''WHAT ANY PARENT KNOWS'' BUT THE SUPREME COURT MISUNDERSTANDS: REASSESSING NEUROSCIENCE'S ROLE IN DIMINISHED CAPACITY JURISPRUDENCE

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In Miller v. Alabama*, the Supreme Court appealed to neuroscience studies concerning the diminished capacities of adolescents to justify leniency in the sentencing of juvenile offenders. Reflecting on the recent proliferation of juvenile proportionality cases, the Court noted "[o]ur decisions rested not only on common sense—on what 'any parent knows'—but on science and social science as well." This Article casts a skeptical eye on the legal import of these scientific insights into the adolescent brain for normative evaluations of criminal culpability. Although the studies cited offer little probative value beyond the common sense wisdom about children that "any parent knows," the Court's efforts to employ psychiatric data to objectify mitigating criteria have distracted the Justices from analyzing the precise legal relationship between diminished* capacity *and diminished* culpability*, while intractably confusing the Eighth Amendment doctrine of proportionality. After analyzing the history of both proportionality review and the diminished capacity defense, this Article cautions that judges should not automatically equate factual findings of neurobiological abnormalities—that merely evidence diminished capacity—with a moral-legal conclusion of lessened culpability. Given the wide applicability of this defense, such reductionist interpretations contravene the principles of moral responsibility, which seek to differentiate culpability among individual*

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offenders. As an alternative means of reconciling the burgeoning role of neuroscience with the established tenets of the criminal doctrine, this Article proposes a novel framework for assessing the mitigating effect of brain science that judges could equally apply to all classes of offenders, including juveniles.

Keywords: *Mitigation, moral responsibility, proportionality, criminal defenses, neuroscience, juveniles*

INTRODUCTION

The recent Supreme Court jurisprudence on juvenile sentencing reveals a struggle to reconcile novel developments in neuroscience with the established criminal doctrine. In an effort to rescue uniquely sympathetic classes of offenders from the excessively harsh sanctions frequently mandated by the criminal justice system, the Court has significantly expanded the Eighth Amendment doctrine of proportionality, which aims to prohibit cruel and unusual punishment by matching the severity of a punishment to the culpability of the offender and the gravity of his offense. The Court has accelerated this doctrinal transformation by increasingly bolstering its independent judgment that a sentence is disproportionately severe with hard scientific facts that obscure, rather than clarify, the underlying normative judgments regarding blame and desert. The Court's challenge arises not from any groundbreaking scientific revelation, but from the conspicuous absence of a theory of mitigation into which it could integrate new scientific data.

As the most recent installation of this trend, the 2012 case of *Miller v. Alabama* prohibited sanctioning juveniles with the cruel and unusual punishment of mandatory life imprisonment without the possibility of parole.[1] *Miller* thus became the third Supreme Court opinion in less than a decade to employ proportionality review to mandate leniency for juvenile offenders on the basis that a sentence failed to reflect science's most recent affirmation of adolescents' diminished culpability and heightened capacity for change.[2] In justifying the need for leniency, the Court noted that "[o]ur decisions rested not only on common sense—on what 'any

1. Miller v. Alabama, 132 S. Ct. 2455, 2463 (2012).

2. *Miller*, 132 S. Ct. at 2460; Graham v. Florida, 130 S. Ct. 2011, 2030 (2010); Roper v. Simmons, 543 U.S. 551, 570, 571 (2005).

parent knows'—but on science and social science as well."[3] Yet, as this Article will argue, the studies cited by the Court offer little probative value for assessing the blameworthiness of minors beyond the common sense wisdom about children that had long been accepted.

This Article strives to illuminate some unforeseen doctrinal implications of the Court's choice to justify juveniles' diminished culpability by appealing to neuroscience research demonstrating that children's brains differ from those of adults. Although this Article does not contest the sagacity of the Court's ultimate determination that minors—who are still developing their moral judgment—should not automatically be sentenced to life without parole, it does problematize the Court's inference that evidence of brain abnormalities corresponding to adolescents' diminished moral capacities should automatically be equated to the legal—and deeply moral—finding of reduced blameworthiness. The cited studies, which establish the neurobiological underpinnings of juveniles' immaturity and recklessness, their susceptibility to environmental influences, and the evolving nature of their moral character, only confirm behavioral propensities that would be obvious to any parent. Yet, the Supreme Court neglects another principle that any parent would know: when children demonstrate poor judgment, those charged with morally educating them reprimand them precisely because this behavior reflects a moral defect for which the minor ought to be held accountable. By contrast, the Supreme Court employed studies that medicalize these quintessential features of youth in order to externalize these character faults and exculpate the minor from blame.

Because the Court failed to investigate *why* neuroscientific accounts of adolescents' criminal propensities should reduce minors' legal accountability, it does not articulate a sufficiently nuanced principle of diminished capacity to be generalizable to other classes of offenders. By confusing biomechanical causation with per se mitigation, the Court validates the "my brain made me do it" excuse. This "fundamental psycho-legal error"[4] undermines foundational doctrines of criminal responsibility by mitigating the culpability of many criminal offenders whom the law traditionally regards as entirely deserving of blame, such as drug addicts, sex offenders,

3. *Miller*, 132 S. Ct. at 2464.

4. Stephen J. Morse, *Brain Overclaim Syndrome and Criminal Responsibility*, 3 OHIO ST. J. CRIM. L. 397, 405 (2006).

and the large swaths of the criminal population with antisocial personality disorder. The Court's error lies in suggesting that all neurological abnormalities mitigate culpability, without clarifying the particular psychological features of a diminished capacity—such as impaired rationality—that render an offender less blameworthy.

Although this Article is not the first to suggest that a court—enchanted with the authoritative trappings of scientific data—cited neuroscience research in an unreliable or disingenuous manner,[5] it does seek to propose a novel solution, by discerning discrete principles of mitigation from the existing criminal doctrine of excuse. After analyzing several criminal defenses, it argues that only impairments of morally neutral capacities such as rationality (and, to a lesser extent, volition) ought to diminish culpability. The law cannot, however, coherently mitigate an offenders' culpability to reflect diminished *moral* capacities without contravening the doctrine's core retributive understandings of desert. Moreover, this Article observes that although the *Miller* opinion could have precluded overbroad applications of its holding by grounding its conclusion solely on juveniles' greater prospects for reform, this approach would have required the Court to abandon the predominantly retributive approach to punishment it has endorsed over the past several decades. This raises the question of whether the Court's proportionality jurisprudence truly seeks to vindicate juveniles' unique claim to leniency, or merely strives to combat the severe mandates of the United States' highly retributive sentencing regimes.

In Part I, this Article begins by contextualizing the *Miller* opinion within the developing Eighth Amendment jurisprudence. It highlights the evolution of proportionality analysis, in which the Court's practice of citing objective scientific data has grown with its increasing reliance on its own subjective evaluations of proportionality. Part II then outlines the majority's reasoning in *Miller*, noting the superficiality of the Court's diminished capacity rationale. Part III proceeds to explore the undertheorized concept of diminished capacity. After debunking the coherence of its broadest application, it strives to construct a novel diminished capacity framework

5. *See, e.g.*, Jay D. Aronson, *Brain Imaging, Culpability and the Juvenile Death Penalty*, 13 PSYCHOL. PUB. POL'Y & L. 115 (2007); Teneille Brown & Emily Murphy, *Through A Scanner Darkly: Functional Neuroimaging as Evidence of a Criminal Defendant's Past Mental States*, 62 STAN. L. REV. 1119 (2010); Dahlia Lithwick, *There Are More Reasons than "Brain Science" to Go Easier on Children*, SLATE (June 27, 2012); Richard A. Posner, *Justices Should Use More than Their Gut and "Brain Science" to Decide a Case*, SLATE (June 26, 2012).

that would comport with the existing doctrine. By classifying three distinct types of diminished decision-making capacities, it suggests how courts could avoid overinclusive applications of this doctrine without wrestling with the difficult issues of causal determinism and free will. Employing the proposed principles of mitigation, this Article argues that the diminished moral capacities on which the Court relies are not supported by the existing criminal doctrine and undermine a retributive theory of desert. Finally, to preserve the Court's protective treatment of children, Part IV explores alternative justifications for the Court's mandate of leniency for minors. It applauds the Court for recognizing the salience of juveniles' "capacity for change," but argues that the significance of this factor depends on a rehabilitative ideal. Neuroscience attesting to the "fixability" of certain criminal propensities could nonetheless legitimately justify greater mercy by signaling situations in which it would be appropriate to dispense with the excessively harsh retributive lens.

I. A BRIEF HISTORY OF PROPORTIONALITY REVIEW

The Court's appeal to neuroscience in *Miller v. Alabama* constitutes only the most recent installation of a broader trend wherein the Supreme Court has increasingly expanded the Eighth Amendment doctrine of proportionality to independently evaluate the punishment that it believes an offender deserves. The evolution of this doctrine lends insight into the Court's attraction to scientific data. Throughout the past century, justices have endured criticisms alleging that the proportionality principle merely permits members of the court to supervene the democratic process on the basis of their own subjective moral judgment instead of "objective factors."[6] While *Miller* presents its holding as a mere extension of the principles articulated in two preceding Eighth Amendment cases on juvenile punishment, the Court's increasing reliance on the scientific research supporting

6. *See, e.g.*, Coker v. Georgia, 433 U.S. 584, 592 (1977) ("[T]hese Eighth Amendment judgments should not be, or appear to be, merely the subjective views of individual Justices; judgment should be informed by objective factors to the maximum possible extent."); Kennedy v. Louisiana, 129 S. Ct. 1, 3–4 (2008) (Scalia, J.) ("The proposed Eighth Amendment would have been laughed to scorn if it had read 'no criminal penalty shall be imposed which the Supreme Court deems unacceptable.'"), *denying reh'g to* Kennedy v. Louisiana, 554 U.S. 407 (2008).

these principles, at the expense of "objective indicia of contemporary values,"[7] suggests that the availability of scientific data may itself be transforming the doctrine.

A. The Origins of Proportionality Review

The Eighth Amendment has always been understood to entirely forbid certain barbaric punishments. Only in the relatively recent past, however, did the Supreme Court establish that it also prohibits the imposition of otherwise constitutional punishments, when they are disproportionately harsh relative to the offense committed.

The 1910 decision of *Weems v. United States* marked the first case in which the Supreme Court suggested that the Eighth Amendment might contain a principal of proportionality.[8] But it was not until the greater part of a century later that the Supreme Court explicitly recognized the proportionality principle by restricting capital punishment to crimes involving murder.[9] Then, in the 1983 case of *Solem v. Helm*, the Supreme Court first held that the Eighth Amendment prohibits excessive incarceration, where the time imposed is "grossly disproportionate" to the crime committed.[10] Writing for the five-member majority, Justice Powell outlined three ostensibly "objective criteria" for the Court to consider in determining whether a sentence is proportionate.[11] Although two of the factors looked to societal indicators of "national consensus," the first of these simply compared the "gravity of the offense" to the "harshness of the penalty," much as the Court would endeavor to do in *Miller*.

Yet each majority opinion establishing the proportionality principle confronted a sizeable dissent, which asserted that the doctrine substituted the subjective moral values of the Court for the democratic will of the

7. Atkins v. Virginia, 536 U.S. 304, 324 (2002).

8. Weems v. United States, 217 U.S. 349, 364 (1910) (overturning a sentence of "hard and painful labor," because the punishment was disproportionate to the crime of falsifying bank notes).

9. *Coker*, 433 U.S. 584.

10. Solem v. Helm, 463 U.S. 277, 284 (1983) (holding that life without parole is cruel and unusual punishment for the crime of issuing a "no account" check for $100); Chris Baniszeweski, *Supreme Court Review of Excessive Prison Sentences: The Eighth Amendment's Proportionality Requirement*, 25 ARIZ. ST. L.J. 929, 941 (1993).

11. *Solem*, 463 U.S. at 290–92.

people, as revealed by the legislature.[12] For instance, Chief Justice Burger, writing for a four-member dissent to *Solem*, took issue with the majority's assessment of the retributive and deterrent value of the death penalty as punishment for rape, contending that "[n]o neutral principle of adjudication permits a federal court to hold that in a given situation individual crimes are too trivial in relation to the punishment imposed."[13] These protests regarding the subjectivity of proportionality review may have inclined the Court to seek hard scientific data to foster the impression of greater objectivity.[14]

B. Proportionality and Diminished Capacity

Only in the past two decades has the Supreme Court begun using the Eighth Amendment to forbid the imposition of otherwise constitutional punishments on certain classes of offenders because of their lessened culpability. Over time, these cases have relied increasingly less on evidence of national consensus and increasingly more on the Court's independent assessment of justice and desert.

In *Atkins v. Virginia* the Supreme Court declared it cruel and unusual punishment to impose capital punishment on mentally retarded offenders.[15] Although the Court premised its decision both on national consensus and the penological purposes served by executing offenders with intellectual disabilities, it grounded its national consensus finding on much weaker evidence than in past cases where this factor had been

12. *See, e.g.*, *Weems*, 217 U.S. at 385 (White, J., dissenting); *Coker*, 433 U.S. at 612–18 (Burger, J., dissenting); *see also* NORMAN J. FINKEL, COMMONSENSE JUSTICE: JUROR'S NOTIONS OF THE LAW 139 (1995) (likening Justice White's opposition to proportionality review in *Weems* to Justice Black's dissent in *Griswold*, where he claimed that the Court was not equipped to take Gallup polls).

13. *Solem*, 463 U.S. at 314.

14. *See* Stanford v. Kentucky, 492 U.S. 361, 379 (1989) (denouncing the "philosopher-king" approach whereby judges assess proportionality on the basis of whether a sentence is "measurably contributory to acceptable goals of punishment"), *overruled by Roper*, 543 U.S. 551 (2005); LEARNED HAND, THE BILL OF RIGHTS, VI (1958) (rejecting the notion of the judge as a "Platonic Guardian" charged with seeking objective truth).

15. Since *Atkins*, Congress replaced federal law references to "mental retardation" with "intellectual disability" to connote "individuals with significant limitations in intellectual and cognitive functioning." Rosa's Law, Pub. L. No. 111-256, 124 Stat. 2643 (2010); DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (5th ed. 2013) [DSM-5].

key.[16] The Supreme Court then bolstered this purported societal judgment by asserting that neither the penological goals of deterrence nor retribution favored the imposition of the death penalty.

With respect to retribution—or society's interest in seeing that the offender gets his "just deserts"—the majority found that although intellectually disabled persons "frequently know the difference between right and wrong and are competent to stand trial," their cognitive and behavioral impairments diminish their personal culpability.[17] It cited the works of forensic psychiatrists in explaining that by *clinical definition*, these offenders "have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others."[18] Although the Court asserted that there was no evidence that the persons with intellectual disabilities were more likely to engage in criminal conduct, it referred to psychological research, which provided "abundant evidence that they often act on impulse rather than pursuant to a premeditated plan, and that in group settings they are followers rather than leaders."[19] Noting that "the theory of deterrence in capital sentencing is predicated upon the notion that the increased severity of the punishment will inhibit criminal actors from carrying out murderous conduct," the Court further reasoned that these offenders' "diminished ability to understand and process information, to learn from experience, to engage in logical reasoning, or to control impulses" also reduce the likelihood that they will be deterred by the threat of execution.[20]

The *Atkins* decision served as an impetus for the juvenile sentencing cases in several respects. First, it established a precedent of using proportionality review to constitutionalize leniency for certain categories of offenders with "diminished capacity." Second, it modeled the practice of supplementing weaker evidence of national consensus with an independent judicial assessment of proportionality when the Court could buttress its

16. *Atkins*, 536 U.S. at 315 (finding national consensus in "the consistency of the direction of change" toward prohibiting execution of intellectually disabled offenders in death penalty states that had directly addressed the issue, even though only 21 states had forbidden their execution).

17. *Id.* at 319.

18. *Atkins*, 536 U.S. at 318.

19. *Id.* at n.24.

20. *Id.* at 320.

moral analysis with social science data. Third—and most crucially—it endeavored to at least briefly articulate *why* diminished mental capacities might diminish blameworthiness under a retributive theory of desert. *Atkins* indicated that although the ability to distinguish right from wrong satisfied the mental capacity necessary for attributions of guilt, the presence of other diminished cognitive capacities in a legally "sane" offender may render him less blameworthy if they incline him toward criminal conduct. However, by declining to explain in any greater depth the theoretical principles that justify leniency for offenders with diminished mental capacities, *Atkins* opened the door for other classes of offenders to seek leniency on the basis that they too could trace their criminal propensities to mental abnormalities validated by brain science.

