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THE DIFFERING CONCEPTIONS OF CULPABILITY IN LAW & PSYCHOLOGY

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I want to thank the *Widener Law Review*, the Institute for Graduate Clinical Psychology, and Professor Marczynski, particularly, for giving me the honor of offering this afternoon’s keynote address. Sometimes your students turn out well, and Professor Marczynski is a striking example, but just one of many, testifying to the worth of joint programs in law and psychology.

In the next 45 minutes or so I will address four topics related to the theme of this symposium. First, I will attempt to show how the differing conceptions of culpability in criminal law and psychology, that is, that behavior is either the result of free will or is determined, affects how society metes out punishment. I will follow that brief discussion with three examples of the clash between law and psychology within the context of the death penalty. Using *Lockhart v. McCree*,¹ I will show how the Supreme Court ignores sound social science data that has a direct impact on how the death penalty is adjudicated. Using *Atkins v. Virginia*,² and to a lesser extent, the juvenile death penalty cases, I will show how organized psychology misuses social science data in applying the death penalty and that its view, ironically, diminishes rather than enhances the rights of vulnerable populations. And, finally, using a burgeoning favorite instrument of prosecutorial expert witnesses, I will show how psychologists misrepresent or are oblivious to relevant research in giving expert opinions about who is eligible for the death penalty.

First, I will discuss the differing conceptions of responsibility. Nowhere is the disconnect between science and law more obvious than in how we define crime and treat those who commit murder. Criminality is commonly defined as conduct that incurs a formal and solemn pronouncement of the moral condemnation of the community. And, as the Supreme Court stated in *Gregg*, “capital punishment is an expression of society’s moral outrage at particularly offensive conduct.”³

According to the Court, the two principal penological purposes for the death penalty are deterrence and retribution. I do not want to take on the deterrence argument at any significant length today. I will be content with a couple of remarks. The Supreme Court in *Gregg* admitted that “there is no convincing empirical evidence”⁴ supporting the view that the death penalty functions as a

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4. *Id.* at 185.
more significant deterrent to murder than lesser penalties. In fact, it is more probably true that capital punishment does not have a general deterrent effect on the criminal homicide rate. If it is true that in the very least the evidence for a deterrent effect is in equipoise, one would hope, given that the preservation of life is such a compelling interest, the Court would come down on the side of life rather than death. But, as we know, that is not the case when the Supreme Court reviews the death penalty, preferring to defer to legislative prerogatives.

In any event, although the Supreme Court pays lip service to deterrence, the predominant theory underlying the death penalty is retribution. Retributivists believe that punishment is justified because people deserve it. Although the tragedies of 9/11 have resurrected the rampant concept of evil and its retaliation by moral crusade, there is nothing new in this. Writing 120 years ago in *A History of the Criminal Law in England*, James Fitzjames Stephen asserted that:

> [T]he infliction of punishment by law gives definite expression and a solemn ratification and justification to the hatred which is excited by the commission of the offense. . . . The criminal law thus proceeds upon the principle that it is morally right to hate criminals, and it confirms and justifies that sentiment by inflicting upon criminals punishments which express it.\(^6\)

More particularly and more recently, Ernest van den Haag argued along a similar vein: “Never to execute a wrongdoer, regardless of how depraved his acts, is to proclaim that no act can be so irredeemably vicious as to deserve death—that no human being can be wicked enough to be deprived of life.”\(^7\)

In essence, then, retribution is grounded in the belief that behavior is the result of free will. People freely choose, the position claims, to engage in evil behavior and, therefore, deserve the punishments they receive, including execution at the hands of the State. But, any decently trained psychologist knows that behavior is not so unfettered. It is determined as the result of the confluence of genetic endowment and life experiences. In that view, as Skinner has argued, and I think correctly, there are no heroes and there are no villains.

For those who do not ascribe to the reality of determinism, one must respond to the question: would Hitler, bin Laden or any other so-called “evil” killer have acted as they did if they were born to the doubter’s parents, lived in the doubter’s home town, and gotten advanced degrees in law or psychology? Those who ascribe to free will would make human beings the only species whose behavior was not determined by heredity and the reinforcing impact of their daily lives. Free will is a legal fiction, but it is an enduring one impervious to the principles

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of science. It has allowed societies throughout history to inflict painful and grievous punishments upon wrongdoers.

