

Spring 1984

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Recommended Citation

Stephen J. Morse, Undiminished Confusion in Diminished Capacity, 75 J. Crim. L. & Criminology 1 (1984)

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CRIMINAL LAW

UNDIMINISHED CONFUSION IN DIMINISHED CAPACITY

STEPHEN J. MORSE*

The diminished capacity doctrine allows a criminal defendant to introduce evidence of mental abnormality at trial either to negate a mental element of the crime charged, thereby exonerating the defendant of that charge, or to reduce the degree of crime for which the defendant may be convicted, even if the defendant's conduct satisfied all the formal elements of a higher offense. The first variant of diminished capacity, which I shall refer to as the "mens rea" variant, is the dominant approach in the United States. The second, which I shall refer to as the "partial responsibility" variant, is the rule in Great Britain and in indirect form has been adopted in a substantial number of American jurisdictions.¹

After presenting a case study to introduce the issues, I shall address the two variants of the doctrine and propose that the law should adopt the full mens rea variant but should not adopt the partial responsibility

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This paper was presented at a conference on *Recent Developments in Mental Health Law*, sponsored by the American Society of Law and Medicine, held in Chicago, in June 1983, and then at a Faculty Workshop at the University of Southern California Law Center. My USC colleagues, Erwin Chemerinsky, Alan Schwartz, Michael Shapiro, David Slawson, Matt Spitzer, and Jeff Strnad, Richard Bonnie of the University of Virginia School of Law, and Dino Fulgoni, Esq. made especially helpful suggestions.

In revised form, this Article will appear as a chapter in my forthcoming book, *The Jurisprudence of Craziness*, to be published by Oxford University Press.

¹ I first proposed this categorization of diminished capacity in an earlier article, Morse, *Diminished Capacity: A Moral and Legal Conundrum*, 2 INT'L J. L. & PSYCHIATRY 271 (1979) [hereinafter cited as Morse, *Diminished Capacity*]. The present Article continues to adopt the earlier categorization and extends, expands, and updates the analysis of the prior article.

variant. Then, I shall consider the relation of mental disorder to mens rea and the proper use of mental health experts to prove either variant.

I. INTRODUCTION: *COMMONWEALTH V. TEMPEST*

On the morning of June 18, 1976, Patricia Tempest killed her six-year-old son, Gregory, by drowning him in a bathtub.² She described the event in a confession given two hours after she was taken into custody on the afternoon of the homicide.

I got up quarter to eleven or something like that. My husband had already left to go to work. I gave Gregory his breakfast. He was already up watching T.V. It was the last day for kindergarten. I was packing him a lunch for his picnic. I gave him juice with vitamin E. I told him he had to get a bath. He didn't want to go right away. He wanted to finish watching his program so I told him to come up after he did. I went upstairs and filled the tub. I filled it more than normal. When he came upstairs he noticed and said it was kind of deep. He got in the tub himself. I washed the front of his body, then I told him to turn around on his stomach. He told me I didn't wash his face yet. So, I washed his face. I told him to turn on his stomach. When he did I pushed his face down. He struggled and cried, "Mommy you're drowning me." He kept fighting for a couple of minutes—it could have been longer. He still tried to move a little but I kept his head under until he stopped. He didn't move any more so I got out of the tub, I had gotten into the tub to hold him down. I didn't know how long it would take to drown, so I left him there in the tub. He was on his back. His face was sideways. I sat there and told him, "I had to kill you. I'm sorry." I went into the bedroom, put the television on and watched the movie. I went downstairs and got a banana and ate it, and also took my medicine. I came back upstairs and watched another program—\$20,000 pyramid [sic]. My husband came home at 25 of 4. I told him I killed Greg. I'd drowned him. He went upstairs and came back and looked very sad.³

Mrs. Tempest also told her husband Ronald that she had planned the killing three days in advance and had also pondered "bumping off her husband."⁴ She told one of the examining psychiatrists, Dr. Glass, that she considered using poison, drowning, or firearms on her child and husband. The confession contained, in addition, the following exchange:

Q: When you went upstairs to fill the tub for Greg's bath, had you planned on drowning Greg?

A: Yes.

Q: How much water did you put in the tub?

² *Commonwealth v. Tempest*, 496 Pa. 436, 437 A.2d 952 (1981). The facts described in the text are all taken from the court's opinion. Footnotes are omitted except in the case of direct quotation.

³ *Id.* at 438-39, 437 A.2d at 953 (quoting Mrs. Tempest's confession).

⁴ *Id.* at 441, 437 A.2d at 955.

A: About 3 or 4 inches—I don't know.

Q: Is this more than normal?

A: No, but I filled it up more after he got in the tub.⁵

Mrs. Tempest's confession also described her motive for killing Gregory.

Q: Why did you drown Greg?

A: My husband made friends down the street. Greg played with Joey, the little boy down the street. I didn't have any friends. I'm afraid of everybody. I don't really know why I did it. I just did—I didn't want Ronnie and Greg in my life anymore.

Q: Why didn't you want them in your life any more?

A: Greg was too demanding. He got on my nerves. Just having to do things for him. I didn't want the responsibility. I didn't want him to go into 1st grade because I would have to talk to other people. I didn't want to be a housekeeper and have people come to my house. My husband did most of the work.⁶

She repeated essentially the same statement of her motive to the arresting officer, her husband, and a psychiatrist. In response to the interrogating officer's question about whether she knew the difference between right and wrong, Mrs. Tempest replied, "Yes, I know killing Greg was wrong."⁷ The rest of the confession was "coherent" and evinced "appellant's lucidity."⁸

Mrs. Tempest had been emotionally disturbed since adolescence, suffering from depression and low self-esteem. She perceived herself as unattractive and a loner. Prior to the homicide, beginning at age fifteen, she had been hospitalized for mental disorder seven or eight times, twice following suicide attempts. She married Ronald Tempest and bore and brought up Gregory despite her problems. A psychiatrist who counselled the Tempest family described them as "intact and affectionate." Mrs. Tempest was examined after the homicide by a psychiatrist, who diagnosed her as suffering from chronic schizophrenia, acute type.

