In Michael C., the defendant was brought in for questioning on the basis of his, and his vehicle's, similarity to a description of an individual and an vehicle used in a crime. Id. at 709. The tape-recorded interrogation of Michael C. revealed that the officers explained to the defendant his Miranda rights and then asked if he understood them, to which he answered affirmatively. Id. at 710. When asked whether he wanted to waive his rights and talk to the officers "about this murder," defendant first feigned lack of knowledge and then inquired as to whether he could have his probation officer present. Id. The officers stated that they would not call the probation officer that night and again asked if defendant was willing to waive his rights and discuss the murder. Id. at 711. The defendant agreed and provided self-incriminating statements and sketches. Id. at 710-11.
131. Id. at 733 (Powell J., dissenting).
132. Id. at 728.
133. Id. at 726.
134. For a more complete discussion of juvenile death cases, see supra notes 95-99 and accompanying text.
I, of course, am not the first or only concerned complainer about this state of affairs. Such scholars interested in law and social science as Melton, Mnookin, Weithorn, and Wrightsman have noted their concern.\textsuperscript{136} What is particularly galling to me, as well as others, is that the Court justifies its differential treatment of children on the unsupported assumptions that all children are peculiarly vulnerable, are unable to make critical decisions in an informed, mature manner, and need the control and guidance of their parents.\textsuperscript{137} While these assumptions may be correct as to infants and elementary school children, it is very much open to doubt whether it is true about adolescents.\textsuperscript{138} At the very least, these assumptions are empirically testable hypotheses. And, in the main, the existing data do not support these hypotheses relative to adolescents.\textsuperscript{139}

In amicus briefs it submitted in Hartigan v. Zbaraz,\textsuperscript{140} and in Hodgson v. Minnesota,\textsuperscript{141} two cases regarding minors' right to abortions, the APA argued that psychological theory and sound research about cognitive, social and moral development strongly support the conclusion that most adolescents are competent to make informed decisions.\textsuperscript{142} The data do not support the Court's presumption that adolescents typically lack the capacity to make sound health care decisions, including decisions about abortions.\textsuperscript{143} In addition, the evidence does not support the proposi-


\textsuperscript{138.} See, e.g., Weithorn & Campbell, supra note 108.

\textsuperscript{139.} See id.

\textsuperscript{140.} 484 U.S. 171 (1987).

\textsuperscript{141.} 110 S. Ct. 2926 (1990).


\textsuperscript{143.} See Howard S. Adelman et al., Competence of Minors to Understand, Evaluate, and Communicate About Their Psychoeducational Problems, in The Rights of Children
tion that parental involvement in such decisions fosters productive intrafamily communication or ensures a more competent decision.\footnote{144}

Did the Supreme Court listen to such evidence? The answer, not unexpected given its decisions in the 1980s, was decidedly "No". In Hodgson, and its companion case, Ohio v. Akron Center for Reproductive Health,\footnote{145} decided on the same day in June 1990, the Court upheld the right of the State to require prior notification to parents before a physician can perform an abortion on unmarried, unemancipated young women below eighteen years of age.\footnote{146} The Court held these same restrictions unconstitutional.


\footnote{145. 497 U.S. 502 (1990).}

\footnote{146. In Hodgson, the regulation at issue was a Minnesota statute described by the Court as follows:

[N]o abortion shall be performed on a woman under 18 years of age until at least 48 hours after both of her parents have been notified. In subdivisions 2-4 of the statute the notice is mandatory unless (1) the attending physician certifies that an immediate abortion is necessary to prevent the woman's death and there is insufficient time to provide the required notice; (2) both of her parents have consented in writing; or...}
as to adults in 1983.\textsuperscript{147} In a highly fragmented opinion, Justice Stevens, speaking for the majority in \textit{Hodgson}, agreed that the "[s]tate has a strong and legitimate interest in the welfare of its young citizens, whose immaturity, inexperience, and lack of judgment may sometimes impair their ability to exercise their rights wisely."\textsuperscript{148}

As noted, this result was not unexpected. To most of the Supreme Court, the "pages of human experience,"\textsuperscript{149} at least as lived by its members, no matter how wrong, often is far more persuasive than data gleaned from methodologically sound research. As I have noted in a 1986 article in \textit{Law \& Human Behavior},\textsuperscript{150} the

