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## REVIEW

### **Rethinking the Connection between Developmental Science and Juvenile Justice**

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*Rethinking Juvenile Justice*

Elizabeth S. Scott and Laurence Steinberg. Harvard, 2008. Pp 1, 370.

#### INTRODUCTION

In *Rethinking Juvenile Justice*, Elizabeth Scott, a legal scholar, and Laurence Steinberg, a developmental psychologist, join forces to consider how the law should respond to adolescent offenders. They offer readers a new “developmental model” for juvenile justice, which they suggest is distinct in important ways from both the “traditional” vision of the early twentieth century progressives and the “contemporary” vision of tough-on-crime reformers (pp 6, 16–18). But the real contribution of the book is more significant for being more subtle. What distinguishes this book from other writings in the field are not the proposals made, which are relatively modest, but rather the developmental sophistication with which they are defended. And in the end, the hard questions the book raises are not about juvenile justice policy, but rather about the interrelationship between law and science. Offering us the gold standard in legal-developmental collaboration, it presses us to consider the role the developmental sciences should play in shaping the law affecting children.

In Part I of this Review, I take the authors’ project on its own terms and assess the application of their developmental account to their legal analysis and recommendations. The book represents the best marriage of these disciplines addressing juvenile justice policy to date. Anyone convinced that developmental psychology answers the

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relevant questions would be hard-pressed to disagree with the bulk of Scott and Steinberg's conclusions. That being said, the recommendations the authors make are less novel than they suggest and, if anything, they stop short of realizing the full implications of their developmental understanding.

In Part II, I turn to the bigger question raised by the book, namely the appropriate role for developmental psychology (and, increasingly, neurophysiology) in designing the law affecting children. While such laws inevitably reflect lawmakers' understanding of how children change as they grow up, tying law directly to social-scientific (and, increasingly, neuroscientific) research presents special puzzles and risks. This research may be most useful, and least dangerous, where, as in the context of juvenile antisocial behavior, it confirms conventional wisdom and therefore supports policies safely within the mainstream. But even here, we should take care not to abdicate legal choices to scientific knowledge or to discount the role that law can play in shaping how children grow up.

#### I. A JUVENILE JUSTICE SYSTEM THAT IS TRUE TO THE EXPERIENCE OF ADOLESCENCE

##### A. Increased Sophistication in Both Developmental Psychology and in Law

The great strength of *Rethinking Juvenile Justice* is the depth and subtlety of its description of adolescent development and the relevance of that development for law. Both leaders in their respective fields of juvenile law and adolescent psychology, Scott and Steinberg have spent years collaborating on empirical research, academic scholarship, and policy work,<sup>1</sup> and in the process they have thoroughly educated one another in each other's expertise. In writing the book, they have comprehensively canvassed the traditional psychological

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<sup>1</sup> See, for example, Laurence Steinberg and Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 *Am Psych* 1009 (2003) (arguing that due to their immaturity, youths should not be held to the same level of criminal responsibility as adults and should not be subject to the death penalty). Scott and Steinberg served together on the MacArthur Foundation Research Network on Adolescent Development and Juvenile Justice from 1995 to 2006 and participated in a large-scale study of juvenile defendants' trial competence, whose results were reported in Thomas Grisso, et al, *Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants*, 27 *L & Human Behav* 333 (2003) (finding that youths aged fifteen and younger showed a level of impairment on competence tests consistent with adults found incompetent to stand trial).

research, as well as more recent brain imaging studies (pp 35–52). The authors include in their account not only cognitive development, which is commonly considered when children’s rights and responsibilities are at issue, but also psychosocial and identity development, which have largely been ignored.<sup>2</sup> In capturing the complexity of this developmental picture, they increase the nuance with which they can connect adolescent development to the intricacies of the criminal law.

Adolescents’ basic cognitive capacity, meaning their ability to employ understanding and logical reasoning in making decisions, roughly matches that of adults by early- to mid-adolescence (p 36). Because an adolescent who commits a crime “rarely is so deficient in his decision-making capacity that he cannot comprehend the immediate harmful consequences of his choice or its wrongfulness,” Scott and Steinberg conclude that adolescents can appropriately be blamed for their criminal conduct in a way that young children cannot (p 131). But because adolescents have far less experience using their decisionmaking skills, and because their psychosocial development and identity development continue into young adulthood, the authors conclude that adolescents’ conduct should be seen as less blameworthy than that of adults (p 131).

Adolescents’ psychosocial immaturity, Scott and Steinberg explain, makes them more vulnerable to peer pressure, undermines their ability to control their impulses, and increases their attraction to risk. Their vulnerability to peer pressure is tied to the important role peers play in helping adolescents separate from their parents and embrace an independent identity (pp 38, 50), and may also reflect neurological and hormonal changes that prime adolescents for social bonding (p 48). The lack of impulse control may in part be attributed to neurological changes and in part reflect their lack of practice exercising self-control, and relates to the intensity of their relationship with their peers (pp 45, 131). The attraction to risk reflects the relatively high value they place on the immediate rewards of risky behavior—whether drug and alcohol use, unprotected sex, or criminal conduct—and on their heavy discounting of the future costs associated with the risky behavior. It also reflects the value they place on the experience of risk taking itself (pp 37–43). These aspects of psychosocial immaturity all undermine a typical adolescent’s ability to refrain from engaging in criminal conduct.

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<sup>2</sup> *Roper v Simmons*, 543 US 551 (2005), which outlaws the imposition of the death penalty for offenses committed by minors, offers a notable exception, but the Court’s consideration of psychosocial and identity development in assessing juveniles’ culpability for their crimes appears to be based on the analysis in Scott and Steinberg, 58 Am Psych at 1014 (cited in note 1). See *Roper*, 543 US at 569–75.

As important, the central task of adolescence, identity formation, inspires adolescents to experiment, to try on different values and behaviors in order to assess their “fit,” and to separate from their parents (pp 50–52). Not until early adulthood do those values and behaviors become relatively fixed in a stable sense of self (p 52). And until they do, the authors contend, it is unfair to hold adolescents fully responsible for actions that reflect a quest for, rather than a manifestation of, their identities.

By bringing to light the aspects of development that continue throughout adolescence, Scott and Steinberg make the case that adolescent offenders are different from adult offenders in important ways that bear on culpability. While the general theme is somewhat familiar (in part because of work they have done in the past), the authors add considerable force to the argument by tying their developmental case for reduced culpability into the specific doctrines of excuse and mitigation in our criminal law (pp 133–39). Every piece of the picture of adolescence they describe connects to one form or other of recognized excuse, which they argue entitles adolescents to some mitigation in punishment. Thus, adolescents’ vulnerability to peer pressure qualifies as a form of coercion (a normal adolescent in certain social contexts will not be able to resist going along with peers), and adolescents’ limited impulse control regularly impairs their ability to make decisions and act on their choices (pp 125–26, 131–36). The fluidity of their identity also suggests that adolescents’ bad acts cannot yet be attributed to bad character, a variation, they suggest, on the “out of character” excuse recognized in criminal law (pp 127–28, 136–38). In taking the criminal law on its own terms, Scott and Steinberg suggest that adult criminal law itself directs us to punish adolescents less severely.