At a bench trial, both defense psychiatrists, Drs. Burt and Glass, concluded that Mrs. Tempest did not have sufficient mental capacity to form the specific intent to kill Gregory.⁹ No mental health professional testified for the prosecution. The judge found Mrs. Tempest legally sane and guilty of first degree murder on the basis that she acted with a pre-meditated, specific intent to kill.¹⁰

One finds in this haunting and terrible story all the major issues

⁵ *Id.* at 441-42, 437 A.2d at 955.

⁶ *Id.* at 439, 437 A.2d at 953-54.

⁷ *Id.* at 440, 437 A.2d at 954.

⁸ *Id.*

⁹ Dr. Glass also testified that Mrs. Tempest could tell right from wrong. Dr. Burt also testified that although Mrs. Tempest could tell right from wrong "on the surface," she *really* could not do so as a result of her psychosis.

¹⁰ *Tempest*, 496 Pa. at 441, 437 A.2d at 954-55.

encompassed by the diminished capacity doctrine. The defense raised the mens rea variant by claiming that Mrs. Tempest lacked the capacity to form the specific intent to kill Gregory because of mental disorder. If we believe this claim, Mrs. Tempest could not be convicted of first degree murder because she did not premeditate; that is, she lacked the "specific intent to kill" under Pennsylvania law.¹¹ Is this claim believable, however? Note the use of the confusing and unnecessary term "specific intent," as distinguished from "general intent," to describe a mens rea that might be negated by mental disorder.¹² What is the use, if any, of these terms?

In a partial responsibility jurisdiction, the defense would assert that even if Mrs. Tempest killed Gregory with premeditated intent as these

¹¹ *Id.*; Commonwealth v. O'Searo, 466 Pa. 224, 234, 352 A.2d 30, 35 (1976).

¹² There is no universally agreed-upon set of definitions for these terms and virtually all serious commentators agree that they are confusing and unnecessary. *E.g.*, MODEL PENAL CODE 125 (Tent. Draft No. 4, 1955); G. WILLIAMS, CRIMINAL LAW: THE GENERAL PART 49, 569-70 (2d ed. 1961); G. WILLIAMS, TEXTBOOK OF CRIMINAL LAW 428-30 (1978) ("In allocating crimes to one category or the other, the courts adopt a Humpty Dumpty attitude"; distinction is "mystical"). Some courts also understand. *State v. Stasio*, 78 N.J. 467, 473-78, 396 A.2d 1129, 1132-34 (1979). Because many courts continue to place crimes in these categories, they must, alas, be used throughout this Article and thus some definition is necessary. For instance, Kadish, Schulhofer, and Paulsen note that specific intent crimes are commonly defined as those that require true purpose or knowledge as the mens rea, whereas general intent crimes require only recklessness or negligence. S. KADISH, S. SCHULHOFER & W. PAULSEN, CRIMINAL LAW AND ITS PROCESSES 277 (4th ed. 1983). But assault—an attempted battery and thus a crime of purpose—is usually considered a general intent crime. One definition, derived inductively from looking at courts' actual characterizations, is that specific intent crimes require two or more mens reas (e.g., burglary—the intent to break and enter and the intent to felonize), whereas general intent crimes require only one mens rea (e.g., breaking and entering—the intent to break and enter). All definitions ultimately break down and fail to match courts' characterizations, however, and the best that sensible criminal lawyers can do is to consult the appellate decisions of their jurisdiction, or, if there is no decision about a particular crime, to propose the use of the definition that most advances their case.

The underlying reason courts have created the confusing general/specific intent categorization is to deal with claims of intoxication, mistake, and diminished capacity. Courts commonly confuse the mens rea and partial responsibility variants of such claims or they fear the negation of mens rea by intoxication, mistake, or disorder. In the former case, courts have used the categorization to limit what they perceive to be a new affirmative defense. In the latter, they use the categorization to prevent defendants from achieving total acquittal of all crimes charged by prohibiting the negation of the mens rea of general intent crimes. In so doing, however, they commonly confuse a moral issue—when *should* the law allow mens rea to be negated?—with an empirical issue—when can mens rea be negated in fact? Any mens rea can be negated in a particular case by intoxication, mistake, or disorder, but to avoid acquitting defendants, courts often wrongly claim that "general intent" mens rea cannot be negated in fact. It would be far less confusing simply to address the moral and social policy issue directly, as, for instance, the Model Penal Code does when it prohibits defendants from using evidence of intoxication to negate recklessness, even if the recklessness was negated in fact. *See* MODEL PENAL CODE § 2.08(2) (Proposed Official Draft (1962)).

The general/specific intent problem will be discussed again in greater detail at various points throughout this Article.

terms are technically defined, she should not be found guilty of first degree murder because she is simply less responsible, because of her mental condition, than if she had committed the same awful deed while fully normal. This assertion raises several questions. Does Mrs. Tempest's mental condition make her less culpable, and if so, in what way? Even if Mrs. Tempest was technically guilty of murder in the first degree, would a just system of criminal law hold her as responsible as a fully normal defendant, say, a killer-for-hire? On moral grounds, must some type of partial responsibility doctrine be adopted to permit the criminal law to lessen the culpability and desert of people like Mrs. Tempest? If not, is mitigation of punishment at sentencing an appropriate response to her alleged diminished blameworthiness?

Tempest also demonstrates the abuse of mental health expert testimony on the mens rea issue. In light of the evidence, there is no doubt that Mrs. Tempest killed Gregory intentionally and with premeditation: Mrs. Tempest patently and by her own admission formed the requisite mental states. What could the psychiatrists possibly have meant when they testified that she lacked the capacity to form them? Why did they make such an outrageous assertion? Is there a systemic remedy to prevent the admission of such confusing, prejudicial, and, to be blunt, ridiculous testimony?

Finally, note that the issue for the experts is framed in terms of the defendant's *capacity* to form mens rea, rather than in terms of the direct legal question, which is whether the mens rea was *actually* formed. Although there is clearly a logical relationship between the defendant's ability or capacity to form a mental state and whether he formed it in fact, the law's focus on the capacity issue has allowed experts to provide unscientific testimony, deflecting the fact finder's attention away from the ultimate legal issue.