C. The "Lessened Culpability" of Juveniles

In the past decade, proportionality review has witnessed its most rapid evolution yet, through three juvenile cases illustrating the Court's increasing willingness to rely on its own independent evaluation of an offender's desert. *Roper v. Simmons*, *Graham v. Florida*, and *Miller v. Alabama* all prohibited subjecting minors to certain sentences or sentencing regimes that posed too great a risk of imposing a disproportionately harsh sanction in light of the adolescent's "diminished culpability" and "greater capacity for change."

Whereas the majority in all three of these cases at least mentions "objective indicia of national consensus," the Court's reliance on this inconclusive evidence shifts from weak to nonexistent over the course of the decade.[21] For instance, when *Roper* overruled *Stanford v. Kentucky* by forbidding the execution of juveniles, it premised its reversal in part on *Stanford*'s prior "rejection of the idea that this Court is required to bring its independent judgment to bear on the proportionality of the death penalty for a particular class of crimes or offenders."[22] *Roper* then bolstered its independent judgment that minors warranted special leniency by appealing to scientific research attesting to the differences between the minds of juveniles and adults. As the science attesting to juveniles' diminished capacities grew stronger over the course of these cases, the Court not only devoted a diminishing portion of its analysis to explaining the relevance of these studies, but

21. *Miller*, 132 S. Ct. at 2471; *Graham*, 130 S. Ct. at 2026; *Roper*, 543 U.S. at 574–75.
22. *Roper*, 543 U.S. at 574–75, *citing Stanford*, 492 U.S. at 377–78.

also began limiting the justifications offered to those that could be confirmed with data. For example, when *Thompson v. Oklahoma* prohibited capital punishment for offenders under the age of sixteen in 1988, it proffered three reasons why juveniles deserve leniency under a retributive theory of punishment: (1) their lesser culpability due to diminished capacity, (2) their greater capacity for moral growth, and (3) society's fiduciary obligation to its children.[23] Yet when *Roper* subsequently cited *Thompson* as support for its decision to outlaw the death penalty for all minors, only *Thompson*'s third factor—which was not supported by social science data—was dropped from the analysis.[24]

As the most recent installation in this line of doctrine, *Miller v. Alabama* epitomized the trend observed throughout the Supreme Court's proportionality decisions. *Miller* expressly disclaimed the relevance of national consensus data, asserting that objective indicia analysis was inapposite when the Court invalidates a sentencing process as opposed to erecting a categorical bar.[25] Instead, the majority justified expanding Eighth Amendment protections of juveniles merely by reiterating the proportionality principles previously articulated in *Roper* and *Graham*: that minors are categorically deserving of less severe punishment because of their "lessened culpability" and "greater 'capacity for change.'"[26] As Justice Roberts argues in his dissent, however, the precedent established in neither *Roper* nor *Graham* "compelled" the specific prohibition in *Miller*,[27] as those cases had restricted their holdings to cases involving the death penalty or nonhomicide offenders, respectively.[28] Hence, in the absence of historical, textual, precedential, or legislative authority speaking directly to the issue, the majority in *Miller* turned to neuroscience to support its progressive determination that imposing mandatory life without parole on juveniles

23. Thompson v. Oklahoma, 487 U.S. 815, 835–37 (1988).

24. *See Roper*, 543 U.S. at 561–62.

25. *Miller*, 132 S. Ct. at 2470–73; Ian P. Farrell, *Abandoning Objective Indicia*, 122 YALE L.J. ONLINE 303, 308–10 (2013) (arguing that the justification offered in *Miller* for abandoning objective indicia analysis did not comport with the Court's previous account of categorical bars).

26. *Miller*, 132 S. Ct. at 2460.

27. *Id.* at 2480 ("[The Court] claims that precedent 'leads to' today's decision, primarily relying on *Graham* and *Roper*. Petitioners argue that the reasoning of those cases 'compels' finding in their favor. The Court is apparently unwilling to go so far, asserting only that precedent points in that direction.") (internal citations omitted).

28. *Id.* at 2481.

constituted cruel and unusual punishment according to "evolving standards of decency."[29] After reiterating portions of the vague diminished capacity principle articulated in *Roper* and *Graham*, the Court asserted that "the science and social science supporting *Roper*'s and *Graham*'s conclusions have become even stronger."[30] One need not question the scientific validity of these studies to wonder whether they truly remove any subjectivity from the Court's judgment. As the *Miller* majority itself observed, "none of what [*Graham*] said about children—about their distinctive (and transitory) mental traits and environmental vulnerabilities—is crime-specific."[31] *Miller* failed to realize, however, that these mitigating principles are not crime-specific because no scientific fact about the adolescent brain could speak directly to the moral question of what punishment a court ought to impose.

II. THE *MILLER V. ALABAMA* DECISION

Miller established that mandatory sentences of life imprisonment without the possibility of parole constitutes cruel and unusual punishment when imposed on offenders under the age of eighteen. As a result, *Miller* afforded all juvenile offenders the enhanced procedural protection of individualized sentencing in order to permit judges to consider the mitigating circumstance of the defendant's youth. Moreover, the Court anticipated cases not governed by a mandatory sentencing regime, asserting that even for the most heinous crimes, juvenile sentences of life without parole should be rare, because minors should typically be sentenced more leniently in accordance with their "lesser culpability" and "greater capacity for change."[32] In essence, this holding constitutionalized the principle that youth should always be considered as a factor mitigating culpability and, consequently, punishment.

In justifying the majority's holding, Justice Kagan referenced a body of psychological and neuroscience research supporting the same mitigation principles that had furnished the basis for leniency in *Roper* and *Graham*. She highlighted the Court's reliance on empirical data in these cases, remarking that, "[o]ur decisions rested not only on common sense—on

29. *Id.* at 2463.
30. *Id.* at 2465 n.5.
31. *Id.* at 2465.
32. *Id.* at 2463.

what 'any parent knows'—but on science and social science as well."[33] By the time *Miller* was decided, it was uncontroversial within the scientific community that adolescent brains are still typically underdeveloped compared to those of adults. As the American Psychological Association brief cited by the Court states, "It is increasingly clear that adolescent brains are not yet fully mature in regions and systems related to higher-order executive functions such as impulse control, planning ahead, and risk avoidance."[34] But scientific data was hardly necessary to verify the accepted wisdom that teenagers are susceptible to peer pressure and still in the process of developing a permanent identity. What remains less clear, however, is how this neurological evidence should influence the Court's assessment of juveniles' blameworthiness and, accordingly, the appropriate severity of their punishment.

Kagan explained that the constitutional requirement for juvenile leniency relies on three significant gaps between juveniles and adults: (1) immaturity, (2) vulnerability, and (3) unformed character. First, children's lack of maturity and underdeveloped sense of responsibility leads to recklessness, impulsivity, and heedless risk-taking. Noting that the empirical evidence establishing fundamental differences between the executive functioning of juvenile and adult brains had become even stronger since *Graham*, the Court swiftly concluded that these diminished capacities "both lessened a child's 'moral culpability' and enhanced the prospect that, as the years go by and neurological development occurs, his 'deficiencies will be reformed.'"[35] Second, children are more vulnerable given their susceptibility to negative influences as well as their inability to extricate themselves from crime-producing settings. Here, as well, the Court observed that numerous post-*Graham* studies "indicate that exposure to deviant peers leads to increased deviant behavior and is a consistent predictor of adolescent delinquency."[36] Third, because a child's character is not as well formed as an adult's, his actions are less likely to be evidence of

33. *Id.* at 2464.

34. *Id.* at 2465 n.5, *citing* Brief for the American Psychological Association, American Psychiatric Association, and National Association of Social Workers as Amici Curiae in Support of Petitioner, Miller v. Alabama, 132 S.Ct. 2455 (2012) (No. 10-9646), 2012 WL 174239, *3.

35. *Id.* at 2464–65.

36. *Id.* 2464 n.5.

irretrievable depravity.[37] The Court similarly bolstered this intuitive claim with studies from *Roper* showing that a only small percentage of adolescents who engage in illegal activity actually go on to develop entrenched patterns of problem behavior.[38]

Because these juvenile traits bear on the question of what punishment an offender deserves to the extent that they diminish the penological justifications for imposing a harsh sentence, the Court analyzed the morally salient attributes of juvenile offenders in terms of the four purposes of punishment. First, society's interest in incapacitating dangerous offenders could only justify sentencing a minor to life without parole if the offense served as "evidence of irretrievabl[e] deprav[ity]" indicating that the "juvenile offender forever will be a danger to society." Noting that this would require a finding that the offender is incorrigible, the Court asserted that "'incorrigibility is inconsistent with youth,'" because an adolescent's traits are "less fixed" and his character "not as 'well formed'" as an adult's.[39] Second, rehabilitation could not support such a permanent sanction, since life without parole—like the death penalty—"'forswears altogether the rehabilitative ideal.'"[40] Third, the Court reasoned that deterrence could not justify imposing the harshest sanctions on a juvenile offender, because the "immaturity, recklessness, and impetuosity" characteristic of youth, render it less likely that a minor will consider potential punishment when evaluating whether to engage in criminal conduct.[41]

With respect to retribution, *Miller* appealed to the concept of "diminished culpability" as its primary basis for leniency,[42] but provided essentially no explanation for how these three distinctive attributes of youth reduce an adolescent's blameworthiness. In fairness, one must understand *Miller's* abridged analysis of the legal relevance of these factors in light of its citation to slightly more robust discussion in *Thompson*, *Roper*, and *Graham*. In both *Roper* and *Graham*, the Court expounded briefly on the goals of retribution, asserting that society may impose a severe sanction on

37. *Id.* at 2464.
38. *Id.*
39. *Id.* at 2458, 2465.
40. *Id.* at 2465.
41. *Id.*
42. The following sentence encompasses *Miller's* entire analysis of this issue: "Because "'[t]he heart of the retribution rationale'" relates to an offender's blameworthiness, "'the case for retribution is not as strong with a minor as with an adult.'" *Id.*

an offender either to express the community's moral outrage or to restore the moral imbalance created when the offender inflicted harm on the victim.[43] In either case, retribution requires that the sentence directly relate to the "personal culpability of the offender," but *Graham* said little more to clarify how one assesses the magnitude of personal culpability. By contrast, *Roper* indicated that all three of the "distinctive attributes of youth" reduce the blameworthiness of a minor. Specifically, immaturity diminishes culpability according to what is best understood as a diminished capacity rationale. Analogizing to *Atkins*, the Court asserted that "the susceptibility of juveniles to immature and irresponsible behavior" renders their conduct less morally reprehensible than an adult's, despite the fact that they can distinguish right from wrong.[44] *Roper* also explained that minors' "vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment."[45] Here the Court implied that an offender is less blameworthy if his wrongdoing results in part from challenging external circumstances as opposed to merely from his own internal defects in character. Finally, *Roper* cited juveniles' unformed character as mitigating culpability, explaining that "[f]rom a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed."[46] Although juveniles' capacity for change most obviously relates to incapacitation and rehabilitation considerations, *Roper* indicated that their transient character deficiencies also mitigate their retributive desert because their current misconduct often does not accurately reflect the quality of character that a juvenile offender may acquire as an adult.[47]

43. *Graham*, 130 S. Ct. at 2028.

44. *Roper*, 543 U.S. at 563, 570.

45. *Id.* at 570.

46. *Id.*

47. Juveniles' capacity for change might diminish blameworthiness under a "character theory of excuse," according to which an offender is excused from blame for wrongful conduct because "such action is not determined by (or in some other way expressive of) those enduring attributes of ourselves we call our characters." By contrast, the preceding environmental rationale relies on a choice theory of excuse, which holds that an offender is excused from blame when, at the time of performing an action, he "did not have sufficient capacity or opportunity to make the choice to do otherwise." Michael S. Moore, *Choice, Character, and Excuse*, *in* Ellen Frankel Paul et al., Crime, Culpability, and Remedy 29 (1990).

Of the three juvenile attributes proffered as justifying adolescents' lessened culpability, the Supreme Court has increasingly relied on the most obscure—diminished capacity—as the primary reason why minors are less blameworthy under a retributive framework.

III. DIMINISHED *MORAL* CAPABILITIES DO NOT DIMINISH CULPABILITY

Despite *Thompson*'s brazen assertion that the justification for granting leniency to juveniles "is too obvious to require extended explanation,"[48] the Supreme Court's attempts to clarify this axiom have not succeeded. One cannot reconcile the seemingly unrestricted diminished capacity principle articulated in these cases with well-established doctrines of criminal law. In particular, the Court's analysis contravenes the law's compatibilist understanding of voluntary action and commits the fundamental psycholegal error by confusing mere causation with excuse. Whereas the law clearly regards intellectual impairments as legitimate excusatory conditions, in general, the criminal doctrine has staunchly resisted deterministic arguments that extrapolate from this principle to argue that offenders are less blameworthy solely because of their propensity toward criminal behavior. The juvenile proportionality cases therefore raise the question of what sorts of mental abnormalities legitimately reduce the culpability of an offender. The law's treatment of diminished capacities in the context of other excusatory doctrines reveals that *Miller* fails to attend to a distinction that criminal defense doctrine has historically regarded as supremely salient. Namely, mental abnormalities only mitigate blame if they distort the offender's behavior in a particular manner—by frustrating the offender's ability to effectuate his own good intentions, rather than simply producing morally unacceptable intentions on which he voluntarily acts.

A. Diminished Capacity as Partial Excuse

The weak precedent in American jurisprudence for diminished capacity as a partial excuse cannot justify regarding the neurological states corresponding to minors' immaturity or recklessness as reducing their blameworthiness. The broadest understanding of diminished capacity "permits the jury

48. *Thompson*, 487 U.S. at 835

to mitigate the punishment of a mentally disabled but sane offender in any case where the jury believes that the defendant is less culpable than his normal counterpart who commits the same criminal act."[49] This concept rejects the law's traditionally binary approach to mental competency,[50] instead reflecting the notion that culpability exists along a "continuum of competence"—across which people's capacities are widely distributed.[51] Although the pure concept of "diminished responsibility" or "partially diminished capacity" exists as a formal defense in many European countries, most jurisdictions in the United States do not officially recognize diminished capacity as either an excuse or partial excuse.[52] Moreover, the Insanity Defense Reform Act strongly disfavors the admission of diminished capacity evidence in an effort to prevent courts from covertly expanding the statutory definition of insanity—for instance, by admitting psychiatric testimony regarding psychological impairments or intoxication that is immaterial to any statutorily enacted affirmative defense.[53]

In practice, however, some state courts have permitted defendants to submit evidence of a mental abnormality not rising to the level of legal insanity for a purpose that is theoretically distinct, but functionally similar,

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49. United States v. Pohlot, 827 F.2d 889, 905 (3d Cir. 1987).

50. When Michigan abolished the diminished capacity defense, it asserted:

> [T]o the psychiatrist mental cases are a series of imperceptible gradations from the mild psychopath to the extreme psychotic, whereas criminal law allows for no gradations. It requires a final decisive moral judgment of the culpability of the accused. For the purposes of conviction there is no twilight zone between abnormality and insanity. An offender is wholly sane or wholly insane.

People v. Carpenter, 627 N.W.2d 276, 283 (Mich. 2001) (*citing* State v. Bouwman, 328 N.W.2d 703, 706 (Minn. 1982)).

51. Stephen J. Morse, *Criminal Law: Undiminished Confusion in Diminished Capacity*, 75 J. CRIM. L. & CRIMINOLOGY 1, 21 (1984); Joshua Dressler, *Reaffirming the Moral Legitimacy of the Doctrine of Diminished* Capacity, 75 J. CRIM. L. & CRIMINOLOGY 953, 959 (1984).

52. *Pohlot*, 827 F.2d at 905 (finding that the Insanity Defense Reform Act sought to eliminate the partial responsibility excuse, but did not prohibit the admission of credible psychiatric evidence that would negate a defendant's mens rea); *see also* Metrih v. Lancaster, 133 S. Ct. 1781 (2013) (holding that the Michigan Supreme Court did not unreasonably apply clearly established federal law by retroactively abolishing the diminished-capacity defense); Lyle Denniston, *Argument Preview: Taking Away a Defense to Crime*, SCOTUS BLOG (Apr. 23, 2013), http://.scotusblog.com///preview/ (discussing the controversial status of what the media labeled "the Twinkie defense").