Although the central conclusion the authors draw from their developmental analysis is that adolescents are more culpable than child offenders but less culpable than adult offenders, they also point to the developmental literature to support two additional conclusions. First, they argue that the sentences imposed through the juvenile system are more likely to facilitate adolescents’ maturation into productive adult citizens and therefore are more likely to promote social welfare (pp 206–24). Second, they conclude that a significant portion of adolescents are incompetent to stand trial in adult court and therefore should be tried only in juvenile court (pp 166–71). The first of these conclusions follows directly from their commitment to developmentally appropriate juvenile justice policy. The second reflects a compromise between those commitments and more pragmatic considerations.

The authors rely on developmental literature as well as other empirical research to conclude that youth and society will both be better off if juvenile sentences give offenders opportunities to develop the skills they will need to succeed at work and in intimate relationships as adults. The developmental literature suggests that the development of these skills plays an important role in determining whether adolescent offenders will outgrow their antisocial conduct (pp 55–60). Recent research focusing on recidivism rates has highlighted some marked successes among juvenile delinquency programs and suggested that adult sentencing only increases juveniles' rate of reoffending (pp 215–21). The authors sensibly conclude that adolescent sentences should be served in juvenile facilities with their lower staff-offender ratios and their emphasis on treatment and rehabilitation rather than in adult (or adult-style) prisons, where staff-to-inmate ratios are high, and the primary education offered comes from more seasoned criminals happy to pass on the tricks of the trade (pp 208–13). In many cases, even better for youth development and therefore for society's safety are community-based programs that give young people supervision and support within the environment to which they will inevitably return (pp 213–15).

The authors also argue convincingly that deficiencies in adolescents' ability to understand their rights, follow trial proceedings, and consult meaningfully with their attorneys should generally disqualify them from trial in adult court (p 166). Their own empirical research, and that of others, suggests that all but the oldest adolescents will routinely fail to meet the standard of trial competence that is applied to adults<sup>3</sup> (pp 160–65). But unlike many mentally impaired adults, these adolescents cannot generally be coached or medicated out of their incompetence. Because waiting for juveniles to grow up does not seem like a good way to satisfy any of the aims of our criminal justice system, the authors advocate trying all but the oldest, most serious repeat offenders, those most likely to meet the adult trial competence standard (and most likely to threaten public safety), in a separate juvenile system (pp 167, 244–45).

As the authors acknowledge, however, this recommendation just pushes the competency issue back to the juvenile court (p 169). Since

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<sup>3</sup> For an articulation of this standard, see *Dusky v United States*, 362 US 402, 402 (1960) (holding that the test of competence to stand trial should be “whether [the defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him”).

the Supreme Court decided *In re Gault*,<sup>4</sup> juvenile court procedures, and the pretrial administration of the juvenile justice system, look much like the adult process, and can be expected to be at least as befuddling to juveniles. Indeed, juvenile proceedings may be especially hard to follow, as the lack of juries in most of these proceedings<sup>5</sup> diminishes judges' and attorneys' motivation to speak in terms that a lay person can understand.<sup>6</sup>

Scott and Steinberg conclude that, because juveniles need to face prosecution and sentencing somewhere, and because the adult system is generally inappropriate, they must be subject to prosecution in juvenile court, despite their difficulty comprehending and participating in those juvenile proceedings (pp 166–68). The authors take comfort in the connection between this recommendation and the juvenile court's history of less harsh sentencing, which comports with their recommendation of mitigated punishment (p 174). Juveniles may often not be able to participate in their trials in a meaningful way, but at least, they reason, the stakes will be lower.

This tradeoff sacrifices an opportunity to be true to the authors' developmental principles and to consider how the juvenile court process could be designed to enhance juveniles' trial competence. In Part II, I discuss this opportunity at some length. Here, I note that such a redesign would require a major overhaul in the design of the juvenile justice system that is inconsistent with the pragmatic thrust of Scott and Steinberg's approach. Largely to their credit, Scott and Steinberg aspire not to design perfection, but rather to achievable, coherent reform. What makes the book so valuable is that it can be relied upon by judges, legislatures, lawyers, and policymakers to enhance the sophistication with which they consider the very issues that they are currently being called on to decide.

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<sup>4</sup> 387 US 1 (1967) (holding that the Due Process Clause entitles juveniles to written notice of the proceedings against them, the assistance of counsel, the privilege against self-incrimination, and the rights of confrontation and sworn testimony).

<sup>5</sup> In *McKeiver v Pennsylvania*, 403 US 528 (1971), the Supreme Court held that jury trials were not constitutionally required in juvenile proceedings. See *id.* at 545. As of 2004, sixteen states provided for a right to a jury trial in juvenile court in some or all circumstances by statute. See Sandra M. Ko, Comment, *Why Do They Continue to Get the Worst of Both Worlds? The Case for Providing Louisiana's Juveniles with the Right to a Jury in Delinquency Adjudications*, 12 *Am U J Gender, Soc Policy & L* 161, 178 n 120 (2004) (listing statutes that provide for a state jury trial right in juvenile proceedings).

<sup>6</sup> My own experience in juvenile court suggests that the very informality of the proceedings often leads the lawyers and judges involved to speak at a pace, and use terms, that are impossible for anyone unfamiliar with the system (let alone a trial-incompetent juvenile) to follow.

In this sense, *Rethinking Juvenile Justice* is a complete success. Lawmakers already look to Scott and Steinberg's earlier work when they address how the law should respond to juvenile crime, and this book should only enhance the sophistication of those lawmaking efforts. This is true not only on the issue of trial competence, where courts have relied upon the authors' research to recognize a developmentally based incompetence claim,<sup>7</sup> but also, indeed most significantly, on the question of juvenile culpability, the core focus of the book. It is the work of Scott and Steinberg that left the strongest mark on the Supreme Court's discussion of juvenile culpability in *Roper v Simmons*,<sup>8</sup> outlawing the juvenile death penalty,<sup>9</sup> and it is the *Roper* Court's reasoning, built on the authors' research, that has inspired advocates to press for other juvenile justice reforms.<sup>10</sup> As a more comprehensive treatment of the same influential themes by the same highly respected authors, *Rethinking Juvenile Justice* promises to enhance the sophistication of those addressing juvenile justice policy on a broad range of issues.

#### B. The Claim of Novelty

In describing the contribution their developmental model makes to the literature, Scott and Steinberg suggest that the model is distinct from previous juvenile justice models as well as the law's general approach to childhood. Although the model the authors lay out is unquestionably more nuanced in its developmental grounding than other models, the bulk of their recommendations are not new. In the end, Scott and Steinberg favor a separate juvenile justice system that closely

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<sup>7</sup> See, for example, *Timothy J. v Superior Court*, 58 Cal Rptr 3d 746, 754–56 (Cal App 2007).