II. THE MENS REA AND PARTIAL RESPONSIBILITY VARIANTS

A. THE MENS REA VARIANT

The prosecution always bears the burden of proving beyond a reasonable doubt its prima facie case, the definitional elements necessary to find the defendant guilty of the crime charged or lesser included offenses.¹³ Cases of strict liability aside, all crimes include a mental element, a mens rea, that the prosecution must prove. If the prosecution fails to carry its persuasion burden on a requisite mental element, the defendant must be acquitted of any crime that includes such an element in its definition. As a matter of constitutional law, the defendant is enti-

¹³ *In re Winship*, 397 U.S. 358, 364 (1970).

tled to introduce competent and relevant evidence to disprove any element of any crime charged¹⁴ subject to few and limited exceptions.¹⁵

In light of these elementary principles of criminal law, it is clear that the mens rea variant of diminished capacity is not a separate defense that deserves to be called "diminished capacity" or any other name connoting that it is some sort of special, affirmative defense.¹⁶ The defendant is simply introducing evidence, in this case evidence of mental abnormality, to make the following claim: "I did not commit the crime charged because I did not possess the requisite mens rea." This is not an affirmative defense whereby the defendant admits or has proved against him the elements of the crime charged, but then raises a claim of justification or excuse. Further, a defendant claiming no mens rea because of mental disorder is not asserting some lesser form of legal insanity, that is, he is not claiming that he is partially or less responsible for the crime charged. Rather, the defendant is straightforwardly denying the prosecution's prima facie case by attempting to cast doubt on the prosecution's claim that a requisite mental element was present at the time of the offense. He is claiming that he is not guilty of that crime at all, although he may be guilty of a lesser crime if all the elements of the latter are proven. It is as if, for example, a defendant charged with murder on an intent-to-kill theory pleads not guilty on the ground that he thought he was shooting at a tree and therefore lacked the requisite intent to kill.

The moral logic of the mens rea variant is as compelling and straightforward as the technical logic. In our system of criminal justice, culpability is dependent upon a finding of both an act *and* a requisite mental state. Moreover, culpability for the same act varies according to the accompanying mental state. An intentional killing is generally considered more heinous than a reckless killing. A defendant who lacks a required element is not blameworthy for an offense that includes that element, and it would be unjust as well as unconstitutional to punish him for it.

Many courts and legislatures have been convinced of the funda-

¹⁴ *Chambers v. Mississippi*, 410 U.S. 284 (1973); *accord*, *Hughes v. Matthews*, 576 F.2d 1250 (7th Cir.), *cert. dismissed sub nom.* *Israel v. Hughes*, 439 U.S. 801 (1978); Note, *The Relevance of Innocence: Proposition 8 and the Diminished Capacity Defense*, 71 CALIF. L. REV. 1197, 1202-03 (1983); *see* *Washington v. Texas*, 388 U.S. 14, 17-18, 25 (1967) (Harlan, J., concurring); *cf.* *Muench v. Israel*, 715 F.2d 1124, 1137-44 (7th Cir. 1983).

¹⁵ The Court recognized in *Chambers*, 410 U.S. at 302, that limitations might exist, but it seems clear that the state's justifications must be exceptionally weighty in order to defeat the defendant's right to present evidence that is admittedly competent and relevant. The creation of extreme prejudice or confusion might be such a reason.

¹⁶ Insightful commentators have recognized this point for decades. Weihofen & Overholser, *Mental Disorder Affecting the Degree of Crime*, 56 YALE L.J. 959, 962-63 (1947).

mental fairness and consequent necessity of allowing defendants to attempt to cast doubt on the prosecution's case using evidence of mental abnormality,¹⁷ but they have usually placed illogical limitations on the defendant's ability to do so.¹⁸ A smaller number of courts and legislatures have refused to permit the admission of any evidence of mental abnormality, except on the issue of legal insanity.¹⁹ I believe that most, if not all, limitations on the mens rea variant are unconstitutional. In an adversary system of criminal justice, where liberty and stigma are at stake, it is a violation of the defendant's sixth and fourteenth amendment rights to prevent him from introducing competent and relevant evidence to defeat the state's case unless there are powerful justifications for the prohibition.²⁰ As I shall argue, such justifications do not exist.

The mens rea variant has been limited or rejected because courts or legislatures have perpetrated a number of remedial confusions or mistakes: (1) the confusion of the mens rea and partial responsibility variants; (2) a misunderstanding of the nature of the evidence presented by the defendant and its relationship to other forms of evidence, such as intoxication, that are used to support similar claims; (3) an unwarranted fear of endangering public safety; (4) an unjustified belief that accepting the mens rea variant will eviscerate the insanity defense and undermine the bifurcated trial in those states where this procedure is used for the insanity defense; (5) an unjustified fear of cluttering the trial process. Let us consider these problems.

1. *The Confusion of Mens Rea with Partial Responsibility*

Courts commonly reject the mens rea variant because they mistakenly believe that it is a form of partial insanity or partial responsibility.²¹ They argue that so momentous a change in substantive criminal law as adopting a defense of partial insanity is a task appropriately left to the legislature.²² I completely agree with this argument, but it does

¹⁷ The Model Penal Code was an early proponent of this view. MODEL PENAL CODE § 4.02 (Proposed Official Draft 1962); MODEL PENAL CODE § 4.02 Comments (Tent. Draft No. 4, 1955).

¹⁸ *E.g.*, Commonwealth v. Walzack, 468 Pa. 210, 360 A.2d 914 (1976) (evidence of mental abnormality admissible only on issue of premeditation).

¹⁹ *E.g.*, State v. Wilcox, 70 Ohio St. 2d 182, 436 N.E.2d 523 (1981); State v. Laffoon, 125 Ariz. 484, 610 P.2d 1045 (1980); State v. Roussel, 424 So. 2d 226, 230 (La. 1982). All of these courts reject the "defense" of diminished capacity. Unfortunately, courts constantly confuse partial responsibility with the mens rea variant and then reject the mens rea variant on the ground that the insanity defense is the only doctrine that considers nonresponsibility caused by mental abnormality. See *infra* notes 21-28 and accompanying text.

²⁰ See *supra* notes 14-15 and accompanying text.

²¹ See, *e.g.*, Mill v. State, 585 P.2d 546, 550-51 (Alaska 1978).

