



2014

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## Recommended Citation

Michael Vitiello, The Expanding Use of Genetic and Psychological Evidence: Finding Coherence in the Criminal Law? 14 Nev. L.J. 897 (2014).

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# THE EXPANDING USE OF GENETIC AND PSYCHOLOGICAL EVIDENCE: FINDING COHERENCE IN THE CRIMINAL LAW?

Michael Vitiello\*

## I. INTRODUCTION

Imagine criminal defense attorneys accepting a court appointment to represent a defendant facing capital charges. Even if the evidence of guilt is not overwhelming, they will begin building their case in mitigation as part of the anticipated penalty phase of the trial.<sup>1</sup> The penalty phase gives the parties broad discretion in introducing evidence of aggravating and mitigating factors about the defendant.<sup>2</sup> Although the Supreme Court has never held that the Eighth Amendment of the United States Constitution requires states to allow juries to balance mitigating evidence against aggravating factors,<sup>3</sup> the Court has held that, once states create such systems, they must grant the offender wide latitude in introducing such mitigating evidence.<sup>4</sup> Competent attorneys have routinely

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\* Distinguished Professor of Law, University of Pacific, McGeorge School of Law; University of Pennsylvania, J.D. 1974; Swarthmore College, B.A. 1969. I want to extend special thanks to my colleague Jerry Caplan, and my former colleagues Joshua Dressler and Michael Hoffheimer, and Fordham Professor Deborah Denno for their helpful comments on an earlier draft of this article. In addition, I want to extend thanks to Jerry Caplan for leading a workshop on this paper and to my colleagues who attended that presentation and specifically to Raquel Aldana, Mary-Beth Moylan, and Emily Garcia Uhrig for their comments at the presentation. Also, I want to thank McGeorge students Erika Lewis and Jacquelyn Loyd for their help with footnoting the article, and to Jacquelyn Loyd for her research assistance and coordination of work on the footnotes.

<sup>1</sup> LINDA E. CARTER ET AL., UNDERSTANDING CAPITAL PUNISHMENT 75 (3d ed. 2012). All jurisdictions that authorize the death penalty require two trials: the first deciding the question of guilt or innocence and the second beginning only after a judge or jury finds the defendant guilty of an offense punishable by death. This is known as the bifurcated trial. *Id.*

<sup>2</sup> In fact, randomness and ‘freakishness’ are even more evident in a system that requires aggravating factors to be found in great detail, since it permits sentencers to accord different treatment, for whatever mitigating reasons they wish, not only to two different murderers, but to two murderers whose crimes have been found to be of similar gravity.

Walton v. Arizona, 497 U.S. 639, 666–67 (1990) (Scalia, J., concurring). The American Law Institute was an early proponent of the balancing process of aggravating and mitigating factors but, largely in recognition of the arbitrariness of the process, the Institute withdrew its support for Model Penal Code § 210.6 in 2009. See Cary Bricker & Michael Vitiello, *Chinese Homicide Law, Irrationality, and Incremental Change*, 27 TEMPLE INT’L & COMP. L.J. 43, 57, 59 (2013).

<sup>3</sup> CARTER ET AL., *supra* note 1, at 53–54, 131. In fact, the Court has held that the Eighth Amendment sets limits to the introduction of aggravating evidence and “must provide a basis for an individualized decision that death is appropriate for th[e] defendant.” *Id.* at 131.

<sup>4</sup> *Id.* at 174. “[V]irtually all proffered mitigating evidence relating to the defendant’s character, record or crime is ‘relevant’ and, thus, . . . admissible.” *Id.*

relied on scientific evidence focusing on environmental factors<sup>5</sup> that reduce the offender's culpability. In recent years, neuroscience<sup>6</sup> and genetic information<sup>7</sup> have gained increasing acceptance in the death penalty phase,<sup>8</sup> adding to information about the influence of an offender's dysfunctional upbringing.<sup>9</sup> In an impressive study of over eighty criminal cases involving behavioral genetic evidence, Professor Deborah Denno found a trend towards greater judicial acceptance of such evidence, especially in death penalty cases.<sup>10</sup>

Perhaps surprisingly, Professor Denno found in the cases she reviewed that prosecutors typically did not attempt to use similar genetic evidence to prove future dangerousness.<sup>11</sup> Instead, as with information about the offender's upbringing and other environmental information, behavioral genetic information is used almost exclusively to attempt to reduce an offender's culpability.<sup>12</sup> After all, if one's family has a history of antisocial behavior caused by those family members' genetic makeup, presumably we are less likely to blame the offender.

Many death penalty opponents no doubt applaud the expansion of the use of such material to lessen the likelihood of the imposition of the death penalty.<sup>13</sup> But the use of such information begs additional questions. The argument that genetics and environmental factors reduce an offender's culpability is a powerful one, the implications of which need to be explored. Currently, reliance on behavioral genetic and environmental information is primarily limited to death penalty cases, not other criminal cases.<sup>14</sup> Analytically, however, because information showing an offender's genetic predisposition to criminality and with a horrible upbringing of abuse and neglect reduces an offender's culpability, one should ask why such evidence is not important at a criminal sentencing hearing or the trial itself. Framed differently, as courts routinely

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<sup>5</sup> By environmental, I mean evidence of abuse and other evidence about the offender's upbringing that may explain the offender's ability to commit a heinous crime. *See, e.g.*, *Penry v. Lynaugh*, 492 U.S. 302, 309–10 (1989); *Detrich v. Ryan*, 619 F.3d 1038, 1047–48 (9th Cir. 2010), *rev'd on other grounds*, 131 S. Ct. 1388 (2011); *Worthington v. Roper*, 631 F.3d 487, 493 (8th Cir. 2011).

<sup>6</sup> *See* Full Definition of “neuroscience,” MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/neuroscience> (last visited Apr. 24, 2014) (defining neuroscience as “a branch . . . of the life sciences that deals with the anatomy, physiology, biochemistry, or molecular biology of nerves and nervous tissue and especially with their relation to behavior and learning”).

<sup>7</sup> Deborah W. Denno, *Courts' Increasing Consideration of Behavioral Genetics Evidence in Criminal Cases: Results of a Longitudinal Study*, 2011 MICH. ST. L. REV. 967, 998 (2011) (indicating that behavioral genetics evidence can be grouped into four types: “(1) expert testimony, (2) family history, (3) behavioral history, and (4) medical history”).

<sup>8</sup> *Id.* at 1028.

<sup>9</sup> *See, e.g.*, *Penry*, 492 U.S. at 309–10; *Detrich*, 619 F.3d at 1047–48; *Russell v. Collins*, 998 F.2d 1287, 1291–92 (5th Cir. 1993).

<sup>10</sup> Denno, *supra* note 7, at 1028.

<sup>11</sup> *Id.* at 974. Speculating why prosecutors have not done so is beyond the scope of this article.

<sup>12</sup> *Id.*

<sup>13</sup> Deborah W. Denno, *The Scientific Shortcomings of Roper v. Simmons*, 3 OHIO ST. J. CRIM. L. 379, 379–80 (2006) (criticizing the court's use of scientific studies but applauding its result).

<sup>14</sup> *See infra* Part II.

accept such evidence in death penalty cases, are they likely also to allow the use of such evidence in other contexts where they would seemingly have equal applicability?

These are the questions on which this article focuses. Section II reviews the use of evidence about how the brain works in death penalty cases and develops in more depth why such evidence is relevant.<sup>15</sup> Section III examines an area outside the death penalty where the Supreme Court has relied on studies about psychological development to find that the Eighth Amendment prevents the imposition of a term of life without the benefit of parole on an offender who was under eighteen years old when he committed his offense and who has not committed homicide,<sup>16</sup> and then has extended that to juvenile offenders who have committed murder. Specifically, it held that a state may not mandate life without the benefit of parole for all juvenile murders.<sup>17</sup> In *Graham v. Florida* and *Miller v. Alabama*, the Court relied on information derived from such studies to support its interpretation of the Eighth Amendment.<sup>18</sup> Section IV looks beyond *Graham* and *Miller* and examines how the Court views the Eighth Amendment in criminal sentencing cases generally.<sup>19</sup> Elsewhere, the Court has given states wide latitude in setting criminal punishments when the punishment is a term of years and the case does not involve a juvenile offender.<sup>20</sup> Further, the Court has seldom suggested that the Constitution requires states to take such scientific evidence into consideration in deciding what substantive defenses to allow. For example, the Court has not held that states must allow a particular substantive defense, like insanity, even though modern scientific evidence might support an argument that an offender suffering from mental illness cannot conform his conduct to the requirements of the law.<sup>21</sup> That section also explores whether the current state of the law, which, in effect, forces states to comply with modern scientific studies in two limited contexts but not elsewhere, is consistent. Despite a powerful argument that the same line of thought that prevailed in the death penalty and juvenile punishment contexts should apply with equal force elsewhere in the law, Section IV further explores why the Court is not likely to extend the same reasoning to those areas of the law. This is the case because, at its core, the criminal law is grounded in the idea that offenders have free will to choose whether to commit crimes.<sup>22</sup> Psychological evidence, which focuses on causes of human behavior, is inconsistent with that premise. That section also explores the reality of the criminal law: the criminal law often compromises consistency and coherency when protection of the public requires abandoning principle.

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<sup>15</sup> See *infra* Part II.

<sup>16</sup> *Graham v. Florida*, 560 U.S. 48, 82 (2010).

<sup>17</sup> *Miller v. Alabama*, 132 S. Ct. 2455, 2460 (2012).

<sup>18</sup> See *infra* Part III.

<sup>19</sup> See *infra* Part IV.

<sup>20</sup> See, e.g., *Ewing v. California*, 538 U.S. 11 (2003) (plurality opinion); *Harmelin v. Michigan*, 501 U.S. 957 (1991) (plurality opinion); *Solem v. Helm*, 463 U.S. 277 (1983).

<sup>21</sup> See *infra* pp. 19–22.

<sup>22</sup> H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 28 (2d ed. 2008).

## II. THE SCIENCE OF THE BRAIN AND THE LAW

Back to the hypothetical criminal defense lawyers who have just been appointed to represent a client charged with capital murder. When they begin to piece together the facts of the crime, they may discover truly gruesome facts. Here is a not-so-hypothetical example of what they may learn:

Prior to committing two murders and leaving a third victim near death, the defendant spent the day with a friend. The pair injected cocaine and drank a large quantity of beer. Later, they found a pornographic magazine and took turns reading it. During the early afternoon, the defendant returned to the apartment complex where he and the victims lived. He forced his way into his neighbors' apartment and began making sexual advances towards his first victim, the single mother of two young children. When she resisted, the defendant became violent. Grabbing a butcher's knife, the defendant stabbed the woman repeatedly, splattering blood all over the apartment. The autopsy report listed over eighty wounds, many of them defensive wounds. No single wound was fatal, suggesting that the victim suffered for a long time as the defendant assaulted her.

Her daughter, two years old, was found near her mother's body on the kitchen floor. She was also dead. Her autopsy listed wounds from the butcher's knife to her chest, abdomen, back, and head. The only surviving victim was a three year-old son of the first victim. He was found with multiple stab wounds and had lost most of the blood in his body. Surgeons were able to save his life by performing surgery, lasting over five hours.