I do, however, distinguish between responsibility and accountability. We all have the right to self-defense and to be protected from harm. So, those whose genes and environment lead them to engage in acts that we define as criminal should be held accountable, and it may be entirely appropriate to segregate them from society. But that is much different from viewing them as evildoers deserving of hateful retribution. Retributive punishment, as Karl Menninger argued, is tantamount to sanctioned vengeance and therefore intolerable in a civilized society:

And just so long as the spirit of vengeance has the slightest vestige of respectability, so long as it pervades the public mind and infuses its evil upon the statute books of the law, we will make no headway toward the control of crime.8

Adopting a deterministic philosophy would result in more humane institutions, greater reliance on empirically-validated interventions, and, of course, the end of the death penalty. Unfortunately, like so many other areas of law, the entrenchment of a retributive philosophy is but another example of how unresponsive the law is to science and reality.

Another example of this unresponsiveness is evident in what are called the death qualification cases, exemplified by Lockhart v. McCree.9 For those unfamiliar with the term, I’ll briefly explain the process of death qualification. In those states which authorize the death penalty, it is universal practice to question potential jurors as to whether they have moral or religious scruples that would prevent them from voting to impose the death penalty in a capital case. Members of the venire who answer that they do have such scruples—and would never vote for death—are excused from jury service. The constitutional issue that arises is that in many states a single jury decides both the question of the defendant’s guilt or innocence and the question of his or her punishment if he or she is found guilty. Thus, potential jurors who could fairly and honestly adjudicate guilt—guilt-phase includables—are excluded from both the guilt phase and the penalty phase, should there be one.

The defendant in an earlier 1968 case and in Lockhart argued that forbidding those who are opposed to the death penalty from deciding guilt denied them both their right to a fair cross-section of the community on their juries under the Sixth Amendment, and to a fair trial and due process under the Fourteenth Amendment.10 Witherspoon, the defendant in the 1968 case, cited three studies to show that those excluded from jury service because of their opposition to the death penalty were more disposed toward acquittal verdicts, and that so-called “death qualified” jurors were more disposed toward guilty verdicts. Because of

the perceived paucity in the number of studies, the Supreme Court rejected Witherspoon’s claim for the time being, saying that “[t]he data adduced by the petitioner . . . are too tentative and fragmentary to establish that jurors not opposed to the death penalty tend to favor the prosecution in the determination of guilt.”\(^1\)

Social scientists responded to this apparent invitation to produce more evidence. Thus, between Witherspoon in 1968 and McCree’s trial in 1978, several research-oriented social psychologists, such as Phoebe Ellsworth and Craig Haney, produced a number of studies supplementing and improving on the research that Witherspoon had presented.\(^1\) Those data were submitted in short form by McCree in respondent’s brief to the Supreme Court and in a more extensive exposition in an amicus brief I and David Ogden drafted on behalf of the American Psychological Association (hereinafter “APA”) when I served as its legal counsel.\(^1\) Using diverse subjects, stimulus materials, and empirical methodologies, the studies published in peer reviewed journals invariably produced stable and converging findings, gleaned over three decades, that showed that death-qualified juries are more pro-prosecution, less than neutral with respect to guilt, and more unrepresentative than typical criminal juries, excluding a disproportionate number of women and African-Americans.\(^1\)

In a 5-4 vote, the Supreme Court rejected as “illogical and hopelessly impractical”\(^1\) McCree’s claim that juries that exclude guilt-phase includables violate due process. And it rejected out of hand the empirical studies offered by the respondent and the APA. In fact, even if the majority had given the particular research introduced in this case a more respectful and more proper review, it would have made little difference. At the end of his critique of the psychological evidence, then Justice Rehnquist said:

> [W]e will assume for purposes of this opinion that the studies are both methodologically valid and adequate to establish that “death qualification” in fact produces juries somewhat more “conviction-prone” than “non-death-qualified” juries. We hold, nonetheless, that the Constitution does not prohibit the States from “death qualifying” juries in capital cases.\(^1\)

The dissent, led by Justice Marshall, was decidedly more impressed with the social science evidence. Commenting, for example, on the majority’s refusal to take the empirical evidence into consideration, it stated:

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12. For a detailed exposition of the studies cited in *Witherspoon* and discussed or rejected in *Lockhart*, see, e.g., Donald N. Bersoff, *Social Science Data and the Supreme Court: Lockhart as a Case in Point*, 42 AM. PSYCH. 52 (1987) [hereinafter Bersoff].
16. *Id.* at 173.
Faced with the near unanimity of authority supporting [the] claim that death qualification gives the prosecution a particular advantage in the guilt phase of capital trials, the majority here makes but a weak effort to contest that proposition. Instead, it merely assumes . . . “that ‘death qualification’ in fact produces juries somewhere more ‘conviction-prone’ than ‘non death-qualified’ juries” . . . and then holds that this result does not offend the Constitution. This disregard for the clear import of the evidence tragically misconstrues the settled constitutional principles that guarantee a defendant the right to a fair trial and an impartial jury whose composition is not biased toward the prosecution.17

The reaction in the scientific community to the majority’s antagonistic reception to clearly persuasive data was depression. As one scholar put it:

The Court’s opinion in *Lockhart* suggests that most Justices are hostile towards social psychology, do not understand it, believe that empirical research on juror behavior is no more reliable than intuition and anecdotal evidence, and ultimately believe that the science of psychology has little or no place in the jurisprudence of trial procedure.18

The majority’s dismissive tone in *Lockhart* is not a unique event by any means. The case is merely one example of the Court’s mistreatment of social science evidence. The Court has misapplied or misused data when it believes the data will enhance the persuasiveness of its opinions, has ignored or rejected data despite its dependence on empirically testable statements in support of its holding, and has disregarded data when the research does not support its views.19 As I have expressed elsewhere concerning the relationship between psychologists and the law:

[If that relationship were to be examined by a Freudian, the analyst would no doubt conclude that it is a highly neurotic, conflict-ridden ambivalent affair (I stress affair because it is certainly no marriage). Like an insensitive scoundrel involved with an attractive but fundamentally irksome lover who too much wants to be courted, the judiciary shamelessly uses the social sciences.20

Courts will cite psychological research when they believe it will enhance the elegance of their opinions, but data is readily discarded when more traditional and legally acceptable bases for decision making are available.

I want to move from complaining about my colleagues in the legal system to complaining about my colleagues in psychology. As Michael Saks, a social

psychologist who serves on a law school faculty has pointed out, lawyers are “smart people who do not like math.” Thus, although I am irritated by the Supreme Court’s ignorance about social science, its behavior is understandable. But one would hope that the American Psychological Association, populated by over 100,000 practitioners, academics, and researchers, would be a bit more sophisticated about data and its implications. Thus, I find inexcusable and unwarranted the position the American Psychological Association, joined by the American Psychiatric Association and the American Academy of Psychiatry and the Law, took in its amicus brief initially submitted in *McCarver v. North Carolina*, the case that would have decided whether it is unconstitutional to execute those diagnosed as mentally retarded. As we know, however, when North Carolina changed its law to bar the execution of persons with mental retardation, the Court dismissed the writ of certiorari as improvidently granted and replaced *McCarver* with *Atkins v. Virginia*, a case presenting similar issues. The APA and its two cosigners were granted permission to resubmit its *McCarver* brief in *Atkins*.

Although I am sure the APA’s effort was well-intended, in fact, not only did the *McCarver/Atkins* brief undermine the rights of people with mental retardation but, despite the APA’s efforts in prior cases, it undermined the rights of children as well.

Here are two quotes from the APA’s brief that will serve as the bases for my concern:

Th[e] small group of [individuals with mental retardation] represents those whose intellectual limitations substantially restrict their development and adaptive functioning. These limitations are reflected in diminished capacities to understand and process facts and information; to learn from mistakes and from experience generally; to generalize and to engage in logical if-then reasoning; to control impulses; to communicate; to understand the moral implications of actions and to engage in moral reasoning; and to recognize and understand the feelings, thoughts, and reactions of other people.

A comparison with children is instructive.