\textsuperscript{148} \textit{Hodgson}, 497 U.S. at 417. The Court revisited the issue in Planned Parenthood of Southeastern Pennsylvania v. Casey, 112 S. Ct. 2791 (1992). The Court addressed this issue in three short paragraphs, merely reiterating its views in previous cases and without citing new social science evidence supporting earlier research findings that older adolescents have the decisionmaking capabilities of average adults. \textit{Id.}
relationship between law and social science is less than perfect. "Like an insensitive scoundrel involved with an attractive but fundamentally irksome lover who too much wants to be courted, the judiciary shamelessly uses the social sciences." 151 Courts cite the results of psychological research when they believe it will enhance the elegance of their opinions, as in the most oft-cited example of Brown v. Board of Education, but empiricism is readily discarded when more traditional legally acceptable bases for decisionmaking are available.

Illustrative examples are legion, but, in the interests of space, I will select but a few. In 1968, the Supreme Court in Witherspoon v. Illinois held the cited social science research too "tentative and fragmentary" to be useful. 153 The results from three then extant studies showed that juries from whom individuals with scruples against the death penalty were excluded were prone to support the prosecution. 154 The Court left open the possibility it would

151. Id. at 155-56.
152. 347 U.S. 483 (1954). In Brown, the Court cited the work of psychologist Kenneth Clark to support the finding that state-sanctioned segregation instills a debilitating sense of inferiority in black children. Id. at 494 (citing K.B. Clark, Effect of Prejudice and Discrimination on Personality Development (Midcentury White House Conference on Children and Youth, 1950)).
154. Id. at 517. The "death-qualification" of the jury in Witherspoon occurred pursuant to an Illinois statute that provided: "In trials for murder it shall be a cause for challenge of any juror who shall, on being examined, state that he has conscientious scruples against capital punishment, or that he is opposed to the same." Id. at 512 (quoting Ill. Rev. Stat., c. 38, § 743 (1959)).

In accordance with this statute, the trial court permitted the dismissal of 47 consecutive potential jurors on grounds that they were against the death penalty and could thus not be relied upon to find the defendant guilty if they knew the sentence would be the death sentence. Id. at 512-13. Defense counsel argued that such a jury, unlike one chosen at random from a cross-section of the community, must necessarily be biased in favor of conviction, for the kind of juror who would be unperturbed by the prospect of sending a man to his death . . ., is the kind of juror who would too readily ignore the presumption of the defendant's innocence, accept the prosecution's version of the facts, and return a verdict of guilt. Id. at 516-17.

The court considered the three studies cited by defendant, but found them unpersuasive, concluding that "[i]n light of the presently available information, we are not prepared to announce a per se constitutional rule requiring the reversal of every conviction returned by a jury selected as this one was." Id. at 518. The three studies were, W.C. Wilson, Belief in Capital Punishment and Jury Performance (unpublished manuscript, University of Texas, 1964 cited in Witherspoon, 391 U.S. at 517 n.10); F.J. Goldberg, Attitude Toward Capital Punishment and Behavior as a Juror in Simulated Capital Case (unpublished manuscript, Morehouse College, undated cited in Witherspoon, 391 U.S. at 517 n.10); H. Zeisel, Some Insights Into the Operation of Criminal Juries 42 (Confidential
rule differently if further research more clearly demonstrated that these death-qualified juries were prosecution prone.\textsuperscript{155}

Social scientists took the Court's invitation seriously and produced a great deal of what appeared to be legally relevant, methodologically sound research on the issue.\textsuperscript{156} Much of that research was originally published or reviewed in a special issue of \textit{Law and Human Behavior}, the official journal of the American Psychology-Law Society, in 1984.\textsuperscript{157} It was presented to the Court in 1985, in a carefully crafted \textit{amicus} brief by the APA in \textit{Lockhart v. McCree}.\textsuperscript{158}


155. \textit{Witherspoon}, 391 U.S. at 517 n.11.