53. Insanity Defense Reform Act, 18 U.S.C.A. § 17.

to a pure diminished capacity defense. Courts have admitted evidence of a neurological abnormality offered to reduce sentences or to negate mens rea by arguing that the defendant did not have the capacity to form specific intent.[54] These defenses contend that offenders with diminished capacity "do not and cannot function well enough for us to confidently liken their 'actions' and 'intentions' to the actions and intentions of sober, sane, adults."[55] Likewise, the Federal Sentencing Guidelines provide that a reduced sentence may be warranted if a "significantly reduced mental capacity . . . contributed substantially to the commission of the offense," where "'[s]ignificantly reduced mental capacity' means the defendant, although convicted, has a significantly impaired ability to (A) understand the wrongfulness of the behavior comprising the offense or to exercise the power of reason; or (B) control behavior that the defendant knows is wrongful."[56] Although adopted only by a small minority of states, the Model Penal Code's doctrine of "extreme emotional disturbance" also reduces homicide from murder to manslaughter in cases where "homicide which would otherwise be murder is committed under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse."[57] Nonetheless, the term "disturbance" seems to encompass transient mental states rather than enduring mental abnormalities.[58]

Although this Article does not advocate abolishing the diminished capacity defense, as has been urged by many courts and legal commentators, the controversial legal status of the defense helps to explain why the concept is undertheorized.[59] According to the most cautious (and in this Article's view, correct) understanding of diminished capacity, insane and diminished capacity defendants differ only in the degree that they lack the

54. Morse, *Criminal Law: Undiminished Confusion*, *supra* note 51, at 21 (describing four basic forms of "partial responsibility" utilized by Anglo-American jurisprudence).

55. Moore, *Choice*, *supra* note 47, at 29, 31; Michael S. Moore, *Causation and Excuses*, 73 CAL. L. REV. 1091 (1985).

56. U.S. SENTENCING GUIDELINES MANUAL § 5K2.13 (2002).

57. MODEL PENAL CODE § 210.3 cmt. 5(a) (stating that, in the context of manslaughter, "it is clear that personal handicaps and some external circumstances must be taken into account."); Morse, *Criminal Law: Undiminished Confusion*, *supra* note 51, at 22.

58. Stephen J. Morse, *Diminished Rationality, Diminished Responsibility*, 1 OHIO ST. J. CRIM. L. 289, 294 (2003).

59. *See, e.g.*, *Carpenter*, 627 N.W.2d at 276; *Pohlot*, 827 F.2d at 905; State v. Wilcox, 436 N.E.2d 523 (Ohio 1982); Peter Arenella, *The Diminished Capacity and Diminished Responsibility Defenses: Two Children of a Doomed Marriage*, 77 COLUM. L. REV. 827 (1977).

requisite capacities for legal responsibility.[60] Whereas the law will not wholly exonerate an offender who demonstrates sufficient rationality to satisfy the binary test for legal competency, the partial excuse of diminished capacity can nonetheless mitigate the culpability of a sane but mentally impaired offender, if he possesses psychological impairments with respect to those same abilities that qualify him as competent to be tried, convicted, and punished.

1. What Diminished Capacity Does *Not* Mean

To maintain a coherent concept of diminished capacity, courts must resist the instinct to regard the neurobiological underpinnings of an offender's behavior as per se excusatory. For if the law embraces this "fundamental psycho-legal error," it succumbs to a reductio ad absurdum whereby it cannot hold any actor fully accountable for his conduct, because brain states precipitate the choices of all actors independent of their level of culpability.

a. The Fundamental Psycho-Legal Error: A Reductio Ad Absurdum

The least imaginative reading of the juvenile proportionality cases suggests that adolescents are less blameworthy under a diminished capacity rationale because their underdeveloped brains produce their behavior, and society should not blame people for their neurobiology. Although intuitively appealing, this explanation rests on the mistaken assumption that one ought to excuse all behavior that is caused by one's brain. Professor Morse has labeled the folk intuition that an actor is not responsible for a crime if his brain made him do it, "the fundamental psycho-legal error."[61] The fundamental psycho-legal error actually comprises two mistaken assumptions. First, it invokes "naïve dualism," which regards brain activity as wholly independent of the corresponding mental states—like desires, beliefs, or intentions—to which moral responsibility typically attaches. Second, it adopts the philosophical position of incompatibilism by assuming

60. *See* Morse, *Diminished Rationality*, *supra* note 58, at 289 ("This partial excuse would apply in cases in which a defendant's behavior satisfied the elements of the crime charged, but the defendant's rationality was non-culpably compromised and thus the defendant was not fully responsible for the crime charged.").

61. Morse, *Brain Overclaim*, *supra* note 4, at 405.

that truly voluntary action cannot be caused by any antecedent fact. Metaphysics aside, the law cannot sustain defenses relying on either of these assumptions without obliterating the criminal doctrine and its core objective of distinguishing culpable offenders from the blameless.

i. Naïve Dualism

Defendants typically invoke the fallacy of naïve dualism when they seek leniency on the basis of a neurological abnormality such as a chemical imbalance or brain trauma. For instance, after the previously well-adjusted sixteen-year-old, Christopher Tiegreen, suffered damage to his frontal lobe and brain stem during a car collision, he became violent and began habitually engaging in inappropriate and illegal behavior. To his mother's disappointment, a Georgia court nonetheless found him competent to stand trial when he was prosecuted for aggravated assault, citing a psychologist's testimony that Tiegreen was focused, cooperative, and understood the proceedings against him. His mother lamented the law's narrow understanding of competency, asserting, "His brain is so screwed up. It's not that Christopher is mean or cruel. It's just that he can't control himself like me or you."[62] While undoubtedly an intuitively compelling claim, this argument fails to realize that "as a general matter, it is *always* true that our brains 'made us do it.'"[63]

Neuroscience recognizes that, in all cases, each of our behaviors corresponds to a brain state. Because all psychological states are also biological ones, when assigning responsibility, the law cannot ask "was the cause psychological or biological?"[64] Were neuroscientists to demonstrate that the experience of love correlates to the firing of certain mirror neurons in the brain, one should not conclude that, because their brains manufacture the sentiment, people cannot truly love. All mental activity, ranging from logical reasoning to the experience of emotion, also manifests itself on the neurobiological level. Indeed, moral psychologists have conducted much research with psychologically "normal" individuals on the brain activity associated with people's reasoning as they think through different kinds of

62. KEVIN DAVIS, *Brain Trials: Neuroscience Is Taking a Stand in the Courtroom*, ABA JOURNAL (Nov. 1, 2012).

63. John Monterosso & Barry Schwartz, *Did Your Brain Make You Do It?*, NEW YORK TIMES (July 27, 2012).

64. *Id.*

moral dilemmas.[65] Yet, one would commit the error of naïve dualism by inferring from this research that society cannot hold the psychologically typical research participants accountable for their decisions merely because material brain states produced their judgments.

Naïve dualism begins from the premise that the mind and body are two separate entities that can each independently affect human behavior, such that operation of one causal mechanism automatically precludes the other. From this assumption, the dualist reasons that when a person's brain causes his behavior, the person does not act voluntarily or make an authentic choice, because his decision does not issue from the mental states that we associate with our own first-hand experience of voluntary action.[66] The fallacy lies in presuming that physical events (i.e., neurobiological activity) operate within a distinct causal system from the mental self (i.e., the soul). This leads the dualist to regard evidence that the brain played a role in producing an offender's behavior as proof that the mental states to which the law typically attaches responsibility could not have been sufficiently present. In reality, because all mental experiences correspond to brain activity, the mere identification of a neurobiological cause of a decision or behavior does not render it any less likely that an actor's decision was voluntary. Likewise, establishing that an antisocial behavior correlates to a neurobiological characteristic does not in of itself challenge the default assumption that an individual's predilection for misconduct reflects an authentic defect in character for which he may be held accountable.

B.F. Skinner clarified and renounced naïve dualism in 1971, when he coined the term "homunculus" to describe the inner agent inside one's head. He posited that people mistakenly understand this inner agent to animate the typical individual by directing the rest of his physical body, including his brain.[67] As Greene and Cohen explain:

65. *See, e.g.*, Joshua Greene et al., *An fMRI Investigation of Emotional Engagement in Moral Judgment*, 293 SCIENCE 2105 (2001).

66. John Monterosso, Edward B. Royzman, & Barry Schwarz, *Explaining Away Responsibility: Effects of Scientific Explanation on Perceived Culpability*, 5 ETHICS & BEHAVIOR 139, at 155.

67. B.F. SKINNER, BEYOND FREEDOM AND DIGNITY 190–91 (1972) ("The picture which emerges from a scientific analysis is not of a body with a person inside, but of a body which *is* a person.").

> It is not as if there is you, the composer, and then your brain, the orchestra. You are your brain, and your brain is the composer and the orchestra all rolled together. There is no little man, no 'homunculus', in the brain that is the real you behind the mass of neuronal instrumentation.[68]

Yet, almost half a century later, people continue to fall victim to the trap of naïve dualism.[69] To illustrate, Monterosso conducted a study in which he asked research subjects to assess the culpability of wrongdoers in a series of hypothetical vignettes. Each vignette described causal explanations for an offender's wrongdoing of either a psychological nature, such as poor upbringing, or a neurological nature, such as a chemical imbalance or brain abnormality. Monterosso found that respondents mitigated the offender's culpability to a significantly greater degree when an explanation was framed in neurological rather than psychological terms. The participants justified their assessments with such statements as "If something is chemically wrong, in her brain that controls her, *she can't control that at all. Like, there's something insider her that, it controls her body*." And "I don't think it can be willpower or character if it is a brain thing."[70] Similarly, in Aspinwall's study, researchers evaluated the aggravating or mitigating effects of expert testimony regarding psychopathy on the sentences of state trial court judges.[71] The study found that although judges perceived psychopathy as an aggravating factor overall, the portion of judges identifying mitigating considerations significantly increased when evidence of precisely the same mental abnormality referenced biomechanical features of the disorder such as low MAOA activity, atypical amygdala function, and other neurodevelopmental factors. Thus, when researchers merely framed the same mental facts in neurological terms, judges understood traditionally *inculpatory* evidence to reduce blameworthiness and justify leniency.

These findings illuminate the untenable consequences of employing naïve dualism in legal thinking. The principle permits courts to diminish offenders' culpability for *all* psychological states—including those that typical increase blame—so long as a psychiatrist can furnish data revealing

68. Joshua Greene & Jonathon Cohen, *For the Law, Neuroscience Changes Nothing and Everything*, 359 PHIL. TRANSACTIONS ROYAL SOC'Y B (SPECIAL ISSUE) 1775, 1779 (2004).

69. *See* Skolnick Weisberg et al., *The Seductive Allure of Neuroscience Explanations*, 20 J. COGNITIVE NEUROSCIENCE 470 (2008).

70. Monterosso et al., *supra* note 66, at 152–53.

71. Lisa G. Aspinwall et al., *The Double-Edged Sword: Does Biomechanism Increase or Decrease Judges' Sentencing of Psychopaths?*, 337 Science 846 (2012).

the neurobiological underpinnings of the offender's behavior. Since scientists could theoretically provide such data for all individuals, not merely those with mental impairments or diminished capacities, embracing naïve dualism would undermine the fundamental objective of criminal jurisprudence. Nor is it sufficient to show that an offender possesses an *abnormal* brain or manifests *atypical* neurological activity. Every violent or impulsive person would presumably exhibit brain activity corresponding to these attitudes. Likewise, it would not be shocking to discover that recidivism is correlated with certain atypical neurobiological features relative to the law-abiding population. Yet U.S. law has overwhelmingly rejected the notion that a diagnosis of mental illness is per se excusatory, instead requiring that the illness additionally corrupt the thought processes of the accused in a particular manner.[72] As such, evidence of underdevelopment in the adolescent brain is insufficient on its own to justify leniency.

ii. Legal Compatibilism: Causation Is Not Excuse

A similar danger exists that folk intuitions about culpability will confuse causal determinism with coercion. Determinism consists in the widely accepted principle that "all events in the universe, including human action, are fully caused."[73] The Anglo-American legal tradition—along with practically all scientists and most philosophers—adopts the truth of determinism, at least as a working hypothesis. The truth of determinism is however irrelevant to evaluating the culpability of individual actors. Whether the laws of nature allow for the type of free will that would permit human beings to produce entirely uncaused decisions is a question that has equal implications for all decision makers and thus provides no assistance in *distinguishing* innocent agents from those who are blameworthy. Likewise, if people are not morally responsible for behaviors that issue from antecedent causes, the law could never hold anyone responsible for their behavior

72. *See* Durham v. United States, 214 F.2d 862, 874–75 (D.C. Cir. 1954) (exonerating a defendant from criminal responsibility if his unlawful act was the "product" of mental disease or defect), *overruled by* Unites States v. Brawner, 471 F.2d 969 (D.C. Cir. 1972) (rejecting the Product Test and holding that a person is not responsible for criminal conduct only if at the time of such conduct, as result of mental disease or defect, he lacked substantial capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law).

73. Stephen J. Morse, *Severe Environmental Deprivation (aka RSB): A Tragedy, Not a Defense*, 2 ALA. C.R. & C.L. L. REV. 147, 148–50 (2011).

in a deterministic world. Therefore, "[e]ven if the universe is causal and determined, some people lack rational capacity or are compelled, and most people have substantial rational capacity and do not lack control capacity or otherwise act under compulsion."[74] To preserve the moral accountability of at least some actors, all legal doctrines of responsibility are therefore fully consistent with the truth of determinism. Furthermore, the truth of determinism should not influence the thinking of courts that entertain diminished capacity defenses, as they have already conceded that human behavior arises from neurobiological causes by admitting deterministic psychiatric evidence concerning mental illness or brain defects.

The law therefore rejects the position of incompatibilism. In philosophical literature, "incompatibilism" is the label for the belief that actions are neither truly "free" nor morally culpable when they are necessitated by antecedent facts beyond the actor's control.[75] This conviction can be articulated in terms of either "source incompatibilism" or "leeway incompatibilism."[76] Leeway incompatibilism asserts that an agent is morally responsible for his actions only if he could have done otherwise. This view is grounded in "the principle of alternative possibility," which holds that the freedom requires not only an ability on the part of the agent to do what he in fact did, but also the ability to have refrained from this action. Leeway incompatibilism consequently advocates a "choice theory of excuse" according to which society cannot fairly blame an agent for his actions if he lacked the freedom to refrain from so acting. Source incompatibilism, by contrast, does not take issue with the absence of alternative possibilities at the moment of any given decision, but rather with determinism's unbroken causal chain, which traces all our decisions back to causes that were not ultimately "up to us." It argues that because the decisions of all people are the necessary consequence of factors that existed before their birth and were

74. *Id.*

75. The "Consequence Argument" articulates incompatibilism as follows:

> If determinism is true, then our acts are the consequence of the laws of nature and the events in the remote past. But it is not up to us what went on before we were born, and neither is it up to us what the laws of nature are. Therefore, the consequences of these things (including our present acts) are not up to us.

Peter Van Inwagen, *The Consequence Argument*, METAPHYSICS: BIG QUESTIONS 450 (1998).

76. DERK PEREBOOM, LIVING WITHOUT FREE WILL (2001).

therefore outside their control, no one is genuinely responsible for their behavior. Source incompatibilism thus employs a "character theory of excuse" to argue that people are not morally responsible when they are not the ultimate sources of their actions.[77] Although incompatibilism continues to play a live role in the free will debate, courts must reject this principle when dealing in scientific literature because under either version the "closed causal system" that psychology presumes to exist would eliminate culpability for all persons, not only those whose decisions are predominantly guided by a single abnormal and immutable source.

By contrast, "compatibilism" is the view that society can hold people accountable for their choices even if facts beyond an agent's control necessarily caused him to act as he did.[78] The Anglo-American legal tradition embraces compatibilism by adopting narrow conditions for voluntary action. It generally takes a snapshot approach to assessing voluntariness, by treating all actions as voluntary so long as they are immediately precipitated by minimally conscious intentions. In virtually no instances where a competent individual, guided by his own motivations, consciously chooses to engage in criminal conduct, will courts peek behind the veil of voluntary action to examine whether he could have done otherwise or whether his motivations originated from sources beyond his control.

