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A Tear in the Eye of the Law: Mitigating Factors and the Progression Toward a Disease Theory of Criminal Justice

> We shall look on crime as a disease, and its physicians shall displace the judges, its hospitals displace the galleys. Liberty and health shall be alike. We shall pour balm and oil where we formerly applied iron and fire; evil will be treated in charity, instead of in anger. This change will be simple and sublime.
>
> —Victor Hugo[1]

Throughout history, members of society have committed acts that violate a social code, and society's dilemma has been the question of how to deal with these crimes. Punishment issues are of such import to humans that world religions and mythology often include tales of punishments for transgressions. For exam-

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1 VICTOR HUGO, *The Last Days of a Condemned*, *in* THE DEATH PENALTY: A LITERARY AND HISTORICAL APPROACH 103, 105 (Edward G. McGehee & William H. Hildebrand eds., 1964). A more contemporary writer raised a related question:

> But there's just one question/Before they kill me dead/ I'm wondering just how much/ To you I really said/ Concerning all the boys that come/ Down a road like me/ Are they enemies or victims/ Of your society?

BOB DYLAN, *The Ballad of Donald White*, *on* BROADSIDE BALLADS VOL. 6: BROADSIDE REUNION (Folkways Records 1971).

ple, the gods punished Prometheus for stealing fire,[2] and Sisyphus' punishment was to eternally roll the stone up the hill.[3] God punished Adam and Eve for eating from the Tree of Knowledge.[4] Cain later slew Abel, so God banished Cain,[5] who responded, "My punishment is greater than I can bear."[6] Similarly, the Qur'an, the Hindu Bhagavad Gita, and Buddhist Dhammapada address retribution for the wicked.[7]

Today, the struggle continues as American society debates the benefits of tough prison sentences, the death penalty, and "three strikes" laws. The theories used to justify the use of punishment usually center on two main justifications: (1) utilitarian justifications such as deterrence, incapacitation, and rehabilitation; and (2) retributive justifications. Under utilitarian theory, punishment is used to prevent offenders from hurting other people and to serve as a warning to others.[8] Under retributive theory, some people just "deserve" punishment on moral grounds.[9] The utilitarian and retributive justifications appear throughout the history of our criminal justice system in both case decisions[10] and in scholarship.[11] And while the former justification embraces the theory that criminal behavior may be controlled by the threat of

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[2] *See* AESCHYLUS, PROMETHEUS BOUND 4 (Mark Griffith ed., Cambridge Univ. Press 1983).

[3] *See* ALBERT CAMUS, THE MYTH OF SISYPHUS AND OTHER ESSAYS 119 (Justin O'Brien trans., Vintage Books 1991) (1955).

[4] *Genesis* 3:24.

[5] *Id*. 4:12.

[6] *Id*. 4:13 (King James).

[7] Jon'a F. Meyer, *Retributive Justice*, *in* ENCYCLOPEDIA OF CRIME AND PUNISHMENT 1393, 1396 (2002). Additionally, for a recent discussion of punishment theory and the Church of Jesus Christ of Latter-day Saints, see Marguerite A. Driessen, *Not for the Sake of Punishment Alone: Comments on Viewing the Criminal Sanction Through Latter-Day Saint Thought*, 2003 BYU L. REV. 941; Martin R. Gardner, *Viewing the Criminal Sanction Through Latter-Day Saint Thought*, 2003 BYU L. REV. 861; Steven F. Huefner, *Reservations About Retribution in Secular Society*, 2003 BYU L. REV. 973.

[8] *See* discussion *infra* Part I.

[9] *See id*.

[10] *See, e.g.*, Gregg v. Georgia, 428 U.S. 153, 183-87 (1976) (plurality opinion); Furman v. Georgia, 408 U.S. 238, 345 (1972) (Marshall, J., concurring).

[11] *See, e.g.*, CESARE BECCARIA, OF CRIMES AND PUNISHMENTS (Jane Grigson trans., Oxford Univ. Press 1996) (1764); JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (John Bowring ed., 1843), *reprinted in* JOSH DRESSLER, CASES AND MATERIALS ON CRIMINAL LAW 34 (3d ed. 2003); MARVIN HENBERG, RETRIBUTION: EVIL FOR EVIL IN ETHICS, LAW, AND LITERATURE (1990); JEFFRIE G. MURPHY & JEAN HAMPTON, FORGIVENESS AND MERCY (1988); Joshua Dressler, *Hating Criminals: How Can Something that Feels So Good Be Wrong?*, 88 MICH. L. REV. 1448 (1990).

punishment, the latter embraces the theory that some people simply are unquestionably evil.[12]

There is, however, another view about the relationship between crime and punishment that has been around for centuries. Some philosophers, writers, lawyers, and judges have argued that criminals have no choice in how they act not because they are inherently "evil" but because they are a product of their genes and their environment. Plato wrote, "For no man is voluntarily bad; but the bad becomes bad by reason of an ill disposition of the body and bad education, things which are hateful to every man and happen to him against his will."[13] Victor Hugo predicted that society eventually would come to see crime as a "disease" because crime is caused by factors beyond the actor's control.[14] In 1884, John Peter Altgeld wrote the book *Our Penal Machinery and Its Victims*, which argued that society should focus its resources on addressing the causes of crime instead of punishing wrongdoers.[15] The book would influence Clarence

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[12] When encountering evil, philosophers have debated whether or not we should attempt to explain it. *See* SUSAN NEIMAN, EVIL IN MODERN THOUGHT: AN ALTERNATIVE HISTORY OF PHILOSOPHY 238-328 (2002). The use of the term "evil" has been part of the modern debate about the September 11, 2001 terrorist attacks in the United States as President George W. Bush and others used the term to describe the terrorists and certain countries. *See, e.g.*, Matthew Carolan & Raymond J. Keating, *War Is No Excuse to Expand Size or Role of Government*, N.Y. NEWSDAY, Dec. 18, 2001, at A38 ("Some have criticized President George W. Bush's use of the word evil when referring to bin Laden, other terrorists and governments supporting terror . . . . The war in which we are engaged is a fight against evil."); David E. Sanger, *A Nation Challenged: The Rogue List*, N.Y. TIMES, Jan. 31, 2002, at A1 (noting President Bush's use of the term "axis of evil" to describe certain countries). Ms. Neiman explained the debate over the use of the term in this context:

> To call what happened on September 11 evil appeared to join forces with those whose simple, demonic conceptions of evil often deliberately obscure more insidious forms of it. Not to call the murders evil appeared to relativize them, to engage in forms of calculation that make them understandable – and risked a first step toward making them justifiable.

NEIMAN, *supra*, at 285.

[13] THE GREAT QUOTATIONS 568-69 (comp. by George Seldes 1990) (quoting Plato as was quoted in VICTOR GOLLANCZ, FROM DARKNESS TO LIGHT (1956)).

[14] HUGO, *supra* note 1, at 105.

[15] *See* JOHN P. ALTGELD, OUR PENAL MACHINERY AND ITS VICTIMS (1886); GEOFFREY COWAN, THE PEOPLE v. CLARENCE DARROW: THE BRIBERY TRIAL OF AMERICA'S GREATEST LAWYER 27 (1993). Around the same time, Justice Oliver Wendell Holmes wrote that if punishment "stood on the moral grounds which are proposed for it [we would have to consider] those limitations in the capacity for choosing rightly which arise from abnormal instincts, want of education, lack of intelligence, and all the other defects which are most marked in the criminal classes." OLIVER WENDELL HOLMES, JR., THE COMMON LAW 45 (39th prtg. 1946) (1881).

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Darrow,[16] who would later argue that the criminal justice system should be abolished.[17] In the 1970s, Judge David Bazelon of the U.S. Court of Appeals for the D.C. Circuit raised the argument that when assigning criminal culpability, courts should consider the "rotten social background" of defendants.[18]

Other commentators have made similar arguments, though such arguments have never been popular. Today, the public is often unsympathetic toward possible explanations of crime that might lessen a criminal's punishment.[19] Recently, the famous defense attorney Professor Alan Dershowitz wrote that the growing use of "the legal tactic by which criminal defendants claim a history of abuse as an excuse for violent retaliation . . . is a dangerous trend, with serious and widespread implications for the safety and liberty of every American."[20]

Yet, in narrow areas, the law implicitly accepts the view of crime as a disease to be cured rather than punished. For example, insanity is a defense to crimes in most states.[21] Many courts now allow evidence of battered spouse syndrome to help jurors understand the state of mind of some defendants.[22] On a more experimental level, new problem-solving courts are experimenting with different approaches to crime.[23]

The most subversive acceptance of the "crime as disease" the-

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16 COWAN, *supra* note 15, at 27.

17 *See generally* CLARENCE S. DARROW, RESIST NOT EVIL 153-79 (Loompancis Unltd. 1994) (1902).

18 United States v. Alexander, 471 F.2d 923, 957-65 (D.C. Cir. 1973) (Bazelon, C.J., dissenting); *see infra* notes 84-100 and accompanying text.

19 For example, after John Hinkley used the insanity defense and was acquitted of charges regarding his attempted assassination of President Reagan, numerous states and the federal government responded by making it more difficult to establish the defense of insanity. *See* DANIEL N. ROBINSON, WILD BEASTS & IDLE HUMOURS: THE INSANITY DEFENSE FROM ANTIQUITY TO THE PRESENT 188-89 (1996).

20 ALAN M. DERSHOWITZ, THE ABUSE EXCUSE: AND OTHER COP-OUTS, SOB STORIES, AND EVASIONS OF RESPONSIBILITY 3 (1994).

21 *See* Robert D. Miller, *Patient Responsibilities: The Other Side of the Coin*, 17 T.M. COOLEY L. REV. 91, 102 (2000) ("In the great majority of jurisdictions in the United States, mentally-disordered defendants are permitted to raise the affirmative defense of insanity.").

22 *See, e.g.*, Lenore E.A. Walker, *Battered Women Syndrome and Self-Defense*, 6 NOTRE DAME J.L. ETHICS & PUB. POL'Y 321, 321-22 (1992).

23 *See* discussion *infra* Part VI.B.2; *see, e.g.*, Aubrey Fox & Greg Berman, *Going to Scale: A Conversation About the Future of Drug Courts*, CT. REV., Fall 2002, at 4, *available at* http://courtinnovation.org/pdf/goingtoscale.pdf; Robin Campbell & Robert Victor Wolf, *Problem-Solving Probation: A Look at Four Community-Based Experiments*, TEX. J. CORRECTIONS, Aug. 2001, *available at* http://courtinnovation.org/ pdf/ prob-sol_prob.pdf.

ory in recent years has been in the area of capital punishment. Since 1976, the Supreme Court has required courts and jurors to give consideration to the causes of capital murder in the form of mitigating factors.[24] As a result, in the following years, attorneys have created court records about the causes of violent crime and the moral justifications for punishing certain individuals.[25]

For example, consider the mitigating evidence in a recent Supreme Court decision, *Williams v. Taylor*.[26] The Supreme Court found Terry Williams's attorneys constitutionally ineffective for failure to investigate and discover:

> that Williams'[s] parents had been imprisoned for the criminal neglect of Williams and his siblings, that Williams had been severely and repeatedly beaten by his father, that he had been committed to the custody of the social services bureau for two years during his parents' incarceration (including one stint in an abusive foster home), and then . . . had been returned to his parents' custody.[27]

Juvenile records described the home where Williams grew up as "a complete wreck . . . . There were several places on the floor where someone had had a bowel movement. Urine was standing in several places in the bedrooms."[28] Additionally, the parents were too intoxicated to find clothes for the dirty children, several of whom were also "under the influence of whiskey."[29]

In addition to noting the importance of Mr. Williams's childhood conditions in mitigating his sentence, the Court also noted the relevance of the following evidence: "Williams was 'borderline mentally retarded' and did not advance beyond sixth grade in school"; prison records "recording Williams'[s] commendations for helping to crack a prison drug ring and for returning a guard's missing wallet"; "the testimony of prison officials who described Williams as among the inmates 'least likely to act in a violent, dangerous or provocative way' "; "a certified public ac-

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[24] *See, e.g.*, Lockett v. Ohio, 438 U.S. 586, 608 (1978) (holding that a statute that limits a jury's consideration of mitigating factors is unconstitutional).

[25] *See* discussion *infra* Parts IV, V.

[26] 529 U.S. 362 (2000).

[27] *Id.* at 395 (footnote omitted).

[28] *Id.* at 395 n.19.

[29] *Id.* Another recent case that documents another string of mitigating facts is *Hardwick v. Crosby*, 320 F.3d 1127, 1162-82 (11th Cir. 2003) (noting mitigating evidence including a physically and emotionally abusive father who beat the defendant, routinely exposed himself and urinated on the floor in front of the children, and gave drugs and alcohol to the defendant when he was a child).

countant who had offered to testify that he had visited Williams frequently when Williams was incarcerated as part of a prison ministry program, that Williams 'seemed to thrive in a more regimented and structured environment'"; and that "Williams was proud of the carpentry degree he earned while in prison."[30]

The Court stated that this information was relevant to the capital sentencing of Mr. Williams without any explanation for why the childhood abuse or other evidence related to his sentencing for the murder.[31] Mr. Williams had killed an intoxicated man with a mattock because the man refused to loan him a couple of dollars, and after Mr. Williams's initial trial he was sentenced to death.[32] Mr. Williams had confessed to the crime, yet the Court found that his sentencing hearing was unfair and his death sentence was reversed because his attorney did not discover the above evidence.[33] It is important to understand the reasons why any mitigating evidence should be considered for such a horrible crime. This Article addresses the question of why mitigation is legally and morally relevant to the use of the death penalty in the United States.

This Article examines how mitigating circumstances reveal moral problems in the foundation of the capital punishment and criminal justice systems. Part I begins by discussing the main punishment theories that justify consideration of mitigating factors: utilitarian, retributive, and disease theories. Part II discusses Judge Bazelon's writings on disease theory and the "rotten social background" defense. Part III discusses the Supreme Court's jurisprudence on the use of mitigating factors in capital cases, and Part IV lists a broad range of mitigating factors that have been used in capital cases, placing them into four categories and addressing the criminal justice justifications for each category.[34]

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30 *Williams*, 529 U.S. at 396 (citations omitted).

31 *See id*. at 396-99.

32 *Id.* at 367-68.

33 *Id.* at 395.

34 This Article collects the broad range of mitigating factors used in the United States, complementing my previous article, *Aggravating and Mitigating Factors: The Paradox of Today's Arbitrary and Mandatory Capital Punishment Scheme* which collected and categorized every statutory aggravating factor. Jeffrey L. Kirchmeier, *Aggravating and Mitigating Factors: The Paradox of Today's Arbitrary and Mandatory Capital Punishment Scheme*, 6 WM. & MARY BILL RTS. J. 345, 397-431 (1998). Whereas this Article considers mitigation in context of the moral justifications for the death penalty, in that previous article, I concluded that the current use

Part V examines one of the categories of mitigation and the empirical, philosophical, and practical issues raised by the use of mitigating factors in that category. The Article explains how the use of that type of mitigating factor indicates that the criminal justice system is following science toward embracing disease theory. Part VI then examines how a legal, philosophical, and scientific understanding of this category of mitigating factors can have a broad impact on the law. Thus, the Article concludes, the development of the law of mitigating factors is taking the criminal justice system to new understandings of human responsibility.

I

Traditional Theories of Punishment

In recent years, there has been an extraordinary growth in the number of people in prison in the United States.[35] At year-end 2003, there were approximately 482 prison inmates per 100,000 U.S. residents,[36] a substantial increase from 292 inmates per 100,000 residents at year-end 1990.[37] At the end of 2003, there were 2,212,475 prisoners in federal and state prisons or in local jails.[38] One in every 109 men in the United States was serving a prison sentence.[39] The number of people on death rows in the United States as of July 1, 2004 was 3,490.[40]

Those that are in prison often are there for a long time. A 2004 report found that almost ten percent of people in state and federal prisons in the United States were serving life terms.[41]

of aggravating and mitigating circumstances has resulted in systemic problems with capital punishment in the United States. *See id*. at 360-434.

[35] *See, e.g.*, Vivien Stern, A Sin Against the Future: Imprisonment in the World 61 (1998).

[36] Paige M. Harrison & Allen J. Beck, *Prisoners in 2003*, Bureau of Just. Stat. Bull., Nov. 2004, at 1, *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/p03.pdf [hereinafter *Prisoners in 2003*].

[37] Paige M. Harrison & Allen J. Beck, *Prisoners in 2001*, Bureau Of Just. Stat. Bull., July 2002, at 1, *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/p01.pdf.

[38] *Prisoners in 2003*, *supra* note 36, at 1.

[39] *Id*. One in every 1,163 women was serving a prison sentence. *Id*.

[40] Deborah Fins, *A Quarterly Report by the Criminal Justice Project of the NAACP Legal Defense and Educational Fund, Inc.*, Death Row USA 3 (Summer 2004), *available at* http://www.naacpldf.org/content/pdf/pubs/drusa/DRUSA_Summer_2004.pdf.

[41] Fox Butterfield, *Almost 10% of All Prisoners Are Now Serving Life Terms*, N.Y. Times, May 12, 2004, at A17. In California and New York, approximately 20% of people in state prisons are serving life terms. *Id.* "In addition, the report found, there were 23,523 inmates serving a life sentence who were mentally ill and whose acts might have been caused by their illness." *Id.*

The growth in harsh sentences in American history is a result of not an increase in crime, but an increase in more punitive laws.[42]

The numbers are more disturbing when one considers the racial disparity in the percentage of people in prison. At the end of 2003, of all black males aged 25 to 29 in the United States, 9.3% were in prison or jail, compared to 2.6% of Hispanic males and 1.9% of white males of the same age.[43] An African-American male born in 2004 has a 32.2% likelihood of being incarcerated sometime during his lifetime.[44]

With such a substantial portion of our population being imprisoned and thousands of the condemned waiting for execution, the policy and moral justifications for these numbers need to be examined. As Justice Kennedy recently stated, "'Tough on crime' should not be a substitute for thoughtful reflection or lead us into moral blindness."[45]

While the intentional infliction of pain is generally seen as something wrong, "legal punishment involves deliberate infliction of suffering . . . beyond the suffering occasioned by stigma and censure."[46] Thus, an important issue is the question of what justifies society's infliction of suffering. Traditionally, there have been two main rationales for punishment: utilitarian theory and retributive theory.[47]

In 1843, Jeremy Bentham wrote about the utilitarian theory when he explained that because punishment itself is evil, "if it ought at all to be admitted, it ought only to be admitted in as far as it promises to exclude some greater evil."[48] Utilitarian theory reasons that punishment should only be used if it benefits society,[49] such as by protecting society from the individual by inca-

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42 *Id.* During 1992-2002 the number of people serving life sentences grew 83%, but during the same time crime actually fell 35%. *Id.*

43 *Prisoners in 2003, supra* note 36, at 1.

44 AMERICAN BAR ASSOCIATION JUSTICE KENNEDY COMMISSION, REPORT TO THE HOUSE OF DELEGATES 18 (2004), *available at* http://www.abanet.org./yld /annual04/121A.pdf [hereinafter ABA JUSTICE KENNEDY COMMISSION REPORT].

45 Linda Greenhouse, *High Court Justice Supports Bar Plan to Ease Sentencing*, N.Y. TIMES, June 24, 2004, at A14.

46 HENBERG, *supra* note 11, at 191.

47 *See, e.g.*, *id*. at 199. "The retributivist maintains that the dutiful response to wrong is to liken legal punishment to offense; the utilitarian, by contrast, holds that the dutiful response to wrong is to choose that response which provides the most favorable balance of good consequences over bad." *Id.*

48 BENTHAM, *supra* note 11, at 83-84.

49 *See, e.g.*, *id*. at 14. "Punishments which go beyond the need of preserving the common store or deposit of public safety are in their nature unjust. The juster the

pacitation, by deterring others from committing crimes, or by rehabilitating the criminal. In the United States, until around the last twenty-five years, rehabilitation was the "central professed goal" of the justice system.[50] In the late twentieth century, however, rehabilitation became one of the least professed goals of the American criminal justice system, while justifications like incapacitation and deterrence became the dominant goals.[51]

As opposed to utilitarian justifications, retribution theory, such as that advocated by Immanuel Kant, reasons that punishment is justified because it is deserved, and it is deserved when a criminal freely decides to violate the rules of society.[52] "A retributivist believes that the imposition of deserved punishment is an intrinsic good."[53] The classic formulation of retribution, and the way it is used in this Article, differs from vengeance in that it focuses on what the perpetrator deserves as an individual, not on the victim's desire for retaliation.[54] Retribution has a proportionality component in that, as Kant stated, punishment ought to be "pronounced over all criminals proportionate to their internal wickedness . . . ."[55] Further, as one law professor explained, "[R]etribution is based on the dual premises that humans possess free will and that punishment is justified when it is deserved."[56]

Although all retributivists might not agree,[57] under Kantian moral philosophy, society not only is justified in punishing

punishments, the more sacred and inviolable the security and the greater the liberty which the sovereign preserves for his subjects." *Id.*

[50] Albert W. Alschuler, *The Changing Purposes of Criminal Punishment: A Retrospective on the Past Century and Some Thoughts About the Next*, 70 U. CHI. L. REV. 1, 6 (2003).

[51] *See id.* at 9, 11; Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453, 456 (1997). One criticism of the incapacitation justification is that under such a theory, sentences should be based upon a defendant's future dangerousness, which cannot be predicted reliably, and results in punishment for acts not yet done. *Id*. at 464-68.

[52] *See* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 17 (3d ed. 2001).

[53] Alschuler, *supra* note 50, at 15. Professor Alschuler argues that retribution "merits recognition as the central purpose of criminal punishment." *Id.*

[54] Private vengeance as a justification for punishment "is a disguised form of utilitarianism, since it defends punishment in order to deter private revenge." DRESSLER, *supra* note 52, at 17; *see* Huefner, *supra* note 7, at 975 n.7 (noting that the classic formulation of retribution holds that punishment is required simply because it is "just").

[55] IMMANUEL KANT, THE SCIENCE OF RIGHT (W. Hastie trans., Augustus M. Kelly Pub. 1974) (1887).

[56] DRESSLER, *supra* note 52, at 17.

[57] *See* Alschuler, *supra* note 50, at 15.

criminals, it has a moral obligation to do so.[58] Kant explained this obligation:

> Even if a civil society were to dissolve itself by common agreement of all its members . . . . the last murderer remaining in prison must first be executed, so that everyone will duly receive what his actions are worth and so that the blood-guilt thereof will not be fixed on the people because they failed to insist on carrying out the punishment; for if they fail to do so, they may be regarded as accomplices in this public violation of legal justice.[59]

In a 1992 U.S. Supreme Court capital case, *Morgan v. Illinois*,[60] Justice Scalia quoted this passage in a dissenting opinion.[61]

During the last forty years in the United States, there has been a "great philosophical revival of retributivism,"[62] reintroducing "ideas of moral agency and moral responsibility into the criminal law, abandoning the brute therapeutic psychologism of the mid-twentieth century."[63] Professor James Whitman has noted that the major role retributivism now plays is at least partly the result of American democracy, because "[o]rdinary voters are never capable of the kind of routinized, sober, and merciful approach to punishment that is the stuff of the daily work of punishment professionals."[64] Thus, to gain popular support, American politicians push for retributive punishments, and the result is dramatically long prison sentences even for nonviolent offenses, "three-strikes-and-you're-out" laws, and one of the highest incar-

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[58] HENBERG, *supra* note 11, at 159. Because Kant holds that the state, whatever the sentiments of its individual citizens,

> has a stern duty to punish legal offenses, it *must* punish them. Legal punishment of criminals, Kant argues, is a categorical imperative, rationally universalizable. As such, it does not share in the merely hypothetical aims of relieving the distress of victims inflamed by the desire for vengeance. Still less does it share in the aims of humiliating the offender or of communicating love via forgiveness once the debt of punishment is paid. When understood as comfort for distress of any sort, solace derives from humankind's passional nature and is for Kant as morally irrelevant as the desire for happiness or success.

Id.

[59] *Id*. at 160 (quoting IMMANUEL KANT, THE METAPHYSICAL ELEMENTS OF JUSTICE 102 (John Ladd trans., Bobbs-Merrill Co. 1965) (1797).

[60] 504 U.S. 719 (1992).

[61] *Id.* at 752 n.6 (Scalia, J., dissenting) (quoting IMMANUEL KANT, THE PHILOSOPHY OF LAW 198 (W. Hastie trans., Augustus M. Kelley Pub. 1974) (1887)).

[62] JAMES Q. WHITMAN, HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE 23-24 (2003).

[63] *Id.* at 24.

[64] *Id.* at 55.

ceration rates in the world.[65]

The theories of utilitarianism and retributivism are inconsistent, but many lawmakers and scholars use a mixture of the two to justify punishments.[66] Thus, "the rules of criminal responsibility and punishment reflect society's attraction to both theories."[67]

These theories of punishment also form the bases for the theories behind allowing certain defenses. Most substantive defenses fall into the categories of justification defenses or excuse defenses. The law provides a justification defense to defendants who acted out of necessity and acted reasonably, such as in cases where a defendant acted in self-defense.[68] In these cases, utilitarian and retributive theories do not require that such defendants be punished.[69] Similarly, utilitarian and retributive theories do not require the punishment of people who have an excuse defense. Defendants have an excuse defense where, although society does not approve of their action, society understands that the person was not culpable, such as cases where the defendant was legally insane.[70] Punishment has less deterrent effect on such individuals, who are also less deserving of punishment.

When the Supreme Court addressed the constitutionality of the death penalty in the 1970s, it used utilitarian and retributive theories in its Eighth Amendment analysis. In *Furman v. Georgia*,[71] when Justice Marshall considered whether death is an unnecessary and excessive punishment under the Eighth Amendment, he discussed these theories of punishment.[72] He argued that "[t]he history of the Eighth Amendment supports only the conclusion that retribution for its own sake is im-

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65 *Id.* at 56-58.

> Depending on how you reckon it, the American incarceration rate now stands at somewhere between 450 and 700 per 100,000 of the general population—on a rough par with Russia; and in certain parts of the United States, like Lousiana and the District of Columbia, the rate stands as high as 760 or 1,700 per 100,000. The typical European incarceration rate, by contrast, stands somewhere between 65 and 100 per 100,000.

Id. at 57-58.

66 DRESSLER, *supra* note 52, at 22.

67 *Id.*

68 *See, e.g.*, *id*. at 232-34.

69 *See id.* at 214-16.

70 *See id.* at 210-14.

71 408 U.S. 238 (1972).

72 *Id.* at 342 (Marshall, J., concurring).

proper,"[73] though other justices disagreed.[74] Further, in concluding that the death penalty violates the Constitution, he also considered various studies and concluded that the death penalty was not a deterrent.[75]

When the Court upheld the constitutionality of the death penalty in 1976 in *Gregg v. Georgia*,[76] the plurality also looked at these theories. Quoting a 1949 case,[77] the plurality noted, "'Retribution is no longer the dominant objective of the criminal law.'"[78] However, the plurality added, "[N]either is it a forbidden objective nor one inconsistent with our respect for the dignity of men."[79] The plurality concluded that retribution could justify the use of the death penalty.[80] The *Gregg* plurality also reasoned that the death penalty must have some deterrent effect, though the extent of that effect was best left for legislatures to consider.[81]

In dissent, Justice Marshall discussed several studies and concluded that the death penalty is not necessary as a deterrent.[82] Additionally, he rejected the plurality's reliance on retribution by stating that under the Eighth Amendment, punishments must comport with human dignity, and "[t]he mere fact that the community demands the murderer's life in return for the evil he has done cannot sustain the death penalty."[83]

Beyond retribution theory, which views a criminal as someone morally deserving of punishment, and utilitarian theory, which views a criminal as someone who may be punished as an example to others, there is another possible view. One may view the crim-

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73 *Id*. at 345.

74 *Id*. at 394-95 (Burger, C.J., dissenting); *id.* at 452-54 (Powell, J., dissenting); *see also* Powell v. Texas, 392 U.S. 531, 535-36 (1968) (plurality opinion).

75 *Furman*, 408 U.S. at 354 (Marshall, J., concurring).

76 428 U.S. 153 (1976) (plurality opinion).

77 Williams v. New York, 337 U.S. 241 (1949).

78 *Gregg*, 428 U.S. at 183 (quoting *Williams*, 337 U.S. at 248).

79 *Gregg*, 428 U.S at 183.

80 *See id.* at 184. "Indeed, the decision that capital punishment may be the appropriate sanction in extreme cases is an expression of the community's belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death." *Id.*

81 *Id.* at 186-87.

82 *Id.* at 236 (Marshall, J., dissenting).

83 *Id.* at 240. With respect to retribution, Justice Marshall points out that the plurality made a common error at one point when equating retribution with serving society's expression of moral outrage and preventing citizens from taking the law into their own hands. Such arguments are actually based on utilitarian arguments that a punishment benefits society, not pure retributive arguments. *See id.* at 238-39.

inal as someone with a disease, which leads one to question our moral justification for punishing for any purpose beyond "curing" the individual.

This "disease" theory is not completely inconsistent with retribution and utilitarian theories, both of which may explain why the "diseased" criminal should not be punished. Under retribution theory, one might say that the "diseased" criminal should not be punished because the person had no control and was not deserving of punishment. Under utilitarian theory, the "diseased" criminal should not be punished because such punishment will not serve any deterrence purposes. Yet, if all, or at least a majority of criminals are seen as "diseased," it seems that such a view would be inconsistent with current retributive and utilitarian thought. In the 1970s, Judge David Bazelon discussed a version of this "disease theory" approach, and his writings on the subject are discussed in the next section.

II

Early Debate about the Consideration of the Causes of Crime in the Criminal Justice System

A. *Judge Bazelon's Proposed Consideration of "Rotten Social Background" as a Defense*

Because environment plays a significant role in determining an individual's behavior,[84] legal scholars have discussed whether severe environmental deprivation, or a "rotten social background," should be a defense in criminal cases.[85] Judge David Bazelon first wrote about this defense in 1973 in *United States v. Alexander*,[86] and he explored the issue further in a debate with Professor Stephen Morse in the *Southern California Law Review*.[87]

Judge Bazelon took the phrase "rotten social background" ("RSB") from one of the defense attorneys who used the phrase in closing argument at the trial in *Alexander*.[88] In the case, the

84 *See* discussion *infra* Part VI.A.

85 *See generally* Richard Delgado, *"Rotten Social Background": Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation?*, 3 Law and Ineq. 9 (1985).

86 471 F.2d 923, 957-65 (D.C. Cir. 1973) (Bazelon, C.J., concurring in part and dissenting in part). *Alexander* was a per curiam decision, but Chief Judge Bazelon wrote a separate opinion.

87 *See infra* notes 100-15 and accompanying text.

88 471 F.2d at 959 n.100 (Bazelon, C.J., concurring in part and dissenting in part).

defendants were charged with various crimes related to the killing of a marine after the marine had used a racial slur.[89] The defense argued that the defendant who fired the gun did not have control of his conduct because the RSB environment in which he was raised conditioned him to respond to the racial slur in such a way that he had no meaningful choice of action.[90] The trial judge had instructed the jury to disregard the testimony about the defendant's background and instead to focus on the legal standard of insanity.[91] The defendant was convicted, and the court of appeals in *Alexander* affirmed.[92]

In the appellate decision, Judge Bazelon concurred in part and dissented in part, discussing some of his ideas about the RSB defense and how it could apply.[93] Then, Judge Bazelon considered four "unattractive" alternatives for its application:[94] (1) impose illogical limitations on the RSB defense so that it will not be successful;[95] (2) allow the RSB defense, and if successful, it would result in the acquittal and release of the defendant;[96] (3) allow the RSB defense and if the community will not tolerate the release of the defendant, find a therapeutic purpose for hospitalization;[97] or (4) allow the RSB defense and if the defendant cannot be cured, then confine him based upon his future dangerousness.[98]

In *Alexander*, Judge Bazelon did not offer a solution to the practical question of how courts should permit the RSB defense, but he criticized the court for not adequately considering the choices and fully examining criminal responsibility doctrine.[99] He reasoned that further discussion of the defendant's responsibility defense might lead to further discoveries about the causes of violent criminal behavior.[100]

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89 *Id.* at 928-29 (plurality opinion).
90 *See id.* at 960 (Bazelon, C.J., concurring in part and dissenting in part).
91 *Id*. at 928 (plurality opinion).
92 *Id.* at 927.
93 *Id.* at 961-62 (Bazelon, C.J., concurring in part and dissenting in part).
94 *Id.* at 962.
95 *Id.*
96 *Id.* at 963.
97 *Id.* at 963-64.
98 *Id.* at 964.
99 *See id.*
100 *Id.* at 965.

