Law and Neurobiology: Adolescent Development

On Tuesday, May 22, we will be discussing two United States Supreme Court cases concerned with neurobiological evidence as it pertains to adolescent development. In the first case, *Ohio v. Akron Center* (1990), the Court considered an Ohio law that required parental notification of minors seeking an abortion. See http://www.law.cornell.edu/supct/html/88-805.ZO.html In the second case, Roper v. Simmons (2005), the Court considered the case of Christopher Simmons, who was sentenced to death for a murder he committed as a 17-year-old. http://www.law.cornell.edu/supct/html/03-633.ZS.html The Court asked the question: Is the imposition of the death penalty on a person who commits a murder at age seventeen "cruel and unusual," and thus barred by the Eighth and Fourteenth Amendments? In both cases, the American Psychiatric Association filed amicus ("friend of the court") briefs.

Please read these documents and consider the following questions before coming to class:

Selection from amicus brief from Alabama et. al. **BELOW IN THIS DOCUMENT**

Selections from APA Amicus Brief from Ohio v. Akron **BELOW IN THIS DOCUMENT**

AMA, APA, et. al. Amicus Brief on Roper v. Simmons, pp. 1-24. **WEB POSTING**

1. What position is taken by the APA in the Roper v. Simmons amicus brief? What position is taken by the APA in the Ohio v. Akron amicus brief? Are the positions consistent?

2. What do you think about the ability of adolescents to make "adult" decisions in these circumstances?

3. The authors of these amicus briefs appeal to various kinds of evidence, including general knowledge about adolescents, psychology, sociology, and neurobiology. What approach is most persuasive? How much weight does the neurological evidence carry in comparison to other kinds of evidence?

Selection from amicus brief filed by American Psychiatric Association for *Ohio v. Akron*

1. Psychological theory and research about cognitive, social and moral development strongly supports the conclusion that most adolescents are competent to make informed decisions about important life situations.

Developmental psychologists [FN44] have built a rich body of research examining adolescent' capacities for understanding, reasoning, solving problems and making decisions, especially in comparison to the same capacities in adults. Research consistently supports the conclusion that there is a predictable development during late childhood and early adolescence of the capacity to think rationally about increasingly complex problems and decisions. Although there are several competing theories of cognitive development, these theories each recognize that a revolution in rationality occurs during early adolescence.

FN44. Developmental psychologists are scientists who study cognitive, perceptual, personality, social and emotional development along the life span of individuals.

The specific reasoning abilities that develop during early adolescence are closely akin to the capacity to consent, and include the capacity to reason abstractly about hypothetical situations; the capacity to reason about multiple alternatives and consequences; the capacity to consider more variables and combine variables in more complex ways; and the capacity for systematic, exhaustive use of information. [FN45]

FN45. For a discussion of these changes from three theoretical perspectives, see B. INHELDER & J. PIAGET, THE GROWTH OF LOGICAL THINKING FROM CHILDHOOD TO ADOLESCENCE (1958); Braine & Rumain, Logical Reasoning in HANDBOOK OF CHILD PSYCHOLOGY, VOLUME III: COGNITIVE DEVELOPMENT 263 (P.H. Mussen ed., J.H. Flavell & E.M. Markman vol. eds. 1983); Sternberg & Powell, The Development of Intelligence in HANDBOOK OF CHILD PSYCHOLOGY, VOLUME III: COGNITIVE DEVELOPMENT 341 (P.H. Mussen ed., J.H. Flavell & E.M. Markman vol. eds. 1983).