Independent of one's stance on free will, it is obvious that the criminal justice system—which seeks to distinguish those who are culpable from those who are not—cannot coherently endorse any principle of culpability that would exonerate all people equally. Instead, by assuming the compatibilist position, the law can accommodate the possibility that all people act

77. Moore, *Choice*, *supra* note 47, at 29.

78. The law's pragmatic approach to compatibilism might be best likened to the minimalist conditions for moral responsibility espoused by P.F. Strawson, who focused on the morally reactive attitudes of the community. *See* P.F. Strawson, *Freedom and Resentment*, *in* 59 FREE WILL (Gary Watson ed., 1982); *see also* JOHN LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING (1689) (advocating a theory of free action slightly more lenient than the law's, under which one is accountable for all actions performed in the absence of physical compulsion or restraint). These views may be distinguished from more robust "causal integrationist" accounts of compatibilism, which attempt to tie conditions for moral responsibility to actions that are causally integrated with features of the agent's psychology, as most famously advocated by Hume and Ayer, Frankfurt, Fischer, and Ravizza, and Wallace. PEREBOOM, *supra* note 76, at 200; *see, e.g.*, John Martin Fischer, *Compatibilism*, *in* FOUR VIEWS ON FREE WILL 5–43 (John Martin Fischer et al. eds., 2007); Harry Frankfurt, *Alternate Possibilities and Moral Responsibility*, 60 J. PHIL. 820–39 (1969).

in a manner that might be 100 percent causally determined while remaining appropriate candidates for moral judgment. In assessing a defense, the law instead looks to the *type* of cause at issue to evaluate whether it coercively interfered with an agent's ability to effectuate his own intent. Yet this is precisely the analysis that the juvenile proportionality cases failed to conduct.

b. Distinguishing Ordinary Causes from Mitigating Conditions

In *How It Is Not "Just Like Diabetes,"* Nomy Arpaly argues that not all mental disorders mitigate blameworthiness because only some provide evidence that an individual's perceived wrongdoing is not actually motivated by the bad intentions that harmful conduct typically reflects.[79] For instance, because Tourette's syndrome may cause a person to act in a manner completely at odds with his conscious desires, one should not impute malicious intent to the involuntary utterances or spasms produced by this disorder. Similarly, if a person suffering from schizophrenia kills an innocent person believing in his acute psychotic state that the victim posed an imminent harm to others, one should not attribute blame to him because his misdeed does not reveal the expected ill will. In fact, his demonstrable conduct fails to accurately reflect the good intentions motivating his actions, which might have resulted in commendable behavior were the situation actually as he understood it to be.

By contrast, personality disorders[80] do not significantly distort society's ability to accurately infer an offender's malicious intent from his misdeeds.[81] For example, an individual diagnosed with narcissistic personality disorder

79. Nomy Arpaly, *How It Is Not "Just Like Diabetes": Mental Disorders and the Moral Psychologist*, 15 PHIL. ISSUES 282, 289 (2005); *see also* 4 WILLIAM BLACKSTONE, COMMENTARIES 21 ("[A]n unwarrantable act without a vicious will is no crime at all."); Francis Bowes Sayre, *Mens Rea*, 45 HARV. L. REV. 974, 975 (1932) ("Vengeance seeks a blameworthy victim; and blameworthiness rests upon fault or evil design.").

80. A personality disorder is an enduring pattern of inner experience and behavior that deviates markedly from the expectations of the individual's culture, as manifested in abnormal cognition, affectivity, interpersonal functioning, and impulse control. DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 287 (4th ed. 2000) [DSM-4]; *see also* International Classification of Mental and Behavioural Disorders.

81. PSYCHOPATHY: ANTISOCIAL, CRIMINAL AND VIOLENT BEHAVIOR vii (Theodore Millon et al. eds., 1998).

(NPD)[82] is defined as possessing maladaptive attributes and entertaining pervasive narcissistic thoughts. Arpaly therefore contends:

> [W]e cannot truly say [of the person with NPD] "it's not that he really is indifferent to the needs of others, it's only a disease like diabetes," or "it's not that he really thinks he is superior to you, it's only a disease like diabetes." The narcissistic *does* think his is superior to you. He *is* indifferent to the needs of others. The usual content-efficacious causes for arrogant and selfish behavior are in fact behind his arrogant and selfish behavior. As a result, labeling someone with the official term "Narcissistic Personality Disorder" is hardly any less derogatory than simply calling someone "a narcissist" or "a selfish, self-absorbed megalomaniac."[83]

If personality disorders arise in response to biological or environmental factors beyond an agent's control, then those afflicted with these psychological conditions have certainly been dealt a bad hand. When appealing solely to the blameless origin of a criminal propensity, however, personality disorders would be no more mitigating than the defense of environmental deprivation, which the law has consistently rejected. Under either defense, actors seek to explain their criminal propensities in terms of causes they had no opportunity to change. Yet neither of these causal histories challenges the retributive basis for holding the offender accountable for his conscious decision at the time of the offense, because they do not undermine the fact that the wrongdoer's own antisocial mental state motivated his intentional choice to violate the law.

To excuse an actor from blame simply because his misconduct stemmed from abnormal desires or values[84] would be equivalent to asserting that one

82. Narcissistic Personality Disorder has since lost its official status as a personality disorder and been removed from the DSM-5. Tara Parker-Pope, *Narcissism No Longer a Psychiatric Disorder*, NEW YORK TIMES (Nov. 29, 2010). However, the same argument could be made with other personality disorders, and perhaps more saliently with Antisocial Personality Disorder, which encompasses those persons who are known in common parlance as psychopaths or sociopaths.

83. Arpaly, *supra* note 79, at 290–91.

84. Stephen J. Morse, *Uncontrollable Urges and Irrational People*, 88 VA. L. REV 1025, 1078 (2002); ROBERT NOZICK, THE NATURE OF RATIONALITY 139–40 (1993) ("At present, we have no adequate theory of the substantive rationality of goals and desires."); *see also* Stephen J. Morse, *Crazy Behavior, Morals & Science: An Analysis of Mental Health Law*, 51 S. CAL. L. REV. 527, 557–58 (1978).

cannot praise Ernest Hemmingway or Sylvia Plath for their acclaimed novels because they wrote them while suffering from clinical depression.[85] Moreover, asserting that an agent is not truly responsible for his actions if he has an affective disturbance or personality disorder is at odds with the commitment to liberal pluralism in that it strips individuals of their moral status as agents for maintaining a value system that deviates from societal norms. By contrast, treating an individual as a competent, morally accountable agent so long as he has substantial rationality and the capacity to effectuate his own desires recognizes that people behave meaningfully even when they do not possess an ideal psychological disposition.

The trouble with the diminished capacity analysis in the juvenile proportionality cases is that the Court regards the poor judgment of juveniles as mitigating simply because their propensities are correlated with immutable neurobiological features of youth. Yet the immaturity and recklessness of adolescents far more closely resemble a nonmitigating personality disorder than a blameless quasi-somatic disease like Tourette's. When a teenager participates in an armed robbery in which he impulsively shoots the cashier, it would be inaccurate to say, "He did not truly disregard the harm that his actions might inflict on others, it was merely his underdeveloped brain." Rather, he did genuinely fail to give due weight to the interests of others by engaging in this illegal conduct, and he genuinely exhibited callousness in extinguishing another person's life. One can merely explain his moral failure as a manifestation of the immaturity stereotypical of juveniles. Therefore, the neuroscience cited by the Supreme Court does not challenge our commonsense understanding of the mental experiences precipitating a minor's decision to violate the law. Rather it reveals that, as a statistical generality, a teenager's reckless propensities tend to be instantiated on the neurological level as less than complete development in the portions of the brain associated with executive functioning.

85. Note that the intuition to excuse an agent from responsibility is weaker when praising a desirable behavior characteristic produced by one's biology. For instance, one is unlikely to doubt the authenticity of a person's intelligence upon discovering evidence that the individual inherited this trait. *See* J.J.C. Smart, *Free Will, Praise, and Blame*, 70 MIND 279, 291–306 (1961).

2. A Novel Framework for Understanding Diminished Capacity

To avoid the fundamental psycho-legal error and the reductio ad absurdum it entails, diminished capacity jurisprudence must develop a framework for distinguishing the rare brain abnormalities that mitigate culpability from mere neurobiological descriptions of the brain states of culpable offenders. This Section proposes such a framework by first delineating three distinct categories of mental impairments and then analyzing the legal treatment of each under the existing criminal doctrine.

The psychological abnormalities relevant to criminal decision making can be demarcated into three categories of "incapacity": (1) evaluative, (2) executive, and (3) motivational. Although some individuals may present mental impairments that do not neatly align with a single category, delineating conceptually distinct varieties of capacity according to their morally salient features will facilitate courts in assessing the legal precedent for their mitigating effect.

a. Diminished Evaluative Capacities

Evaluative capacities comprise the intellectual and perceptual faculties that enable an individual to discern the moral interests at stake when making a decision. The cognitive capacities for judgment, reflection, and reasoning, for example, are inherently morally neutral, because an individual's aptitude for rational thinking reveals neither the nature of his intentions nor the quality of his moral character. To illustrate, if a schizophrenic person experiencing a psychotic episode shoots his neighbor believing her to be a dangerous intruder, his failure to correctly perceive the attendant facts does not reflect ill will or a general lack of concern for others. The same goes for a person's capacity for reasoning, whereby he manipulates perceived facts. As recognized in *Atkins*, the cognitive impairments of intellectually disabled offenders tend to impede their ability to "understand and process information." For instance, such an individual may not comprehend that he cannot legally own a gun, despite knowing that he is convicted of a felony and that the law prohibits felons from gun ownership.[86] When this kind of misapprehension plays a role in an actor's misconduct, the offender is no more culpable for his initial mistake than a struggling student who fails his calculus exam or a colorblind individual who confuses

86. *Atkins*, 536 U.S. at 318.

green with red. Although society may value intellectual aptitude, it does not ascribe moral value to it. As such, diminished evaluative capacities can serve as excusatory conditions because they obscure the connection between an actor's moral sentiments and his ultimate conduct.

b. Diminished Executive Capacities

Executive capacity permits an individual to effectuate his plans or desires by conforming his behavior to his intentions.[87] Impairments to these capacities implicate a spectrum of behaviors ranging from the unconscious, to the involuntary, to the impulsive. Impairments to truly volitional capacities—when most strictly defined—also lack any inherent moral value. For instance, the inability of an individual with Tourette's syndrome to control his bodily movements or utterances is no more intrinsically blameworthy than having the hiccups or sneezing. If such an individual involuntarily hits someone during a motor tic, the criminal law exculpates him because there is no meaningful causal relationship between his conscious desires and his action, as manifested by a complete lack of mens rea. This rationale parallels exonerating a sleepwalker for assaulting a victim while unconscious. As such, a true absence of volitional control over one's physical conduct clearly serves as an excusatory condition.

On the broader view, however, executive capacities empower an individual with the self-regulation and impulse control to align one's conduct with enduring values and social norms. To illustrate, when a Virginia schoolteacher developed a massive tumor in his orbitofrontal cortex—which is posited to correspond with self-regulation and impulse control—he suddenly began stockpiling pornography, making sexual advances toward his stepdaughter, and publicly attempted to molest his nurses the day before his sentencing hearing.[88] Although he admitted to knowing that

87. Executive capacities are related to, but not identical with, the psychological concept of "executive functioning," which subsumes not only the executive capacities for self-regulation and impulse control, but also certain capacities better classified as evaluative, such as complex problem solving.

88. Jeffrey M. Burns & Russel H. Swerdlow, *Right Orbitofrontal Tumor with Pedophilia Symptom and Constructional Apraxia Sign*, 60 ARCHIVES NEUROLOGY 437 (2003); J.L. Saver & A.R. Damasio, *Preserved Access and Processing of Social Knowledge in a Patient with Acquired Sociopathy Due to Ventromedial Frontal Damage*, 29 NEUROPSYCHOLOGIA 1241 (1991); *Doctors Say Pedophile Lost Urge After Brain Tumor Removed*, USA TODAY (July 28, 2003). http:// www.usatoday.com/news/health/2003-07-28-pedophile-tumor_x.htm.

these acts were wrong, he increasingly struggled to control his behavior along with his bodily functions. If the schoolteacher suffered from a complete inability to weigh his impulses against other considerations before acting on them, his executive dysfunction should arguably excuse his misconduct because his behavior does not adequately reflect his values. Acquired brain injuries, neurodegenerative diseases like Alzheimer's, Attention Deficit Disorder, certain personality disorders, and intoxication or the consumption of mind-altering substances may also implicate diminished executive capacities to varying degrees. Unlike pure volitional impairments like Tourette's, however, this broader category of executive impairments will not completely exculpate the wrongdoer under a retributive rationale, because his conduct *does* reveal something about his intentional mental state. At the least, an observer can discern that the offender possessed an antisocial instinct upon which he had a desire to act. However, if one grants that the offender's condition renders him so impulsive that he literally lacks the ability bring his moral interests to bear on his behavior by first entering into a decision-making calculus, then his compulsive conduct cannot reliably indicate the balance of his moral sentiments. It follows that the law arguably should not hold him as accountable for his misconduct as the typical offender who had the opportunity to weigh his desire for gratification against the potential repercussions of so acting.

The law has struggled, however, to distinguish between an irresistible impulse and an impulse not resisted.[89] This infamously difficult task was the precise reason that American law overwhelmingly abandoned the volitional prong of the insanity defense.[90] For although an offender is less

89. Kansas v. Crane, 534 U.S. 407, 415 ("Here, as in other areas of psychiatry, there may be 'considerable overlap between a . . . defective understanding or appreciation and . . . [an] ability to control . . . behavior.' Nor, when considering civil commitment, have we ordinarily distinguished for constitutional purposes among volitional, emotional, and cognitive impairments."), *citing* American Psychiatric Association, *Statement on the Insanity Defense* 11 (1982), *reprinted in* G. MELTON ET AL., PSYCHOLOGICAL EVALUATIONS FOR THE COURTS 200 (2d ed. 1997) ("The line between an irresistible impulse and an impulse not resisted is probably no sharper than that between twilight and dusk.").

90. When *Powell v. Texas* upheld the constitutionality of Texas's public intoxication statute as permissibly criminalizing a voluntary act rather than the status of addiction, Justice Marshall explained, "[I]t is difficult to see how a State can convict an individual for murder, if that individual, while exhibiting normal behavior in all other respects, suffers from a 'compulsion' to kill, which is an 'exceedingly strong influence,' but 'not completely overpowering.'" 392 U.S. 514, 534 (1968).

blameworthy if he did not consciously premeditate his wrongdoing, he is *more* blameworthy if he did or could have considered the reasons for refraining, but valued his immediate gratification to a greater degree.[91] For instance, some jurisdictions employing the "irresistible impulse" test for insanity have sought to distinguish the former from the latter with the demanding "policeman-at-the-elbow" test. This test inquires whether the offender would have refrained from misconduct had there been a police officer at his elbow, who was ready to immediately apprehend him at the time he committed the offense.[92] Moreover, whether an offender's decision flowed from substantial self-reflection is irrelevant to his capacity for volitional control, since recklessness also qualifies as a culpable mental state. So long as the offender formed the intention to misbehave in a manner that was sufficiently conscious to allow him to mentally confront some opportunity to weigh his impulse against countervailing considerations, his antisocial choice accurately reveals something unfavorable about his moral sentiments or values. Thus, whereas a complete inability to bring one's values to bear on one's conduct is a morally neutral impairment, which qualifies as an excusatory condition, an impulsive disinclination to consider the consequences of one's conduct before acting may itself constitute a moral defect.

c. Motivational Defects

By contrast, motivational defects are *inherently moral*, because factors relating to an agent's motive are deeply entrenched in the legal tests for assessing the magnitude of culpability. Motivational defects consist in normatively suspect deviations in values that predictably predispose agents toward wrongdoing. These defects can exist in either a positive or negative form—that is,

91. *See Crane*, 534 U.S. at 412–13 (discussing the importance of distinguishing the dangerous sexual offender subject to civil commitment in light of his "special and serious lack of ability to control behavior" from the dangerous but typical recidivist more properly dealt with exclusively though criminal proceedings aimed at achieving retribution and general deterrence goals).