*Children and persons with mental retardation share the same critical characteristic: diminished intellectual and practical capacities compared to non-retarded adults.*

*Inexperience, less education, and less intelligence make the teenager less able to evaluate the consequences of his or her conduct while at the same time he or she is much more apt to be motivated by mere emotion or peer pressure than is an adult.*

First, I want to address the children’s rights issue. For almost two decades, until its brief in *Atkins*, the APA sought to educate the Supreme Court about the cognitive abilities of adolescents. It did so in an attempt to rebut the Court’s historic view, as expressed by former Chief Justice Burger, that “[m]ost children, even in adolescence, simply are not able to make sound judgments concerning many decisions. . .”\(^\text{25}\) In a series of amicus briefs in the decade of the 1980s, particularly in cases involving the rights of adolescents to abortions, the APA argued that psychological theory and sound research about cognitive, social, and moral development strongly supported the conclusion that most adolescents are competent to make informed decisions. The substantial empirical research testing adolescents’ decision-making performance when faced with a variety of practical problems indicates that by age fourteen most adolescents have developed adult-like intellectual and social capacities, including specific abilities outlined in law as necessary for understanding alternatives, considering risks and benefits, and giving legally competent consent. Unfortunately, the APA, in attempting to bolster its argument that people with mental retardation should not be executed, decided to liken the disabilities associated with that diagnosis with the putative cognitive and judgmental infirmities of children. As I will try to explain, this position potentially harms both people with mental retardation and adolescents.

As Professor Ellis so eloquently described this morning, the Supreme Court, by a 6-3 vote in *Atkins*, held that executions of all mentally retarded individuals violated the Eighth Amendment’s cruel and unusual punishment clause.\(^\text{26}\) Justice Stevens, writing for the majority, clearly relied on the APA’s amicus brief in grounding his opinion. Justice Stevens, though acknowledging that people with mental retardation “frequently know the difference between right and wrong and are competent to stand trial,”\(^\text{27}\) found that their lesser culpability precluded imposition of the death penalty in any case. He based this lesser culpability on their “diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others.”\(^\text{28}\) As you recognize, this quote clearly echoes the excerpt from the APA’s brief I recounted earlier.

An early hypothetical I was confronted with in my first year of law school concerned the stereotypical little old lady who, after contracting with a major bank to secure a loan, found herself unable to pay the installments because of unfortunate life circumstances. Many of us sided with the poor, aged, and infirm woman against the big bad bank (knee-jerk liberals were still going to law school in the early ’70s). But as our professor pointed out, if a court permitted this

\(^\text{976 (1971).}\)


\(^{26}\) *Atkins*, 536 U.S. at 321.

\(^{27}\) Id. at 318.

\(^{28}\) Id.
senior citizen to breach her contract, the consequence would be that no bank would lend money to the elderly, an outcome that served no one’s purposes. I think this hypo has relevance to the issue of a per se ban on the execution of juveniles and those with mental retardation. I believe a bright line rule making the death penalty unconstitutional for all defendants who commit murders under the age of sixteen and those with mental retardation has serious potential unintended consequences and ultimately disserves their interests.

Before I continue with this argument, I want to state unequivocally that I am adamantly opposed to the death penalty for anyone. Not only, as I have argued, is there no valid penological purpose for its imposition, but as we have discovered, its imposition is inevitably fraught with caprice and mistake. Furthermore, execution by the State, particularly of those with severe intellectual deficits, does not comport with the standards of decency that should be the hallmark of governments, and therefore violates the cruel and unusual punishment clause of the Eighth Amendment. Thus, I am gratified by any decision that further reduces the imposition of the death penalty against any member of our society.

But, if the death penalty can be meted out to adults and older adolescents, as the Supreme Court has said it can, then it is short-sighted to exclude all people with mental retardation from its application, precisely because a constitutional ban for all these defendants, on the ground that they deserve special protection and dispensation, as the APA argued, is antagonistic to their long range rights and entitlements. It is difficult for me to see how an absolute ban, grounded on the assumption that they [mentally retarded individuals] are too incompetent to be held morally responsible and criminally culpable serves the ultimate interests of people with mental retardation. As important as it is to protect those who cannot protect themselves, it is equally important to promote the right of all persons to make their own choices and, as a corollary, to be held accountable for those choices. It is simply untrue that no person under the age of 16, nor any person with mental retardation, is incapable of carrying out a horrible murder with the requisite intent or foresight. If we accept the concept of blanket incapacity, we relegate people with mental retardation to second class citizenship, potentially permitting the State to abrogate the exercise of such fundamental interests as the right to marry, to have and to rear one’s children, or such everyday entitlements such as to enter into contracts or to make a will.