> We might discover, for example, that there is a significant causal relationship between violent criminal behavior and a "rotten social background." That realization would require us to consider, for example, whether income

Judge Bazelon expanded upon his views of the RSB defense in his 1975 J. Edgar Hoover Foundation lecture,[101] and his published rejoinder[102] to Professor Morse's response to the publication of the lecture.[103] Judge Bazelon advocated for an expanded inquiry into culpability of defendants and the fact that "almost all violent crime is committed by the disadvantaged and deprived."[104] He argued that "the law's aims must be achieved by a moral process cognizant of the realities of social injustice."[105]

Judge Bazelon discussed the debate over the tests for insanity, including the expansion of the *M'Naghten*[106] test with the test he earlier had developed in *Durham v. United States*.[107] While courts ultimately abandoned the *Durham*, or "Product" test because most judges believed it went too far in allowing the insanity defense where the act was a product of a mental disease or defect, Judge Bazelon said that the test did not go far enough.[108] Judge Bazelon said that juries should be able to consider the moral culpability of a defendant even in cases where insanity was not an issue, through the following instruction: "[A] defendant is not responsible *if at the time of his unlawful conduct his mental or emotional processes or behavior controls were impaired to such an extent that he cannot justly be held responsible for his act*."[109]

> redistribution and social reconstruction are indispensable first steps toward solving the problem of violent crime.

Id.

101 David L. Bazelon, *The Morality of the Criminal Law*, 49 S. Cal. L. Rev. 385 (1976).

102 David L. Bazelon, *The Morality of the Criminal Law: A Rejoinder to Professor Morse*, 49 S. Cal. L. Rev. 1269 (1976).

103 Stephen J. Morse, *The Twilight of Welfare Criminology: A Reply to Judge Bazelon*, 49 S. Cal. L. Rev. 1247 (1976) [hereinafter Morse, *A Reply*]; *see also* Stephen J. Morse, *The Twilight of Welfare Criminology: A Final Word*, 49 S. Cal. L. Rev. 1275 (1976) [hereinafter Morse, *A Final Word*].

104 Bazelon, *supra* note 101, at 403.

105 Bazelon, *supra* note 101, at 386.

106 M'Naghten's Case, 8 Eng. Rep. 718 (H.L. 1843).

107 214 F.2d 862 (D.C. Cir. 1954).

108 Bazelon, *supra* note 101, at 390-97. The *Durham* test was heavily criticized because it gave too much importance to the testimony of experts, which took away from the role of the jury. *See, e.g.,* State v. Johnson, 399 A.2d 469, 474-75 (R.I. 1979). Judge Bazelon recognized the problems with the test, and the United States Court of Appeals for the District of Columbia eventually proscribed experts from testifying concerning productivity in *Washington v. United States*, 390 F.2d 444 (1967), and ultimately abandoned the *Durham* test in *United States v. Brawner*, 471 F.2d 969 (D.C. Cir. 1972).

109 Bazelon, *supra* note 101, at 396 (quoting *Brawner*, 471 F.2d at 1032 (Bazelon, C.J., concurring in part and dissenting in part). Later, Judge Bazelon explained,

Such an instruction would allow "testimony on the nature and extent of behavioral impairments and of physiological, psychological, environmental, cultural, educational, economic, and heredity factors."[110] Such considerations would not only give more moral weight to criminal condemnations, but these inquiries would "give all of us a deeper understanding of the causes of human behavior in general and criminal behavior in particular."[111] Ultimately, these inquiries would force society to address crime in other ways besides incarceration and to directly attack the causes of crime, such as poverty.[112]

In response, Professor Morse was more skeptical in his essays: "Even if great amounts of evidence on social conditions were admitted at trials, cases leading to conviction would probably not force *society at large* to face its complicity in causing criminal behavior. Such cases would be 'lost' in the system."[113] Professor Morse did note that acquittals of dangerous defendants would compel society to examine systemic problems, but releasing such defendants would be a great cost.[114] Further, he argued, "it is doubtful that the adversary trial is the best forum for developing and disseminating the inordinately complex data and philosophical considerations that would be reasonably necessary to justify and promote a major change in societal attitudes towards criminal responsibility."[115]

> It is precisely because I believe there is no a priori answer to the question, 'What is a free choice to do wrong?' that I advocate asking the jury, the traditional representative of 'our consensual sense of morality,' to decide in each case whether, in light of that morality, the defendant can justly be held responsible for his act.

Bazelon, *supra* note 102, at 1270.

[110] Bazelon, *supra* note 101, at 396.

[111] *Id.* Judge Bazelon explained:

> The overwhelming majority of violent street crime, which worries us so deeply, is committed by people at the bottom of the socioeconomic-cultural ladder—the ignorant, the ill-educated, and the unemployed and often unemployable. I cannot believe that this is coincidental. Rather, I must conclude that those people turn to crime for reasons such as economic survival, a sense of excitement or accomplishment, and an outlet for frustration, desperation, and rage. We cannot produce a class of desperate and angry citizens by closing off, for many years, all means of economic advancement and personal fulfillment for a sizeable part of the population, and thereafter expect a crime-free society.

Id. at 402.

[112] *Id*. at 403-05.

[113] Morse, *A Final Word*, *supra* note 103, at 1275.

[114] *Id.* at 1276.

[115] *Id.*

Judge Bazelon's ideas were revolutionary in that he argued for a deeper inquiry into the minds of the criminal and a higher moral justification for punishment.[116] Due to the perceived impracticality and radical nature of his ideas, they never gained widespread acceptance.

Other commentators, however, have noted that RSB theory plays a role in several excuse-oriented defenses in the criminal justice system. For example, the insanity defense is based on the assumption that a person's background may impair her or his mental and emotional processes.[117] As noted above, in *Durham v. United States*,[118] Judge Bazelon earlier had advocated for an insanity defense standard similar to what he later proposed for the RSB defense: "[a]n accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect."[119] Although the tests used today for insanity are much more restrictive than the *Durham* test, they still allow a defendant to be excused for criminal conduct in a narrow range of cases because "moral blame cannot attach where an act was not the result of free choice."[120] Similarly, the reasoning that a person's background gives that person a limited range of free will may support defenses such as duress and extreme emotional disturbance.[121] Yet, although these existing defenses often apply to defendants who would also have an RSB defense, "none of these existing defenses was designed to include all RSB cases, and it is largely a matter of chance that an RSB defendant happens to meet the requirements of a given defense."[122]

In 1985, Professor Richard Delgado argued that a pure RSB defense should be available to defendants.

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116 Considering Judge Bazelon's concern about the role of mental illness and criminal law, it is not surprising that he is also the author of two landmark opinions establishing the right of a mental patient to get appropriate treatment. *See* Rouse v. Cameron, 373 F.2d 451 (D.C. Cir. 1966) (recognizing a right to appropriate treatment under a D.C. statute); Lake v. Cameron, 364 F.2d 657 (D.C. Cir. 1966) (holding that the right was the right to treatment in the least restrictive alternative setting).

117 *See* Delgado, *supra* note 85, at 38.

118 214 F.2d 862 (D.C. Cir. 1954).

119 *Id*. at 874-75; *see supra* notes 106-08 and accompanying text.

120 DAVID L. BAZELON, QUESTIONING AUTHORITY: JUSTICE AND CRIMINAL LAW 24 (1988).

121 *See* Delgado, *supra* note 85, at 45. Other defenses, such as intoxication and battered spouse syndrome, are based upon a similar conclusion that the defendant is acting on something less than free will.

122 *Id*. at 54.

> From both individual and societal perspectives, a strong case can be made for new defenses for the criminal defendant whose crime stems from poverty, mistreatment, or a legitimate and frustrated desire for self-respect. Destitution and neglect affect individual behavior and choice; they are thus highly relevant to issues of criminal responsibility.[123]

Professor Delgado argued that an RSB defense is justified under utilitarian and retributive theories.[124] For example, a person compelled to act a certain way because of that person's background is less likely to be deterred by punishment, and such a person is less deserving of punishment.[125]

As discussed later, the main purposes of RSB theory is to undermine retributive principles and to question whether certain individuals are morally deserving of punishment. If RSB factors, as well as other environmental and heredity factors, are what make a person more likely to commit a crime, that person is less deserving of punishment. Depending on how we view the strength of those influences, if we conclude that these factors in effect "caused" a person to commit a crime, then any retributive reason for punishing the person disappears. The person does not deserve punishment if the crime was caused by factors beyond the person's control. We might still punish the person for deterrence reasons, but we cannot say that the person morally "deserves" punishment any more than we can say that a river "deserves" to be dammed to prevent flooding.

B. Other Legal Commentators Have Made Similar Arguments

Although Judge Bazelon is the most famous advocate of the RSB defense among legal scholars, he was not the first person to note the close relation between social environment and crime. Other commentators have questioned the moral justification for punishing individuals who act as a result of forces beyond their control such that they do not act with free will. Clarence Darrow once explained,

> All people are products of two things, and two things only—their heredity and their environment. And they act in exact accord with the heredity which they took from all the past, and for which they are in no wise responsible, and the environment, which reaches out to the farthest limit of all life that can

[123] *Id.* at 79.
[124] *Id.* at 55-75.
[125] *See id.*

influence them. We all act from the same way."[126]

In 1902, in an address to prisoners in the Cook County Jail, he told the prisoners that they were "in jail simply because they cannot avoid it on account of circumstances which are entirely beyond their control and for which they are in no way responsible."[127]

Lewis Lawes, a former warden of Sing Sing Prison, wrote, "[e]very murder, whether instigated by passion, criminality or even gang warfare, reaches back to some form of social disaffection."[128] Recently, mental health professionals have stressed similar points in considering the behavior and neurological causes of violent crime.[129] The mental health and medical literature are discussed in more detail later in this Article.[130]

These ideas are not new. In the early sixteenth century, English martyr John Bradford had a saying for when he saw criminals going to be executed: "But for the grace of God, there goes John Bradford."[131] Plato may have been the first advocate of a disease theory of crime.[132] Echoes of a belief in the effects of the environment can be found throughout history, such as in the statement of Vladimir Ilyich Lenin, "Man can be made what we want him to be."[133] Abraham Lincoln had the fatalistic belief

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126 CLARENCE DARROW, *Is Capital Punishment a Wise Policy?: Debate with Judge Talley*, *in* ATTORNEY FOR THE DAMNED 89, 98 (Arthur Weinberg ed., 1989).

127 CLARENCE DARROW, *Address to the Prisoners in the Cook County Jail*, *in* ATTORNEY FOR THE DAMNED, *supra* note 126, at 3-4.

128 LEWIS E. LAWES, TWENTY THOUSAND YEARS IN SING SING 337 (1932). He then asked, "[w]hy not reexamine the fundamentals that have to do with shaping and strengthening the guide posts of good living and right thinking?" *Id.*

129 *See, e.g.*, DOROTHY OTNOW LEWIS, M.D., GUILTY BY REASON OF INSANITY: A PSYCHIATRIST EXPLORES THE MINDS OF KILLERS 187-88, 286-94 (1998).

130 *See* discussion *infra* Part IV.B.

131 Anecdote by John Bradford, *in* THE LITTLE, BROWN BOOK OF ANECDOTES 74 (Clifton Fadiman ed., 1985).

132 HENBERG, *supra* note 11, at 95.

> Applying a medical analogy, Plato thinks of vice—the source of crime—as an ailment of soul in the way that physical illness is an ailment of body. He attributes vice sometimes to ignorance, sometimes to disorder among the elements of the soul, and sometimes to bodily fractiousness affecting the soul; but in each case, the object of punishment is the same: to restore order in the soul.

Id. (citations omitted). Plato saw that punishment was necessary when training and education did not cure the "disease," but the purpose of the infliction of suffering as punishment was to cure the criminal. *See id.* However, Plato's writings also included some retributive views of punishment. *See id.* at 96-108.

133 MATT RIDLEY, NATURE VIA NURTURE: GENES, EXPERIENCE, AND WHAT MAKES US HUMAN 185 (2003).

of another famous Illinois lawyer Clarence Darrow that there is no free will.[134] Based on his belief in "necessity," Lincoln also was a critic of punishment for retributive purposes.[135]

Of course, these ideas are not generally accepted in criminal law. Judge Evelle J. Younger once commented,

> Too many persons indulge themselves in gushing sentimentalism over criminals. They overemphasize the fact that life, education and environment are the forces that victimize and penalize every criminal. If society is wholly responsible, why not apologize to the cutthroat and pension him for life? If you don't hang him, why imprison him? He surely needs neither gallows nor cell if the blame is all on the universe at large.[136]

Further, in 1988, Professor Deborah W. Denno wrote "that social science research has not successfully demonstrated sufficiently strong links between biological factors and criminal behavior to warrant major consideration in determining criminal responsibility."[137] Professor Denno argued that the only defense to mitigate criminal responsibility should be in rare insanity defense cases and that mitigating factors should only be considered to determine where a defendant will be incarcerated but not to determine the length of a sentence.[138] Still, she concluded that "[u]ltimately, the criminal justice system must confront the significance of the mounting evidence concerning the biological bases of behavior, weigh its importance, evaluate its strengths and weaknesses, and recommend a policy for its use."[139]

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134 ALLEN C. GUELZO, ABRAHAM LINCOLN: REDEEMER PRESIDENT 118, 120 (2003); *see supra* notes 126-27 and accompanying text for a discussion of Clarence Darrow's views.

135 GUELZO, *supra* note 134, at 118, 120. Lincoln's friend Orville Hickman Browning noted:

> Since Lincoln was a 'thorough fatalist' and 'believed that what was to be would be, and no prayers of ours could arrest or reverse the decree,' then 'men were but simple tools of fate, of conditions, and of laws,' and no one 'was responsible for what he was, thought, or did, because he was a child of conditions.' This, [Lincoln's law partner and friend William] Herndon believed, was the real spring of Lincoln's 'patience' and 'his charity for men and his want of malice for them everywhere.'

Id. at 120.

136 Evelle J. Younger, *Capital Punishment: A Sharp Medicine Reconsidered*, A.B.A. J. (1956), *republished in* THE DEATH PENALTY: A LITERARY AND HISTORICAL APPROACH 129, 130 (Edward G. McGehee & William H. Hildebrand eds., 1964).

137 Deborah W. Denno, *Human Biology and Criminal Responsibility: Free Will or Free Ride?,* 137 U. PA. L. REV. 615, 617 (1988).

138 *Id.*

139 *Id.* at 618.

The debate about heredity, environment, free will, determinism, and moral culpability is discussed in Part V. Part III discusses how, beginning in 1976, those issues were brought to the forefront of the criminal justice system through the jurisprudence of mitigating circumstances in capital cases.

III
The Supreme Court's Jurisprudence on Mitigating Factors

One of the best ways to examine the role of RSB, personal responsibility, and punishment theory is in the area of capital sentencing. Because of a lack of clear proof that the death penalty effectively deters more than imprisonment,[140] the death penalty is in many ways the punishment most based upon moral condemnation and retributive theory.[141] Additionally, because of the extreme nature of the punishment, the U.S. Constitution requires courts to do more of a moral balancing than in other cases.[142] Consequently, sentencing in capital cases is much more structured than in non-capital cases.[143] Generally, there is a list of factors that are considered by the sentencer, and these factors range across a broad spectrum. To understand how the process works, one must understand the development of the current capital punishment scheme.

In the early years of the United States, all states followed the common-law practice of requiring the death penalty automatically for people found guilty of certain offenses.[144] Eventually, the number of eligible defenses decreased, but under such a system, all premeditated murderers were deserving of the death penalty and were equally morally culpable in the sense that they

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140 *See, e.g.*, William C. Bailey & Ruth D. Peterson, *Murder, Capital Punishment, and Deterrence: A Review of the Literature*, *in* The Death Penalty in America: Current Controversies 135 (Hugo Adam Bedau ed., 1997).

141 *See, e.g.*, Robert Blecker, *The Death Penalty: Where Are We Now?*, 46 N.Y.L. Sch. L. Rev. 665, 674 (2002-03) ("Increasingly [retributivists] agree that if the death penalty is used at all, it ought to be reserved for the worst of the worst who, beyond factual and moral doubt, deserve to die.").

142 *See, e.g.*, Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (noting the importance of individualized sentencing in capital cases because the death penalty differs from other punishments).

143 *See, e.g.*, *id.*

144 *Id*. at 289 (citing Bailey & Peterson, *supra* note 140, at 5-6, 15, 27-28 (rev. ed., 1967)) (holding that a mandatory death penalty system violates the Constitution).

received the same punishment.[145]

Soon, however, legislatures realized there were problems with having an unforgiving mandatory death penalty system, especially when juries began making moral distinctions that the law did not permit, such as finding sympathetic guilty defendants "not guilty" to avoid giving the death penalty.[146] In response to this type of jury nullification, states began changing their death penalty laws, and by 1963, every state with the death penalty and the federal government had moved to discretionary systems that permitted juries the complete discretion to grant mercy to guilty defendants.[147] Under this discretionary system, jurors were permitted to make their own moral judgments whether a guilty defendant should be executed.

The modern era of the death penalty in the United States began in 1972 with *Furman v. Georgia*,[148] which addressed the constitutionality of those discretionary statutes as well as the constitutionality of the death penalty.[149] In *Furman*, the Court voted five to four that the imposition of the death penalty in the three cases before it violated the Eighth and Fourteenth Amendments, with many of the justices focusing on concerns about the arbitrary imposition of the punishment.[150] The cases before the Court were from states where juries were given complete discretion as to whether or not to impose the death penalty.[151] In *Furman*, each of the nine justices wrote a separate opinion, and there was no clear consensus on the reasoning behind the result,[152] but the decision prevented the execution of everyone on death row in the United States at the time.[153]

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145 *See Woodson*, 428 U.S. at 289-90; McGautha v. California, 402 U.S. 183, 198 (1971).

146 *Woodson*, 428 U.S. at 293.

147 *Id.*; *see also* JEFFREY ABRAMSON, WE, THE JURY 217 (1994).

148 408 U.S. 238 (1972).

149 *Id*. at 239-40. A year earlier, the Court held in *McGautha* that discretionary statutes did not violate the Fourteenth Amendment, but the Court did not address whether such statutes violated the Eighth Amendment. 402 U.S. at 196.

150 *Furman*, 408 U.S. at 239-40. *Cf. McGautha*, 402 U.S. at 196 (holding that the Fourteenth Amendment is not violated by the absence of standards to guide the jury's discretion in determining whether to impose the death penalty).

151 *Furman*, 408 U.S. at 240 (Douglas, J., concurring).

152 The nine opinions in *Furman* "totaled 50,000 words, 243 pages—the longest decision in the Court's history." BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN: INSIDE THE SUPREME COURT 220 (1979).

153 FRANKLIN E. ZIMRING & GORDAN HAWKINS, CAPITAL PUNISHMENT AND THE AMERICAN AGENDA 37 (1986).

A number of state legislatures responded to *Furman* by drafting new death penalty statutes. To avoid the constitutional problem of arbitrary jury discretion addressed by *Furman*, states drafted statutes that either (1) made the death penalty mandatory upon the conviction of a specific capital crime; or (2) provided "guided discretion" to capital juries.[154] The latter type of statute generally permitted capital sentencers to consider specific aggravating factors that supported a death sentence and mitigating factors that supported a lesser sentence.[155]

In 1976, the Court addressed the constitutionality of these two types of death penalty statutes, striking down the mandatory death penalty statutes[156] and upholding the guided discretion statutes.[157] In *Gregg v. Georgia*,[158] a guided discretion statute case, the Court considered a state statute with a bifurcated system that contained specific aggravating and mitigating factors for a jury to consider.[159] The plurality, in an opinion written by Justice Stewart, held that such a statute provided "clear and objective standards" and gave adequate guidance to the sentencer.[160] On the same day, the Court upheld other states' guided sentencing statutes in *Jurek v. Texas*[161] and *Proffitt v. Florida*.[162]

At the same time, the Court struck down mandatory death penalty statutes as violating the Eighth Amendment in *Woodson v. North Carolina*[163] and *Roberts v. Louisiana*.[164] In these cases, one first sees the beginning of an emphasis on the importance of mitigating factors in capital cases. In *Woodson*, the plurality noted that "the Eighth Amendment draws much of its meaning from 'the evolving standards of decency that mark the progress of a maturing society.'"[165] The plurality considered the historical

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154 William J. Bowers, Legal Homicide: Death as Punishment in America, 1864-1982, at 174 (1984).

155 *Id*. at 174-75.

156 Woodson v. North Carolina, 428 U.S. 280 (1976); Roberts v. Louisiana, 428 U.S. 325 (1976).

157 *See* Gregg v. Georgia, 428 U.S. 153 (1976); Jurek v. Texas, 428 U.S. 262 (1976); Proffitt v. Florida, 428 U.S. 242 (1976). The Court also held that the death penalty per se does not violate the Eighth Amendment. *Gregg*, 428 U.S. at 169.

158 428 U.S. 153 (1976).

159 *Id*. at 161.

160 *Id.* at 196-98.

161 428 U.S. 262 (1976).

162 428 U.S. 242 (1976).

163 428 U.S. 280 (1976).

164 428 U.S. 325 (1976).

165 *Woodson*, 428 U.S. at 301 (plurality opinion) (quoting Trop v. Dulles, 356 U.S.

failures of mandatory death penalty statutes and concluded that in death penalty cases the Eighth Amendment "requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death."[166] Individualized sentencing in capital cases is required because there is an increased need for reliability, since "the penalty of death is qualitatively different from a sentence of imprisonment, however long."[167] This balancing of individual aspects of the crime and the defendant is achieved by consideration of mitigating and aggravating circumstances.

Thus, because of concerns about arbitrariness, under *Furman* and *Gregg* a jury cannot have complete discretion in determining the moral culpability of a capital defendant.[168] However, in *Woodson* and *Roberts* the Court required that the sentencer have some discretion, in the form of considering mitigating factors, in determining the moral culpability of the defendant.[169]

Later cases further explained the role served by mitigating factors in the legal and moral condemnation of capital defendants. In *Lockett v. Ohio*, Ohio's death penalty statute was struck down because it limited the mitigating factors a capital jury could consider during a sentencing hearing.[170] The plurality stated that a sentencer must "not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."[171]

Other cases strengthened the *Lockett* rule. In *Skipper v. South Carolina*, the Court held that the trial court's exclusion of evi-

86, 101 (1958)). Like *Gregg*, *Woodson* was a plurality opinion written by Justice Stewart and joined by Justices Powell and Stevens. *See generally Woodson*, 428 U.S. at 280. Justices Brennan and Marshall concluded that the death penalty is unconstitutional per se and provided the other two votes to strike down North Carolina's statute. *See id.* at 305-06.

166 *Woodson*, 428 U.S. at 304.

167 *Id.* at 305.

168 A jury's discretion must be guided by statutory factors. *See* Furman v. Georgia, 408 U.S. 238, 239-40 (1972); Gregg v. Georgia, 428 U.S. 153, 196-98 (1976).

169 *Woodson*, 428 U.S. at 304. In *Roberts*, the plurality explained that the crime of intentional murder of a police officer could not result in a mandatory death sentence. *Roberts*, 428 U.S. at 335-36. More than ten years later, as in *Woodson* and *Roberts*, the Court struck down a mandatory death penalty statute in *Sumner v. Shuman*, 483 U.S. 66 (1987).

170 438 U.S. 586, 608-09 (1978) (plurality opinion).

171 *Id.* at 604.

dence that the defendant had adjusted to incarceration violated the Eighth Amendment.[172] In *Eddings v. Oklahoma*, the Court held that a sentencer must be able to consider a capital defendant's troubled youth during sentencing.[173] Thus, not only must death penalty statutes provide for the consideration of mitigating circumstances about the offense and the defendant's character, but the statutes cannot limit the factors that may be considered.[174] Any information about "the circumstances of the offense together with the character and propensities of the offender"[175] that is relevant must be considered.[176]

Therefore, mitigating circumstances play an essential role in capital sentencing. Most states list some of the factors that are mitigating in their capital sentencing statutes. Because a defen-

[172] 476 U.S. 1, 114-15 (1986).

[173] 455 U.S. 104, 115-16 (1982).

[174] *See* Hitchcock v. Dugger, 481 U.S. 393, 398-99 (1987) (holding that trial judge's instruction to advisory jury to only consider statutory mitigating circumstances and refusal to consider non-statutory mitigating factors violated the Constitution). The plurality in *Lockett* noted that there may be a rare case, such as the situation of where a prisoner commits murder while serving a life sentence, where mitigating factors would not have to be considered. *Lockett*, 438 U.S. at 604 n.11. However, the Court later held that even in such a situation mitigating circumstances must be considered. *See* Sumner v. Shuman, 483 U.S. 66, 76 (1987).

[175] *Eddings*, 455 U.S. at 112 (quoting Pennsylvania v. Ashe, 302 U.S. 51, 55 (1937)).

[176] The Court has implied that there might be some limits on what mitigation a sentencer is required to consider under the Constitution. In *Franklin v. Lynaugh*, 487 U.S. 164, 172-73 (1988), the Court implied that a capital defendant may not have a constitutional right to an instruction telling the jury to consider any lingering doubt about the defendant's guilt as mitigating. The Court reasoned that such doubts are not part of a defendant's "'character,' 'record,' or a 'circumstance of the offense.'" *Id.* at 174. In the alternative, however, the Court concluded that even if there were such a right to have a jury consider "residual doubt," the right was not violated by the jury instructions in that case. *Id.* at 175. Also, the Court has suggested a limit on the broad holding of the *Lockett* line of cases. In *Johnson v. Texas*, 509 U.S. 350 (1993), the Court considered a capital sentencing statute that presented special questions to jurors instead of a list of aggravating and mitigating factors. *Compare* TEX. CRIM. PROC. CODE art. 37.071(b) (Vernon 1981), *with* TEX. CODE CRIM. PROC. CODE art. 37.071(b) (Vernon Supp. 2002) (Texas's current death penalty statute does specifically provide for mitigating factors to be considered). In Johnson's case, the jury was told to sentence him to death (1) if he deliberately killed the victim; and (2) if he were a future danger to society. *Johnson*, 509 U.S. at 354. Johnson, who was nineteen at the time of the murder, argued that the questions did not permit consideration of his youth as a mitigating factor. The Court, however, held that *Lockett* only requires that a jury be able to consider mitigating evidence and that it does not have to "be able to give effect to mitigating evidence in every conceivable manner in which the evidence might be relevant." *Id.* at 372. Thus, the Court upheld the death sentence because the mitigating factor of youth could be considered in at least one way—how it affected the defendant's future dangerousness. *Id.* at 371-72.

dant is not limited to the factors in a statute,[177] court decisions have contributed to the list of factors. The Supreme Court has not provided definitive guidance as to what specific factors should be mitigating or why some factors are mitigating. Thus, on a case-by-case basis, lower courts have developed mitigating circumstances. While there are a large number of mitigating circumstances and not all of them are disease theory factors, a substantial number of them paint a picture of the causes and effects of human failings. The next section lists and discusses the range of factors that have been found to be mitigating by the legislatures and the courts, and it addresses some of the reasons that the factors are mitigating.

IV
Categories of Mitigating Factors in Capital Cases

In making the legal and moral determination that a defendant

[177] Many state statutes explicitly incorporate the command of *Lockett* that all mitigating evidence must be considered by including a catch-all provision among the list of specific statutory mitigating circumstances. *See, e.g.,* Cal. Penal Code § 190.3(k) (West 1999 & Supp. 2004) ("Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime"); Colo. Rev. Stat. § 18.1.3-1201(4)(l) (2003) ("Any other evidence which in the courts opinion bears on the question of mitigation"); Fla. Stat. Ann. § 921.141(6)(h) (West 2001 & Supp. 2004) ("The existence of any other factors in the defendant's background that would mitigate against imposition of the death penalty"); Ind. Code Ann. § 35-50-2-9(c)(8) (Burns Supp. 2002) ("Any other circumstances appropriate for consideration") (amended 2003); N.C. Gen. Stat. § 15A-2000(f)(9) (2001) ("Any other circumstance arising from the evidence which the jury deems to have mitigating value").

The Connecticut statute, by contrast, only contains a catch-all provision and does not list specific mitigating factors. Conn. Gen. Stat. Ann. § 53a-46a(d) (West 2001 & Supp. 2002). Instead, it states,

> the court shall first determine whether a particular factor concerning the defendant's character, background or history, or the nature and circumstances of the crime, has been established by the evidence, and shall determine further whether that factor is mitigating in nature, considering all the facts and circumstances of the case.

Id. Interestingly, Connecticut used to list five statutory mitigating circumstances, but the statute was rewritten so that one of those factors was eliminated (duress) and the remaining four became per se bars to the death penalty. An Act Concerning the Death Penalty, 1995 Conn Legis. Serv. 95-19 (West). The four former mitigating circumstances that are now bars to the death penalty are whether at the time of the crime: (1) the defendant was under eighteen; (2) significant mental impairment; (3) minor participation; or (4) the defendant could not have reasonably foreseen that the conduct would create a risk of death. Conn. Gen. Stat. Ann. § 53a-46a(h).

should be executed, jurors consider certain mitigating factors presented by the defendant and approved by the trial court. As discussed above, the Supreme Court has stated that a sentencer must "not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."[178] The threshold for determining what evidence is relevant mitigating evidence is a low one: "Relevant mitigating evidence is evidence which tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value."[179] However, the category of relevant factors about the offense or the defendant's character and record is not unlimited. For example, the fact that a defendant has a certain hair color or was born on a Tuesday would generally not be mitigating.[180] The mitigating factor must somehow relate to the crime, and sometimes courts will find that certain evidence does not constitute a mitigating circumstance.[181] Still, courts and legislatures have found a signif-

[178] *Lockett*, 438 U.S. at 604.

[179] McKoy v. North Carolina, 494 U.S. 433, 440 (1990) (quoting State v. McKoy, 372 S.E.2d 12, 55 (N.C. 1988) (Exum, C.J., dissenting)). In Tennard v. Dretke, 124 S. Ct. 2562, 2570 (2004), the Supreme Court emphasized that there is a "low threshold for relevance" and rejected the higher threshold applied by the U.S. Court of Appeals for the Fifth Circuit.

[180] The Supreme Court has noted as another example, "we have no quarrel with the statement . . . that 'how often [the defendant] will take a shower' is irrelevant to the sentencing determination." *Tennard*, 124 S. Ct. at 2571 (quoting State v. Plath, 313 S.E.2d 619, 627 (S.C. 1984)).

[181] Below are some examples of cases where courts found certain evidence did not constitute a mitigating factor. *See, e.g.*, State v. Koskovich, 776 A.2d 144, 172 (N.J. 2001) (holding that capital sentencing jury may not consider a co-defendant's sentence as a catch-all mitigating factor); State v. Timmendequas, 737 A.2d 55, 115-16 (N.J. 1999) (holding that capital defendant's alleged offer to plead guilty in exchange for a life sentence was not a mitigating factor); State v. Clark, 990 P.2d 793, 806-07 (N.M. 1999) (holding that fact that the former governor had commuted prior death sentences to life imprisonment was not a mitigating factor; also holding that opinions of friends or relatives of the defendant that defendant should not be sentenced to death is not a mitigating circumstance and that testimony of religious leaders and lawyers as to the propriety of a death sentence was not relevant mitigating evidence); State v. Torres, 713 A.2d 1, 18 (N.J.A.D. 1998) (rejecting as a mitigating factor the defendant's age of sixteen because the crime was not of a nature consistent with youth); State v. Morton, 715 A.2d 228, 270 (N.J. 1998) (holding that parole ineligibility is not a mitigating factor); Madison v. State, 718 So. 2d 90, 96-97 (Ala. Crim. App. 1997) (holding that evidence from defense expert that the defendant suffered from delusional and thought disorders was insufficient to support the mitigating circumstance of extreme mental or emotional disturbance); State v. Brown, 651 A.2d 19, 56 (N.J. 1994) (holding that sentencing of co-defendant may not be

icant number of factors that should be considered in capital cases as mitigating.

The law of mitigating factors in capital cases is a relatively recent development, but these mitigating factors are not new concepts. As noted earlier, Judge Bazelon and others have noted the relationship between crime and many factors that courts now consider mitigating circumstances in capital cases.[182]

For organization and discussion purposes, the mitigating factors are grouped together here into four categories: (1) mitigating circumstances unrelated to the crime that show that the defendant has some good qualities ("Good Character Factors"); (2) mitigating circumstances that show the defendant had a lesser involvement with the murder ("Crime Involvement Factors"); (3) mitigating circumstances related to the legal proceedings ("Legal Proceeding Factors"); and (4) mitigating circumstances that show less culpability and/or that help explain why a defendant committed the crime ("Disease Theory Factors"). The Disease Theory Factors reflect the disease considerations that Judge Bazelon raised in his discussions of the RSB defense.

A. Good Character Factors: Mitigating Factors Unrelated to the Crime That Show Defendant Has Some Good Qualities.

Assisted in the prosecution of another[183]

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considered as a mitigating factor), *overruled on other grounds*, State v. Cooper, 700 A.2d 306, 331 (N.J. 1997).

[182] For example, Judge Bazelon explained:

> The circumstances that lead some of these people to crime are no mystery. They are born into families struggling to survive—if they have families at all. They are raised in deteriorating, overcrowded housing. They lack adequate nutrition and health care. They are subjected to prejudice and educated in unresponsive schools. They are denied the sense of order, purpose, and self-esteem that makes law-abiding citizens. With nothing to preserve and nothing to lose, they turn to crime for economic survival, a sense of excitement and accomplishment, and an outlet for frustration, desperation, and rage.

BAZELON, *supra* note 120, at 17.

[183] *E.g.*, N.J. STAT. ANN. § 2C: 11-3(5)(g) (West Supp. 2004) ("The defendant rendered substantial assistance to the State in the prosecution of another person for the crime of murder."); N.C. GEN. STAT. § 15A-2000(f)(8) (2001) ("The defendant aided in the apprehension of another capital felon or testified truthfully on behalf of the prosecution in another prosecution of a felony."). Many states do not list this mitigating factor in their statute. *E.g.*, OHIO REV. CODE ANN. § 2929.04 (Anderson 1996 & Supp. 2001).

