

## Genetic Mitigation

In this paper I argue that some pleas based on credible evidence from a behavioural geneticist ought to have a mitigating effect at sentencing.

In explanation, I note that certain social factors which are linked with offending are currently recognised as worthy of mitigation at sentencing. I will argue that the courts are morally justified in adopting the view that such influences are relevant because this form of mitigation recognises the effect of factors outside the offenders control on conduct, and moderates punishment accordingly.

I will then outline some recent research from behavioural genetics which might be used in a plea in mitigation before going on to argue that the formative effect of genetic predispositions are morally similar to the formative effect of social circumstances on offenders.

First I will provide an brief overview of the main strands in behavioural genetics that may be relevant to sentencing, before turning to focus on the MAOA gene. Arguments based on MAOA have been presented to the US Courts at sentencing and it seems likely that Australia will encounter similar arguments. One piece of research that has attracted considerable attention and stimulated much further research is a paper by a team of scientists lead by Avshalom Caspi (2002). I will briefly describe this research and some of the subsequent attempts to replicate it. Caspi's work suggests that the interaction between a genetic predisposition and adverse formative social circumstances has a very significant effect on criminal conduct.

I will argue that behavioural genetics is an area of study which is developing but it may be that, even though the science is currently in its early stages, the courts may at some stage be presented with credible evidence from behavioural geneticists of factors which influence criminal conduct.

I argue that the morally relevant similarity between one's genetic constitution and one's formative circumstances as a child, is that these factors are outside the individual's control. In consequence, it is fair to moderate punishment for conduct that is significantly influenced by factors beyond the control of offenders. This is why the courts are right to take note of events from an offender's childhood social environment and this is also why the courts should be similarly receptive to reliable evidence from behavioural geneticists.

Furthermore it would be strange for the courts to accept that adverse social circumstances can, in some situations, mitigate punishment and yet to deny further mitigation to those who, as a result of a biological condition, are especially susceptible to its adverse effects.

## Conclusion

If behavioural geneticists were to produce credible evidence of a predisposition to criminal conduct of the type that an offender has been convicted, it would be fair and consistent with current approaches to sentencing to recognise it as having a mitigating effect. However, it is notable that this may accentuate an existing tension in sentencing; that of giving an offender what is deserved and protecting the community.