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The Guilty Mind and Criminal Sentencing: Integrating Legal and Empirical Inquiry as Illustrated by Capital Sentencing

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We articulate an interpretation of *mens rea* that is broader than the traditional special sense but narrower than the traditional general sense. *Mens rea* in this intermediate sense addresses the guilty mind required by the sentencing criteria for specific criminal sentences for particular offenses. We advance an analytic structure for the integration of legal and empirical inquiry regarding standards of culpability that establish eligibility for capital punishment under contemporary United States legal doctrine. This structure addresses legal standards of culpability directly as well as indirectly in the form of evolving standards of decency. The general form of this analysis should be applicable more generally to sentencing provisions that address culpability as a sentencing consideration for other criminal sentences. Copyright © 2003 John Wiley & Sons, Ltd.

In a broad traditional sense, ''*mens rea*'' refers to the guilty mind required for criminal conviction and punishment.[1] Sanford Kadish distinguishes special and general senses of the term. In the narrower special sense, ''*mens rea*'' refers to the mental state required by the definition of a particular offense, but in the broader general sense, the term refers to all mental states and processes required for criminal responsibility, including those relevant to the insanity defense.[2] Consider an intermediate sense represented by the interpretation of *mens rea* as the guilty mind required to render an offender subject to a particular criminal punishment. Interpreted in this manner, *mens rea* includes the mental states or processes required by

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[1]THE CAMBRIDGE DICTIONARY OF PHILOSOPHY 556 (Robert Audi, 2nd ed. 1999); BLACKS LAW DICTIONARY 999 (7th ed. 1999); WAYNE R. LAFAVE, CRIMINAL LAW 224–225 (3rd ed. 2000).
[2]Sanford H. Kadish, *The Decline of Innocence*, 26 CAMBRIDGE L.J. 273, 274–275 (1968).

offense definitions and those identified as sentencing factors that support particular sentences for those offenses. This sense differs from the broad sense in that it does not include the mental states or properties relevant to defenses, such as insanity, that undermine an attribution of criminal responsibility. Understood in this intermediate sense, *mens rea* includes the mental states and processes relevant to the imposition of specific criminal sentences, including capital punishment.

Insofar as capital sentencing provisions identify mental states or processes as relevant to capital sentencing, the identification, description, and explication of these mental states or processes represents an aspect of the study of *mens rea* in which psychological research might fulfil an important role. Capital sentencing frequently draws stark attention to issues that arise in criminal sentencing more generally. The risks of miscarriages of justice or of discriminatory application, for example, pervade criminal sentencing but elicit special attention and concern in the context of capital sentencing. Thus, capital sentencing provides an arena in which one can address the application of psychological research to criminal sentencing more generally. The analysis presented in this article should apply generally to other sentencing decisions in which psychological states and processes served as sentencing factors, and particularly to those that address culpability as a sentencing factor.

United States Supreme Court cases regarding capital sentencing emphasize the culpability of the perpetrator as a central consideration in sentencing and arguably as the most important consideration.[3] Common statutory sentencing factors reflect this emphasis on personal culpability in that some listed sentencing factors identify aggravating conditions that increase culpability or mitigating conditions, such as distress or impairment, that reduce culpability.[4] A controversial series of cases addressing the significance of youth and mental retardation for capital sentencing reflects this concern for personal culpability. The petitioners contended that the United States Constitution precluded capital punishment of juvenile or mentally retarded offenders, and the Court's reasoning in addressing these cases explicitly discussed the ability of offenders in these categories to act with sufficient culpability to warrant capital punishment.[5] These opinions discuss the relevance of these conditions to culpability directly as well as indirectly through discussion of evolving standards of decency (ESD) as represented by legal standards and other indicia of widely accepted views regarding the significance of these conditions for culpability and sentencing.

Some empirical studies purport to inform this inquiry by measuring the significance that mock jurors attribute to youth for the purpose of capital sentencing.[6]

[3]Penry v. Lynaugh, 492 U.S. 302, 319–338, 336–340 (1989); Stanford v. Kentucky, 492 U.S. 361, 376–378 (1989); Thompson v. Oklahoma, 487 U.S. 815, 833–838 (1988) (plurality opinion); Eddings v. Oklahoma, 455 U.S. 104, 115–116 (1982); Woodson v. North Carolina, 428 U.S. 280, 303–304 (1976) (plurality opinion).

[4]American Law Institute, Model Penal Code and Commentaries §§ 210.6(3), (4) (official draft and revise comments, 1985) [hereinafter MPC].

[5]*Penry*, 492 U.S. at 319–338, 336–340; *Stanford*, 492 U.S. 376–378; *Thompson*, 487 U.S. 833–838 (plurality opinion).

[6]Catherine A. Crosby, Preston A. Britner, Kathleen M. Jodl, & Sharon G. Portwood, *The Juvenile Death Penalty and the Eighth Amendment: An Empirical Investigation of Societal Consensus and Proportionality*, 19 L. & Hum. Behav. 245 (1995); Norman J. Finkel, Kevin C. Hughes, Stephanie F. Smith, & Marie L. Hurabiell, *Killing Kids: The Juvenile Death Penalty and Community Sentiment*, 12 Behav. Sci. & L. 5 (1984); Sandra E. Skovron, Joseph E. Scott, & Francis T. Cullen, *The Death Penalty for Juveniles: An Assessment of Public Support*, 35 Crime & Delinq. 546 (1989).

These cases, studies, and sentencing provisions provide an opportunity to examine the application of empirical social science to legal issues regarding the significance of psychological states and processes for the assessment of culpability that renders an individual subject to a particular criminal punishment. In principle, such studies could address aggravating or mitigating circumstances. This article discusses youth as a mitigating condition because the legal and policy debate regarding capital punishment has been framed as raising the question whether youth serves as a mitigating factor as a categorical bar to capital punishment. A similar pattern of analysis could also apply to aggravating circumstances.

This article examines the relevant case opinions and the studies in order to consider the manner in which these studies do or do not illuminate the legal questions at hand. It also suggests a pattern of analysis that might further the application of social science to these questions and to similar questions involving the description and explanation of psychological states or processes for the purpose of evaluating the culpability of the individual. We do not defend any claim regarding the justification (or lack thereof) for capital punishment. If one holds that capital punishment is categorically unjustifiable, it follows trivially that no psychological processes are relevant to identifying those who are appropriate for that sentence. If one holds that capital punishment is justifiable in certain circumstances, the specific justification one finds persuasive may influence the relevance of various psychological states or processes. For the purpose of this article, we accept the principles and criteria of capital sentencing articulated in sentencing provisions and cases. We examine the relationship between the psychological states and processes identified as relevant to capital sentencing by these sources and the empirical studies that purport to inform deliberation regarding the eligibility of juvenile offenders for capital punishment. Thus, we neither support nor reject capital punishment or its application to certain classes of offenders. Rather, we hope to increase understanding of the potential integration of legal and empirical analysis regarding criminal culpability and sentencing.