²² Another, related, confusion is the belief that if the insanity defense is expanded or liberalized, there is less need for an expansive mens rea variant, State v. Sessions, 645 P.2d 643,

not respond to the argument for acceptance of the mens rea variant. As I just demonstrated, the defendant claiming no mens rea is not attempting to prove that he is less criminally responsible in general. To use the terminology of a leading casebook, the mens rea variant does not involve claims about "general mens rea."²³ Courts and commentators consistently fall prey to confusing "special" mens rea, the specific mental state element that is part of the definition of the crime and thus part of the prosecution's prima facie case, and "general" mens rea, a generic term for lack of responsibility that might be produced in whole or in part by factors such as legal insanity, duress, or partial responsibility. The confusion is compounded by use of the term "criminal intent." Sometimes, this term is a shorthand designation for all the special mens reas such as intent, knowledge, recklessness, and negligence. When so used, it tends to obscure understanding of which specific mens rea is required by the definition of the crime. At other times, unfortunately, it is used as a synonym for general mens rea.

Whether or not one accepts the special/general mens rea terminology or any other set of terms, there is no doubt that the phenomena being described by those terms are conceptually distinct. A defendant who lacks special mens rea is acquitted because his conduct fails to satisfy the state's definition of the offense, not because he lacks responsibility. The conduct of a defendant who lacks general mens rea almost always satisfies the elements of the prima facie case including special mens rea, but he is acquitted because he is not considered responsible for his conduct.²⁴ The claim that the state's prima facie case cannot be proven is entirely different from the claim of partial insanity or partial responsibility. A court faced with an attempt to admit evidence of mental abnormality to negate mens rea can completely exclude such evidence only by demonstrating that the evidence is not relevant to the evaluation of mens rea or, even if it is relevant, that it should be excluded for other, powerful policy reasons. Thus, the mens rea variant is mandated by current law and does not represent any substantive change.²⁵

645 (Utah 1982), or any mens rea variant at all, *State v. Wilcox*, 70 Ohio St. 2d 182, 436 N.E.2d 523 (1981). The reason this is confusing, of course, is that courts assume that the mens rea variant is really partial responsibility and, thus, if the insanity defense is liberalized, there is no need for a lesser insanity defense to ameliorate the rigors of a strict insanity rule. But again, the mens rea variant is not partial responsibility; the courts' arguments are therefore irrelevant and nonresponsive to arguments in favor of the mens rea variant.

²³ S. KADISH, S. SCHULHOFER & M. PAULSEN, *supra* note 12, at 267-68.

²⁴ Thus, a nonresponsible defendant can surely have special mens rea and it is a needless source of confusion to claim otherwise. See *State v. Buzynski*, 330 A.2d 422, 429 (Me. 1974).

²⁵ Some courts claim the opposite, of course, but their reasoning always belies a confusion about the nature of the mens rea variant. *E.g.*, *Johnson v. State*, 439 A.2d 542, 551 (Md. 1982) (confusing mens rea and partial responsibility variants).

Conflation of the mens rea and partial responsibility variants also leads to confusion about who should bear the burden of persuasion. Although partial responsibility may be properly viewed as an affirmative defense, the mens rea variant cannot be so viewed, because it is simply a denial of the prima facie case. Although the defendant may have the production burden when attempting to controvert the prosecution's case, the prosecution must bear the ultimate burden of proving every element, including mens rea, beyond a reasonable doubt. Calling the mens rea variant "diminished capacity," and thereby hoping to make it a separate affirmative defense, does not make it so.

The argument in favor of the constitutional and logical necessity of adopting the mens rea variant is predicated on the position that intent, purpose, knowledge, and recklessness are subjective mens reas; that is, the defendant must subjectively intend, know, or be aware of a risk in order for criminal liability to be imposed. If criminal liability is based on subjective mental states, then it is, of course, possible that the defendant did not actually have the requisite mental state at the time of the offense. By contrast, if these mens reas are objective, the arguments for limiting the introduction of evidence of mental abnormality to negate mens rea gain coherence; the issue, then, is what the *reasonable* person's state of mind would have been, rather than what the defendant's state of mind actually was. Evidence concerning the defendant's actual state of mind is less relevant if subjective mens rea is not the issue.

There is resistance in the criminal law to the idea that liability should purely or primarily be based on subjective mental states. If mens rea is subjective, a highly unreasonable and dangerous defendant may be freed entirely if he can prove that mens rea was actually absent.²⁶ This is an uncongenial result to many²⁷ and leads to tensions and ambiguities in the definitions of intent, knowledge, and recklessness.²⁸ The better solution would be to confront openly our willingness to impose liability on objective grounds.

²⁶ For example, except in the case of homicide, there are rarely extensive lesser degrees of culpability for most crimes, and most crimes do not include a lower degree imposing liability on an objective basis.

²⁷ Wells, *Swatting the Subjectivist Bug*, 1982 CRIM. L. REV. 209.

²⁸ The formulation that a person intends the natural and probable consequences of his actions is an example. This is an unobjectionable guide to the fact finder in the difficult enterprise of inferring mental states, but, as a substantive rule of what mens rea is required, it can have the effect of substituting negligence for intent. See, e.g., *United States v. Neiswender*, 590 F.2d 1269 (4th Cir. 1979). Where true intent is required, however, a conclusive or mandatory evidentiary presumption that a person intends the natural and probable consequences of his acts is unconstitutional. *Sandstrom v. Montana*, 442 U.S. 510 (1979); see also *infra* note 128.

2. Evidentiary Confusion

Many courts and legislatures that understand the constitutional necessity or logic of accepting the mens rea variant, nevertheless reject or limit it because of evidentiary confusion. This confusion results in two related objections to the mens rea variant: first, that evidence of mental disorder is not probative on the issue of mens rea; and second, that mental health testimony is too inexact to be reliable even if it is theoretically relevant. Although I am generally in sympathy with claims about the inexactness of mental health testimony,²⁹ its exclusion on the issue of mens rea is insupportable given the present law of evidence. Mental health testimony is broadly admissible everywhere to help assess mental states in many criminal and civil law contexts.³⁰ For instance, it is considered relevant and admissible on the issues of criminal responsibility, competence to stand trial, competence to contract, competence to make a will, competence to manage one's financial affairs, competence to consent to medical and psychological treatment, and a host of other legal issues concerned with mental states.

Contrary to what some courts assert or assume without empirical or theoretical justification,³¹ there is no significant difference between assessing mens rea and assessing the mental states included in other legal criteria. For instance, it is no more difficult to determine what a criminal defendant intended than to determine whether a testator-decedent understood the nature and extent of his property, or whether a person seeking to avoid a contract understood the nature of the deal at the time the bargain was struck. The same point applies with equal force to the alleged distinction between specific and general intent crimes:³² it is no harder to assess one mens rea than another.