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Capacity to love[184]
Character in general[185]
Cooperated with police or prosecutor / Did not resist arrest[186]

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[184] *E.g.*, State v. Canez, 74 P.3d 932, 937 (Ariz. 2003) (noting that trial court found "love of family" as a mitigating circumstance); Powell v. State, 796 So. 2d 404, 433 (Ala. Crim. App. 1999) (noting that trial court found that it was a mitigating factor that the capital defendant had demonstrated the capacity to love and to care for another human being); State v. Smith, 974 P.2d 431, 442 (Ariz. 1999) (in upholding death sentence, holding that defendant's love for his son was a mitigating circumstance); People v. Kelly, 800 P.2d 516, 540 (Cal. 1990) (affirming death sentence and noting that defendant's love for and from his family, friends, and persons who have known him was mitigating).

[185] Many of the mitigating circumstances listed fall into the category of "character." However, the category is listed as a separate mitigating circumstance to stress the Supreme Court's emphasis that anything about a defendant's character should be considered. *E.g*., Mills v. Maryland, 486 U.S. 367, 374-75 (1988) (noting that the sentencer must be able to consider all mitigating factors regarding the defendant and the offense); Eddings v. Oklahoma, 455 U.S. 104, 110 (1982) (holding that "the Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death") (quoting Lockett v. Ohio, 438 U.S. 586, 604 (1978)); State v. Wagner 786 P.2d 93, 96 (Or. 1990) (noting that general mitigation question to be submitted to sentencing jury must allow the jury to consider all aspects of the defendant's character and background); *see also* 21 U.S.C. § 848(m)(10) (2000) ("That other factors in the defendant's background or character mitigate against imposition of the death sentence."); MD. CODE ANN., CRIM. LAW § 2-303(h)(2)(viii) (2004) ("Any other facts which the court or the jury specifically sets forth in writing that it finds as mitigating circumstances in the case"); MONT. CODE ANN. § 46-18-304(2) (2004) ("The court may consider any other fact that exists in mitigation of the penalty."); NEV. REV. STAT. ANN. 200.035(7) (Michie 2001 & Supp. 2003) ("Any other mitigating circumstance"); N.H. REV. STAT. ANN. § 630:5(VI)(i) (Michie 1996 & Supp. 2001) ("Other factors in the defendant's background or character mitigate against imposition of the death sentence."); N.J. STAT. ANN. § 2C: 11-3(5)(h) ("Any other factor which is relevant to the defendant's character or record or to the circumstances of the offense"); N.Y. CRIM. PROC. LAW § 400.27(9)(f) (McKinney Supp. 2004) ("Any other circumstance concerning the crime, the defendant's state of mind or condition at the time of the crime, or the defendant's character, background or record that would be relevant to mitigation or punishment for the crime").

[186] *E.g.*, COLO. REV. STAT. § 18-1.3-1201(4)(h) (2003) ("The extent of the defendant's cooperation with law enforcement officers or agencies and with the office of the prosecuting district attorney"); N.M. STAT. ANN. § 31-20A-6(H) (Michie Supp. 2001) ("The defendant cooperated with authorities."). Many state courts have found cooperation with authorities to be a nonstatutory mitigating circumstance. *E.g.*, State v. Nesbit, 978 S.W.2d 872, 895 (Tenn. 1998) (affirming death sentence but finding defendant's cooperation with the police after his apprehension was a mitigating factor); Barbour v. State, 673 So. 2d 461, 472 (Ala. Crim. App. 1994) (noting that the fact that the appellant cooperated with police was a nonstatutory mitigating circumstance but affirming the death sentence); State v. Van Tran, 864 S.W.2d 465, 485 (Tenn. 1993) (reversing the death sentence and considering among other things as mitigating that the defendant cooperated with the FBI to find others); *Ex parte* Harris, 825 S.W.2d 120, 121 (Tex. Crim. App. 1991) (holding that the circumstances sur-

Creative (art/poetry)[187]
Criminal history (lack of)[188] / Defendant previously has not

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rounding the shooting and applicant's remorse and cooperation with the police suggest that applicant is not a violent person); State v. Joubert, 399 N.W.2d 237, 248 (Neb. 1986) (approving trial judge's decision that defendant's guilty plea was a mitigating circumstance); State v. Compton, 726 P.2d 837, 846 (N.M. 1986) (affirming death sentence and holding that it does not violate the Constitution to consider cooperating with authorities as a mitigating factor because the factor does not unconstitutionally allow for imposition of the death penalty based upon the exercise of the right to remain silent).

[187] *E.g.*, Freeman v. State, 563 So. 2d 73, 75 (Fla. 1990); State v. Jeffries, 717 P.2d 722, 739-40 (Wash. 1986) (holding that the defendant's artwork introduced as mitigation was insufficient to merit leniency).

[188] Many statutes in the United States list "no significant history of prior criminal activity" as a statutory mitigating factor. *E.g.*, 21 U.S.C. § 848 (m)(6) ("The defendant did not have a significant prior criminal record."); ALA. CODE § 13A-5-51(1) (Michie 1994 & Supp. 2001) ("The defendant has no significant history of prior criminal activity."); ARK. CODE. ANN. § 5-4-605(6) (Michie 1997 & Supp. 2002) (same); CAL. PENAL CODE § 190.3 (b) (West 1999 & Supp. 2004) ("The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence."); CAL. PENAL CODE § 190.3(c) ("The presence or absence of any prior felony conviction."); COLO. REV. STAT. § 18-1.3-1201(4)(g) ("The absence of any significant prior conviction"); FLA. STAT. ANN. § 921.141(6)(a) (West 2001 & Supp. 2004) ("The defendant has no significant history of prior criminal activity."); 720 ILL. COMP. STAT. ANN. 5/ 9-1(c)(1) (West Supp. 2002) (same); IND. CODE ANN. § 35-50-2-9(c)(1) (Burns Supp. 2002) (same) (amended 2003); KAN. STAT. ANN. § 21-4626(1) (Supp. 2001) (same); KY. REV. STAT. ANN. § 532.025(2)(b)(1) (Michie 1999 & Supp. 2003) (same); MD. CODE ANN., CRIM. LAW §2-303 (h)(2)(i)(1)-(3) (2004) ("The defendant previously has not: (1) been found guilty of a crime of violence; (2) entered a plea of guilt or a plea of nolo contendere to a charge of a crime of violence; or (3) received probation before judgment for a crime of violence."); MISS. CODE ANN. §99-19-101(6)(a) (West 1999 & Supp. 2001) ("The defendant has no significant history of prior criminal activity."); MO. ANN. STAT. § 565.032(3) (West 1999 & Supp. 2002) ("The defendant has no significant history of prior criminal activity."); MONT. CODE ANN. § 46-18-304(1)(a) (same); NEB. REV. STAT. § 29-2523(2)(a) (Supp. 2000) (same); NEV. REV. STAT. ANN. 200.035(1) (same); N.H. REV. STAT. ANN. § 630:5(VI)(e) ("The defendant did not have a significant prior criminal record."); N.J. STAT. ANN. § 2C:11-3(5)(f) ("The defendant has no significant history of prior criminal activity."); N.M. STAT. ANN. § 31-20A-6(A) ("The defendant has no significant history of prior criminal activity."); N.Y. CRIM. PROC. LAW § 400.27(9)(a) ("The defendant has no significant history of prior criminal convictions involving the use of violence against another person."); N.C. GEN. STAT. § 15A-2000(f)(1) (2001) ("The defendant has no significant history of prior criminal activity."); OHIO REV. CODE ANN. § 2929.04(B)(5) ("The offender's lack of a significant history of prior criminal convictions and delinquency adjudication."); OR. REV. STAT. § 163.150(1)(c)(A) (2003) ("[T]he extent and severity of the defendant's prior criminal conduct."); 42 PA. CONS. STAT. § 9711(e)(1) (2002) ("The defendant has no significant history of prior criminal convictions."); S.C. CODE ANN. § 16-3-20(C)(b)(1) (West Supp. 2001) ("The defendant has no significant history of prior criminal conviction involving the use of violence against another person.") (amended 2002); TENN. CODE ANN. § 39-13-204(j)(1) (Supp. 2001) ("The defendant has no significant history of prior criminal activity.") (amended 2002); UTAH CODE ANN. § 76-3-207(4)(a) (2003 & Supp.

entered a guilty or nolo contendere plea to a crime of violence[189] / Defendant previously has not received probation for a crime of violence[190]
Defendant's family will suffer from execution[191]
Education obtained in prison[192]
Good behavior in prison or a structured environment[193]

2004) ("[T]he defendant has no significant history of prior criminal activity."); VA. CODE ANN. § 19.2-264.4(B)(i) (Michie 2000 & Supp. 2002) ("The defendant has no significant history of prior criminal activity."); WASH. REV. CODE § 10.95.070(1) (West 2002 & Supp. 2004) ("Whether the defendant has or does not have a significant history, either as a juvenile or an adult, of prior criminal activity."); WYO. STAT. ANN. § 6-2-102(j)(i) (Michie 2003) ("The defendant has no significant history of prior criminal activity.").

Not all states, however, list lack of prior criminal history as a statutory mitigating factor. *E.g.*, ARIZ. REV. STAT. ANN. § 13-703 (West Supp. 2004). Case law in many states addresses this mitigating factor. *E.g.*, Apicella v. State, 809 So. 2d 841, 864-65 (Ala. Crim. App. 2000) (holding that the trial court may consider a defendant's arrest record in determining the weight to be given the statutory mitigating circumstance, but its existence or nonexistence must be based only on whether the defendant has prior convictions); Riggs v. State, 3 S.W.3d 305, 319 (Ark. 1999) (concluding that jury found the mitigating circumstance of no significant history of criminal activity); State v. Moore, 316 N.W.2d 33, 45 (Neb. 1982) (holding that "the commission of two felonies cannot support a finding that there is no significant prior criminal history"), *rev'd sub nom. on other grounds*, Moore v. Kinney, 278 F.3d 774 (8th Cir. 2002); State v. Simants, 250 N.W.2d 881, 892 (Neb. 1977) (noting that allegations of statutory rape and several misdemeanor convictions for intoxication and reckless driving were not a significant history of prior convictions), *overruled on other grounds*, State v. Reeves, 453 N.W.2d 359 (Neb. 1990); Bowers v. State, 468 A.2d 101, 104 (Md. 1983) (vacating death sentence and remanding to the trial court for a new sentencing procedure because the court found that the jury erred in failing to find the mitigating factor of no prior conviction of a crime of violence).

189 *See, e.g.*, MD. CODE ANN., CRIM. LAW § 2-303(h)(2)(i) ("[T]he defendant previously has not . . . entered a guilty plea or a plea of nolo contendre to a charge of a crime of violence.").

190 *See, e.g.*, *id*. § 2-303(h)(i), (1) ("The defendant previously has not . . . been found guilty of a crime of violence.").

191 *E.g.*, State v. Stevens, 879 P.2d 162, 168 (Or. 1994) (holding that circumstantial evidence that defendant's execution might have some harmful effect on defendant's daughter is relevant during the penalty phase to defendant's character or background); Romine v. State, 305 S.E.2d 93, 101 (Ga. 1983) (noting that it should be considered as mitigating the effects that a death penalty will have on the defendant's loved ones); *cf.* People v. Ochoa, 966 P.2d 442, 506 (Cal. 1998) (stating "that sympathy for a defendant's family is not a matter that a capital jury can consider in mitigation, but that family members may offer testimony of the impact of an execution on them if by so doing they illuminate some positive quality of the defendant's background or character").

192 *E.g.*, State v. Schurz, 859 P.2d 156, 165 (Ariz. 1993) (noting that the trial court found the mitigating circumstance that the defendant completed the requirements for a GED certificate and a course on substance abuse).

193 *E.g.*, Johnson v. Texas, 509 U.S. 350, 364 (1993) (holding that a good prison record is a mitigating factor); Skipper v. South Carolina, 476 U.S. 1, 4-8 (1986) (holding that Eighth Amendment requires sentencer to consider evidence of defendant's good behavior in jail between arrest and trial as mitigating); Jackson v. State,

Good citizen / Good character[194]
Good employment history[195]

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791 So. 2d 979, 1035-36 (Ala. Crim. App. 2000) (holding that the trial court not only considered the defendant's ability to adapt to prison life, but found that it constituted a non-statutory mitigating circumstance, albeit a "weak" one); State v. Carriger, 692 P.2d 991, 1010-11 (Ariz. 1984) (indicating that the defendant's action in saving the life of another inmate was evidence in mitigation); State v. Matthews, 353 S.E.2d 444, 449-50 (S.C. 1986) (reversing sentence of death because of the exclusion of testimony of a clinical psychologist as to the defendant's future adaptability to prison life, since such testimony was evidence of a mitigating circumstance); State v. Patterson, 351 S.E.2d 853, 856-58 (S.C. 1986) (reversing a death sentence based on the trial judge's refusal to permit a clinical psychologist to testify at sentencing because the expert's testimony as to future adaptability to prison life was required to be admitted as a relevant mitigating evidence of the defendant's character).

However, a defendant who argues that he is entitled to a new hearing to consider his behavior on death row as mitigating will be unsuccessful. In *Evans v. Muncy*, 498 U.S. 927 (1990), the Supreme Court denied a stay of execution where Wilbert Evans sought consideration of his actions in saving the lives of guards and preventing the rape of a nurse while he was on death row when other prisoners tried to escape. *Id*. at 928-31 (Marshall, J., dissenting); Kirchmeier, *supra* note 34, at 372-74.

194 *E.g.*, Harris v. Alabama, 513 U.S. 504, 507 (1995) (affirming Alabama Supreme Court and death sentence where the trial judge found as non-statutory mitigating circumstances that Harris was a hardworking, respected member of her church and community, although the non-statutory mitigating factors were outweighed by one statutory aggravating factor); Mayfield v. Woodford, 270 F.3d 915, 928-32 (9th Cir. 2001) (en banc) (holding that defense counsel was ineffective for, among other reasons, failing to present witness testimony that the defendant was a good person and was non-violent and his family loved him); Collier v. Turpin, 177 F.3d 1184, 1202 (11th Cir. 1999) (holding that defense counsel was constitutionally ineffective for failing to present mitigating evidence that included, among other things, the defendant's gentle disposition and instances of compassion and heroism); Mak v. Blodgett, 970 F.2d 614, 616-18 & n.5 (9th Cir. 1992) (holding that defense counsel was ineffective for, among other things, failing to present postive testimony from defendant's family that would have humanized the defendant); Wilson v. State, 777 So. 2d 856, 892-93 (Ala. Crim. App. 1999) (upholding death sentence but noting that it was a non-statutory mitigating circumstance that two witnesses from the defendant's church testified that he was a person of good character and participated in church activities); State v. Williams, 904 P.2d 437, 452-53 (Ariz. 1995) (holding that trial court correctly found non-statutory mitigating circumstance that the defendant displayed good character prior to murdering the victim because he was law abiding and had previously saved lives of others); *In re* Marquez, 822 P.2d 435, 448-49 (Cal. 1992) (holding that trial counsel was ineffective for failing to present mitigating evidence that included fact that his family members would have testified that he was a good son and brother, he worked hard, and he had good character traits); Dawson v. State, 581 A.2d 1078, 1108 (Del. 1990) (noting that it was mitigating that the defendant offered to donate his kidney to his cousin), *vacated*, 503 U.S. 159 (1992); People v. Thompkins, 732 N.E.2d 553, 569-70 (Ill. 2000) (holding that defense counsel was ineffective for failing to present mitigation that included that the defendant was a good family person, was kind, and may have saved the life of a youth officer who later became a police chief); State v. Marshall, 586 A.2d 85, 208 (N.J. 1991) (noting that the defendant's character was shown by his civil, business, and philanthropic acts but affirming death penalty), *supplemented by* 613 A.2d 1059.

195 *E.g.,* State v. Soto-Fong, 928 P.2d 610, 634 (Ariz. 1996) (affirming death sen-

Military service[196]
Not a future danger[197]
Potential for rehabilitation[198]
Religious[199]

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tence and holding that it was mitigating that the defendant was employed for at least some of the time that he was not in school); Smalley v. State, 546 So. 2d 720, 723 (Fla. 1989) (holding that the defendant's work habits, among other mitigating circumstances, were sufficient to reduce the death penalty); People v. Johnson, 538 N.E.2d 1118, 1130-31 (Ill. 1989) (holding that the defendant's work record along with other mitigating factors were sufficient to warrant leniency).

196 *E.g.*, State v. Styers, 865 P.2d 765, 777 (Ariz. 1993) (holding that the defendant's service in Vietnam and his honorable discharge were relevant mitigating circumstances but upholding death sentence); People v. Lucero, 3 P.3d 248, 272 (Cal. 2000) (noting that it was mitigating evidence the defendant had served three tours of duty in Vietnam and had been awarded Purple Heart and combat infantry badge); People v. Babbitt, 755 P.2d 253, 265-66 (Cal. 1988) (holding that it was non-prejudicial error for trial court to find that post-Vietnam stress syndrome did not rise to the level of a mitigating circumstance).

197 *See e.g.,* COLO. REV. STAT. § 18-1.3-1201(4)(k)(2003) ("The defendant is not a continuing threat to society."); KAN. STAT. ANN. § 21-4626(9) (Supp. 2001) ("A term of imprisonment is sufficient to defend and protect the people's safety from the defendant."); MD. CODE ANN., CRIM. LAW § 2-303(h)(2)(vii)(2004) ("[I]t is unlikely that the defendant will engage in further criminal activity that would be a continuing threat to society.").

One way of showing that the defendant is not a future threat is to show that the defendant is seriously ill. *See, e.g*., White v. State, 446 So. 2d 1031, 1036 (Fla. 1984) (noting that the defendant suffered from a heart condition that required medication); Jones v. State, 767 S.W.2d 41, 43 (Mo. 1989) (noting that defendant suffered from a heart condition).

198 *E.g.*, Hitchcock v. Dugger, 481 U.S. 393, 398 (1986) (implying that "capacity for rehabilitation" should have been considered as a mitigating factor at trial); Skipper v. South Carolina, 476 U.S. 1, 5 (1986) (holding that Eighth Amendment requires that evidence that defendant in capital case would not pose danger if spared, but incarcerated, must be considered potentially mitigating); State v. Schad, 788 P.2d 1162, 1172 (Ariz. 1989) (noting that the defendant's potential for rehabilitation but affirming death sentence); State v. Davis, 477 A.2d 308, 311-12 (N.J. 1984) (noting that "character" may include the defendant's potential for rehabilitation); State v. Smith, 863 P.2d 1000, 1009 (N.M. 1993) (holding that the sentencing court erred by failing to order a presentence investigation and report that included consideration of defendant's admission of guilt, contrition, commitment to rehabilitation, and conduct while incarcerated, which were all relevant as mitigating evidence); State v. Godsey, 60 S.W.3d 759, 786 (Tenn. 2001) (changing death sentence to life imprisonment and noting as mitigating that the fact that the defendant appeared genuinely remorseful and offered evidence that he was a dependable worker of above-average intelligence, suggested his amenability to rehabilitation); *see also* N.M. STAT. ANN. § 31-20A-6(G) (Michie Supp. 2000) ("[T]he defendant is likely to be rehabilitated.").

199 *E.g.*, Miniel v. Cockrell, 339 F.3d 331, 338 (5th Cir. 2003) (noting that fact that a petitioner had a religious conversion or "rededicated his life to God" is a mitigating circumstance); State v. Richmond, 495 S.E.2d 677, 692 (N.C. 1998) (noting mitigating value of fact that defendant has sought forgiveness from God); State v. Boyd, 319 S.E.2d 189, 203 (N.C. 1984) (discussing quality of evidence submitted to support

Remorse[200]

The Supreme Court has indicated the constitutional significance of some of these good character mitigating circumstances. For example, in *Hitchcock v. Dugger*, Justice Scalia wrote for a majority and vacated the death sentence because the jury was limited from considering mitigating factors.[201] Mitigating circumstances in that case included "innocence of significant prior criminal activity or violent behavior," "potential for rehabilitation" and "voluntary surrender to authorities."[202] However, there was little discussion by the Court about why these factors are mitigating.

These factors are mitigating not because they mitigate the crime, but because they show that a defendant is not completely evil and therefore should not be executed. Thus, these factors are relevant to the moral determination of whether a defendant should be executed. A court's consideration of these factors recognizes, for retributive purposes, that a defendant consists of something more than the murder that took place on one day of the defendant's life.

Good Character Factors not only go to the moral value of the defendant, but for utilitarian reasons are relevant to the defendant's future dangerousness. For example, if a defendant has done good things and has not committed crimes in the past, it shows that the murder was not consistent with the defendant's

mitigating factors that the defendant had been baptized and had expressed a devotion to God).

200 *E.g.*, State v. Trostle, 951 P.2d 869, 887 (Ariz. 1997) (holding that remorse was a non-statutory mitigating circumstance where in letters written to both the victim's family and the judge, the defendant expressed remorse for the damage his "rash and unthoughtful" actions had caused); Jackson v. State, 684 So. 2d 1213, 1238 (Miss. 1996) (holding that "catch-all" mitigating circumstance instruction adequately afforded jury opportunity to consider remorse as mitigating factor during sentencing phase of capital murder case); State v. Allen, 994 P.2d 728, 764 (N.M. 2000) (holding that remorse was a non-statutory mitigating factor but affirming death sentence); Clark v. Commonwealth, 257 S.E.2d 784, 790 (Va. 1979) (noting that had the defendant manifested remorse, sorrow, or grief for the murder that he had committed, this would have been a mitigating circumstance); *Ex parte* Harris, 825 S.W.2d 120, 121 (Tex. 1991) (holding that the circumstances surrounding the shooting and applicant's remorse and cooperation with the police suggest that applicant is not a violent person); *see also* Theodore Eisenberg et al., *But Was He Sorry? The Role of Remorse in Capital Sentencing*, 83 CORNELL L. REV. 1599 (1998); Scott E. Sundby, *The Capital Jury and Absolution: The Intersection of Trial Strategy, Remorse, and the Death Penalty*, 83 CORNELL L. REV. 1557 (1998).

201 481 U.S. 393 (1987).

202 *Id.* at 397.

usual behavior. In such a case, the person is less of a risk to society or other prisoners than are murderers with a consistent dangerous history. Therefore, these factors are mitigating for utilitarian reasons as well as retributive reasons.

As a practical matter, these factors usually are not given great weight in sentencing capital defendants. For example, despite the fact that a defendant has not committed crimes in the past, juries seem to consider that the defendant has now committed capital murder argues strongly for the defendant's moral culpability and future dangerousness.[203] Still, these factors should carry more weight than courts often give to them. When a person is executed, society is destroying not only the murderer but the entire person, who may have been a parent, sibling, and child who was not entirely evil.

These "redeeming" mitigating factors are important to supplement other mitigating factors. "The thinking goes in mitigation circles that it's not enough to present someone as psychically battered and frayed, since if a jury feels he is too far gone, what's left to save?"[204] So, in addition to factors that might help explain why a defendant committed the crime, redeeming factors give jurors a reason to spare the life of the defendant.

B. *Crime Involvement Factors: Mitigating Factors That Show the Defendant Had Less Involvement in the Murder*

Belief that the killing was morally justified[205]

[203] *See, e.g.,* Harris v. Alabama, 513 U.S. 504, 507 (1995) (affirming Alabama Supreme Court and death sentence where the trial judge found as non-statutory mitigating circumstances that Harris was a hardworking, respected member of her church and community, although the non-statutory mitigating factors were outweighed by one statutory aggravating factor); Jackson v. State, 791 So. 2d 979, 1035-36 (Ala. Crim. App. 2000) (holding that the trial court not only considered the defendant's ability to adapt to prison life, but found that it constituted a non-statutory mitigating circumstance, albeit a "weak" one); State v. Allen, 994 P.2d 728, 764 (N.M. 2000) (holding that remorse was a non-statutory mitigating factor but affirming death sentence).

[204] Alex Kotlowitz, *In the Face of Death*, N.Y. TIMES, July 6, 2003, at 32. Similarly, one state supreme court considered the mitigating circumstance of a capital defendant's troubled early family life as showing he was violent and therefore "it weighs as much in favor of the death sentence as against it." State v. Schurz, 859 P.2d 156, 167 (Ariz. 1993) (affirming death sentence). Therefore, the "redeeming" mitigating factors are an important addition to mitigating factors that help explain the causes of the murder.

[205] *E.g.*, CAL. PENAL CODE § 190.3(f) (West 1999 & Supp. 2004) ("Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct"); COLO. REV. STAT.

Causation/Defendant's act was not the sole proximate cause of the victim's death[206]
Circumstances that justify or reduce the crime[207]
Consent[208]

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§ 18-1.3-1201(4)(j) (2003) ("The good faith, although mistaken, belief by the defendant that circumstances existed which constituted a moral justification for the defendant's conduct"); KY. REV. STAT. ANN. § 532.025(2)(b)(4) (Michie 1999 & Supp. 2003) ("The capital offense was committed under circumstances which the defendant believed to provide a moral justification or extenuation for his conduct even though the circumstances which the defendant believed to provide a moral justification or extenuation for his conduct are not sufficient to constitute a defense to the crime."); LA. CODE CRIM. PROC. ANN. art. 905.5(d) (West 1997 & Supp. 2004) ("The offense was committed under circumstances which the offender reasonably believed to provide a moral justification or extenuation for his conduct."); TENN. CODE ANN. § 39-13-204(j)(4) (Supp. 2001) ("The murder was committed under circumstances which the defendant reasonably believed to provide a moral justification for the defendant's conduct."); *see also* Simmons v. Lockhart, 814 F.2d 504, 514 (8th Cir. 1987) (noting that the Arkansas trial court stated that the jury could have viewed the murderer's fear of detection as a mitigating circumstance in killing three victims because it at least provided an understandable, though twisted, motive for killing); People v. White, 870 P.2d 424, 437 (Colo. 1994) (reversing death sentence and noting that trial court found the mitigating factor that the defendant believed that his acts were morally justified).

206 *See, e.g.* MD. CODE ANN., CRIM. LAW § 2-303(h)(2)(vi) (2004) ("[T]he act of the defendant was not the sole proximate cause of the victim's death.").

207 *E.g.*, N.M. STAT. ANN. § 31-20A-6(F) (Michie Supp. 2001) ("The defendant acted under circumstances which tended to justify, excuse, or reduce the crime.").

208 *E.g.*, 21 U.S.C. § 848(m)(9) (2000) ("The victim consented to the criminal conduct that resulted in the victim's death."); ALA. CODE § 13A-5-51(3) (Michie 1994 & Supp. 2001) ("The victim was a participant in the defendant's conduct or consented to it."); CAL. PENAL CODE § 190.3(e) (West 1999 & Supp. 2004) ("Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act."); FLA. STAT. ANN. § 921.141(6)(c) (West 2001 & Supp. 2004) ("The victim was a participant in the defendant's conduct or consented to the act."); 720 ILL. COMP. STAT. ANN. 5/9-1(c)(3) (West Supp. 2002) ("[T]he murdered individual was a participant in the defendant's homicidal conduct or consented to the homicidal act"); IND. CODE ANN. § 35-50-2-9(c)(3) (Burns Supp. 2002) ("The victim was a participant in or consented to the defendant's conduct.") (amended 2003); KAN. STAT. ANN. § 21-4626(3) (Supp. 2001) ("The victim was a participant in or consented to the defendant's conduct."); KY. REV. STAT. ANN. § 532.025(2)(b)(3) ("The victim was a participant in the defendant's criminal conduct or consented to the criminal act."); MD. ANN. CODE art. 27, § 413(g)(2) (2003) ("The victim was a participant in the defendant's conduct or consented to the act which caused the victim's death."); MISS. CODE ANN. § 99-19-101(6)(c) (West 1999 & Supp. 2001) ("The victim was a participant in the defendant's conduct or consented to the act."); MO. ANN. STAT. § 565.032(3) (West 1999 & Supp. 2002) ("The victim was a participant in the defendant's conduct or consented to the act."); MONT. CODE ANN. § 46-18-304(1)(e) (2004) ("The victim was a participant in the defendant's conduct or consented to the act."); NEB. REV. STAT. § 29-2523(2)(f) (Supp. 2000) ("The victim was a participant in the defendant's conduct or consented to the act."); NEV. REV. STAT. ANN. 200.035(3) (Michie 2001 & Supp. 2003) ("The victim was a participant in the defendant's conduct or consented to the act."); N.H. REV. STAT. ANN. § 630:5(VI)(h) (Michie 1996 & Supp. 2001) ("The victim consented to the criminal conduct that

Duress or coercion[209]

resulted in the victim's death."); N.J. STAT. ANN. § 2C: 11-3(5)(b) (West Supp. 2004) ("The victim solicited, participated in, or consented to the conduct which resulted in his death."); N.M. STAT. ANN. § 31-20A-6(E) ("The victim was a willing participant in the defendant's conduct."); 42 PA. CONS. STAT. § 9711(e)(6) (West Supp. 2002) ("The victim was a participant in the defendant's homicidal conduct or consented to the homicidal acts."); TENN. CODE ANN. § 39-13-204(j)(3) ("The victim was a participant in the defendant's conduct or consented to the act."); S.C. CODE ANN. § 16-3-20(C)(b)(3) (West Supp. 2001) ("The victim was a participant in the defendant's conduct or consented to the act.") (amended 2002); VA. CODE ANN. § 19.2-264.4 (B)(iii) (Michie 2000 & Supp. 2002) ("[T]he victim was a participant in the defendant's conduct or consented to the act."); WASH. REV. CODE § 10.95.070(3) (West 2002 & Supp. 2004) ("Whether the victim consented to the act of murder"); WYO. STAT. ANN. § 6-2-102(j)(iii) (Michie 2003) ("The victim was a participant in the defendant's conduct or consented to the act."); *see also* Gospodareck v. State, 666 So. 2d 835, 841-42 (Ala. Crim. App. 1993) (holding that the fact that the victim may have participated in his death or consented to it was appropriately considered by the jury as a mitigating factor in the sentencing phase of the trial).

[209] *E.g.*, 21 U.S.C. § 848(m)(2) (2000) ("The defendant was under unusual and substantial duress, regardless of whether the duress was of such a degree as to constitute a defense to the charge."); ALA. CODE § 13A-5-51(5) ("The defendant acted under extreme duress or under the substantial dominion of another person."); ARIZ. REV. STAT. ANN. § 13-703(2) (West Supp. 2004) ("The defendant was under unusual and substantial duress, although not so much as to constitute a defense to prosecution."); ARK. CODE ANN. § 5-4-605(2) (Michie 1997 & Supp. 2002) ("The capital murder was committed while the defendant was acting under unusual pressures or influences or under the domination of another person."); CAL. PENAL CODE § 190.3(g) ("Whether or not the defendant acted under extreme duress or under the substantial domination of another person"); COLO. REV. STAT. § 18-1.3-1201(4)(c) (2003) ("The defendant was under unusual and substantial duress, although not such duress as to constitute a defense to prosecution.").; FLA. STAT. ANN. § 921.141(6)(e) ("The defendant acted under extreme duress or under the substantial domination of another person."); 720 ILL. COMP. STAT. ANN. 5/9-1(c)(4) ("[T]he defendant acted under the compulsion of threat or menace of the imminent infliction of death or great bodily harm."); IND. CODE ANN. § 35-50-2-9(c)(5) ("The defendant acted under the substantial domination of another person."); KAN. STAT. ANN. § 21-4626(5) ("The defendant acted under extreme distress or under the substantial domination of another person"); KY. REV. STAT. ANN. § 532.025(2)(b)(6) ("The defendant acted under duress or under the domination of another person even though the duress or the domination of another person is not sufficient to constitute a defense to the crime."); LA. CODE CRIM. PROC. ANN. art. 905.5(b) (West 1997 & Supp. 2004) ("The offense was committed while the offender was under the influence or under the domination of another person."); MD. ANN. CODE art. 27, § 413(g)(3) (2003) ("The defendant acted under substantial duress, domination or provocation of another person, but not so substantial as to constitute a complete defense to the prosecution."); MISS. CODE ANN. §99-19-101(6)(e) ("The defendant acted under extreme duress or under the substantial domination of another person."); MO. ANN. STAT. § 565.032(5) ("The defendant acted under extreme duress or under the substantial domination of another person."); MONT. CODE ANN. § 46-18-304(1)(c) ("The defendant acted under extreme duress or under the substantial domination of another person."); NEB. REV. STAT. § 29-2523(2)(b) ("The offender acted under unusual pressure or influences or under the domination of another person."); NEV. REV. STAT. ANN. 200.035(5) ("The defendant acted under duress or under the domination

Felony-murder[210]
Lack of presence at the homicide[211]
Minor participation: defendant was an accomplice and her or his participation was relatively minor[212]

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of another person."); N.H. REV. STAT. ANN. § 630:5(VI)(b) ("The defendant was under unusual and substantial duress, regardless of whether the duress was of such a degree as to constitute a defense to the charge."); N.J. STAT. ANN. § 2C: 11-3(5)(e) ("The defendant was under unusual and substantial duress insufficient to constitute a defense to prosecution."); N.M. STAT. ANN. § 31-20A-6(B) ("The defendant acted under duress or under the domination of another person."); N.Y. CRIM. PROC. LAW § 400.27(9)(c) (McKinney Supp. 2004) ("The defendant was under duress or under the domination of another person, although not such duress or domination as to constitute a defense to prosecution."); N.C. GEN. STAT. § 15A-2000(f)(5) (2001) ("The defendant acted under duress or under the domination of another person."); OHIO REV. CODE ANN. § 2929.04(B)(2) (Anderson 1996 & Supp. 2001) ("Whether it is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation"); 42 PA. CONS. STAT. § 9711(e)(5) ("The defendant acted under extreme duress, although not such duress as to constitute a defense to prosecution under § 309 (relating to duress), or acted under the substantial domination of another person."); TENN. CODE ANN. § 39-13-204(j)(6) ("The defendant acted under extreme duress or under the substantial domination of another person."); S.C. CODE ANN. § 16-3-20(C)(b)(5) (West Supp. 2001) ("The defendant acted under duress or under the domination of another person."); *see also* Glass v. Butler, 820 F.2d 112, 114 (5th Cir. 1987) (noting that in the case "coercion" could be considered a mitigating circumstance); State v. Spain, 4 P.3d 621, 622 (Kan. 2000) (noting that trial court had found as a mitigating circumstance that the defendant was dominated by his co-defendant); State v. Howard, 369 S.E.2d 132, 138 (S.C. 1988) (holding that the defendant was prejudiced by the exclusion of his confession because the confession contained mitigating evidence that the co-defendant dominated the defendant).