In a separate dissenting opinion in \textit{Atkins}, Justice Scalia would have relied on the individualized decision-making of sentencers to determine whether a particular defendant should suffer the death penalty: “Once the Court admits . . . that mental retardation does not render the offender \textit{blameless} . . . there is no


\footnotesize{30. See CHARLES L. BLACK, CAPITAL PUNISHMENT: THE INEVITABLY OF CAPRICE AND MISTAKE (1974).}
basis for saying that the death penalty is never appropriate retribution, no matter how heinous the crime.\textsuperscript{31}

Although I am gratified by any decision that further reduces the imposition of the death penalty, as the majority has done, and do not support Justice Scalia’s retributive basis for executing any defendant on the grounds I argued earlier, I agree, albeit reluctantly, with Justice Scalia’s particularized approach. In the long run, the concept of individualized decision-making comports with the sophisticated and discriminating treatment we should accord all people regardless of age or intellectual deficits. And it is more protective of the rights of people with mental retardation than is the rationale adopted by the APA and the Court’s majority.

IQ, after all, is not the factor that renders the imposition of the death penalty against those with mental retardation unjust. Rather, IQ is a proxy, an imperfect one at that, for a combination of factors, such as maturity, judgment, and the capability of assessing the consequences of one’s conduct, that determines the relative culpability of a mentally retarded killer. These are the factors that should be evaluated by a forensic clinician on a case-by-case basis. Culpability, not IQ, should be the benchmark. In this way, defendants with mental retardation will be treated as persons, and society can respond to their conduct in a manner that respects their individuality and competency. I regret that the APA decided to take the thoughtless approach to the rights of our fellow citizens that it did in its amicus brief.

My final concern relates to an increasingly invidious practice: the use of the Psychopathy Checklist Revised (hereinafter “PCL-R”) in the penalty phase of capital murder cases. The PCL-R was developed in 1991 by psychologist Robert Hare and represented a revised version originally published in 1980.\textsuperscript{32} It consists of twenty items designed to evaluate whether a person has traits that may be defined as psychopathic. Eight of the twenty items are aligned on one factor describing “a constellation of interpersonal and affective traits commonly considered to be fundamental to the construct of psychopathy.”\textsuperscript{33} This factor is called “Selfish, callous, and remorseless use of others.”\textsuperscript{34} Nine other items comprise Factor Two titled, “Chronically unstable, antisocial, and socially deviant lifestyle.”\textsuperscript{35}

The PCL-R was initially normed on 1,192 male prison inmates and 440 male forensic psychiatric patients, all of whom were Canadian and almost all Caucasian, although more recent research has included African-American samples as well.\textsuperscript{36}

\textsuperscript{31} Atkins, 536 U.S. at 351 (Scalia, J., dissenting).
\textsuperscript{33} Id. at 38.
\textsuperscript{34} Id.
\textsuperscript{35} Id.
\textsuperscript{36} Id.
Data to score the twenty items comes from interviews with the test taker and/or from collateral information gleaned from files. The examiner scores each of the items as 0, 1, or 2. A score of zero is given if the item does not apply to the individual. A score of one is given if it applies to a certain extent. A score of two is given if the item is a reasonably good match with the behavior of the individual. The scoring manual for the PCL-R indicates that an individual should obtain a total score of thirty or higher to be classified as a psychopath.

Sometimes the individual is not available to participate in the interview or refuses to be interviewed. At those times, the PCL-R can be scored solely through what is called a “file-review-only” procedure. There is conflicting research as to whether a file-only-review affects the ultimate score. At least one study indicates that the file-only method results in higher psychopathy scores. The PCL-R is generally regarded as the gold standard for assessing psychopathy and anti-social personality, and it may have some usefulness in predicting future violence.

The concern I want to raise is its use in capital cases by the prosecution to assess whether the defendant in such cases meets a common statutory criterion for imposing the death penalty—namely that the defendant presents a probability of engaging in criminal acts of violence that would constitute a serious threat to society. You may recall that in 1995 the American Psychiatric Association expelled from its membership James Grigson, the notorious Texas psychiatrist, better known as Dr. Death. He was tossed out “for arriving at a psychiatric diagnosis without first having examined the individuals in question, and for indicating, while testifying in court as an expert witness, that he could predict with 100 [percent] certainty that the individuals would engage in future violent acts.”