Reading further, the defendant's attorneys discover that evidence of the defendant's guilt is overwhelming.<sup>23</sup>

Faced with a prosecutor unlikely to agree to a plea deal for a sentence other than death, the attorneys must chart their strategy. Competent death penalty lawyers know what they must do: they must build a powerful case for mitigation that is likely to be built on a combination of witnesses from the defendant's childhood who can testify about the horrible experience of the defendant's life and experts who can explain the psychological impact that those experiences had on his life.<sup>24</sup> In more recent years, they might also develop a behavioral genetic history.<sup>25</sup>

What is that personal history likely to reveal? Anyone familiar with death penalty cases knows the common denominators that appear in the life stories of offenders who have committed heinous crimes, which qualify them as the worst of the worst.<sup>26</sup> Begin with horrendously abusive families, parents who commit

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<sup>23</sup> With a few minor modifications, these are the facts of *Payne v. Tennessee*, 501 U.S. 808, 811–13 (1991). As I have argued elsewhere, the Supreme Court no doubt took certiorari in *Payne* in order to overrule very recent precedent. See Michael Vitiello, *Payne v. Tennessee: A "Stunning Ipse Dixit"*, 8 NOTRE DAME J.L. ETHICS & PUB. POL'Y 165, 167 (1994). While the facts are truly gruesome, anyone familiar with death penalty litigation knows that they are hardly unique.

<sup>24</sup> CARTER ET AL., *supra* note 1, at 169–70.

<sup>25</sup> Denno, *supra* note 7, at 974.

<sup>26</sup> See CARTER ET AL., *supra* note 1, at 15 (quoting *Gregg v. Georgia*, 428 U.S. 153, 183 (1976)).

unthinkable acts of violence towards their children.<sup>27</sup> These offenders are often shunted from home to home with stepparents or other caretakers who seem to resent their existence.<sup>28</sup> Their parents often abuse alcohol and drugs<sup>29</sup> and may leave their children without adequate care while they go on binges.<sup>30</sup> Parents may also allow others to abuse their children<sup>31</sup> and may, themselves, have extensive experience with the criminal justice system.<sup>32</sup> Brain injuries are common among offenders who end up on death row,<sup>33</sup> leading some experts to speculate that such physical trauma is a major cause of violence among death row inmates.<sup>34</sup> Such offenders often suffer from other problems, including retardation,<sup>35</sup> alcoholism<sup>36</sup> and drug addiction,<sup>37</sup> paranoia, and other mental illnesses.<sup>38</sup>

For those unfamiliar with modern death penalty law, one might ask what such facts have to do with the imposition of the death penalty. That has to do with the current administration of the death penalty in states that allow the death penalty. At one point in our history, premeditation was the dividing line between offenders who might receive the death penalty and those who were

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<sup>27</sup> See, e.g., *Penry v. Lynaugh*, 492 U.S. 302, 309–10 (1989) (indicating that the mentally handicapped defendant Penry's mother had abused him as a child); *Detrich v. Ryan*, 619 F.3d 1038, 1047–48 (9th Cir. 2010) (noting that the defendant, alleged to have stabbed the victim over forty times, had an abusive childhood at the hands of several stepparents); *Russell v. Collins*, 998 F.2d 1287, 1291–92 (5th Cir. 1993) (outlining the murder defendant's mitigating evidence, including a severe beating he received as a child in which his stepfather hit him the face with a baseball bat).

<sup>28</sup> *Detrich*, 619 F.3d at 1047–48 (explaining that Detrich lived with an abusive stepmother before moving to his biological mother's where he acquired an abusive stepfather). See generally Phyllis L. Crocker, *Childhood Abuse and Adult Murder: Implications for the Death Penalty*, 77 N.C. L. REV. 1143 (1999).

<sup>29</sup> *Detrich*, 619 F.3d at 1047 (alcohol abuse); *Worthington v. Roper*, 631 F.3d 487, 493 (mother abused alcohol, father abused heroin); *Rhoades v. Henry*, 638 F.3d 1027, 1048–49 (9th Cir. 2010) (alcohol and drug abuse).

<sup>30</sup> *Detrich*, 619 F.3d at 1047 (noting even shockingly worse behavior can occur: Detrich's stepfather actually took him along on his drinking binges, and in one instance, the two of them disappeared for days and ended up 300 miles from home).

<sup>31</sup> *Id.* (describing the defendant's abuse at the hands of two different stepparents).

<sup>32</sup> *Cullen v. Pinholster*, 131 S. Ct. 1388, 1410, 1425 (2011).

<sup>33</sup> *Jones v. Ryan*, 583 F.3d 626, 630 (9th Cir. 2009); *Russell v. Collins*, 998 F.2d 1287, 1291–92 (5th Cir. 1993); *Purkey v. United States*, No. 06-8001, 2010 WL 4386532, at \*6 n.1 (W.D. Mo. Oct. 28, 2010); *Commonwealth v. Williams*, Nos. 200001876, 200002869, 2010 Pa. Dist. & Cnty. Dec. LEXIS 193, at \*5–6 (C.P. Allegheny Cty., Crim. Div. May 13, 2010).

<sup>34</sup> See generally Drew Barzman et al., *Does Traumatic Brain Injury Cause Violence?*, CURRENT PSYCHIATRY, Apr. 2012, available at <http://www.currentpsychiatry.com/articles/evidence-based-reviews/article/does-traumatic-brain-injury-cause-violence/cc8f09d62b5d5abc023ea413a99617d2.html>.

<sup>35</sup> *Penry v. Lynaugh*, 492 U.S. 302, 309 (1989); *Williams*, Nos. 200001876, 200002869, 2010 Pa. Dist. & Cnty. Dec. LEXIS 193, at \*5–7.

<sup>36</sup> *Detrich*, 619 F.3d at 1047; *Mickey v. Ayers*, 606 F.3d 1223, 1231 (9th Cir. 2010); *Morales v. Mitchell*, 507 F.3d 916, 924 (6th Cir. 2007).

<sup>37</sup> *Hodges v. Bell*, 548 F. Supp. 2d 485, 507 (M.D. Tenn. 2008).

<sup>38</sup> *Morris v. Malfi*, 449 F. App'x 686, 686 (9th Cir. 2011); *Worthington v. Roper*, 631 F.3d 487, 493 (8th Cir. 2011); *Henry v. Ryan*, No. CV 02-656-PHX, 2009 WL 692356, at \*65 (D. Ariz. Mar. 17, 2009);. See also *Brant v. State*, 21 So. 3d 1276, 1281 (Fla. 2009) (introducing the defendant's PET scan at trial, which showed low activity in certain areas of the brain related to impulse control and judgment).

statutorily ineligible.<sup>39</sup> That is, in many states, first degree murder, a premeditated murder,<sup>40</sup> made the offender eligible for the death penalty, whereas a second degree murderer would receive some term of years.<sup>41</sup> Scholars found premeditation a poor dividing line for those eligible for death as opposed to a term of years in prison. Among other problems with the premeditation formulation identified by the Model Penal Code drafters, the idea that a person who plans ahead is more culpable than a person who does not is a generalization that “does not . . . survive analysis.”<sup>42</sup> For example, “[p]rior reflection may reveal the uncertainties of a tortured conscience rather than exceptional depravity. . . . The suddenness of the killing may simply reveal callousness so complete and depravity so extreme that no hesitation is required.”<sup>43</sup>

While many members of the American Law Institute favored abolition of the death penalty,<sup>44</sup> the original Code included an alternative to the use of premeditation or any other simple formula for dividing between murderers who were and were not death eligible.<sup>45</sup> For states that were going to impose the death penalty, the Model Penal Code prescribed a set of aggravating and mitigating circumstances that should be balanced in determining whether the death penalty was justified.<sup>46</sup>

The Supreme Court has never mandated that states follow this model.<sup>47</sup> However, it has become *de facto* the law for states that retain the death penalty.<sup>48</sup> During the post-*Furman*<sup>49</sup> era, the Supreme Court found constitutional various state laws allowing the imposition of the death penalty.<sup>50</sup> Many of them

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<sup>39</sup> See Bricker & Vitiello, *supra* note 2, at 57; MODEL PENAL CODE § 210.6 cmt. 3 (1962). The Pennsylvania Act of 1794 limited capital murder to first-degree murder. There has always been some confusion over whether murder committed by one of the specified means—e.g., poison—must also be found “wilful, deliberate or premeditated” in order to support the capital sanction. Bricker & Vitiello, *supra* note 2, at 55.

<sup>40</sup> Many jurisdictions have a second category of first degree murder, those cases in which a death occurred during a particularly heinous felony. In such cases, premeditation is irrelevant. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 500–01 (6th ed. 2012).

<sup>41</sup> *Id.* The Pennsylvania Act of 1794 provided that all murder, which shall be perpetrated by “means of poison, or by lying in wait,” or by any kind of “willful, deliberate and premeditated killing” shall be murder in the first degree; and all other kinds of murder shall be deemed murder in the second degree. *Id.* at 501 (internal quotations omitted). Only first-degree murder was capital. *Id.* at 500–01.

<sup>42</sup> MODEL PENAL CODE § 210.6 cmt. 4(b).

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* § 210.6 cmt. 1.

<sup>45</sup> Bricker & Vitiello, *supra* note 2, at 55–56 (discussing the critique of the line between first and second degree murder).

<sup>46</sup> MODEL PENAL CODE §§ 210.6(1), 210.6(3).

<sup>47</sup> CARTER ET AL., *supra* note 1, at 172. Relevant mitigating evidence relates to the defendant’s “character or record” or “the circumstances of the crime.” The Court has found that aggravating circumstances must be adequately narrowed to the class of persons eligible for a sentence of death. *Id.* at 140.

<sup>48</sup> *Id.* at 139. Each of the thirty-four states that have death penalty statutes require a jury to find at least one statutory aggravating circumstance or its functional equivalent. See Bricker & Vitiello, *supra* note 2, at 45 (discussing the Model Penal Code).

<sup>49</sup> *Furman v. Georgia*, 408 U.S. 238 (1972).

<sup>50</sup> CARTER ET AL., *supra* note 1, at 139. The Court found the death penalty statutes of Georgia and Florida, which enumerated aggravating circumstances, constitutional. *Id.*

have adopted an approach based on § 210.6 of the Model Penal Code.<sup>51</sup> As a result, they allow the state and offender to introduce evidence relating to aggravation or mitigation.<sup>52</sup> In various holdings, the Supreme Court has protected the right of the defendant to introduce a wide variety of mitigating evidence.<sup>53</sup> This approach may have few supporters<sup>54</sup> but, given the fact that this balancing of mitigating and aggravating factors is so well established in the law, death penalty attorneys have pushed to expand the kinds of evidence that the jurors may consider in their deliberations.<sup>55</sup>

Mitigation evidence, like behavioral genetic information, psychological evidence about the harm caused by abuse, and expert evidence about the effect of brain trauma, is relevant because it tends to reduce the offender's culpability.<sup>56</sup> That, of course, is the point of asking the jury to balance mitigating and aggravating factors.<sup>57</sup> Compare the following two offenders: one has grown up in a stable loving environment and does not have any identifiable brain abnormality; the other has been the victim of horrendous abuse, which has contributed to his inability to conform his conduct to the law. Each offender murders someone. Surely, if the decision maker must decide who is more culpable, he or she is likely to choose the privileged individual. One might object that an examination of the background of the privileged individual would reveal mitigating evidence. Fair enough; but although one can raise many objections to such a balancing approach,<sup>58</sup> the idea is grounded on the notion that the set of cards we are dealt, both environmental and genetic, influences our behavior and ability to conform our conduct to the law. Even a strong proponent of free will may recognize that some offenders have more difficulty conforming their conduct to the requirements of the law, in part, because of their genetic and environmental backgrounds.