Competent decisionmaking is also dependent on social and personality development including the development of personal values, identity, autonomy, and the ability to resolve social dilemmas. Research in social and personality development contradicts the stereotype of adolescence as a period when young people are paralyzed by a struggle for identity, social confusion and rebellion against parents. In fact, by middle adolescence (age 14-15) young people develop abilities similar to adults in reasoning about moral dilemmas, [FN46] understanding social rules and laws, [FN47] reasoning about interpersonal relationships [FN48] and interpersonal problems, [FN49] and reasoning about custody preference during parental divorce. [FN50] By middle adolescence most young people develop an adult-like identity and understanding of self. [FN51] Furthermore, the majority of adolescents do not repudiate parental values, but incorporate them, during their search for autonomy. [FN52] Thus, by age 14 most adolescents have developed adult-like intellectual and social capacities including specific abilities outlined in the law as necessary for understanding treatment alternatives, considering risks and benefits, and giving legally competent consent.

FN46. Rest, Morality in HANDBOOK OF CHILD PSYCHOLOGY, VOLUME III: COGNITIVE DEVELOPMENT 556 (P.H. Mussen ed., J.H. Flavell & E.M. Markman vol. eds. 1983); Kohlberg, Moral Stages and Mortalization: The Cognitive-Developmental Approach in MORAL DEVELOPMENT AND BEHAVIOR: THEORY, RESEARCH AND SOCIAL ISSUES (Lickona ed. 1976); Kohlberg & Hersch, Moral Development: A Review of the Theory, 16 Theory into Practice 53 (1977).

FN47. Tapp & Kohlberg, Developing Senses of Law and Legal Justice in LAW, JUSTICE AND THE INDIVIDUAL IN SOCIETY: PSYCHOLOGICAL AND LEGAL ISSUES 89 (J. Tapp. & F. Levine, eds. 1977).

FN48. R. SELMAN, THE GROWTH OF INTERPERSONAL UNDERSTANDING: DEVELOPMENTAL AND CLINICAL STUDIES (1980).

FN49. Marsh, Serafica & Barenboim, Effect of Perspective-taking Training on Interpersonal Problem Solving, 51 Child Development 140 (1980); Marsh, Serafica & Barenboim, Interrelationships Among Perspective Taking, Interpersonal Problem Solving, and Interpersonal Functioning, 138 J. Genetic Psychology 37 (1981).

FN50. Greenberg, An Empirical Determination of the Competence of Children to Participate in Child Custody Decision-Making (1983) (Dissertation Abstracts Int'l).

FN51. Harter, Developmental Perspectives On the Self System in HANDBOOK OF CHILD PSYCHOLOGY, VOLUME IV: SOCIALIZATION, PERSONALITY & SOCIAL DEVELOPMENT 275 (Heatherington, ed. 1983).

FN52. See Conger, A World They Never Knew: The Family and Social Change in TWELVE TO SIXTEEN 197 (J. Kagan & R. Coles eds. 1972); Brittain, supra note 13.

There is not as much information about the practical decisionmaking competence of younger adolescents--those aged 11 to 13. [FN53] Research has indicated that there is considerable variability in cognitive development and decisionmaking competence among adolescents, and there are some 11-to-13-year-olds who possess adult-like capabilities in these areas. [FN54] It is instructive that young adolescents are deemed capable in many state statutes of giving informed consent to various medical procedures, including mental health services, treatment for sexually transmitted diseases, and surgery related to childbirth. Should they have a child, young adolescents are typically deemed competent to make health care decisions both for themselves and their child. [FN55] At a minimum, therefore, a case-by-case approach to assessing decisionmaking competence among young adolescents is essential.

FN53. Because few young adolescents become pregnant, it is difficult for researchers to obtain a sample large enough to study the abortion decisionmaking competence of this group.

FN54. See sources cited supra notes 46-51.

FN55. MORRISSEY, HOFFMAN & THROPE, supra note 8, at 43.

For all the reasons set forth in this section, the assumption that adolescents as a group are less able than adults to understand, reason and make decisions about intellectual and social dilemmas is not supported by contemporary psychological theory and research.

2. Research does not support the States' assumption that adolescents typically lack the capacity to make sound health care decisions, including decisions about abortion.