The next section provides a brief explication of capital sentencing provisions and cases relevant to the analysis presented here. The third section reviews some psychological studies that purport to inform important issues addressed in the central cases as relevant to the application of capital punishment to juveniles. The fourth section examines the relationship between the studies reviewed in the third section and the law discussed in the second section. The fifth section advances an analytic structure intended to promote further integration of legal analysis and empirical research in a manner that can advance our understanding of the manner in which psychological states and processes are relevant to capital sentencing and to noncapital sentencing decisions that vest significance in individual culpability. The sixth section concludes the article.

CAPITAL SENTENCING

The Supreme Court cases addressing the significance of culpability for capital sentencing include a series of decisions establishing the requirement that the sentencer may not be precluded from evaluating any mitigating evidence regarding

the character of the offender or the circumstances of the offense.[7] Common statutory mitigating factors identify conditions that affect the offender's psychological states or processes such as to decrease culpability. The Model Penal Code, for example, includes the following mitigating factors: (i) the offender committed the capital offense while suffering extreme mental or emotional disturbance; (ii) the offender suffered impaired capacity to appreciate the wrongfulness of his conduct or to conform that conduct to law; and (iii) the youth of the offender at the time of the offense.[8] The first two of these factors explicitly refer to distress or impairment that distorts psychological capacities or processes in a manner that decreases culpability for the capital crime. The third factor directly addresses the age of the offender rather than psychological distress or impairment, but at least some of the rationales for treating youth as a mitigating factor depend on the premise that juveniles lack either the capacities required for full culpability or the experience, education, perspective, or judgment necessary to effectively make use of those capacities in evaluating likely consequences and directing their behavior.[9] Insofar as this premise is accurate, it provides both a rationale for listing youth as a mitigating factor and a reason to expect that youthful offenders would frequently qualify for mitigation under other factors addressing culpability.

The intended interpretation of these factors and the justification for vesting them with mitigating effect is not explicit in the Code.[10] Each of these factors identifies circumstances involving the offender's mental states or processes in a manner that arguably decreases his culpability for his capital crime because he lacked the fully ''guilty mind'' that would render him an appropriate subject of capital punishment under the standards of the Code. The precise meanings of the traditional *mens rea* terms in offense definitions have been notoriously difficult to articulate, but those offense elements represent attempts to articulate psychological states, capacities, or processes that render the individual sufficiently culpable to justify conviction and punishment for a particular offense.[11] Similarly, these sentencing factors identify psychological states, capacities, or processes relevant to the degree of culpability with which the individual committed the capital offense and, thus, to the capital sentencing decision. Insofar as these sentencing factors and traditional *mens rea* elements in offense definitions identify psychological capacities and processes considered relevant to legal criteria of culpability, they should be amenable to scholarship that integrates psychological research with the relevant legal analysis. Furthermore, this integration of legal and empirical inquiry should inform non-capital sentencing decisions that recognize the significance of culpability for criminal sentencing.

[7]*Eddings*, 455 U.S. at 113–115; *Lockett*, 438 U.S. 586, 608 (1978); *Woodson*, 428 U.S. at 303–304 (plurality opinion).
[8]MPC, *supra* note 4 at §§ 210.6(4)(b), (g), and (h) respectively and commentaries at 132–142. The code also includes as a mitigating factor that the offender believed he acted with moral justification or extenuation. We do not include that factor because it addresses belief content rather than impaired capacities or processes.
[9]*Thompson*, 487 U.S. at 833–838 (plurality opinion); *Eddings*, 455 U.S. at 112–117.
[10]MPC, *supra* note 4 at commentaries at 137–142 briefly discusses the mitigating factors but provides no clear justification of these factors.
[11]MPC, *supra* note 4 at commentaries at 121–129; LaFave, *supra* note 1 at 224–229; Kadish, *supra* note 2 at 273–275.

Supreme Court cases addressing the significance of youth and of mental retardation for capital sentencing have recognized the potential mitigating effect of both conditions. These cases have established neither categorical rules regarding the eligibility of juvenile offenders for capital punishment nor clear criteria or guidelines regarding the specific characteristics of the capacities or processes associated with youth that mitigate. Although the Court's discussion of the mitigating effects of youth has been relatively sparse, the Court has provided a relatively detailed discussion of the mitigating significance of mental retardation. This discussion clearly indicates that mental retardation can serve as a mitigating factor because it reduces culpability, and it identifies in general terms some characteristics of retardation that might mitigate. The Court required that sentencers have the opportunity to consider the mitigating effect of the defendant's impairment, and it later precluded capital punishment of mentally retarded offenders.[12]

Similarly, the Court recognized the potential mitigating effects of youth and required that the sentencer have the opportunity to consider and give effect to that mitigating effect in a particular case. The opinions briefly discuss the characteristics of youth, including lesser capacities, maturity, experience, and perspective, that render juvenile offenders less culpable than adults, but they provide no clear criteria or guidelines.[13] Although a plurality of the Court endorsed a categorical rule barring capital punishment of those who committed their capital crimes before the age of 16, that position did not command a majority of the Court.[14] Thus, the current state of Supreme Court doctrine remains consistent with the comparable doctrine regarding mental retardation. Regarding each matter, the sentencer must consider the mitigating effect of the individual offender's condition for the crime and circumstances at issue, but the Court provides no clear criteria or guidelines of mitigation for either condition.

EMPIRICAL STUDIES

Two recent psychological investigations provide empirical evidence regarding the manner in which student and non-student participants address the significance of the youth of the perpetrator for capital sentencing. These investigations were designed to inform our understanding of ESD regarding capital sentencing of juvenile murderers by measuring the degree to which the youth of the perpetrators affected the propensity of the participants to assign capital punishment. These investigations also elicited information regarding the properties of the crimes and of the perpetrators that contributed to sentencing decisions and regarding the participants' evaluation of the culpability of juveniles generally.[15]

These two investigations share some basic methodological features. Both include written summaries of evidence based on United States Supreme Court capital cases

[12]Atkins v. Virginia, 122 S.Ct. 2242 (2002); *Penry*, 492 U.S. at 319–328, 336–340.
[13]*Thompson*, 487 U.S. at 833–837 (plurality opinion); *Eddings*, 455 U.S. at 115–116.
[14]*Thompson*, 487 U.S. at 838 (plurality opinion), 848–859 (O'Connor, J. concurring).
[15]Crosby et al., *supra* note 6; Finkel et al., *supra* note 6.

in which the juvenile age of the defendant was an issue at sentencing.[16] In both investigations, individual mock juror participants read and responded to the stimulus materials individually, without deliberating in groups. Both investigations addressed sentencing decisions and culpability estimates.[17]

Although these investigations are representative examples of reputable experimental studies on jury decision making, both employ designs that raise some concerns regarding ecological validity. These concerns are common among controlled studies of capital sentencing. Neither, for example, involved collective jury deliberation, and both relied upon written summaries of evidence, argument, and law. Thus, the participants were not exposed to defendants, witnesses, or victims' survivors, regarding whom actual jurors might form impressions regarding credibility, remorse, malevolence, potential for rehabilitation, or other matters. This lack of exposure to the individuals involved may reduce the intensity of interpersonal responsiveness involving empathy, sympathy, anger, or other responses that may significantly influence decision making or public opinion regarding murder cases, defendants, and sentences. Perhaps most importantly, the participants were fully aware that they were participating in a study rather than a trial and, thus, that no one's life would be directly affected by their decisions.