Even beyond holding that such mitigating evidence is admissible, in *Roper v. Simmons*, the Supreme Court relied on scientific studies demonstrating that adolescents are less able than adults to conform their conduct to the require-

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<sup>51</sup> *Id.* at 131 and accompanying notes (stating that some states have adopted statutory aggravating evidence); MODEL PENAL CODE §§ 210.6(1), 210.6(3).

<sup>52</sup> CARTER ET AL., *supra* note 1, at 172 (describing the “no preclusion” principle that allows defendants to introduce mitigating evidence).

<sup>53</sup> *Id.* at 169 (“The Court has held that almost all evidence proffered by the defense as mitigating must be permitted in the penalty phase.”).

<sup>54</sup> See Bricker & Vitiello, *supra* note 2, at 57. The American Law Institute considered a provision allowing discretionary sentencing, but ultimately did not include it in the Model Penal Code due to the propensity for abuse that comes with all discretionary standards. Instead, the Institute suggested states adopt a guided discretionary standard. *Id.* See also *Callins v. Collins*, 510 U.S. 1141, 1142 (1994) (Scalia, J., concurring). Justice Scalia concurred to say that these discretionary principles “were invented without benefit of any textual or historical support” and that personal moral convictions against the death penalty should not be read into the Constitution. *Id.*

<sup>55</sup> Denno, *supra* note 7, at 1028 (describing the court’s increasing acceptance of behavioral evidence over the last few years).

<sup>56</sup> *Id.* at 972.

<sup>57</sup> CARTER ET AL., *supra* note 1, at 169. Mitigation evidence enables the sentence to consider the life and circumstances of the particular defendant in deciding whether death or life is the appropriate sentence. *Id.*

<sup>58</sup> See Bricker & Vitiello, *supra* note 2, at 57; see also text accompanying note 54.



ments of the law to hold that certain punishments that are constitutional with respect to adults are unconstitutional with respect to people under the age of eighteen.<sup>59</sup> One prominent scholar has criticized the Court's analysis of that data in *Roper*,<sup>60</sup> largely on grounds that some of the support was dated and that the Court read sources carelessly, using them for propositions somewhat different from the authors' points.<sup>61</sup> Nonetheless, *Roper* is an example of where the Court's view of the Eighth Amendment has been influenced by an emerging scientific understanding of the brain. Unclear is whether the view of any justice who voted in the majority in *Roper* turned on modern scientific evidence; but reliance on such data seems like a powerful rhetorical argument: the Court is no longer relying solely on a subjective sense that adolescents lack the same capacity for control as adults.

Thus, at least in the death penalty context, psychological and genetic evidence influences the law in one of two ways. In cases where the offender remains death penalty eligible, that offender may present that kind of evidence in mitigation because it is relevant to the offender's culpability. In *Roper*, the Court relied on that kind of evidence to determine that a class of offenders is not death penalty eligible in the first instance. In both instances, the evidence is relevant because it demonstrates a lower degree of culpability.

### III. GRAHAM, MILLER, AND BEYOND

As explored more fully below, members of the Court have often incanted the mantra that "death is different" in discussing rules governing the death penalty that may not apply elsewhere in the criminal law. But the Court extended its holding in *Roper* to two other cases involving juvenile offenders.<sup>62</sup> It did so, in part, in reliance on the same scientific support it found compelling in *Roper*.<sup>63</sup>

In *Graham v. Florida*,<sup>64</sup> the Supreme Court resolved the following question: does the Eighth Amendment prohibit a state from sentencing a juvenile offender to a true life sentence for a non-homicide offense?<sup>65</sup> The Court concluded that such a sentence did violate the Eighth Amendment.<sup>66</sup>

Graham was obviously a deeply troubled youth, raised by drug addicts, diagnosed with attention deficit disorder at an early age, using alcohol and tobacco from age nine and marijuana from age thirteen.<sup>67</sup> His violent criminal career began at least as early as sixteen years old, when he and friends made a botched armed robbery attempt.<sup>68</sup> Despite a promise to the court to turn his life around, Graham was involved in a serious home invasion robbery within

<sup>59</sup> *Roper v. Simmons*, 543 U.S. 551, 569 (2005).

<sup>60</sup> Denno, *supra* note 13, at 380.

<sup>61</sup> *Id.*

<sup>62</sup> *Graham v. Florida*, 560 U.S. 48, 67 (2010); *Miller v. Alabama*, 132 S. Ct. 2455, 2464 (2012).

<sup>63</sup> See text accompanying note 59.

<sup>64</sup> *Graham*, 560 U.S. at 48.

<sup>65</sup> *Id.* at 52–53.

<sup>66</sup> *Id.* at 82.

<sup>67</sup> *Id.* at 53.

<sup>68</sup> *Id.*

months of his initial sentencing.<sup>69</sup> Believing that Graham was incorrigible, the trial court sentenced him to life without the possibility of parole, rejecting even the prosecutor's recommended sentence of a term of years.<sup>70</sup>

The *Graham* majority recognized that Eighth Amendment case law has fallen into two categories: instances in which a particular sentence may violate the Eighth Amendment's proportionality provision and those in which the Court establishes categorical rules.<sup>71</sup> The cases involving categorical rules, in turn, involve two subsets of cases: cases in which certain offenses do not qualify for the death penalty<sup>72</sup> and cases in which a subset of offenders do not qualify for the death penalty.<sup>73</sup> *Roper* presented an instance in which the underlying crime, murder, qualified for the death penalty, but met the second criterion whereby the Eighth Amendment prevents the execution of offenders who were juveniles when they committed murder.<sup>74</sup> *Graham* presented the Court with a new subcategory: a categorical challenge to a term of years.<sup>75</sup>

Following analysis familiar from the death penalty context, the Court analyzed whether there exists a national consensus on the suitability of a particular punishment.<sup>76</sup> The Court concluded that the sentencing practice at issue was "exceedingly rare."<sup>77</sup> More important for this discussion, the Court focused on the culpability of the offender and of juvenile offenders generally.<sup>78</sup> In reliance on Justice Kennedy's concurring opinion in *Harmelin v. Michigan*,<sup>79</sup> the majority examined "the culpability of the offenders at issue in light of their crimes and characteristics, along with the severity of punishment in question."<sup>80</sup> In that discussion, the Court also assessed whether the state's sentencing policy advanced legitimate penological goals.<sup>81</sup>

The Court's conclusion followed naturally from *Roper*, which "established that because juveniles have lessened culpability they are less deserving of the most severe punishments."<sup>82</sup> Further, as compared to adults, juveniles had a "lack of maturity and an underdeveloped sense of responsibility."<sup>83</sup> As a result, juveniles are not categorically among the worst offenders.<sup>84</sup> The Court relied on brain science as presented to the Court by *Graham*'s amici, including briefs from the American Medical Association and the American Psychological Association.<sup>85</sup> The Court also found no compelling penological justification

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<sup>69</sup> *Id.* at 54.

<sup>70</sup> *Id.* at 56–57.

<sup>71</sup> *Id.* at 59.

<sup>72</sup> *Id.* at 60–61.

<sup>73</sup> See *Roper v. Simmons*, 543 U.S. 551, 575, 578 (2005).

<sup>74</sup> *Id.*

<sup>75</sup> *Graham*, 560 U.S. at 61.

<sup>76</sup> *Id.* at 62–67.

<sup>77</sup> *Id.* at 67.

<sup>78</sup> *Id.* at 62–67.

<sup>79</sup> *Harmelin v. Michigan*, 501 U.S. 957, 996 (1991) (Kennedy, J., concurring).

<sup>80</sup> *Graham*, 560 U.S. at 67.

<sup>81</sup> *Id.* at 67–75.

<sup>82</sup> *Id.* at 68 (citing *Roper v. Simmons*, 543 U.S. 551, 569 (2005)).

<sup>83</sup> *Id.* (quoting *Roper*, 543 U.S. at 569–70).

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

that supported life without the benefit of parole for juvenile offenders.<sup>86</sup> The overall conclusion was clear: juveniles are less morally culpable than adults, in part because of what brain science reveals.<sup>87</sup>

The juvenile offenders in *Miller*, which included the consolidated case, *Jackson v. Hobbs*,<sup>88</sup> were fourteen when they committed their crimes. Both juveniles were charged with murder, for which they were sentenced to life without benefit of parole.<sup>89</sup> Thus, the Court had to decide whether to extend *Roper* and *Graham*.

It did so. Initially, the majority relied on the essential holding in both cases that “children are constitutionally different from adults for purposes of sentencing.”<sup>90</sup> They are less culpable and have greater capacity for reform than adults.<sup>91</sup> This line of cases has relied not only on common sense (“on what ‘any parent knows’ ”<sup>92</sup>), “but on science and social science as well.”<sup>93</sup>

The Court has not distinguished between behavioral genetic studies and other studies. Distinguishing between the different kinds of studies almost certainly would not matter because both types support the view that the capacity for self-control develops over time and that youth is a particularly volatile period.<sup>94</sup>

*Roper*, *Graham*, and *Miller* raise some interesting questions for purposes of this article. There are several issues that seem to flow from those cases. First, what is the underlying principle at work? For example, the Court’s reasoning in *Roper* seemed to flow from death penalty cases where the Court has taken a close look at proportionality, at least since 1976 when it decided *Coker v. Georgia*.<sup>95</sup> While *Coker* focused on the underlying crime, it held, in effect,<sup>96</sup> the death penalty was proportional only if the defendant took a life.<sup>97</sup> *Roper* and cases like *Atkins v. Virginia*<sup>98</sup> involved the death penalty and focused on the offender, rather than the offense. Nonetheless, cases like *Coker*, *Roper*, and *Atkins* seem to revolve around a single principle: the death penalty must be proportional based on retributive grounds. Punishment is excessive if the state

<sup>86</sup> *Id.* at 71.

<sup>87</sup> *Id.* at 82.

<sup>88</sup> *Jackson v. Hobbs and Miller v. Alabama*, 132 S. Ct. 2455 (2012).

<sup>89</sup> *Jackson and Miller*, 132 S. Ct. at 2460.