In all cases, the court must reconstruct a past mental state largely on the basis of inferences from the defendant's utterances and actions at the relevant time. This process is often difficult because we can never be

²⁹ See Morse, *Crazy Behavior, Morals and Science: An Analysis of Mental Health Law*, 51 S. CALIF. L. REV. 527, 600-26 (1978) [hereinafter cited as Morse, *Crazy Behavior*]; Morse, *Failed Explanations and Criminal Responsibility: Experts and the Unconscious*, 68 VA. L. REV. 971 (1982) [hereinafter cited as Morse, *Failed Explanations*].

³⁰ Mezer & Rheingold, *Mental Capacity and Incompetency: A Psycho-Legal Problem*, 118 AM. J. PSYCHIATRY 827-28 (1962) (listing the many areas in which evidence of mental abnormality is relevant to legal criteria).

³¹ See *Muench v. Israel*, 715 F.2d 1124 (7th Cir. 1983). In *Muench*, the majority wrote that evidence of mental abnormality was competent and relevant on the "gross" issue of legal insanity, but not so on the "fine-tuned" issue of mens rea. *Id.* at 1136, 1143. As the dissent recognized, however, *id.* at 1145-48 (Cudahy, J., dissenting), and as I argue *infra* at notes 54-59 and accompanying text, this distinction is nonexistent and the legal policy based upon it is incorrect. For sheer gobbledygook, see *State v. Bouwman*, 328 N.W.2d 703, 705 (Minn. 1982).

³² See *supra* note 12.

sure what is (or was) in the mind of another. Even the person in question may have faulty recollection, for various reasons, about his past mental processes. Still, the best we can do is to consider the applicable legal criteria in light of the fullest possible picture of the defendant's mental state at the time in question. Despite the admitted difficulties with making this determination, the evaluation process is the same whether the question is *mens rea*, criminal responsibility, competence to contract, or some other issue. We do not look at different aspects of mental functioning when applying different legal criteria. In all cases, we must attempt the broadest possible assessment of the person's overall mental state. Indeed, the law has sought the help of mental health experts precisely because it is so difficult to make the necessary assessment of mental states. If the law admits mental health expert testimony on a vast range of questions for which the assessments are indistinguishable from the assessment of *mens rea*, by what coherent theory can it exclude such testimony on the *mens rea* issue? A criminal defendant seeking admission of mental health expert testimony on *mens rea* has far more at stake in our society—liberty and stigma—than a party seeking the admission of such testimony in any other context.³³

The argument for admitting mental health expert testimony on *mens rea* is further strengthened by recognizing that in almost all jurisdictions, the law already admits evidence of mental abnormality to negate some *mens reas* if the mental abnormality is produced by voluntary intoxication.³⁴ Although evaluating the effect of intoxication on behavior is easier and more objective than evaluating the behavioral effects of mental disorder or defect, since the law has already adopted the *mens rea* variant to some extent by admitting expert and lay evidence on intoxication, it would be anomalous, arbitrary, and unfair to exclude expert evidence on mental disorder. As just noted, the law already accepts the probativeness of mental health testimony on the issue of mental states generally. Moreover, it seems morally obtuse to allow a defendant to controvert the prosecution's case using a mental abnormality produced by his own volitional choice—voluntary intoxication—but not to allow him to do so using evidence of a disorder produced through no

³³ The argument in the text for the extensive admissibility of evidence of mental abnormality on the *mens rea* issue is based on the law's present acceptance of the general and broad relevance of mental health testimony to mental state issues. My views about the relevance of evidence of mental disorder and the usefulness of mental health testimony to both the *mens rea* and partial responsibility variants are presented in section IV, *infra* notes 122-69 and accompanying text.

³⁴ W. LAFAVE & A. SCOTT, JR., *CRIMINAL LAW* 342-43 (1972). Courts and legislatures often prohibit on policy grounds the use of evidence of intoxication to negate recklessness or the *mens rea* of "general intent" crimes. *Id.* at 343-47.

fault of his own.³⁵ Even if mental health evidence is more indeterminate than intoxication evidence, for the reasons just given, courts and legislatures should be more inclined to ease any restrictions in evidence law to admit the former more freely.

Finally, in a sense, the law already de facto accepts the mens rea variant in cases of mental disorder. Lay testimony concerning the phenomena upon which a diagnosis or mental health opinion is based is already fully admissible on the mens rea issue, because lay witnesses are competent to testify about the defendant's thoughts, feelings, and actions that bear on mens rea. It is precisely thoughts, feelings, and actions that mental health experts use to formulate diagnoses and opinions.³⁶ For instance, suppose a homicide defendant delusionally believed the Lord would protect his victim from the untoward effects of fatal blows administered as part of a "religious ritual."³⁷ Such a belief would be relevant in determining whether the defendant killed intentionally, knowingly, or recklessly, and lay witnesses would be allowed to testify about the defendant's utterances and actions that would demonstrate the delusional belief. Lay witnesses might not be allowed to testify that the defendant was mentally ill, and certainly they would not be allowed to give a diagnosis. Such restrictions do not vitiate the force of

³⁵ Weihofen & Overholser, *supra* note 16, at 962-63. In *United States v. Brawner*, 471 F.2d 969, 999 (D.C. Cir. 1972), the court wrote:

Neither logic nor justice can tolerate a jurisprudence that defines the elements of an offense as requiring a mental state such that one defendant can properly argue that his voluntary drunkenness removed his capacity to form the specific intent but another defendant is inhibited from a submission of his contention that an abnormal mental condition, for which he was in no way responsible, negated his capacity to form a particular specific intent, even though the condition did not exonerate him from all criminal responsibility.

Except for the use of the term "capacity," *see infra* notes 140-44 and accompanying text, the court is absolutely right.

The law assumes that crazy persons have no control over their behavior and its consequences. The position taken in the text reflects that assumption. By contrast, I have argued in detail elsewhere that both the law and lay opinion underestimate the degree to which mentally disordered persons can exercise control over their disordered behavior and its consequences. Morse, *Crazy Behavior*, *supra* note 29, at 560-90. This argument is one of the foundations for the position taken in section III, *infra* notes 101-21 and accompanying text, that the law should not adopt the partial responsibility variant of diminished capacity.