Most of these concerns permeate controlled studies of this type, however, and to at least some degree they may be unavoidable. Furthermore, the opportunities to directly study the sentencing process in a controlled manner are limited. For these reasons, we should remain conscious of these limitations and interpret the results cautiously in light of them, but they do not preclude the possibility that such studies can substantially contribute to our understanding of the sentencing process.

Crosby et al. report an experimental study they conducted as "an attempt to examine systematically the empirical questions underlying the constitutional analysis of juvenile executions."[18] The experimental design was a 4×2 factorial resulting in eight experimental conditions. There were four levels of defendant age (10, 15, 16, or 19) and two levels of defendant remorse (high or low) for the crime. Each experimental cell involved a convicted defendant who represented one age condition and one remorse condition. Court officials provided the names and addresses of former jurors to whom the researchers mailed questionnaire booklets with a cover letter from the Chief Judge, yielding a sample of 179.[19] Participants, who were asked to assume that the defendant had been found guilty, read a summary of guilt- and sentencing-phase evidence before issuing a sentencing verdict.[20] In addition to measuring sentencing verdicts, Crosby et al. also measured participant responses on six items regarding attitudes toward juvenile defendants in

[16]Both Finkel et al. and Crosby et al. used events patterned after the *Wilkins* case reported in Stanford v. Kentucky, 492 U.S. 361 (1989), although Finkel et al. used two additional case fact patterns in their first study.

[17]Finkel et al. measured both guilt-phase verdicts and sentencing decisions for participants whose guilt-phase verdict was murder. Crosby et al. did not measure guilt-phase verdicts; they focused explicitly on sentencing phase decisions.

[18]Crosby et al., *supra* note 6 at 250.

[19]Of the original 400 former jurors to whom Crosby et al. sent materials, 264 responded. The researchers excluded 19 participants as not death qualified under the Supreme Court standards, 21 participants who made errors in completing the survey, and 45 participants whose materials were a pilot for some other research. *Id.* at 251.

[20]The length and specificity of the Crosby et al. stimulus materials were not reported in the publication.

capital cases generally. These responses were aggregated into a ''Culpability Composite Scale'' which consisted of an average score among the items.[21]

Crosby et al. compared death sentence verdicts in each of the four defendant age conditions. Consistent with their hypothesis, the percentage of death verdicts increased with defendant age: 60.5% of participants in the 10-year-old defendant condition selected death over life, compared with 73.2, 90, and 96% of participants in the 15-year-old, 16-year-old, and 19-year-old defendant conditions, respectively. The authors conducted logistic regression analyses to determine the relationships among the independent variables and sentencing verdicts. Youth of the defendant and lower Culpability Composite Scale scores, which reflected judgments of lower culpability for juveniles in capital cases generally, were significantly related to life verdict decisions in the final analysis.[22] Although these data demonstrate a significant effect of age on capital sentencing, the authors noted the high rate of capital sentencing among their participants, including those who sentenced the 10-year-old defendant. They interpreted their results as indicating a lack of social consensus in opposition to capital punishment for juvenile offenders and a lack of ''any reluctance on the part of these former jurors to vote for execution.''[23]

Finkel et al. reported two studies related to capital sentencing of juveniles. The fact patterns were based on three capital cases decided by the United States Supreme Court in which the age of the defendant was an issue in the sentencing phase. In study 1, the experimental design was a mixed 3×5. Defendant age was manipulated in each of three different cases. The defendant was aged 15, 16, 17, 18, or 25. Participants read and responded to each of the three randomly ordered cases, with the defendant age differing in each case. After reading instructions regarding five possible guilt-phase verdicts, participants selected one of these verdicts. Those who issued a first-degree murder verdict then read capital penalty phase arguments and instructions and made a sentencing decision of life or death.[24] Participants had one week to complete the materials. The final sample consisted of 67 undergraduate students.[25] Finkel et al. found differences in guilt-phase verdicts and sentencing decisions across cases. Among participants finding the defendant guilty of first-degree murder, the overall percentage of death sentences ranged from 22 to 57% across the three cases. The authors also found differences in murder verdicts and

[21]These items addressed general attitudes toward juvenile culpability and the death penalty, rather than study-specific data. The authors' statistical justification for creating the Culpability Composite Scale was not clear. They reported the results of a factor analysis as yielding ''a one-factor solution that accounted for 33.1% of the variance.'' *Id.* at 253. No further information was provided regarding the interrelatedness of the scale items.

[22]*Id.* at 254–255. It is unclear how the researchers arrived at the four levels within the age manipulation. The two middle ages, 15 and 16, were addressed in two central legal decisions. Stanford v. Kentucky, 492 U.S. 361 (1989); Thompson v. Oklahoma, 487 U.S. 815 (1988). The authors assert that the lowest age in the study (10) is ''the youngest age at which a defendant could hypothetically be executed in the United States,'' but they offer no legal authority to support that assertion. *Id.* at 249. The highest age level in the study (19) presumably represents an adult defendant. Although the intervals vary from 5 years to 1 year to 3 years, the authors treated the age variable as continuous in the statistical analyses.

[23]*Id.* at 258.

[24]The authors did not report the length of the case summaries, but the judicial instructions alone were eight single-spaced pages long. Unless a great deal of detail was included in the guilt- and penalty-phase summaries, the instructions may have been much more salient than the case facts. Finkel et al., *supra* note 6 at 10.

[25]The original sample of Finkel et al. in study 1 included 85 undergraduates, 18 of whom were screened out as non-death-qualified under Supreme Court standards. *Id.* at 9, 12.

death sentences with different levels of the defendants' age. In general, the results showed a trend toward fewer murder verdicts and fewer death sentences when the defendant was younger.[26]

Study 2 was a between-subjects 7×3 design based on a single case. The defendant's age was 13, 14, 15, 16, 17, 18, or 25. Age was varied within each of three ''type of defendant'' conditions: principal perpetrator, accomplice who actively participated in the murder, or accomplice who participated only by driving the getaway car.[27] Eighty-seven undergraduate participants were each instructed to recruit two adult community participants from different decades. This yielded an additional 174 adult participants. After screening out non-death qualified participants, the net sample was 202 participants who had a week to complete and return the booklets containing the study materials.[28] Study 2 employed a methodology similar to that in study 1 in that participants issued guilt-phase verdicts and those who found the defendant guilty went on to the sentencing phase instructions, evidence and arguments. In addition, the authors collected open-ended self-report data from participants regarding the reasons they articulated for their sentencing decisions in the specific cases they addressed. Type of defendant was related to guilt- and sentencing-phase decisions, and lower age of the defendant was associated with reduced frequency of murder verdicts and death sentences.[29] The most common reason articulated by the participants for selecting life rather than death was the youth of the defendant.[30]

The authors described the differences in verdicts and sentencing decisions across cases in study 1 as relating to the heinousness of the crime. They characterize their overall findings from both studies by saying, ''[w]hat we offer in this matter is the sentiment of our [death-qualified] sample, which was this: when given an easy, paper and pencil way to administer the death sentence to a juvenile who killed, they rarely killed the kid.''[31] Death sentences in study 1 for the 15- and 16-year-old defendants ranged from 10 to 56% of those who issued a first-degree murder verdict. Of the study 2 participants in the 13- to 15-year-old defendant conditions who found the principal and active accomplice guilty of first-degree murder, approximately 38% issued a death sentence for the principal, and approximately 32% issued a death sentence for the active accomplice. In light of these results and the concerns discussed earlier about simulation studies, one might paraphrase the characterization quoted above as ''when participants who do not have the opportunity to administer the death penalty to juveniles who killed are asked what they

[26] *Id.* at 12–13. We are cautious in interpreting the sentencing results reported in study 1 because it is difficult to ascertain the number of death sentence decisions made within each of the age conditions. Each subject completed all three case scenarios with a different aged defendant in each. Thus, there were 201 guilt-phase verdicts, and only those who brought verdicts of guilty for first-degree murder went on to the sentence decision. We do know that the percentage of participants in study 1 who progressed from the guilt to sentencing decisions ranged from 44 to 100% depending upon the case and age condition.

