Mental Disorder and Criminal Law
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Contributors

Stephen D. Hart  Department of Psychology, Simon Frazer University, Vancouver, British Colombia, Canada, hart@sfu.ca

Daniel A. Krauss Department of Psychology, Claremont McKenna College, Claremont, California, USA, Dkrauss@claremontmckenna.edu

Bradley D. McAuliff Department of Psychology, California State University, Northridge, California, USA

John G. McCabe Department of Psychology, Claremont Graduate University, Claremont, California, USA

Sarah McFadden Department of Psychology, Claremont McKenna College, Claremont, California, USA

Randy K. Otto Department of Mental Health Law & Policy, Florida Mental Health Institute, University of South Florida, Tampa, Florida, USA, otto@fmhi.usf.edu

Jodi A. Quas Department of Psychology, University of California, Irvine, California, USA, jquas@uci.edu

Michael R. Quattrocchi Independent Practice, Fishers, Indiana, USA, quattrocchimr@sbcglobal.net

Mario J. Scalora Department of Psychology, University of Nebraska, Lincoln, Nebraska, USA, mscalora1@unl.edu

Robert F. Schopp College of Law, University of Nebraska, Lincoln, Nebraska, USA, rschopp1@unl.edu

Christopher Slobogin Vanderbilt University Law School Nashville, Tennessee, c.slobogin@law.vanderbilt.edu

Barbara J. Sturgis Center for Children, Families, and the Law, University of Nebraska, Lincoln, Nebraska, USA, bsturgis@ccfl.unl.edu

Bruce J. Winick School of Law, University of Miami, Coral Gables, Florida, USA, bwinick@law.miami.edu
Introduction

Robert F. Schopp

Recent Supreme Court decisions categorically preclude the application of capital punishment to convicted offenders who were below the age of eighteen or mentally retarded at the time they committed the crimes for which they were sentenced.¹ Neither opinion suggests that offenders in these categories cannot be criminally responsible for their offenses, and the *Atkins* opinion explicitly recognizes that some mentally retarded offenders can qualify as criminally responsible for their offenses.² In each case, part of the reasoning in support of the exemption from capital sentences purports to show that capital punishment of these offenders would serve neither the retributive nor the deterrent functions of criminal punishment.³ Both opinions focus substantial attention on the retributive rationale, contending that these offenders lack sufficient culpability, blameworthiness, or depravity to merit capital punishment.⁴ The opinions recognize that a categorical bar for all offenders below a specified age or level of intelligence might exempt some individuals who do not lack culpability sufficient to justify capital sentences. The opinions draw categorical rules, however, to avoid the risk that some individuals who lack sufficient culpability to deserve capital punishment will be misidentified as sufficiently culpable to merit capital sentences.⁵

The dissenting opinions in each case recognize that offenders in these categories have limitations that render them less culpable on average than unimpaired offenders who commit similar crimes. They reject, however, the contention that these differences justify categorical preclusion of capital sentences, rather than individualized assessment of the capacities and culpability of each offender.⁶

The majority opinions in both cases provide some reasoning to support the contention that the limitations manifested by juvenile or mentally retarded offenders render them less culpable or blameworthy than unimpaired adult offenders who commit similar offenses.⁷ Neither opinion, however, provides clear reasoning that explains why this impairment necessarily renders all offenders in these categories insufficiently culpable to merit capital sentences for any crime in any circumstances but does not preclude criminal responsibility or culpability sufficient to justify any punishment other than capital punishment.

R.F. Schopp (✉)
College of Law, University of Nebraska, Lincoln, Nebraska, USA
e-mail: rschopp1@unl.edu
If these offenders are responsible for capital crimes but exempted from capital punishment, most will receive severe sentences of incarceration. The maximum noncapital sentence varies among jurisdictions, but in most jurisdictions, it is life without the possibility of parole (LWOP). These opinions and these alternative sentences should lead us to ask a series of questions regarding the significance of youth or of various types of psychological impairment for criminal conviction and sentencing. What evidence and reasoning justifies the contention that criminally responsible offenders in these categories necessarily lack sufficient culpability to merit capital punishment but remain sufficiently culpable to merit LWOP?