92. *See* People v. Hubert, 119 Cal. 216, 223–24 (1897). *But see* People v. Jackson, 627 N.W.2d 11, 18 (Mich. Ct. App. 2001) (holding that defendant need not establish that he completely lacked capacity for self-control if he lacked "substantial capacity" to conform his conduct to the law); *Crane*, 534 U.S. (embracing a liberal understanding of "lack of control" for the purposes of civilly confining sexual offenders, which is satisfied by "serious difficulty in controlling behavior").

as an unusually forceful desire to engage in morally sanctioned conduct, or as a systematic under-appreciation of certain salient moral considerations.

In the first category, a sex offender might allege that he suffers from a compulsive urge or a psychological disorder that drives him to engage in predatory sexual acts.[93] Similarly, drug addicts, alcoholics, and violent recidivists might contend that their culpability is diminished because they find complying with the law more difficult than the average citizen due to their habitual experience of pathologically compelling cravings to engage in prohibited acts. To these individuals, their ego-alien desires may subjectively feel like an unwanted external force undermining their self-control.[94] Although society may colloquially describe the psychological experience of an addict as an "inability to control" oneself,[95] this characterization is metaphorical. Irresistible impulses do not actually undermine an agent's executive capacities, but only disproportionately weight his moral decision making in favor of wrongdoing. In general, the law is not sympathetic to defenses premised on a propensity toward criminal behavior. For instance, the heightened sanctions for intentional criminal conduct and hate crimes penalize offenders more severely to the extent they were guided by depraved motives. Additionally, the law has generally resisted attempts to mitigate culpability on the basis that addiction or intoxication uniquely predisposed the offender toward criminal conduct. Despite widespread acceptance of the psychiatric diagnosis of addiction as a disease[96] and scientific consensus confirming the damaging neurobiological effects of substance abuse, the law does not tend to view these mental impairments as diminishing offenders' culpability so long as they acted in a minimally conscious manner.[97]

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93. *See* Gene G. Abel & Joanne L. Rouleau, *Male Sex Offenders*, *in* HANDBOOK OF OUTPATIENT TREATMENT OF ADULTS: NONPSYCHOTIC MENTAL DISORDERS 271 (M. Thase, B. Edelstein, & M. Hersen eds., 1990); *see also Crane*, 534 U.S. at 415 (declining to decide whether the "emotional," as opposed to volitional, impairments of sex offenders justify their confinement).

94. Morse, *Uncontrollable Urges*, *supra* note 84, at 1059.

95. ALFRED W. HERZOG, MEDICAL JURISPRUDENCE 538 (1931) ("[T]he true sexual pervert is not a master of his will").

96. *See* R.E. Kendell, *The Distinction Between Personality Disorder and Mental Illness*, 180 BRITISH J. OF PSYCHIATRY 110, 114 (2002).

97. *See, e.g.*, *Powell*, 392 U.S. at 534–35 (stating that an individual who can control his aggressive neurosis when sober should not be excused for crimes committed while intoxicated even if "the individual suffers from a very strong desire to drink, which is an

In the second category exist individuals who persistently find themselves unmoved by certain types of moral considerations that society deems salient. For example, psychopathy consists of a psychological abnormality defined by the absence of empathy or remorse, as well as a lack of insight, shallow affect, and failure to learn from experience. Behaviorally, psychopaths manifest egocentricity, impulsivity, and chronic violation of social, moral, and legal norms.[98] Although the psychopath can intellectually appreciate societal rules and conventional meanings of right and wrong, his conscious wrongdoing stems from a pathological tendency to ignore considerations that do not further his own interests. In fact, when the psychiatrist Phillipe Pinel first described the concept of the psychopathic personality in the early nineteenth century, he called it *manie sans delire*—insanity without delirium.[99] Yet the psychopath does suffer from a diminished capacity to *subjectively* appreciate that the harmful effects of his conduct as a reason to refrain. He also tends to be relatively unresponsive to the threat of punishment or other potential consequences associated with his behavior. As such, historical understandings of psychopathy characterized it as a form of "moral insanity."[100]

Despite some claims that psychopaths are not mentally ill, but merely moral monsters,[101] research indicates that their antisocial traits may correspond to a host of neurobiological abnormalities.[102] Studies suggest that

'exceedingly strong influence' but 'not completely overpowering.'"). The Model Penal Code also provides that intoxication is neither a defense nor a mental disease. MODEL PENAL CODE § 2.08.

98. PSYCHOPATHY, *supra* note 81, at vii. Note that antisocial personality disorder (APD) serves as the psychiatric label for both sociopathy and psychopathy in the DSM-4, but these three disorders are not identical. The diagnosis of APD focuses less on subjective psychological features than psychopathy, instead emphasizing demonstrable antisocial behavior. *See* Robert D. Hare, *Psychopaths and Their Nature: Implications for the Mental Health and Criminal Justice Systems*, *in* PSYCHOPATHY, *supra* note 81, at 188.

99. Ellison M. Cale & Scott O. Lilenfeld, *What Every Forensic Psychologist Should Know About Psychopathic Personality*, *in* HANDBOOK OF FORENSIC PSYCHOLOGY 395, 396 (William O'Donoohue & Eric Levensky eds., 2004).

100. *See* Susan R. Schmeiser, *The Ungovernable Citizen: Psychopathy, Sexuality, and the Rise of Medico-Legal Reasoning*, 20 YALE J.L. & HUMAN. 163, 240 (2008).

101. *See, e.g.*, Jennifer Kahn, *Can You Call a 9-Year-Old a Psychopath?*, NEW YORK TIMES (May 11, 2011) ("Many psychiatrists and psychologists, too, see evil and con artistry where researchers like Dr. Lewis see disease.").

102. ROBERT D. HARE, WITHOUT CONSCIENCE: THE DISTURBING WORLD OF THE PSYCHOPATHS AMONG US 52–59 (1993).

atypical functioning of the amygdala—an area of the brain responsible for producing aversive emotions such as fear and anxiety—hinders psychopaths from fully appreciating the significance of the harm their actions cause others, and from learning from their adverse experiences.[103] Additionally, some research points to reduced mirror neuron activity, which is posited to facilitate empathy by firing when observing the behavior of others.[104] Neuroimaging further indicates that psychopaths' aggression, impulsivity, and "infantile goal-orientation" may spawn from underdevelopment in the prefrontal cortex—the same region of the brain posited to be underdeveloped in juveniles.[105] Studies also indicate that antisocial behavior and aggression in psychopaths and other recidivists correlates to low MAOA activity produced by the "warrior gene."[106] Although further study is needed, this body of research illustrates that even the psychopaths and recidivists, to whom society has traditionally been least sympathetic, could also invoke neurobiological causes for their criminal behavior as a partial excuse under the Supreme Court's current diminished capacity principle.

Essentially, psychopathy diminishes an individual's capacity to internalize the concerns of others and inclines him toward antisocial behavior.[107] Nonetheless, the law notoriously rejects the possibility that this psychological disorder diminishes an offender's culpability, often treating it instead as an

103. *See* R.J.R. Blair, *The Emergence of Psychopathy: Implications for the Neuropsychological Approach to Developmental Disorders*, 101 COGNITION 414 (2006).

104. Shirley Fecteau et al., *Psychopathy and the Mirror Neuron System: Preliminary Findings from a Non-Psychiatric Sample*, 160 PSYCHIATRY RESEARCH 137 (2008).

105. Veena M. Narayan, *Regional Cortical Thinning in Subjects with Violent Antisocial Personality Disorder or Schizophrenia*, 164 AM. J. PSYCHIATRY 1418 (2007; Charles Fischette, *Psychopathy and Responsibility*, 90 VA. L. REV. 1423, 1434 (2004); HARE, *supra* note 102, at 168–69.

106. *See* Kevin M. Beaver et al., *Exploring the Association Between the 2-Repeat Allele of the MAOA Gene Promoter Polymorphism and Psychopathic Personality Traits, Arrests, Incarceration, and Lifetime Antisocial Behavior*, 54 PERSONALITY & INDIVIDUAL DIFFERENCES 164 (2013); *see also* David M. Fergusson et al., *Moderating Role of the MAOA Genotype in Antisocial Behaviour*, 200 BRIT. J. PSYCHIATRY 116 (2002); Rickard L. Sjoberg et al., *A Non-Additive Interaction of a Functional* MAO-*A VNTR and Testosterone Predicts Antisocial Behavior*, *33* NEUROPSYCHOPARMACHOLOGY 425 (2008); Avshalom Caspi et al., *Role of Fenotypice in the Cycle of Violence in Maltreated Children*, 297 SCIENCE 851 (2002) (finding that maltreated children with a genotype conferring low levels of MAOA expression were more likely to develop antisocial problems).

107. JAMES BLAIR ET AL., THE PSYCHOPATH: EMOTIONS AND THE BRAIN 17 (2005).

aggravating factor increasing blameworthiness.[108] Although these biological etiologies may have a tendency to engender sympathy in the same manner as would a history of environmental deprivation, the scientific findings do not contradict prior accounts of these offenders' mental states and associated behavioral patterns. Since the research does not challenge the observable fact that psychopaths do not feel empathy for others, to treat the disorder as mitigating blameworthiness merely because it arises from neurobiological abnormalities would commit the fundamental psycho-legal error. Psychopathy in particular highlights the danger of excusing agents solely on the basis of a brain abnormality, as psychopaths constitute only 1 percent of the general population, but "roughly 15 to 25 percent of the offenders in prison and are responsible for a disproportionate number of brutal crimes and murders."[109] Treating their diminished moral capacities as per se excusatory therefore illustrates the danger of an unnuanced theory of diminished capacity, which could grant leniency to broad swaths of criminal offenders. Although *some* of these offenders undoubtedly possess diminished culpability, the law must proceed with heightened caution when analyzing diminished moral capacities to determine whether the impairments actually distort the mental states to which the law attaches blame.

B. The Legal Status of Juveniles' Diminished Capacities

The proposed framework for understanding diminished capacities would enable courts to systematically assess whether the neurobiological features of adolescence truly lessen minors' culpability or merely provide a material account of their culpable mental states. According to the "continuum of

108. *See, e.g.*, MODEL PENAL CODE § 4.01 (stating that for the purposes of the insanity defense, the meaning of "mental disease or defect" does not include "an abnormality manifested only by repeated criminal or otherwise antisocial conduct."); State v. Richmond, 560 P.2d 41, 52–53 (Ariz. 1977) ("A psychopathic or sociopathic condition has never been accepted as a defense to a criminal act in Arizona."); State v. Brewer, 826 P.2d 783, 802 (Ariz. 1992) ("Generally, a mere character or personality disorder alone is insufficient to constitute a mitigating circumstance. Such conditions 'differ in degree from a slow, dull, brain-damaged defendant whose judgment and rationality are marginal.'"); Andersen v. State, 43 Conn. 514, 515 (1876) ("Courts have been slow to recognize moral insanity as an excuse for crime; but that it exists and is well understood and in some cases clearly defined by medical and scientific men, can not be denied.").

109. Kahn, *supra* note 101.

competency" approach to diminished capacity, an individual may possess the requisite capacities for a conviction of guilt, but the degree of these particular capacities may be sufficiently diminished as to nonetheless justify mitigating his culpability. Examining the doctrine of excuse reveals the specific competencies that the law treats as preconditions for moral responsibility, and thereby identifies those diminished capacities that should mitigate blame. Because adolescents' brain abnormalities do not lessen the capacities corresponding to any legally operative excuse, it is difficult to reconcile *Miller's* diminished capacity analysis with the retributive perspective of the criminal doctrine.

1. Juveniles Do Not Exhibit Impairments Related to Sanity or Competency

Because the law's primary criterion for agency is rationality, the least contentious basis for a mental impairment to mitigate culpability is that the offender possesses diminished cognitive capacities for judgment, reflection, and reasoning.[110] The diminished capacities of adolscents, however, consist in motivational or mild executive deficiencies, not rational impairments. Thus, according to the continuum of competency approach to diminished capacity, adolescents are not entitled to mitigation under the existing criminal law, because they do not suffer from the species of diminished capacities that would exculpate them under any existing doctrine if present to a greater degree.

American law overwhelmingly defines insanity in terms of cognitive abilities.[111] Both the federal system and the state majority rule employ some version of the *M'Naughten* test, which disavows any motivational or volitional prong to insanity, instead defining it exclusively in cognitive terms by whether the "defendant, by reason of mental disease or defect, did not know the nature and quality of the act or did not know that act was wrong."[112] The definition of decision-making competency focuses solely

110. Morse, *Diminished Rationality*, *supra* note 58, at 294.

111. *See, e.g.*, State v. Wilson, 700 A.2d 633 (Conn. 1997).

112. *See Daniel M'Naghten's Case*, 8 ENG. REP. 718 (H.L. 1843); 18 U.S.C. § 17 (reinstating the *M'Naghten* test and eradicating more permissive definitions of insanity that exonerate a defendant who acted upon an "irresistible impulse," or by reason of mental disease or defect, lacked substantial capacity to conform his conduct to the law); Donald A. Dripps, *Fundamental Retribution Error: Criminal Justice and the Social Psychology of Blame*, 56 VAND. L. REV. 1383, 1384 n.1, 1438 n.107 (2003); *see also* APA, *Statement on the Insanity Defense*, *supra* note 89 (advocating abolition of the volitional prong of the insanity

on cognitive faculties as well.[113] Although the law does not articulate a universal standard for competency, but rather permits courts to formulate case-specific tests, competency typically demands that an agent possess the intellectual and perceptual faculties to comprehend his choices and make a selection informed (but not necessarily logically implied) by relevant facts.[114] An actor therefore qualifies as competent to make decisions by demonstrating sufficient capacity to understand facts and manipulate information. The requirement that he can minimally respond to reasons, however, takes no notice of whether he possesses idiosyncratic motivations or ultimately arrives at decisions that do not rationally apply his values. For example, in *Katz v. Superior Court*, a judge denied parents' request to forcibly "deprogram" their non-minor children after they had been coercively brainwashed by a cult. The judge declined to find the children incompetent, concluding that they were not so "gravely disabled" by feeblemindedness as to "not realize and comprehend" the prudent management of their basic bodily health and security. The court further disregarded arguments that the children's new beliefs were strange, simplistic, or in conflict with previously held values, holding that the deprogramming would nonetheless violate the children's First Amendment rights.[115]

Yet, as noted in the brief submitted by the American Medical Association (AMA) and the American Academy of Child and Adolescent Psychiatry, "The difference between adolescent and adult behavior . . . is not

defense); *see also* American Bar Association, ABA Criminal Justice Mental Health Standards 330, 339–42 (1984) (adopting the same position).

113. *See* Elyn R. Saks, *Competency to Refuse Treatment*, 69 N.C. L. Rev. 945 (1991) (arguing that both legal precedent and philosophical considerations advocate defining decision-making incompetency under a "gross inability to assess evidence standard" whereby an individual is competent to refuse treatment if he comprehends the attending facts and forms no patently false beliefs).

114. In *Lounsbury v. Capel*, the court explains that decision-making competency is a case-specific factual determination in which the trier of fact inquires whether the person in question, at the time of the decision, possesses sufficient mind or reason to enable him to understand the nature and effects of the decision to be made. 836 P.2d 188, 197–98 (Utah Ct. App. 1992); Peterson v. Eritsland, 419 P.2d 332 (Wash. 1966); Grannum v. Berard, 422 P.2d 812, 814 (Wash. 1967); Page v. Prudential Life Ins. Co. of America, 120 P.2d 527 (Wash. 1942); Harris v. Rivard, 390 P.2d 1004 (Wash. 1964). 17 C.J.S. Contracts § 133(1) (1963) (applying this same standard whether the questioned mental condition be the product of disease, age, alcohol, or drugs).