<sup>90</sup> *Id.* at 2464.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> That conclusion is supported by other data as well as scientific studies. Anyone familiar with crime statistics knows that violent crime is a “young man’s game.” Michael Vitiello, *California’s Three Strikes and We’re Out: Was Judicial Activism California’s Best Hope?*, 37 U.C. DAVIS L. REV. 1025, 1097 n.581 (quoting Posner, J.). The peak crime years are between 15 and 29. *See id.* at 1055.

<sup>95</sup> *Coker v. Georgia*, 433 U.S. 584 (1977) (plurality opinion).

<sup>96</sup> *Coker* did not produce a majority opinion, but the plurality opinion was narrower than Justices Brennan and Marshall’s view. As a result, the plurality’s holding could be cited as having precedential value. More recent, a majority of the Court has made that explicit. *Kennedy v. Louisiana*, 554 U.S. 407, 426–30 (2008).

<sup>97</sup> The Court has left open the question whether some offenses, perhaps treason, might justify the death penalty even absent the loss of life. *See id.* at 437 (choosing not to rule on state crimes like treason).

<sup>98</sup> *Atkins v. Virginia*, 536 U.S. 304 (2002).

seeks to take a life when the offender did not take a life. Further, the offender must be sufficiently culpable to warrant retribution even if he has taken a life.<sup>99</sup>

Blindly relying on the mantra that “death is different” does not explain why the principle emerging from *Coker* through *Roper* should not be extended further. This article takes up that question in the next section. Before leaving *Graham* and *Miller* though, I want to observe the questions that those cases seem to raise: Is death “different” or has the Court extended the principle that culpability is essential to proportionality outside the area of the death penalty? The obvious common denominator in *Graham* and *Miller* is the age of the offenders. But that compels one final question. Why should those cases be limited to juvenile offenders? Why don’t they apply any time an offender can show an absence of culpability resulting from causes beyond his control?

#### IV. STRUGGLING TO FIND THE PRINCIPLE

Assume that defense counsel represents two offenders, charged with unrelated murders. One is a youth, charged with killing an older man, who forced the young man to have intercourse and then ridiculed him after the fact. Call the first offender Mr. Camplin.<sup>100</sup> The other is an older man from an ethnic group known for their passionate nature. The second client learned that another man insulted his wife. He became enraged and killed the other man. Call the second offender Mr. Esaltato.<sup>101</sup> Based on clear evidence that her clients committed the acts, she starts to investigate whether they may have successful provocation defenses.

She consults her scientific expert. He explains the most recent research, both genetic and cultural, and tells her that young people do not have the same capacity as do more mature adults.<sup>102</sup> As a result, they have difficulty conforming their behavior to social norms. He also explains the existence of an emerging body of literature that demonstrates ethnic differences in levels of control.<sup>103</sup> He mentions a recent study showing much higher alcohol addiction rates among some ethnic groups than others.<sup>104</sup> She now must determine if she can use her expert at trial on the ground that her clients are less culpable than offenders who are not youthful or not of this particular ethnic group. She is

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<sup>99</sup> See *Tison v. Arizona*, 481 U.S. 137, 158 (1987) (holding that the defendants who were major participants in a crime such that their actions showed a highly culpable mental state could still be sentenced to death); *Enmund v. Florida*, 458 U.S. 782, 798 (1982) (holding that the death penalty cannot be imposed on the defendants found guilty of felony murder because they do not have a culpable enough state of mind).

<sup>100</sup> These are the facts of *DDP v. Camplin*, [1978] A.C. 705 (H.L.) 712, in which the House of Lords held that a fifteen year old is entitled to be judged by the standard of self-control exhibited by youths of the same age when the issue is reducing a charge of murder to voluntary manslaughter.

<sup>101</sup> *Esaltato* means “exalted,” “raised up,” or “hot headed” in Italian.

<sup>102</sup> See *supra* Part II; Mara Rose Williams, *Teens’ Brains Lack in Ability for Sound Judgment*, DAVIDVANALSTYNE.COM, <http://www.davidvanalstyne.com/pg-teensbrainslack.html> (last visited Mar. 17, 2014).

<sup>103</sup> Mara Rose Williams, *Reckless Teen Acts May Start in Brain: Nerve Center Forms into Adulthood*, KAN. CITY STAR, Sept. 23, 2000, at A1. .

<sup>104</sup> See M. Reza Nakhaie et. al., *Self Control and Social Control: An Examination of Gender, Ethnicity, Class and Delinquency*, 25 CANADIAN J. OF SOC. 35, 44 (2000).

about to learn that the answers to those questions are maybe and it depends. As discussed above, if Mr. Esaltato was charged with a capital offense, some of the evidence would be relevant.<sup>105</sup> Also as discussed above, the Supreme Court has already found that sentencing Mr. Camplin to a true life sentence would violate the Eighth Amendment.<sup>106</sup> But what about in other instances?

Whether such evidence is relevant at sentencing is largely dependent on state law. Outside the areas of the death penalty and the recent cases dealing with true life sentences for juveniles, the Supreme Court has largely left sentencing policies to the states. The body of case law dealing with terms of imprisonment for adults is thin.

Prior to 1980, the Court paid little attention to the question. The one notable exception involved a defendant who was working for a public agency as a disbursing agent and was convicted of falsifying documents in order to defraud the government.<sup>107</sup> He was sentenced to fifteen years “at cadena”<sup>108</sup> by a Philippine court.<sup>109</sup> The Court found that the sentence amounted to cruel and unusual punishment.<sup>110</sup> The Court did not make clear whether the fact that the defendant would be subject to hard labor was necessary to its finding.<sup>111</sup>

Between 1980 and 2003, the Court decided a series of cases that stand for the proposition that the Eighth Amendment includes a proportionality protection even when the sentence is a term of years, but that only in exceedingly rare instances will a defendant prevail.<sup>112</sup> A divided Court rejected the defendant’s claim in *Rummel v. Estelle*<sup>113</sup> in 1980. There, a Texas court sentenced a repeat offender to a term of life in prison.<sup>114</sup> Under Texas law, the prisoner was parole eligible,<sup>115</sup> and offenders like Rummel typically got out of prison in a relatively short time.<sup>116</sup> In dicta, the Court suggested that a term of imprisonment might violate the Eighth Amendment but found no constitutional violation in Rummel’s case.<sup>117</sup>

Two years later, the Court affirmed a forty-year sentence imposed on a defendant charged with possession and possession with intent to distribute nine ounces of marijuana.<sup>118</sup> The Court issued a per curiam opinion, largely in reli-

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<sup>105</sup> See *supra* Part II.

<sup>106</sup> See *supra* Part III.

<sup>107</sup> *Weems v. United States*, 217 U.S. 349, 357 (1910).

<sup>108</sup> *Id.* at 356, 363 (defining “cadena” as a type of offense imposed on public officials who falsify any information). Time served at cadena also entailed being chained and working at hard labor. *Id.* at 364.

<sup>109</sup> The Philippines was a US colony in 1910. *Id.* at 361 (referring to the government in question as “The United States Government of the Philippine Islands”).

<sup>110</sup> *Id.* at 380–81.

<sup>111</sup> *Id.* at 381–82.

<sup>112</sup> See *infra* notes 113–47.

<sup>113</sup> *Rummel v. Estelle*, 445 U.S. 263, 264–65 (1980).

<sup>114</sup> *Id.* at 264.

<sup>115</sup> *Id.* at 278.

<sup>116</sup> *But see* *Solem v. Helm*, 463 U.S. 277, 303 (1983) (sentencing defendant to life without parole caused the court to hold that the sentence was cruel and unusual under the Eighth Amendment).

<sup>117</sup> *Rummel*, 445 U.S. at 283–84.

<sup>118</sup> *Hutto v. Davis*, 454 U.S. 370, 370–72 (1982) (per curiam).

ance on *Rummel*.<sup>119</sup> As in *Rummel*, the per curiam opinion stated that some terms of imprisonment may be so grossly disproportionate that they would violate the Eighth Amendment, but that such challenges would be exceedingly rare.<sup>120</sup>

A year later, the Court found such a case. In *Solem v. Helm*, the Court held that a true life sentence imposed on a repeat offender was grossly disproportionate.<sup>121</sup> Like *Rummel*'s record, *Helm*'s prior record involved a succession of relatively minor felonies.<sup>122</sup> The Court stated that its precedent had established proportionality review and that *Rummel* had reaffirmed it.<sup>123</sup> No doubt in recognition that a broad reading of the Eighth Amendment might federalize large numbers of state criminal sentences, the Court was explicit that legislatures retain broad authority to determine appropriate punishments, and instances in which a term of imprisonment might violate the Eighth Amendment would be "exceedingly rare."<sup>124</sup> But in *Helm*'s case, the severity of the punishment far outweighed the gravity of the harm posed by a criminal offense.<sup>125</sup>

By 1991, Justice Powell, the author of the majority opinion in *Solem v. Helm*, had retired and was replaced by Justice Kennedy.<sup>126</sup> Faced with a similar issue in *Harmelin v. Michigan*,<sup>127</sup> the Court was deeply divided in a case involving a true life sentence imposed on an offender convicted of possession of more than 650 grams of cocaine.<sup>128</sup> Writing the plurality opinion only for himself and Chief Justice Rehnquist, Justice Scalia found that the Eighth Amendment did not contain a proportionality principle when an offender was sentenced to a term of years.<sup>129</sup> Four dissenters found the case controlled by *Solem v. Helm*.<sup>130</sup> Writing for three justices, Justice Kennedy summarized what has become the prevailing rule of law. He reaffirmed several legal propositions, including the principle that a grossly disproportionate sentence violates the Eighth Amendment.<sup>131</sup> He also emphasized that a court must give substantial deference to legislative determinations about proper sentences; that the Eighth

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<sup>119</sup> *Id.* at 370.

<sup>120</sup> *Id.* at 374.

<sup>121</sup> *Solem*, 463 U.S. at 303.

<sup>122</sup> *Id.* at 279–80.

<sup>123</sup> *Id.* at 288–89.

<sup>124</sup> *Id.* at 289–90.

<sup>125</sup> *Id.* at 290. The Court's test focused on three steps. First, a court must assess the culpability of the offender and the harm threatened to society from the offender's conduct. Second, a court should then do an intra-jurisdictional comparison whereby the court should compare the kinds of offenders who received similar punishments in the same state. Third, a court should conduct an inter-jurisdictional comparison of criminal sentences to see the kinds of punishments meted out for similar defendants in other states. As would become clear when the Court returned to the question in 1991, the Court did not indicate whether after addressing the first question, a court must go on to the second and third inquiries. *Harmelin v. Michigan*, 501 U.S. 957, 962, 965 (1991) (plurality opinion).

<sup>126</sup> Justice Kennedy took his seat on the Court in 1988. *Biographies of Current Justices of the Supreme Court*, SUP. CT. U.S., <http://www.supremecourt.gov/about/biographies.aspx> (last visited Apr. 24, 2014).

<sup>127</sup> *Harmelin*, 501 U.S. at 961–62.

<sup>128</sup> *Id.* at 961. *Harmelin* possessed 672 grams of cocaine.

<sup>129</sup> *Id.* at 961, 965.

<sup>130</sup> *Id.* at 1027–28.