A persuasive response to this question requires consideration of at least three more specific questions. First, what differences between capital punishment and LWOP support the conclusion that the level of culpability necessary to justify each can render certain categories of offenders necessarily insufficiently culpable to merit capital punishment although they remain sufficiently culpable to merit LWOP? Second, what functional impairment inherent in mental retardation or youth renders members of these populations categorically less deserving of severe punishment than otherwise similar offenders who are not members of these populations? Third, what is the relationship between these characteristics of mentally retarded or juvenile offenders and the relevant differences between capital punishment and LWOP that justifies categorical preclusion of capital sentences for criminally responsible members of these categories of offenders, but does not render them ineligible for LWOP?

Neither the Atkins nor Simmons opinions provide a substantial response to the first question, but each opinion makes some attempt to address the second question. The Atkins opinion identifies differences in the abilities 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.” The opinion concludes that this impairment renders mentally retarded offenders insufficiently culpable to merit capital punishment. The opinion does not address the third question, however, in that it does not explain how these forms of impairment ameliorate culpability in a manner and to a degree that necessarily precludes eligibility for capital punishment among criminally responsible offenders, regardless of the nature and circumstances of the crime. Neither does it explain why these offenders remain sufficiently culpable to merit LWOP. Similarly, the Simmons opinion describes juveniles as impetuous, immature, vulnerable to influence, and susceptible to immature and irresponsible behavior. Once again, however, the opinion provides no clear reasoning to explain how these general characteristics categorically preclude culpability sufficient for capital punishment, regardless of the circumstances of the offense or the capacities of the specific individual offender. Neither does it explain why these juvenile offenders who cannot be sufficiently culpable to merit capital punishment remain sufficiently culpable to merit LWOP. In short, neither opinion provides any substantial attempt to address the third and central question.

One answer to this question that is suggested by some Court opinions is that “death is qualitatively different from a sentence of imprisonment, however long.”
A plausible defense of this response requires an account of the properties that render death different and justificatory reasoning to support the contention that these differences justify categorical preclusion of capital punishment for offenders in these categories but do not undermine the legitimacy of LWOP for those offenders. Some Supreme Court opinions contend that capital punishment is different from other sentences in severity and finality or irrevocability.\(^\text{13}\)

Consider first the claim that capital punishment is unique in its severity. Although it might seem clear at first glance that capital punishment is a more severe punishment than incarceration, reflection can raise some question regarding that assertion. In separate analyses, Jeremy Bentham and John Stuart Mill advanced arguments regarding the justification of capital punishment based on the utilitarian principle that justified law should maximize the balance of pleasure over pain. Although they both argued as utilitarians, they differed regarding the relative severity of capital punishment and life prison sentences. In 1789, Bentham rejected capital punishment for all but the most extraordinary cases because it is “unfrugal.” That is, the legitimate preventive purposes of punishment can be served by less severe sentences such as imprisonment. Thus, capital punishment costs excessive pain without providing comparable gains in pleasure.\(^\text{14}\) In 1868, Mill accepted the utilitarian justification for punishment as promoting the balance of pleasure over pain. He endorsed capital punishment as preferable to life in prison because capital punishment appears more severe but is actually less severe than life in prison as measured by the suffering inflicted. Thus, it is at least as efficacious as life imprisonment for the preventive functions of deterrence and incapacitation, but it is less inhumane to the criminal than a sentence of life in prison.\(^\text{15}\) In short, two writers who accept the common criteria of maximizing the utilitarian balance of pleasure over suffering disagreed about the relative severity of capital punishment and life in prison.

Consider also those offenders who “volunteer” for capital punishment by refusing to advance mitigating evidence in sentencing or by foregoing appeals. Offenders who volunteer in this sense might do so for a variety of reasons, but these decisions by these offenders suggest that some individuals in some circumstances experience extended imprisonment as more aversive than execution.\(^\text{16}\) Some offenders make these decisions in some circumstances despite the general tendency to discount long-term effects as compared to short-term effects.

The dispute between Bentham and Mill, as well as the decisions made by these “volunteers” should lead us to question whether capital punishment is clearly a more severe sentence than LWOP if one evaluates severity as the degree of suffering inflicted on the offender. The claim here is not that LWOP is the more severe sentence. Rather, I claim only that neither is obviously more severe than the other when severity is understood as referring to the degree to which the offender experiences the sentence as aversive.