<sup>8</sup> 543 US 551 (2005).

<sup>9</sup> *Id.* at 569–75 (articulating three important culpability-affecting differences between adults and adolescents that reflect a broader adoption of Scott and Steinberg's approach to the question of adolescent culpability), citing Scott and Steinberg, 58 Am Psych 1009 (cited in note 1).

<sup>10</sup> See generally, for example, Brief of Amici Curiae, Juvenile Law Center, the National Juvenile Defender Center, and Southern Juvenile Defender Center, Supporting Appellant, *Connell v Alabama*, No CR-06-0668 (Ala Crim App Aug 3, 2007) (arguing that the same developmental distinctions highlighted in *Roper* to justify the Court's conclusion that minor offenders had an Eighth Amendment right not to be sentenced to death supported appellant's contention that a sentence of life without parole violated his Eighth Amendment rights); Barry C. Feld, *A Slower Form of Death: Implications of Roper v. Simmons for Juveniles Sentenced to Life without Parole*, 22 Notre Dame J L, Ethics, & Pub Policy 9 (2008) (relying on Scott and Steinberg's research and earlier writing to argue that "*Roper's* diminished responsibility rationale provides a broader foundation to formally recognize youthfulness as a categorical mitigating factor in sentencing"). See also generally Hillary J. Massey, Note, *Disposing of Children: The Eighth Amendment and Juvenile Life without Parole after Roper*, 46 BC L Rev 1083 (2006) (citing articles by Steinberg and Scott, as well as the *Roper* decision, to support the argument that imposing life without parole on a juvenile offender violates the Eighth Amendment).

resembles the traditional vision, particularly as it evolved over the course of the twentieth century. After considering in some detail how Scott and Steinberg's juvenile justice model compares with the models that came before it, I will briefly consider its fit within the larger context of the law's treatment of children.

Scott and Steinberg place their developmental model for juvenile justice between the initial vision of the progressives in the early twentieth century and the late twentieth century tough-on-crime reformers. The progressives erred, the authors contend, in formulating the "traditional" juvenile justice model, by casting adolescent lawbreakers as innocent children, who bore no responsibility for their crimes and who required care and guidance to grow into successful adults (p 17). The "contemporary" reformers of the 1980s and 1990s, by contrast, erred by casting adolescent lawbreakers as hardened adult criminals (p 96). Highlighting the distinct developmental stage of adolescence, the authors place these young lawbreakers at a middle level of culpability—more blameworthy than children but less blameworthy than adults (pp 134–36).

The historical story the authors tell is, in its essentials, well accepted (pp 82–102). The progressive vision inspired the creation of separate juvenile courts to shield youthful offenders from the harsh treatment of the criminal system to which they had been subject in the past,<sup>11</sup> and the new courts aimed to oversee these offenders' correction, helping them to grow into productive and law-abiding adults.<sup>12</sup> The juvenile courts changed considerably over the years, but it was not until a surge in violent youth crime in the 1980s and 1990s that the juvenile justice system faced serious public challenge. With the cry of "adult time for adult crime," lawmakers and prosecutors challenged the effectiveness of the juvenile justice system in keeping society safe, and shifted increasing numbers of juvenile offenders into adult court.

The tough-on-crime reformers of the 1980s and 1990s clearly gained political momentum by casting the juvenile court in the child-coddling terms Scott and Steinberg describe. To justify transferring juveniles to adult court, the reformers attacked juvenile courts as unconcerned about public safety and founded on sentimental notions of child-

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<sup>11</sup> See Franklin E. Zimring, *The Common Thread: Diversion in the Jurisprudence of Juvenile Courts*, in Margaret K. Rosenheim, et al, eds, *A Century of Juvenile Justice* 142, 143–46 (Chicago 2002) (describing diversion and intervention as the two primary justifications for a separate juvenile court).

<sup>12</sup> Anthony M. Platt, *The Child Savers: The Invention of Delinquency* 137–45 (Chicago 1969) (describing the early development of juvenile courts whose judges "approached their work in medical-therapeutic terms").



hood innocence (pp 94–96).<sup>13</sup> But there is no reason to think that the defenders of the juvenile justice system who argued against these reforms actually held any of these sentimental views. To claim the middle ground of compromise in the contemporary debate, Scott and Steinberg need to accept the tough-on-crime reformers' rhetorical manipulation of their adversaries' position. More aptly, Scott and Steinberg could have used their developmentally sophisticated defense of the juvenile court to challenge the get-tough reformers' polarized account.

If the juvenile justice system was ever built on notions of childhood innocence, that conception clearly disappeared over the course of the twentieth century. But even initial conceptions of the juvenile court frequently focused on the need to address juvenile offenders' "depravity" early in order to protect society from their potential lives of crime.<sup>14</sup> To be sure, some of the founders of the juvenile court movement spoke in sentimental terms, but this sentimentality focused more on how young people could best be corrected than on the inherent virtues or blamelessness of children.<sup>15</sup> And from the beginning, some of the reformers took pains to distinguish their paternalistic, corrective intervention from soft sentimentality.<sup>16</sup> The key conviction was that children were more amenable than adults to reform and education, and that society as a whole would benefit if delinquents were saved from lives of crime.

Whatever sentimentality was reflected in the early days of the juvenile justice system was gone by the time the Supreme Court began to scrutinize the system in the 1960s. In *In re Gault*, the Supreme Court considered and rejected the contention that affording juveniles due process protections would undermine the distinct aims of the juvenile justice system. It catalogued these aims as rehabilitation, separation from adult offenders, avoiding stigmatization, and a judicial manifesta-

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<sup>13</sup> Consider Sara Glazer, *Lawmakers Pressured to Give Adult Terms to Juvenile Offenders: Perception That Youth Crime Is Becoming More Violent Borne Out in Statistics*, Dallas Morning News 6A (Mar 13, 1994) ("[L]awmakers across the country are scrambling to respond to polls indicating that Americans see juvenile punishment as too short and too soft.").

<sup>14</sup> See Platt, *The Child Savers* at 51 (cited in note 12) (noting that a preoccupying question of correctional workers at the turn of the twentieth century was: "How can we reach the germ and prevent its development into self-perpetuating evil?").

<sup>15</sup> See, for example, Julian W. Mack, *The Juvenile Court*, 23 Harv L Rev 104, 120 (1909) ("Seated at a desk, with the child at his side, where he can on occasion put his arm around his shoulder and draw the lad to him, the judge, while losing none of his judicial dignity, will gain immensely in the effectiveness of his work.").