³⁶ The criteria for all of the diagnoses contained in the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders are primarily thoughts, feelings, and actions (behavioral data) and for most diagnoses the entire set of criteria is behavioral. AMERICAN PSYCHIATRIC ASSOCIATION'S DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (3d ed. 1980) [hereinafter cited as DSM-III]. A full discussion of this point may be found in Morse, *Crazy Behavior*, *supra* note 29, at 943-47, and Morse, *Failed Explanations*, *supra* note 29, at 1059-70.

³⁷ This hypothetical is a variant of *People v. Strong*, 37 N.Y.2d 568, 338 N.E.2d 602, 376 N.Y.S.2d 87 (1975) (defendant stuck knives in thoracic cavity of victim as part of religious ritual of Sudan Muslim sect that believes in cosmetic consciousness, mind over matter, and psychosomatic psychosomatic consciousness).

the argument, however, for prohibited labels are irrelevant to whether the defendant formed the requisite *mens rea*. What is relevant is the defendant's belief, his actual mental state, and not the psychiatric label, developed for nonlegal purposes, that might be attached to people who believe such things or possess such mental states.³⁸ Because lay witnesses are permitted to testify about the phenomena of mental disorders, it seems odd to prohibit experts about such phenomena from also testifying.³⁹

Of course, lay persons would be permitted to testify only if they had been percipient witnesses at the relevant time,⁴⁰ whereas in most cases, mental health experts will base their testimony on interviews conducted substantially later. It is extremely difficult for mental health professionals accurately to reconstruct past mental states. They must rely on the reports of the person being examined and other observers, reports that decrease in accuracy as time passes. Again, however, this is a problem with all mental health expert testimony, not a reason to prohibit such evidence only in assessing *mens rea*. If the reconstruction of past mental states is too problematic, perhaps it should be barred throughout the law, but it makes little sense to bar it only to a criminal defendant seeking to defeat the prosecution's *prima facie* case. Too much is at stake to place the criminal defendant under such a disability. Justice as well as the Constitution would seem to compel the admission of reasonably limited expert evidence on the *mens rea* issue.

3. *Fears for Public Safety*

Another major argument against complete or partial adoption of the *mens rea* variant is the claim that its adoption will endanger the public.⁴¹ If defendants are permitted to defeat the prosecution's case using evidence of mental abnormality, dangerous offenders will be freed; by contrast, insanity acquittees are almost always committed immediately to secure hospitals. Courts make three responses to such claims: (1) they reject the *mens rea* variant entirely; (2) they adopt the *mens rea* variant but limit it to a particular crime, usually murder in the first degree; or (3) they adopt the *mens rea* variant but limit it to so-called "specific intent" crimes.

Fears for the public safety are often outweighed in our criminal justice system by the need to protect important constitutional rights.

³⁸ For a full discussion of why diagnoses are irrelevant, see *infra* notes 163-69 and accompanying text.

³⁹ The proper role of experts and lay witnesses in *mens rea* determinations is considered in section IV.A., *infra* notes 124-59 and accompanying text.

⁴⁰ C. MCCORMICK, *HANDBOOK OF THE LAW OF EVIDENCE* § 10 (1972).

⁴¹ *E.g.*, *State v. Doyon*, — R.I. —, 416 A.2d 130, 137 (1980).

The exclusion of illegally seized evidence or improperly obtained confessions are examples of situations that often lead to the freedom of dangerous actors whose conduct satisfies the prosecution's *prima facie* case. The entire rejection of the *mens rea* doctrine on the ground of public safety is unacceptable, especially if a less restrictive alternative is available.

Proponents of a limited *mens rea* variant argue that the limitations provide precisely the less restrictive alternative needed sensibly to balance the defendant's rights against the need for public safety. Although this argument appears to have much appeal, limited *mens rea* variants are also unacceptable. Consider first the limitation of the *mens rea* variant to a specific crime or crimes, usually murder or first degree murder.⁴² This was the law in Pennsylvania under which Mrs. Tempest was tried. Under this limitation, a defendant who does not form the *mens rea* for the higher homicide crime is convicted of a lower degree of homicide, such as second degree murder or one of the manslaughter offenses. The impact of mental abnormality is thereby considered, but a dangerous killer does not go free.

The difficulty with this limitation is that it makes little sense even when evaluated on its own terms. Once it is admitted that mental abnormality can negate *mens rea*, why should this possibility be restricted to the crime of murder, rather than extended to all crimes that have a lesser included offense? Such an extension would grant all defendants important constitutional rights while simultaneously providing for the conviction and incarceration of dangerous offenders. A proponent of the limitation to homicide might respond that because the lesser included offenses of most other crimes typically carry relatively light penalties, too many dangerous offenders will be released unreasonably quickly. The problems with this argument are that many nonhomicide offenders are not highly dangerous and mental abnormality rarely negates *mens rea*.⁴³ There is simply no evidence demonstrating that an extensive *mens rea* variant produces substantially more public danger than a constricted limited variant.⁴⁴

⁴² See *Commonwealth v. Walzack*, 468 Pa. 210, 360 A.2d 914 (1976).

⁴³ Of course, many nonhomicidal defendants are dangerous, but many are not, and *mens rea* actually will be negated in only a tiny number of cases. See *infra* notes 124-59 and accompanying text.

⁴⁴ Proof of this assertion would be impossible because no jurisdiction has substantial experience with an extensive *mens rea* variant and no statistics are available. One bit of "soft" evidence may be helpful, however. California reformed its diminished capacity doctrine by legislation effective January 1, 1982. 1981 Cal. Stat. ch. 404. This legislation abolished the distinction between specific and general intent and allowed evidence of mental abnormality to be introduced to negate all *mens rea*. Although this was part of what was popularly and properly viewed as anti-diminished capacity legislation, the abolition of the specific/general intent distinction was viewed with delight by the defense bar and fear by the prosecution

If the point of the limitation to murder is to avoid the unfairness of applying the death penalty to abnormal offenders, it is no longer necessary. The United States Supreme Court held in *Lockett v. Ohio*⁴⁵ that the Constitution prohibits the state from excluding any mitigating evidence in death penalty proceedings. Mental abnormality is a standard mitigating factor. Any abnormality severe enough to prevent the formation of mens rea would surely be severe enough to prohibit the constitutional application of the death penalty.⁴⁶

The remaining rationale for limiting the mens rea variant to murder—that there is something special about this offense—makes little sense. That murder is the most heinous crime paradoxically undergirds both a retributive and consequentialist argument for *not* applying the variant to it. In general, murderers are especially blameworthy and dangerous people. Therefore, they deserve no special mitigating treatment, and no policy should be adopted that (theoretically) vitiates general deterrence or abbreviates incarceration. Even if the gradations in homicide law permit substantial incarceration for those convicted of the lesser grades, it is probably better in terms of societal safety that dangerous killers serve the longest possible terms.