Similarly the contention that capital punishment is unique in its irrevocability may not be as clear as it initially appears. Bentham’s argument against capital punishment rested partially on the premise that punishment should be remissible, but capital punishment is irrevocable. That is, the utilitarian value for the maximum balance of pleasure over pain favors punishments that are subject to remission or
compensation if it is discovered that they were misapplied. Bentham rejected capital punishment as not subject to remission through reversal or compensation.\textsuperscript{17}

Convictions can be overturned but sentences already served cannot be retrospectively revoked. That is, a reversal by a court can officially invalidate a conviction, but it cannot negate the actual harm or suffering inflicted upon the convicted individual through execution or incarceration. If an individual is shown to be innocent after he has been convicted and incarcerated for part of a sentence of imprisonment, the harm can be ameliorated in that the conviction can be overturned and he can be released, but the years spent in prison cannot be returned to him. Similarly, the harm done to an innocent individual who is convicted of a capital crime and receives a capital sentence can be ameliorated if he is exonerated before the execution occurs. It is possible that both offenders can receive vindication or financial compensation, but neither can have that period of unjustified incarceration returned to them. Exoneration after an individual completes a sentence of imprisonment or after he is executed for a capital crime can vindicate the standing of the individual, but it cannot ameliorate the tangible deprivation of life or liberty inflicted by either sentence.

Capital sentences are less subject to amelioration than are sentences of imprisonment in those cases in which an individual is sentenced to death, executed, and then exonerated. That is, the individual who receives a capital sentence, is executed, and is exonerated after execution can not experience any benefit of amelioration. Although his exoneration might vindicate his standing to others, he cannot experience that vindication, and he can experience no improvement in quality of life through release. In contrast, the individual who receives a life sentence and is exonerated after a period of incarceration that extends beyond the time at which he would have been executed if he had received a capital sentence can have his sentence ameliorated. He can experience the vindication, and his release from prison provides the possibility of improved experience of quality of life. Insofar as the severity of the sentence is measured by the suffering inflicted on the individual, however, it remains unclear which of these two individuals suffers more severely from unjustified punishment. The exonerated individual may suffer to a lesser or greater degree than the executed individual, depending on the duration and intensity of suffering in prison and upon the quality of life he experiences after exoneration.

The risk of erroneous conviction and punishment and the probability of correction of such errors are additional considerations in evaluating the relative severity of these sentences. Mill argued that the severity of capital punishment promotes scrupulous review of evidence regarding guilt by judges and juries in making decisions regarding guilt in capital cases.\textsuperscript{18} This premise is more persuasive in current conditions in which capital punishment receives “super due process” involving substantial procedural rigor, appellate review and attention from advocacy groups in addition to any enhancement of careful reflection upon the evidence by trial judges and juries.\textsuperscript{19} Thus, it is reasonable to expect that if other considerations are held constant, a wrongfully convicted offender is more likely to be exonerated if he receives a capital sentence than if he receives a life sentence. Insofar as exoneration of wrongfully sentenced individuals is of central concern, the disadvantage inherent in the inability to ameliorate a capital sentence already carried out must be
balanced against the increased likelihood that a wrongful conviction will be discov-
ered and reversed if the individual is sentenced to capital punishment, as compared
to LWOP.

This balance of risk suggests the following thought experiment for each reader
reflecting upon the horror of experiencing a wrongful conviction for a severe crimi-
nal offense. Imagine that you were wrongfully convicted of a capital murder and
that the available evidence persuaded you that a capital sentence would place you at
serious risk of execution but that it would also increase the likelihood of exonera-
tion. Do you think that you would prefer the risk of execution and the accompany-
ing elevated likelihood of exoneration associated with the capital sentence, or do
you think that you would prefer to avoid the risk of execution at the cost of a lesser
likelihood of exoneration?

It is clear that we should be very tentative in drawing any conclusions from such
reflection on hypothetical situations that we have never directly experienced. The
purpose of this thought experiment and of the brief discussion of the Bentham–Mill
debate is only to suggest that insofar as the claim that death is different purports to
address the severity and irrevocability of the suffering imposed upon the individu-
als sentenced or upon those wrongly sentenced, it is not obvious that capital pun-
ishment inflicts more severe suffering or greater risk of unjustified suffering than
LWOP. Although this brief review of the dispute regarding severity and irrevocability
addresses only the utilitarian balance of pleasure and pain, the most defensible moral
or constitutional justification of capital punishment specifically or of criminal pun-
ishment generally remains contentious. Thus a comprehensive analysis would also
evaluate the severity and irrevocability of punishment from the perspectives of alter-
nate justifications as well as the reasoned arguments that support these justifications.