[27] The authors combined the principal type of defendant with the active accomplice to the murder condition following preliminary analyses. *Id.* at 15.

[28] The death qualification procedures in study 2 were identical to those in study 1.

[29] Compared to the combined principal and active accomplice category, the getaway driver was less likely to be found guilty of first-degree murder and less likely to receive a death sentence when found guilty of first-degree murder. The authors concluded that planned comparisons combining multiple age categories in two separate analyses showed discriminable breaks in the death sentence by age between 15 and 16 and between 18 and 25. *Id.* at 15.

[30] *Id.* at 15–17.

[31] *Id.* at 19.

would do if they had such an opportunity, significantly fewer of them say they would vote to execute the younger offenders than say they would vote to execute the older offenders.''

Interpreted together, the results of these two investigations provide some central consistency. Both find a significant age effect in that participants were less willing to apply capital punishment to younger offenders than they were to apply it to older juveniles or to adults. The studies differed regarding the general degree of willingness to apply capital punishment, with the participants in the studies by Finkel et al. less willing to do so than those in the study by Crosby et al. The explanation for this difference is not clear. It may reflect differences among the subject pools, the study materials and procedures, or external circumstances.

Both investigations provide some evidence consistent with the interpretation that differential sentencing by age reflects judgments that younger perpetrators are less culpable for their crimes than are older perpetrators. Crosby et al. found that sentences of life, rather than death, were significantly related to lower offender age and to judgments of lesser culpability of juveniles generally. Finkel et al. found that principal perpetrators and active accomplices were more likely than getaway drivers to receive death sentences. This difference can be interpreted plausibly as reflecting the judgment that the getaway driver was less culpable for the murder. Furthermore, several of the clusters derived from the reasons given for sentences of death can plausibly be interpreted as indicating judgments of higher culpability. These include, for example, criminal intent, the heinous or aggravated nature of the crime, and the judgment that the offender was a hardened criminal.[32] These factors are consistent with the interpretation that the subjects sentenced on the basis of their judgments regarding culpability, but they do not establish either that the subjects sentenced only on the basis of culpability or that their assessments of culpability were consistent with legal standards. Other interpretations emphasizing considerations such as risk may also be plausible. We claim only that the results are consistent with the interpretation that subjects selected sentences at least partially on their assessment of culpability.

In light of these common patterns, one might offer the following paraphrase of Finkel et al.'s characterization quoted earlier as applying to the two studies jointly: ''When participants who do not have the opportunity to administer the death penalty to juveniles who killed are asked what they would do if they had the opportunity, they say they would vote to execute younger offenders at a significantly lower rate than they would vote to execute older offenders.'' The rate at which they would do so remains unclear and may vary substantially across circumstances. Their evaluations of the culpability of the offenders may play a significant role in their decisions.

THE STUDIES AND THE LAW

As discussed in the introduction the Court addresses the significance of youth and mental retardation for culpability directly by discussing the characteristics associated with these conditions that decrease culpability and indirectly by reviewing

[32] *Id.* at 15–17.

indicia of ESD regarding the application of capital punishment to members of these classes of offenders. The studies discussed in the last section purport to inform the Court regarding the social standards that represent ESD. To do so successfully, the studies must measure social standards defined in a manner that coheres with the conception of social standards addressed by the Court or with a conception that renders these standards relevant to defensible capital sentencing.

Conscience of the Community: Informal Attitudes or Societal Standards

The Court often addresses this issue in terms of the nature of the evidence it should consider in establishing ESD for the purpose of capital sentencing. Some opinions limit this inquiry to a narrow range of ''objective evidence'' consisting of statutes and court decisions by appellate courts or sentencing juries.[33] Other opinions advocate reliance on a much broader range of evidence including statutes and court decisions as well as various sources of public opinion including the positions revealed by organizations, surveys, and studies.[34] At first glance, these opinions appear to differ regarding their estimates of the reliability of certain types of evidence as representative of a common conception of the relevant community standards or attitudes. A more careful review suggests, however, that these opinions differ regarding a deeper question. That is, rather than disagreeing about the most reliable types of evidence of a common conception of the relevant community standards, they disagree about what constitutes community standards within the legitimate purview of the courts.

The Court's opinions make clear that the Eighth Amendment forbids punishments that were considered cruel and unusual at the time the amendment was adopted as well as those that may not have been so considered at that time but that are rejected by contemporary standards. The Court discusses these contemporary standards of acceptable punishment as ESD.[35] These ESD are relevant to the roles of legislatures, appellate courts, and perhaps to sentencers. As a constitutional limit on punishment, ESD define limits on the types of criminal punishment legislatures can legitimately impose. Appellate justices apply these ESD in fulfilling their responsibility to perform constitutional review of legislatively authorized criminal sentences. Sentencers, especially jurors, may fulfill a role in defining and applying ESD. Unfortunately, the legitimacy and limits of this role are less clear because the Court's opinions have not provided a fully articulated conception of ESD.

Some passages in some opinions suggest that ESD for the purpose of the Eighth Amendment consist of widely held informal attitudes. These passages review statutes, cases, the positions of relevant organizations, surveys, and other sources as evidence of these informal community attitudes.[36] Other passages limit the

[33]Atkins v. Virginia, 122 S.Ct. 2242, 2264 (2002) (Scalia, J. dissent); Stanford v. Kentucky, 492 U.S. 361, 370–380 (1989); Penry v. Lynaugh, 492 U.S. 302, 333–335 (1989).
[34]Atkins 1225 S.Ct. At. 2249a 21; *Stanford*, 492 U.S. at 388–390 (Brennan, J. dissenting); Thompson v. Oklahoma, 487 U.S. 815, 838 (1988) (plurality opinion).
[35]Gregg v. Georgia, 428 U.S. 153, 173–182 (1976).
[36]*Stanford*, 492 U.S. at 388–390 (Brennan, J. dissenting). Some passages reflect some divergence of opinion as to whether such community standards should reflect current views or the opinions that citizens would hold if they were fully informed. *Compare* Furman v. Georgia, 408 U.S. 238, 360–363 (1972) (Marshall, J. concurring) *with Gregg*, 428 U.S. at 232 (Marshall, J. dissenting).