The limitation of the mens rea variant to so-called “specific intent” crimes seems at once more logical and more confusing than limiting the variant to murder or a small, select number of crimes. The specific intent limitation is more logical because it considers the impact of mental abnormality on a wide range of crimes and, at the same time, protects the public, because the defendant often can be convicted of a lesser included “general intent” crime. The logic of a limited mens rea variant is therefore apparently satisfied. However, this limitation is also more confusing because there are no satisfactory criteria for distinguishing between specific and general intent crimes. There are some rough and ready rules of thumb, but all break down definitionally or in light of the

because both believed that dangerous offenders might be acquitted and freed if all mens rea was negated. The fear of the prosecutors was so great that emergency “reform” legislation was passed, effective January 1, 1983, 1982 Cal. Stat. ch. 893, to reintroduce the specific versus general intent distinction and to allow the negation only of specific intent by evidence of mental abnormality. To determine what happened during 1982, when a total mens rea variant was in effect, I informally contacted public defenders in both the state and local public defenders’ offices. None of my respondents could identify a case in which a credible claim for the negation of all mens rea arose. No such case has reached the appellate level. And, it must be remembered, California generates an enormous number of criminal prosecutions and appeals and its defense bar is very sophisticated about mental abnormality defenses because of the rich development of mental defense doctrine in that state. At least for the one year in question in California, then, an unlimited mens rea variant created no danger.

⁴⁵ 438 U.S. 586 (1978).

⁴⁶ Cf. *State v. Gretzler*, — Ariz. —, 659 P.2d 1 (1983) (defendant’s partial mental impairment not an absolute bar to imposition of the death penalty).

policy reasons behind the distinction.⁴⁷

The first confusion engendered by the specific versus general intent distinction is the false belief that mental abnormality cannot in fact negate those mens reas that are termed "general intents." But knowledge, recklessness, or "general intent" (for example, the intent to unlawfully touch, as in battery) are mental states that in principle might be negated by mental abnormality. General intent crimes are not strict liability crimes; if a mental state is required, it can in fact be negated. If knowledge of a result or a circumstance is required, a person might not have the requisite knowledge. Or a person might not be aware of a risk because of a delusional belief about the circumstances. Mental abnormality in fact rarely negates any mens rea, whether denominated specific or general intent, but it is equally possible for both general and specific intents to be negated. Specific intent crimes tend to have more complex mental elements than general intent crimes, but even the most complex mens reas are relatively simple to form, and the degree of abnormality necessary to negate a specific intent will generally be sufficient to negate a general intent as well.⁴⁸

The second problem with the specific intent limitation is that it fails to satisfy its own policy rationale, despite the appearance of doing so. Some specific intent crimes do not have lesser included offenses contained within them: An acquittal on the specific intent charge of one of these crimes will consequently lead to freedom for the accused and alleged danger to the public. Even where conviction of a lesser included offense is possible, that offense will typically be minor and carry a light penalty, again resulting in the relatively speedy release of allegedly dangerous offenders. Thus, allowing mental abnormality to negate specific intent, but not general intent, will not substantially protect society.⁴⁹ The specific intent limitation unfairly and illogically prevents defendants from trying to defeat the prosecution's case in the wide variety of general intent crimes without any protection of the public. The specific intent limitation is a failed compromise because its benefits to defendants and society are outweighed by its costs to both.

The major problem with any compromise mens rea variant limitation is that it is unfair to defendants. Prohibiting the defendant from offering probative evidence to defeat the prosecution's prima facie case for any crime seems grossly unjust in an adversary system in which the state has such powerful resources compared to most defendants. In response, it may be argued that an unlimited mens rea variant is theoretic-

⁴⁷ See *supra* note 12.

⁴⁸ See *infra* notes 124-40 and accompanying text.

⁴⁹ I argued above, of course, that fears about the negation of mens rea are unjustified, but I am here considering the argument on its own terms.

cally sound but practically unworkable because of the public danger involved. There are two answers to this accusation. The first is that if the criteria for the various mental elements are properly understood and mental health testimony is kept within credible bounds,⁵⁰ few defendants will be able to cast a reasonable doubt on the mental elements of the prosecution's *prima facie* case. Even the craziest defendants, those who are most likely to succeed with an insanity defense, are unlikely to produce credible evidence that they lacked any *mens rea*. The tiny number of defendants who might be fully acquitted and freed under an unlimited *mens rea* variant will not produce nearly enough danger to society to justify preventing all defendants from introducing evidence of their mental abnormality in attempting to defeat the prosecution's basic case.⁵¹

Second, the state has remedies to counteract any danger that might be produced by an unlimited *mens rea* variant. All states have involuntary civil commitment statutes whereby disordered, dangerous people may be involuntarily confined according to criteria and procedures that are far less strict than in the criminal justice system.⁵² The counterargument that involuntary commitment terms are not very long in some jurisdictions is unpersuasive, because the prison or jail terms for general intent crimes also tend to be very short. Moreover, it is easier to prove committability than guilt, so some incarceration is relatively certain.⁵³

4. *The Integrity of the Insanity Defense and the Bifurcated Trial*

The fourth argument for rejecting the *mens rea* variant is that adopting it will eviscerate the insanity defense and the bifurcated trial.⁵⁴ By negating all *mens rea*, a defendant will totally evade criminal responsibility, even though only the insanity defense allows a defendant to

⁵⁰ Both of which are achievable goals, as I shall argue in section IV, *infra* notes 122-69 and accompanying text.

⁵¹ In a sense, the *mens rea* variant is not worth extended discussion because it will rarely lead to acquittal if it is properly used. Nevertheless, discussion is important because a significant principle of justice is involved, a few defendants will succeed under the *mens rea* variant, and the law as it now stands is dreadfully confused.

⁵² Schwitzgebel, *Survey of State Civil Commitment Statutes*, in CIVIL COMMITMENT AND SOCIAL POLICY 47 (A. McGarry, R. Schwitzgebel, P. Lipsitt & D. Lelos eds. 1981).