<sup>131</sup> *Id.* at 996.

Amendment does not adopt any particular penological theory; that differences in sentencing are inevitable in a federal system; that a court must look to objective factors in determining whether a sentence is disproportionate; and that a court will find an Eighth Amendment violation only if a term of imprisonment is grossly disproportionate to the crime.<sup>132</sup>

Justice Kennedy departed from the dissent over whether a court must perform an inter-jurisdictional and intra-jurisdictional comparison of sentences in every case.<sup>133</sup> In *Solem v. Helm*, Justice Powell stated that a lower court “may” conduct such a review.<sup>134</sup> As a result, Justice Kennedy could argue that only if a comparison of the crime committed and the sentence imposed led to an inference of gross disproportionality should a court conduct the sentence comparisons.<sup>135</sup> Finding that Harmelin’s crime was so serious and posed such a high risk of harm to society, Justice Kennedy did not go further.<sup>136</sup>

In 2003, the Court revisited the proportionality issue in *Ewing v. California*.<sup>137</sup> The defendant in that case, Ewing, had a long criminal history, similar to the defendants in cases like *Rummel v. Estelle* and *Solem v. Helm*.<sup>138</sup> Charged under California’s Three Strikes law,<sup>139</sup> Ewing’s third felony was a theft offense.<sup>140</sup> He received a term of imprisonment of twenty-five-years-to-life.<sup>141</sup>

As in *Harmelin*, the *Ewing* Court lacked a majority opinion. Justices Scalia and Thomas argued that the Eighth Amendment does not extend to terms of imprisonment.<sup>142</sup> Justice O’Connor’s three-person plurality reaffirmed Justice Kennedy’s approach in *Harmelin*.<sup>143</sup> The plurality upheld Ewing’s twenty-five-year-to-life sentence for several reasons. Justice O’Connor found legitimate the state’s interest in increasing punishment for repeat offenders and cited traditional deference to state legislatures in making rational policy choices. She underscored that Ewing’s punishment was for a career of crime, not simply for this third strike.<sup>144</sup> But, “[e]ven standing alone, Ewing’s theft should not be taken lightly.”<sup>145</sup> The plurality suggested that a twenty-five-year sentence is not

<sup>132</sup> *Id.* at 997–99 (Kennedy, J., concurring).

<sup>133</sup> *Id.* at 999–1000.

<sup>134</sup> *Solem v. Helm*, 463 U.S. 277, 290 (1983).

<sup>135</sup> *See Harmelin*, 501 U.S. at 1000 (Kennedy, J., concurring); *Solem*, 463 U.S. at 290.

<sup>136</sup> *See Harmelin*, 501 U.S. at 1000 (pointing out that the Court has looked before to societal norms when evaluating whether or not a sentence is cruel and unusual). By not going further in the analysis, Justice Kennedy avoided analysis of Harmelin’s best argument: his sentence was truly unusual at that time, even in the height of the war on drugs.

<sup>137</sup> *Ewing v. California*, 538 U.S. 11, 23–24 (2003) (plurality opinion).

<sup>138</sup> *Id.* at 18. Prior to stealing some golf clubs and being sentenced to twenty-five-years-to-life under California’s Three Strikes law, Ewing had been convicted of various forms of theft, including grand theft auto, as well as battery, burglary, robbery, possession of drug paraphernalia, and unlawful possession of a firearm. *Id.* at 18–20. He was on parole when he committed the theft that led to his life sentence. *Id.*

<sup>139</sup> CAL. PENAL CODE §§ 667, 1170 (West 2013).

<sup>140</sup> *Ewing*, 538 U.S. at 19 (plurality opinion).

<sup>141</sup> *Id.* at 20.

<sup>142</sup> *Id.* at 31–32 (Scalia, J., concurring) (Thomas, J., concurring).

<sup>143</sup> *Id.* at 14–32.

<sup>144</sup> *Id.* at 29.

<sup>145</sup> *Id.* at 28.

so long that it creates a presumption of gross disproportionality that would compel examination of intra- and inter-jurisdictional comparisons.<sup>146</sup>

Four justices dissented and found that the case violated the Eighth Amendment.<sup>147</sup> For them, the question was squarely within *Solem*.<sup>148</sup> While four dissenters and three justices who joined the plurality agreed that the Eighth Amendment includes a proportionality principle in cases involving terms of imprisonment, the principle is not a very robust one. Until *Graham* and *Miller*, *Solem* was the Court's only decision overturning a term of imprisonment, at least in the modern era.<sup>149</sup>

Think back to my hypothetical defense attorney representing Camplin and Esaltato. Even if she amasses a good bit of evidence that they are less culpable because of their youth in Camplin's case or temperament in Esaltato's case, is that evidence relevant to a court's determination of an appropriate sentence if the court is considering a term of years, instead of the death penalty or life without benefit of parole in the case of the juvenile offender? The answer is almost certainly "no" based on any plausible Eighth Amendment argument.

At the outset, many sentencing schemes allow consideration of the age of the offender, with an offender's youth being a mitigating factor,<sup>150</sup> and a variety of other factors, including employment history, family history and the like.<sup>151</sup> But it does not follow that the Constitution requires consideration of such factors; the Supreme Court suggests that the answer to the question whether the age of the offender, employment history, and the list of other mitigating factors are constitutionally mandated is no.

*Solem*, *Harmelin*, and *Ewing* are clear: the Eighth Amendment does not prescribe any particular penological goal; states are free to pursue any goal that they choose.<sup>152</sup> Even after *Graham* and *Miller*, the Court will find a sentence grossly disproportionate only in the rarest of instances.<sup>153</sup>

To underscore how much latitude states have in determining their goals for sentencing, imagine my hypothetical defense attorney arguing on behalf of her clients Camplin and Esaltato. She seeks to introduce evidence at their sentencing hearings to demonstrate that their culpability is less than that of other offenders. Camplin's youth makes him less capable of conforming his behavior to social norms than do adult offenders; Esaltato's inherited disposition makes him less capable than offenders who are not of the same ethnic background.

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<sup>146</sup> *Id.* at 23.

<sup>147</sup> *Id.* at 32 (Stevens, J., dissenting). Justices Souter, Ginsberg, and Breyer joined Justice Stevens's dissent.

<sup>148</sup> *Id.* at 37 (Breyer, J., dissenting).

<sup>149</sup> *Weems v. United States*, 217 U.S. 349, 358 (1910). As indicated above, whether *Weems* turned on the form of punishment—"cadena"—is not clear.

<sup>150</sup> *See, e.g.*, *Walton v. Arizona*, 497 U.S. 639, 645 (1990); *Eddings v. Oklahoma*, 455 U.S. 104, 107 (1982).

<sup>151</sup> *See, e.g.*, *State v. Velazquez*, 166 P.3d 91, 105 (Ariz. 2007); *Franqui v. State*, 804 So. 2d 1185, 1190 (Fla. 2001).

<sup>152</sup> *See Ewing*, 538 U.S. at 24 (plurality opinion); *Harmelin v. Michigan*, 501 U.S. 957, 965 (1991) (plurality opinion); *Solem v. Helm*, 463 U.S. 277, 317 (1983) (Burger, C.J., dissenting).

<sup>153</sup> *See Miller v. Alabama*, 132 S. Ct. 2455, 2469 (2012) (restricting the ruling to juvenile offenders only); *Graham v. Florida*, 560 U.S. 48, 60 (2010).



State legislatures often prescribe many and, at times, competing goals for punishment. Thus, in deciding on a term of imprisonment, a sentencing court may have to consider the need to protect society; retribution; specific deterrence; rehabilitation; general deterrence; the need for uniformity of sentencing; and the need to secure restitution for the victim of a crime.<sup>154</sup> Consistent with the Supreme Court's case law, states are free to do just that. And what if a state were to return to the state of affairs prior to the mid-1970s when states abandoned rehabilitation in favor of punishment?<sup>155</sup> What if a state decided that its goal of punishment was to "cure" all offenders without regard to their culpability? That too seems consistent with the Supreme Court's case law. Such a sentencing scheme is not hard to imagine: prior to the revitalization of retribution in the 1970s and 1980s, many states gave judges wide discretion to sentence an offender;<sup>156</sup> in the most extreme systems, a judge might sentence an offender to as little as one day to life in prison.<sup>157</sup> The theoretical justification for such a system was that an offender gained release when the system rehabilitated him.<sup>158</sup> Were a state to re-impose such a system, unless an offender could make an argument under the narrow holdings of *Harmelin* and *Ewing*, such a sentence would be constitutional.<sup>159</sup> Presumably, consistent with Justice Kennedy's view in *Harmelin*, such a jurisdiction would be free to pursue its penological goal of rehabilitation. Similarly, a state like South Dakota would be free to impose very long prison sentences on repeat offenders like in *Solem* unless it sentenced him to a true life sentence.<sup>160</sup> Such a sentencing scheme would be justified by the goal of incapacitating or deterring repeat offenders, not punishing them according to their just deserts.<sup>161</sup>

At this point, one begins to see inconsistency between the Court's death penalty case law and its proportionality case law when an adult offender is sentenced to a term of years. As discussed above, cases like *Coker v. Georgia* and *Kennedy* have adopted a retributive principle: unless an offender takes a life, she is not subject to the death penalty.<sup>162</sup> Other cases have further limited the applicability of the death penalty, for example, to cases where the offender has a sufficient mens rea<sup>163</sup> and a sufficiently important role in the crime to deserve the ultimate punishment.<sup>164</sup> As a result, even if a state believed that the death penalty could deter other offenders, the Supreme Court case law does not allow a state to impose the death penalty unless it meets the minimum retributive goals.

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<sup>154</sup> CAL. R. CT. 4.410(a).

<sup>155</sup> Michael Vitiello, *Reconsidering Rehabilitation*, 65 TUL. L. REV. 1011, 1015 (1991).

<sup>156</sup> *Id.* at 1022.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* at 1012.

<sup>159</sup> California courts for a time led the nation in limiting such broad discretion and found many such sentences violated the state constitutional protection against cruel or unusual punishment. See Vitiello, *supra* note 94, at 1026.

<sup>160</sup> *Cf.* Rummel v. Estelle, 445 U.S. 263 (1980); Solem v. Helm, 463 U.S. 277 (1983).

<sup>161</sup> Vitiello, *supra* note 94, at 1057.

<sup>162</sup> Kennedy v. Louisiana, 554 U.S. 407, 413 (2008); Coker v. Georgia, 433 U.S. 584, 599 (1977) (plurality opinion).

<sup>163</sup> See Tison v. Arizona, 481 U.S. 137, 158 (1987).

<sup>164</sup> *Id.*

This difference between sentencing in general and the death penalty invites another question: is the distinction justified? Answering that question requires more than the rote recitation of the “death is different” line found so often in justices’ opinions.<sup>165</sup>

I am not convinced that one can logically distinguish the two situations. One way to distinguish between the death penalty and terms of imprisonment is the obvious reality that allowing state prisoners to challenge their terms of imprisonment on Eighth Amendment grounds opens a floodgate, an administrative nightmare for the federal court system.<sup>166</sup> By contrast, far fewer prisoners are on death row.<sup>167</sup> But the Court’s case law dealing with terms of imprisonment allows states to choose different penological goals.<sup>168</sup> Instead, if the Court held that states can sentence offenders to prison only when justified by just deserts, it might also limit federal review to cases where sentences grossly deviate from some measure of just desert. The Court has not even hinted at such an approach.