analysis to ''objective evidence'' in the form of statutes and legal determinations by courts or juries. Although these passages initially appear to reflect the view that these legal sources are objective in the sense that they provide reliable indicators of the informal social attitudes, close review suggests that these passages reflect a substantive legal position regarding the parameters of the social standards that fall within the legitimate scope of judicial consideration. These passages discuss ''standards,'' ''societal standards,'' and the decisions of the ''citizenry'' in terms that suggest that only standards embodied in legal institutions qualify as public standards that courts may legitimately consider.[37]

According to the latter interpretation, the term ''objective evidence'' refers not to an estimate of the reliability of the evidence as an indicator of informal social attitudes, but rather to a limit on the legitimate jurisdiction of courts as institutions of law. Justices are legal officials who have the authority and expertise to interpret and apply law. Including informal social attitudes in the ESD would exceed this authority and expertise. Furthermore, it would subject the defendant, victim, and victim's survivors to judgment by informal standards regarding which these individuals had no notice and no opportunity to participate in developing. The results of the two studies reviewed here, for example, suggest that the pariticipants sentenced at least partially on their assessment of culpability. They may also have considered additional concerns which may or may not have been consistent with legally recognized sentencing standards, however, and they may have evaluated culpability in a manner that departs from legal standards. We do not claim that they did so; we claim only that the interpretation of ESD as informal social attitudes is particularly vulnerable to these difficulties. Finally, these standards would remain open to relatively wide variation in interpretation as different courts reviewed different evidence regarding informal opinion that shifts across time, location, and source. Thus, those who applied these standards would do so with minimal commitment to apply the same standards to others, including themselves.[38]

Understood in this manner, the fundamental dispute regarding the proper interpretation of ESD is a jurisprudential one about the types of social standard that fall within the legitimate scope of the Eighth Amendment and the jurisdiction of the courts rather than an empirical one about the most reliable source of evidence regarding these standards. If this interpretation is correct, these two sets of court opinions differ about what constitutes ESD for capital sentencing rather than merely about the most accurate form of evidence relevant to a common conception of ESD. If the strongest jurisprudential arguments support the more narrowly legal approach to this debate, the Eighth Amendment prohibits punishment that violates contemporary standards represented by legal institutions. According to this interpretation, empirical studies such as those reviewed in the last section are irrelevant because they address the informal social attitudes rather than the legally embodied standards that constitute the ESD. Alternately, if the strongest jurisprudential arguments support the broader approach that addresses informal social attitudes, these studies and other sources of empirical data can provide relevant evidence of the ESD applicable under the Eighth Amendment. We do not purport to resolve this

[37] *Stanford*, 492 U.S. at 378–380; *Penry*, 492 U.S. at 333–335 (contrasting poll and opinion evidence of ''public sentiment'' with legal indicia of ''contemporary values'').
[38] Robert F. Schopp, *Reconciling ''Irreconcilable'' Capital Punishment Doctrine as Comparative and Noncomparative Justice*, 53 FLA. L. REV. 475, 508–512 (2001).

jurisprudential debate here.[39] In order to examine the appropriate application of the empirical data to the formulation of the legal question to which that data would be relevant, we assume for the sake of argument that the informal social attitude approach applies.

Informal Social Attitudes and the Empirical Data

It is well established that offenders may offer evidence of youth as a mitigating factor. The controversy involves the contention that the Constitution categorically precludes capital punishment of any juvenile offender. Accepting the informal social attitudes interpretation of ESD, the empirical evidence reviewed in the last section supports the Court's decisions to address youth as a matter of mitigation for each defendant rather than as a matter for categorical preclusion of capital punishment. The studies demonstrate that the participants treat age as a mitigating factor that reduces the tendency to apply capital punishment to juvenile offenders but does not preclude it in all cases considered. Furthermore, these studies do not address the full range of aggravating circumstances involving factors such as torture, multiple murders, or murders of children. Some empirical work suggests that a substantial subset of those who consider themselves categorically opposed to capital punishment would consider applying it when confronted with cases of highly aggravated murders.[40] This work suggests that some individuals who would not consider capital punishment appropriate in ''ordinary'' murder cases might consider it appropriate for offenders who commit particularly heinous murders. Similarly, some who would think of themselves as categorically opposed to capital punishment for juvenile offenders might not remain categorically opposed if confronted with highly aggravated murders by juvenile perpetrators.[41] Thus, if ESD appropriately reflect informal social attitudes, these data support the contention that youth represents a legitimate mitigating factor for consideration in the circumstances of each case. These studies do not demonstrate that ESD categorically repudiate capital punishment for all murders by juveniles.

Insofar as appellants argue that the Constitution categorically precludes capital punishment for certain classes of offenders, evidence that offenders from these classes are generally less culpable or seen as less culpable would be inadequate to support the contention. Discussion of categorical preclusion requires differentiation of two senses in which this notion appears to have been discussed in the context of legislative action. In the first sense, capital punishment for certain classes of offenders might be rejected by the states categorically. That is, all states might reject capital punishment for offenders in these classes. Understood in this sense, categorical preclusion would prevent any case involving capital punishment of these offenders from coming before the Court because no sentence of capital punishment

[39] *Id.* at 508–517 (addressing this debate).
[40] Robert J. Robinson, *What Does ''Unwilling'' to Impose the Death Penalty Mean Anyway? Another Look at Excludable Jurors*, 17 L. & HUM. BEHAV. 471 (1993); Michele Cox & Sarah Tanford, *An Alternative Method of Capital Jury Selection*, 13 L. & HUM. BEHAV.167 (1989).
[41] The effect of heinousness in these studies is consistent with the significance of heinousness as a sentencing factor in the study by Finkel et al., *supra* note 6 at 16–17.

applied to members of this class would occur for appeal.[42] Second, a consensus of states might reject capital punishment of these defendants categorically. That is, most states might rule that no member of this class can qualify for capital punishment. In these circumstances, this broad consensus of states would support the claim that ESD as measured by legally enacted standards precludes capital punishment of any member of this class.

The first interpretation is appropriately rejected as an applicable standard because it would only apply when the issue cannot arise. The opinions addressing youth and mental retardation, however, apply the second interpretation as the applicable standard for ESD. Those opinions conclude that capital punishment of juvenile offenders has not been categorically rejected by a sufficiently large proportion of the states to establish a consensus for the purpose of constitutionally precluding capital punishment of juvenile offenders as contrary to the ESD.[43] This interpretation is consistent with the claim that many or most juvenile offenders lack full culpability.

The degree of agreement among states required to constitute a consensus for the purpose of constitutional preclusion under the Eighth Amendment remains unclear. In ordinary usage, a consensus requires at least a majority and in some contexts it requires unanimous or nearly unanimous agreement.[44] Capital cases applying ESD have prohibited only practices that were authorized by few if any states.[45] Furthermore, the precise significance of the views of individual participants in the studies, as compared to legislatures, juries, professional organizations, or other collective entities, in defining the informal consensus remains unclear. Assume for the sake of argument that (i) informal social attitudes among the general population provide the appropriate measure of ESD (ii) a consensus requires a substantial majority but not unanimity; and (iii) the results in the studies discussed in the last section would remain roughly consistent across a national subject pool and across cases involving more heinous conditions such as torture, multiple murder, and murder of children.