158. 476 U.S. 162 (1986). \textit{Lockhart} also involved the "death-qualification" of a jury by removal of potential jurors who claimed that they could not vote for the imposition of the death penalty. \textit{Id.} at 166. In this case, both the Federal
I was the nominal drafter of the brief, along with my colleague David Ogden who had clerked for Justice Blackmun. We were aided immeasurably by the participation of five social psychologists directly involved in legal issues—John Monahan, Phoebe Ellsworth, Michael Saks, Reid Hastie, and Craig Haney. Although the dissent was impressed with the social science evidence, calling it "overwhelming," 159 Chief Justice Rehnquist, speaking for the majority, found "several serious flaws" in the social science evidence introduced by the defendant, relied on by lower courts, and described in the APA's amicus brief. 160 It was a methodological critique worthy of a hostile dissertation chairman. 161 The detail of the critique was particularly ironic given

District Court for the Eastern District of Arkansas and the Eighth Circuit agreed that there was 'substantial evidentiary support . . . that the removal for cause of Witherspoon-excludables resulted in 'conviction prone' juries [in violation of defendant's] constitutional right to a jury selected from a fair cross section of the community.' 162

159. Id. at 184 (Marshall, J., dissenting).
160. Id. at 168.
161. Justice Rehnquist's logic in refuting the entirety of the social science evidence does not withstand even casual scrutiny. With a fine-toothed comb, Justice Rehnquist sorted through each study, identifying each of the studies' imperfections as replications of the decisionmaking process of death-qualified juries. 163 A sample of the Court's statement will illustrate the point:

McCree introduced into evidence some 15 social science studies in support of his constitutional claims, but only 6 of the studies even purported to measure the potential effects on the guilt-innocence determination of the removal from the jury of Witherspoon-excludables. Eight of the remaining nine studies dealt solely with generalized attitudes and beliefs about the death penalty . . . and were thus, at best, only marginally relevant to the constitutionality of McCree's conviction. . . . Of the six studies introduced by McCree that at least purported to deal with the central issue in this case . . . three were also before this Court when it decided Witherspoon [when it found the data too tentative and fragmentary to establish that jurors not opposed to the death penalty tend to favor the prosecution in the determination of guilt]. . . . It goes almost without saying that if these studies were 'too tentative and fragmentary' to make out a claim of constitutional error in 1968, the same studies, unchanged but for having aged some 18 years, are still insufficient to make out such a claim in this case.

Id. at 168-71 (footnotes omitted).

It is statements such as these that may lead one to see the Court, as mentioned earlier, as more fraudulent and duplicitous than merely confused and unprincipled. In the analysis quoted from above, Justice Rehnquist has completely ignored the cumulative nature of the science, and instead appears to require that each study perfectly replicate the death-qualified jury. This, of course, is completely contrary to the way data are considered in the social sciences, or any of the sciences for that matter, where converging evidence from multifarious sources and types of studies, all pointing in the same general direction, actually strengthens the point being made. For Justice Rehnquist to claim that three studies, deemed tentative and fragmentary in 1968 because they stood
the Court's statement in an earlier case in which social science evidence was at issue, that "[i]t is unrealistic to expect either members of the judiciary or state officials to be well versed in the rigors of experimental or statistical technique." \(^{162}\) Most relevant is Justice Rehnquist's illuminating comment in *Lockhart* that:

"[W]e will assume for purposes of this opinion that the studies are both methodologically valid and adequate to establish that 'death qualification' in fact produces juries somewhat more 'conviction-prone' than 'non-death-qualified' juries. We hold, nonetheless, that the constitution does not prohibit the States from 'death qualifying' juries in capital cases." \(^{163}\)

In the 1976 death penalty cases, the Court was similarly unpersuaded by social science data indicating that execution was ineffective as a general deterrent and ruled that properly framed statutes permitting the death penalty did not violate the Cruel and Unusual Punishment Clause of the Constitution. \(^{164}\) In *Ingramham v. Wright*, the Court refused to hold that corporal punishment of school children was cruel and unusual. \(^{165}\) Although there was substantial research by psychologists supporting the contention that physical punishment produced long-range negative effects, \(^{166}\) the Court cited no empirical studies and relied mainly on

alone in the literature, must still remain such after substantial buttressing by further research, is at best sophistic and at worst purposely deceitful. *See generally* JOHN MONAHAN & LAURENS WALKER, SOCIAL SCIENCE IN LAW 33-66 (2d ed. 1990) (describing empirical approach to social science and increased validity of cumulative research).