There has been substantial empirical research testing adolescents' decisionmaking performance when faced with various types of practical problems involving treatment and non-treatment decisions. Some of these studies specifically compare the performance of adolescents to that of adults in making such decisions. [FN56] The evidence does not support the assumption underlying notification laws that adolescents lack an adult's capacity to understand and reason about problems and decisions, including medical and psychological treatment alternatives, or the ability to comprehend and consider risks and benefits regarding treatment alternatives. [FN57]

FN56. Studies comparing adolescents and adults include Belter & Grisso, Children's Recognition of Rights Violations in Counseling, 15 Prof. Psychology 899 (1984) [hereinafter Belter & Grisso]; Grisso, Juveniles' Capacities to Waive Miranda Rights: An Empirical Analysis, 68 Calif. L. Rev. 1134 (1980) [hereinafter Grisso]; Lewis, A Comparison of Minors' and Adults' Pregnancy Decisions, 50 Am. J. Orthopsychiatry 446 (1980); Weithorn & Campbell, supra note 41; Ambuel, Developmental Change in Adolescents' Psychological and Legal Competence to Consent to Abortion: An Empirical Study and Quantitative Model of Social Policy (1989) (Dissertation Abstracts Int'l) [hereinafter Ambuel].

FN57. See, e.g., Melton & Pliner, Adolescent Abortion: A Psycholegal Analysis in ADOLESCENT ABORTION: PSYCHOLOGICAL & LEGAL ISSUES 1 (G. Melton ed. 1986) [hereinafter Melton & Pliner]; Weithorn, Children's Capacities in Legal Contexts in CHILDREN, MENTAL HEALTH, AND THE LAW 25 (N. Reppucci & Assoc. eds. 1984); Melton, Developmental Psychology and the Law: The State of the Art, 22 J. Fam. L. 445 (1984); Grodin & Alpert, Informed Consent and Pediatric Care in CHILDREN'S COMPETENCE TO CONSENT 93 (G. Melton, G. Koocher & M. Saks eds. 1983); Weithorn, Developmental Factors and Competence to Make Informed Treatment Decisions in LEGAL REFORMS AFFECTING CHILD AND YOUTH SERVICES 85 (G. Melton ed. 1982); Wald, Children's Rights: A Framework for Analysis, 12 U.C. Davis L. Rev. 255 (1979); Ferguson, The Competence and Freedom of Children to Make Choices Regarding Participation in Rescarch: A Statement, 34 J. Soc. Issues 114 (1978); Grisso & Vierling, Minors' Consent to Treatment: A Developmental Perspective, 9 Prof. Psychology 412 (1978); Schowalter, The Minor's Role in Consent for Mental Health Treatment, 17 J. Am. Acad. Child Psychiatry 505 (1978).
Not all older adolescents and not all adults reach the highest levels of competence to consent to treatment, see Roth, Meisel, & Lidz, Tests of Competence to Consent to Treatment, 135 Am. J. Psychiatry 279 (1977), but there is no substantial support for the proposition that cognitive abilities of the two groups are different.

The two most directly relevant studies compared abortion decisionmaking by adolescents and adults at the time they received pregnancy tests in actual treatment settings. Results of both are consistent with the research and theory reviewed above showing that "adolescents are as able to conceptualize and reason about treatment alternatives as adults are." [FN58] In one study, [FN59] 16 unmarried adolescents, aged 13-17, and 26 unmarried adult women, aged 18-25, were asked to consider their options for responding to their own pregnancies at the time of their pregnancy tests. Standardized questions were used to determine their knowledge of pregnancy-related laws, sources of advice they had received or expected to seek, the range of factors one could consider in making choices about one's pregnancy, and the reasons for their own choices. The study revealed no differences between the unmarried minors and adults in the decisions they made or in their knowledge of pregnancy-related laws. Further, when asked to describe factors that could affect one's choice of abortion or motherhood, minors differed very little from adults in the frequency with which they mentioned various considerations and consequences. There were no differences on such factors as the positive emotions associated with mothering, financial concerns, the effect of given choices on one's goals or present lifestyle, or social stigma.