<sup>16</sup> See, for example, Platt, *The Child Savers* at 47 (cited in note 12) (describing the reformatory movement that predated and anticipated states' juvenile court acts, and quoting one of its advocates as admonishing that the "science" of rehabilitation was not to be confused with "sickly sentimentalism").

tion of care and concern, and suggested that these aims were consistent with a more formalized adversary process.<sup>17</sup> Moreover, the Court stressed the punitive nature of many juvenile dispositions.<sup>18</sup> Inspired in large part by the fact that juveniles were routinely being punished as or more severely than their adult counterparts, the Supreme Court concluded in *In re Gault* and subsequent cases that these juveniles were entitled to most of the procedural protections afforded to adults.<sup>19</sup>

Scott and Steinberg's developmental approach is best seen as an updated, more sophisticated defense of the traditional juvenile justice model. They call for a separate juvenile system for all but the oldest, most serious offenders. They advocate a system that assumes most adolescents can grow out of their criminal offending and calls for a response to their offending that will help them grow into productive and law-abiding citizens. They conclude that this approach is in the interest of society as well as juveniles. All this is the stuff of the traditionalist vision.

Rhetoric aside, the biggest problem with the traditionalist vision, for most of the twentieth century, was that there was no evidence that rehabilitative programs worked. In this sense, an intelligent understanding of the data supported the get-tough reformers' pessimism with the juvenile justice system. As the authors note, however, research done just as states were moving offenders and offenses out of juvenile court began to document the considerable success of certain juvenile programs in reducing recidivism rates.<sup>20</sup> Thus, Scott and Steinberg's account not only offers developmental support for the progressive view that adolescents are different from adults, but it also offers empirical support for the progressives' conviction that adolescents can be helped to grow up well.

The authors resist the suggestion that they are merely defending the progressives' vision and emphasize that they are calling for sentences that not only enhance social welfare (by helping offenders de-

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<sup>17</sup> *In re Gault*, 387 US at 21–27 (“[T]he observance of due process standards, intelligently and not ruthlessly administered, will not compel the States to abandon or displace any of the substantive benefits of the juvenile process.”).

<sup>18</sup> *Id.* at 27 (“The fact of the matter is that, however euphemistic the title, a ‘receiving home’ or an ‘industrial school’ for juveniles is an institution of confinement in which the child is incarcerated for a greater or lesser time.”).

<sup>19</sup> *Id.* at 29 (discussing Gerald Gault’s sentence in juvenile court of up to six years in custody and noting that he would have only been subject to a fine and up to two months in prison if sentenced as an adult).

<sup>20</sup> See, for example, Mark W. Lipsey, *Can Rehabilitative Programs Reduce the Recidivism of Young Offenders? An Inquiry into the Effectiveness of Practical Programs*, 6 Va J Soc Policy & L 611, 640 (1999) (finding that some rehabilitative programs aimed at juvenile offenders, including those offering academic skill development and counseling, can reduce recidivism rates by 20 to 25 percent).

velop in a prosocial direction), but that also assess blame and allocate punishment proportional to that blame (pp 229–31). The authors are right to recognize that blameworthiness and proportionality are not highlighted as central themes in the traditional vision. Because of the traditional vision's commitment to rehabilitation, the convention is to focus on the offender rather than the offense and treatment rather than punishment. But to a large extent, these distinctions have always been elusive. Judges directed to design juvenile dispositions to meet the needs of the individual offenders routinely impose the longest and harshest dispositions on those who have committed the most serious crimes.<sup>21</sup> And the distinction between reforming treatment and punishment, as the Court noted as far back as *In re Gault*, is often more rhetorical than real.<sup>22</sup> Adolescents confined for long periods for the purposes of reforming their behavior can sensibly be expected to experience their confinement as punishment. Moreover, as a conceptual matter, there is no reason to think of rehabilitation and punishment, particularly of juveniles, as conflicting aims. Indeed, teaching adolescents that their acts have (proportionate) consequences has always been conventional fare in their education and treatment.

Scott and Steinberg conclude that maintaining a fair system is important enough that, “in hard cases, fairness should trump social welfare” (p 234). The context surrounding the statement suggests that by this the authors mean that an individual juvenile's healthiest development will sometimes have to be sacrificed to maintain a sense of systemwide fairness that comes from treating similar offenses similarly. But this tradeoff does not elevate fairness over social welfare, nor does it distinguish their model from the general approach that the juvenile justice system has taken, as it has always allowed some deviation from its individualized, rehabilitative focus to ensure the health of the system overall.<sup>23</sup> Rather, acknowledging the tradeoff simply reflects the fact that a social welfare calculus has to account for both individual

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<sup>21</sup> See Barry C. Feld, *The Juvenile Court Meets the Principle of the Offense: Punishment, Treatment, and the Difference It Makes*, 68 BU L Rev 821, 837 (1988) (concluding, based on a review of juvenile justice law and practice, that “despite persisting rehabilitative rhetoric, the dispositional practices of the contemporary juvenile court increasingly are based on the Principle of Offense and reflect the punitive character of the criminal law”).

<sup>22</sup> See note 18 and accompanying text.

<sup>23</sup> See Robert O. Dawson, *Judicial Waiver in Theory and Practice*, in Jeffrey Fagan and Franklin E. Zimring, eds, *The Changing Borders of Juvenile Justice: Transfer of Adolescents to the Criminal Court* 45, 45 (Chicago 2000) (noting that providing a “safety valve” whereby the most serious offenders are excluded from juvenile court “is necessary in order to preserve the juvenile justice system politically”).

well-being (for its own sake, and its effects on others) and institutional health at the same time.

Scott and Steinberg's claim of a third, middle way is unconvincing as a matter of substance, but it is masterful as a matter of rhetoric. Savvy as well as pragmatic, the authors likely recognize that it can only undermine public support for a return to the traditional progressive vision to call it what it is. By offering a comprehensive developmental justification for the essential progressive vision that assigns blame to youthful offenders and assesses the social benefits of nevertheless helping them, Scott and Steinberg rally the progressive cause in a language designed to bring around its opponents.

Scott and Steinberg bolster their claim of a new middle ground by distinguishing their developmental approach from the "binary approach" the law takes to childhood and adulthood in most legal contexts (pp 79–81). In their view, age lines that divide rights, responsibilities, and benefits into two categories—those for minors and those for adults—mimic the child-adult dichotomy reflected in the debate between the traditionalists and the get-tough reformers (pp 68–69). Because this binary approach fails to take account of the special developmental attributes of adolescents, the argument goes, it has produced two failed models of juvenile justice. But in my view, the law in other contexts is far less dichotomous, and the authors' juvenile justice model is more so, than they suggest.

Scott and Steinberg explain that most laws, if they make any distinctions based on age, draw a single line between childhood and adulthood, and that line divides the rights and responsibilities of individuals into two groups (pp 61–62). In the authors' view, it was the application of this same binary approach in the juvenile justice system that led to the backlash against that system. Where distinctions in development among minors at different ages are rarely material in other legal contexts, the distinction between children and adolescents matters a great deal, they argue, in our response to minors' violations of the criminal law (pp 120–21). But a closer look at the laws' approach to childhood in other contexts reveals that it accounts with considerable subtlety for the gradual changes of development and the special circumstances of adolescence. A better way to understand the law's binary division is between adult and not-yet-adult, a distinction Scott and Steinberg's model maintains.