Accepting these assumptions, neither study provides evidence of social consensus precluding capital punishment of 16-year-old offenders, and one study clearly fails to provide evidence of a consensus against capital punishment of 15-year-old offenders while the other provides equivocal evidence due to the uncertain level of agreement required for a consensus.[46] Thus, both studies are consistent with the plurality opinion in *Stanford*.[47] Furthermore, the two studies together reveal mixed

[42]This appears to be the interpretation applied by Justice Brennan in his dissenting opinion in *Stanford*, 492 U.S. at 385–386. For convenience, we refer to all states, although strictly speaking, unanimity would require all jurisdictions that fall within the authority of the Constitution such as the federal jurisdiction and Washington, DC, as well as the states.

[43]This appears to be the interpretation applied by Justice Scalia in *Stanford*, **492** U.S. at 370–374 and Justice O'Connor in *Penry*, at 492 U.S. 328–340.

[44]*See, respectively*, NEW SHORTER OXFORD ENGLISH DICTIONARY 484 (1993), DICTIONARY OF MODERN LEGAL USAGE 205 (2nd ed. 1995).

[45]*Stanford*, 492 U.S. at 371.

[46]*Compare* Crosby et al., *supra* note 6 at 254 (73.2% vote to execute the 15-year-old) *with* Finkel et al., *supra* note 6 at 15–16 (38.1% vote to execute the 15-year-old). If 62% is sufficient to constitute a consensus, then the latter study supports a consensus against capital punishment for this particular murder, although it does not demonstrate that such agreement extends to more heinous offenses. The former study clearly does not support a consensus against capital punishment for 15 year old offenders.

[47]*Stanford*, 492 U.S. at 380.

views regarding capital punishment of 15-year-old murderers, and, thus, they support the dissenting opinion in *Thompson* that would have upheld the capital sentence for the 15-year-old offender in that case.[48] In short, on the assumptions listed, studies demonstrating that participants apply capital sentences at statistically significantly different rates to youthful offenders, as compared to adults who commit similar crimes, support the contention that these participants treat youth as a mitigating factor. Such studies do not support the contention that ESD preclude capital punishment of juveniles, however, unless the rate of capital sentencing across all murders by juveniles is sufficiently low to suggest that a consensus of informal opinion rejects such sentences for all such murderers.[49]

This section discusses the indirect evaluation of culpability through the assessment of informal social attitudes as reflected in the sentencing patterns of the participants. The studies also gathered some data relevant to the participants' direct assessment of culpability. One collected data regarding the participants' general views regarding the culpability of juveniles, and the other gathered data regarding the sentencing factors the participants reported, some of which addressed culpability.[50] A comprehensive integration of legal and empirical inquiry would address the direct assessment of culpability as well as the indirect assessment of the ESD.

AN ANALYTIC STRUCTURE

The Indirect Analysis of Culpability through ESD

The sentencing patterns in the studies discussed in the last two sections provide an estimate of culpability only if one accepts the premise that the participants made sentencing decisions by applying standards of culpability applicable to capital sentencing. Insofar as the studies are able to provide hypothetical cases, instructions, and circumstances that bear some reasonable similarity to actual cases, and insofar as the participants sentenced on the basis of culpability, it is reasonable to interpret the results as providing some approximation of likely judgments of culpability regarding similar circumstances by jurors drawn from similar populations.

Suppose, however, that someone were to advance the following proposal regarding capital sentencing provisions. Capital sentencing provisions should represent ESD as represented by informal social attitudes. Empirical data provide reason to believe that jurors are more likely to apply capital punishment in cases in which the victim is white than in relevantly similar cases involving black victims.[51] Therefore, capital sentencing provisions should list the killing of white victims as an aggravating circumstance and the killing of black victims as a mitigating circumstance. As far as we are aware, no one advances such an argument, but if we accept the premise that capital sentencing criteria properly reflect informal social attitudes

[48] *Thompson*, 487 U.S. at 859 (Scalia, J. dissenting).
[49] This reasoning applies to a class defined as including all juveniles or as including all juveniles below a specified age such as 15 or 16.
[50] *See, respectively*, Crosby et al., *supra* note 6 at 253–254; Finkel et al., *supra* note 6 at 15–17.
[51] David C. Baldus, George Woodworth, & Charles A. Pulaski, Jr., Equal Justice and the Death Penalty 149–157 (1990).

as reflected in the sentencing practices of actual or mock jurors, why would this not constitute a legitimate proposal?

It seems obvious that we should disregard such an argument out of hand as catering to illegitimate prejudice. The difficulty arises, however, in explaining what remains of the premise that informal social attitudes reflected in sentencing practices qualify as a legitimate source of ESD regarding criminal sentencing criteria or decisions. If we evaluate such attitudes in order to select only those that reflect legally or morally defensible criteria of culpability, have we abandoned informal social acceptance as a source of the ESD in favor of critical legal or moral analysis?[52] If we evaluate apparently common attitudes as represented by actual or mock juror decisions for legal or moral acceptability, does informal social acceptance continue to carry any weight independent of the conclusion that the attitudes in question are legally or morally defensible? One might argue that general acceptance retains weight for the purpose of choosing among standards or approaches that are equally justifiable on critical legal or moral grounds, but this approach seems to reduce informal social acceptance to the status of a relatively trivial device for selecting from among legally or morally equivalent positions. Alternately, one might apply empirical methodology to directly inform the application of conventional or critical standards of legal or moral culpability. Some of the data collected by Crosby et al. suggests that the participants' sentences reflected their views regarding the culpability of juveniles generally, and some of the sentencing factors found by Finkel et al. suggest sentencing according to culpability.[53] The next section presents a framework for integrating legal and empirical inquiry regarding culpability for sentencing. To avoid complexity that would extend this article beyond acceptable length, we set aside the moral inquiry.

Empirical Inquiry Regarding The Direct Analysis of Legal Culpability

An analytic framework for a program of empirical inquiry that would inform the direct evaluation of culpability for a particular criminal sentencing question would require at least the following components. First, it must provide an account of legal culpability for this purpose. Second, it requires an account of the type of empirical data that would advance our understanding of the degree or manner to which people in certain categories (such as juveniles) have characteristics relevant to that account of culpability. Third, it must provide an integration of the first and second steps that would enable us to determine whether certain categories of people categorically fail to qualify as sufficiently culpable to qualify for the sentence at issue.[54] Fourth, if the inquiry does not support a categorical exclusion, the framework should provide an integration of the first and second steps that would advance our ability to evaluate

[52]Critical moral justification would appeal to arguments from defensible moral principles. Justification according to the conventional morality represented by law would appeal to the principles of morality embodied in a particular legal system. Either provides an alternative form of analysis to general acceptance in the informal social attitudes.

[53]*See, respectively*, Crosby et al., *supra* note 6 at 258–259; Finkel et al., *supra* note 6 at 15–17.

[54]These categories may include all juveniles or mentally retarded offenders or they may include only those below a certain age or level of functioning.

individual members of these categories in order to estimate the degree to which the mitigating properties associated with these categories reduce the culpability of each individual in the circumstances.