In summary, insofar as certain conditions, such as youth, mental retardation
or other forms of impairment are plausibly understood to render some classes of
offenders categorically ineligible for capital punishment without rendering them
ineligible for criminal conviction and punishment, we should ask what significance
these conditions should, or should not, carry for criminal sentencing in the range of
noncapital sentences. A comprehensive approach to this inquiry requires the inte-
gration of a series of justificatory and empirical projects, addressing at least the
following elements: (1) explicit articulation of the moral or constitutional justifi-
cations for criminal punishment; (2) application of those justifications to various
forms of punishment and to the relative severity of those forms of punishment;
(3) a clear empirical explanation of the type of functional impairment manifested
by those who fall within the condition being examined, including an account of the
homogeneity or heterogeneity of the impairment manifested by various individuals
in the category; (4) the integration of (1) and (2) with (3) to derive justifications in
principle for vesting significance in these conditions in setting justified criminal
sentences.

These four steps address the justification in principle for applying these sentences to
these categories of individuals. Concerns regarding the application in practice require
at least the following additional elements: (5) an empirical inquiry regarding the capac-
ity of sentencers to understand and apply the significance of those considerations to
individualized sentencing decisions; (6) an empirical inquiry regarding the ability of
expert testimony regarding these conditions to inform sentencers in a manner that
enables them to apply case-specific sentencing; (7) an empirical inquiry regarding the
effects of the criminal trial and punishment process on other parties including victims,
witnesses, families, prison workers, and others; (8) integration of this complex set of
empirical inquiries into the justificatory argument.

This brief introduction addresses only questions regarding criminal sentenc-
ing as applied to various sentences and categories of offenders. Similar questions
regarding the integration of justificatory and empirical inquiry arise in the contexts
of criminal competence and responsibility. The following chapters represent a series
of initial steps in an extended process of developing such integrated analyses. We do
not pretend that these chapters provide a comprehensive resolution of this extended
project. Rather, they represent a series of steps in an extended process intended to
gradually advance our understanding of these matters and to promote ongoing pro-
grams of interdisciplinary research designed to further that understanding. These
chapters are based on a series of presentations made during a symposium at the
University of Nebraska during May 2007. These presentations and discussions were
organized into three series of presentations and discussions, intended to draw atten-
tion to different aspects of the integrated inquiry. The first series draws attention
to the variety of roles and purposes for which psychological impairment can have
relevance in the criminal process, with particular attention to the potential effects
of the criminal justice process on individuals other than offenders. The second and
third series each focus attention on one particular area of concern that requires the
integration of legal analysis with empirical research.

The first series consists of three primary chapters and reflections upon those
chapters by an individual who served as a commentator during the symposium. In
the first chapter, I address depression in the context of criminal responsibility, sen-
tencing, and competence. That chapter can reasonably be understood as an exten-
sion of this introduction in that I do not purport to defend a series of proposals
advocating the most defensible conclusions regarding the significance of depres-
sion at these various stages in the criminal process. Rather, I examine the potential
effects of depression on the various functions served at these stages of the criminal
process in order to develop a more detailed and explicit awareness of the various
ways in which we need to pursue the integration of doctrinal, empirical, and justifi-
catory analysis in pursuit of a more satisfactory understanding of these questions.

The second and third chapters examine different explicit questions regarding
the intersection of mental disorder and the criminal process, but they share a com-
mon concern for the effects of the criminal justice process on those who partici-
pate in that process. In Chapter 2, Bruce J. Winick examines the significance of
severe mental illness for capital sentencing. The chapter addresses both substan-
tive and procedural questions. Substantively, this chapter endorses a standard that
has been proposed by several national professional organizations for exclusion of
severely mentally ill offenders from eligibility for capital punishment. The chapter
emphasizes the procedural questions regarding the most defensible procedure and
decision maker for the application of this exemption. The analysis contends that
the principles embodied in the Eighth Amendment converge with considerations of accuracy, cost and therapeutic jurisprudence in supporting the application through a pretrial determination by the trial judge. The therapeutic jurisprudence analysis supports this approach by considering the potential effects of the process on the judge, the jurors, the attorneys, the family members of the victim, and the defendant. This careful review of the potential effects of the process on a variety of participants in the process is a common concern of the second and third chapters.