FN58. APA Interdivisional Committee on Adolescent Abortion, Adolescent Abortion, Psychological and Legal Issues, 42 Am. Psychologist 73, 73 (1987) [hereinafter Interdivisional Committee Study].

FN59. Lewis, A Comparison of Minors' and Adults' Pregnancy Decisions, 50 Am. J. Orthopsychiatry 446 (1980).

The second highly relevant study examined pregnancy decisionmaking in 15 adolescents aged 14-15, 19 adolescents aged 16-17, and 40 adults aged 18-21, at the time they sought a pregnancy test at a women's health clinic. [FN60] The sample was representative of various economic, racial and religious backgrounds. Each person participated in an extensive decisionmaking interview conducted by a counselor, which was audio-taped and later rated by trained, independent raters. The four measures used to evaluate decisionmaking competence were suggested by this Court's understanding of competency, [FN61] and focused on the individual's cognitive and volitional capacity: consideration of risks and benefits including immediate and future consequences; quality and clarity of reasoning; number and types of factors considered; and volition, i.e., making a decision without being coerced by or acquiescing to others. Results showed that minors aged 14 to 17, who considered abortion as an option, equaled adults in all four measures of competence. Taken together these two studies suggest that minors equal adults "in their 'competence' to imagine the various ramifications of the pregnancy decision," [FN62] and their capacity to make a reasoned choice when facing unplanned pregnancy. [FN63]

FN60. Ambuel, supra note 56; Ambuel & Rappaport, Developmental Change in Adolescents' Psychological and Legal Competence to Consent to Abortion (1989) (Paper Presented at American Psychological Association Convention, available from amicus counsel of record).

FN61. See Danforth, 428 U.S. at 104 (Stevens, J., concurring in part and dissenting in part). See also Wadlington, Consent to Medical Care for Minors: The Legal Framework in CHILDREN'S COMPETENCE TO CONSENT 57 (G.P. Melton, G. Koocher & M. Saks eds. 1983).

FN62. Id. See Lewis, Minors' Competence to Consent to Abortion, 42 Am. Psychologist 84 (1987).

FN63. In another relevant study, 14-year old minors and adults were presented with four vignettes about individuals suffering from particular medical or psychological disorders. They were given detailed information about the nature, purpose, risks and benefits of the alternative treatments, and were asked to choose among them. The participants were then asked a series of standardized questions about their decisions. In most instances, the responses showed no difference between the adults and the 14-year-olds on any of the scales of competency used in the study--factual understanding, inferential understanding (appreciation), reasoning, choice of reasonable option, and evidence of choice. Weithorn & Campbell, supra note 41. For a confirming study, see Belter & Grisso, supra note 56; Grisso, supra note 56.

Indeed, the National Academy of Sciences, in a major review of the research, observed that almost all minors who employ judicial bypass procedures to avoid parental involvement are held to be mature, and their decisions to have an abortion are held to be in their best interests. [FN64] This evidence strongly suggests that many adolescents who choose not to consult with their parents are competent to make the abortion decision. [FN65]

FN64. See NAS REPORT, supra note 10, at 194-195. For supporting research see Melton & Pliner, supra note 57, at 26; Mnookin, supra note 9; Judging Teenagers, supra note 11, at 259-267; see also Hodgson v. Minnesota, 648 F. Supp. at 765, 766-67.

FN65. Indeed, it can be seriously questioned whether a notification statute with a bypass procedure in practice does more than expend judicial resources. At worst, it is a source of anxiety, medically harmful delay, and family conflict. Melton, Legal Regulation of Adolescent Abortion: Unintended Effects, 42 Am. Psychologist 79, 82 (1987). That so many minors, despite its burdens, choose to undergo a bypass process and succeed in demonstrating their competence and best interests to a judge, dramatizes the fact that without a bypass, the burdens of mandatory

parental notification would be intolerable.