A variety of legal sources inform an account of legal culpability in terms amenable to identifying psychological factors relevant to culpability for a particular purpose. Consider first some judicial opinions addressing capital punishment. Early cases required that capital punishment serve a legitimate penal purpose such as retribution or deterrence and that the sentencer consider the character and record of the offender.[55] Following cases required individualized sentencing on the basis of the character and record of the offender, including any aspect of that character and record that provide a basis for a sentence less than death.[56] Opinions addressing capital punishment of juveniles discuss lack of experience, education, perspective, judgment, maturity, and the ability to evaluate the consequences of their behavior as factors that decrease culpability.[57] Similarly, a related case addressing mental retardation and capital punishment emphasized the importance of sentencing in proportion to personal culpability and discussed impairment in the abilities to understand, reason, evaluate consequences, appreciate wrongfulness, learn from mistakes, and consider the long range.[58]

Several other legal sources provide evidence of systemic standards of culpability for criminal conviction and punishment. Previously discussed capital mitigating factors include impaired capacity to appreciate the wrongfulness of the criminal conduct or to conform to the requirements of law.[59] Similarly, common insanity defense standards also emphasize impairment in the ability to know or appreciate wrongfulness or to conform to law.[60] The Model Penal Code in the United States formulates traditional *mens rea* in the special sense as culpability elements requiring that the offender engage in the criminal conduct purposefully, knowingly, recklessly, or negligently as reflecting a roughly decreasing scale of culpability.[61] Each of these culpability elements requires the ability to engage in some variety of understanding of the nature of one's conduct and the circumstances or to form the purpose to engage in that conduct. Similarly, the various degrees of homicide reflect the various degrees of culpability associated with those culpability elements.[62]

Although these cases and statutory provisions do not provide a fully articulated theory of individual culpability, they suggest a set of core factors. These include the ability to comprehend the nature and harmfulness of one's conduct, the applicable circumstances, and the applicable legal limits. These sources also reflect the importance of the ability to engage in at least minimally adequate reasoning and deliberation regarding one's conduct in context of the circumstances and the legal constraints. Certain requirements such as the ability to appreciate the wrongfulness of one's conduct or the ability to conform to the requirements of law have been

[55]Gregg v. Georgia, 428 U.S. 153, 182–187 (plurality opinion); Woodson v. North Carolina, 428 U.S. 280, 303–304 (1976) (plurality opinion).
[56]Eddings v. Oklahoma, 455 U.S. 104, 113–115 (1982); Lockett v. Ohio, 438 U.S. 586, 602–605 (1978).
[57]*Thompson*, 487 U.S. at 834–838 (plurality opinion); *Eddings*, 455 U.S. at 112–117.
[58]*Penry* 492 U.S. at 319–340.
[59]MPC, *supra* note 4 at § 210.6(4)(g).
[60]LaFave, *supra* note 1 at §§ 4.2, 4.3.
[61]MPC, *supra* note 4 at § 2.02.
[62]MPC, *supra* note 4 at §§ 210.1–210.4 (the negligence element may not conform to this description).

notoriously difficult to explicate clearly.[63] Space precludes detailed analysis of the standards of culpability represented by these statutory provisions and cases. This brief discussion suggests that a full formulation would include at least the abilities (i) to comprehend the nature and harmfulness of one's conduct, the relevant circumstances, the likely consequences, and applicable legal constraints and (ii) to direct one's conduct through a minimally adequate process of practical reasoning that incorporates this comprehension in the process of decision making.[64]

The second component in a satisfactory analytic framework would provide a descriptive and explanatory account of the psychological properties or deficits that characterize a specified class and that are of at least arguable relevance to criminal culpability. This empirical component would include a comprehensive assessment of the current state of knowledge and a research program designed to improve our understanding of capacities or deficits of relevance to the standards of culpability formulated in the first component of the framework.[65]

The third component of the framework would integrate the descriptive and explanatory account from the second component with the standards of culpability developed in the first component. This integration might either support or undermine the contention that the properties identified in the second component preclude culpability sufficient for a specified sentence by the standards developed in the first component. If this analysis did not support the contention that certain classes of individuals, such as juveniles below a certain age, categorically lacked sufficient culpability for a specified sentence, it might advance our understanding of the factors relevant to the fourth component that applies the framework to the analyses of particular crimes by particular individuals in order to assess the relative culpability of specific offenders.

Although the basic four component structure may seem straightforward, it would be misleading to suggest that the legal and empirical inquiries are likely to interact in any simple or mechanical fashion. First, the legal analysis is unlikely to provide concrete criteria of culpability. The statutes and cases may identify the capacities to comprehend and reason as relevant to culpability, for example, but they do not specify any specific degree of competence or impairment that serves as a criterion of culpability for criminal responsibility generally or for specific sentences. Social scientists might adopt some measurable criteria such as one standard deviation below the mean for competent adults or a statistically significant difference between competent adults and a specified population such as juveniles below a certain age.[66] Adopting such criteria might promote reliability of measurement across studies, but it provides no basis for attributing legal significance to differences of the magnitude measured by these criteria. Evaluating the defensible legal significance of such differences requires a justificatory argument clarifying the significance of such differences for the culpability required by specified offense definitions and sentencing standards.

[63]ROBERT F. SCHOPP, AUTOMATISM, INSANITY, AND THE PSYCHOLOGY OF CRIMINAL RESPONSIBILITY §§ 2.1.2, 6.3 (1991).

[64]This minimal sketch does not directly address the significance of affective impairment, but such disorders might also carry weight in the context of sentencing. *Id.* at § 6.6.2 and chapter 7.

[65]For an approximation of such a project, *see* Thomas Grisso, *Society's Retributive Response to Juvenile Violence: A Developmental Perspective*, 20 L. & HUM. BEHAV. 229 (1996).

[66]Norman J. Finkel, *Prestidigitation, Statistical Magic, and Supreme Court Numerology in Juvenile Death Penalty Cases*, 1 PSYCHOLOGY, PUB. POL'Y, & L. 612, 629–639 (1995) (adopting statistical significance).

A similar but more pronounced difficulty arises when legal sources identify factors relevant to culpability without articulating reasonably clear or precise conceptions of these factors. The mitigating factors discussed previously, for example, include impaired ability to appreciate the wrongfulness of one's conduct or to conform to the requirements of law. These factors not only lack thresholds of measurement for the purpose of mitigation, they also lack any clear conception of the type of impairment involved. That is, neither legislatures, courts, nor scholars have been very successful in the attempt to articulate clearly what we mean by the abilities to appreciate or to conform.[67] Thus, the legal standard provides very little guidance regarding the nature of the empirical inquiry that would be relevant. Although these concerns impede the ability of social scientists to design empirical studies that specifically inform legal criteria, they do not render social science irrelevant. Insofar as social scientists can provide increasingly detailed descriptions and explanations of the reduced capacities manifested by members of specified classes relative to fully responsible adults, these descriptions and explanations might enhance the ability of legal actors to more clearly articulate the applicable legal conceptions of culpability and the corresponding mitigating factors. Detailed empirical accounts of the manner in which juveniles discount long-term interests in decision making, for example, might enhance the ability of legal actors to evaluate the mitigating force (or lack thereof) of youth for culpability and to articulate applicable criteria or guidelines. These clarified legal formulations may in turn promote more relevant empirical study. Thus, the legal and empirical inquiries each have the potential to enhance the other in an ongoing process.