[210] *E.g.*, State v. Dickens, 926 P.2d 468, 492 (Ariz. 1996) (finding that felony-murder verdict was a relevant mitigating factor but not one that was sufficiently substantial to call for leniency in a case where defendant was a major participant); State v. McDaniel, 665 P.2d 70, 83 (Ariz. 1983) (reducing the defendant's death sentence to life imprisonment, finding that his lack of intent to kill was a mitigating circumstance sufficiently substantial to call for leniency).

In felony-murder cases the Supreme Court has held that the category of murderers who did not have the intent to kill or act with reckless disregard to human life may not be sentenced to death. *See* Tison v. Arizona, 481 U.S. 137, 157-58 (1987) (holding that prior to sentencing felony-murder defendants to death, there must be a determination that they were major participants in the felony and that they acted with reckless indifference to human life); Enmund v. Florida, 458 U.S. 782, 798-802 (1982) (holding that person in a getaway car during a robbery-murder could not be sentenced to death without a showing that he intended or anticipated that lethal force be used).

[211] *E.g.,* 720 ILL. COMP. STAT. ANN. 5/9-1(c)(5) ("[T]he defendant was not personally present during commission of the act or acts causing death.").

[212] *E.g.,* ALA. CODE § 13A-5-51(4) ("The defendant was an accomplice in the capital offense committed by another person and his participation was relatively minor."); ARIZ. REV. STAT. ANN. § 13-703(G)(3) (West Supp. 2004) ("The defendant was legally accountable for the conduct of another . . . , but his participation was relatively minor, although not so minor as to constitute a defense to prosecution."); ARK. CODE ANN. § 5-4-605(5) ("The capital murder was committed by another per-

Residual doubt / Innocence[213]

son and the defendant was an accomplice and his participation relatively minor."); CAL. PENAL CODE § 190.3(j) ("Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor."); COLO. REV. STAT. § 18-1.3-1201(4)(d) ("The defendant was a principal in the offense which was committed by another, but the defendant's participation was relatively minor, although not so minor as to constitute a defense to prosecution."); FLA. STAT. ANN. § 921.141(6)(d) ("The defendant was an accomplice in the capital felony committed by another person and his or her participation was relatively minor."); IND. CODE ANN. § 35-50-2-9(c)(4) ("The defendant was an accomplice in a murder committed by another person, and the defendant's participation was relatively minor."); KAN. STAT. ANN. § 21-4626(4) ("The defendant was an accomplice in a murder committed by another person, and the defendant's participation was relatively minor."); KY. REV. STAT. ANN. § 532.025(2)(b)(5) ("The defendant was an accomplice in a capital offense committed by another person and his participation in the capital offense was relatively minor."); MD. ANN. CODE art. 27, § 413(g)(6) ("The act of the defendant was not the sole proximate cause of the victim's death."); MISS. CODE ANN. § 99-19-101(6)(d) ("The defendant was an accomplice in the capital offense committed by another person and his participation was relatively minor."); MO. ANN. STAT. § 565.032(3) ("The defendant was an accomplice in the murder in the first degree committed by another person and his participation was relatively minor."); MONT. CODE ANN. § 46-18-304(1)(f) ("The defendant was an accomplice in an offense committed by another person, and the defendant's participation was relatively minor."); NEB. REV. STAT. § 29-2523(2)(e) ("The offender was an accomplice in the crime committed by another person and his or her participation was relatively minor."); NEV. REV. STAT. ANN. 200.035(4) ("The defendant was an accomplice in a murder committed by another person and his participation in the murder was relatively minor."); N.H. REV. STAT. ANN. § 630:5(VI)(e) ("The defendant is punishable as an accomplice . . . in the offense, which was committed by another, but the defendant's participation was relatively minor, regardless of whether the participation was so minor as to constitute a defense to the charge."); N.Y. CRIM. PROC. LAW § 400.27(9)(d) ("The defendant was criminally liable for the present offense of murder committed by another, but his participation in the offense was relatively minor although not so minor as to constitute a defense to prosecution."); OHIO REV. CODE ANN. § 2929.04(B)(6) ("If the offender was a participant in the offense but not the principal offender, the degree of the offender's participation in the offense and the degree of the offender's participation in the acts that led to the death of the victim"); N.C. GEN. STAT. § 15A-2000(f)(4) ("The defendant was an accomplice in or accessory to the capital felony committed by another person and his participation was relatively minor."); TENN. CODE ANN. § 39-13-204(j)(3) ("The victim was a participant in the defendant's conduct or consented to the act."); *see also* State v. Stout, 46 S.W.3d 689, 704-05 (Tenn. 2001) (holding that the trial court should have considered as a possible mitigating factor evidence that defendant played a minor role in the offenses).

[213] *E.g.*, United States v. Davis, 132 F. Supp. 2d 455, 463-67 (E.D. La. 2001) (holding that "residual doubt" argument is permissible under 18 U.S.C. § 3592 and must be considered by jury if offered by defense); Height v. State, 604 S.E.2d 796, 797-98 (Ga. 2004) (holding that trial court should admit the defendant's polygraph evidence to support his mitigation argument of residual doubt); State v. Hartman, 42 S.W.3d 44, 57 (Tenn. 2001) (noting that impeachment of state's eyewitness is "clearly relevant and admissible to establish residual doubt as a mitigating circumstance"); State v. Rockwell, 775 P.2d 1069, 1079 (Ariz. 1989) (holding that the "unique circumstances" of the defendant's conviction, where there was questionable evidence of his

Unforeseen risk of causing death[214]
Victim's actions make the defendant less culpable (victim's provocation).[215]

guilt, was a mitigating circumstance); People v. Earp, 978 P.2d 15, 65 (Cal. 1999) (holding that the defendant may urge his possible innocence to the jury as a factor in mitigation at penalty phase of capital trial); Minnick v. State, 551 So.2d 77, 95 (Miss. 1988) (implying it is permissible for a jury to consider whimsical doubt as a mitigating factor), *rev'd on other grounds*, Minnick v. Mississippi, 498 U.S. 146 (1990); State v. Bane, 57 S.W.3d 411, 422 (Tenn. 2001) (holding that the defendant was permitted to present evidence of "residual doubt" as a non-statutory mitigating factor in a re-sentencing proceeding). *But see, e.g.,* Woratzeck v. Ricketts, 820 F.2d 1450, 1457 (9th Cir. 1987) (holding that once guilt is established beyond a reasonable doubt, a doubt about guilt does not need to be evaluated as a mitigating circumstance), *vacated on other grounds*, 486 U.S. 1051 (1988); Homick v. State, 825 P.2d 600, 609 (Nev. 1992) (affirming death sentence and holding that trial court did not err in refusing defendant's requested jury instruction listing residual doubt as mitigating circumstance because there is no constitutional mandate). *Cf*. Franklin v. Lynaugh, 487 U.S. 164, 166 (1988) (leaving open possibility of residual doubt as a mitigating circumstance, but stating that the Court's previous holding about mitigation "in no way mandates reconsideration by capital juries, in the sentencing phase, of their 'residual doubts' over a defendant's guilt").

214 *E.g.* 21 U.S.C. § 848(m)(9) (2000) ("The victim consented to the criminal conduct that resulted in the victim's death."); ARIZ. REV. STAT. ANN. § 13-703(G)(4) ("The defendant could not reasonably have foreseen that his conduct in the course of the commission of the offense for which the defendant was convicted would cause, or would create a grave risk of causing, death to another person."). COLO. REV. STAT. § 18-1.3-1201(4)(e) ("The defendant could not reasonably have foreseen that the defendant's conduct in the course of the commission of the offense for which the defendant was convicted would cause, or would create a grave risk of causing, death to another person."); 42 PA. CONS. STAT. § 9711(e)(6) ("The victim was a participant in the defendant's homicidal conduct or consented to the homicidal acts."); S.C. CODE ANN. § 16-3-20 (C)(b)(3) ("[T]he victim was a participant in the defendant's conduct or consented to the act."); TENN. CODE ANN. § 39-13-204(j)(3) ("The victim was a participant in the defendant's conduct or consented to the act."); VA. CODE ANN. § 19.2-264.4 (B)(iii) (Michie 2000) (amended 2003) ("[T]he victim was a participant in the defendant's conduct or consented to the act."); WASH. REV. CODE ANN. § 10.95.070(3) (West 2002 & Supp. 2004) ("Whether the victim consented to the act of murder"); WYO. STAT. ANN. § 6-2-102(j)(iii) (Michie 2003) ("The victim was a participant in the defendant's conduct or consented to the act.").

215 *See*, *e.g.*, N.C. GEN. STAT. § 15A-2000(f)(3) (2001) ("The victim was a voluntary participant in the defendant's homicidal conduct or consented to the homicidal act."); OHIO REV. CODE ANN. § 2929.04(B)(1) (Whether the victim of the offense induced or facilitated it"); S.C. CODE ANN. § 16-3-20(C)(b)(8) ("The defendant was provoked by the victim into committing the murder."); *see also* State v. Fierro, 804 P.2d 72, 87 (Ariz. 1990) (holding that it was a mitigating factor that defendant reasonably believed his life was in danger from the victim); State v. Cooper, 353 S.E.2d 441, 444 (S.C. 1986) (holding that photos of the interiors of the defendant's dilapidated house should have been admitted as mitigating evidence because the morning of the murder the defendant had conferred with his landlord, the victim, about the conditions), *overruled on other grounds*, State v. Torrence, 406 S.E.2d 315, 329 (S.C. 1991).

Crime Involvement Mitigating Factors, which indicate the defendant had lesser involvement in the murder, are the mitigating circumstances most directly related to the crime. Thus, it is easy for jurors to see the relevance of these factors to the defendant's culpability. Although at the sentencing stage, the jurors will have already found the defendant guilty of capital murder, these factors require additional findings about the type of murder committed by the defendant. If the defendant were not present at the killing or if the victim had provoked the defendant, the defendant is less culpable and less dangerous than someone who killed without provocation.

The extreme situation here is the "residual doubt" mitigating circumstance, where jurors may decide not to impose a death sentence because they are not completely sure that the defendant is guilty of the murder. The Supreme Court defined "residual doubt" as "a lingering uncertainty about facts, a state of mind that exists somewhere between 'beyond a reasonable doubt' and 'absolute certainty.'"[216] Advocates of this mitigating circumstance argue that while a jury may convict someone of murder "beyond a reasonable doubt," society should not execute a defendant unless a higher degree of guilt is established.[217] However, the Supreme Court has implied that there may be no constitutional requirement to consider residual doubt as a mitigating circumstance.[218] Also, although some courts allow consideration of residual doubt, some courts have held that once guilt is established beyond a reasonable doubt, there cannot be a mitigating circumstance of residual doubt.[219] In light of the recent

For a more general discussion of how capital juries consider a victim's behavior and characteristics in making their sentencing decision, see Scott E. Sunby, *The Capital Jury and Empathy: The Problem of Worthy and Unworthy Victims*, 88 CORNELL L. REV. 343 (2003).

216 *Franklin*, 487 U.S. at 188.

217 One study of capital jurors concluded that "'residual doubt' over the defendant's guilt is the most powerful 'mitigating' fact." Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 COLUM. L. REV. 1538, 1563 (1998); *see* Tarver v. Hopper, 169 F.3d 710, 715 (11th Cir. 1999) (noting that "creating lingering doubt has been recognized as an effective strategy for avoiding the death penalty").

218 *Franklin*, 487 U.S. at 174 (plurality) (leaving open possibility of residual doubt as a mitigating circumstance, but stating that the Court's previous holding about mitigation "in no way mandates reconsideration by capital juries, in the sentencing phase, of their 'residual doubts' over a defendant's guilt").

219 *E.g.*, State v. Josephs, 803 A.2d 1074, 1117 (N.J. 2002) (holding that residual doubt evidence is inadmissible at the sentencing phase); McKenna v. State, 968 P.2d 739, 749 (Nev. 1998) (affirming death sentence and holding that trial court did not

number of exonerations of death row inmates, however, courts should permit residual doubt as a mitigating factor more often.[220]

Unlike the "redeeming" circumstances of the Good Character Factors, the Crime Involvement Factors are directly related to the murder. These factors are relevant to the culpability of the defendant and they go, to some extent, toward determining both the nature of the crime committed by the defendant and the defendant's guilt.

C. Legal Proceeding Factors: Mitigating Factors Relating to the Legal Proceedings

Ineligible for parole[221]
Jury recommended life[222]
Length of legal proceedings[223]
Prosecutor (or victim's family) recommended leniency[224]
Sentencing disparity with co-defendant[225]

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err in refusing defendant's requested jury instruction listing residual doubt as a mitigating circumstance because there is no constitutional mandate); Homick v. State, 825 P.2d 600, 609-10 (Nev. 1992) (same).

220 *See* Jeffery L. Kirchmeier, *Another Place Beyond Here: The Death Penalty Movement in the United States*, 73 U. COLO. L. REV. 1, 39-43 (2002) (discussing large number of innocent defendants released from death row and an increasing concern about executing innocent defendants).

221 At least in cases where the prosecution has placed the defendant's "future dangerousness" at issue, the Due Process Clause of the Fourteenth Amendment gives the defendant the right to inform the jury that she or he is ineligible for parole if sentenced to life in prison. *See* Simmons v. South Carolina, 512 U.S. 154, 161-70 (1994). The factor is listed here, though arguably parole ineligibility is not a mitigating factor but more like rebuttal to the aggravating factor of future dangerousness.

222 *E.g.*, Ferguson v. State, 814 So. 2d 925, 961 (Ala. Crim. App. 2000) (noting that the trial court found as a non-statutory mitigating factor that the jury recommended a sentence of life imprisonment without the possibility of parole).

223 *E.g.*, State v. Adamson, 665 P.2d 972, 989 (Ariz. 1983) (upholding the death sentence but noting that the length of the legal proceedings from inception was a mitigating factor).

224 *E.g.*, Jeffers v. Ricketts, 627 F. Supp. 1334, 1360 (D. Ariz. 1986) (noting that the prosecutor offered a plea bargain that did not involve a death sentence), *rev'd on other grounds* 832 F.2d 476 (9th Cir. 1987), *rev'd sub nom.* Lewis v. Jeffers, 497 U.S. 764 (1990); State v. White, 982 P.2d 819, 825 (Ariz. 1999) (affirming death sentence but holding that trial judge erred by not finding a mitigating circumstance that the two prosecutors did not believe that death was the appropriate sentence).

225 *E.g.*, 18 U.S.C. § 3592(a)(4) (2000) (requiring the jury to consider as a mitigating factor that another defendant or defendants, equally culpable in the crime, would not be punished by death); 21 U.S.C. § 848(m)(8) (2000) ("Another defendant or defendants, equally culpable in the crime, will not be punished by death."); N.H. REV. STAT. ANN. § 630:5(VI)(g) (Michie 1996 & Supp. 2001) ("Another defendant or defendants, equally culpable in the crime, will not be punished by death."). Courts have interpreted the "equally culpable co-defendant" mitigating factor as not limited to indicted defendants, thus also requiring sentencers to compare a defen-

These Legal Proceeding Mitigating Factors relate to specific aspects of the defendant's legal case, such as that the victim's family does not want the death penalty. These factors tend to be permitted to make the system more fair, such as by considering how other co-defendants were sentenced. They also consider specific aspects of the defendant's case, such as the recommendations of juries, prosecutors, or victims' families. Unlike the Good Character, Crime Involvement, and Disease Theory Factors, these Legal Proceeding Factors do not have a direct relation to the moral culpability or moral value of the defendant.

D. Disease Theory Factors: Mitigating Factors That Show Less Culpability and/or That Help Explain Why a Defendant Committed the Crime

Age[226]

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dant's sentence with the punishment for uncharged accomplices. *E.g.*, United States v. Beckford, 962 F. Supp. 804, 812 (E.D. Va. 1997) (finding that federal statutory "equally culpable" mitigating factor applies to uncharged co-conspirators); McLain v. Calderon, No. CV 89-3061 JGD, 1995 WL 769176 (C.D. Cal. Aug. 22, 1995) (applying a non-statutory disparate treatment mitigating factor and noting no distinction between charged and uncharged accomplices); *see also* Arthur v. State, 711 So. 2d 1031, 1095 (Ala. Crim. App. 1996) (holding that the disparity of treatment between the appellant and his accomplices was a non-statutory mitigating circumstance); Craig v. State, 685 So. 2d 1224, 1226 (Fla. 1996) (noting that in sentencing the defendant, the jury must consider the co-defendant's punishment); State v. Marlow, 786 P.2d 395, 402-03 (Ariz. 1989) (reducing the defendant's sentence to life and finding that the "dramatic disparity" between the defendant's death sentence and his co-defendant's four-year sentence was a mitigating factor that the trial court had not considered). *But see* State v. Gerald, 549 A.2d 792, 824-26 (N.J. 1988) (finding that a co-defendant's sentence was not a mitigating factor); State v. Henley, 774 S.W.2d 908, 918 (Tenn. 1989) (holding that a rational basis for different sentences existed when a co-defendant received a lesser penalty than the defendant because the co-defendant did not initiate the crimes and participated out of fear for his life).

[226] Statutes do not usually list a specific age limit for youth as a mitigating factor, although some do. Additionally, statutory mitigating factors sometimes focus on "youth" as mitigating, while others focus on the "age" of the defendant, leaving open the possibility that old age might be mitigating. *E.g.*, 21 U.S.C. § 848(m)(5) (2000) ("The defendant was youthful, although not under the age of 18."); ALA. CODE § 13-5-51(7) (Michie 1994 & Supp. 2001) ("The age of the defendant at the time of the crime"); ARIZ. REV. STAT. ANN. § 13-703(G)(5) (West Supp. 2004) ("The defendant's age"); ARK. CODE ANN. § 5-4-605(4)(Michie 1997 & Supp. 2002) ("The youth of the defendant at the time of the commission of the capital murder"); CAL. PENAL CODE § 190.3(i) (West 1999 & Supp. 2004) ("The age of the defendant at the time of the crime"); COLO. REV. STAT. 18-1.3-1201(4)(a) (2003) ("The age of the defendant at the time of the crime"); FLA. STAT. ANN. § 921.141(6)(g) (West 2001 & Supp. 2004) ("The age of the defendant at the time of the crime"); IND. CODE ANN. § 35-50-2-9(c)(7) (Michie Supp. 2002) ("The defendant was less than eighteen (18) years of age at the time the murder was committed.") (amended 2003);

KAN. STAT. ANN. § 21-4626(7) (2001) ("The age of the defendant at the time of the crime"); KY. REV. STAT. ANN. § 518-1.3-1201(4)(a) (2003) 32.025(2)(b)(8) (Michie 1999 & Supp. 2003) ("The youth of the defendant at the time of the crime"); LA. CODE CRIM. PROC. ANN. art. 905.5(f) (West 1997 & Supp. 2004) ("The youth of the offender at the time of the offense"); MD. CODE ANN., CRIM LAW § 2-303(h)(2)(v) (2004) ("[T]he defendant was of a youthful age at the time of the murder."); MISS. CODE ANN. §99-19-101(6)(g) (West 1999 & Supp. 2001) ("The age of the defendant at the time of the crime"); MO. ANN. STAT. § 565.032(3) ("The age of the defendant at the time of the crime"); MONT. CODE ANN. § 46-18-304(1)(g) (2004) ("The defendant, at the time of the commission of the crime, was less than 18 years of age."); NEB. REV. STAT. § 29-2523(2)(d) (Supp. 2000) ("The age of the defendant at the time of the crime"); NEV. REV. STAT. ANN. 200.035(6) (Michie 2001 & Supp. 2003) ("The youth of the defendant at the time of the crime"); N.H. REV. STAT. § 630:5(VI)(d) (Michie 1996 & Supp. 2001) ("The defendant was youthful, although not under the age of 18."); N.J. STAT. ANN. § 2C:11-3(5)(c) (West Supp. 2004) ("The age of the defendant at the time of the murder"); N.M. STAT. ANN. § 31-20A-6(I) (Michie Supp. 2000) ("[T]he defendant's age"); N.C. GEN. STAT. § 15A-2000(f)(7) (2001) ("The age of the defendant at the time of the crime"); OHIO REV. CODE ANN. § 2929.04(B)(4) (Anderson 1996 & Supp. 2001) ("The youth of the offender"); PA. CONS. STAT. § 9711(e)(4)(2002)("The age of the defendant at the time of the crime"); TENN. CODE ANN. § 39-13-204(j)(7) (Supp. 2001) ("The youth or advanced age of the defendant at the time of the crime") (amended 2002); S.C. CODE ANN. § 16-3-20(C)(b)(7),(9) (West Supp. 2001) ("The age or mentality of the defendant at the time of the crime") ("The defendant was below the age of eighteen at the time of the crime.") (amended 2002); UTAH CODE ANN. § 76-3-207(4)(e) (2003 & Supp. 2004) ("[T]he youth of the defendant at the time of the crime"); VA. CODE ANN. § 19.2-264.4(B)(v) (Michie 2000) ("[T]he age of the defendant at the time of the commission of the capital offense") (amended 2002); WASH. REV. CODE § 10.95.070(7) (2003) ("Whether the age of the defendant at the time of the crime calls for leniency"); WYO. STAT. ANN. § 6-2-102(j)(vii) (Michie 2003) ("The age of the defendant at the time of the crime"). A number of cases have emphasized that there is no specific age limit for "youth" as a mitigating factor, and other factors besides chronological age should be considered. *See also* Hill v. Lockhart, 927 F.2d 340, 342 (8th Cir. 1991) (noting that statutory mitigating circumstance of "youth" is not defined by chronological age but must be considered in light of the circumstances); State v. Holtan, 250 N.W.2d 876, 880 (Neb. 1977) (holding that age is relative and must be considered in light of surrounding conditions), *overruled on other grounds*, State v. Palmer, 339 N.W.2d 706, 728 (Neb. 1986); State v. Bey, 610 A.2d 814, 842-43 (N.J. 1992) (affirming death sentence and holding that in determining whether age as a mitigating factor applies, juries must consider chronological age and maturity but give more weight to chronological age); Johnson v. State, 703 A.2d 1267, 1275-76 (Md. 1998) (holding that trial court erred in equating mitigating factor of youthful age with chronological age). In *Bryant v. State*, 824 A.2d 60, 75 (Md. 2003), the Maryland Court of Appeals noted that chronological age was not the only consideration in weighing "youthful age." However, the court held that as a matter of law the sentencer must consider the youthful age mitigator when the defendant was under the age of nineteen at the date of the homicide, although the weight of the factor may vary depending on other factors. *Id.* at 64. The court's analysis considered that the Maryland legislature had prohibited the execution of defendants under eighteen years of age at the time of the crime, so it seemed that those barely above that marker should have their age considered as mitigating. *Id.* at 65. States have also disagreed on whether old age, in addition to young age, may be a mitigating factor. *E.g.*, State v. Ramseur, 524 A.2d 188, 275 (N.J. 1987) (holding that age

Agoraphobia[227]
Brain damage / Head injury[228]
Childhood abuse / Deprived childhood[229]
Circumstances that excuse the crime[230]

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should be considered as a mitigating circumstance only when the defendant is relatively young or relatively old), *rev'd on other grounds*, 524 A.2d 188 (1987); State v. Nuttall, 861 P.2d 454, 457 (Utah Ct. App. 1993) (holding that young age, but not old age, may be a mitigating factor). Because the "age" of the defendant means more than just the chronological age, courts have not been consistent in finding that chronological age is mitigating, but it is still a fairly common mitigating factor. *See* State v. Rockwell, 775 P.2d 1069, 1079 (Ariz. 1989) (holding that life sentence should be imposed because of defendant's youth of twenty-one years of age as well as other mitigating factors); State v. Velencia, 645 P.2d 239, 241 (Ariz. 1982) (holding that the fact that the defendant was sixteen at the time of the murder was mitigating); Hawk v. State, 718 So. 2d 159, 163 (Fla. 1998) (vacating death sentence and holding that fact that defendant was nineteen years of age at the time of the crimes was a mitigating factor); Ellis v. State, 622 So. 2d 991, 1001 (Fla. 1993) (reversing death sentence and holding that when a murder is committed by a minor, the mitigating factor of age must be found and weighed); Scull v. State, 533 So. 2d 1137, 1143 (Fla. 1988) (vacating death sentence and holding that the emotional age of a twenty-four-year-old defendant was low enough to find mitigating circumstance of youth); State v. Battle, 661 S.W.2d 487, 488, 494 (Mo. 1983) (affirming death sentence and holding that age of eighteen years and four months was not a mitigating factor); Mooney v. State, 990 P.2d 875, 885 (Okla. Crim. App. 1999) (holding that age and maturity are relevant mitigating factors); *Ex parte* Kelly, 832 S.W.2d 44, 47 (Tex. Crim. App. 1992) (listing mitigating factors as including fact that the defendant was twenty-one at the time of the offense).

227 *E.g.*, Musgrove v. State, 519 So. 2d 565, 585 (Ala. Crim. App. 1986) (holding that symptoms or manifestations of agoraphobia should be given careful consideration in mitigation of sentence), *aff'd*, 519 So. 2d 586 (Ala. 1986).

228 *E.g.*, State v. Lapointe, 678 A.2d 942, 944 (Conn. 1996) (holding that a sentence of life imprisonment without the possibility of parole was appropriate and finding as one of several mitigating factors that the defendant had a congenital cranial deformity, resulting in hydrocephalus that left him with permanent brain damage); State v. Rockwell, 775 P.2d 1069, 1079-80 (Ariz. 1989) (reducing death sentence to life in prison because of mitigating factors, including that the defendant lost his leg and hit his head in an accident, which caused personality changes).

229 Courts have found that childhood abuse is a mitigating factor, as is evidence that the defendant was neglected and had a deprived childhood. Eddings v. Oklahoma, 455 U.S. 104, 115 (1982) (noting that when the defendant is still young, "there can be no doubt that evidence of a turbulent family history, of beatings by a harsh father, and of severe emotional disturbance is particularly relevant"); Campbell v. Kincheloe, 829 F.2d 1453, 1463 (9th Cir. 1987) (holding that defendant has a right to present evidence that he was abused as a child); Williams v. State, 710 So. 2d 1276, 1346 (Ala. Crim. App. 1996) (finding nonstatutory mitigating circumstance that the appellant had suffered from a "deprived" childhood, including "abandonment by his natural mother and the representation to him that his aunt was his mother"); Coulter v. State, 31 S.W.3d 826, 830 (Ark. 2000) (noting that the jury found the mitigating circumstance that the defendant "did not have the opportunities of a normal childhood because of the divorce of his parents, the alcoholism of his father, and his placement in foster homes").

230 *E.g.*, N.M. STAT. ANN. § 31-20A-6(F) ("[T]he defendant acted under circumstances which tended to justify, excuse or reduce the crime.").

Drug addiction[231]
Emotional problems from death of a family member[232]
Extreme mental or emotional disturbance[233]

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231 *E.g.*, State v. Stevens, 764 P.2d 724, 728 (Ariz. 1988) (vacating death sentence and holding that the defendant's long-term alcohol and drug dependency and the fact that the defendant was under the influence at the time of the shooting was sufficient mitigating evidence); People v. Ochoa, 966 P.2d 442, 482 (Cal. 1998) (finding that it was a mitigating factor that the defendant was addicted to cocaine); State v. Roll, 942 S.W.2d 370, 374 (Mo. 1997) (noting that in some situations drug abuse may be considered as a mitigating factor); Swartz v. State, 225 N.W. 766, 769-70 (Neb. 1929) (reducing defendant's sentence to life imprisonment because the defendant was under the influence of drug addiction at the time of the robbery that resulted in the murder).

232 *E.g.*, Davis v. State, 740 So. 2d 1115, 1134 (Ala. Crim. App. 1998) (holding that it was a mitigating circumstance that there was evidence of possible emotional problems brought on from the death of the defendant's brother and the defendant's subsequent feelings of guilt and remorse); McNair v. State, 653 So. 2d 351, 352 (Ala. Crim. App. 1994) (upholding death sentence but holding that it was a non-statutory mitigating circumstance that the appellant's father died when he was very young and he was the oldest of seven children born to his mother).

233 *E.g.*, 21 U.S.C. § 848(m)(7) (2000) ("The defendant committed the offense under severe mental or emotional disturbance."); ALA. CODE § 13A-5-51(2) (Michie 1994 & Supp. 2001) ("The capital offense was committed while the defendant was under the influence of extreme mental or emotional disturbance."); ARIZ. REV. STAT. § 13-703(G)(2) (West Supp. 2004) ("The defendant was under unusual and substantial duress, although not such as to constitute a defense to prosecution."); ARK. CODE ANN. § 5-4-605(1) (Michie 1997 & Supp. 2002) ("The capital murder was committed while the defendant was under extreme mental or emotional disturbance."); CAL. PENAL CODE § 190.3(d) (West 1999 & Supp. 2004) ("Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance"); COLO. REV. STAT. § 18-1.3-1201(4)(f) (2003) ("The emotional state of the defendant at the time the crime was committed"); FLA. STAT. ANN. § 921.141(6)(b) (West 2001 & Supp. 2004) ("The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance."); 720 ILL. COMP. STAT. ANN. § 5/9-1(c)(2) (West Supp. 2002) ("[T]he murder was committed while the defendant was under the influence of extreme mental or emotional disturbance, although not such as to constitute a defense to prosecution."); IND. CODE ANN. § 35-50-2-9(c)(2) (Michie Supp. 2002) ("The defendant was under the influence of extreme mental or emotional disturbance when the murder was committed.") (amended 2002); KAN. STAT. ANN. § 21-4626(2) (Supp. 2001) ("The crime was committed while the defendant was under the influence of extreme mental or emotional disturbances."); KY. REV. STAT. ANN. § 532.025(2)(b)(2) (Michie 1999 & Supp. 2003) ("The capital offense was committed while the defendant was under the influence of extreme mental or emotional disturbance even though the influence of extreme mental or emotional disturbance is not sufficient to constitute a defense to the crime."); LA. CODE CRIM. PROC. ANN. art. 905.5(b) (West 1997 & Supp. 2004) ("The offense was committed while the offender was under the influence of extreme mental or emotional disturbance."); MISS. CODE ANN. § 99-19-101(6)(b) (West 1999 & Supp. 2001) ("The offense was committed while the defendant was under the influence of extreme mental or emotional disturbance."); MO. ANN. STAT. § 565.032(3)(2) (West 1999 & Supp. 2002) ("The murder in the first degree was committed while the defendant was under the influence of extreme mental or emotional disturbance."); MONT. CODE ANN. § 46-18-304(1)(b)

Family background[234]

(2004) ("The offense was committed while the defendant was under the influence of extreme mental or emotional disturbance."); NEB. REV. STAT. § 29-2523(2)(c) (Supp. 2000) ("The crime was committed while the offender was under the influence of extreme mental or emotional disturbance."); NEV. REV. STAT. ANN. 200.035(2) (Michie 2001 & Supp. 2003) ("The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance."); N.H. REV. STAT. ANN. § 630:5(VI)(f) (Michie 1996 & Supp. 2001) ("The defendant committed the offense under severe mental or emotional disturbance."); N.J. STAT. ANN. § 2C:11-3(c)(5)(a) (West Supp. 2004) ("The defendant was under the influence of extreme mental or emotional disturbance insufficient to constitute a defense to prosecution."); N.M. STAT. ANN. § 31-20A-6(D) (Michie Supp. 2000) ("The defendant was under the influence of mental or emotional disturbance."); N.Y. CRIM. PROC. LAW § 400.27(9)(e) (McKinney Supp. 2004) ("The murder was committed while the defendant was mentally or emotionally disturbed or under the influence of alcohol or any drug, although not to such an extent as to constitute a defense to prosecution."); N.C. GEN. STAT. § 15A-2000(f)(2) (2001) ("The capital felony was committed while the defendant was under the influence of mental or emotional disturbance."); PA. CONS. STAT. § 9711(e)(2) (2002)("The defendant was under the influence of extreme mental or emotional disturbance."); S.C. CODE ANN. § 16-3-20 (C)(b)(2) (West Supp. 2001) ("The murder was committed while the defendant was under the influence of mental or emotional disturbance.") (amended 2002); TENN. CODE ANN. § 39-13-204(j)(2) (Supp. 2001) ("The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance.") (amended 2002); UTAH CODE ANN. § 76-3-207(4)(b) (2003 & Supp. 2004) ("[T]he homicide was committed while the defendant was under the influence of mental or emotional disturbance."); VA. CODE ANN. § 19.2-264.4(B)(ii) (Michie 2000) ("[T]he capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.") (amended 2002); WASH. REV. CODE § 10.95.070(2) (West 2002 & Supp. 2004) ("Whether the murder was committed while the defendant was under the influence of extreme mental disturbance."); WYO. STAT. ANN. § 6-2-102(j)(ii) (Michie 2003) ("The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance."); *see also* Castor v. State, 587 N.E.2d 1281, 1288-89 (Ind. 1992) (vacating death sentence and holding that defendant should have been provided with a psychologist to assist during the penalty phase because the possibility that the defendant was subject to extreme mental or emotional disturbance is an appropriate mitigating factor to be considered); Wells v. State, 698 So. 2d 497, 515 (Miss. 1997) (affirming death sentence and holding that mental retardation alone would not cause extreme emotional disturbance); State v. Sandles, 740 S.W.2d 169, 179-80 (Mo. 1987) (holding that the fact that defendant was emotionally disturbed at the time of the killing was a mitigating circumstance); State v. Rust, 250 N.W.2d 867, 876 (Neb. 1977) (noting mitigating factor of emotional instability).