In the third chapter, Jodi A. Quas and Bradley D. McAuliff examine a series of concerns regarding the participation in the criminal justice process of child victim–witnesses. These authors identify a series of stages and functions in the legal process that can raise important concerns regarding the ability of these children to provide accurate accounts of the relevant events and regarding the potential effects of the process on these children. The authors review an extended body of research in order to articulate more clearly the circumstances that elevate the risk of undermining the accuracy of the accounts elicited from child victim–witnesses and that exacerbate the stress placed on these children through their participation in the process. They also apply available research in order to identify a series of evidentiary and procedural alterations in the process that might reduce the risk of harm to the children and protect the integrity of the process.

In the fourth and final chapter in the first section, commentator Barbara J. Sturgis identifies a series of questions and concerns raised by earlier chapters. She draws particular attention to the need to reflect carefully upon the legal procedures and clinical practices through which various proposals might be implemented. This discussion reveals some of the complexity that can arise in the attempt to integrate substantive and procedural legal standards with clinical skills and practices. Can we perform the clinical assessments and interventions that are appropriate to a particular legal function in a manner that retains clinical efficacy without interfering with the purpose and justification of the legal process?

The second series of chapters addresses concerns raised by the use of judgments of dangerousness and of expert testimony regarding dangerousness in criminal sentencing. A substantial body of psychological research has sought to illuminate the assessment and management of risk presented by various categories of individuals in various circumstances. Research regarding risk assessment and management can inform social policy in a variety of areas, but the chapters in this section address the concerns raised by the application of psychological expertise regarding risk in the context of criminal sentencing, and particularly in the context of capital sentencing. In the fifth chapter, Christopher Slobogin discusses the use of dangerousness as sentencing consideration in the context of capital sentencing. This chapter addresses a series of objections to relying on determinations of dangerousness as a basis for capital sentencing. It recognizes the concern regarding the unreliability of determinations of dangerousness, but it extends beyond reliability to emphasize the jurisprudential concerns raised by the use of dangerousness as an aggravating factor in capital sentencing. Thus, it draws our attention to the importance of considering the relationship between the reliability of risk assessment and the specific justification for applying a more severe criminal punishment than would be applied for a
similar offense in the absence of the judgment that the individual presented a risk of additional harm. In addition, this chapter focuses attention on the significance of mental disorder for capital sentencing, and particularly upon the significance of mental disorders that might increase the risk presented by an offender while mitigating his blameworthiness for the offense.

In Chapter 6, Daniel A. Kraus, John G. McCabe, and Sarah McFadden emphasize the concerns regarding the application of expert testimony regarding risk assessment to capital sentencing. These authors address a series of concerns regarding the reliability of risk assessment as applied to capital sentencing, including the low base rates in high security prison environments, the lack of directly relevant statistical data to these circumstances, and the inability of sentencers to critically evaluate the reliability of various forms of expert testimony regarding dangerousness. They also address the interaction between these concerns regarding the sufficiency of the evidence and the tendency of jurors to focus attention on dangerousness in a manner that may lead them to underestimate the appropriate sentencing significance of relevant mitigating factors. Chapters 5 and 6 provide the reader with an opportunity to reflect upon the interaction between the jurisprudential and empirical concerns because both chapters recognize and address both categories of concern, but Chapter 5 emphasizes the jurisprudential analysis while Chapter 6 emphasizes the empirical.

In Chapter 7, Stephen D. Hart both narrows and broadens the focus of the inquiry. He narrows the focus by addressing psychopathy as a specific category of psychopathology with particular relevance to the criminal justice process. He broadens the focus by addressing that category of pathology in the context of criminal culpability and in the context of commitment. This analysis draws attention to the importance of fully recognizing the complex patterns and degrees of impairment that can occur among individuals who fall within a particular diagnostic category. It also directs attention to uncertain relationships among various forms of clinical impairment and the relevant legal functions, such as the cognitive or volitional capacities identified by legal standards designed to assess an individual’s eligibility for punishment or for commitment. Thus, the chapter emphasizes the importance of synthesizing clinical categories of impairment, legal standards for particular legal purposes, and the method of clinical assessment appropriate to those forms of impairment and legal purposes.

In Chapter 8, commentator Mario J. Scalora identifies and develops a series of concerns raised by the application of clinical skills to the assessment of risk for the purpose of making determination of dangerousness in the context of capital sentencing. This chapter responds to the analyses presented in Chapters 5 and 6, but it extends beyond those chapters to consider the strengths and weaknesses of various approaches to risk assessment. It also identifies the ethical concerns raised by the participation of clinicians in the assessment of risk at various stages in the criminal process. These concerns provide a natural bridge to the chapters in the third and final section of the volume.