163. *Lockhart*, 476 U.S. at 173. To social scientists, the majority opinion, to say the least, is "disheartening," and will be a significant disincentive for future experiments on the topic. "After McCree, there is little likelihood that additional research on death qualification will influence the development of the law. Social scientists who hope to see their research used in litigation and cited in legal opinions would be well advised to work in another area." William C. Thompson, *Death Qualification After Wainwright v. Witt and Lockhart v. McCree*, 13 L. & HUM. BEHAV. 185, 205 (1989).
164. In five cases decided the same day, the Court rejected the social science evidence concerning the ineffectiveness of the death penalty as a deterrent. Gregg v. Georgia, 428 U.S. 153 (1976) ("Although some of the studies suggest that the death penalty may not function as a significantly greater deterrent than lesser penalties, there is no convincing empirical evidence either supporting or refuting this view."); Profitt v. Florida, 428 U.S. 242 (1976); Jurek v. Texas, 428 U.S. 262 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976); Roberts v. Louisiana, 428 U.S. 325 (1976).
166. *See, e.g.*, ALBERT BANDURA, AGGRESSION: A SOCIAL LEARNING ANALYSIS (1973) (people are not always consistent in their response to aggressive behav-
four or five unobtainable education texts and reports. The Court noted that centuries of pedagogical tradition and current state legislation overwhelmingly sanctioned corporal punishment. Thus the Court erroneously concluded that "[p]rofessional and public opinion is sharply divided on the practice."^167

As an aside, the Court's reliance on public opinion in Ingraham is instructive, as twelve years later, Justice Scalia, writing for the majority in Stanford v. Kentucky,^168 rejected public opinion as evidence of the evolving standards of decency.^169 In fact, like Chief Justice Rehnquist, Justice Scalia rejected all social science evidence in that case, disparagingly calling it "socioscientific" or "ethicoscientific," but stating in deciding the issue that "socioscientific, ethicoscientific, or even purely scientific evidence is not an available weapon."^170 This belittling of social evidence is reminiscent of Justice Powell's concurring opinion in the jury size cases a decade ago when he acerbically noted, after Justice Blackmun's use of social science data in support of the holding that five-person juries violated the Constitution, his "reservations as to the wisdom—as well as the necessity—of Mr. Justice Blackmun's heavy reliance on numerology derived from statistical studies."^171

Another possibly even more egregious rejection of social sci-

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169. For a more complete discussion of Stanford, see supra notes 98-99 and accompanying text.

170. Stanford, 492 U.S. at 378 (emphasis added).

ence data occurred in *Bowers v. Hardwick*, the controversial, heavily publicized five-four decision in which the Court in 1986 held that the Constitution does not confer a fundamental right upon consenting homosexuals to engage in oral or anal intercourse in private. The APA contributed an *amicus curiae* brief in that case, with a great deal of scientific and clinical data concerning the beneficial aspects of diverse methods of intercourse, the absence of any evidence that either homosexuality or method of intercourse is pathological in and of itself, and the harmful effects of deterring such conduct. Nonetheless, the Court rejected this evidence and upheld sodomy statutes in an opinion that, in its most favorable light, can only be described as medieval and callous. Research was ignored in favor of history and morality. Sodomy statutes, former Chief Justice Burger opined, were "firmly rooted in Judeo-Christian moral and ethical standards."

By way of contrast, the Court relied on what it considered


173. See id. at 194. In *Bowers*, respondent had been charged with violating the Georgia statute criminalizing sodomy by engaging in sodomy with another male in the bedroom of his own home. Id. at 187-88.


adequate social science evidence when in H.L. v. Matheson,\textsuperscript{176} it said that the "emotional, and psychological consequences of an abortion are serious and can be lasting . . . particularly so when the patient is immature."\textsuperscript{177} The Court cited two articles to support its conclusion,\textsuperscript{178} both published prior to the Court's decision in Roe v. Wade,\textsuperscript{179} when elective abortions were difficult to obtain and most abortions were either illegal or performed only for therapeutic reasons.\textsuperscript{180} The first article limited its study to women receiving therapeutic abortions, that is, abortions where there is a substantial risk that continuation of pregnancy would gravely impair the physical or mental health of the woman.\textsuperscript{181} In fact, the authors candidly admitted that "this study is sociologically skewed (since it draws in its entirety upon young unmarried women) as well as methodologically skewed because of the high refusal rate (which may have resulted in a heavier weighting toward those experiencing difficulties)."\textsuperscript{182} The second article was in fact an account of rather unsystematic psychoanalytic impressions of a sample of adolescents who carried their pregnancy to term.\textsuperscript{183}