[234] *E.g.*, Eddings v. Oklahoma, 455 U.S. 104, 113-16 (1982) (stating that the Eighth and Fourteenth Amendments are violated where the trial judge considers youth as a mitigating circumstance but refuses to consider family history of emotional and physical abuse); McGriff v. State, CR-97-0179, 2000 WL 1455196 (Ala. Crim. App. Aug. 31, 2001) (holding that fact that the defendant's natural father abandoned him and that his mother had little contact with him was not a mitigating factor because a stepfather was present in his life), *rev'd*, *Ex parte* McGriff, 1010469, 2004 WL 2914951 (Ala. Sup. Ct. Dec. 17, 2004); Knotts v. State, 686 So. 2d 431, 444 (Ala. Crim. App. 1995) (affirming death sentence but holding that it was a nonstatutory mitigating circumstance that the appellant came from a dysfunctional family

General background[235]

with an alcoholic, abusive father); State v. Wallace, 773 P.2d 983, 985-986 (Ariz. 1989) (holding that doctor's testimony that the defendant had a difficult childhood and was in a disassociative state at the time of murder did not establish the statutory mitigating circumstance of significant impairment); Williams v. State, 902 S.W.2d 767, 772 (Ark. 1995) (affirming death sentence and holding that there was no error for jury to find no mitigating factors even though the defendant offered evidence of his deprived socioeconomic background and dysfunctional family); People v. Rodrigues, 885 P.2d 1, 66 (Cal. 1994) (affirming death sentence but noting that there was some evidence of mitigating factors such as defendant's childhood and family relationships); Blanco v. State, 706 So. 2d 7, 10-11 (Fla. 1997) (holding that trial court did not err in giving little mitigating weight to circumstance of defendant's impoverished childhood because other family members had the same background and did not follow lives of crime); Campbell v. State, 571 So. 2d 415, 419 (Fla. 1990) (vacating death sentence and holding that the trial court improperly rejected the defendant's deprived and abusive childhood as a mitigating factor); Livingston v. State, 565 So. 2d 1288, 1292 (Fla. 1988) (vacating death sentence and holding that the defendant's childhood of abuse and neglect was a mitigating factor); People v. Henderson, 568 N.E.2d 1234, 1271-73 (Ill. 1990) (affirming death sentence and holding that defendant's troubled childhood does not have to be considered a mitigating circumstance and that it can be considered as evidence of the aggravating circumstance of future danger to society); State v. Williams, 490 N.E.2d 906, 914 (Ohio 1986) (affirming death sentence but noting evidence that the defendant pursued a life of crime in response to a lack of love in his childhood); State v. Odom, 928 S.W.2d 18, 31 (Tenn. 1996) (noting that background evidence is relevant because defendants who come from a disadvantaged background or who have emotional or mental problems may be less culpable than other defendants); Henley v. State, 960 S.W.2d 572, 582 (Tenn. 1997) (same); Goss v. State, 826 S.W.2d 162, 165-66 (Tex. Crim. App. 1992) (holding that Texas statutory scheme allows jury to consider and give mitigating effect to evidence of troubled or abusive childhood); Richardson v. State, 901 S.W.2d 941, 942 (Tex. Crim. App. 1994) (noting that society has a long-held belief that defendants who commit criminal acts that are attributable to a disadvantaged background may be less culpable than defendants without that excuse).

[235] *E.g.*, 21 U.S.C. § 848(m)(10) (2002) ("[T]hat other factors in the defendant's background or character mitigate against imposition of the death sentence"); CONN. GEN. STAT. ANN. § 53a-46a(d) (West 2001 & Supp. 2002) ("[T]he court shall first determine whether a particular factor concerning the defendant's character, background or history, or the nature of the circumstances of the crime, has been established by the evidence, and shall determine further whether that factor is mitigating in nature, considering all the facts and circumstances of the case."); MD. CODE ANN., CRIM. LAW § 2-303(h)(2)(viii) (2004) ("[A]ny other facts that the court or the jury specifically sets forth in writing as mitigating circumstances in the case"); MONT. CODE ANN. § 46-18-304(2) (2004) ("The court may consider any other fact that exists in mitigation of the penalty."); NEV. REV. STAT. ANN. 200.035(7) ("[A]ny other mitigating circumstance"); N.H. REV. STAT. ANN. § 630:5(VI)(i) ("Other factors in the defendant's background or character mitigate against imposition of the death sentence."); N.J. STAT. ANN. § 2C:11-3(5)(h) ("[A]ny other factor which is relevant to the defendant's character or record or to the circumstances of the offense"); N.Y. CRIM. PROC. LAW § 400.27(9)(f) ("[A]ny other circumstance concerning the crime, the defendant's state of mind or condition at the time of the crime, or the defendant's character, background or record that would be relevant to mitigation or punishment for the crime"); *see also* State v. Mejia, 662 A.2d 308, 320-21 (N.J. 1995) (reversing death sentence and holding that a claim of right instruction should have

Insanity[236]
Intoxication / Substantially impaired capacity[237]

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been given in the penalty phase because it would have given weight to the "catch-all" mitigating factor that at the time of the homicide the defendant was attempting to reclaim money that he had entrusted to the victim), *overruled on other grounds*, State v. Cooper, 700 A.2d 306 (N.J. 1997); State v. Marshall, 586 A.2d 85 (N.J. 1991) (noting that the defendant's character was shown by his civil, business, and philanthropic acts but affirming death penalty), *aff'd*, 613 A.2d 1059 (N.J. 1992); Edwards v. State, 737 So. 2d 275, 297 (Miss. 1999) (holding that trial court erred in not admitting relevant mitigating evidence that defendant was in mental health facility as a youngster, which failed to address the problems he suffered as a result of abuse and neglect at home); State v. Worthington, 8 S.W.3d 83, 89 (Mo. 1999) (affirming death sentence but finding mitigating factors that the defendant was raised in a dysfunctional family, and was neglected and abused as a child and that the defendant is a long-term drug abuser).

236 *E.g.*, Ullery v. State, 988 P.2d 332, 352-53 (Okla. Crim. App. 1999) (holding that the defendant's mental state, which included indications he was insane, was a mitigating circumstance that outweighed the single aggravating circumstance).

237 *E.g.*, Colo. Rev. Stat. § 18-1.3-1201(4)(i) (2003) ("The influence of drugs or alcohol"); Ind. Code Ann. § 35-50-2-9(c)(6) ("The defendant's capacity to appreciate the criminality of the defendant's conduct or to conform that conduct to the requirements of law was substantially impaired as a result of mental disease or defect or of intoxication."); La. Code Crim. Proc. Ann. art. 905.5(e) (West 1997 & Supp. 2004) ("At the time of the offense the capacity of the offender to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or intoxication."); Md. Code Ann., Crim. Law § 2-303(h)(2)(iv) ("[T]he murder was committed while the capacity of the defendant to appreciate the criminality of the defendant's conduct or to conform that conduct to the requirements of law was substantially impaired due to emotional disturbance, mental disorder, or mental incapacity."); Mass. Gen. Laws ch. 279, § 69(b)(4) (2002) ("[T]he offense was committed while the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired as a result of a mental disease or defect, organic brain damage, emotional illness brought on by stress or prescribed medication, intoxication, or legal or illegal drug use by the defendant which was insufficient to establish a defense to the murder but which substantially affected his judgment."); Neb. Rev. Stat. § 29-2523(2)(g) ("At the time of the crime, the capacity of the defendant to appreciate the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of the law was impaired as a result of mental illness, mental defect, or intoxication."); N.Y. Crim. Proc. Law § 400.27(9)(e) ("The murder was committed while the defendant was mentally or emotionally disturbed or under the influence of alcohol or any drug, although not to such an extent as to constitute a defense to prosecution.") Tenn. Code Ann. § 39-13-204(j)(8) ("[I]ntoxication which was insufficient to establish a defense to the crime but which substantially affected the defendant's judgment"); Utah Code Ann. § 76-3-207(4)(d) ("[A]t the time of the homicide, the capacity of the defendant to appreciate the wrongfulness of his conduct or to conform his conduct to the requirement of law was impaired as a result of a mental condition, intoxication, or influence of drugs.").

Some state statutes do not specifically list alcohol as a separate factor but intoxication might be included as part of a statutory lack of "capacity" factor. Colorado has separate mitigating factors for capacity and for being under the influence of drugs or alcohol. *See* Colo. Rev. Stat. § 18-1.3-1201(4)(b) ("The defendant's capacity to

Mental retardation[238]

appreciate wrongfulness of the defendant's conduct or to conform the defendant's conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution."); COLO. REV. STAT. § 18-1.3-1201(4)(i) ("The influence of drugs or alcohol"); *see also* Bell v. Ohio, 438 U.S. 637, 641-42 (1978) (holding that Ohio's death penalty statute was unconstitutional because it did not allow consideration of defendant's drug problems and emotional and mental instability); State v. Canez, 74 P.3d 932, 937 (Ariz. 2003) (noting that trial court found drug and alcohol abuse as a mitigating circumstance); State v. Stevens, 764 P.2d 724, 728-29 (Ariz. 1988) (vacating death sentence and holding that the defendant's long-term alcohol and drug dependency and fact that was under influence at the time of the shooting was sufficient mitigating evidence); Smalley v. State, 546 So. 2d 720, 722-23 (Fla. 1989) (vacating death sentence and considering, among other factors, that defendant's minor marijuana use on the day of the killing contributed to impairing his ability to appreciate the criminality of his conduct); Smith v. Commonwealth, 845 S.W.2d 534, 539-40 (Ky. 1993) (holding that the jury was entitled to instruction of intoxication as a mitigating circumstance); State v. Reeves, 476 N.W.2d 829, 841 (Neb. 1991) (holding that evidence supported finding of impairment mitigating circumstance due to intoxication but upholding death sentence after re-weighing), *rev'd on other grounds*, Hopkins v. Reeves, 524 U.S. 88 (1998); State v. Coyle, 574 A.2d 961, 970 (N.J. 1990) (holding that prosecutor improperly suggested that jurors must hold the defendant accountable for the effect of the intoxication when the legislature had provided that intoxication is a mitigating circumstance); State v. Pierce, 346 S.E.2d 707, 710-11 (S.C. 1986) (holding that evidence of voluntary intoxication should be considered by jury in mitigation), *overruled on other grounds*, State v. Torrence, 406 S.E.2d 315 (S.C. 1991); State v. Wood, 648 P.2d 71, 78 (Utah 1982) (noting that trial court found intoxication as one of three mitigating circumstances).

[238] In 2002, the Supreme Court held in *Atkins v. Virginia*, 536 U.S. 304, 321 (2002), that it violates the Eighth Amendment to execute mentally retarded inmates. So, now, mental retardation should bar the execution of some inmates. Of course, prior to *Atkins*, when the Supreme Court held that it was constitutional to execute mentally retarded defendants in 1989, mental retardation was still treated as a mitigating circumstance. *See* Penry v. Lynaugh, 492 U.S. 302, 340 (1989) ("In sum, mental retardation is a factor that may well lessen a defendant's culpability for a capital offense."). Impaired mental ability that does not rise to a constitutional statutory definition of mental retardation, however, should still continue to act as a mitigating circumstance in much the same way as mental retardation did in the past. *See* N.Y. CRIM. PROC. LAW § 400.27(9)(b) ("The defendant was mentally retarded at the time of the crime, or the defendant's mental capacity was impaired or his ability to conform his conduct to the requirements of the law was impaired but not so impaired in either case as to constitute a defense to prosecution."); S.C. CODE ANN. § 16-3-20(C)(b)(10) (West Supp. 2001) ("The defendant had mental retardation at the time of the crime. 'Mental retardation' means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period.") (amended 2002); VA. CODE ANN. § 19.2-264.4(B)(vi) ("[M]ental retardation of the defendant"). Prior to *Atkins*, several states prohibited the execution of the mentally retarded. *See, e.g.*, WASH. REV. CODE § 10.95.070(6) ("[A] person found to be mentally retarded under RCW 10.95.030(2) may in no case be sentenced to death."); *see also* Hall v. State, 614 So. 2d 473, 478 (Fla. 1993) (holding that the defendant's mental retardation did not provide a justification that would preclude a finding at sentencing that the murder was committed in a cold, calculated, and premeditated manner); Blue v. State, 674 So. 2d

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Personality disorder[239]
Pesticide exposure / Chemical brain poisoning[240]
Post-traumatic stress[241]
Substantially impaired capacity[242]

1184, 1235 (Miss. 1996) (affirming death sentence and holding that jury was able to consider the defendant's sixty-seven IQ as a mitigating circumstance); Jones v. State, 602 So. 2d 1170, 1173 (Miss. 1992) (holding that jury was correctly allowed to consider defendant's mental retardation as a mitigating factor); State v. Rogers, 478 N.E.2d 984, 996-97 (Ohio 1985) (holding that mitigating factor of mental retardation, among others, did not outweigh aggravating circumstances surrounding the murder and affirming the death sentence), *vacated by* Rogers v. Ohio, 474 U.S. 1002 (1985); State v. Hughey, 529 S.E.2d 721, 730 (S.C. 2000) (holding that trial judge adequately instructed jury to consider the non-statutory mitigating factor of the defendant's "level of intellectual function whether as a natural consequence of his birth or as a result of physical and/or emotional trauma suffered as a child or as an adult"); Rios v. Texas, 846 S.W.2d 310, 315-16 (Tex. Crim. App. 1992) (holding that penalty phase instruction did not adequately allow the jury to consider mental retardation as a mitigating circumstance).

239 *E.g.*, Perkins v. State, 808 So. 2d 1041, 1142 (Ala. Crim. App. 1999) (finding nonstatutory mitigating factors that the defendant suffered from borderline personality disorder, is of borderline intelligence, and possibly has organic brain dysfunction), *vacated by* Perkins v. Alabama, 536 U.S. 953 (2002); Freeman v. State, 776 So. 2d 160, 200 (Ala. Crim. App. 1999) (finding nonstatutory mitigating factor that the defendant suffered from an antisocial personality disorder); Corcoran v. State, 774 N.E.2d 495, 501 (Ind. 2002) (noting testimony of doctors that the defendant suffered from schizotypal or paranoid personality disorder was a mitigating factor). Not all courts have found that antisocial personality disorder qualifies as a mitigating circumstance. *See* Harris v. Pulley, 885 F.2d 1354, 1383-84 (9th Cir. 1988).

240 *E.g.*, Caro v. Calderon, 165 F.3d 1223, 1226-27 (9th Cir. 1999) (holding that to resolve ineffective assistance of counsel claim, the case should be remanded to the district court for an evidentiary hearing about whether the defendant suffered brain damage as a result of his exposure to pesticides as a migrant farm worker).

241 *E.g.*, KAN. STAT. ANN. § 21-4626(8) (Supp. 2001) ("At the time of the crime, the defendant was suffering from post-traumatic stress syndrome caused by violence or abuse by the victim."); *see also* State v. Styers, 865 P.2d 765, 777-78 (Ariz. 1993) (noting that post-traumatic stress disorder can be a mitigating factor); People v. Lucero, 750 P.2d 1342, 1356-57 (Cal. 1988) (holding that it was error to prevent the defense from presenting expert testimony regarding the mitigating factor of defendant's post-traumatic stress disorder).

242 *E.g.*, 21 U.S.C. § 848(m)(1) (2000) ("The defendant's capacity to appreciate the wrongfulness of the defendant's conduct or to conform conduct to the requirements of law was significantly impaired, regardless of whether the capacity was so impaired as to constitute a defense to the charge."); ALA. CODE § 13A-5-51(6) (Michie 1994 & Supp. 2001) ("The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired."); ARIZ. REV. STAT. ANN. § 13-703(G)(1) (West Supp. 2004) ("The defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution."); ARK. CODE ANN. § 5-4-605(3) (Michie 1997 & Supp. 2002) ("The capital murder was committed while the capacity of the defendant to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect, intoxication or drug abuse."); CAL. PENAL CODE § 190.3(h) (West 1999 &

Supp. 2004) ("Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect, or the affects of intoxication"); COLO. REV. STAT. § 18-1.3-1201(4)(b) (2003) ("The defendant's capacity to appreciate wrongfulness of the defendant's conduct or to conform the defendant's conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution."); FLA. STAT. ANN. § 921.141(6)(f) (West 2001 & Supp. 2004) ("The capacity of the defendant to appreciate the criminality of his or her conduct or to conform his or her conduct to the requirements of law was substantially impaired."); IND. CODE ANN. § 35-50-2-9(c)(6) ("The defendant's capacity to appreciate the criminality of the defendant's conduct or to conform that conduct to the requirements of law was substantially impaired as a result of mental disease or defect or of intoxication."); KAN. STAT. ANN. § 21-4626(6) ("The capacity of the defendant to appreciate the criminality of the defendant's conduct or to conform the defendant's conduct to the requirements of law was substantially impaired."); KY. REV. STAT. ANN. § 532.025(2)(b)(7) (Michie 1999 & Supp. 2003) ("At the time of the capital offense, the capacity of the defendant to appreciate the criminality of his conduct to the requirements of law was impaired as a result of mental illness or retardation or intoxication even though the impairment of the capacity of the defendant to appreciate the criminality of his conduct or to conform the conduct to the requirements of law is insufficient to constitute a defense to the crime."); MD. CODE ANN., CRIM. LAW § 2-303(h)(2)(iv) ("[T]he murder was committed while the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired as a result of mental incapacity, mental disorder or emotional disturbance."); MISS. CODE ANN. § 99-19-101(6)(f) (West 1999 & Supp. 2001) ("The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired."); MO. ANN. STAT. § 565.032(3)(6) (West 1999 & Supp. 2002) ("The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired."); MONT. CODE ANN. § 46-18-304(1)(d) (2004) ("The capacity of the defendant to appreciate the criminality of the defendant's conduct or to conform the defendant's conduct to the requirements of the law was substantially impaired."); NEB. REV. STAT. § 29-2523(2)(g) ("At the time of the crime, the capacity of the defendant to appreciate the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of law was impaired as a result of mental illness, mental defect, or intoxication."); N.H. REV. STAT. ANN. § 630:5(VI)(a) (Michie 1996 & Supp. 2001) ("The defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired, regardless of whether the capacity was so impaired as to constitute a defense to the charge."); N.J. STAT. ANN. § 2C:11-3(c)(5)(d) (West Supp. 2004) ("The defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired as the result of mental disease or defect or intoxication, but not to a degree sufficient to constitute a defense to prosecution."); N.M. STAT. ANN. § 31-20A-6(C) (Michie Supp. 2001) ("[T]he defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired."); N.Y. CRIM. PROC. LAW § 400.27(9)(b) ("The defendant was mentally retarded at the time of the crime, or the defendant's mental capacity was impaired or his ability to conform his conduct to the requirements of law was impaired but not so impaired in either case as to constitute a defense to prosecution."); N.C. GEN. STAT. § 15A-2000(f)(6) (2001) ("The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired."); OHIO

Stress (unusual / substantial)[243]

The Disease Theory Factors, which are consistent with a disease theory of criminal law, are common in capital cases. One informal review of court records in one state found that approximately 50% of the state's death row inmates had evidence they had been victims of childhood abuse or neglect, and the actual number was certainly higher.[244]

REV. CODE ANN. § 2929.04(B)(3) (Anderson 1996 & Supp. 2001) ("Whether, at the time of committing the offense, the offender, because of a mental disease or defect, lacked substantial capacity to appreciate the criminality of the offender's conduct or to conform the offender's conduct to the requirements of the law"); OHIO REV. CODE ANN. § 2929.04(B)(3) (Anderson 1999 & Supp. 2001) ("Whether, at the time of committing the offense, the offender, because of a mental disease or defect, lacked substantial capacity to appreciate the criminality of the offender's conduct or to conform the offender's conduct to the requirements of the law"); 42 PA. CONS. STAT. § 9711(e)(3) (West Supp. 2002) ("The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired."); S.C. CODE ANN. § 16-3-20(C)(b)(6) ("The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired."); TENN. CODE ANN. § 39-13-204(j)(8) ("The capacity of the defendant to appreciate the wrongfulness of the defendant's conduct or to conform the defendant's conduct to the requirements of the law was substantially impaired as a result of mental disease or defect or intoxication which was insufficient to establish a defense to the crime but which substantially affected the defendant's judgment."); UTAH CODE ANN. § 76-3-207(4)(d) ("[A]t the time of the homicide, the capacity of the defendant to appreciate the wrongfulness of his conduct or to conform his conduct to the requirement of law was impaired as a result of a mental condition, intoxication, or influence of drugs."); VA. CODE ANN. § 19.2-264.4(B)(iv) ("[A]t the time of the commission of the capital felony, the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was significantly impaired."); WASH. REV. CODE § 10.95.070(6) ("Whether, at the time of the murder, the capacity of the defendant to appreciate the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of law was substantially impaired as a result of mental disease or defect"); WYO. STAT. ANN. § 6-2-102(j)(vi) (Michie 2003) ("The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired."); *see also* State v. Simants, 250 N.W.2d 881, 891 (Neb. 1977) (affirming death sentence and holding that trial court properly found that as a result of the combination of alcohol, low intelligence, and mental deficiency, the defendant met the requirements of the capacity statutory mitigating circumstance).

[243] *E.g.*, State v. Gulbrandson, 906 P.2d 579, 603 (Ariz. 1995) (holding that defendant's unusual stress—resulting from lack of sleeping and eating, being depressed, and having a history of mental illness—was a non-statutory mitigating circumstance); *see also supra* note 231.

[244] *See* Clint Williams, *Paths Paved in Violence: Consequences of Abuse Evident on Death Row*, ARIZ. REPUBLIC, Nov. 21, 1993, at A25. "For many death-row inmates, there simply isn't enough available information . . . . Probation officers rarely dig deeply into a killer's family history. The killers themselves are seldom candid." *Id.*

One may wonder why we should give a less severe punishment to someone merely because the person had a difficult childhood or because the person had a drug addiction. Most of the factors in this category are mitigating because: (1) they show that the defendant is less able to control herself or himself; and (2) they are among the causes that led the defendant to commit the crime.[245] Under the first rationale, these culpability factors work like partial excuses rather than justifications for the defendant's conduct.[246] Many of these factors relate to the development of the defendant's brain and the idea that neurological or psychological problems show that the defendant is not as responsible as someone acting under "normal" conditions.[247]

In the second rationale, these factors help explain why the defendant committed the crime, and several of them fit into Judge Bazelon's RSB category. For example, the fact that someone is young and emotionally disturbed may be among the causes of the crime. The justification for allowing these factors to be mitigating is important because the factors raise questions about punishment, evil, and morality. The presence of these factors undermine the retributive theories for punishing certain individuals because the individuals are less deserving of punishment, even though there still may be deterrence principles that support a severe punishment. Thus, disease theory and Judge Bazelon's RSB defense have been adopted in the capital sentencing context.[248]

Courts have attempted to explain why some Disease Theory Factors are mitigating. In *Eddings v. Oklahoma*, the Supreme

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[245] Another possible reason that many of these factors are mitigating might be because they show that the defendant has already suffered in life and that a jury should take pity on the defendant. Although viewing these factors as "pity factors" might be part of what goes on in jurors' minds, as discussed below, the analysis from court decisions is more consistent with the view that these are causal factors relating to the crime.

[246] *See*, *e.g.*, Richardson v. State, 901 S.W.2d 941, 942 (Tex. 1994) (noting that society has a long-held belief that defendants who commit criminal acts that are attributable to a disadvantaged background may be less culpable than defendants without that excuse). Unlike excuse defenses, however, mitigating factors only affect punishment and do not act as defenses to the crime.

[247] For more information about the scientific literature on this issue, see *infra* Part VI.A.

[248] One may distinguish the use of RSB factors in sentencing versus the use of RSB factors for determining criminal culpability. However, in capital cases, the difference between a sentence of life in prison and death is so substantial that the capital sentencing stage is more like the culpability stage of other criminal trials than the sentencing stage for non-capital cases.

Court explained that a young age is a mitigating factor because minors are "less mature and responsible than adults."[249] In holding that Eddings's age of sixteen years should have been considered a mitigating circumstance, the Court stated that age is "a time and condition of life when a person may be most susceptible to influence and to psychological damage."[250] Noting that adolescents are less able to control themselves and contemplate repercussions, the Court concluded that on moral grounds such offenders are not completely to blame because the murder had other causes: "[O]ffenses by the young also represent a failure of family, school, and the social system, which share responsibility for the development of America's youth."[251]

Although the Supreme Court has noted that a defendant's family background may be a mitigating factor, it has not provided a clear explanation for the reasons. In *Eddings*, the Court seemed to equate such evidence with chronological age, when it noted that Eddings had been raised "in a neglectful, sometimes even violent, family background,"[252] which could show that a defendant's "mental and emotional development were at a level several years below his chronological age."[253] The Court explained that "just as the chronological age of a minor is itself a relevant mitigating factor of great weight, so must the background and mental and emotional development of a youthful defendant be duly considered in sentencing."[254]

Further, the *Eddings* Court noted that evidence of a "difficult family history and of emotional disturbance" might be given little weight in some cases where a defendant is older.[255] However, it added, "But when the defendant was 16 years old at the time of the offense there can be no doubt that evidence of a turbulent

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[249] 455 U.S. 104, 115-16 (1982).

[250] *Id.* at 115.

[251] *Id.* at 115 n.11 (quoting TWENTIETH CENTURY FUND TASK FORCE, CONFRONTING YOUTH CRIME: SENTENCING POLICY TOWARD YOUNG OFFENDERS 7 (1978)). Also, in recognizing that "minors, especially in their earlier years, generally are less mature and responsible than adults," the Court implied that one of the reasons that age should be mitigating is that youths have potential to grow up and be rehabilitated. *Eddings*, 455 U.S. at 115-16.

[252] *Eddings*, 455 U.S. at 116.

[253] *Id.*

[254] *Id.*

[255] *Id*. at 115; *see also* Hitchcock v. Dugger, 481 U.S. 393, 397 (1987) (holding that it was mitigating that "petitioner had been one of seven children in a poor family that earned its living by picking cotton; that his father had died of cancer; and that petitioner had been a fond and affectionate uncle").

family history, of beatings by a harsh father, and of severe emotional disturbance is particularly relevant."[256] The Court cited no psychological support and did not explain its rationale for implying that such evidence may carry less weight with an older defendant, though the implication is that it would be for experts to sort out during individual sentencing hearings. However, it is somewhat odd that the Court made psychological conclusions without cited support, both about the effects and non-effects of family abuse.

Some factors from this mitigation category are of such concern that the Court has held that they may make a defendant completely ineligible for the death penalty. The Court has held that defendants who committed a murder while under a certain age may not be executed.[257] In *Ford v. Wainwright*, the Court held that the insane may not be executed,[258] and more recently, in *Atkins v. Virginia*, the Court held that a state may not execute a person who is mentally retarded.[259]

Besides considering the treatment of these excluded categories in law and in legislatures, the Court looked at the rationales for excluding these categories of defendants from executions. In considering the insane, the Court noted that there was not a consensus for the rationale to exclude them, but that possible rationales included: the execution of the insane offends humanity; such executions provide no example to others; insanity is its own punishment; and a community's quest for retribution is not served by executing the insane.[260]

In *Atkins*, the Court noted that mentally retarded capital defendants are less culpable than other capital defendants because of significant limitations in adaptive skills and evidence that they are more likely than others to act on impulse.[261] Thus, the goals of retribution are not served by their execution.[262] Also, the Court reasoned that exempting the mentally retarded from the death penalty would not undermine the deterrent effect of capi-

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256 *Eddings*, 455 U.S. at 115.

257 The Supreme Court recently granted a petition for writ of certiorari to reconsider how old a defendant must be at the time of the crime in order to be eligible for the death penalty. *See* Roper v. Simmons, 540 U.S. 1160 (2004).

258 477 U.S. 399, 409-10 (1986).

259 536 U.S. 304 (2002)

260 *Ford*, 477 U.S. at 407-08.

261 536 U.S. at 306, 318.

262 *Id*. at 319.

tal punishment because the mentally retarded are less likely to be deterred from committing murder because of their diminished ability to process information, learn from experience, or control impulses.[263]

Thus, the Court's rationale behind many of these Disease Theory Factors stresses that these factors show that defendants have less control over their actions and for retributive purposes are less deserving of punishment.[264] These mitigating circumstances are inconsistent with the other categories of mitigating factors, especially the Good Character and Crime Involvement Factors that focus on the "good" qualities of the defendant. Those categories are reasonable because they show that the defendant has good qualities and is deserving of life. The Disease Theory Factors, by contrast, may show that the defendant is a bad person who is irrational and will commit more crimes in the future. Therefore, Disease Theory Factors do not make the defendant a better person. For utilitarian purposes, although their punishment may deter others, such defendants may not be deterred themselves by the threat of punishment. These factors do not make a defendant any less dangerous or less worthy of punishment for incapacitation purposes. Yet, these factors make a person less deserving of the severest punishment because they show the person has less control and that there were outside causes of the murder. In a sense, the courts are accepting that these defendants acted with something less than free will, as discussed in the next section. The next section considers Disease Theory Factors from empirical and philosophical viewpoints to understand their legal and moral significance.

V

Empirical, Philosophical, and Practical Considerations Raised by Disease Theory Factors

In considering the legal and moral justifications behind punish-

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[263] *Id*. at 320. Some commentators have criticized the *Atkins* decision because many of the same conclusions may also be reached about the mentally ill, who are still eligible for execution. Margaret Talbot, *The Executioner's I.Q. Test*, N.Y. Times, June 29, 2003, at 30. "You can be skeptical . . . about the classes of people [*Atkins*] leaves out. Why the mentally retarded and not the schizophrenic, whose particular demons and deficiencies make them, if anything, less able to conform to the law than people with low I.Q.'s?" *Id.*

[264] 536 U.S. at 318-19.

ment and mitigating circumstances, one should consider the empirical world where the theories apply and the philosophical theories behind the justifications.[265] These areas are discussed below. The first subsection discusses the scientific theories underlying Disease Theory Factors and how we continue to learn more about the causes of human behavior.

Philosophical implications of the Disease Theory Factors are discussed in the second subsection below. Because mitigating factors, RSB, and disease theory in capital cases involve the consideration of the causes of crime, they raise issues of determinism and free will. Therefore, the second subsection considers whether there is any philosophical justification for the death penalty and the courts' consideration of mitigating circumstances.

A. Empirical View: Developments in Science and Psychology Provide Theories About the Causes of Crime

The modern form of the debate about the effects of nature and nurture on human beings began in the late 1800s with geographer Francis Galton, who may have borrowed the "nature-nurture" terminology from William Shakespeare.[266] Sigmund Freud believed "that childhood events were key in determining adult behavior, but he also felt that many of the most important childhood events were innately predetermined."[267] Since Galton's and Freud's times, scientists continue to make new discoveries about the effects of genes and environment on human behavior,[268] as well as the effects of brain damage and brain functioning.[269]

These discoveries are relevant to the criminal justice system. As one author noted, "Clearly, very violent and recidivistic indi-

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265 *See* Jeffrey G. Murphy, *Marxism and Retribution*, *in* PUNISHMENT AND REHABILITATION 84-85 (2d ed. 1985). Professor Murphy notes that before this relatively simple point—about the importance of the nature of the empirical world—was made by Karl Marx, it was ignored by Enlightenment political theory, including that of Thomas Hobbes, John Locke, and Immanuel Kant. *Id.* at 85 n.24.