The authors acknowledge that nuances in development justify different rules for different ages throughout the law but suggest that the clean way our law deals with the issue is to draw the single line at different ages, depending on what is at stake for the young people and

others (pp 72, 79–81). Thus, we let young people drive at sixteen to give them age-appropriate independence, but not drink until twenty-one to keep them safe on the roads. The lines are necessarily inexact, excluding young people prepared to behave competently and including some not ready to do so, but these single lines make things clear and simple, and keep the law out of the difficult and costly business of making individualized assessments of capacity.<sup>24</sup>

Although the authors' account is accurate at a very general level, the law's age-based distinctions are far more nuanced than this account suggests. To be sure, there are some absolute lines: at eighteen you can vote, at seventeen you cannot; but in most areas, the age line reflects one layer of legal differentiation, and the more subtle distinctions among minors of different ages are fleshed out in statutory detail, decisional law, and actual practice. The authors acknowledge two such examples—the varying attention courts give to the custody preferences of children, depending on their age, and the distinction in driving privileges afforded to a permit-qualified sixteen-year-old and an older, more experienced teen (pp 80–81). But other examples of such age and development-based distinctions among minors abound in the law. To name just one additional example, under a single standard that describes children's right to speak in schools, courts recognize that the scope of children's First Amendment rights will vary with the age of both the speaker and the audience.<sup>25</sup> In resolving a wide variety of cases, courts are explicit about the role the age of the party plays in determining how legal standards are applied.<sup>26</sup>

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<sup>24</sup> In an earlier article on this subject, Scott notes that minors' access to abortion is regulated through a process that calls for this sort of individualized assessment and concludes that it is a costly approach that does not serve its intended sorting aim. See Elizabeth S. Scott, *The Legal Construction of Adolescence*, 29 Hofstra L Rev 547, 569–76 (2000).

<sup>25</sup> See, for example, *Walz v Egg Harbor Township Board of Education*, 342 F3d 271, 276, 278 (3d Cir 2003) (noting that whether the Constitution protects a pre-kindergarten student's right to distribute pencils with a religious message in class depends upon whether the message represented his own expression and also whether distributing the message would interfere with the special pedagogical and behavioral goals the elementary school curriculum was designed to achieve); *Walker-Serrano v Leonard*, 325 F3d 412, 416–17 (3d Cir 2003) (“There can be little doubt that speech appropriate for eighteen-year-old high school students is not necessarily acceptable for seven-year-old grammar school students.”).

<sup>26</sup> For one of the most express recognitions of the gradual evolution of rights that accompanies a minor's development, see *Polovchak v Meese*, 774 F2d 731, 736–37 (7th Cir 1985):

At the age of twelve, Walter was presumably near the lower end of an age range in which a minor may be mature enough to assert certain individual rights that equal or override those of his parents; at age seventeen (indeed, on the eve of his eighteenth birthday), Walter is certainly at the high end of such a scale, and the question whether he should have to subor-

As important as the law's recognition of gradual change and emerging competence and authority, however, is its recognition that adolescents are still on the nonadult side of a bright line, for better and for worse. In the custody context, this means that the adolescents are still under the authority of their parents (and the court, which divvies up that authority between them). In the First Amendment context, the school setting confers a nonadult status for purposes of speech rights, whether attendance is compelled by law (one binary line), compelled by parental authority (another binary line), or pursued voluntarily by an individual old enough to qualify as an adult in other contexts.

This binary system, with developmentally based, nuanced application on the not-yet-adult side of the line, is precisely the system Scott and Steinberg champion in the juvenile justice context. To be sure, they also call for a second bright line at ten, but the essential idea is the same: throughout minority, the law should make distinctions in rights and obligations to reflect minor's ongoing development, but once individuals cross the adult line, the law should treat them as fully responsible, and developmentally all the same.

## II. THE LIMITED WISDOM OF SCIENCE

Scott and Steinberg's argument for juvenile justice reform is grounded, nearly exclusively,<sup>27</sup> on their developmental analysis. In Part I, I assumed the validity of this developmental approach, and considered how well the pieces of the authors' analysis fit together and answer the questions they frame. In this Part, I step back and consider, more generally, the limitations and puzzles associated with grounding the legal rights and responsibilities of children on our understanding of developmental psychology and neurophysiology.<sup>28</sup>

At some level, lawmakers inevitably ground the legal rules affecting children on an understanding of how children are different from adults, and how children change with age. For example, common sense notions of development clearly undergirded the common law division of childhood into three stages, during the first of which (up to age sev-

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dinate his own political commitments to his parents' wishes looks very different. The minor's rights grow more compelling with age, particularly in the factual context of this case.

<sup>27</sup> The book devotes considerable attention to the implications for general social welfare of various juvenile justice policies, but even this discussion focuses most heavily on the avoidance of recidivism, which is also directly tied to the promotion of healthy adolescent development. Their discussions of incapacitation and incarceration costs, however, are only indirectly related to offenders' development.

<sup>28</sup> This consideration is intended to raise questions about all writing that relies on developmental research to analyze law, including my own.

en) the law assigned no criminal responsibility to minors, the second of which (age seven to fourteen) the law presumed incapacity to form criminal intent but gave courts the authority to make an individualized assessment of a minor's culpability, and the third of which (fourteen and over) the law assigned full criminal responsibility.<sup>29</sup> While these age lines predated the field of developmental psychology as we know it, they reflected lawmakers' rough attempt to capture precisely the same information that social scientists have more recently set out to study. The same can be said for every law that makes some exception for minority. Indeed, this can even be said for the tough-on-crime reforms that have sent large numbers of juveniles to adult court and given them adult sentences. Lawmakers favoring the treatment of juveniles as adults, in addition to focusing on the risks posed to public safety by these juvenile offenders, also justified their reforms in common sense developmental terms. Transfers were justified, they argued, not just because the youth had engaged in serious crime, but also because these crimes revealed them to be "hardened" criminals who had grown up early and were no longer open to prosocial development (p 9).

A strong argument for the law's reliance on the developmental literature, therefore, is that it is the best, most sophisticated source of information about how children actually develop. At times, the literature confirms common intuitions about child development, but at other times its findings are counterintuitive, suggesting that common sense may be leading lawmakers astray.<sup>30</sup> And, most commonly, the developmental research suggests a fine-tuning of the sort I contend Scott and Steinberg offer in their book.

But the greater detail and quantification that comes with the social science research raises many questions as well. Common to the law's use of all social science is the risk of bad data or misused data, and the danger that lawmakers will not have the sophistication or the inclination to assess the data closely and limit its use accordingly. There are many examples of such contested uses of empirical research in lawmaking on controversial issues.<sup>31</sup> Perhaps one of the better known examples

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<sup>29</sup> See Andrew Walkover, *The Infancy Defense in the New Juvenile Court*, 31 UCLA L Rev 503, 509–11 (1984).