Nor can federalism concerns, at play in the case law governing terms of imprisonment,<sup>169</sup> justify the different treatment of the two areas of the law. Closely related to the administrative burden argument, the federalism argument supports Justice Kennedy’s *Harmelin* position, which allows a great deal of freedom for states to adopt their own penological purposes for punishment and leads to fewer cases in which federal courts overrule state judges’ decisions about a suitable punishment.<sup>170</sup> But much the same argument could be made in the area of the death penalty. Indeed, one might argue, in the area of the death penalty where passions run higher than in many sentencing cases,<sup>171</sup> and where state practice varies significantly around the country,<sup>172</sup> concerns about federalism are even more acute than in criminal sentencing generally. As does the administrative burden argument, the federalism argument relates more to pragmatics than it does to principle.

<sup>165</sup> See *Graham v. Florida*, 560 U.S. 48, 69, (2010) (citing *Gregg v. Georgia*, 428 U.S. 153, 187 (1976) (“It is true that a death sentence is ‘unique in its severity and irrevocability.’ ”)); *Harmelin v. Michigan*, 501 U.S. 957, 995 (1991) (plurality opinion) (“The penalty of death differs from all other forms of criminal punishment.”) (internal quotations omitted).

<sup>166</sup> See *Harmelin*, 501 U.S. at 998 (Kennedy, J., concurring) (discussing the implications of Eighth Amendment review by federal courts).

<sup>167</sup> In 2009, there were 3,173 inmates on death row in the United States. *Death Row Inmates By State*, DEATH PENALTY INFO. CENTER (Apr. 1, 2013), <http://www.deathpenaltyinfo.org/death-row-inmates-state-and-size-death-row-year>. In the same year 140,610 inmates were in prison for life. Solomon Moore, *Number of Life Terms Hits Record*, N.Y. TIMES (July 22, 2009), [http://www.nytimes.com/2009/07/23/us/23sentence.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2009/07/23/us/23sentence.html?pagewanted=all&_r=0).

<sup>168</sup> See *Ewing v. California*, 538 U.S. 11, 24–25 (2003) (plurality opinion); *Harmelin*, 501 U.S. at 998–1000 (Kennedy, J., concurring).

<sup>169</sup> See *Ewing*, 538 U.S. at 25 (plurality opinion) (stating the Court’s long deference to state legislatures); *Harmelin*, 501 U.S. at 999–1000 (Kennedy, J., concurring) (explaining the federal system’s recognition of the State’s power to make criminal law).

<sup>170</sup> See *Harmelin*, 501 U.S. at 998–99 (Kennedy, J., concurring).

<sup>171</sup> See, e.g., Charles S. Johnson, *Bill Seeking Death Penalty Abolition Inspires Emotional Testimony*, BILLINGS GAZETTE (Feb. 14, 2013, 7:38 PM), [http://billingsgazette.com/news/state-and-regional/montana/bill-seeking-death-penalty-abolition-inspires-emotional-testimony/article\\_66e2d70a-b747-517a-b929-03fbfb18b9b7.html](http://billingsgazette.com/news/state-and-regional/montana/bill-seeking-death-penalty-abolition-inspires-emotional-testimony/article_66e2d70a-b747-517a-b929-03fbfb18b9b7.html).

<sup>172</sup> CARTER ET AL., *supra* note 1, at 1 (“[W]ithin the United States, there is division over the . . . applicability of the death penalty among those states that do authorize it.”).

Another possible argument may be that the need for public safety is satisfied if the Supreme Court limits the death penalty because society is protected through the use of long prison sentences. This ignores the risk that a violent offender creates to fellow inmates. Perhaps, the ability of the state to place high risk offenders in maximum security facilities<sup>173</sup> reduces that risk. But states' need to use long terms of imprisonment for public safety are overstated; recent discussions about alternatives to imprisonment now make that clear.<sup>174</sup> Often, criminal sentences, including mandatory minimum sentences, are mindlessly long, well beyond the need of the public for protection.<sup>175</sup>

The previous considerations that may be advanced to support the different interpretation of the Eighth Amendment in the two contexts are pragmatic. A more principled argument for having different constitutional rules govern the death penalty and criminal sentencing generally might be that the source of the two different legal rules is different; thus, the different rules are based on a policy choice made by Framers of the Eighth Amendment. But that does not seem to be the case.

Originalists like Justices Scalia and Thomas argue that the Eighth Amendment does not apply to the death penalty<sup>176</sup> or the length of a prison sentence.<sup>177</sup> Other justices have argued that the application of the death penalty may violate equal protection.<sup>178</sup> But most of the Supreme Court's death penalty case law is grounded in the Eighth Amendment's prohibition against cruel and unusual punishment.<sup>179</sup> In many of those cases, the Court has indicated that, instead of rigid adherence to the original understanding of the Eighth Amendment, the Court looks to evolving standards of decency to determine the constitutionality of the death penalty.<sup>180</sup> But the Court's case law dealing with terms of imprisonment is also grounded in the Eighth Amendment's cruel and un-

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<sup>173</sup> An unusual coalition, California Families to Abolish Solitary Confinement, has started to criticize California's use of solitary confinement. *CFASC, SOLITARY WATCH*, <http://solitarywatch.com/cfasc/> (last visited Apr. 24, 2014). Given the wide use of solitary confinement in prisons around the county, see SHARON SHALEV, *A SOURCEBOOK ON SOLITARY CONFINEMENT 2-3* (2008), available at [http://solitaryconfinement.org/uploads/sourcebook\\_web.pdf](http://solitaryconfinement.org/uploads/sourcebook_web.pdf), efforts to eliminate the practice are not likely to succeed.

<sup>174</sup> Michael Vitiello, *Alternatives to Incarceration: Why is California Lagging Behind?*, 28 GA. ST. U. L. REV. 1275, 1285 (2012); Eric Holder, Att'y Gen., Remarks at the Annual Meeting of the American Bar Association's House of Delegates (Aug. 12, 2013) (transcript available at <http://www.justice.gov/iso/opa/ag/speeches/2013/ag-speech-130812.html>).

<sup>175</sup> See Vitiello, *supra* note 174, at 1281. Thus, one might attempt to distinguish the juvenile offender cases from other term of imprisonment cases by focusing on the impermanence of youth. We all grow old. But many offenders who were adults when they committed their offenses also stop committing crime as they age. Hence, for many offenders, criminality is not permanent.

<sup>176</sup> *Harmelin v. Michigan*, 501 U.S. 957, 993-94 (1991) (plurality opinion).

<sup>177</sup> *Ewing v. California*, 538 U.S. 11, 31 (2003) (Scalia, J., concurring).

<sup>178</sup> *Furman v. Georgia*, 408 U.S. 238, 249, 255-57 (1972) (Douglas, J., concurring); *McCleskey v. Kemp*, 481 U.S. 279, 333-35 (1987) (Brennan, J., dissenting).

<sup>179</sup> *CARTER ET AL.*, *supra* note 1, at 24 ("The United States Supreme Court has relied heavily on interpretations of the . . . Eighth Amendment[']s provision on cruel and unusual punishment] to define constitutional capital procedures.").

<sup>180</sup> See, e.g., *Harmelin*, 501 U.S. at 1015 (White, J., dissenting); *Furman*, 408 U.S. at 242 (Douglas, J., concurring).

sual punishment provision.<sup>181</sup> More recently, Justice Kennedy made clear that the Court also looks to evolving standards of decency in cases involving terms of imprisonment.<sup>182</sup> And, as developed above, the recent juvenile offender cases have rejected life without parole for juvenile offenders in large part because juvenile offenders lack the same level of culpability as adults.<sup>183</sup> As a result, finding a principled explanation for why death penalty cases, in effect, impose a retributive limitation on the states but prison sentence cases do not may not be possible.

When one turns to substantive criminal law doctrine, the inconsistency is at least as jarring. Let me pose the problem again. I read the death penalty cases and recent juvenile sentencing cases as turning on reduced culpability of the offenders.<sup>184</sup> That is, what makes the various sentences unconstitutional is that the punishment exceeds the culpability of the offender (either categorically as to a class of offenders as in cases of retarded killers<sup>185</sup> and juvenile offenders;<sup>186</sup> or categorically as to a class of crimes as in the cases of rape<sup>187</sup> and child rape;<sup>188</sup> or in specific cases where offenders are able to bring in substantial mitigating evidence showing that they lack the necessary level of culpability because of genetic or environmental circumstances of their lives<sup>189</sup>). When we turn to the substantive criminal law and defenses, does this constitutional principle carry any weight?

The answer is quite clear: no. In theory, the criminal law is animated by notions of culpability. For example, the law of homicide can be understood as based on a graded scale of culpability. Even if premeditation does a bad job of dividing the most culpable from less culpable murderers,<sup>190</sup> the adoption of degrees of murder was intended to serve as a gate keeper to divide the most heinous from less heinous offenders.<sup>191</sup> Allowing an enraged offender to reduce his crime from murder to voluntary manslaughter was based on a similar impulse: at the formal level, an offender who has been provoked does not have the malice necessary for murder.<sup>192</sup> More theoretically, the actor is less culpable than an actor who acts without similar provocation.<sup>193</sup> An offender who kills through culpable negligence is not treated as harshly as one who kills intentionally.<sup>194</sup> And an offender who killed without fault gets off without punishment.<sup>195</sup> Felony murder is one notable exception where liability falls outside the carefully graded scale of culpability because an offender may be guilty of

<sup>181</sup> See *Ewing*, 538 U.S. at 20–21 (plurality opinion); *Harmelin*, 501 U.S. at 964 (plurality opinion); *Solem v. Helm*, 463 U.S. 277, 284 (1983).

<sup>182</sup> *Graham v. Florida*, 560 U.S. 48, 58–59 (2010).

<sup>183</sup> See *supra* Part III.

<sup>184</sup> See *supra* Part III.

<sup>185</sup> See *Atkins v. Virginia*, 536 U.S. 304, 306–07 (2002).

<sup>186</sup> See *Miller v. Alabama*, 132 S. Ct. 2455, 2460, 2464 (2012); *Graham*, 560 U.S. at 69.

<sup>187</sup> See *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (plurality opinion).

<sup>188</sup> See *Kennedy v. Louisiana*, 554 U.S. 407, 413 (2008).

<sup>189</sup> See *Denno*, *supra* note 7.

<sup>190</sup> See *supra* Part II.

<sup>191</sup> *Bricker & Vitiello*, *supra* note 2, at 44–45, 55.

<sup>192</sup> *DRESSLER*, *supra* note 40, at 524.

<sup>193</sup> *Id.*

<sup>194</sup> *Id.* at 535.

<sup>195</sup> *Id.* at 208 (explaining justification).

murder, even murder one, without any *mens rea* as to the death.<sup>196</sup> But of course, that is why the doctrine is extensively criticized.