266 RIDLEY, *supra* note 133, at 69-71. In *The Tempest*, Prospero insulted Caliban with the comment, "A devil, a born devil, on whose nature [n]urture can never stick." WILLIAM SHAKESPEARE, THE TEMPEST, act 4, sc. 1, ll. 188-89 (Richard Grant White ed., 1911).

267 ELIZABETH KANDEL ENGLANDER, UNDERSTANDING VIOLENCE 60 (1997).

268 *See, e.g.,* RIDLEY, *supra* note 133, at 1-6.

269 For a summary of recent neuroscientific research on brain functioning and brain damage, see Deborah W. Denno, *Crime and Consciousness: Science and Involuntary Acts*, 87 MINN. L. REV. 269, 320-37 (2002).

viduals frequently have a multitude of handicaps, including neurological and medical disorders, profound psychological disorders, and intellectual and familial dysfunction."[270] The authors of one study concluded that a large number of condemned individuals likely have unrecognized severe psychiatric, neurological, and cognitive disorders.[271] A forensic psychologist recently wrote, "Research indicates that antisocial behavior is caused by a combination of biological, psychological, and social phenomenon such as negative parenting practices, peer influence, genetics and heredity, neurobiological factors, and socioeconomic/environmental influences."[272] Numerous scientific studies confirm that genetic, biological, cognitive, and social factors may predispose an individual to crime.[273]

Several studies show biological links to crimes, and scientists have examined links between crime and such factors as minimal brain damage, physical anomalies, head injuries, neurotransmitters, hormones, and genetics.[274] For example, scientists know that criminality is highly heritable.[275] One familiar indication of

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270 ENGLANDER, *supra* note 267, at 95.

271 Dorothy Otnow Lewis et al., *Psychiatric, Neurological, and Psychoeducational Characteristics of 15 Death Row Inmates in the United States*, 143 AM. J. PSYCHIATRY 838, 841-42 (1986).

272 John M. Fabian, *Death Penalty Mitigation and the Role of the Forensic Psychologist*, 27 LAW & PSYCHOL. REV. 73, 94 (2003).

273 *See generally* ADRIAN RAINE, THE PSYCHOPATHOLOGY OF CRIME: CRIMINAL BEHAVIOR AS A CLINICAL DISORDER 243-44 (1993) (discussing several studies about violence and its causes); Fabian, *supra* note 272, at 94-103 (discussing several studies about the causes of antisocial personality disorder); David P. Farrington, *The Explanation and Prevention of Youthful Offending*, *in* DELINQUENCY AND CRIME: CURRENT THEORIES 68-148 (J. David Hawkins, ed., 1996); Craig Haney, *The Social Context of Capital Murder: Social Histories and the Logic of Mitigation*, 35 SANTA CLARA L. REV. 547, 570-80 (1995) (concluding that "[t]he nexus between poverty, childhood abuse and neglect, social and emotional dysfunction, alcohol and drug abuse, and crime is so tight in the lives of many capital defendants as to form a kind of social historical 'profile'"); Dorothy Otnow Lewis et al., *Biopsychosocial Characteristics of Children Who Later Murder: A Prospective Study*, 142 AM. J. PSYCHIATRY 1161 (1985) (finding a strong relationship between experiencing abuse as children and later committing murder).

274 *See, e.g.*, ENGLANDER, *supra* note 267, at 50-60 (discussing several studies about biological links to crime). There is, of course, a danger that studies of biological or genetic links to crimes could be misused by ignorant people. However, these issues still need to be discussed, and the importance of environment in most studies would undermine the misuse of the biological studies.

275 RIDLEY, *supra* note 133, at 87. For example,

> [A]dopted children end up with a criminal record which looks a lot more like that of their biological parents than like that of their foster parents. Why? Not because there are specific genes for criminality, but because

the fact that biology plays a role in violence is that men are much more likely than women to commit crimes of violence.[276] At least one capital defendant attempted to make a defense based upon his genes.[277]

Mental illness has a strong relation to crime. As the incarceration rate in the United States has dramatically increased since the early 1970s and the number of residents in state mental hospitals has dropped, "state prisons and county jails have become the 21st-century equivalent of insane asylums."[278] One estimate is that 15% of inmates have a serious mental illness, and about 20% of adolescents in juvenile detention facilities have a major mental illness.[279] A recent report concluded that the two largest psychiatric inpatient institutions in the United States are the Los Angeles County Jail and New York's Rikers Island.[280] The overlap between the criminal justice system and the mental health system is consistent with a disease theory of criminal law.

Studies also show an environmental link to crime. Although most abused children do not become criminals, neglect and abuse of a child increases that individual's risk for criminal and violent

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> there are specific personalities that get into trouble with the law and those personalities are heritable."

Id.

276 *See* ENGLANDER, *supra* note 267, 86-90. "[M]en perpetrate street violence in numbers overwhelmingly larger than women. In contrast, women seem to perpetrate family violence as often as men do, although their aggression is generally significantly less severe, is much less often fatal, and is more likely to result from self-defense." *Id.* at 88. This difference between men and women, however, may not be entirely biological and may be affected, in part, by the different social settings boys and girls face as children. *Id.* at 89-90.

On a similar point, several defendants have unsuccessfully tried to use a defense that they have an XYY chromosomal abnormality (as compared to the pair of sex chromosomes for the normal male of XY – or the normal female of XX). *See, e.g.*, People v. Tanner, 91 Cal. Rptr. 656 (Ct. App. 1970); People v. Yukl, 372 N.Y.S.2d 313 (Sup. Ct. 1975); State v. Roberts, 544 P.2d 754 (Wash. 1976).

277 The argument, which was unsuccessful, was made in the Georgia case of Stephen Mobley. RIDLEY, *supra* note 133, at 272.

278 *Prisoners of Mental Illness*, HARV. MENTAL HEALTH LETTER, (Harv. Med. Sch., Cambridge, Mass.), July 1, 2003, *available at* 2003 WL 2050931. "[T]he number of residents in state mental hospitals has declined from nearly 600,000 in the 1950s to about 60,000 today." *Id.*

279 *Id.*

280 Sally Satel, *Out of the Asylum, Into the Cell*, N.Y. TIMES, Nov. 1, 2003, at A15. The report by Human Rights Watch found that there were 3,400 mentally ill prisoners at the Los Angeles County Jail and 3,000 mentally ill inmates at Rikers Island. *Id.* A Justice Department report found that approximately sixteen percent of inmates in the United States have serious psychiatric illnesses. *Id.*

behavior.[281] Some analysis has found that "[c]riminal behaviors are acquired by a process of socialization and learning."[282] A number of researchers have concluded that a child's attachment to a parent or parents, which may be the most important event in a child's life, "is probably strongly related to the child's tendency to be either prosocial or aggressive."[283]

The nature and nurture factors do not work in isolation from each other. Physical components of human beings work together with the environment in ways we still are discovering. Some scientific studies have indicated a connection between a person's genes and a person's environment and whether the person grows into a criminal.[284] One study found that people with a certain type of gene who are exposed to abuse as a child are much more likely to commit crimes, while people who were not victims of abuse or did not have the certain type of gene were much less likely to commit crimes.[285] One author explained, "[Some experts] recognize the role of sexual selection in making young adult males the prime perpetrators of murder, for example, but recognize just as strongly the role of the environment in producing the situations that actually elicit murder."[286]

There are a range of studies regarding crime's relation to genetic evidence, hormonal research, intellectual ability, attention deficit disorder, minimal brain dysfunction, socioeconomic fac-

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281 RAINE, *supra* note 273, at 246.

282 David C. Rowe, *An Adaptive Strategy Theory of Crime and Delinquency*, *in* DELINQUENCY AND CRIME: CURRENT THEORIES 268-314 (J. David Hawkins ed., 1996). Although Professor Rowe notes the importance of environmental factors, he also notes the role that biological factors play. *Id.*

283 ENGLANDER, *supra* note 267, at 68. "The findings that violence interferes with attachment, and that a poor attachment may help predict antisocial behavior, might help explain the relationship between parental violence and an increased risk of aggression in the family children." *Id.*

284 *See, e.g.*, RIDLEY, *supra* note 133, at 267-68. Professor Ridley cites a large study from Denmark that looked at the percent probability of a person getting in trouble with the law where the person was adopted from an honest family into an honest family (13.5%); where the person was adopted from an honest family into a family that included criminals (14.7%); where the person was adopted from criminal parents into an honest family (20%); and where both biological parents and the adopting parents were criminals (24.5%). *Id.* at 253. Interestingly, Professor Ridley still concludes that, despite the importance of heredity and environment, there is free will. *Id.* at 272-75.

285 *See id.* at 267-69. The study was done by Terrie Moffitt and Avshalom Caspi on 400 young men in a city in New Zealand, checking the subjects at regular intervals. *Id.* at 267. Studies of animals have shown a similar interaction between genes and environment in creating aggressive behavior. *See, e.g., id*. at 50.

286 *Id*. at 246 (citing MARTIN DALY & MARGO WILSON, HOMICIDE (1988)).

tors, familial factors, sociological influences, and other factors.[287] These factors are reflected in the list of capital case mitigating circumstances. Examining Disease Theory Factors, one sees that the law acknowledges, at least to some extent, that violence is a result of nature and nurture. The mitigating factors that courts and legislators have created reveal how society views the reasons for violent crime.

One might argue that the criminal nature in a defendant develops not by choice but by other factors, much like the way diseases develop by hereditary and outside factors. Just as we do not blame individuals for getting diseases, one might argue that a criminal is similarly not blameworthy. A disease theory of crime would focus on finding a cure rather than on punishing.

Not everyone embraces the disease theory. Some scholars argue that current understandings of biology and cognitive neuroscience are consistent with the claim that human beings still act with free will.[288] One scientist has questioned the effects of the adoption of disease theory on the criminal justice system: "[I]t is much bruited about that the discovery of genes influencing behavior will lead to an epidemic of lawyers to try to excuse their clients on the ground that it was their genetic fate to commit crimes, not their choice."[289] He concluded, however, that because of deterrence concerns, it would be unlikely that juries and judges would release people predisposed to commit crimes.[290]

The deterrence concern, however, does not address the important moral implications. Society has a right to protect itself, but the issue is whether it can morally condemn individuals. If a person's predisposition to commit crime comes from that person's

[287] *See, e.g.*, ENGLANDER, *supra* note 267; RAINE, *supra* note 273; Denno, *supra* note 137, at 619-60. Some studies have indicated that important predictors for whether males will commit crimes include "poor parental child management techniques, childhood antisocial behavior, offending by parents and siblings, low intelligence and educational attainment, and separation from parents." Farrington, *supra* note 273, at 83.

[288] *See, e.g.*, DANIEL C. DENNETT, FREEDOM EVOLVES (2003). Professor Dennett, who is a university professor and Director of the Center for Cognitive Studies at Tufts University, concedes that genes and environment play a major role in creating who a person is, but still concludes that all human actions are not inevitable. *See id.* at 156-66.

[289] RIDLEY, *supra* note 133, at 271.

[290] *Id.* at 271-72. Professor Ridley did note that a gene defense would be useful for sentencing purposes in death penalty cases, presumably as a mitigating circumstance. *Id.* at 272. He notes that the gene "defense" was used in the Georgia capital case of Stephen Mobley. *Id.*

genes and environment, arguably there is no moral justification to place individual blame upon the person. Society may be justified only in acting to prevent the person from committing future crimes but not justified in any aspects of the punishment that are retributive. In other words, under the disease theory, once the person is no longer a threat or "cured," then society is not morally entitled to keep the person in prison. In considering the moral implications from the lessons of science, it is helpful to consider philosophical theories underlying the use of mitigating circumstances.[291]

B. Philosophical View: Which Views of Disease Theory and Free Will Form the Basis of Our Criminal Justice System?

Ultimately, disease theory, scientific evidence about the causes of crimes, and Disease Theory Factors raise the issue of whether or not human beings have free will and whether there is any philosophical and moral basis for our capital punishment system.[292] Philosophers have used different definitions of "free will," but for criminal culpability purposes, this Article uses the term in the sense of how much freedom one has at the point she commits a crime, i.e., whether the individual has the ability to make the choice and originates the idea and behavior on her own accord not completely dictated by other causes.

The debate of free will versus determinism has been around for centuries, but the developments of scientific knowledge about human behavior in the late eighteenth century led to optimism about understanding criminal behavior.[293] During the Progres-

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[291] Of course, the scientific studies help to inform our understanding of the free will versus determinism debate. For example, scientific studies about brain activity by Benjamin Libet have indicated that philosophers should revisit the concept of free will. *See* DENNETT, *supra* note 288, at 228-42; Benjamin Libet, *The Timing of a Subjective Experience*, 12 BEHAV. & BRAIN SCI. 183, 183 (1989). Though one might argue that the development of science may make the free will debate irrelevant, as Tom Wolfe wrote, "Why wrestle with Kant's God, Freedom, and immortality when it is only a matter of time before neuroscience, probably through brain imaging, reveals the actual physical mechanism that fabricates these mental constructs, these illusions?" RIDLEY, *supra* note 133, at 249 (quoting TOM WOLFE, HOOKING UP (2000)).

[292] The resolution of the free will debate is beyond the scope of this Article, which instead focuses on the issue as it relates to the narrow context of mitigating factors in capital cases.

[293] *See* Thomas A. Green, *Freedom and Criminal Responsibility in the Age of Pound: An Essay on Criminal Justice*, 93 MICH. L. REV. 1915, 1921-22 (1995).

sive Era in the United States, a deterministic view of human behavior began to increasingly play a role in the understanding of criminal behavior.[294]

Much of the recent scientific studies about causality discussed above tend to undermine a free will theory, though some argue that science still does support some level of free will.[295] While ultimately much of American criminal law takes a free will view,[296] the consideration of the philosophical consequences of free will and determinism in criminal law continues to be an essential discussion when talking about criminal responsibility.

This Article does not solve the age-old debate of free will versus determinism. Instead, the following sub-sections consider the role of mitigating circumstances, the death penalty, and disease theory: (1) if there is no free will; (2) if there is absolute free will; and (3) if there is partial free will. Ultimately, the current system is not justified under any of the possible philosophical models.

1. A Determinism Model Does Not Morally Justify the Criminal Justice System's Use of Death Penalty or Consideration of Mitigating Factors

One philosophical view is that there is no free will because all human actions have a cause, a view sometimes called hard determinism or incompatibilism.[297] If we decide that individuals do not have free will, then we have no moral right to punish them for determined actions.[298] If every act of the defendant was determined and completely beyond the defendant's control because, as Baruch Spinoza asserted, "[t]here is no such thing as free will,"[299] then we cannot say that the defendant is morally blameworthy.[300] Thus, the legal system's uses of punishment, the

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[294] *See id*. at 1922.

[295] For example, California neuroscientist Walter Freeman and German philosopher Henrik Walter argue that causation of behavior is circular and not linear and permits some level of free will. RIDLEY, *supra* note 133, at 272-74.

[296] Green, *supra* note 293, at 1942-43.

[297] *See, e.g.*, Steven Goldberg, *Evolutionary Biology Meets Determinism: Learning from Philosophy, Freud, and Spinoza*, 53 FLA. L. REV. 893, 898 (2001).

[298] One may argue, however, that if there is no free will, our decision to punish is predetermined. Then, one may wonder whether we may say that our decision to punish is immoral if we had no free will in making that decision.

[299] THE GREAT QUOTATIONS 651 (comp. by George Seldes 1990) (quoting BARUCH SPINOZA, ETHICS (1677)). "The mind is induced to wish this or that by some cause, and that cause is determined by another cause, and so on back to infinity." *Id.*

[300] On the other hand, compatibilists believe that it is not illogical to believe in

death penalty, and retributive theory do not seem consistent with a belief in determinism.[301]

A utilitarian might argue that society is still justified in punishing people who act without free will for deterrence purposes, even though the individual being punished is not deserving of punishment under retributive theory. Still, there is a question whether society would be morally justified to inflict suffering on an individual who could not have acted otherwise.

Disease Theory Factors are used in capital cases to show that circumstances beyond an individual's control caused the murder. The use of mitigating circumstances in capital cases to establish the causes of crime, then, seems to be consistent with a theory of determinism. As one professor of philosophy has noted, "[T]he more thoroughly and in detail we know the causal factors leading a person to behave as he does, the more we tend to exempt him from responsibility."[302] Further, the more one learns that com-

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determinism and in human responsibility for actions. Goldberg, *supra* note 297, at 899.

301 The same might be true even if any freedom of will that might exist does not affect individual earthly actions, as Arthur Schopenhauer concluded in his *Prize Essay on the Freedom of the Will*, which was awarded a gold medal in 1839 by the Royal Norwegian Society of Sciences:

> In a word, a human being always does only what he wills, and yet he necessarily does it. This is owing to the fact that he already *is* what he wills; for from what he is all that he ever does follows of necessity. If we consider his actions *objectively*, i.e., from without, we recognize apodictically that, like the actions of every [human] being in nature, they must be subject to the law of causality in all its strictness. *Subjectively*, on the other hand, everyone feels that he always does only what he *wills*. But this means merely that his actions are the pure manifestation of his very own essence. Therefore if it could feel, every being in nature, even the lowest, would feel the same thing.
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> *Freedom*, then, is not suspended by my treatment of the matter, but merely moved up from the domain of individual actions, where it obviously is not to be found, into a higher region, which, however, is not so easily accessible to our cognition; in other words, freedom is transcendental.

ARTHUR SCHOPENHAUER, PRIZE ESSAY ON THE FREEDOM OF THE WILL 98 (1999).

302 John Hospers, *Psychoanalysis and Moral Responsibility*, *in* THE PROBLEMS OF PHILOSOPHY 452 (William P. Alston & Richard B. Brandt eds., 2d ed. 1978) (emphasis omitted).

> Let us suppose it were established that a man commits murder only if, sometime during the previous week, he has eaten a certain combination of foods—say, tuna fish salad at a meal also including peas, mushroom soup, and blueberry pie. What if we were to track down the factors common to all murders committed in this country during the last twenty years and found this factor present in all of them, and only in them? The example is of course empirically absurd; but may it not be that there is *some* combination of factors that regularly leads to homicide . . . ?

mon causation factors are present for some murderers, the more one may believe that causation factors exist for all murderers, even though not all factors have been discovered.

However, an advocate of free will might argue that the use of the death penalty and mitigating circumstances is consistent with a belief in free will because mitigating factors would be unnecessary for a legal system that believed in determinism. If everything is predetermined, then: (1) every murder is predetermined, not just some murders; (2) no individuals are blameworthy; and (3) therefore there is no moral justification for the death penalty and no need for mitigating circumstances to distinguish individual cases. Thus, the legal system's adoption of the death penalty and the use of mitigating circumstances for differentiating individual cases illustrates that the legal system embraces ideas of free will to some extent.

2. *A Free Will Model Does Not Justify the Death Penalty and Consideration of Mitigating Circumstances*

Many world religions and philosophies are based upon the assumption that people act under free will.[303] Although early thinkers believed that outside forces dictated the actions of human beings, many, beginning with Socrates, have argued for the free will of human beings.[304] Aristotle wrote, "Virtue, as well as evil, lies in our power."[305] Although much of Indian culture focuses on the deterministic law of karma,[306] Ghandhi claimed that "no man loses his freedom except through his own weak-

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Id. at 451.

303 One commentator has noted that an anthropological study might show that "all cultures, religions, and philosophic disciplines tend to view humans as free, conscious beings, capable of exercising self-control." Rachel J. Littman, *Adequate Provocation, Individual Responsibility, and the Deconstruction of Free Will*, 60 ALB. L. REV. 1127, 1146 (1997). "The historical tendency of religion (though replete with anomalies like the Calvinist theory of predestination) has been to fix both the blame and the punishment for sin on the individual and to repudiate the tribal concept that the sins of the fathers are inevitably visited upon the children." SUSAN JACOBY, WILD JUSTICE: THE EVOLUTION OF REVENGE 69 (1983).

304 *See* S.E. FROST, JR., BASIC TEACHINGS OF THE GREAT PHILOSOPHERS, 129-30 (rev. ed., Anchor Books 1989) (1942).

305 *Id.* at 131.

306 *See* Littman, *supra* note 303, at 1146. However, "[i]n Upanishadic psychology, the inner demand all human beings feel for freedom is ultimately a drive to free ourselves from the inherited and acquired compulsions in our own psychic makeup." Michael N. Nagler, *Reading the Upanishads*, *in* THE UPANISHADS 291 (Eknath Easwaran trans., 1987).

ness."[307] One of existentialist Jean-Paul Sartre's most famous statements was that "man is condemned to be free."[308]

Further, the legal system generally assumes that human beings act with free will. As Justice Cardozo wrote in *Steward Machine Company v. Davis*, "till now the law has been guided by a robust common sense which assumes the freedom of the will as a working hypothesis in the solution of its problems."[309] Other cases have made similar assertions,[310] and William Blackstone wrote, "[P]unishments are . . . only inflicted for abuse of that free will, which God has given to man."[311] Professor Sanford Kadish noted that it is to society's benefit to presume free will exists, even if those who argue for determinism are actually correct: "Whether the concept of man as responsible agent is fact or fancy is a very different question from whether we ought to insist that the government in its coercive dealings with individuals must act on that premise."[312]

Therefore, traditional views of punishment, based upon the belief that defendants acted with free will, form the bases for the belief that we are morally justified in executing defendants. For example, utilitarianism accepts the belief that conduct of individ-

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307 Nagler, *supra* note 306, at 291.

308 Jean-Paul Sartre, *The Ethics of Existentialism*, *in* THE PROBLEMS OF PHILOSOPHY, *supra* note 302, at 260.

> Condemned, because he did not create himself, yet, in other respects is free; because, once thrown into the world, he is responsible for everything he does. The existentialist does not believe in the power of passion. He will never agree that a sweeping passion is a ravaging torrent which fatally leads a man to certain acts and is therefore an excuse.

Id.

309 301 U.S. 548, 590 (1937).

310 *See, e.g.*, United States v. Grayson, 438 U.S. 41, 52 (1978) (noting that a deterministic view would be "inconsistent with the underlying precepts of our criminal justice system"); Morissette v. United States, 342 U.S. 246, 250 (1952) (stating that a universal element of the law is the "belief in [the] freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil").

311 4 WILLIAM BLACKSTONE, COMMENTARIES *27 (William S. Hein & Co. 1992) (1769).

312 Sanford H. Kadish, *The Decline of Innocence*, 26 CAMBRIDGE L.J. 273, 287 (1968), *reprinted in* SANFORD H. KADISH, BLAME AND PUNISHMENT: ESSAYS IN THE CRIMINAL LAW 65, 77 (1987). Professor Kadish stated, "Much of our commitment to democratic values, to human dignity and self-determination, to the value of the individual, turns on the pivot of a view of man as a responsible agent entitled to be praised or blamed depending upon his free choice of conduct." *Id.* One may question, however, whether our commitment to human dignity is upheld if our moral justification for executions is based upon a convenient presumption that has no basis in reality.

uals, such as potential criminals, can be affected by outside factors, such as the threat of punishment or execution. Thus, the utilitarian would argue, individuals have free choice.[313] However, it is possible for a utilitarian to concede that there is not complete free will. According to Graham McFee, "The utilitarian position concedes the determinist's first premise, that every event has a cause, while maintaining notions of moral responsibility, and indeed responsibility more generally."[314]

The belief in absolute free will is consistent with the retributivist theory of punishment: criminals deserve punishment because they acted out of free will. For example, Immanuel Kant believed that the actions of human beings were not dictated by rigid causation principles,[315] and he believed in the retributive purposes of punishment and in the death penalty for certain crimes.[316]

The use of Disease Theory Factors, however, seems inconsistent with a belief in complete free will. If there is complete free will in a society that uses a death penalty, then murderers could be condemned without consideration of mitigating circumstances because the decision to murder was made with complete free will.[317] At the least, if there is free will, many of the Disease

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313 One author explained utilitarianism's embrace of free will concepts:

> The 'utilitarian' position, then, turns the determinist argument on its head, urging that those events where praise or blame would be efficacious in altering the behaviour are free, rather than, as the determinist does, asking whether any behaviour *can* be affected by, for example, praise or blame. There seems something right in this. For we might well think that, across a range of human activity, praising activities will tend to make humans more likely to continue with them and censuring will have the opposite tendency.

GRAHAM MCFEE, FREE WILL 72 (2000).

314 *Id.*

315 "Reason is present in all the actions of men at all times and under all circumstances, and is always the same." IMMANUEL KANT, CRITIQUE OF PURE REASON 476 (Norman Kemp Smith trans., St. Martin's Press 1968) (1781); *see* EDGAR BODENHEIMER, PHILOSOPHY OF RESPONSIBILITY 18 (1980).

> It is impossible, Kant held, ever to prove that the will is free. Nevertheless, because such a belief is necessary, we can act and live as if the will was free. When we so act and live, we discover that certain moral insights are possible . . . . We are not drowned in complete moral despair . . . . Life becomes meaningful . . . . The moral consciousness of man implies that the will is free.

FROST, JR., *supra* note 304, at 147.

316 HENBERG, *supra* note 11, at 158-59, 164-66.

317 One view that rejects the claim that human will is determined is sometimes called libertarianism. *See, e.g.*, Goldberg, *supra* note 297. "Libertarians accept that humans may be predisposed to take certain actions by evolution, the environment,

Theory Factors should not be mitigating. If at the moment a murderer decides to kill, that person has complete free will in that decision and is not affected by prior events, then arguably we are morally justified in executing that defendant based upon the free choice to kill in spite of whatever happened in the defendant's past.[318] In other words, under a complete free will model, a defendant's experience as a child would be irrelevant. Thus, the fact that courts accept Disease Theory Factors shows that the legal system does not follow a complete free will model.

More recently, the complete free will model has become less popular among philosophers because of advances by social scientists, behavioral scientists, medical experts, and psychology experts.[319] Similarly, the criminal justice system, by allowing consideration of certain defenses and mitigating factors that indicate that the defendant was not in complete control of events, accepts that individuals are not acting with complete free will. For example, in *Atkins*, the Court excluded mentally retarded defendants from death row because they were more likely to be acting on "impulse," i.e., without free will.[320] The courts' moral rejection of determinism by considering mitigating factors at all, and the rejection of absolute free will by allowing Disease Theory Factors, indicate that the criminal justice system must be grounded in an alternative belief, as discussed in the next subsection.

C. *Does a Partial Free Will Model Justify the Death Penalty and the Consideration of Mitigating Circumstances?*

1. *An Alternative View to Absolute Free Will or Determinism Is Limited Free Will*

A third view in the free will debate is the belief that humans have some free will but it is limited by various means beyond our

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and other causes outside of their control, but they insist that, in the end, individuals can choose to follow or not follow these tendencies." *Id.* (citing Littman, *supra* note 303, at 1138-39).

318 The free will debate is the essence of the disagreement between some death penalty abolitionists and some death penalty retentionists. The retentionists believe in free will and the resulting moral culpability, while some death penalty abolitionists believe that defendants may not be acting with complete free will. *See infra* notes 352-56 and accompanying text (discussing death penalty supporter Justice Scalia's views on free will); *see supra* notes 126-127 and accompanying text (discussing death penalty abolitionist Clarence Darrow's views on free will).

319 Littman, *supra* note 303, at 1132.

320 536 U.S. 304, 320-21 (2001).

control.[321] A baby born with a disease may not have free will to be an Olympic athlete. A child born in poverty who starves to death does not have the free will to make choices that would lead her to be president of the United States. A child born with brain damage who is severely abused has limited options too. Even if that child has free will in small day-to-day choices, those are a limited range of choices compared to those made by a child growing up healthy in a loving environment. We may have free will to make small individual choices throughout the day, but given a certain biological make-up and a fixed set of environmental factors, our decisions on some issues are determined, at least to some extent. One view of limited free will has been called "degree determinism."[322]

The debate about free will has been argued by philosophers and may never be resolved. "[John] Locke said that it was as nonsensical to ask 'whether a man's will be free as to ask whether his sleep be swift or his virtue square.'"[323] Yet, even if humans do have free will, their choices are limited by circumstances beyond their control.[324] As you read this Article, if the electricity

321 Psychology Professor Adrian Raine explained the concept of variable free will and how it relates to the criminal justice system:

> Perhaps one erroneous assumption in these considerations is that free will is a categorical variable, that one either has free will or does not have free will at a specific point of time. Instead, it seems much more likely that free will lies on a continuum and that there are differing degrees to which each of us as individuals have a free choice in most of our daily actions as well as those more extreme acts such as killing another individual. While it is true that in most cases a criminal has a choice regarding whether or not to commit a criminal act, the decision is likely to be heavily weighted by a large number of preceding events, including the individual's social history and presence/absence of both social and biological predispositional influences. Indeed, the whole notion of absolute free will as applied to criminal offending may be unrealistic, with consequent implications for issues such as responsibility for one's actions, consequent punishment, and justice.

RAINE, *supra* note 273, at 310.

322 NORVAL MORRIS, MADNESS AND THE CRIMINAL LAW 61 (1982) (defining degree determinism as the "degree of freedom of choice on a continuum from the hypothetically entirely rational to the hypothetically pathologically determined—in states of consciousness neither polar condition exists"); Denno, *supra* note 137, at 661-662; Michael Moore, *Causation and the Excuses*, 73 CAL. L. REV. 1091, 1114-18 (1985) (criticizing degree determinism). Degree determinism has been defined as "a denial that all human actions are fully caused. The degree determinist believes in a continuum of freedom from causation: different actions can be more or less determined and thus more or less free." *Id*. at 1114.

323 RIDLEY, *supra* note 133, at 270.

324 The question of where this free will comes from is beyond the scope of this Article. One explanation comes from a Californian neuroscientist named Walter

in your building goes out, your decision as to whether to continue reading or to go do something else is affected by surrounding circumstances. You might have the option to go outside to continue reading if the weather is nice, but if it is raining outside—as it is as the author writes this section—your options are limited.[325]

Some philosophers, faced with the scientific studies supporting determinism and a causal view of human actions, argue that determinism and free will are compatible.[326] Although an in-depth discussion of compatibilism, or soft determinism, is beyond the scope of this Article, compatibilists concede that at least on one level, we live in a world with causes.[327] However, they argue that we may still hold people morally responsible because even if human actions are caused, such actions are "the product of potentially rational practical reason."[328]

Freeman who notes that the belief in predetermination comes from the belief that the brain is embedded in a simple linear causal chain, when complex nonlinear causality may be a source of free will. *See id*. at 272. Similarly,

> [t]he German philosopher Henrik Walter believes that the full ideal of free will is genuinely an illusion, but that people do possess a lesser form of it, which he calls natural autonomy and which derives from the feedback loops within the brain, where the results of one process become the next starting conditions. Neurons in the brain are hearing back from the recipient even before they have finished sending messages. The response alters the message they send, which in turn alters the response, and so on. This idea is fundamental to many theories of consciousness.

Id. at 274.

325 The concept of degree determinism has its critics. "It makes sense to say that we are determined or that we are free, but to speak of being partly determined or partly free makes as much sense as to speak of being partly pregnant." *See* Moore, *supra* note 322, at 1115-16.

326 The compatibilist view is popular among moral philosophers today. *See* Stephen J. Morse, *The Moral Metaphysics of Causation and Results*, 88 CAL. L. REV. 879, 886 (2000).

327 *Id*.

328 *Id*.

> A compatibilist holds an agent responsible if the agent acts intentionally, complies with or breaches a moral or legal obligation we accept, and the agent is generally capable of grasping and of being guided by reason in the context . . . . For the compatibilist, moral responsibility is dependent primarily on the agent's general capacity to grasp and be guided by reason, because it is reasonable and fair to hold an agent responsible only if the agent possesses this capacity. According to this account, human action is different from the rest of the causal universe not because it is uncaused, but rather because it is the product of potentially rational practical reason. Only people act for reasons, and moral and legal rules are thus action-guiding primarily because they provide an agent with good reasons for forbearance or action.

Id. (footnote omitted).

Yet, if our choices are influenced by fate, then it makes moral sense that those factors that limit one's free will be considered in the capital sentencing determination.[329] Thomas Nagel wrote about this topic in an essay about "Moral Luck," explaining that who we are and what we do is subject to luck, thus questioning moral culpability because we cannot blame people for acts over which they have no or only partial control.[330] When circumstances and characters are shaped at least to some extent by "moral luck," we do not have the moral right to condemn those individuals. Mitigating circumstances help juries to weigh the moral luck factors in determining whether to impose the death sentence or life imprisonment.

2. *Ultimately, Even a Limited Free Will Model Does Not Justify the Current Death Penalty System*

The theory of moral luck, even in a limited sense, is not that *some* people are shaped by surrounding hereditary and environmental factors, but that *everyone* is.[331] So, defendants whose de-

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[329] Of course, limits on free will do not always result in crimes or misfortunes. To acknowledge that unlucky events may lead to poor results in one's life is also to acknowledge that good fortune may have played a significant role in one's successes.