<sup>30</sup> See, for example, Edwin M. Schur, *Radical Non-intervention: Rethinking the Delinquency Problem* 118–26 (Spectrum 1973) (arguing that a state response to juvenile offending labels adolescents in a developmentally destructive manner); Marvin E. Wolfgang, Robert M. Figlio, and Thorsten Sellin, *Delinquency in a Birth Cohort: Studies in Crime and Justice* 65 (Chicago 1972) (finding that 46 percent of juvenile delinquents in the cohort studied were one-time offenders).

<sup>31</sup> For an example of conflicting interpretations of empirical data on the deterrence value of the death penalty, compare Cass R. Sunstein and Adrian Vermeule, *Is Capital Punishment*

in the context of child development concerns the highly publicized and influential conclusion, based on studies with serious limitations, that children of divorce were at high risk of abnormal development.<sup>32</sup> Scott and Steinberg's work demonstrates how, over time, the high-quality work can be distinguished from the low, and data can be applied in an increasingly fine-grained way. But even the highest quality interdisciplinary work, which *Rethinking Juvenile Justice* clearly represents, will only be as good as the currently available data, which we know will be improved upon with additional research.

Moreover, even the most careful reliance on the best developmental research, attentive to changes in findings over time, has its limitations and risks. Indeed, the very quality of Scott and Steinberg's interdisciplinary analysis—both the thoroughness of the developmental account and the specificity with which they connect this account to the detail of the law—helps bring some of these limitations and risks into relief.

At the most basic level is the risk that a focus on development's significance for law will obscure the fact that the relationship between law and development is dynamic. Much of the legal scholarship that relies on developmental psychology suggests that development is fixed, and that law can do a better or worse job of mapping rights and responsibilities onto this fixed progression toward full adult maturity. But context clearly plays an important role in minors' development, and expectations and experiences can accelerate or slow down minors' progress

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*Morally Required? Acts, Omissions, and Life-life Tradeoffs*, 58 Stan L Rev 703, 706 (2005) (concluding that the empirical research supports a conclusion that the death penalty deters murder), with John J. Donohue and Justin Wolfers, *Uses and Abuses of Empirical Evidence in the Death Penalty Debate*, 58 Stan L Rev 791, 794 (2005) (challenging evidence suggesting that the death penalty is an effective deterrent and concluding that the deterrent effect of the death penalty is uncertain). For a similar conflict related to the deterrence value of carrying concealed handguns, compare John R. Lott, Jr and David B. Mustard, *Crime, Deterrence, and Right-to-carry Concealed Handguns*, 26 J Legal Stud 1, 64 (1997) (claiming that "[a]llowing citizens without criminal records or histories of significant mental illness to carry concealed handguns deters violent crimes" and that over 1,414 murders and over 4,177 rapes would have been avoided if such practices had been more broadly permitted), with Ian Ayres and John J. Donohue III, *Shooting Down the 'More Guns, Less Crime' Hypothesis*, 55 Stan L Rev 1193, 1201-02 (2003) (calling Lott's evidence "limited, sporadic, and extraordinarily fragile," and suggesting that their own statistical analysis provides some support for the conclusion that the laws Lott favors increase rather than decrease crime).

<sup>32</sup> Compare generally Judith S. Wallerstein and Joan B. Kelly, *Surviving the Breakup: How Children and Parents Cope with Divorce* (Basic 1980); Judith Wallerstein, Julia Lewis, and Sandra Blakeslee, *The Unexpected Legacy of Divorce: A 25 Year Landmark Study* (Hyperion 2000), both of which were widely quoted by policymakers to argue that divorce caused serious long-term harm to children, with E. Mavis Hetherington and John Kelly, *For Better or For Worse: Divorce Reconsidered* (Norton 2002) (arguing, based on quantitative family law research, that Wallerstein's conclusions are exaggerated). For an attempt to find some middle ground between these two conclusions, see Paul R. Amato, *Reconciling Divergent Perspectives: Judith Wallerstein, Quantitative Family Research, and Children of Divorce*, 52 Fam Rel 332, 332 (2003).



toward maturity in any and all aspects of their development. This concept, well understood and extensively studied by developmentalists for decades,<sup>33</sup> tends to get lost when conscientious lawmakers look to developmental psychology to inform their decisions.<sup>34</sup> While this problem might be cast as a failure of the law to consider development sufficiently comprehensively, it is better understood, in my view, as the law's abdication of its responsibility in the partnership. This characterization captures two related risks: first, the risk that law will defer to developmental science in making judgments it is the law's responsibility to make, and second, the risk that law, in so deferring, will lock in a developmental status quo.

Brain imaging research, still in its infancy, has dramatically increased both of these risks, by translating psychologists' observations into scientists' facts.<sup>35</sup> Scott and Steinberg note policymakers' considerable interest in this research, and explain that "large-scale structural change[s]" in the brain between adolescence and adulthood may account for adolescents' impulsivity and immature decisionmaking (p 44). Brain imaging studies cannot, however, explain why adolescents with presumably similar brain structures behave so differently in different cultures around the world,<sup>36</sup> nor have they yet captured the influence adolescents' different life experiences might have on the maturation of their brains.<sup>37</sup>

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<sup>33</sup> One of the most influential theorists who focused on the social and cultural context of development was Lev Vygotsky. See generally Lev Vygotsky, *Thought and Language* (MIT 1986); L.S. Vygotsky, *Mind in Society: The Development of Higher Psychological Processes* (Harvard 1978). For a leading example of a contemporary developmental psychologist who has built upon Vygotsky's themes, see generally Barbara Rogoff, *Apprenticeship in Thinking: Cognitive Development in Social Context* (Oxford 1990).

<sup>34</sup> For example, Justice Douglas simplistically relied on developmental psychology to conclude that Amish fourteen- and fifteen-year-olds had the "moral and intellectual judgment" to decide for themselves whether their continued school attendance violated their own religious beliefs and therefore should be asked about their religious views. *Wisconsin v Yoder*, 406 US 205, 245 n 3 (1972) (Douglas dissenting). For a criticism of Justice Douglas's position and analysis, see Emily Buss, *What Does Frieda Yoder Believe?*, 2 U Pa J Const L 53, 53 (1999) (criticizing Douglas's analysis of children's development as religious believers and the state's ability to ascertain those beliefs).

<sup>35</sup> For a general discussion cautioning against premature reliance on brain imaging studies in assessing juvenile culpability, see Jay D. Aronson, *Brain Imaging, Culpability and the Juvenile Death Penalty*, 13 Psych, Pub Policy & L 115 (2007) (describing the use of neuroscience in *Roper*).

<sup>36</sup> For a survey of adolescent behavior and expectations around the world, see generally B. Bradford Brown, Reed W. Larson, and T.S. Saraswathi, eds, *The World's Youth: Adolescence in Eight Regions of the Globe* (Cambridge 2002).