The third series of chapters addresses concerns raised by the participation of psychologists and related professionals in specific roles that facilitate the institution
of capital punishment. These chapters draw specific attention to the roles of individuals who participate in the evaluation and treatment of offenders who raise concerns regarding competence to face execution and to the roles of professional organizations that participate in the appellate process regarding capital punishment by filing amicus briefs. In Chapter 9, Randy K. Otto addresses the process of evaluating convicted offenders for the purpose of ascertaining competence to face execution. He begins by reviewing the central legal opinions that have addressed the constitutional requirement that condemned offenders must be competent to face execution at the time of execution. He then discusses the relevance of various forms of psychological impairment for an individual’s ability to fulfill the constitutional requirement of competence. Capital punishment often draws careful attention to concerns that apply to criminal punishment more generally and that arise in the broader application of clinical evaluation to various legal functions. In this chapter, the author directs attention specifically to the significance of various types of impairment for competence to face execution, but in doing so, he illustrates the importance of carefully integrating the clinical assessment of the individual’s form and severity of impairment with the legal standard applicable to a particular legal determination.

In Chapter 10, I reflect upon an amicus brief addressing the proper standard for competence to face execution as a vehicle that facilitates an examination of the appropriate role of scientific and professional organizations as amici in the context of capital punishment and as amici more generally. This chapter is primarily concerned with articulating various approaches to the role of amicus curiae and the most defensible functions of professional organizations in this role. Although this chapter directly addresses one particular amicus brief, it is intended to elicit broader reflection on the appropriate roles and limits of organizations as participants in the legal process. Ideally, such reflection would advance the abilities of the organizations to fulfill their roles in a manner that will promote the effectiveness and the integrity of the organizations and of the legal institutions. This chapter replaces a different chapter that would have been written by James W. Ellis who contributed substantially to the symposium that provided the basis for this volume. He was forced to withdraw from the written volume due to a personal emergency. We appreciate his contributions to the symposium and regret that the volume will not directly benefit from his expertise and efforts, although various chapters have benefited from his discussion during the symposium.

In Chapter 11, commentator Michael R. Quattrocchi identifies and develops a series of concerns related to those raised by the authors in Chapters 9 and 10. He draws particular attention to the tensions that can arise for members of the clinical professions who participate at various stages of the criminal justice process and in corrections institutions. Perhaps the most complex and troubling of these tensions involve the interaction of legal doctrine, professional ethics, and personal morality that occurs when members of the clinical professions must engage in the evaluation and treatment of prison inmates who are condemned to death and who manifest serious impairment requiring treatment for the dual purposes of improving their ability to adjust adaptively to life in the prison environment and of restoring competence to face execution. These concerns force us to recognize the importance of integrating
legal doctrine with psychological research and practice in a manner that promotes careful consideration regarding the integrity of the legal and professional institutions as well as regarding the potential effects on the broad range of individuals who participate in those institutions.

These chapters reflect the presentations and discussion that occurred at the Spring 2007 Program of Excellence Conference at University of Nebraska at Lincoln. This was the third such program organized by the Interdisciplinary Law and Psychology Program that pursues integration of Legal and Psychological scholarship and graduate education. We are grateful to a number of individuals and units within the University of Nebraska for facilitating this series of symposia. These include the University of Nebraska for the Program of Excellence Grant that enabled us to pursue these symposia, the College of Law, and the Department of Psychology. In addition to the presenters and commentators who participated in the conference and contributed the chapters discussed above, several individuals merit recognition. These include David Hanson (Chair of the Department of Psychology) and Steven Willborn (Dean of the College of Law). Steve Willborn also served as co-editor of this volume, along with Richard L. Wiener and Brian H. Bornstein. Finally, graduate student Cindy Laub provided organizational and planning skills of such an advanced degree that she was able to coordinate a program full of professors!

Notes

2. Atkins, 536 U.S. at 318.
4. Simmons, 543 U.S. at 568–71; Atkins, 536 U.S. at 319.
5. Simmons, 543 U.S. at 572–5; Atkins, 536 U.S. at 320–1.
6. Simmons, 543 U.S. at 598–604 (O’Connor, J., dissenting), 618–22 (Scalia, J., dissenting); Atkins, 536 U.S. at 350–51 (Scalia, J., dissenting).
7. Simmons, 543 U.S. at 568–71; Atkins, 536 U.S. at 318–9.
10. Id. at 319.
11. Simmons, 543 U.S. at 568–70.