[330] Thomas Nagel, *Moral Luck*, *in* FREE WILL 174, 177 (Gary Watson ed., 1982). Nagel explained:

> There are roughly four ways in which the natural objects of moral assessment are disturbingly subject to luck. One is the phenomenon of constitutive luck—the kind of person you are, where this is not just a question of what you deliberately do, but of your inclinations, capacities, and temperament. Another category is luck in one's circumstances—the kind of problems and situations one faces. The other two have to do with the causes and effects of action: luck in how one is determined by antecedent circumstances, and luck in the way one's actions and projects turn out. All of them present a common problem. They are all opposed by the idea that one cannot be more culpable or estimable for anything than one is for that fraction of it which is under one's control. It seems irrational to take or dispense credit or blame for matters over which a person has no control, or for their influence on results over which he has partial control. Such things may create the conditions for action, but action can be judged only to the extent that it goes beyond these conditions and does not just result from them.

Id.

[331] Professor Michael Moore made an interesting argument that while legal scholars make excuse arguments for defendants with an abusive or poor background, rarely do they make arguments that criminals should be excused because of "their happy childhood, their parents' wealth, or the advantages they may have enjoyed—even though such factors may well cause someone . . . to become a criminal." Moore, *supra* note 322, at 1146. He suggests that the reason we allow the unhappy background to be an excuse is not so much based on causal explanations but because

fense attorneys failed to present mitigating evidence for juries to consider were not defendants without mitigating factors. In those cases, those mitigating circumstances, or moral luck factors, were not discovered or presented. Another problem is that even when mitigating evidence is presented, its weight is dictated by the beliefs of the decision-makers in the individual cases. Therefore, as discussed below, even the partial free will model does not provide a moral foundation for a system that executes capital defendants.[332]

a. *Is the Death Penalty Morally Justified If Judge, Jury, and Executioner Never Have a Complete Moral Picture of the Defendant?*

The limited free will view, like the free will and determinism models, ultimately fails to provide a moral justification for the current capital punishment system. One problem that arises from the attempt to provide a moral justification for executing human beings through consideration of mitigating factors is that not all mitigating evidence is found in individual cases. This problem occurs because of our incomplete understanding of the causes of crime and because of attorneys' failures or inability to

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we feel guilty for not helping the unhappy child or we feel that the defendant has already suffered enough. *See id.*

Legislatures and courts generally do not list a mitigating circumstances of "happy childhood" as an excuse, but that might be (1) because there is no, or only a few, capital defendants with that background and (2) because there have been no studies that such a background creates murderers. Still, if we live in a determinist world, then any factors in an individual's background, even positive ones, contribute to creating the person who commits murder.

Professor Moore references an argument of privileged background that was made by Clarence Darrow in representing Richard Loeb and Nathan Leopold, Jr. . *See id*.; Clarence Darrow, *The Crime of Compulsion*, *in* ATTORNEY FOR THE DAMNED: CLARENCE DARROW IN THE COURTROOM 16, 16-88 (Arthur Weinberg ed., 1989). Darrow argued to the court, "It is just as often a great misfortune to be the child of the rich as it is to be the child of the poor." *Id*. at 59. In fact, though, much of Darrow's argument centered on the defendants being "emotionally defective." *Id.* at 57.

[332] *See* Moore, *supra* note 322, at 1119. Moore states:

> If we truly believe that all behavior is fully determined and that fully determined behavior is not the actor's responsibility, it would be immoral to hold people responsible because we were ignorant of what caused them to act. To say otherwise would be tantamount to excusing those who have some particular excuse about which we have knowledge, but holding all others responsible because we are ignorant of what excuse they have—even though we believe that all of those others have some valid excuse.

Id.

discover evidence. Under the limited free will model, if we consider current scientific beliefs that crimes have causes, the defense lawyer's failure to discover the cause, or mitigating factors, in an individual case does not mean that a cause does not exist. Similarly, when doctors discover a disease, if they do not know the causes of the disease, they do not assume that there is no cause.

Disease Theory Factors are the building blocks of our understanding of the causes of violent crimes, yet the picture in an individual case is often incomplete. The list of possible causes of crime is still being developed and studied, and we may never know all of the causes because a person's "heart is an abyss" whose depths we cannot fathom.[333] The incomplete list raises the question of whether we can ever determine the "moral desert"[334] of capital defendants accurately. Professor Stephen Nathanson has argued that there are three possibilities regarding our ability to determine moral desert: (1) we cannot develop a precise scale to assess moral desert among individuals; (2) we can never accurately determine the blameworthiness of a person because we will never have complete information; or (3) although we can accurately determine a person's moral blameworthiness, the legal system is incapable of making that determination in an accurate and unbiased way.[335]

Although mitigating circumstances are an attempt to determine moral desert, they still give an incomplete picture of the defendant. Not only are there other possible causes of crime yet to be discovered, known causes may not be adequately researched in individual cases. For example, because the mitigating circumstance of child abuse is relevant to moral desert, a de-

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333 Baron P.H.D. d'Holbach, *Determinism Rules Out Free Will*, *in* THE PROBLEMS OF PHILOSOPHY, *supra* note 302, at 412.

334 THE OXFORD COMPANION TO PHILOSOPHY 193 (Ted Honderich ed., 1995).

> It is a belief fundamental to morality that people ought to get what they deserve. What they deserve are benefits and harms made appropriate by some past fact[s] about the recipients . . . .
>
> Underlying the *ought* involved in desert is the notion of a moral equilibrium: the state in which the benefits and harms an individual receives are proportional to what is warranted by the significant fact in the individual's past. One central aim of morality is to maintain this equilibrium by distributing benefits and harms according to desert and by correcting the disequilibrium that occurs when benefits and harms are received undeservedly.

Id.

335 *See* STEPHEN NATHANSON, AN EYE FOR AN EYE: THE IMMORALITY OF PUNISHING BY DEATH 90-94 (2d ed. 2001).

fense attorney's failure to discover such an existing mitigating circumstance results in a morally inaccurate result.

There are two main reasons for incomplete research of mitigating evidence in individual cases. First, it is not uncommon for capital defense attorneys to fail to adequately investigate the background of their clients.[336] Often because of a lack of resources or for other reasons, attorneys fail to complete the complex task of doing a complete mitigation investigation or supervising such an investigation, and often the courts find that an incomplete investigation is constitutionally adequate.[337]

The second reason that an incomplete mitigation picture is often presented at sentencing is because of the inherent impossibility of presenting a complete picture of all of the influences in a person's life.[338] Mitigating evidence in a capital case goes back across the defendant's entire lifetime and even before the defendant's birth. As one scholar has noted,

> A proper mitigation investigation involves a complex process of researching records, interviewing family members and associates of capital defendants, following leads, multiple follow-up interviews, as well as the organization and compilation of potentially large quantities of evidence into a comprehensible summarized chronology that illustrates the cumulative effect of the influences on a capital defendant's life.[339]

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[336] *See, e.g.*, Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835 (1994); Ivan K. Fong, Note, *Ineffective Assistance of Counsel at Capital Sentencing*, 39 STAN. L. REV. 461 (1987).

[337] *See* Bright, *supra* note 336; Fong, *supra* note 336.

[338] One philosopher who believed in Determinism explained:

> [I]t must be acknowledged that the multiplicity and diversity of the causes which continually act upon man, frequently without even his knowledge, render it impossible, or at least extremely difficult for him to recur to the true principles of his own peculiar actions, much less the actions of others: they frequently depend upon causes so fugitive, so remote from their effects, and which, superficially examined, appear to have so little analogy, so slender a relation with them, that it requires singular sagacity to bring them into light. This is what renders the study of the moral man a task of such difficulty; this is the reason why his heart is an abyss, of which it is frequently impossible for him to fathom the depth.

d'Holbach, *supra* note 333, at 412.

[339] Daniel L. Payne, Note, *Building the Case for Life: A Mitigation Specialist as a Necessity and a Matter of Right*, 16 CAP. DEF. J. 43, 48 (2003); *see* Jonathan P. Tomes, *Damned If You Do, Damned If You Don't: The Use of Mitigation Experts in Death Penalty Litigation*, 24 AM. J. CRIM. L. 359, 365 (1997); Major David D. Velloney, *Balancing the Scales of Justice: Expanding Access to Mitigation Specialists in Military Death Penalty Cases*, 170 MIL. L. REV. 1, 33 (2001).

Such evidence is often difficult to find. Because relevant mitigating evidence may be traced back to decades before the trial, there are situations where even with a complete investigation, substantial mitigating evidence might not be discovered because witnesses have died or records have been destroyed.[340] Further, evidence of some of the Disease Theory Factors, such as child abuse, are not matters family members may be willing to discuss.[341] Therefore, in many cases it is impossible to present a complete picture of mitigating circumstances and especially of Disease Theory Factors. So, at best, as Professor Nathanson suggests, the legal system in this area gives an incomplete picture of moral desert.[342]

Under a limited free will model, the legal system, by adopting the jurisprudence of mitigating factors, accepts that there are causes of crime that are relevant to determining whether a person is executed. Of course, the legal system is not perfect, but there needs to be a higher standard of moral justification in situations where the system takes an individual's life. Because mitigating evidence is relevant to whether the system is morally justified in executing a defendant, an execution is not morally validated in cases with undiscovered mitigating evidence. Thus, the law of mitigating circumstances, an attempt to give a moral force to the execution of individuals, itself undermines the moral justifications for the death penalty.

b. *Is the Death Penalty Morally Justified If Personal Beliefs of Judges, Legislators, and Juries About Free Will Affect the Application of Mitigating Circumstances?*

Another practical problem in determining moral desert under a limited free will model is a disparity of moral beliefs held by the decision-makers about the extent of free will that an individual has. One of the benefits of a jury system is that it incorporates beliefs of the community. However, in the area of the death penalty where a higher degree of moral certainty is re-

[340] *See* Williams, *supra* note 244, at A25. "For many death-row inmates, there simply isn't enough available information . . . . Probation officers rarely dig deeply into a killer's family history. The killers themselves are seldom candid." *Id.*

[341] *See* Elizabeth Beck et al., *Seeking Sanctuary: Interviews with Family Members of Capital Defendants*, 88 CORNELL L. REV. 382, 413 (2003) (discussing how mitigating evidence can make a capital defendant's family feel ashamed within their community).

[342] *See* NATHANSON, *supra* note 335, at 90-94.

quired, the diversity of beliefs and the failure to accurately and consistently consider mitigating factors undermine the moral basis of the capital punishment system.

Despite the important role of mitigating factors in trying to discover the causes of violent crime, the people who consider the evidence impose their own beliefs about personal responsibility and good and evil, even if those beliefs are inconsistent with science and law.[343] Although courts and legislators mandate that various factors should be considered as mitigating in capital cases, the weight given to each factor varies depending on the individual decision-maker.[344]

One study by the Capital Juror Project found that jurors generally give different weight to different mitigating factors.[345] For example, as a whole, jurors give the most mitigating weight to the circumstances of residual doubt, mental retardation, and youthfulness, even though a significant number of jurors still would not give much weight to those factors.[346] Only a small percentage of jurors give weight to some other mitigating circumstances, such as lack of a criminal record, that a co-defendant received a life sentence, and that the crime was committed under the influence

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343 Similarly, one writer recently explained in an editorial that considering that the real rationale for the death penalty is vengeance, jurors are incapable of making a reasonable determination because:

> Human pain is not quantifiable. And understanding the pain of another turns largely on your own experience, your own sensitivities, and the victim's eloquence—not on any accepted extrinsic yardstick. By the same token, whether a defendant deserves to live or die turns largely on what lies deep in his heart and whether there is such thing as redemption; questions that jurors may not be suited to decide with any degree of certainty.

Dahlia Lithwick, *The Crying Game: Should We Decide Capital Punishment With Our Hearts or Our Heads?*, SLATE, Dec. 2, 2004, *at* http://www.slate.com/ id/ 2110567.

344 In some cases, judges and juries may view certain mitigating circumstances as aggravating. "Specifically, mental illness, substance abuse, and having a deprived and abusive childhood, factors that would appear to be mitigating and arising sympathy, may be viewed as aggravating and suggestive of future dangerousness." John M. Fabian, *Death Penalty Mitigation and the Role of the Forensic Psychologist*, 27 LAW & PSYCHOL. REV. 73, 90 (2003).

345 *See* Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 COLUM. L. REV. 1538 (1998).

346 *Id.* at 1563-64. Even for the mitigating factor of residual doubt, which was the most powerful mitigating factor, a significant number of jurors did not give it much weight. "[A]mong those twenty-eight jurors who said they actually held lingering doubt over the defendant's guilt, only 46.4% said it made them much less likely to vote for death, and only 57.1% said it made them at least slightly less likely. Fully 35.7% said it made no difference to them." *Id.* at 1563.

of alcohol or drugs.[347] The study found that "a third of jurors would assign some mitigating weight to the fact that the defendant had been seriously abused as a child, although nearly two-thirds would assign it no weight."[348]

The study concluded, "[N]otions of collective or societal responsibility for shaping the defendant's character played some role in jurors' capital sentencing decision, especially if it appeared that the defendant tried to get help for his problems but society somehow failed him. Notions of individual responsibility, however, played a larger role."[349]

Beliefs about personal responsibility and free will affect not only jurors, but affect legislators and judges. Justices Scalia and Thomas have written opinions advocating that the Court allow states to limit the consideration of mitigating circumstances.[350] Chief Justice Rehnquist also has indicated that he would approve some limitation on mitigating circumstances,[351] though Justice Scalia takes the most extreme position by arguing "that the Eighth Amendment does not require any consideration of mitigating evidence."[352]

Justice Scalia would abandon the mitigating factor requirement because of the arbitrariness it adds to the death penalty, but his proposed scheme is consistent with his belief in free will and that the punishment should be mainly or completely based upon the crime. For example, in a recent dissenting opinion in a capital case, he implied that a defendant's lack of mental capacity may be irrelevant when he wrote, "Surely culpability, and deservedness of the most severe retribution depends not merely (if at all) upon the mental capacity of the criminal (above the level where he is able to distinguish right from wrong) but also upon

347 *Id.* at 1562-63, 1565. For each of the factors of lack of criminal record, a codefendant received a life sentence, and that the crime was committed under the influence of alcohol or drugs, only about a fifth of the jurors surveyed said they would give them mitigating significance. *Id.*

348 *Id.* at 1565.

349 *Id.*

350 *See, e.g.*, Graham v. Collins, 506 U.S. 461, 493-500 (1993) (Thomas, J., concurring); Johnson v. Texas, 509 U.S. 350, 374 (1993) (Thomas, J., concurring); Sochor v. Florida, 504 U.S. 527, 554 (1992) (Scalia, J., concurring in part and dissenting in part); Walton v. Arizona, 497 U.S. 639, 664-65 (1990) (Scalia, J., concurring).

351 Chief Justice Rehnquist joined a dissenting opinion that argued that it would be constitutional to sentence a defendant to death without consideration of mitigating circumstances where that defendant committed murder while serving a life sentence. Sumner v. Shuman, 483 U.S. 66, 86 (1987).

352 *Sochor*, 504 U.S. at 554 (Scalia, J., concurring in part and dissenting in part).

the depravity of the crime."[353]

Justice Scalia explained more about free will in an essay on capital punishment and his own Christian beliefs: "The doctrine of free will—the ability of man to resist temptations to evil, which God will not permit beyond man's capacity to resist—is central to the Christian doctrine of salvation and damnation, heaven and hell."[354] Thus, he argued, "[T]he more Christian a country is the *less* likely it is to regard the death penalty as immoral."[355] Arguably, his proposed judicial solution to dealing with systemic arbitrariness by eliminating the mitigating factor requirement, as opposed to other possible solutions, might be guided by perceptions of how mitigating factors relate to free will and personal responsibility.[356]

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353 Atkins v. Virginia, 536 U.S. 304, 350 (2002) (Scalia, J., dissenting).

354 Antonin Scalia, *God's Justice and Ours*, FIRST THINGS, May 2002, at 17-21.

355 *Id.* In the essay, Justice Scalia quotes St. Paul: "[I]f thou do that which is evil, be afraid; for he beareth not the sword in vain: for he is the minister of God, a revenger to execute wrath upon him that doeth evil. Wherefore ye must needs be subject, not only for wrath, but also for conscience sake." *Id.* (quoting *Romans* 13:1-5).

356 For a further discussion of Justice Scalia's position regarding mitigating factors, see Jeffrey L. Kirchmeier, *Aggravating and Mitigating Factors: The Paradox of Today's Arbitrary and Mandatory Capital Punishment Scheme*, 6 WM. & MARY BILL RTS. J. 345, 447-51 (1998); Christopher E. Smith, *The Constitution and Criminal Punishment: The Emerging Visions of Justices Scalia and Thomas*, 43 DRAKE L. REV. 593, 613 (1995); Stephen G. Gey, *Justice Scalia's Death Penalty*, 20 FLA. ST. U. L. REV. 67, 96 (1992). Professor Gey has noted that Justice Scalia's justification for the death penalty does not center only on individual responsibility but also on society's obligations to execute murderers: "In Scalia's universe, the individualized moral guilt of the defendant is only one part of the equation. Society's outrage at crimes analogous to the defendant's is the other, equally important part of the equation." *Id.* at 124.

Further, Professor Gey argues that Justice Scalia's view of the death penalty is that it is an instrument of revenge rather than retribution. *Id.* at 125-30. Justice Scalia has cited Kant because they both agree about the responsibility of society to execute murderers. Morgan v. Illinois, 504 U.S. 719, 752 n.6 (1992) (Scalia J., dissenting) (quoting IMMANUEL KANT, THE PHILOSOPHY OF LAW 198 (W. Hastie trans., Augustus M. Kelley Pub. 1974) (1887) ("Even if a Civil Society resolved to dissolve itself with the consent of all its members . . . the last Murderer lying in the prison ought to be executed before the resolution was carried out."). However, Kant rejected punishment as revenge. Kant believed that "[t]he state alone possesses both a right and, more important, a duty of retribution; and as the state is impersonal, devoid of passion, its acts cannot be described as the 'channeling' of vengeance." MARVIN HENBERG, RETRIBUTION: EVIL FOR EVIL IN ETHICS, LAW, AND LITERATURE 159 (1990). It should be noted that "[c]lassical retributivism . . . is a late development [in history], attributable in its purest form to Kant and Hegel." *Id.* at 96. Interestingly, Hegel believed that not only was there a duty to punish, the offender had a moral right to be punished. *Id.* at 206.

Therefore, Supreme Court Justices may be swayed by their understandings about free will in evaluating mitigation. In the same way, other judges, like jurors, may give different weight to similar mitigating factors.[357] This disparity in the consideration of mitigating factors, resulting from a disparity in philosophical beliefs and scientific understandings, undermines the moral justification of capital punishment.

D. Scientific Evidence and Alternative Views of Free Will Fail to Provide Moral Justification for the Current Capital Punishment System

In conclusion, in light of scientific evidence of causation principles, none of the possible models of the role of free will provide a moral justification for the death penalty that is consistent with our current justice system. A pure free will model is inconsistent with the consideration of Disease Theory Factors. A determinism model is inconsistent both with the need for mitigating factors and with the use of the death penalty.

A limited free will view is most consistent with our current death penalty system. The attempt to embrace both free will and determinism, however, creates other problems and ultimately does not morally justify the capital punishment system. Despite the fact that courts and legislators have developed a long list of mitigating circumstances, the circumstances are not applied consistently. In some cases, they may be ignored or given less weight by jurors or judges with strong views about individual responsibility and free will. Existing mitigating factors might not be discovered at all. Thus, our current system is not morally justified even under a limited free will model.

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[357] For example, courts may give a range of weight to a defendant's background. *Compare* Blanco v. State, 706 So. 2d 7, 10-11 (Fla. 1997) (holding that trial court did not err in giving little mitigating weight to circumstance of defendant's impoverished childhood because other family members had the same background and did not follow lives of crime), *and* Williams v. State, 902 S.W.2d 767, 772 (Ark. 1995) (affirming death sentence and holding that there was no error for jury to find no mitigating factors even though the defendant offered evidence of his deprived socioeconomic background and dysfunctional family), *with* State v. Odom, 928 S.W.2d 18, 31 (Tenn. 1996) (noting that background evidence is relevant because defendants who come from a disadvantaged background or who have emotional or mental problems may be less culpable than other defendants), *and* Henley v. State, 960 S.W.2d 572, 581 (Tenn. 1997) (same), *and* Richardson v. State, 901 S.W.2d 941, 942 (Tex. Crim. App. 1994) (noting that society has a long-held belief that defendants who commit criminal acts that are attributable to a disadvantaged background may be less culpable than defendants without that excuse).

In specific cases, however, jurors may ultimately gain a new perspective of murderers from learning more about a defendant's mitigating circumstances, as shown by a study of twelve Indiana jurors who favored capital punishment but ultimately voted for a life sentence.[358] In that case, several of the jurors said that it was only by going through the experience of witnessing the mitigating evidence that they could vote for life, whereas their explanations to friends about why they rejected the death penalty seemed insufficient.[359]

The development of mitigating circumstances is an ongoing education process about the causes of crimes and one may wonder what the future holds if society learns the lessons that these individual jurors learned, and we gradually begin to give more consideration to such factors. Yet, we are still left with a system that lacks a consistent moral justification for retributive notions of punishment.

VI

The Future: Lessons for the Criminal Justice System from Mitigating Circumstances, Science, and Philosophy

A. *Disease Theory Will Have Broad Effects for Society and the Criminal Justice System*

Philosophical and scientific evidence supports disease theory and at least a partially deterministic view of human behavior.[360] Yet, the system does not sufficiently take into account these scientific and moral principles.[361] Roscoe Pound wrote that crimi-

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[358] *See* Kotlowitz, *supra* note 204. In this examination of the sentencing phase of the murder trial of Jeremy Gross, all twelve jurors began the trial favoring the death penalty in theory, but they were moved by mitigating evidence of the abusive circumstances of Mr. Gross's childhood, as well as evidence that he could do well in better environments. *Id*.

[359] *Id.*

[360] *See supra* Part V.A and V.B.

[361] Except for punishment purposes, the legal system's goals generally do not include an attempt to understand the causes of a crime. For example, in a civil suit surrounding the April 20, 1999 Columbine school shooting, all four of the parents of Eric Harris and Dylan Klebold were deposed. Peter Wilkinson, *Columbine, Five Years Later*, Salon, April 20, 2004, *at* http://www.salon.com/mwt/feature/2004/04/20/columbine_anniversary/ index.html. Despite the fact that the information from those depositions would be useful for society to understand what caused the young men to do such a horrible crime, "in a highly unusual decision, a Colorado magistrate ordered the deposition transcripts to be destroyed, and a federal judge barred any of the plaintiffs who witnessed the depositions from talking about them." *Id.*

nal law "is so rooted in theological ideas of free will and moral responsibility and juridical ideas of retribution . . . that we by no means make what we should of our discoveries."[362] More recently, another scholar noted that available scientific evidence about insanity is ignored by a legal system that embraces "medievalist concepts of sin and punishment."[363]

One reason that the criminal justice system rejects disease theory and maintains the belief that people have complete free will is because of a fear of the contrary view. One lawyer has claimed that a rejection of the idea of free will in the law would have "deleterious psychological consequences: to tell people that they have no power over their actions tends to prevent or weaken efforts to build inner controls."[364] If, as Judge Bazelon noted, we were not morally justified in punishing anyone and therefore we did not punish, then our streets would be overrun with crime.

However, one might adopt the view that crime is a disease and nobody "deserves" punishment, but we still need to incarcerate for utilitarian reasons to deter crime and protect society. Yet, under such a belief system where utilitarian justifications are the only basis for punishment, the criminal justice system would lose its moral authority.[365] As Professor Sanford Kadish noted, if we remove moral blameworthiness and claim to punish only out of deterrence concerns, "People would continue to see state coercion as punishment, notwithstanding official declarations that the state's only interest is the individual's welfare and social protec-

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At least one witness reported that the destroyed material "'would be rather large news,' the sort of stuff 'people have never heard, are not expecting, and would be shocked to find out.'" *Id.*

362 Roscoe Pound, *Book Review*, 3 AM. POL. SCI. REV. 281, 283-84 (1909) (reviewing MAURICE PARMELEE, THE PRINCIPLES OF ANTHROPOLOGY AND SOCIOLOGY IN THEIR RELATION TO CRIMINAL PROCEDURE (1908)).

363 Michael L. Perlin, *Unpacking the Myths: The Symbolism Mythology of Insanity Defense Jurisprudence*, 40 CASE W. RES. L. REV. 599, 730 (1989/1990).

364 EDGAR BODENHEIMER, PHILOSOPHY OF RESPONSIBILITY 49 (1980).

365 There are critics of using a utilitarian calculus for imposing punishment. For example,

> Dostoevsky developed a passionate hatred for utilitarian thought in all its forms—moral, social, and economic. To excise our native retributive conscience and to replace it with a mental felicfic calculator is, he believed, to debase and demean human nature in the worst way . . . . The utilitarian conscience, in Dostoevsky's judgment, sacrifices everything to externals, counseling us to forfeit our freedom in the mistaken belief that justice can be rationally calculated.

HENBERG, *supra* note 356, at 175.

tion."[366] Further, Professor Kadish argued that it is doubtful society would want to accept such a change, "since blame and punishment give expression to the concept of personal responsibility which is a central feature of our moral culture."[367] So, we proceed with the fiction that we have the moral authority to punish.

Because humans cannot prove whether we have free will or not, our beliefs are often based on a cost-benefit analysis, considering the costs of adopting either theory. In our normal lives, as a practical matter, we err on the side of choosing free will over determinism because, even if we are wrong, we have better lives if we believe in free will.[368] If society were to embrace determinism, there would be a loss of incentive to make the predetermined world a better place. However, in the area of capital punishment and the death penalty, the costs shift. If capital defendants act without free will, then we are executing people who are not morally blameworthy.[369] If they do have free will and we do not execute them because we believe they are not morally blameworthy, the cost is arguable.[370]

Isaiah Berlin noted how difficult it would be for society to change the way it acted and to embrace determinism over free will: "[I]t is difficult, and perhaps beyond our normal powers, to conceive what our picture of the world would be if we seriously believed [in determinism.]"[371] Further, one may ask whether re-

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366 Sanford H. Kadish, *Excusing Crime*, 75 CAL. L. REV. 257, 265 (1987).

367 *Id.*

368 Kant argued that "[l]ife becomes meaningful for us as human beings when we can believe that what we do is the result of free choice, and has, thereby, a moral meaning." FROST JR., *supra* note 304, at 147.

369 This argument leads to a circular argument that if everything is predetermined, so is our decision to execute murderers and we have not free will to act differently. One might argue that if everything is predetermined, there is no reason to debate the issue.

370 A free will advocate might argue that a failure to adopt a belief in anything besides that we have absolute free will would have adverse consequences on human behavior. People may tend to be more anti-social if they believe they are not morally responsible for their actions.

371 ISAIAH BERLIN, *Historical Inevitability*, *in* THE PROPER STUDY OF MANKIND, 119, 147 (Henry Hardy & Roger Havsheer eds., 1997).

> If the belief in freedom—which rests on the assumption that human beings do occasionally choose, and that their choices are not wholly accounted for by the kind of causal explanations which are accepted in, say, physics or biology—if this is a necessary illusion, it is so deep and so pervasive that it is not felt as such.

Id. at 147-48.

cent studies tell us enough about the causes of crime to justify changing our views. Based on fears that studies might be used for improper purposes, some argue that ignorance in this area should be maintained and we should avoid scientific research on the issue.[372] Others might fear that a determinism view will result in arresting people before they commit crimes, as in *The Minority Report*,[373] or that there will be a loss of personal autonomy and society will begin programming individuals as in *A Clockwork Orange*[374] or even programming embryos as in *Brave New World*.[375] Discoveries about the effects of genes and environment and a belief in predictive behavior do raise moral issues,[376]

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372 Besides the general concerns about how such studies will affect our concepts of personal responsibility, some have raised concerns that biological research on crime might be used for racist purposes. RAINE, *supra* note 273, at 314-17. Professor Raine argued that while scientists and society have a responsibility regarding how such studies are done and reported, such studies are important and the issue of biological influences should be "scientifically confronted, not politically repressed." *Id.* at 316.

373 PHILIP K. DICK, *The Minority Report*, *in* THE MINORITY REPORT AND OTHER CLASSIC STORIES (2003). Much of the theme of the book and the movie centers on the free will versus determinism debate. Detective John Anderson initially believed in the deterministic predictions that allowed the police to make arrests before the crimes were committed, until the "precogs" predicted that he would commit a crime in the future. One could argue that one of the major justifications for punishment today is similar to the *Minority Report* scenerio of punishing people for crimes not yet committed. Today, one of the main justifications for punishment is incapacitation—or to prevent a criminal from committing future crimes. *See* Robinson & Darley, *supra* note 51, at 464-68. Thus, punishments like three-strikes laws with a component of incarcerating criminals because they might commit crimes in the future, arguably are not so far away from the future vision of *Minority Report.*

374 ANTHONY BURGESS, A CLOCKWORK ORANGE (1962). In *A Clockwork Orange*, society experiments with reprogramming criminals by giving them a drug that makes them violently ill and then forcing the criminals to watch scenes of violence. While *Minority Report* illustrates the extremes of the incapacitation justification for criminal punishment, *A Clockwork Orange* highlights the extremes of the rehabilitation justification.

375 ALDOUS HUXLEY, BRAVE NEW WORLD (1932). In *Brave New World*, set in the year 632 AF (After Ford), human embryos are conditioned and developed to fit into society by a combination of drugs, nutrients, and oxygen.

376 RIDLEY, *supra* note 133, at 268-69. A New Zealand study found that the combination of a low active monoamine oxidase A gene (MAOA) and an abusive environment resulted in a significant probability that the person would be antisocial. *Id.* at 267-68. Professor Ridley asks,

> Imagine that you are a youngster rescued too late by social services from an abusive family. Just one diagnostic test, of the promoter length in this one gene, will allow a physician to predict, with some confidence, whether you are likely to be antisocial and probably criminal. How will you, your doctor, your social worker, and your elected representative handle this knowledge?

but we must still ask the questions.

If crime were seen as a disease, society would treat the crime and the criminals in a different manner. Doctors strive to cure and prevent diseases, but current American society treats crimes by locking up the perpetrators and by instituting longer sentences. If crime were seen as a disease, society would work harder to cure the problem by looking to the causes. University of Southern California Psychology Professor Adrian Raine, who has written about the causes of crime, has noted:

> If we accept that repeated, serious crime is a disorder, the implication is that such offenders should not be punished as severely for their actions, that more freedoms should be restored to incarcerated prisoners, that new, vigorous attempts should be made to increase new research and clinical efforts to understand and treat crime, and that the criminal justice system requires revision in order to take into account the consequent practical implications.[377]

The immediate changes to the criminal justice system do not have to be drastic, but society should seek knowledge and understanding over maintaining ignorance.[378] There is still much to be done, but an important step was the consideration of mitigating factors in capital cases. These factors include brain damage, child abuse, intoxication, drug abuse, poverty, and other mitigating factors that courts and legislatures have determined as relevant. It is time that these Disease Theory Factors, and the implications from the decisions regarding their relevance in capital cases, be considered beyond the individual cases and have broader significance for the way the criminal justice system works. As one philosopher asked, "Is there not a necessity for deeply reflecting upon an alteration of the system that breeds these crimes, instead of glorifying the hangman who executes a lot of criminals to make room only for the supply of new ones?"[379]

Id. at 268-69.

377 RAINE, *supra* note 273, at 320.

378 For example, some might argue that the adoption of disease theory should apply to the sentencing stage but not to the guilt phase. *See, e.g.*, Thomas A. Green, *Freedom and Criminal Responsibility in the Age of Pound: An Essay on Criminal Justice*, 93 MICH. L. REV. 1915, 1923 (1995) (noting that historically, determinist facts had more influence at the sentencing stage than at the guilt stage of trials). However, the new understanding of disease theory should also have effects on the guilt phase.

379 Karl Marx, *Capital Punishment*, N.Y. DAILY TRIB., Feb. 18, 1853, *quoted in* Jeffrey G. Murphy, *Marxism and Retribution*, *in* PUNISHMENT AND REHABILITATION 74, 75 (2d ed. 1985). Regarding free will, Marx asked, "Is it not a delusion to

One may wonder what are the implications for crime if society adopts a disease theory of criminal law. If society saw crime as something to be cured rather than something to be punished, it would not necessarily result in a flood of criminals in our streets. One might argue that the government would still be justified in detaining people to protect society.[380] If incapacitation is necessary to protect society from certain criminals, then we may imprison them even if they are not morally deserving of the punishment. Then the debate may focus on whether society benefits from the death penalty even if the defendants are not morally deserving of being executed. Further, the new label would be something of a deterrent, as there may be some romance to being an "outlaw" but not to being "diseased."

As an initial experiment, society could adopt a disease theory instead of a punishment model for only certain types of crimes. There are some crimes that seem to fit within the disease model easier than others.[381] Professor Raine has cited studies that indicate that repeated serious crime is a disorder.[382] Certainly, it might be easier for society to accept repeated drug crimes as crimes in need of treatment rather than incarceration. There is room for experimentation. The use of mitigating factors in a structured setting in capital cases is itself an experiment applying the disease theory to the most severe crimes. Society should use that experiment as a way of going forward with alternative ways to deal with our growing prison population in other areas.

Judge Bazelon noted that merely establishing the factors

substitute for the individual with his real motives, with multifarious social circumstances pressing upon him, the abstraction of 'free will'—one among the many qualities of man for man himself?" *Id.* Of course, one might cite the failure of Communism around the world as an example of the possible damage done to society by believing in the ability to control human beings by their environment.