<sup>37</sup> For discussions recognizing the effect of life experience on adolescent brain development, see B.J. Casey, et al, *Imaging the Developing Brain: What Have We Learned about Cognitive Development?*, 9 Trends in Cognitive Sci 104, 108 (2005) (noting that studies suggest that experience shapes brain development and calling for further testing to distinguish between the effects

Scott and Steinberg's descriptions of the state of adolescent brain development and the nature of normative adolescent behavior slide readily into simple declarative statements that adolescents "are less blameworthy" (p 17) and "are less culpable" (pp 18, 223). These statements suggest that culpability or blameworthiness is a fact derived from an assessment of adolescents' brains and capacities and predispositions. But there is nothing inherent about an adolescent's blameworthiness however well we understand the progress of their development, and it is up to the law, not developmental science, to assign that blame. While a better reading of the authors' conclusions is that adolescents "should be deemed less culpable under law," the proliferation of "is" and "are" statements improperly suggests that adolescents' developmental status dictates their level of culpability and leaves no room for independent legal (or moral) judgment.

A second, related danger associated with law's abdication of its moral authority to developmental science is that in building our law upon purported developmental facts, we may contribute to making and keeping them true. Scott and Steinberg certainly understand the fact that law can shape development as well as the other way around. Indeed, their entire discussion of appropriate juvenile dispositions is built upon the idea that these dispositions can enhance or undermine a juvenile's development of the skills needed for success in adulthood. But the authors do not discuss the law's potential to influence development through the very process of adjudicating guilt and assigning blame. In Part I, I noted the possibility that the juvenile justice process might be modified to enhance juveniles' trial competence. Here I consider how modifications could, in turn, influence juveniles' development in important and productive ways.

One of the reasons that adolescents are less mature in the respects discussed by the authors is that they simply lack the experience we gain as we grow older (p 131). Experience gives us information (How does the world really work? Who do I admire and why? What possibilities are open to me, under what circumstances?) and practice (making choices, taking responsibility, expressing views, controlling our emotions). The authors note the connection between juveniles' inexperience and their decisions to offend (or their failure to avoid offend-

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of maturational development and of experience and learning); Daniel P. Keating, *Cognitive and Brain Development*, in Richard M. Lerner and Laurence Steinberg, eds, *Handbook of Adolescent Psychology* 75 (Wiley 2d ed 2004) (noting that there is "neural evidence that the adolescent brain is primed for a critical period during which environments and activities will shape function, especially prefrontal functions," and calling for "deep attention to the way in which the culture and context operate with respect to adolescent development").

ing) and the value of helping juveniles to gain the experience that will equip them to make different choices in adulthood. But they focus little attention on the effect their experience in the juvenile justice system itself might have on their pro- or antisocial development. Social science is just beginning to confirm a sensible intuition that adolescents' experience with the criminal justice system shapes their attitudes about themselves, their government and society, and their own relationship with that government and society.<sup>38</sup> Sadly, under current practice, what juveniles learn from the process is largely negative.

Well documented by the authors in their book and in previous publications is the difficulty juveniles have in understanding their rights and the trial process, and in directing their attorneys in that process. And whatever difficulties juveniles have tracking the formal roles and proceedings of the system are exacerbated, I am convinced, by the lack of visible manifestations of that formal process in most proceedings in juvenile court. Heavy dockets, limited resources, friendly ongoing relationships among counsel and other court personnel, and an understandable preference for agreements over adversarial proceedings all tend to produce extremely brief, jargon-filled hearings that even a well-informed lawyer from outside the system will find hard to track. In most cases, the juvenile will stand silent for the bulk of the brief hearing, watching counsel and the court speak to one another as if he were not in the room. If asked, "Do you understand?," he will know he is meant to answer, "Yes." And if he is induced to speak his own mind, he is more likely to be met with patient indulgence than with any real attempt at engagement.<sup>39</sup>

Juveniles' lesser trial competence matters, not only because it compromises the fairness of juveniles' proceedings, but also because it diminishes the developmental value of juveniles' experience in those proceedings. Juveniles' lesser understanding of their rights, of the trial process itself, and of their relationship with the various players in the court process will, in turn, prevent them from engaging in the process in a

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<sup>38</sup> See, for example, Jeffrey Fagan and Tom R. Tyler, *Legal Socialization of Children and Adolescents*, 18 Soc Just Rsrch 217, 219 (2005) (finding in preliminary research a connection between adolescents' experience with legal authorities and their views about the legitimacy of the legal system). See also Gary B. Melton, *Taking Gault Seriously: Toward a New Juvenile Court*, 68 Neb L Rev 146, 168-69 (1989) (noting the dearth of empirical research on children's and adolescents' perceptions of procedural justice and concluding that what evidence is available suggests that adolescents, like adults, are more likely to perceive the system as just if it allows them an opportunity to participate and treats them with respect).

<sup>39</sup> My portrayal of juveniles' courtroom experience is based on several court observations in multiple jurisdictions, as well as occasional discussions with attorneys who practice regularly in juvenile court.

manner that gives them practice making wise decisions, measuring the consequences of decisions made, and interacting with a host of adults with a broad range of roles and powers. A juvenile justice system designed to be comprehensible and accessible to juveniles, in contrast, could hope to help them build these crucial skills as well as help to legitimize the system in the juveniles' eyes. Substantial research suggests that adults are more likely to see unfavorable court outcomes as legitimate if they were given a meaningful opportunity to participate in the process and were treated with respect.<sup>40</sup> We might expect these experiences and perceptions to be especially important for juveniles, whose sense of self and attitudes toward society are in an active process of development.<sup>41</sup>

In designing our juvenile justice system, we should be mindful not only of whether it will produce "correct" results according to some set of rules governing crime and response, but also of whether it engages its juvenile participants in a way that reinforces their sense that the system is a just one, and that takes them seriously and expects their active participation in the process. This second aim might suggest that adolescents should play a far greater and more direct role in the proceedings, and that judges should more actively and clearly speak to the adolescent throughout. It might require considerably longer hearings, more frequent hearings, or hearings following a different structure. I have elsewhere argued that designing juvenile procedures to facilitate meaningful youth participation is constitutionally required.<sup>42</sup> Here, I emphasize that such procedures could enhance adolescent development and, in turn, social welfare.

Another important aspect of a juvenile justice system designed to have a positive influence on juveniles' development would be its ability to assign and communicate the appropriate level of blame for an offense in a manner that the blamed juveniles could understand. While any system of punishment will communicate some degree of blame to the punished juveniles, a developmentally attuned system of punishment could aim to go further in enhancing juveniles' understanding of society's expectations, and why they matter. That focus might lead to sanctions specifically designed to help an adolescent understand the

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<sup>40</sup> See generally Tom R. Tyler, *Why People Obey the Law* (Princeton 2006).

<sup>41</sup> See Melton, 68 Neb L Rev at 169 (cite in note 38) (suggesting that juveniles' experience of procedural justice is likely to "socialize respect for the law as an institution").