Applying the Analytic Structure in Principle and in Practice

An integrated analysis of the type discussed in this section might support preclusion of a particular class of individuals from a specified punishment in principle or in practice. Consider, for example, the contention that capital punishment of juvenile or mentally retarded offenders should be categorically precluded. Categorical preclusion in principle would require a demonstration that no members of the class of offenders in question could fulfil the legal standards of culpability for capital punishment under any circumstances.[68] An analysis purporting to establish this proposition must confront at least two serious difficulties. First, legal standards of culpability are very likely to take the form of general principles and sentencing factors rather than specific criteria. Thus, it is very difficult to identify precise measures of culpability as the threshold that qualifies individuals for a particular sentence. Second, even if one could demonstrate that no individual member of an identified class could qualify as sufficiently culpable under any of the circumstances measured, it would be extremely difficult to demonstrate that no member of the class could be sufficiently culpable for crimes committed under other circumstances as yet unarticulated.

Alternately, evidence demonstrating that few members of the class could be sufficiently culpable under most plausible circumstances and that sentencers

[67]SCHOPP, *supra* note 63 at §§ 2.1.2, 6.3.
[68]*Stanford*, 492 U.S. at 373–377; *Penry*, 492 U.S. at 333–340.

ordinarily lack the ability to adequately differentiate those few from those who lack sufficient culpability would support an argument from error preference for categorical preclusion of the class. Consider once more the contention that capital sentencing standards should categorically preclude juvenile or mentally retarded offenders in practice. Certain factors might render such an argument more defensible regarding mentally retarded offenders than regarding juveniles. Considered as classes, both juveniles and mentally retarded individuals manifest some defects in functioning as compared to unimpaired adults, and some of these defects are relevant to culpability. Furthermore, the members of both classes vary substantially in their level of functioning. These classes differ, however, in that the distribution of capacities among juveniles overlaps markedly with that of unimpaired adults such that the more capable juveniles have capacities and skills comparable to many unimpaired adults.[69] Mental retardation, in contrast, is defined by intellectual and adaptive impairment such that all members of the class suffer substantial impairment as compared to unimpaired adults. Thus, some juveniles may possess a full set of capacities and skills relevant to culpability that are comparable to those of the broad range of unimpaired adults, but the criteria of mental retardation preclude any mentally retarded person from possessing a full set of capacities and skills comparable to those of unimpaired adults.[70]

Sentencers have all been juveniles, and many have ongoing or recent experience with juveniles. This experience provides them with some familiarity and understanding of the characteristics of youth. Few, in contrast, have comparable experience with mentally retarded individuals. Thus, most sentencers lack the background that would provide them with a reasonable basis to evaluate the mitigating significance of the impairment suffered by a particular mentally retarded offender. The Court has frequently endorsed the premise that death is different. Although this phrase has been notoriously difficult to interpret and defend with precision, it is ordinarily understood to require enhanced reliability in capital sentencing as compared to noncapital sentencing.[71] Collectively, these three premises provide a relatively strong argument from error preference for the categorical preclusion of capital punishment for mentally retarded offenders. For the purpose of this article, we do not pursue the complete analysis necessary to contend that it is (or is not) persuasive.

Our purpose here is to point out the potential for relevant empirical research regarding such an argument from error preference. Empirical inquiry might inform the first premise, for example, by providing detailed description of the types of impairment suffered by mentally retarded people and explanation of the manner in which such impairment affects decision making under various circumstances relevant to criminal activity. Alternately, empirical inquiry might inform the second premise by demonstrating the degree to which ordinary jurors are able to accurately understand the impairment suffered by mentally retarded people and the relationship between this impairment and legal criteria of culpability. Furthermore, empirical inquiry might address our understanding of the degree to which those

[69]Grisso, *supra* note 65 at 233.
[70]American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders 39–46 (4th ed. 1994); James W. Ellis, *Decisions by and for People with Mental Retardation: Balancing Considerations of Autonomy and Protection*, 37 Vill. L. Rev. 1779, 1783–1784 (1992).
[71]Woodson v. North Carolina, 428 U.S. 280, 304–305 (1976) (plurality opinion).

jurors are able to comprehend and apply expert testimony intended to enhance their ability to perform this task. Finally, it might advance our understanding of the manner in which various modes of presentation of such empirical information can be more or less effective in promoting the sentencers' abilities to comprehend that information and to make use of it in discharging their responsibilities.

Notice that if the reasoning provided by an integrated analysis of this type falls short of the force necessary to justify a court in overriding a legislative decision, it might provide reasoning persuasive to a legislature. In order to override a legislatively authorized capital sentence as unconstitutional, an appellate court requires highly persuasive evidence that members of a specified class lack the minimum capacities necessary to qualify as sufficiently culpable to qualify for the sentence. A legislature, in contrast, has the discretion to set boundaries on the basis of evidence sufficient to persuade the majority of its members that the members of the class lack sufficient culpability, either categorically or in sufficient numbers to raise an unwarranted risk of erroneous sentences. Thus, some legislatures might be more amenable than courts to persuasion by strong evidence supporting the argument from error preference.

CONCLUSION

This analysis suggests an analytic structure for the integration of legal and empirical inquiry regarding standards of culpability that establish eligibility for criminal punishment under sentencing schemes that include culpability as a legitimate sentencing consideration. This structure addresses legal standards of culpability directly and indirectly. It does so indirectly through the articulation and application of ESD. If the best jurisprudential arguments support the legal interpretation of ESD, empirical studies such as those discussed above are simply irrelevant, but if the best jurisprudential arguments support the informal social standards of ESD, these studies contribute to a more comprehensive body of evidence regarding current ESD.[72]

Regardless of the outcome of the jurisprudential inquiry regarding ESD, empirical research informing our understanding of the psychological states, processes, and capacities relevant to legally defined standards of culpability can advance our ability to apply these standards to the direct assessment of offenders, either categorically or individually. This direct application requires that we (i) articulate legal standards of culpability as clearly and precisely as reasonably possible, (ii) design, execute, and interpret empirical research that informs those legal standards, and (iii) integrate the data produced by that research with the applicable legal standards in order to clarify the legal significance of psychological characteristics revealed by the research. In this manner, this pattern of analysis can facilitate the integration of legal analysis and empirical inquiry in order to advance our understanding and application of *mens rea* in the intermediate sense discussed in the introduction. Ideally, such a program

[72]Although ESD are specifically associated with legal doctrine interpreting the Eighth Amendment to the United States Constitution, a similar pattern of analysis can apply to other legal sentencing systems that attribute significance to legally embodied or socially accepted standards of culpability for sentence severity.

would promote law reform by producing empirical information relevant to legal sentencing issues and accessible to legislatures and courts. Even if legislatures and courts fail to incorporate such research, however, improved understanding represents an outcome of independent value.