115. *Katz*, 73 Cal. App.3d 952, 966 (Ct. App. 1977).

a function of adolescents' inability to distinguish right from wrong or in their intellectual abilities *per se*, but rather from psychosocial limitations in their ability to consistently and reliably control their behavior."[116] Hence, juveniles do not generally exhibit diminished capacity with respect to understanding the nature or objective moral status of their conduct. For instance, a minor is approximately as equipped as an adult to identify a course of conduct as murder and to recognize that murder is both illegal and contrary to society's moral expectations. Rather, the underdevelopment of adolescents' prefrontal cortex entails that, as compared to adults, minors (1) tend to be more strongly motivated by the possibility of reward, (2) have greater difficulty controlling their impulses, and (3) have greater difficulty recognizing and regulating emotional responses.[117] Since none of these impairments relate to the understanding or manipulation of information, juveniles do not exhibit diminished capacities of the variety relevant to establishing sanity or competency.

In this way, adolescents differ from intellectually disabled offenders in *Atkins*, who possessed "diminished capacities to understand and process information," "to engage in logical reasoning," "to understand the reactions of others," and "to abstract from mistakes and learn from experience."[118] Although *Atkins* also mentioned a few nonevaluative impairments, such as susceptibility to influence and diminished impulse control, the intellectual impairments cited could have independently grounded a finding of diminished capacity. *Atkins* therefore illustrates the consequences of a court overjustifying a finding of diminished capacity with references to impairments of ambiguous legal relevance, because the Supreme Court clearly relied on *Atkins*' arguably superfluous explanations when it later extended the diminished capacity principle to juveniles.[119]

2. Executive Impairments Rarely Mitigate

One struggles to place adolescents squarely in a single category of diminished capacity, as a fine line distinguishes those who subjectively endorse

116. Brief for the American Medical Association and the American Academy of Child and Adolescent Psychiatry as Amici Curiae in Support of Neither Party at 6, Miller v. Alabama, 132 S.Ct. 2455 (2012) (No. 10-9646), 2012 WL 121237 [hereinafter *AMA Brief*].

117. *Id.*

118. *Atkins*, 536 U.S. at 318.

119. *Roper*, 543 U.S. at 563, 570.

societal values but strain to practically effectuate these desires (executive deficiencies) from those who intellectually understand what society expects of them, yet engage in prohibited conduct because their deviant or egocentric desires render the subjective experience of conforming their conduct to the law especially onerous (motivational deficiencies). Although it is clear that adolescents do not exhibit material evaluative impairments, the Court suggests that the underdevelopment of parts of the adolescent brain involved in "behavior control" may constitute an executive impairment. Specifically, the Court noted that juveniles exhibit "transient rashness, proclivity for risk, and inability to assess consequences" because they are "not yet fully mature in regions and systems related to higher-order executive functions such as impulse control, planning ahead, and risk avoidance."[120] Whether construed as an executive or motivational impairment, however, the criminal jurisprudence generally regards this variety of diminished capacity with skepticism.[121] As described above, American law briefly embraced a volitional prong to the insanity defense, but has since predominantly abandoned that approach both in the courts and through legislative enactment.[122] Decision-making competency, moreover, has never required any volitional or motivational capacity.

a. The Voluntary Act Requirement

Outside of diminished capacity, behavioral control arises very little in the criminal jurisprudence. Only two doctrines of criminal law explicitly negate responsibility on the basis that an agent acted involuntarily. First, the foundational principle of *actus non facit reum nisi mens sit rea*—the act

120. *Miller*, 132 S.Ct. at 2464–65.

121. *See, e.g.*, *Richmond*, 560 P.2d at 52 ("[N]o impairment, no matter how great, of a defendant's volitional capacity can constitute a defense to crime."). Many theorists have also questioned the legal relevance of volition. For example, Michael D. Bayles argues that a Humean character theory for assessing blameworthiness best fits the legal excuses that presently exist in American law, but that "[a] distinctive feature of this approach is that the voluntariness of acts is irrelevant to determining blameworthiness." *See* Michael D. Bayles, *Character, Purpose, and Criminal Responsibility*, 1 L. & PHIL. 5, 5 (1982).

122. *See, e.g.*, MODEL PENAL CODE § 4.01(1) (adopting the ALI's volitional definition of insanity according to which a person is not responsible if he "lacked substantial capacity . . . to conform his conduct to the requirements of law"); *Brawner*, 471 F.2d at 973 (same), *superseded by* 18 U.S.C. § 17; *Dripps*, *supra* note 112, at 1438 n.99.

is not guilty unless the mind is guilty—demands a voluntary act.[123] Thus, an agent is not even prima facie responsible unless his physical behavior issued from an intentional choice.[124] The law, however, embraces a narrow view of the conditions that undermine voluntariness. For example, the Model Penal Code provides three examples of involuntary acts: (a) "a reflex or convulsion," (b) "a bodily movements during unconsciousness or sleep", and (c) "conduct during hypnosis."[125] These illustrations focus exclusively on the concurrent mental states of the agent to determine whether the actor's physical behavior was the immediate product of something other than his conscious mental activity. These exceptions to the presumption of volition are not concerned, however, with the source of a mental state. Thus, although a reflex or a behavior performed during hypnosis has an antecedent cause, its salient feature for establishing non-responsibility is the absence of conscious thought. Furthermore, "a lack of self-reflection does not mean a lack of intent and does not negate mens rea."[126] Prima facie responsibility therefore requires only that an agent's conduct be "a product of the effort or determination of the actor, either conscious or habitual."[127] In this way, the law avoids the fundamental psycho-legal error and adopts a compatibilist approach to criminal responsibility, by assuming that "[m]ens rea is generally satisfied . . . by any showing of purposeful activity, regardless of its psychological origins."[128]

Second, the affirmative defense of duress characterizes conduct as involuntary where the agent blamelessly confronts a situation in which he must perpetrate a criminal act in order to avoid unlawful force, and the circumstances are such that "a person of reasonable firmness in his situation would have been unable to resist."[129] Professor Morse observes, however, that the decisions made in the face of hard choices are only *metaphorically*

123. Black's Law Dictionary 55 (4th ed. 1968); *see also* 1 Joel Prentiss Bishop, Commentaries on Criminal Law § 287 (9th ed. 1923); John William Salmond, Jurisprudence § 127 (3d ed. 1910).

124. *See Powell*, 392 U.S. at 541 ("If an intoxicated person is actually carried into the street by someone else, 'he' does not do the act at all, and of course he is entitled to acquittal."), *citing* Martin v. State, 17 So.2d 427 (Ala. 1944).

125. Model Penal Code § 2.01.

126. *Pohlot*, 827 F.2d at 906.

127. Model Penal Code § 2.01.

128. *Pohlot*, 827 F.2d at 904, *citing* State v. Sikora, 210 A.2d 193, 202 (N.J. 1965).

129. Model Penal Code § 2.09(1) (1985).

involuntary, because the actor does not literally lack the capacity to refrain from illegal conduct. The Model Penal Code's appeal to an objective standard for assessing the magnitude of coercion further bolsters the conclusion that the defense of duress does not seek to capture any actual executive incapacity, as one would assess an offender's actual coercion with a subjective test that inquired whether they personally lacked the capacity to resist. Rather, labeling an individual's actions as involuntary in the context of duress entails a normative judgment that society should not condemn the offender for failing to comply with the law when his decision was so difficult that most reasonable and well-intentioned people would have behaved identically under the circumstances.[130]

Yet, one cannot analogize the adolescent brain to the circumstances of duress without invoking the fundamental psycho-legal error or naïve dualism. Whereas duress requires that an external source of compulsion wrongfully biases an actor's behavior toward wrongdoing, one cannot liken the biomechanisms underlying juveniles' intentional wrongdoing to an "external" force without resort to naïve dualism. Likewise, to say that adolescents are "compelled" by their brains to engage in criminal behavior would commit the fundamental psycho-legal error by conflating causation and excuse. Although irresistible impulses are colloquially described in such a manner, to actually regard them as external forces that compel an individual to behave involuntarily invokes the fallacy of the homunculus, by distinguishing the person from his brain. As such, a coherent theory of legal responsibility cannot treat minors as acting involuntarily merely because their decisions originate in their brains.

Therefore, although adolescents' propensity to overvalue immediate rewards may lead them act impulsively or recklessly,[131] this disposition does not indicate that their conduct even approximates involuntary action since they do not have diminished awareness of what they are doing, nor are they compelled by any external source.[132] As *Pohlot* explains:

130. Morse, *Uncontrollable Urges*, *supra* note 84, at 1056–61.

131. *See AMA Brief*, *supra* note 116, at 2–3 (explaining that juveniles are "susceptible to acting in a reflexive rather than a planned voluntary manner").

132. *See* H.R. Rep. No. 98-577, 98th Cong. 1st Sess. 15 n.23 (1983) ("Mental illness rarely, if ever, renders a person incapable of understanding what he or she is doing. Mental illness does not, for example, alter the perception of shooting a person to that of shooting a tree."); *Pohlot*, 827 F.2d at 900.

> [O]nly in the most extraordinary circumstances could a defendant actually lack the capacity to form mens rea as it is normally understood in American law. . . . Even the most psychiatrically ill have the capacity to form intentions, and the existence of intent usually satisfies any mens rea requirement.[133]

Underdeveloped executive functioning could therefore properly mitigate responsibility on the basis of impaired volition only in cases where the mental defect literally inhibits the actor's capacity for conscious choice or self-efficacy. For example, when the Virginia schoolteacher became "totally unable to control his impulses,"[134] he exhibited diminished volition—not because his desires were exceedingly strong or because he discounted the consequences of their conduct—but because he would have been incapable of preceding his action with a decision-making calculus even had there been a policeman at his elbow.[135] Similarly, infants, severely intoxicated individuals, and persons suffering from delusions, Alzheimer's, Post Traumatic Stress Disorder, and acquired brains injuries may exhibit a diminished capacity for even the most basic form of self-control by rendering their choices almost completely unresponsive to reason.[136] Such a strict interpretation of the voluntary act requirement is necessary because to negate this element does not merely deny responsibility, but rather negates the prosecution's case-in-chief by denying that a criminal offense even occurred. As such, the law should only characterize an offender as lacking behavior control where the offender's conduct is sufficiently divorced from his contemporaneous mental states that his actions do not reflect his moral sentiments. Yet this is a far cry from the impulsivity and risk-seeking propensities of juvenile offenders.

b. Legal Compatibilism in Assessing Causal Histories

A defender of the juvenile proportionality doctrine may nonetheless assert that the law should not treat adolescents as fully responsible for their

133. *Pohlot*, 827 F.2d at 905–06; *see also* United States v. Mezvinsky, 206 F. Supp. 2d 661 (E.D. Pa. 2002).

134. *Doctors Say*, *supra* note 88.

135. Christopher Slobogin, *A Jurisprudence of Dangerousness*, 98 NW. U. L. REV. 1, 43 (2003).

136. *See, e.g.*, People v. Grant, 360 N.E.2d 809 (Ill. 1977) (holding that an individual who attacked a police officer during a bar fight would not have acted voluntarily if psychomotor epilepsy truly rendered him in a fugue state of automatism).

conduct if one can explain their choice to perpetrate a crime largely by reference to a mental deficit that impairs their free will in a substantial and verifiable way.[137] For example, Peter Arenella wonders "why should such individuals qualify as appropriate addressees of *moral* norms if, through no fault of their own, they lack the capacity to appreciate the norms' significance?"[138] Arenella cites young children as one category of actors that the law does not treat as moral agents in light of their diminished capacity to respond appropriately to moral reasons for actions, despite the fact that they exhibit "capacity for practical reason and . . . freedom to act on the basis of their reasoned choices."[139] He argues that a six-year-old does not qualify as a moral agent since, through no fault of his own, he has not yet had sufficient time and experience to internalize moral norms as something worthy of respect, nor does he possess sufficient empathy and understanding of the feelings of others for him to comprehend and be motivated by these factors as moral considerations constraining his self-interested desires.

Arenella nonetheless admits that most legal theorists insist that agents need not possess these capacities to be fairly blamed for violating the minimal restraints that the criminal law imposes on their self-interested acts.[140] Rather, an actor's "capacity for rational self-determined actions" alone qualifies him for moral address, since "moral agents are simply beings whose powers of rational choice give them the capacity to comply with governing norms."[141] Accordingly, these scholars argue that individuals who struggle to comply with the law on the basis of their own moral reasons, still qualify as morally accountable agents so long as they are capable of responding to nonmoral, instrumental reasons for obeying the law, like criminal sanctions. This Subsection argues that the criminal doctrine unequivocally favors this second, compatibilist approach to assessing personal culpability without reference to the antecedent causes of an

137. Dressler, *supra* note 51, at 962.

138. Peter Arenella, *Character, Choice and Moral Agency: The Relevance of Character to Our Moral Culpability Judgments*, *in* ELLEN FRANKEL PAUL ET AL., CRIME, CULPABILITY, AND REMEDY 59, 66 (1990).

139. *Id.* at 67–68. Arenella explains that moral capacity requires the capacity to (1) appreciate the normative significance of the norms governing behavior (moral responsiveness), (2) apply these norms in a particular context (moral judgment), and (3) use the applicable norm as the basis for acting (moral motivation).

140. *Id.* at 59.

141. *Id.*

individual's intentional choice. Although this Article contends that children legitimately warrant leniency, the existing criminal doctrine reveals that the basis for mitigating their punishment cannot be justified, as Arenella proposes, by appealing to the fact that minors may exhibit poor moral judgment through no fault of their own.

i. Legal Skepticism of Brainwashing and the Rotten Social Background Defense

The doctrines governing other areas of criminal law contradict Arenella's historical approach to diminished volitional capacity. In *Pohlot*, for example, the court asserts:

> Criminal responsibility must be judged at the level of the conscious. If a person thinks, plans and executes the plan at that level, the criminality of his act cannot be denied, wholly or partially, because, although he did not realize it, his conscious was influenced to think, to plan and to execute the plan by unconscious influences which were the product of his genes and his lifelong environment.[142]

Here, the court recognizes the danger of mitigating culpability to reflect a defendant's "psychiatric compulsion or inability or failure to engage in normal reflection."[143] Specifically, treating these psychological features as excusatory conditions merely because they are biologically determined, implicates variables that influence all human behavior, such genes and environment.

Courts have confronted the issue of how to treat the antecedent causes of criminal behavior in the context of defendants asserting coercive indoctrination (i.e., brainwashing) as an affirmative defense. Consider the infamous Patty Hearst trial in which a rich heiress was convicted for bank robbery after the jury rejected her defenses of brainwashing and Stockholm Syndrome.[144] Although Hearst has been kidnapped and brutally held

142. *Pohlot*, 827 F.2d at 906.

143. *Id.* at 890.

144. *See* Douglas O. Linder, *Patty Hearst Trial* (1976), http:// law2.umkc.edu/faculty/projects/ftrials/hearst/hearstdolaccount.html; Rebecca Emory, *Losing Your Head in the Washer: Why the Brainwashing Defense Can Be a Complete Defense in Criminal Cases*, 30 PACE L. REV. 1337, 1342 (2010); Paul H. Robinson, *Are We Responsible for Who We Are? The Challenge for Criminal Law Theory in the Defense of Coercive Indoctrination and "Rotten Social Background"*, 2 ALA. C.R. & C.L. L. REV. 53 (2011).

hostage during the months immediately preceding her crime, the jury heeded Judge Carter's instructions that it focus exclusively on the mental condition of the defendant at the time of the offense to determine whether Hearst was "acting out of an 'immediate fear for her life.'"[145] Because videos documented Hearst's deliberate behavior during the robbery and her statements immediately afterward disavowing allegations of brainwashing and affirming her devotion to her captor's cause, one strains to deny that, at moment she committed the crime, Hearst had the conscious experience of a willing participant. Thus, Hearst's ultimate conviction reveals how courts tend to eschew historical inquiries into the sources of conduct that otherwise displays the contemporaneous features of voluntariness. To mitigate Hearst's culpability on the basis that one could explain her immediate mental states as the result of a prior psychological harm, would require the trier of fact to contravene the law's compatibilist approach by investigating the prior cause of conscious determination.

Under a determinist understanding of human behavior, one could always theoretically trace a person's decision to commit a crime (or engage in any behavior) back to sources ultimately beyond the actor's control. To avoid arbitrary line drawing, however, courts traditionally embrace a snapshot view of voluntary conduct by ending their inquiry with the defendant's present mental state during the crime. Volitional excuses such as duress, necessity, and provocation can mitigate culpability or exonerate a defendant on the basis of uniquely difficult circumstances precipitating the offense. Yet these affirmative defenses do not focus on the background or the general status of the accused, but rather emphasize the anomalous events present at the time of the agent committed the crime.[146] Often, they may reveal discordance in the actor's contemporaneous mental states. For instance, an individual acting under duress may intentionally rob a bank despite experiencing no desire to commit the crime, but only a fear that refusal to participate will result in immediate bodily harm or death.