Thus, empirical studies of treatment and abortion decisionmaking have found no differences between adolescents aged 14-18 and adults in factors related to legal competence. [FN66] There is therefore no scientific foundation for the States' assumption that adolescents' decisions to have an abortion are generally less thoughtful and informed than adults' decisions.

FN66. Studies have recognized differences between adults and adolescents regarding the decision to have an abortion, but those differences do not reflect upon the relative competence of adolescents (or adults) to make the abortion decision. Instead, the differences appear to be related to minors' and adults' differing social situations. For example, adolescents tend to see their decision as more influenced by consideration of its impact on others, and more frequently involve a parent in the decision. They also tend to take more time to reach a decision, making the added delays caused by notification and bypass procedures even more potentially harmful to the adolescents' health than similar requirements would be to adults' health. See Interdivisional Committee Study, supra note 58, at 73, and studies cited therein.

Moreover, related research indicates that attempts by the State to compel parental consultation in minors' abortion decisions are unlikely to result in better reasoned decisions. [FN67] One study found that although adolescents who were able to discuss their unintended pregnancy with two or three people they considered sympathetic and supportive decided upon a course of action faster than women with less social support, no benefit accrued from discussing the pregnancy with parents or others considered unsympathetic. [FN68] Research has consistently shown that parents are seldom significant sources of sex education for their children. [FN69] The findings of many studies suggest that sex is an issue of conflict that rarely elicits open and honest communication between parents and adolescents, and that a general lack of rapport between parents and adolescents contributes to their difficulty in communicating about sex. [FN70] In many instances, therefore, compelled parental involvement in the abortion decision is not likely to be constructive.

FN67. Melton, Minors and Privacy: Are Legal and Psychological Concepts Compatible? 62 Neb. L. Rev. 455, 470-471 (1983); Zabin & Hirsch, Effects of Abortion and Childbearing on Education and the Psychological Status of Black Urban Adolescents 16 (1988) (Paper presented at Annual Meeting of American Public Health Association, available upon request from counsel of record). See Rothenberg, Communication About Sex and Birth Control Between Mothers and Their Adolescent Children, 3 Population and Env't 35 (1980).

FN68. Ashton, Pattern of Discussion and Decision-making Amongst Abortion Patients, 12 J. Biosocial Sci. 247 (1980).

FN69. Rozema, supra note 35, at 532; Bennett & Dickinson, Student-parent Involvement in sex, birth control and venereal disease education, 16 J. Sex Research 114, 115 (1980).

FN70. Id. Parents, not surprisingly, generally disapprove of their children's premarital sexual relations. Marsman & Herold, Attitudes Toward Sex Education and Values in Sex Education, 35 Fam. Relations 357 (1986).

Selection from amicus brief filed by Alabama et. al. for *Roper v. Simmons*

INTEREST OF AMICI CURIAE

Pursuant to Supreme Court Rule 37.4, the States of Alabama, Delaware, Oklahoma, Texas, Utah, and Virginia submit this brief as amici curiae in support of petitioner, Donald P. Roper, Superintendent, Potosi Correctional Center. At issue is the question whether the Eighth Amendment categorically prohibits the execution of murderers who were younger than 18 years old when they committed their crimes.

In accordance with this Court's decisions in *Thompson v. Oklahoma*, 487 U.S. 815 (1988), and *Stanford v. Kentucky*, 492 U.S. 361 (1989), the State of Alabama has established 16 as the age at which an individual should be held fully responsible for his crimes and subject, in appropriate circumstances, to capital punishment. The State of Alabama thus permits, as the constitutional rule advanced by respondent would not, the execution - again, in appropriate circumstances - of murderers who were 16 or 17 when they killed their victims. *See Ex parte Davis*, 554 So. 2d 1111, 1114 (Ala. 1989). Accordingly, the State of Alabama has a concrete interest in the outcome of this case. The other amici likewise authorize capital punishment in appropriate circumstances for offenders under the age of 18, and thus also have a direct interest in the disposition of this case.