Elsewhere, the criminal law demonstrates a similar preference for culpability. The requirement of a voluntary act is grounded in notions of culpability: how can we blame someone who did not choose to act?<sup>197</sup> The Supreme Court has observed that the requirement of *mens rea* “is no provincial or transient notion.”<sup>198</sup> The Model Penal Code drafters debated whether to include criminal offenses based on negligence.<sup>199</sup> Eventually accepting the idea of criminal negligence, the drafters defined “negligence” as requiring a higher degree of culpability than ordinary negligence<sup>200</sup> and created a presumption that, when a statute does not include a *mens rea* term, the prosecution must show that, at a minimum, the actor committed the act recklessly, i.e., with a subjective awareness of the risk.<sup>201</sup> The Code severely limits strict liability and makes it unavailable if an offender can be sentenced to incarceration.<sup>202</sup> Criminal law commentators are largely critical of strict liability offenses as out of line with the fundamental concept in the criminal law that culpability matters.<sup>203</sup> And some courts have found that strict liability offenses violate constitutional provisions.<sup>204</sup> Courts also tend to read ambiguous statutes as including a *mens rea* requirement on the assumption that legislatures did not intend to criminalize innocent behavior.<sup>205</sup>

Defenses are often grounded on notions of culpability. Obvious examples include situations where an offender is justified in doing what otherwise would be a social harm. Thus, when an offender kills in self-defense or in defense of another, the offender has made the right choice: protecting an innocent life by taking the life of a culpable offender, on balance, increases social good.<sup>206</sup> But courts have expanded the law of self-defense and defense of others to cases where the offender acted under the mistaken belief that his conduct was necessary.<sup>207</sup> Depending on whether the killer’s mistake was culpable,<sup>208</sup> he may

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<sup>196</sup> *Id.* at 510–11. One can find other examples where the criminal law waffles on the role of culpability in defining crimes and defenses: often, accomplice liability may seem out of proportion with the offender’s conduct; many states reject diminished capacity, despite the obvious relevance of such a claim to an offender’s culpability; conspiracy law often sweeps minor actors into a larger conspiracy than the offender could foresee.

<sup>197</sup> *Id.* at 87.

<sup>198</sup> *Morrisette v. United States*, 342 U.S. 246, 250 (1952).

<sup>199</sup> Michael Vitiello, *Defining the Reasonable Person in the Criminal Law: Fighting the Lernaean Hydra*, 14 LEWIS & CLARK L. REV. 1435, 1439, 1443 (2010).

<sup>200</sup> *Id.* at 1439.

<sup>201</sup> MODEL PENAL CODE § 2.02(3) (Proposed Official Draft 1962) (“When the culpability sufficient [t]o establish a material element of an offense is not prescribed by law, such element is established if a person acts purposely, knowingly or recklessly with respect thereto.”).

<sup>202</sup> *Id.* § 2.05 cmt. 1. (“The method used is not to abrogate strict liability completely, but to provide that when conviction rests upon that basis the grade of the offense is reduced to a violation . . . and . . . may result in no sentence other than a fine, or a fine and forfeiture or other authorized civil penalty.”).

<sup>203</sup> DRESSLER, *supra* note 40, at 145, 149–51.

<sup>204</sup> *Id.* at 150.

<sup>205</sup> *Staples v. United States*, 511 U.S. 600, 605 (1994).

<sup>206</sup> DRESSLER, *supra* note 40, at 255–56.

<sup>207</sup> *Id.* (abandoning the alter-ego rule).

have a complete defense: thus, an offender who acted under the incorrect belief the killing force was necessary but who was not negligent in forming that belief is innocent of the killing.<sup>209</sup> Even though he has caused social harm, he was not culpable and society does not believe punishment is deserved.<sup>210</sup>

Even excuse defenses are based on a similar view that one who meets certain requirements lacks sufficient culpability to deserve punishment.<sup>211</sup> Society allows an offender to interpose an insanity defense not because the act was justified, but because society cannot blame the offender for his conduct.<sup>212</sup> Hence, the early development of the insanity defense focused on an offender's ability to tell right from wrong.<sup>213</sup> When legislatures or courts provide an offender with a defense of duress (when duress is an excuse defense, not a justification)<sup>214</sup> they do so because the decision-maker can understand why the offender would act as he did. Thus, the Model Penal Code allows a duress defense when a person of ordinary firmness would act as the defendant did, even though he created more social harm than he prevented.<sup>215</sup> I could offer additional examples where the criminal law is animated by the culpability provision.<sup>216</sup>

The common thread in the criminal law is this: blame is based on the notion that an offender has a functioning will; as a result, when an offender acts with a conscious mind, he makes a choice to violate the criminal law and society is justified in blaming him for his bad choices.<sup>217</sup> When legislatures, courts, or other policy makers stray from these principles, criminal law scholars are quick to point out the inconsistency.<sup>218</sup>

And so, one might conclude that the Supreme Court's death penalty case law and recent juvenile punishment case law is consistent with the substantive area of the criminal law. That is not the case. I offer two examples to demonstrate the inconsistency, one dealing with the constitutionality of the insanity defense; the other dealing with a hypothetical case in which a defendant attempted to introduce behavioral genetic, neuro-scientific, or other evidence involving the way in which the brain works as a way to counter a claim that the offender acted in a culpable manner.

<sup>208</sup> MODEL PENAL CODE § 3.09 (Proposed Official Draft 1962) ("Mistake of Law as to Unlawfulness of Force or Legality of Arrest; Reckless or Negligent Use of Otherwise Justifiable Force; Reckless or Negligent Injury or Risk of Injury to Innocent Persons.").

<sup>209</sup> *Id.* § 3.09(2) cmt. 2. ("So strongly entrenched is the requirement of reasonable belief that it has sometimes been imposed in the interpretation of statutes that do not clearly include it.").

<sup>210</sup> DRESSLER, *supra* note 40, at 249–50.

<sup>211</sup> *Id.* at 207.

<sup>212</sup> *Id.* at 333.

<sup>213</sup> *Id.* at 343–45.

<sup>214</sup> *Id.* at 297.

<sup>215</sup> MODEL PENAL CODE § 2.09 (Proposed Official Draft 1962).

<sup>216</sup> Commentators often focus on when lawmakers abandon the culpability principle or fail to follow it consistently. For a far-reaching discussion of this point in connection with liability for criminal attempts, see Stephen J. Schulhofer, *Harm and Punishment: A Critique of Emphasis on the Results of Conduct in the Criminal Law*, 122 U. PA. L. REV. 1497, 1501–02, 1506–07 (1974).

<sup>217</sup> DRESSLER, *supra* note 40, at 117.

<sup>218</sup> *Id.* at 150–51 (explaining the problems with strict liability offenses).

As discussed above, insanity is a clear example of where the culpability principle seems to be at work. Thus, the classic formulation of the insanity defense developed in *M'Naghten* focuses on the offender's ability to tell right from wrong.<sup>219</sup> Obviously, we cannot blame someone for acting under the delusion that he is squeezing a lemon when in fact he is strangling his victim.<sup>220</sup> But the history of the insanity defense highlights the tension between the assumptions of the criminal law and psychologists and psychiatrists.

The pre-1981 battle between law and science over the insanity defense has been recounted elsewhere.<sup>221</sup> Here is an oversimplified version: probably aware that many offenders who do not qualify as legally insane under *M'Naghten*, nonetheless suffered from such compelling mental illness, courts, legislatures and policy makers adopted alternatives to the prevailing *M'Naghten* test.<sup>222</sup> Thus, some courts adopted an irresistible impulse test, which reflected the view that some actors could not control their conduct.<sup>223</sup> As developed in Judge Bazelon's opinion in *Durham v. United States*, an offender should not be criminalized if his conduct was the product of mental illness.<sup>224</sup> While the Model Penal Code drafters did not go as far as did Judge Bazelon, it adopted a standard more favorable to defendants claiming the insanity defense than the *M'Naghten* rule: the Code provides that a person whose conduct is the result of a mental disease or defect has a defense if he "lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law."<sup>225</sup> The latter provision, the offender's inability to conform his conduct to the requirements of the law, invites greater participation of psychological and medical experts, who see human behavior in causal terms, not merely in terms of free will.<sup>226</sup> Prior to John Hinckley's attack on President Reagan and subsequent trial in which Hinckley was found not guilty by reason of insanity, the ALI provision seemed headed towards wide acceptance nationwide.<sup>227</sup>

Hinckley's acquittal produced a significant backlash against the insanity defense. Many states reacted. Some abandoned the defense outright.<sup>228</sup> Others heightened the defendant's burden of proof.<sup>229</sup> Still others created a new defense: guilty but mentally ill.<sup>230</sup> Typically, the defendant is evaluated and treated in a hospital but, if cured, the offender finishes out his prison sentence.<sup>231</sup>

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<sup>219</sup> *Id.* at 343–44.

<sup>220</sup> *Id.* at 344 (relating similar examples).

<sup>221</sup> *See id.* at 343.

<sup>222</sup> *Id.* at 345–46.

<sup>223</sup> *Id.* at 346.

<sup>224</sup> *Durham v. United States*, 214 F.2d 862, 874–75 (D.C. Cir. 1954).

<sup>225</sup> MODEL PENAL CODE § 4.01 (Proposed Official Draft 1962).

<sup>226</sup> JOSHUA DRESSLER & STEPHEN P. GARVEY, *CASES AND MATERIALS ON CRIMINAL LAW* 609–10 (6th ed. 2012).

<sup>227</sup> *Id.* at 594.

<sup>228</sup> *See id.* at 594, 630.

<sup>229</sup> *Id.* at 594.

<sup>230</sup> *See id.* at 633.

<sup>231</sup> *See id.* at 595.

Mentally ill offenders appear to be among the least culpable offenders encountered in the criminal justice system.<sup>232</sup> Many mentally ill offenders have biographies that break one's heart: they often grow up in horrendous circumstances,<sup>233</sup> may not have access to meaningful mental health care,<sup>234</sup> and may fall through the cracks, unable to get care even when they seek it out.<sup>235</sup> The mentally ill are more likely to interact with the police than they are with mental health care professionals.<sup>236</sup> While they may not meet the *M'Naghten* test because they can give a rote explanation of right and wrong, they may be paranoid, or otherwise deeply troubled.<sup>237</sup> That is, mentally ill offenders seem akin to juvenile offenders, both groups lacking the ability to conform to ordinary social norms.

So would a mentally ill offender (even one who could meet the *M'Naghten* test) be able to make a successful constitutional challenge if a state abandoned the insanity defense?