Such ahistorical excuses also stand in contrast to the "rotten social background defense" (RSBD) in which an offender alleges that although he possessed the intent of a fully competent moral agent at the time of his crime, he is not wholly responsible for his misconduct because the adversities he confronted during his upbringing produced his deficient moral

145. U.S. v. Hearst, 412 F.Supp. 863, 870 (D.C. Cal. 1975); Linder, *supra* note 144.
146. Moore, *Causation*, *supra* note 55, at 1097.

character.[147] Yet as acknowledged by one of the most famous advocates of this defense, "the country has not adopted a rotten social background defense and is unlikely to do so anytime soon."[148] The absence of any judicial decision expressly endorsing RSBD substantiates the claim that the law declines to mitigate culpability simply because one can causally trace an individual's poor moral judgment or criminal propensities back to sources over which he had no control. To reject RSBD, one need not deny that severe socioeconomic deprivation often negatively influences an individual's behavior. Rather, this position avoids the call to consider such factors as genes and environment, by denying the relevance of the offender's personal background to his present crime, and rejecting the claim that one should mitigate the culpability of a currently competent individual when he intellectually understood all the attendant circumstances at the time of his crime, but nonetheless proceeded to engage in wrongful conduct both consciously and intentionally.

3. Diminished Moral Capacities Do Not Diminish Culpability

The legal precedent for treating motivational defects as mitigating is even weaker than for executive impairments. As previously indicated, juveniles' "transient rashness" and "proclivity for risk" is arguably better characterized as a motivational rather than executive defect, because teenagers do not literally lack the capacity to control their impulses.[149] Rather, they

147. *See* United States v. Alexander, 471 F.2d 923, 928–29 (D.C. Cir. 1973) (Bazelon, C.J., dissenting) (introducing the term "rotten social background" into the legal literature and arguing that the jury should have been permitted to consider the defendant's social and economic background as a mitigating factor, potentially justifying a lesser charge or acquittal); David Bazelon, *The Morality of the Criminal Law: A Rejoinder to Professor Morse*, 49 S. CAL. L. REV. 385 (1976) (noting that our legal system fails to take account of social conditions that predictably render underprivileged children unequipped with the internal controls necessary to resist temptation and obey the law); Richard Delgado, *Rotten Social Background: Should Criminal Law Recognize a Defense of Severe Environmental Deprivation*, 3 LAW & INEQUALITY 9 (1985) (calling for limited recognition of the RSB defense on the basis of social science evidence of the effects of severe environmental deprivation on human agency).

148. Richard Delgado, *The Wretched of the Earth*, 2 ALA. C.R. & C.L. L. REV. 1 (2011) (noting that "no judicial decision has expressly endorsed" the RSB defense); Delgado, *Rotten Social Background*, *supra* note 147, at 9 ("No jurisidiction in the United States . . . recognizes a [general] defense based on socioeconomic deprivation *simpliciter*").

149. *Miller*, 132 S.Ct. at 2464–65.

systematically favor impulsive or reckless choices, because they tend to overvalue short-term benefits and are less adept than adults at subordinating their impulses.[150] The AMA brief for *Miller* explains:

> [A]dolescent behavioral research suggests that adolescents take more risks because they overvalue the potential reward, not because they are less able to appreciate the risks, as was once believed. "[A]dolescents' greater involvement in risk taking, compared to adults', does not appear to stem from youthful ignorance, irrationality, delusions of invulnerability, or misperceptions of risk." Rather, it appears that adolescents and adults perceive *risks* similarly, but they evaluate potential *rewards* differently, especially when the risky behavior is weighed against the cost.[151]

This account describes a diminished motivational capacity insofar as it suggests that adolescents are not impervious to reason, but merely biased in favor of egocentric choices. But because motivational deficiencies comprise inherently moral deficits, they cannot coherently diminish culpability. To treat these traits as excusatory would undermine the project of the criminal justice system by reducing all instances of bad intent to blameless symptoms of a psychological defect. Assuming the doctrine of criminal responsibility aims to distinguish the exceptional cases where it is inappropriate to hold an individual fully accountable for his apparent conduct from the typical case where society may fairly blame him for actions that he consciously performed, a theory of mitigation cannot interpret antisocial impulses as conditions reducing blame.

On an intuitive level as well, any parent knows that the reluctance of juveniles to take the consequences of their actions into account is not a blameless feature of their character, even if it is partially biologically determined. While parents recognize that it is typical for teenagers to make ill-considered decisions, they also believe that it is not futile to expect and demand more. To the contrary, parents discipline their teenagers precisely because they believe children can be taught to consider the repercussions of their actions. More crucially, parents do not typically question whether their child really disregarded their authority by taking the car without permission or whether the child really acted deceitfully when cheating

150. *AMA Brief*, *supra* note 116, at 2–3.

151. *Id.*, *citing* Elizabeth Cauffman & Elizabeth Shulman, *Age Differences in Affective Decision Making as Indexed by Performance on the Iowa Gambling Task*, 46:1 DEVELOPMENTAL PSYCHOL. 193, 194 (2010).

on a test. Moral education only makes sense if the child genuinely possessed blameworthy attitudes. By contrast, it would be cruel for parents to sanction their children for a delusion or spasm, because no amount of punishment could persuade the child to refrain from acting in this way. Likewise, parents would not blame an infant for crying because, at that age, the child does lack the evaluative and executive capacities to make a knowing and conscious decision. Although parents may have different objectives than the criminal justice system, there is little reason for these two frameworks to diverge when it comes to simply identifying blameworthy conduct. The Supreme Court, therefore, would have benefited from considering the wisdom of parents, which counsels that a teenager's failure to consider the consequences of immediate gratification is not a mitigating or even morally neutral condition, but rather an inculpatory mens rea.[152]

a. Doctrinal Rejection of Deviant Valuation

The current legal doctrine reinforces the theory that deviant valuation cannot diminish an offender's culpability, since the project of the criminal justice system revolves around enforcing certain moral norms. The defense of mistake provides a helpful illustration of this principle, since it too distinguishes offenders who misapprehend observable facts from those who fail to recognize normative obligations.

i. Mistake of Law

It is axiomatic in the Anglo-American legal tradition that *ignorantia legis non excusat*—ignorance of the law is no excuse. By contrast, a mistake of fact amounting to "ignorance of the deed"[153] typically will exonerate an offender.

Blackstone explained that mistake of fact is a "defect of will; when a man, intended to do a lawful act, does that which is unlawful."[154] A mistake of

152. Although a person who recklessly perpetrates a crime will not have the *most* culpable mental state, when an offender consciously disregards a risk of harm to others or intentionally harms someone on an impulse, he manifests an inculpatory mental state. This Article presumes that teenagers are capable of possessing each level of intent—otherwise the defendants in *Miller* could not be convicted of murder.

153. Christopher St. German, *Dialogues Between a Doctor and a Student*, DIALOGUE II, c. 46 (1518).

154. WILLIAM BLACKSTONE, 4 COMMENTARIES ON THE LAWS OF ENGLAND *27 (1769).

fact is therefore not technically an affirmative defense, since an actor's failure to understand the precise (factual) nature of his behavior negates his mens rea and consequently his prima facie responsibility.[155] As Blackstone observes, the connection between "the deed and will" becomes too attenuated under such circumstances to form a criminal act, "[a]s if a man, intending to kill a thief or housebreaker in his own house, by mistake kills one of his own family."[156] The law exonerates Blackstone's mistaken offender as it would a criminally insane individual, on the basis that the offender's observable conduct does not reflect malicious intent. Had the attendant circumstances been as the offender believed them to be, his conscious choice would not entail a decision to do anything that society condemns. Moreover, one cannot fairly blame the offender for his faulty perception of the world because this evaluative deficiency does not implicate any morally salient deficit.

On the other hand, an agent's failure to know that his conduct is illegal does not excuse him from blame, "for every man is bound at his peril to take knowledge what the law of the realm is."[157] Justice Oliver Wendell Holmes succinctly described the dominant justification for this rule:

> It is no doubt true that there are many cases in which the criminal could not have known that he was breaking the law, but to admit [mistake of law as an] excuse at all would be to encourage ignorance where the law-maker has determined to make men know and obey, and justice to the individual is rightly outweighed by the larger interests on the other side of the scales.[158]

Although many scholars interpret Holmes to merely advance a utilitarian justification for the doctrine, purely pragmatic considerations cannot fully explain the antithetical treatment of the two categories of mistake. First, if the criminal law simply wished to maximize its deterrent effect, why would it not also eradicate the mistake-of-fact defense in hopes of incentivizing individuals to take extra care to ensure that the attendant circumstances

155. JOHN KAPLAN, ROBERT WEISBERG, & GUYORA BINDER, CRIMINAL LAW: CASES AND MATERIALS 231 (6th ed. 2008). With regard to the psychotic individual as well, commentators have argued that the defense of insanity is superfluous, because individuals who are not guilty by reason of insanity do not possess the requisite mens rea to intentionally perpetrate a crime.

156. BLACKSTONE, *supra* note 154.

157. St. German, *supra* note 153.

158. OLIVER WENDELL HOLMES, THE COMMON LAW 41 (Belknap Press 1963) (1881).

were as they appeared before engaging in any conduct that might, under relatively similar circumstances, violate the law? Second, if the doctrine permits a mistake of fact excuse under the rationale that the mens rea requirement mandates that an offender cannot be punished if he did not act with an intent to do evil, why would the law nonetheless sanction some offenders who acted with no awareness that their conduct was forbidden? As Blackstone describes:

> [I]f a man thinks he has a right to kill a person excommunicated or outlawed wherever he meets him, and does so, this is wilful murder. For a mistake in point of law, which every person of discretion not only may but is bound and presumed to know, is in criminal cases no sort of defence.[159]

A purely utilitarian understanding of the doctrine entails that even the most gentle and well-meaning person might be convicted and sentenced as a murderer, solely because he happened to be ignorant of a contingent fact. These inconsistencies reveal that solely pragmatic desires to reduce crime through instrumental incentives cannot adequately reconcile the disparate status of the two varieties of mistake.

Alternatively, Holmes' assertion that a mistake of law defense would "encourage ignorance *where the law-maker has determined to make men know and obey*" might suggest that the defense would undermine a separate, expressive function of the criminal law. Criminal laws reify moral norms in addition to enforcing them. In fact, *Graham* explains that retribution justifies imposing severe sanctions in order to "express its condemnation of the crime" and "the community's moral outage."[160] Because the law criminalizes conduct in part to express a societal determination that certain actions are morally reprehensible, it does not view ignorance of these maxims as morally neutral, at least where they proscribe a crime that is malum in se.[161] This entails that a sane but ignorant offender is blameworthy in part because, not in spite of, his failure to know that murder is

159. BLACKSTONE, *supra* note 154.

160. *Graham*, 560 U.S. at 71; *see also Miller*, 132 S.Ct. at 2478 (Roberts, C.J., dissenting) ("A mature society may determine that [protection of the innocent] requires removing those guilty of the most heinous murders from its midst, both as protection for its other members and as a concrete expression of its standards of decency.").

161. *See* KAPLAN, *supra* note 155, 229–30 (explaining that awareness that an act is illegal is not an element of the offense); MODEL PENAL CODE § 2.02(9).

wrong.[162] Professor Henry Hart argues that it is fair to assume that everyone knows the wrongfulness of certain conduct, because "any member of the community who does these things without knowing that they are criminal is blameworthy, *as much for his lack of knowledge as for his actual conduct.*"[163] Hence, the doctrine avoids the mens rea issue implicated in mistakes of fact through its assumption that "individuals are appropriately judged by the law not only for the law-abiding quality of their actions but also for the moral quality of their values, motivations, and emotions—in a word, for the quality of their character."[164] From this perspective, the doctrine of mistake reflects a commitment to the universal enforcement of societal values. Although a liberal society does not typically tell people what to believe, when the law criminalizes acts, it does not allow room for conscientious dispute. This tenet also comports with the law's rejection of the "cultural defense," which attempts to excuse an actor's criminal conduct by asserting that the behavior would have been moral in the actor's country of origin.[165]

Applying this principle of norm enforcement to juveniles' diminished capacities reveals that the criminal doctrine would typically reject as excusatory the systematic overvaluation of certain crime-producing motivations. The doctrines governing mistake and the cultural defense reflect a demand that actors regulate their conduct according to certain objective moral standards, independent of whether they actually know their legal obligations or have even had a robust opportunity to learn them. Hence, when minors commit serious crimes, such as murder, a retributive rationale would hold them fully responsible so long as they satisfied the minimal requirements of understanding the factual nature of their acts and possessing the basic capacity to consciously direct their behavior. By contrast, any

162. U.S. v. Wilson, 159 F.3d 280, 295 (Ill. 1998) (Posner, C.J., dissenting) ("When a defendant is morally culpable for failing to know or guess that he is violating *some* law . . . we rely on conscience to provide all the notice that is required.").

163. Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 413 (1958) (emphasis added).

164. Dan M. Kahan, *Ignorance of the Law is an Excuse—But Only for the Virtuous*, 96 MICH. L. REV. 127, 128–29 (1997).

165. *See, e.g.*, People v. Wu, 235 Cal. App. 3d 614 (1991) (admitting evidence of a Chinese immigrant's cultural conception of honor-killing only for the purpose of determining whether she was unconscious or acted in the heat of passion when she strangled her son after being shamed by his father).

failure to fully internalize social values exemplifies an inculpatory fact, rather than an excusatory condition under a retributive framework.

4. Over-Inclusive Applications of the Juvenile Diminished Capacity Principle

Many classes of offenders that the criminal doctrine deems fully accountable possess diminished executive or motivational capacities resembling those of juveniles. And as with juveniles, neuroscientists have produced abundant brain studies that explain their psychological features with reference to neurobiological facts. However, a diminished capacity principle that applies equally to these categories of offenders is untenable, both because it would contravene well-established doctrine, and because its expansive breadth would substantially alter the existing criminal justice regime.

As previously discussed,[166] psychopaths—like juveniles— insufficiently weigh the potential repercussions of their conduct, instead focusing predominantly on the potential for rewards. Likewise, psychopaths could cite neuroscience studies indicating that abnormalities in their brain—including, but not limited to, diminished functioning in their frontal lobe—reduce their responsiveness to foreseeable repercussions. Both groups demonstrate egocentricity, impulsivity, and a lack of insight. In addition, because psychopaths have diminished capacity to learn from their experiences, they are similarly situated to children who have had less opportunity than adults to absorb society's moral norms. Both groups also have significantly heightened levels of recidivism that generally decrease only with age.[167] Unlike the typical minor, however, psychopaths (through no choice of their own) are uniquely impaired in their ability to subjectively appreciate the reasons to refrain from criminal activity, rendering it essentially impossible for them to internalize social values. Since the law unequivocally disavows psychopaths' claim to mitigation, it cannot logically validate the diminished capacity of juveniles who possess only a handful of these impairments. Analogously, substance abuse produces demonstrable changes in an addict's brain that cause the individual to overvalue his immediate cravings and undervalue the

166. *See supra* III.A.2(c), A Novel Framwork.