<sup>42</sup> See Emily Buss, *Constitutional Fidelity through Children's Rights*, 2004 S Ct Rev 355, 368–69 (2005) (arguing that the procedures "developed to secure meaningful participation and accurate decisionmaking for adults in criminal court" are a "particularly poor constitutional fit" for adolescents in juvenile court); Emily Buss, *The Missed Opportunity in Gault*, 70 U Chi L Rev 39, 46 (2003) ("Both the nature of minority and the special aims of the juvenile justice system call for deviations from the adult criminal list if we are to remain true to the values that the Due Process Clause protects.").

real harms caused by his offense, and the seriousness with which the offense is viewed by those affected.<sup>43</sup> In sum, assigning the law some responsibility for shaping development will change the nature as well as the justification for our juvenile justice policy.

Even to the extent our developmental pace and direction is physiologically fixed,<sup>44</sup> a reliance on these developmental truths could be problematic. What, for example, is a theory that ties culpability or entitlements to our developmental status to do about the fact that girls appear, consistently, to mature more quickly than boys? If one's culpability is tied to typical brain development and behavior, should adolescent girls be treated as more culpable than boys of a comparable age? To the extent culpability derives directly from one's level of maturity, making this distinction seems only fair. Indeed, making such gender-based distinctions might be constitutionally justified as "substantially related to the important governmental purpose" of assigning punishments properly apportioned to blame.<sup>45</sup>

Another issue raised by greater developmental certainty is how precise the match between law and development should be. Psychologists define adolescence to span the entire decade from ages ten to twenty. Important cognitive milestones are reached for many children by age eleven, and a greater mastery of abstract thinking appears in middle adolescence. Perhaps most important, identity development, through which an individual establishes a stable sense of self with a considerable capacity for self-control, continues into the early to middle twenties. As it turns out, the one age that seems to bear no relationship to any special developmental advancements is eighteen.

And why stop at eighteen (or twenty-one, or even twenty-five)? A growing body of scholarship recognizes development over the life course.<sup>46</sup> Of course, we continue to change as we age, and, while the pace of that change slows for much of the life course, it generally speeds up and becomes dramatic once again if we survive to old age. Most signifi-

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<sup>43</sup> Various forms of "restorative justice," some of which have been embraced in some American jurisdictions, aim to achieve these ends. See generally John Braithwaite, *Restorative Justice & Responsive Regulation* (Oxford 2002).

<sup>44</sup> By this I do not mean fixed against evolution. Presumably over enough generations, we can transform ourselves, and how we develop, completely. Rather, I am attempting to capture our current capacity for developmental variation as limited by our current physiology.

<sup>45</sup> Consider *Craig v Boren*, 429 US 190, 197 (1976) (setting out the test for intermediate scrutiny of gender-based discrimination).

<sup>46</sup> For just one example of an enormous literature, see generally Clara S. Schuster and Shirley S. Ashburn, *The Process of Human Development: A Holistic Life-span Approach* (Lippincott 3d ed 1992).

cant for purposes of this Review is the fact, acknowledged by Scott and Steinberg, that even the worst criminals usually age out of violence by the time they reach age forty (p 247). This behavioral change may well be reflected in physiological changes in hormone levels and brain activity, just like the changes we see before, during, and after adolescence. Should we treat developmental culpability on a continuum, assigning ever-increasing blame for crimes the more developmentally atypical they become? This would suggest that violent offenders in their fifties should be punished more severely than violent offenders in their twenties.

Scott and Steinberg are clear that the distinction lies in what is typical, or normative, for the age cohort as a whole, and that no lesser culpability should be assigned to an individual, regardless of how immature as measured by the same behaviors, capacities, vulnerabilities and brain function, if that immaturity reflects a failure to develop at the typical pace (pp 136–42). At some point, they conclude, behavior can be “reliably attributed to bad character” rather than to deficient development (p 50). But it is not clear why this should be so. Indeed, the very detail of the authors’ developmental accounting lays bare the considerable responsibility families and society bear for an individual’s failure to develop in a prosocial direction.

To state things only a bit too simplistically, it is relatively common for adolescents (especially boys—note that problem again) to engage in antisocial behavior, and in certain social settings (classically high-crime neighborhoods) only extraordinary adolescents can resist the peer pressure to offend. Most adolescents grow out of their antisocial behavior and the aspects of development that cause it, but their likelihood of doing so depends, to a large extent, on the assistance they get from family, community, and broader society in developing the skills that allow them to move into a more stable position in their communities. Those who fail to make the shift suffer, Scott and Steinberg suggest, from some combination of physiological and environmental detriments (pp 255–56). In other words, those who continue offending in adulthood either suffer from some physiological condition that is likely beyond their control, or their opportunity to develop appropriately was squandered by those capable of influencing and controlling the process on their behalf. So described, it is not obvious why blame is reduced for and only for the “developmentally normative” offender. One might even conclude that the behavior of an individual earlier in life was a purer manifestation of self than the behavior of an older person as shaped either positively or negatively by those responsible for raising him.

All this might suggest that any distinction between our treatment of juvenile and adult offenders should rest less on our assessment of

their relative blame and more on the difference between the two groups' potential for change. As Scott and Steinberg recognize, a significant developmental distinction between the typically immature adolescent offender and the atypically immature (or otherwise socially impaired) adult offender is that the identity of the adolescent is still at least potentially fluid and the identity of the adult (setting aside the issue of at what precise age) is fairly fixed (pp 50–52). We might well conclude that the adolescent offender is just as blameworthy at the moment of committing the offense as the adult offender, but that there is a substantially greater chance that the adolescent offender will yet transform himself into someone who does not behave this way anymore. And that conclusion, in turn, might lead to distinctions in our response to the crimes. Such an approach suggests that an assignment of “bad character” might reflect the time at which the law is no longer willing to accommodate the possibility of positive change, rather than any transformation in the relationship between the actor and the act. Indeed, the emphasis in the authors' phrase “reliably attributable to bad character” should perhaps be placed on “reliably” rather than on “character,” as a conventional reading would direct.

Focusing on the fluidity of adolescent identity does not extricate law from a consideration of development, an extrication that I am, in the end, convinced is neither possible nor desirable. But it does rest more of the responsibility for the choices the law makes on lawmakers and defers less to developmental science than a theory that emphasizes the typicality of adolescent offending and the physiological origins of that behavior. Even the drawing of a line between nonadults, whose future prospects are given heightened protection, and adults, whose are not, can be seen more as a commitment that the law makes to give each individual a standard set of years to achieve healthy development than a judgment that this is roughly what these individuals deserve.

Scott and Steinberg's developmental approach builds on the important insight that any politically acceptable juvenile justice system must clearly assign some blame to adolescents. This is surely right, but as I have attempted to demonstrate, assigning blame, with the benefit of developmental wisdom, can take many different forms and leaves other questions unanswered. Most important, my aim in considering some of these alternatives is to remind the reader, appropriately impressed by the depth and breadth of Scott and Steinberg's interdisciplinary work, that a sophisticated understanding of child development does not, in itself, answer any legal questions. The law must determine not only what information it relies upon, but also to what use that information should be put.