

THE CRIMINAL MIND: NEUROSCIENTIFIC EVIDENCE AS A MITIGATING FACTOR IN SENTENCING IN NEW SOUTH WALES, AUSTRALIA

Ellie A. Page[†]

Abstract: “Neurolaw” is the emerging field of Law and Neuroscience that has the potential to lend insight into an offender’s mental state and influence criminal responsibility. In New South Wales, Australia, courts allow neuroscientific evidence of an offender’s cognitive impairment as a consideration in sentencing proceedings. In this comment, I discuss the discretionary nature of New South Wales’ sentencing regime and the limitations of how neuroscience may be utilized within that regime. Although neuroscientists can address the association of an offender’s cognitive impairment with the commission of a crime, they cannot identify, with certainty, a causal relationship. I analyze an original compilation of six case studies from New South Wales to illustrate that sentencing judges resist mitigating offenders’ sentences based on evidence of a cognitive impairment unless there are other factors favorable to the offender, such as a guilty plea or a lack of criminal history. Judges’ resistance to using evidence of a cognitive impairment alone to significantly mitigate an offender’s sentence indicates that judges regard evidence of cognitive dysfunction as simply one factor in the holistic framework at their discretion in sentencing, likely due to the lack of certainty surrounding the nature of the relationship between an offender’s impairment and the commission of the crime. Judges’ reluctance to use neuroscience as a significant mitigating factor also maintains implications for the sustained retributivist nature of the criminal justice system in New South Wales and raises the issue of whether the judiciary is the appropriate body to apply neuroscience to the law.

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[†] J.D. candidate at the University of Washington School of Law class of 2017. The author would like to thank her family for enduring her relentless thoughts about neurolaw.