Unfortunately, much of the same kind of behavior is, in my opinion, being engaged in by a few misguided, ignorant, and unethical forensic psychologists who are using the PCL-R to testify, to a reasonable psychological certainty, that capital defendants, usually African-Americans, pose a continuing threat of violence, even while confined in maximum security prisons. The problem is compounded by the fact that, unlike psychiatric diagnoses propounded on the basis of interviews, the PCL-R is widely regarded as a psychometrically sound instrument.

Nevertheless, recent articles in peer-reviewed journals indicate that it is not a valid predictor of the most pertinent forms of violence relevant to determining future dangerousness in capital cases. For example, Sorensen and Pilgrim

reported that of a sample of 6,390 convicted murderers in the Texas prison system, the incidence of homicides over a forty-year period was about two in a thousand.\footnote{40} Given that the base rate of psychopaths is about 20-30\% of the [prison] population, approximately 1,600 of the prisoners would be psychopaths as defined by the PCL-R.\footnote{41} As John Edens and his colleagues reported in the Journal of Psychiatry and the Law, "[e]ven if all of the 13 homicides estimated to occur over this [forty year] time period . . . were to be committed by psychopathic inmates—a highly questionable assumption—the overwhelming majority of these offenders (>99\%) will not kill again."\footnote{42} A table summarizing almost a dozen studies in David Freedman’s 2001 article in the Journal of the American Academy of Psychiatry and Law indicates that false positive rates for violent recidivism are uniformly at or above 50\%; that is worse than flipping coins.\footnote{43} The use of the PCL-R in death penalty cases to offer an expert opinion about future lethal violence is therefore, in my humble opinion, negligent, unethical, and inadmissible under any reasonable interpretation of Daubert or Kumho Tire.\footnote{44}

I want to caution forensic psychologists in the audience that attorneys who defend death penalty cases are well aware of this literature. I strongly urge those who participate in capital murder cases to read the relevant articles. In the unbridled defense of their clients, defense counsel are ready, willing, and able to attack on cross-examination those unwary psychologists who misuse the PCL-R or any psychological instrument and to report this conduct to the appropriate professional associations. On the other hand, I must caution, those who report what they believe are ethical violations are themselves subject to scrutiny. At least one psychologist, who filed an ethics complaint with the APA against a forensic clinician who has testified in death penalty cases using the PCL-R to predict that the defendant is a continuing threat of violence, is himself now under investigation by a United States attorney seeking to find supporting evidence that the psychologist who filed the complaint engaged in a conspiracy with defense counsel to intimidate a federal witness. Although this is a patently spurious allegation, given that the ethics complaint was filed after the clinician’s testimony, it does indicate the lengths to which the present Attorney General is willing to go to ensure that the death penalty is applied in as many cases as possible.


\footnotesize{41. See, e.g., PSYCHOPATHY: ANTISOCIAL, CRIMINAL, AND VIOLENT BEHAVIOR (Theodore Millon et al., eds., Guildford Press 1998).}

\footnotesize{42. Edens et al., supra note 39, at 452 (emphasis in original).}

\footnotesize{43. Freedman, supra note 39, at 92.}

I am aware of the hubris in my taking on the Supreme Court, organized psychology, and some otherwise respected forensic clinicians all in one day. I am recognizing a tendency toward cantankerousness as I near eligibility for social security. So, I want to close on a positive note.

The examples I have given of the apparent chasm between law and psychology are not irreparable. Joint programs in law and psychology, like those sponsored by Villanova Law School and Drexel University and here at Widener, help produce scholars and practitioners who are “trilingual,”45 that is able to speak the language of law, psychology, and its interaction. Graduates of these programs will spawn future generations who can span the two disciplines in a sophisticated and relevant manner. It is this kind of interdisciplinary conference, sponsored by Widener’s Law School and its Graduate Institute in Psychology, attended by academics, practitioners, and policy-makers, that generates discussion, colleagueship and, one hopes, mutual understanding. I very much appreciate the organizers of this conference for inviting me to participate in this important endeavor.