167. Today, "[p]sychopaths are estimated to make up 1 percent of the population but constitute roughly 15 to 25 percent of the offenders in prison and are responsible for a disproportionate number of brutal crimes and murders." Kahn, *supra* note 101.

costs of satisfying them. An impulsivity theory of substance abuse contends that drug addicts are driven to dependency as a result of a "reward drive," which comprises a heightened sensitivity to reward cues, and "rash impulsiveness," which consists in insensitivity to the repercussions caused by drug use.[168] Yet the law staunchly rejects substance abuse as an excusatory condition as well, as evidenced by the fact that roughly half of the inmates in both state and federal prisons meet the DSM-4 criteria for drug abuse or dependence.[169]

Although these disorders present two of the most similar and forceful analogs to the juvenile characteristics cited by the Supreme Court, countless other conditions ranging from mood disorders to high testosterone would also satisfy the Court's currently unrestricted diminished capacity principle. Because the juvenile proportionality cases erect a categorical bar on certain punishments for all minors independent of their individual maturity, granting leniency to these parallel categories of offenders would undoubtedly shield at least the majority of criminal defendants from the two harshest punishments that our sentencing regime provides. Moreover, the Court itself has noted that the application of the diminished capacity principle is not restricted to particular crimes or punishments.[170] One cannot reconcile the retributive principles of the criminal doctrine with a diminished capacity principle that mitigates the culpability of more offenders than it does not and encompasses those offenders that the law has persistently found to be least deserving of leniency. Although a complete overhaul of our excessively harsh sentencing regime is likely long overdue, the diminished capacity principle would presumably not survive such extension. It follows that to preserve its coherence, a doctrine of diminished capacity must adopt a mitigating principle that would distinguish the psychological features that reduce culpability from those that do not on the basis of a fact less arbitrary than the current state of the art in neuroscience. This Part has advanced such a framework by delineating distinct varieties of psychological impairments according to their morally salient features and analyzing their current treatment under the existing

168. Sharon Dawe et al., *Reward Drive and Rash Impulsiveness as Dimensions of Impulsivity: Implications for Substance Misuse*, 29 ADDICTIVE BEHAVIORS 1389 (2004).

169. Substance Abuse & Mental Health Services Administration, *Results from the 2012 National Survey on Drug Use and Health*, U.S. Department of Health & Human Services, (2013).

170. *Miller*, 132 S. Ct. at 2465.

criminal doctrine. This inquiry suggests that courts could coherently understand mental disorders as excusatory where they impair an accusee's evaluative capacities or, arguably, his basic executive capacity for self-regulation, but not where they implicate his moral attributes by way of his motivations. The immaturity of the adolescent brain, however, does not impede a minor's rational or strictly volition faculties. It merely impairs his moral character by predisposing him toward intentional misconduct. Because the law cannot coherently treat these diminished *moral* capacities as mitigating blameworthiness, the neuroscience cited by the Supreme Court cannot support its finding of lessened culpability for adolescents under a retributive rationale.

IV. CAPACITY FOR CHANGE: AN ALTERNATIVE GROUNDS FOR LENIENCY

Although this Article has argued that juveniles do not have a legally cognizable variety of diminished capacity, this assertion does not entail that they do not warrant special leniency. The preceding discussion analyzed the Court's diminished capacity analysis in order to evaluate the extent of juveniles' diminished culpability under a retributive rationale. Although it concluded that none of the brain science on which the Court relied rendered adolescents less deserving of retributive blame, it did not address the second prong of the Court's analysis: juveniles' "capacity for change." This Part briefly suggests that minors' greater prospects for reform would provide a more coherent basis for leniency, but would nonetheless require the Court to reimagine criminal responsibility jurisprudence in one substantial way—by overtly embracing the rehabilitative ideal.

A. The Rehabilitative Principle of Capacity for Change

Not only do minors possess a greater capacity to reform their patterns of criminal behavior, but their moral capacities *automatically* improve as their brains develop, enabling them to more thoughtfully reflect on their decisions and better weigh the negative repercussions of their actions. Because juveniles tend to engage in less reckless conduct as they naturally mature—even in the absence of legal interventions—the law cannot justify long periods of incarceration under the goals of incapacitation or rehabilitation.

In this way, juveniles who rarely evidence "irretrievable depravity" or "incorrigibility" differ from psychopaths, who psychologists notoriously recognize as resistant or completely impervious to treatment.[171] Rehabilitative ideals therefore supply a more promising basis for leniency, as a rehabilitative approach would mitigate punishment for juveniles without granting to offenders that the law traditionally regards as most blameworthy.

The juvenile proportionality case law—and *Miller* in particular—cites the "transience" of juvenile immaturity and the penological goal of rehabilitation as a partial basis for leniency.[172] But by devoting equal or greater attention to minors' lessened culpability, the Court avoids overt reliance on the rehabilitative ideal. Rather, it treats rehabilitative considerations as factors merely reinforcing its conclusions regarding minors' diminished retributive desert. Importantly, the Court fails to acknowledge that the other juvenile attributes it cites as mitigating would not justify leniency in the absence of a minor's capacity for change. By contrast, because the rehabilitative perspective is forward looking, it vindicates many defenses that the current doctrine rejects. To illustrate, the current doctrine treats a brainwashed offender as a fully accountable target of blame so long as he consciously made a culpable choice. As discussed, retributive blame necessitates this compatibilist approach to responsibility, which attaches blame solely on the basis of an offender's contemporaneous mental states.[173] Nonetheless, a rehabilitative approach might advocate leniency for a coercively indoctrinated offender on the basis that treatment could correct the agent's temporarily skewed value system without resort to penal sanctions, thus restoring him to his former law-abiding self. Similarly, the rehabilitative ideal

171. For decades psychological literature has regarded psychopaths as "virtually incurable." Although research currently continues to produce little compelling evidence that clinicians can teach psychopaths empathy, some clinicians argue that therapists might persuade them to better conform their behavior to the law by appealing to instrumental reasons for refraining from misconduct. Cale & Lilenfeld, *supra* note 99, at 416–18; Kahn, *supra* note 101.

172. *Miller*, 132 S. Ct. at 2467 (observing that youth "is a time of immaturity, irresponsibility, 'impetuousness[,] and recklessness,'" and that "its 'signature qualities' are all 'transient.'"); *id.* at 2465 (noting that juveniles' "transient rashness, proclivity for risk, and inability to assess consequences—both lessened a child's 'moral culpability' and enhanced the prospect that, as the years go by and neurological development occurs, his 'deficiencies will be reformed.'"); *id.* (referring to children's "distinctive (and transitory) mental traits"); *id.* at 2468 ("[T]his mandatory punishment disregards the possibility of rehabilitation even when the circumstances most suggest it.").

173. *See supra* text accompanying notes 115, 145, 146.

would likely consider the effects that substance abuse has on an addict's brain and behavior when assessing the appropriate sentence for an offender who might reform his conduct if he could eradicate his dependency. It follows that for the law to premise leniency on the *prospective* transience of an adolescent's moral defects, it must abandon the backward-looking retributive framework in favor of a forward-looking rehabilitative approach.

To embrace the rehabilitative ideal, however, would conflict with American law's renunciation of rehabilitation over the past several decades.[174] Justice Roberts and Justice Alito argued as much in each of their dissents to *Miller*, recounting that although American sentencing practices emphasized rehabilitation and the availability of parole for most of the twentieth century, in the 1980s legislatures "began imposing longer sentences to punish criminals" and Congress enacted the Sentencing Reform Act to eliminate the discretionary sentencing associated with "what it called the 'outmoded rehabilitation model.'"[175] The time has probably come to revisit the value of a rehabilitative approach. In particular, scientific developments provide an enhanced understanding of the neurobiological deficits of offenders that may spawn more effective treatments than those available in the previous century. Nonetheless, the Court's attempt to shoehorn juvenile leniency into the existing retributive framework has not succeeded because neither their moral deficits nor their prospects for reform are material to the retributive goals of vindicating innocent victims or expressing society's outrage. Attempts to treat it as such merely warp the criminal doctrine.

174. *See* Mistretta v. United States, 488 U.S. 361, 363–66 (1989) (discussing the decline of the rehabilitative ideal in federal sentencing). Since 1974, when Robert Martinson famously argued that rehabilitation does not work, the criminal justice system, motivated by a confluence of factors, has largely abandoned rehabilitation as a purpose of punishment. Robert Martinson, *What Works? Questions and Answers about Prison Reform*, 35 PUB. INT. 22 (1974) (expressing his infamous view that rehabilitation does not work), *but see* Robert Martinson, *New Findings, New Views: A Note of Caution Regarding Sentencing Reform*, 7 HOFSTRA L. REV. 243, 252 (1979) (recanting his previous statement on the basis of new information).

175. *Miller*, 132 S. Ct. at 2489 n.2 (Alito, J., dissenting); *id.* at 2478 (Roberts, C.J., dissenting), *citing* 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, 22 (2003).

B. Two Brief Caveats to the Fixability Approach

There are two reasons why a court that endorses the rehabilitative ideal might nonetheless resist capacity for change as the sole justification for juvenile leniency. The first concerns the contingency of an offender's prospects for reform in a society where new psychological treatments are constantly developing. The second inquires into the Court's true ambitions in expanding the proportionality principle.

1. The Contingency of Cures

First, when applied in other contexts, the rehabilitative principle of "capacity for change" might render the principles of sentencing contingent on the current state of the art in psychiatric treatment. That is, leniency would depend on the likelihood of "fixing" an offender's psychological defects, which itself turns on whether society has developed an effective treatment for the condition.

Juveniles do not implicate this contingency problem, because adolescent brains mature on their own without any sort of penal or psychiatric intervention. By contrast, the advent of psychiatric drugs provides novel methods of combatting some otherwise chronic mental conditions, which can incline an offender toward crime. For instance, by administering antipsychotic medications to a violent schizophrenic, a doctor may effectively "rehabilitate" the offender by reducing the threat he poses to others. Under a capacity for change analysis, the offender would consequently warrant a shorter sentence even though the mitigating fact is completely external to any moral feature of him or his crime. The psychiatrist R.E. Kendell has acknowledged this sociopolitical dimension of treatment, arguing that society comes to regard a mental condition as a blameless "disease" only when medicine is more likely to effectively remedy a problem behavior than would treating it as a crime, a sin, or a social problem. For example, it was only upon the discovery of a medicine that appeared to combat alcoholism that the medical community officially recognized it as a disease.[176] Kendell further asserts that antisocial personal disorder (i.e., psychopathy) would garner similarly robust acceptance as mental illness if only psychiatrists could demonstrate that it responds better to medical treatments than to discipline.

176. Kendell, *supra* note 96, at 112–14.

Applying Kendell's theory in the context of sentencing, a rehabilitative approach to mitigation might subject penal practices to the contingencies of medical knowledge by granting leniency in response to the emergence of an effective treatment, rather than on the basis of the offender's personal traits or the gravity of the offense. Although seemingly far-fetched, this phenomenon has already begun to occur in the eight states that have experimented with the "chemical castration" of recidivist sex offenders.[177] For instance, in 1996 California enacted a law that permitted courts to require certain recidivist sex offenders to receive injections of testosterone-reducing hormones as a condition of parole. Relatedly, a rehabilitative doctrine of mitigation may encounter the issue of compulsory medical treatments.[178] Offenders who warrant leniency solely on the basis of rehabilitative ideals remain fully responsible for their wrongdoing from the retributive perspective and no less dangerous to society if left untreated. As such, the legal system would need to decide whether it would be ethical to forcibly treat criminal offenders or even to precondition leniency on an offender's consent to treatment.[179] In the narrow context of juvenile leniency, however, the Supreme Court could have easily avoided these issues by focusing on incapacitation or by premising its rehabilitation analysis on the fact that juveniles exhibit substantial prospects for reform in the absence of any intervention. Moreover, unlike the diminished capacity rationale, the pragmatic concerns surrounding a rehabilitative approach do not undermine the coherence of the justification or contravene the foundational doctrine of criminal responsibility.

177. *See, e.g.*, Charles L. Scott & Trent Holmberg, *Castration of Sex Offenders: Prisoners' Rights Versus Public Safety*, 31 J. AM. ACAD. PSYCHIATRY & L. 502, 503–04 (2003); John F. Stinneford, *Incapacitation Through Maiming: Chemical Castration, the Eighth Amendment, and the Denial of Human Dignity*, 3 U. ST. THOMAS L.J. 559, 599 (2006); Elizabeth M. Tullio, *Chemical Castration: An Effective Treatment for Child Predators: Practical, Effective, and Constitutional*, 13 CHAP. L. REV. 191, 207 (2008).

178. *E.g.*, Washington v. Harper, 494 U.S. 210 (1990) (permitting forcible medication of an inmate with a serious mental disorder if he poses a danger to himself or others and the medication is in his best medical interest); Perry v. Louisiana, 498 U.S. 28 (1990) (forbidding forcible medication of a death row inmate with a mental disorder to render him competent to be executed).

179. *See* Henry T. Greely, *Neuroscience and Criminal Justice: Not Responsibility but Treatment*, 56 U. KAN. L. REV. 1103, 1137 (2008); Robert A. Burt, *Why We Should Keep Prisoners from the Doctors: Reflections on the Detroit Psychosurgery Case Chambers*, 5 HASTINGS REPORT 25 (1975).

2. Mitigating an Excessively Severe Sentencing Regime

Second, the majorities in the juvenile proportionality cases may welcome over-inclusive applications of the diminished capacity principle if their true ambition was merely to combat an excessively harsh sentencing regime. In the English legal tradition, two reasons historically existed for mitigating legal sanctions. The first sought to realize the principle of proportionality by reducing the sentence of a convicted offender "to obtain a better fit between the punishment on the one hand, and the individual and the circumstances of his offence on the other."[180] Another dominant purpose, however, entailed a "pious perjury" in which the jury would deliberately twist the facts of the offense because they considered the law too severe. For instance, a jury might disingenuously find that the offender stole goods of a value below the threshold for imposition of capital punishment, because they did not wish to put a petty thief to death.

If the *Miller* majority sought to only achieve this latter goal, then its entire diminished capacity analysis constitutes mere pretext for rescuing a uniquely sympathetic class of offenders from an overly severe sentencing regime. Of course, such a theory cannot explain which offenders are sufficiently sympathetic to be singled out for mercy.[181] Nonetheless, the first juvenile proportionality case provided a possible justification for treating minors with special concern when it invoked society's fiduciary obligation to its children.[182] Indeed, this rationale better aligns with the scope of the juvenile proportionality doctrine, which draws a bright line at the age of eighteen, despite the fact that the portions of one's brain relating to executive functioning continue to develop into a person's twenties. The Supreme Court abandoned this ethical rationale, however, when it shifted to relying on objective data. Since then, the Court has engaged itself in an ongoing struggle to mold morally neutral scientific findings to meet the needs of a deeply ethical inquiry into what constitutes cruel and unusual punishment. As such, appeals to scientific data have done little to remove subjectivity from the Court's proportionality analyses.

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180. ALEC BUCHANAN, PSYCHIATRIC ASPECTS OF JUSTIFICATION, EXCUSE, AND MITIGATION IN ANGLO-AMERICAN CRIMINAL LAW 43 (1956).

181. *Miller*, 132 S. Ct. at 2481 (Roberts, C.J., dissenting) (asserting that the majority's reasoning "has no discernible end point").

182. *Thompson*, 487 U.S. at 835–37.

CONCLUSION

The Supreme Court's error in the juvenile proportionality cases consists in its failure to explain *why* the brain studies cited mitigated children's retributive desert. The Court's apparent logic—that neurobiological causes of criminal propensities lessen blameworthiness per se—falls victim to a reductio ad absurdum under which the law cannot hold any criminal accountable for his misconduct because all behavior is caused by the brain. To delineate the mental conditions that truly lessen culpability, this Article constructed a theory of diminished capacity grounded in the same principles that underlie the existing doctrines of responsibility and excuse. The criminal doctrine distinguishes mental deficits according to the manner in which they distort an actor's behavior, treating a mental condition as excusatory only where it produces a disconnect between an agent's apparent conduct and the potentially blameless intentions that he consciously entertained. Specifically, the law validates diminished "evaluative capacities" for perception and reason as legitimate excusatory conditions, but rejects or remains skeptical of the mitigating effect of all other mental deficits. In particular, the law cannot coherently regard inherently moral diminished capacities—including adolescents' propensity for impulsivity and recklessness—as reducing culpability. By ignoring the distinctions between various types of diminished capacities, the Court articulated an over-inclusive proportionality principle that would equally apply to numerous categories of criminal offenders to which the law has traditionally been resolutely unsympathetic. Nonetheless, this Article suggests that juvenile's greater prospects for reform may supply a logically consistent basis for leniency. To rely exclusively on the capacity for change rationale, however, would require the Court to overtly embrace the rehabilitative ideal.

Therefore, whereas neuroscience can provide useful guidance in analyzing a diminished capacity rationale, the Court must employ these scientific findings in a manner that bears on the factors already material to the criminal doctrines of culpability and excuse. To date, however, the Court has utilized scientific data to obscure the reasoning behind its holdings while shielding itself from critics who take issue with the subjectivity of proportionality review. Although the introduction of scientific research has done little to eradicate subjectivity in the Eighth Amendment jurisprudence, it has confused the law surrounding the under-theorized concept of diminished capacity.