The most recent case exemplifying both the Court's duplicity and its use of social science evidence when it serves its purpose is Lee v. Weisman.\textsuperscript{184} In Lee, the Court held that it was a violation of

\textsuperscript{176}. 450 U.S. 398 (1981).
\textsuperscript{177}. Id. at 411.
\textsuperscript{178}. Id. at 411 n.20.
\textsuperscript{179}. 410 U.S. 113 (1973).
\textsuperscript{181}. See Deborah Maine, Does Abortion Affect Later Pregnancies?, 11 FAM. PLANNING PERSPECTIVES 98 (1979).
\textsuperscript{182}. See id.
\textsuperscript{183}. Judith S. Wallerstein et al., Psychological Sequelae of Therapeutic Abortion in Young Unmarried Women, 27 ARCH. GEN. PSYCHIATRY 828 (1972). The extant research does not support the claim that adolescent abortions lead to any long-term psychological difficulties. See, e.g., Nancy Adler & Peggy Dolcini, Psychological Issues in Abortions for Adolescents, in ADOLESCENT ABORTION: PSYCHOLOGICAL & LEGAL ISSUES 74 (Gary Melon ed. 1986) (considering psychological issues involved in alternative of abortion during decision making phase before procedure); Michael B. Bracken et al., The Decision to Abort and Psychological Sequelae, 15 J. NERVOUS & MENTAL DISEASE 155 (1974) (knowledge of abortion by parents and partner not itself associated with positive reaction); Joy D. Ososky & Howard J. Ososky, Teenage Pregnancy: Psychosocial Considerations, 21 CLINICAL OBSTETRICS & GYNECOLOGY 1161 (1978) (presenting data concerning psychological antecedents, impact, and outcome of teenage pregnancy); Lisa Roseman Shusterman, The Psychological Factors of the Abortion Experience: A Critical Review, 1 PSYCHOLOGY WOMEN Q. 79 (1976) (finding psychological consequences of abortion on request "mostly benign").
\textsuperscript{184}. 112 S. Ct. 2649 (1992).
the Establishment Clause to allow clergy to offer a prayer as part of official public middle and high school graduation ceremonies. This may be a salutary outcome from a First Amendment perspective, but part of the Court’s rationale was that allowing prayer in public schools risked the indirect coercion of students who objected by placing them in the position of participating or protesting:

We do not address whether that choice is acceptable if the affected citizens are mature adults, but we think the State may not, consistent with the Establishment Clause, place primary and secondary school children in this position. Research in psychology supports the common assumption that adolescents are often susceptible to pressure from their peers toward conformity, and that the influence is strongest in matters of social convention.185

In support of this “common assumption” the Court relied on three studies.186 These studies, at best, only partially support the Court’s interpretation of the research.187 I do not often agree with Justice Scalia, but in dissent he complained that the majority “invents a boundless, and boundlessly manipulable, test of psychological coercion, which promises to do for the Establishment Clause what the Durham rule did for the insanity defense.”188 More pertinent is that the Court, once again, is quite amenable to citing research that reinforces its concept of minors as passive, unthinking, exploitable, and barely autonomous human beings and ignoring research that demonstrates their ability to think and act with a reasonable degree of maturity.

These may be rather depressing facts to bring up in a symposium celebrating interdisciplinary perspectives on autonomy held

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185. Id. at 2658-59.
187. Brittain concluded that the extent to which adolescents conform to peer pressure is determined by the situation confronting them and that in many instances “parents are perceived as the more competent guides.” Brittain, supra note 186, at 389. Brown et al. found that peer pressure was more salient in guiding “prosocial” rather than antisocial activity. Brown et al., supra note 186, at 529. See Classen & Brown, supra note 186, to the same effect.
188. Lee, 112 S. Ct. at 2679 (Scalia, J., dissenting) (citation omitted).
at one of a handful of universities to sponsor and generously support a J.D./Ph.D. program in law and psychology. However, donning the mantel of optimism, I see these programs as producers of legally sophisticated, scientifically knowledgeable scholars who can conduct empirically sound, methodologically rigorous, situation-specific research. Such scholars are trained to avoid the inclination of clinicians and experimentalists to be advocates rather than neutral scientists attempting to inform the courts. If these programs continue to be successful, perhaps courts may finally arrive at judicially and empirically justified decisions that will withstand both legal and scientific scrutiny, finally recognizing that autonomy is to be preferred to state-imposed beneficence.