380 One commentator has noted that a gene defense is not very effective in individual cases:

> In trying to disprove his guilt, a criminal who admits to a natural inclination to crime is hardly likely to win over the jury. And when being sentenced, if he claims it is in his nature to murder, he is unlikely to persuade the judge to set him free to kill again.

RIDLEY, *supra* note 133, at 271-72.

381 One author has noted certain crimes that do not easily fit within the disease theory of crime, such as economic crimes for the purpose of monetary gain, systematic acts of violence by organized gangs, "tax dodging, espionage, reckless driving, and corruption among civil servants." BODENHEIMER, *supra* note 315, at 36 (citing JOHANNES ANDENAES, PUNISHMENT AND DETERRENCE 63-64 (1974)).

382 RAINE, *supra* note 273, at 319-20.

needed to understand the causes of crime "will not cure the disease. Once we enlighten our understanding, we will still need to decide whether the costs of grappling with the roots of crime are more than we are willing to pay."[383] However, he added, "society can never hope to achieve a just and lasting solution to crime without first facing the facts that underlie it."[384] At the least, we cannot ignore the questions raised by the development of mitigating factors in capital cases.

B. Proposals for Reform: Moral Principles Demand That Our Criminal Justice System Change in at Least Four Ways

Considering that mitigating circumstances are carving a new path for criminal justice theories, the remaining question is what should be the next steps of reform. Mitigating circumstances in capital cases have developed with little discussion about what they mean about our perceptions of humanity. Further discussion is needed. This Article is not proposing that "every frantic and idle humour" of a defendant should exempt that person from punishment.[385] It is important, however, that judges, defense lawyers, prosecutors, academics, criminologists, sociologists, mental health professionals, and others continue to push for further education and reform in this area.

Below are some suggested reforms based on the moral consideration of Disease Theory Factors, new scientific evidence, and philosophical theories. First, social science experts should make use of the evidence being presented in capital cases. Second, the criminal justice system should continue to experiment with alternatives to incarceration where deterrence concerns can still be satisfied. Third, the criminal justice system should abandon considerations of retribution and instead focus on deterrence, disease theory, and victims. Finally, capital punishment should be abolished or a moratorium imposed to further consider the morality of the death penalty.

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[383] BAZELON, *supra* note 120, at 23.

[384] *Id.*

[385] DANIEL N. ROBINSON, WILD BEASTS & IDLE HUMOURS: THE INSANITY DEFENSE FROM ANTIQUITY TO THE PRESENT 133 (1996). At the trial of Edward Arnold in 1724 in Great Britain, Justice Robert Tracy of the Court of Common-Pleas instructed the jury that "it is not every frantic and idle humour of a man, that will exempt him from justice." *Id*.

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1. Make Use of Information the Courts Already Possess

First, we must continue to study the information we have. Each well-investigated capital case contains mitigating evidence that helps explain the crime. In lawyers' files and court offices across the country are important records that give insight into the causes of violent crime. To ignore this information, and the lessons that it can teach us, is a great error. As discussed earlier, Judge Bazelon noted in *United States v. Alexander* that further consideration of the RSB defense could lead to discoveries about the causes of violent behavior.[386] Judge Bazelon later wrote that "eliciting the information necessary to understand the forces that drive people to crime is not a solution to the problem of preventing crime; it is only a prerequisite to solving the problem."[387]

Through the law of mitigating circumstances in capital cases, the legal system is accumulating knowledge about RSB and other factors related to violent crime. This knowledge needs to be used beyond the individual cases so this information is not "lost in the system," as Professor Morse warned about information discovered through the proposed RSB defense.[388]

2. Experiment with Alternatives to Incarceration

Second, participants in the system must continue to be open to new explanations, defenses, and alternatives to the growing incarceration rate.[389] If, learning from the lessons of mitigating circumstances, the criminal justice system begins to see at least certain crimes under disease theory, then changes will take place throughout the system and throughout society. As Justice William O. Douglas wrote, "The judiciary plays an important role in

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386 471 F.2d 923, 965 (D.C. Cir. 1972) (Bazelon, C.J., dissenting in part and concurring in part).

387 BAZELON, *supra* note 120, at 290.

388 Stephen J. Morse, *The Twilight of Welfare Criminology: A Final Word*, 49 S. CAL. L. REV. 1275, 1275 (1976) ("Even if great amounts of evidence on social conditions were admitted at trials, cases leading to conviction would probably not force *society at large* to face its complicity in causing criminal behavior."). *See* discussion *supra* Part II.A.

389 The growing national incarceration rate shows that the prison system is not working. For example, a recent examination of the California Youth Authority, which oversees the state's ten juvenile prisons, found that it is a failure on several levels. *See* John M. Broder, *Dismal California Prisons Hold Juvenile Offenders*, N.Y. TIMES, Feb. 15, 2004, at 18. "The system's mental health programs are in 'complete disarray,' the experts found." *Id.*

educating the people as well as in deciding cases."[390] The lessons of mitigating circumstances must not be isolated to individual capital cases and forgotten.

Professor Moore argued that in the debate between causal theorists and those who argue for personal responsibility, our historical notions of "resentment, moral indignation, condemnation, approval, guilt, remorse, shame, pride, and the like" should guide us in the revelation that we are correct to hold individuals morally responsible for their actions.[391] However, human beings are often wrong. Our incorrect historical notions of how the universe acts should encourage us to question our understandings of how human beings act. Our current views about retributive punishment and the realities of prisons as human storage facilities have created institutions of violence and chronic abuse.[392] Our understandings are slowly changing; we need to use the available evidence to examine our historical understandings of moral responsibility; and we need to use these new understandings to consider reform to our criminal justice system.

There is no one solution, and a range of options should be considered. Professor Angela Davis, who has criticized incarceration because of racial and class disparities, has argued that "rather than try to imagine one single alternative to the existing system of incarceration, we might envision an array of alternatives that will require radical transformations of many aspects of our society."[393]

One current reform is therapeutic jurisprudence[394] and the use

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390 WILLIAM O. DOUGLAS, WE THE JUDGES 443 (1956), *quoted in* BAZELON, *supra* note 120, at 23.

391 Michael S. Moore, *Causation and the Excuses*, 73 CAL. L. REV. 1091, 1144 (1985).

392 *See, e.g.*, Jonathan Cohn, *America's Abu Ghraibs*, THE NEW REPUBLIC, May 24, 2004, *available at* http://www.tnr.com/doc.mhtml?pt=afs%2F9kV2Z8RvsEQdkEEP wR%3D%3D. In addition to evidence of chronic abuse by prison guards, "[i]n 2001, Human Rights Watch released a report citing credible estimates that 20 percent of all male prisoners in the United States have been raped. Inadequate supervision by guards, the mixing of prisoner types, and sheer indifference by prison authorities are often what allows the rapes to take place." *Id.*

393 ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? 108 (2003). Professor Davis explained, "[a]n attempt to create a new conceptual terrain for imagining alternatives to imprisonment involves the ideological work of questioning why 'criminals' have been constituted as a class and, indeed, a class of human beings undeserving of the civil and human rights accorded to others." *Id.* at 112.

394 *See* Bruce J. Winick, *Therapeutic Jurisprudence and Problem Solving Courts*, 30 FORDHAM URB. L.J. 1055 (2003).

> Legal rules and the way they are applied are social forces that produce

of special courts, such as mental health courts.[395] Using the threat of jail, mental health courts keep minor offenders with psychosis in treatment and on medication long enough for the offenders to make rational decisions about future treatments.[396] Recently, Congress passed the Mentally Ill Offender Treatment and Crime Reduction Act, which authorizes fifty million dollars per year for states to create mental health courts and other mental health services for nonviolent offenders.[397]

Similarly, the United States has more than one thousand state and local "drug courts" that offer court-supervised treatment programs instead of prison.[398] A recent study of six jurisdictions by the Center for Court Innovation concluded that nonviolent drug offenders who complete such treatment programs are much less likely to be repeat offenders than similar offenders who serve prison time.[399]

Commentators have noted the promise of specialized courts.[400]

> inevitable, and sometimes negative, consequences for the psychological well-being of those affected. Therapeutic jurisprudence's basic insight was that scholars should study those consequences and reshape and redesign law in order to accomplish two goals—to minimize antitherapeutic effects, and when it is consistent with other legal goals, to increase law's therapeutic potential.

Id. at 1062-63; *see also* Hon. Peggy Fulton Hora et al., *Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionizing the Criminal Justice System's Response to Drug Abuse and Crime in America*, 74 NOTRE DAME L. REV. 439, 444-49 (1999) (noting that therapeutic jurisprudence uses mental health information and social science as tools to gain new perspective on legal issues).

395 *See generally* Winick, *supra* note 394.

396 Sally Satel, *Out of the Asylum, Into the Cell*, N.Y. TIMES, Nov. 1, 2003, at A15.

397 *Congress Passes Bill to Support MH, Criminal Justice Collaboration*, MENTAL HEALTH WEEKLY, Nov. 1, 2004, at 1.

398 Paul von Zielbauer, *Court Treatment System is Found to Help Drug Offenders Stay Clean*, N.Y. TIMES, Nov. 9, 2003, at 33. Another benefit of the drug courts is that they save the state money, as the report concluded that New York drug courts have saved approximately $254 million in prison-related expenses. *Id.*

399 *See id*.; *see* MICHAEL REMPEL ET AL., THE NEW YORK STATE ADULT DRUG COURT EVALUATION: POLICIES, PARTICIPANTS AND IMPACTS (October 2003) (showing meaningful recidivism impacts across a large number of drug court locations), *available at* http://courtinnovation.org/pdf/drug_court_eval.pdf.

400 *See, e.g.*, Jeffrey Fagan & Victoria Malkin, *Theorizing Community Justice Through Community Courts*, 30 FORDHAM URB. L.J. 897, 898 (2003) ("[C]ommunity courts seek to fix problems in the courts by developing legal forums that are unique."); Hora et al., *supra* note 394, at 535 ("By understanding that drug addiction should be considered a treatable disease, judges sitting in [Drug Treatment Courts] apply a more appropriate and effective solution for the problem—judicially supervised drug treatment for a problem that is and should be recognized as largely medical in nature."); Winick, *supra* note 394, at 1090 (problem-solving courts and therapeutic jurisprudence "can do much to transform law into an instrument of heal-

Recently, the American Bar Association Justice Kennedy Commission Report, in recommending alternatives to incarceration, also noted the promise of specialized courts.[401] As a specific example, a restorative justice probation program in Deschutes County, Oregon resulted in a twenty-seven percent drop in serious crime among juvenile offenders during the first two years of the program.[402] In Brooklyn, New York, the Red Hook Community Justice Center, which was created in 2000 and acts as a court and community center for social services, has had positive results.[403]

Such innovations as the mental health courts and drug courts are consistent with the recognition that a person's propensity toward crime may be more like a disease to be cured than just an infraction to be punished. Other innovations may come from outside the U.S. legal system and from other countries and other

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ing for both the individual and the community"); Christin E. Keele, Note, *Criminalization of the Mentally Ill: The Challenging Role of the Defense Attorney in the Mental Health Court System*, 71 UMKC L. REV. 193, 210 (2002) ("With the development of the mental health court, the identified concerns of mentally ill offenders . . . may be addressed in a much more appropriate and effective manner.").

Some commentators, however, have noted that these specialized courts, which often delve into what would otherwise be attorney-client confidences, can create some problems for defense attorneys trying to competently represent their clients. *See* Mae C. Quinn, *Whose Team Am I On Anyway? Musings of a Public Defender About Drug Treatment Court Practice*, 26 N.Y.U. REV. L. & SOC. CHANGE 37 (2001); *see also* Wendy N. Davis, *Special Problems for Specialty Courts*, 89 A.B.A. J., Feb. 2003, at 32. Additionally, some cities, such as Portland, Oregon and Denver, Colorado have cut back or eliminated community and drug courts because of cost. *See* Terry Carter, *Red Hook Experiment*, A.B.A. J., June 2004, at 37, 42.

[401] ABA JUSTICE KENNEDY COMMISSION REPORT, *supra* note 44, at 32-33. The ABA Commission recommended alternatives to incarceration:

> We recommend that jurisdictions study and fund treatment alternatives to incarceration for offenders who may benefit from treatment for substance abuse and mental illness; adopt diversion or deferred adjudication programs that, in appropriate cases, provide an offender with an opportunity to avoid a criminal conviction; and develop graduated sanctions for probation and parole violations that incarcerate only when a probation or parole violator has committed a new crime or poses a danger to the community.

Id. at 24.

[402] ROBIN CAMPBELL & ROBERT VICTOR WOLF, PROBLEM-SOLVING PROBATION: AN EXAMINATION OF FOUR COMMUNITY-BASED EXPERIMENTS, 14 (2001) (examining efforts to reform probation based upon community justice principles in Vermont, Massachusetts, Arizona, and Oregon), *available at* http://courtinnovation.org/pdf/prob_sol_prob.pdf.

[403] Carter, *supra* note 400, at 38-39. "The court is a first-of-its-kind, ambitious attempt at solving a neighborhood's problems by getting at their root causes. All misdemeanors and a couple of low-level felony categories that call for a maximum of a year in jail come through here." *Id.* at 37-38.

cultures.[404] These experiments are just some ways that the criminal justice system can gradually adapt to the new understandings about human behavior.

3. Eliminate the Role of Classical Retributive Principles in Criminal Justice System

Third, because a complete free will model is inconsistent with current knowledge, we should eliminate the role that classical retributive principles play in our criminal justice system so that the system focuses on disease theory and utilitarian principles. Instead of retribution principles, the criminal justice system should

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404 For example, in 1982 the Navajo Nation developed the Peacemaking Court with a focus on restorative justice as an alternative to an adversary system for some cases. *See* Robert Yazzie, *Navajo Peacemaking: Implications for Adjudication-Based Systems of Justice*, 1 CONTEMP. JUST. REV. 123 (1998); James W. Zion, *The Dynamics of Navajo Peacemaking*, 14 J. CONTEMP. CRIM. JUST. 58 (1998). As another example, there are lessons to be learned from South Africa and its Truth and Reconciliation Commission. *See, e.g.*, South African Truth and Reconciliation Commission, *at* http://www.doj. gov.za/trc/ (last visited Oct. 14, 2004). Indeed, consistent with the theme of this Article about the existence of causes of crime is the African principle of *ubuntu*, which holds that each individual person is a reflection of the community. *See, e.g.*, MICHAEL JESSE BATTLE, RECONCILIATION: THE UBUNTU THEOLOGY OF DESMOND TUTU 35 (1997) (quoting Archbishop Tutu as stating, "We are made for a delicate network of interdependence"). *Ubuntu* is a doctrine of human connection that includes the knowledge, as Archbiship Tutu has stated, "that you are bound up with [others] in the bundle of life." ANTHONY SAMPSON, MANDELA: THE AUTHORIZED BIOGRAPHY 12 (1999).

Similarly, Melissa Clack wrote,

> [i]n the United States a person tends to be perceived by self and others as an individual actor whose identity and sense of self stand apart from the community, while in Japan a person is perceived by self and others as a contextual actor whose identity is, in substantial part, defined by social relationships.

Melissa Clack, *Caught Between Hope and Despair: An Analysis of the Japanese Criminal Justice System*, 31 DENV. J. INT'L L. & POL'Y 525, 528 (2003). Hence, "the primary aim of the Japanese criminal justice system is correction rather than strictly punishment. Japanese officials hope to rehabilitate their criminals and allow the offenders to re-enter society and become a part of the 'family' once again." *Id.* at 529.

Finally, Finland is another example. *See* Jim Holt, *Decarcerate?*, N.Y. TIMES, Aug. 15, 2004, at 20. About thirty years ago, Finland had a severe penal system and one of the highest incarceration rates in Europe. *Id*. Then, the Finns changed their approach to become more humane. *Id*. "Finnish prisons became almost ridiculously lenient by our standards. Inmates—referred to as 'clients or pupils,' depending on their age—live in dormitory-style rooms, address guards by the first name and get generous home leaves." *Id*. Today, Finland has a low crime rate and it imprisons 52 prisoners per 100,000 people—the smallest fraction of its population of any European country. *Id*.

focus only on curing the offender, healing the victim, and protecting society.

In 1949, in *Williams v. New York*, the Supreme Court stated, "Retribution is no longer the dominant objective of the criminal law. Reformation and rehabilitation of offenders have become important goals."[405] Since that case was decided, the Court has retreated from that statement and there has been a "great philosophical revival of retributivism,"[406] but it is time for the courts to again consider that direction in light of what we are learning from mitigating factor law. As Roscoe Pound noted, "[I]n order to deal with crime in an intelligent and practical manner we must give up the retributive theory."[407] This suggestion is not that punishment be eliminated altogether, but that, while considering concerns of victims, there be an understanding that the goals of punishment should be utilitarian in regards to deterrence and rehabilitation.[408] Judge Bazelon made such a suggestion when he proposed in *Alexander* that one option is to allow the defendant to use the RSB defense, but to still incarcerate the defendant to protect society.[409] By placing more emphasis on utilitarian justifications, we might embrace Beccaria's conclusion that "[i]t is better to prevent crimes than to punish them."[410]

The abandonment of a pure retributive theory should also result in more focus on the victims of crime. Currently, our society sees vengeance as benefiting society, so it is a utilitarian goal. Too often the line between victims' rights and retributive justice

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[405] 337 U.S. 241, 248 (1949). Similarly, in *Morissette v. United States*, 342 U.S. 246, 251 (1952), the Court noted a "tardy and unfinished substitution of deterrence and reformation in place of retaliation and vengeance as the motivation for public prosecution."

[406] WHITMAN, *supra* note 62, at 23-24. "[T]he most important Anglo-American movement of the last forty years or so" is "the great philosophical revival of retributivism, led by figures such as Andrew von Hirsch, Jeffrie Murphy, and [Jean] Hampton." *Id.*

[407] Roscoe Pound, *Criminal Justice in the American City – A Summary*, *in* CRIMINAL JUSTICE IN CLEVELAND 559, 586-87 (Roscoe Pound & Felix Frankfurter eds., 1922).

[408] For example, "[e]ven if [pedophilia] can be successfully treated in a family context—and medical treatment, unlike criminal law, does not involve the placement of blame—one wonders whether the elimination of accountability and punishment serves the victim as well as it serves the offender." JACOBY, *supra* note 303, at 223.

[409] 471 F.2d 923, 961-62 (D.C. Cir. 1973) (Bazelon, C.J., dissenting in part and concurring in part).

[410] CESARE BECCARIA, OF CRIMES AND PUNISHMENTS 112 (Jane Grigson trans., Marsilio Pub. 1996) (1764).

is blurred, but classical retributive theory—which justifies punishing a person only because the person deserves it—has nothing to do with the concerns of individual victims. Changes in perceptions of moral blameworthiness may eventually alter the justice that victims seek, but in the interim, there should be some acknowledgement that punishment may serve the goal of healing the victims.[411]

Thus, with the eventual elimination of blameworthiness, the focus on punishment should ultimately be to serve utilitarian goals. Further, we should acknowledge that punishment serves some goals of vengeance for the victim, not retribution on a morally blameworthy subject. "Vengeance" is a bad word for some people, but is a more honest term for our current understanding of punishments.[412] As noted above, Justice Scalia has embraced the vengeance function of punishments,[413] and some scholars ad-

[411] Islamic law provides a large role for victims in the process of determining the appropriate punishment for offenders:

> In the administration of Islamic criminal justice, the *lex talionis* provides the basis for *qisas*, exact retaliation, or *diyah*, payment of blood money. Which of these is imposed depends on the will of the victim (in the case of physical injury) or of the appropriate blood relatives (in the case of death). Accordingly, the Islamic law of homicide and physical injury remains intimately concerned with satisfaction of the aggrieved feelings of the victim or of the victim's family.

HENBERG, *supra* note 11, at 117.

The determination that there should be more of a focus on victims instead of on pure retribution, however, does not mean that victims will make punishments more severe. For example, the emphasis on victims in Islamic law is not a development to encourage more severe punishments:

> At the same time, however, the promise of expiation for whomever abjures exact retaliation provides scriptural basis for urging *diyah* as opposed to *qisas* . . . . Though it remains in principle the right of the victim and his kin to demand *qisas*, Muslim tradition has developed such passages into strong moral and institutional pressure on individuals to forego retaliation. Indeed, the treatment of retaliatory punishments in the Muslim *hadith* bears many similarities to the gutting of the *lex talionis* in the Babylonian Talmud, with Islamic jurisprudence tending to ameliorate the harshness of the law as a literalist might frame it.

Id.

[412] One of the reasons for maintaining some sort of vengeance theory until further education can take place is that society is not ready to completely abandon both retribution and vengeance at this point in history. As Ernest van den Haag has argued, "When legal retribution is not imposed for what is felt to be wrong, or when retribution is felt to be less than deserved – when it is felt to be insufficient, not inclusive, certain, or severe enough—public control falters, and the 'passion for revenge' tends to be gratified privately." ERNEST VAN DEN HAAG, PUNISHING CRIMINALS 11 (1975).

[413] See *supra* note 352-53 and accompanying text. In a sense, Justice Scalia is

vocate the use of revenge as a justification for punishment.[414]

It will not be easy for American society to retreat from a retributive model of punishment. Professor James Q. Whitman, in his book *Harsh Justice*, argued that one of the reasons that Americans punish more severely than other countries like France and Germany is "because the management of the punishment system in the United States is more given over to democratic politics—which is often to say demagogic politics."[415] Thus, politicians tend to use the "retributive temper" and tough-on-crime proposals to gain popular support. Despite this obstacle to limiting the role of retribution in punishment and adopting a disease

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correct in making the argument that mitigating circumstances are irrelevant. It is probably true that all murderers have acted because of a heredity and environment beyond their control, so it makes little sense to only excuse those ones with good or lucky attorneys who find and present the evidence. Because of hereditary and environmental forces, it is wrong to say that one murderer is more morally blameworthy than another. Arguably, Justice Scalia's position is consistent with disease theory, but the blameworthiness—or lack of it—is not relevant to him because society demands certain punishments for certain crimes. The question, however, should not be what an individual defendant deserves. Instead, the issue is whether society demands vengeance or deterrence despite the lack of moral culpability, or whether our understanding of mitigation and causation will ultimately allow us to overcome our normal human feelings for revenge.

414 *See, e.g*, JACOBY, *supra* note 303.

> In one sense, it is a curiosity of recent history that a taboo has been attached to the subject of revenge in a century that has witnessed the fearful union of mass vengeance with technology. . . . [But d]ismissing the legitimate aspects of the human need for retribution only makes us more vulnerable to the illegitimate, murderous, wild impulses that always lie beneath the surface of civilization—beneath, but never so deep that they can safely be ignored.

Id. at 362; *see also* Jeffrie Murphy, *Hatred: A Qualified Defense*, *in* FORGIVENESS AND MERCY 88 (1998). "Since I regard retributive hatred as in principle the natural, fitting, and proper response to certain instances of wrongdoing, I do not regard the passion itself as either immoral or irrational." *Id.* at 108.

Professor Robert Blecker has stressed the importance of hate and emotion as a reason for maintaining the death penalty:

> [T]oday, for many of us death penalty advocates: Utilitarian rationality, a future-oriented calculus of costs and benefits, is inadequate. No strictly rational death penalty law can be constructed and applied exhaustively to achieve justice. We need a richer language that includes non-rational, informed emotion. Moral desert can never be reduced strictly to reason, nor measured adequately by rational criteria: Forgiveness, love, anger, resentment are part of justice. The past counts. Not rationally, but really.

Robert Blecker, *Roots: Resolving the Death Penalty: Wisdom from the Ancients*, *in* AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT: REFLECTIONS ON THE PAST, PRESENT, AND FUTURE OF THE ULTIMATE PENAL SANCTION 198 (James R. Acker et al. eds., 2d ed. 2003).

415 WHITMAN, *supra* note 62, at 199.

theory model, retribution should not be a part of the calculus in our criminal justice system.

With the developments of science and mitigating factors along with the rise of the victims rights movement, the theories of criminal justice are shifting toward punishment with less focus on retributive theory and more focus on victims[416] and a consideration of "excuses" for the perpetrator.[417] Members of one side of the political spectrum complain about the excuses being used by criminal defendants, while some defense attorneys and criminal justice theorists might be concerned about the emphasis on victims instead of society in cases where the government is a party. However, both trends are on an enlightened but rocky path toward a new disease theory of criminal justice.[418]

In short, the development of the law of mitigating circumstances is eliminating the blameworthiness of capital defendants, and, by association, the moral blameworthiness of all criminal defendants. If the law allows that factors such as heredity, neurology, environment, and psychology can explain the causes of a crime, we can no longer morally blame the perpetrator. Thus, punishment cannot be justified on a retributive or moral blameworthiness rationale.[419]

4. *Abolish the Death Penalty*

Fourth, the death penalty should be abolished because our cur-

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416 *See, e.g.*, Aileen Adams & David Osborne, *Victims' Rights and Services: A Historical Perspective and Goals for the Twenty-First Century*, 33 McGEORGE L. REV. 673, 675 (2002) (noting among other trends that since 1965, every state has adopted a crime victim compensation program, and that since 1972, more than 10,000 victim assistance programs have been created around the country).

417 *See, e.g.*, ALAN M. DERSHOWITZ, THE ABUSE EXCUSE, 18-19 (1994) (listing a growing number of excuse defenses). "At a time of ever-hardening attitudes toward crime and punishment, it may seem anomalous that so many jurors—indeed, so many Americans—appear to be sympathetic to the abuse excuse." *Id.* at 4.

418 One might argue that a disease theory, rather than a punishment theory of criminal justice, could in some circumstances be less respectful of human beings by trying to impose "cures" on those who might not want to be cured and allowing "cures" to be imposed before one has committed a crime. One case that arguably embraced disease theory is *Kansas v. Hendricks*, 521 U.S. 346, 350 (1997) (holding that involuntary confinement under a Kansas statute that allowed civil commitment of people who were likely to engage in "predatory acts of sexual violence" was not criminal in nature and did not violate the constitution).

419 See Albert W. Alschuler, *The Changing Purposes of Criminal Punishment: A Retrospective on the Past Century and Some Thoughts About the Next*, 70 U. CHI. L. REV. 1 (2003) (arguing that retribution "merits recognition as the criminal law's central objective").

rent system is not empirically or morally justified. One consequence from eliminating blameworthiness from the justifications for punishment would be the elimination of the requirement of mitigating factors. If we accept that all murderers are equally blameworthy and the result of factors beyond their control, then capital defendants should not be treated differently based on whether or not their attorneys were able to discover the causes.

Ironically, the successful development of mitigating circumstances law in capital cases should ultimately eliminate the need for mitigating circumstances. Considering the scientific and philosophical evidence, all defendants are equally culpable and it is morally wrong to impose the death penalty on some and not others. If retribution principles cannot justify the death penalty, then capital punishment should be eliminated.[420]

One might argue that the scientific evidence about causation and the philosophical evidence about free will are too inconclusive to justify eliminating the death penalty. However, if we demand that there be a higher moral justification for the punishment of death, the current evidence raises enough of a question about the morality of the punishment that the punishment should be eliminated unless contrary evidence is developed.

Conclusion

A consideration of the current capital punishment system, in light of empirical evidence of the causes of human actions and in light of philosophical justifications, reveals a criminal justice system with no moral foundation. Consistent with Judge Bazelon's RSB theories, complete free will is a questionable theory and new scientific studies reveal causes of crime exterior to the defendants. Not only is the current capital punishment system without an empirical or philosophical justification, but in practice the condemned are chosen by jurors and judges who apply their own beliefs about free will to incomplete and imperfect information about the defendants. Instead of executing the "worst of the worst" we are executing the "unluckiest of the unlucky."[421]

Even though some mitigating factors in capital cases illustrate

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[420] One might argue, in the alternative, that because all defendants are equally blameworthy, they should all be executed.

[421] Symposium, *Rethinking the Death Penalty: Can We Define Who Deserves Death?*, 24 PACE L. REV. 107, 133 (2004).

a legal system that, to some extent, embraces a deterministic view of crime, the legal system should go further and adopt a disease theory view of crime. Four ways that the criminal justice system can begin to improve are: (1) using the mitigation evidence developed in the courts to give us a better understanding of the causes of crime; (2) experimenting with alternatives to incarceration; (3) eliminating the role of classic retributive principles in the criminal justice system; and (4) abolishing the death penalty. Ultimately, as one professor noted,

> [T]he critical question may be not so much whether crime is indeed a disorder, but whether less than 200 years from now a more advanced society will look back aghast at our current conceptualization of criminal behavior, with its concomitant incarceration and execution of prisoners, with the same incredulity with which today we look back at earlier treatment of mental patients.[422]

Society will hopefully continue to evolve, especially in its changing treatment of the outcasts of society. One way it will change is in its treatment and understanding of those we now label as criminals.

Our belief in moral culpability, manifested in the punishment of criminals, is an assertion of faith in our own free will. However, to embrace the objective lessons presented by mitigation in capital cases requires a new perspective on criminal law and life. The empirical and philosophical evidence shows that each human being evolves from outside factors, and the courts' consideration of mitigating factors reinforces that conclusion. This deterministic view, even if true, may not be a belief that human beings want to embrace. Human beings do not want to believe the statement made by Casy the preacher in John Steinbeck's *The Grapes of Wrath* after Casy awoke one night: "There ain't no sin and there ain't no virtue. There's just stuff people do."[423]

Certainly, there are possible consequences to our world-view if we scale back our visions of free will and personal responsibility. The shock might be comparable to that experienced by Inspector

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[422] RAINE, *supra* note 273, at 319. Professor Raine predicts "that a future generation *will* reconceptualize nontrivial recidivistic crime as a disorder." *Id.*

[423] JOHN STEINBECK, THE GRAPES OF WRATH 28 (1939) (R.R. Donnelley and Sons Co. 1982) (1939). Casy continued: "It's all part of the same thing. And some of the things folks do is nice, and some ain't nice, but that's as far as any man got a right to say." *Id*.

Javert in *Les Miserables* upon discovering that the criminal he pursued was not pure evil as he had believed:

> His supreme anguish was the loss of certainty. He felt that he had been uprooted. The code was now no longer anything more than a stump in his hand. He had to do with scruples of an unknown species. There had taken place within him a sentimental revelation entirely distinct from legal affirmation, his only standard measurement hitherto. To retain in his former uprightness did not suffice. A whole order of unexpected facts had cropped up and subjugated him. A whole new world was dawning on his soul: kindness accepted and repaid, devotion, mercy, indulgence, violence committed by pity on austerity, respect for persons, no more definitive condemnation, no more conviction, the possibility of a tear in the eye of the law, no one knows what justice according to God, running in inverse sense to justice according to men. He perceived amid the shadows the terrible rising of an unknown moral sun; it horrified and dazzled him. An owl forced to the gaze of an eagle.[424]

Mitigation in capital cases is a "tear in the eye of the law."[425] Causes of crime are generally left to the criminologists, sociologists, neurologists, psychologists, and others, while the criminal justice legal system focuses on punishing and protecting society. By digressing from the path of automatic death sentences and specifically identifying mitigating circumstances, the law has created a new view of criminals that is concerned not only with retribution and deterrence but also with understanding humanity and discovering the causes of crime.

Because of Supreme Court decisions in cases such as *Gregg v. Georgia*[426] and *Lockett v. Ohio*,[427] in courtrooms around the nation lawyers are documenting the causes of violent crime. Struggling with our imperfect information about human behavior, the judges, juries, and lawyers in each capital case try to determine what caused a particular defendant to commit a specific murder at a certain time. A substantial amount of information is scattered in court records throughout the country, but we need to begin to look at this information as a whole and determine what we can learn about crime, violence, and human beings. Even if

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424 Victor Hugo, *Les Miserables*, *in* VICTOR HUGO'S WORK 180 (1905) (describing when Inspector Javert confronts the humanity of Jean Valjean, the escaped prisoner he had been pursuing).

425 *Id*.

426 428 U.S. 153 (1976).

427 438 U.S. 586 (1978).

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current society is incapable of digesting the true meaning of the information, at some point in the future our descendants will see crime the way we currently see diseases. The result will be a criminal justice system that no longer focuses on retribution but instead focuses on disease theory, deterrence, and crime victims.

When society changes its views to see crime as a disease it will alter the current goals of punishment to focus on the search for a cure, in terms of preventing crime. Such a change of view will have a dramatic impact and create "an unknown moral sun," but it will be a day of a new perception of the fabric of humanity.[428] If we see that the worst among us and the best among us share common bonds, the new understanding will cause us to be more charitable to our fellow creatures. As one philosopher wrote about the ability to understand the causes of crime, "It may prevent us . . . from indulging in righteous indignation and committing the sin of spiritual pride."[429] Ultimately, then, the search for a new theory of criminal justice will help answer the question asked by the first murderer: "Am I my brother's keeper?"[430]

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[428] Hugo, *supra* note 424, at 180.

[429] Hospers, *supra* note 302, at 417. Professor Hospers added,

> And it will protect from our useless moralizings those who are least equipped by nature for enduring them. As with responsibility, so with deserts. Someone commits a crime and is punished by the state; 'he deserved it,' we say self-righteously—as if we were moral and he immoral, when in fact we are lucky and he is unlucky—forgetting that there, but for the grace of God and a fortunate early environment, go we.

Id.

[430] *Genesis* 4:9.