The Supreme Court has left the question open. In *Clark v. Arizona*, the Court upheld Arizona's changes in the law governing its insanity defense.<sup>238</sup> The Arizona legislature changed its insanity law, making it more stringent than even the *M'Naghten* test.<sup>239</sup> The petitioner argued that Arizona violated his due process, not Eighth Amendment, rights. Specifically, he contended that a state had to provide, at a minimum, the test from *M'Naghten* because the *M'Naghten* rule is "so rooted in the traditions and conscience of our people as to be ranked as fundamental."<sup>240</sup> Recognizing that states and the federal government have adopted different formulations of the insanity test, the Court rejected the argument that any one test could be considered fundamental.<sup>241</sup> It stated further that the insanity rule, like the definition of criminal offenses, is left largely within the discretion of the states.<sup>242</sup> But the extent to which the Constitution requires an insanity defense at all remains an open question. The Court noted that "[w]e have never held that the Constitution mandates an insanity defense, nor have we held that the Constitution does not so require. This case does not call upon us to decide the matter."<sup>243</sup>

That question was squarely presented in *Delling v. Idaho*, a case in which the petitioner sought certiorari to review whether Idaho violated the Constitu-

<sup>232</sup> See generally Michael Vitiello, *Addressing the Special Problems of Mentally Ill Prisoners: A Small Piece of the Solution to Our Nation's Prison Crisis*, 88 DENV. U. L. REV. 57 (2010) (identifying how mentally ill prisoners engage the criminal justice system).

<sup>233</sup> See *id.* at 63 (describing the homeless and self-medicating mentally ill).

<sup>234</sup> *Id.*

<sup>235</sup> *Id.*

<sup>236</sup> *Id.* at 63, 66.

<sup>237</sup> DRESSLER, *supra* note 40, at 345–46.

<sup>238</sup> *Clark v. Arizona*, 548 U.S. 735, 756 (2006).

<sup>239</sup> ARIZ. REV. STAT. ANN. § 13-502 (2013) (granting the insanity defense only if the defendant "did not know the criminal act was wrong").

<sup>240</sup> *Clark*, 548 U.S. at 748 (internal quotations omitted).

<sup>241</sup> *Id.* at 749–51.

<sup>242</sup> *Id.* at 752.

<sup>243</sup> *Id.* at 752 n.20. Meanwhile, courts in states that have abandoned the insanity defense have rejected constitutional challenges to the law abandoning the defense. DRESSLER, *supra* note 40, at 357.



tion when it abrogated the insanity defense.<sup>244</sup> But the Court denied the petition for review.<sup>245</sup>

Courts in states that have abandoned the insanity offense have upheld those laws as constitutional.<sup>246</sup> Defendants have contended that the laws violate the offenders' due process rights<sup>247</sup> and the prohibition against cruel and unusual punishment.<sup>248</sup> But as Professor Joshua Dressler has observed,

[s]ince the federal Due Process Clause does not prohibit a legislature from abandoning the basic requirement of *mens rea*, it would seem to follow that a state may take the less dramatic approach of retaining the element of *mens rea*, while repealing the *defense* of insanity, as long as the prosecution is required to prove beyond a reasonable doubt that the defendant had the requisite mental state.<sup>249</sup>

Perhaps, then, a defendant could argue in favor of a constitutional right to introduce psychological evidence reducing his culpability as a way to negate his *mens rea*.

*Clark* also discussed the general rule that an offender has a due process right to present a defense and to introduce evidence in support of that defense.<sup>250</sup> As such, an offender is entitled to introduce evidence that tends to negate his *mens rea*.<sup>251</sup> Thus, one might argue that a defendant has a right to introduce behavioral genetic, neuro-scientific, and other evidence relating to the workings of the brain to negate *mens rea* evidence. But whether such a claim would succeed is uncertain.

In *Clark*, the Court recognized that evidence of an offender's mental disease sufficient to show that he could not form the necessary *mens rea* is relevant to negate the required *mens rea*.<sup>252</sup> But it rejected the petitioner's claim that his right was violated. Instead, as the Court observed, trial courts have broad discretion to disallow relevant evidence.<sup>253</sup> Thus, a court may exclude evidence when the prejudicial value of the evidence outweighs its probative value.<sup>254</sup> Further, at trial, the petitioner was allowed to introduce observational evidence of his mental illness. That is, lay witnesses testified about his behavior at home and with friends.<sup>255</sup> Witnesses were able to testify about the petitioner's statements that aliens inhabited his body.<sup>256</sup> That kind of evidence could be presented by experts as well as lay witnesses.<sup>257</sup> But the Court left the States a good bit of latitude in excluding expert evidence on mental illness when it observed that some categories of mental illness are controversial, that

<sup>244</sup> *Delling v. Idaho*, 133 S. Ct. 504, 506 (2012) (Breyer, J., dissenting).

<sup>245</sup> *Id.* at 504.

<sup>246</sup> *See, e.g.*, *State v. Mace*, 921 P.2d 1372, 1378–79 (Utah 1996); *State v. Herrera*, 895 P.2d 359, 366 (Utah 1995); *State v. Searcy*, 798 P.2d 914, 918–19 (Idaho 1990); *State v. Korell*, 690 P.2d 992, 1001 (Mont. 1984).

<sup>247</sup> *See, e.g.*, *Clark*, 548 U.S. at 756; *Korell*, 690 P.2d at 998–99.

<sup>248</sup> *See, e.g.*, *Korell*, 690 P.2d at 1001.

<sup>249</sup> DRESSLER, *supra* note 40, at 358 (footnotes omitted).

<sup>250</sup> *Clark*, 548 U.S. at 755–56.

<sup>251</sup> *Id.* at 756–57.

<sup>252</sup> *Id.* at 776.

<sup>253</sup> *Id.* at 769–71.

<sup>254</sup> *Id.*

<sup>255</sup> *Id.* at 745, 756–57.

<sup>256</sup> *Id.* at 745.

<sup>257</sup> *Id.* at 757–58.

some mental-disease evidence may mislead, and that expert testimony creates a danger of creating greater certainty about an offender's lack of capacity than is warranted.<sup>258</sup> As a result, at least where the state allowed the petitioner to introduce evidence of mental disease on the issue of insanity, the state did not violate the petitioner's due process right by disallowing the evidence on *mens rea*.<sup>259</sup> The expert evidence created too great a risk of misleading the jury.<sup>260</sup>

Implicit in some of the discussion in *Clark* is the fact that expert evidence on mental illness may be irrelevant on the *mens rea* question as well.<sup>261</sup> That is so because an offender may suffer from a mental disease and yet be able to form an intent to commit the underlying crime. An offender who is not delusional may know that killing is wrong and that he is killing. That is, *Clark* argued that the state had to provide the traditional *M'Naghten* defense, not a more scientifically based insanity defense like the Model Penal Code approach. If that is the case, he has the *mens rea*. Evidence of his genetic or psychological condition may not negate the *mens rea* at all. While behavioral genetic evidence or other evidence about the offender's psyche may reduce his culpability, it does not contradict the fact that his mind formed the intent to kill. Thus, *Clark* seemingly allows the state to exclude the evidence.<sup>262</sup> And this point takes me back full circle to the hypothetical defendant Mr. Esaltato.<sup>263</sup>

When Mr. Esaltato faces criminal charges, he tells his attorney, "I got dealt a bad disposition. That was not my fault. And now your experts examined me and have studied my culture. They agree that I have a much harder time controlling myself than ordinary people. Holding me to that standard is not fair." New evidence about the way the brain works confirms Mr. Esaltato's insight into his own psyche. But in many ways, the kind of evidence he seeks to rely on is in direct conflict with a fundamental principle of the criminal law. Today, the science of the brain is more advanced than in the past but the debate is the same as has been carried on for some time: the medical model of human behavior looks for causes; the criminal law is premised on the assumption that a person acting with awareness has the free will to choose how to behave.<sup>264</sup> Because the free will principle is foundational, I would not expect courts or legislatures to allow liberal use of brain evidence any time in the foreseeable future, no matter how much that evidence suggests that an offender may have reduced culpability.

At least, the free will model is the foundational idea in the criminal law when the issue is not the availability of the death penalty. As developed above, if Mr. Esaltato was charged with capital murder, he could introduce the same evidence that may be inadmissible in his trial for non-capital murder.<sup>265</sup>

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<sup>258</sup> *Id.* at 774.

<sup>259</sup> *Id.* at 776.

<sup>260</sup> *Id.* at 776, 778.

<sup>261</sup> *Id.* at 776–77.

<sup>262</sup> *Id.* at 778–79.

<sup>263</sup> See *supra* Part IV.

<sup>264</sup> DRESSLER, *supra* note 40, at 334, 342–43 (examining the divide between the medical and legal definitions of insanity).

<sup>265</sup> See *supra* Part IV.

Above, I argued that the distinction between the death penalty cases and sentencing cases may be explained on pragmatic, not principled, grounds. That is equally true when one compares the death penalty cases and the case law giving states broad latitude in defining criminal law offenses and defenses.<sup>266</sup>

## V. CONCLUSION

As developed above, modern science relating to the way the brain works has increasing importance in death penalty cases.<sup>267</sup> Even more recently, the Supreme Court has relied on that body of evidence in cases involving punishment for juveniles.<sup>268</sup> The emerging principle is that such evidence demonstrates that individual offenders or categories of offenders are not fully culpable for their conduct.<sup>269</sup> And that principle is grounded in the Constitution.<sup>270</sup>

But when one explores whether such a principle may require courts to admit such evidence outside the confines of the death penalty and juvenile offender cases, the argument seems to flounder.<sup>271</sup> Either the Supreme Court has rejected such an argument<sup>272</sup> or seemingly would do so.<sup>273</sup> This different approach seems at best pragmatic and not principled.<sup>274</sup>

Is this inconsistency within the criminal law intolerable? That is the subject of another, much longer discussion. Suffice it to say that even under the most ideal circumstances for reform, coherence in the criminal law is likely to be elusive.<sup>275</sup> As someone largely opposed to the death penalty,<sup>276</sup> I hesitate to criticize the inconsistency in the Supreme Court's case law. By incorporating a retributivist just desert principle into the Eighth Amendment, cases like *Coker* and *Kennedy* cabin the death penalty.<sup>277</sup> That may be a good enough explanation for why the Court tolerates the inconsistency.<sup>278</sup> For proponents of behavioral genetic evidence and other evidence relating to human behavior, the message may be that their efforts to expand areas in which such evidence is relevant may have hit a wall.

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<sup>266</sup> Further, it is not enough to say that society has a need to incapacitate someone like Mr. Esaltato because of his short fuse. *See supra* Part II (stating that the retributivist theories of punishment require the punishment be proportional to the crime).

<sup>267</sup> *See supra* Part II.

<sup>268</sup> *See supra* Part III.

<sup>269</sup> *See supra* Part IV.

<sup>270</sup> *See supra* Part IV.

<sup>271</sup> *See supra* Part IV.

<sup>272</sup> *See supra* Part IV.

<sup>273</sup> *See supra* Part IV.

<sup>274</sup> *See supra* Part IV.

<sup>275</sup> *See Vitiello, supra* note 199, at 1441.

<sup>276</sup> *See generally* Michael Vitiello, *Personal Reflections on Connick v. Thompson*, 11 OHIO ST. J. ON CRIM. L. 217 (2013) (using *Thompson* to discuss the author's opposition to the death penalty).

<sup>277</sup> *See* text accompanying notes 97–99, 162.

<sup>278</sup> *See* Bricker & Vitiello, *supra* note 2, at 44–46.