SUMMARY OF ARGUMENT

Amici's experience strongly indicates that a bright-line rule categorically exempting 16- and 17-year-olds from the death penalty - no matter how elaborate the plot, how sinister the killing, or how sophisticated the cover-up - would be arbitrary at best, and downright perverse at worst. Using abbreviated descriptions of a handful of murders committed by “juvenile” offenders currently on Alabama's death-row, this brief will show that, despite their chronological age, *at least some* 16- and 17-year-old killers most assuredly are able to distinguish right from wrong and to appreciate fully the consequences of their murderous actions. Because a prophylactic constitutional rule taking capital punishment off the table for *all* such offenders would have no footing in the real world, it should be rejected.

Although this brief uses examples drawn from Alabama to make its point, the other amici hasten to note that their experiences have been no different. There simply is no basis to conclude that 16- and 17-year-olds are categorically incapable of committing heinous (and meticulously planned) murders, and there is no justification for categorically exempting them from the death penalty.

ARGUMENT

Once again, this Court is asked to " 'draw a line' that would prohibit the execution of any person who was under the age of 18 at the time" he or she committed capital murder. *Thompson v. Oklahoma*, 487 U.S. 815, 838 (1988); *see also Stanford v. Kentucky*, 492 U.S. 361 (1989). As it has done twice before, this Court should decline to impose that sort of constitutional prophylaxis.

The States' purpose in filing this brief is a limited one. It is simply to show - using the facts of real-world cases - that there is no principled basis for concluding that 16- and 17-year-old murderers, as a class, are categorically incapable of acting with a degree of moral culpability ***3** deserving of society's severest punishment. Adolescents are fundamentally distinguishable from the mentally retarded in that respect. This Court's decision in *Atkins v. Virginia*, 536 U.S. 304 (2002), exempting mentally retarded murderers from the death penalty rests, at bottom, on a judgment that retarded offenders are, by virtue of their limited cognitive abilities, less blameworthy than non-retarded offenders. That sort of clinical assessment simply does not hold for adolescents. Some juvenile offenders, to be sure, are not capable of the sort of cold-blooded calculation to which the death penalty is properly addressed. But others most assuredly are. And that is the point: a juvenile offender's moral culpability, if it is to have any mooring in reality, must be assessed on an individualized basis.

As this Court held in *Stanford*, "[i]n the realm of capital punishment in particular, 'individualized consideration [is] a constitutional requirement.' " 492 U.S. at 375 (quoting *Lockett v. Ohio*, 438 U.S. 586, 605 (1978)). Indeed, "one of the individualized mitigating factors that sentencers must be permitted to consider is the defendant's age." *Id.* (citing *Eddings v. Oklahoma*, 455 U.S. 104, 115-16 (1982)). There simply is no warrant, either in law or in fact, for abandoning the touchstone of individualized sentencing, which sensibly has characterized this Court's death-penalty jurisprudence for nearly a quarter century, in favor of a prophylactic rule that bears no necessary relationship to an adolescent offender's actual moral culpability. Where an individual offender - whether adolescent or adult - truly cannot appreciate the wrongfulness of his actions, he should by all means be spared the death penalty. But where an individual - again, adolescent or adult - *can* make informed moral choices, he should be held fully responsible for the human consequences of those choices.

The following summaries, abbreviated descriptions of murders committed by current Alabama death-row inmates when they were 16 or 17 years old, leave little room for doubt that *at least some* adolescent killers most ***4** assuredly have the mental and emotional wherewithal to plot, kill, and cover up in cold blood. They should not evade full responsibility for their actions by the serendipity of chronological age.