⁵³ It may seem paradoxical for me to make this argument in light of my public opposition to any form of involuntary commitment. See Morse, *A Preference for Liberty: The Case Against Involuntary Commitment of the Mentally Disordered*, 70 CALIF. L. REV. 54 (1982) [hereinafter cited as Morse, *A Preference for Liberty*]. I am simply analyzing the issue in the context of present legal arrangements, however. If involuntary commitment were abolished as I have suggested, I should still favor an unlimited *mens rea* variant for at least two reasons: first, the constitutional and policy principle involved is so powerful, and, second, the danger presented would be negligible because *mens rea* is almost never negated by mental abnormality. No credible reasons exist not to adopt the *mens rea* variant.

⁵⁴ See, e.g., *Steele v. State*, 97 Wis. 2d 72, 294 N.W.2d 2 (1980).

be exonerated specifically because of mental abnormality. This argument fails for both constitutional and empirical reasons. A criminal defendant cannot be prevented from presenting relevant evidence to controvert the prosecution's *prima facie* case. This simple but fundamental constitutional conclusion bears repeating to the point of exhaustion, because courts so often lose sight of it when they are confronted with a claim for the negation of *mens rea* based on mental abnormality.⁵⁵ Contrary to what courts often assume, if the defendant negates all *mens rea* and must thereby be acquitted, he is freed not because he lacks criminal responsibility in the sense of being legally insane, but because the state has failed to prove its basic, *prima facie* case. Some dangerous defendants might be acquitted and freed, but, as we have seen, our criminal justice system often frees dangerous actors in order to preserve constitutional rights.⁵⁶

This fourth argument against the *mens rea* variant also fails for empirical reasons. Persons crazy enough to be legally insane are not necessarily lacking *mens rea*. Even defendants who are most demonstrably legally insane rarely lack the *mens rea* for the highest charged offense. Virtually no defendant lacks some *mens rea* because of mental disorder or defect. On empirical grounds too, then, adopting the *mens rea* variant will seldom lead to total exoneration for criminal defendants and thus to the general evisceration of the insanity defense.⁵⁷

The arguments that the bifurcated trial will be undermined are equally unpersuasive. The first fear is that there will be much duplicative evidence. This is correct. The evidence relevant to both *mens rea* and legal insanity will be largely the same: information concerning the defendant's thoughts, feelings, and actions. There are no mental functions that are differentially specific to *mens rea* or legal insanity. The fact finder will need the fullest possible picture of the defendant's mental functioning in both cases. Possible duplication of evidence, however, is hardly a reason to deny the defendant an important, constitutionally based right. A defendant who raises the insanity defense to a charge of capital murder and loses will then present much the same mental health testimony at the death penalty proceeding in order to avoid the noose, yet it is unthinkable that the insanity defense would be

⁵⁵ A major reason for the courts' confusion is a failure to distinguish the *mens rea* and partial responsibility variants. If the *mens rea* variant were a form of partial responsibility, then the courts might have a point. But it is not and they do not. See *supra* note 19.

⁵⁶ See *supra* notes 41-6 and accompanying text.

⁵⁷ Those who wish to abandon the insanity defense and to substitute pure special *mens rea* rules instead may try to confuse special and general *mens rea* in order to avoid convicting clearly crazy defendants whose conduct satisfies the requisite special *mens rea*. This is sleight of hand that tries to have it both ways—to abolish the insanity defense and to acquit nonresponsible actors. The ultimate result, however, is simply confusion.

prohibited in such cases simply because of the duplication of evidence.⁵⁸ Finally, although I know of no empirical studies on this point, I conclude from my experience with the bifurcated trial in California that the duplicative evidence problem is simply not that important.⁵⁹

A second reason for prohibiting the mens rea variant in bifurcated proceedings is that it creates fifth amendment difficulties. A defendant who attempts to negate mens rea by using evidence of mental abnormality will have to undergo an examination by the prosecution's psychiatrist and inevitably will have to talk about incriminating facts that bear on prima facie guilt. Indeed he will, but the situation is no different when the defendant raises the insanity defense, in which case the state is already entitled to examine the defendant.⁶⁰ The rationale, that the defendant must waive the privilege because there is no way to rebut the defense without such an examination, applies equally to a claim of no mens rea. It is difficult to understand how the mens rea variant is distinguishable from the same situation involving the insanity defense. In both cases, the defendant willingly runs the risk because he believes that the probability of succeeding with a mental abnormality claim outweighs the increased risk of conviction produced by providing potentially incriminating information.

The third argument for rejecting the mens rea variant is that a jury that finds the defendant guilty at the "guilt" phase will be unduly inclined to reject the insanity defense at the second phase of the trial. This consequentialist worry can be solved by empanelling a different jury for the second phase of trial on the motion of either side. The objection that this provision will be costly and time consuming is surely outweighed by the patent unfairness of preventing the defendant from casting doubt on the prosecution's prima facie case using evidence that all states consider probative on mental state questions in a large number of contexts.

5. *Cluttering the Trial Process*

The last argument for rejecting the mens rea variant is that it will clutter the courts with a great deal of confusing and noncredible evidence.⁶¹ As the *Tempest* case and others⁶² show, courts are often faced

⁵⁸ Moreover, to the extent the evidence is duplicative, one expects that the second presentation will be more efficient.

⁵⁹ The basis for this conclusion, and for my conclusion concerning the lack of danger created by an expansive mens rea variant, *see supra* note 44, is personal observation and communication with prosecutors and defense lawyers.

⁶⁰ *See e.g.*, FED. R. CRIM. P. 12.2(a), 12.2(b).

⁶¹ *State v. Roussel*, 424 So. 2d 226, 230 (La. 1982).

⁶² *See infra* note 123.

with utterly incredible expert testimony purporting to demonstrate the negation of mens rea. A reasonable solution would be to require defendants seeking to introduce such testimony to do so first by a motion *in limine* out of the jury's hearing. If the testimony is incredible it should be excluded, but if it appears reasonably probative, it should be admitted because of the defendant's weighty interest in defeating the prosecution's prima facie case. Of course, there might be a flurry of such motions and trial judges reluctant to be reversed might well err on the side of admissibility. When, however, as surely will be the case, defendants routinely fail to convince juries that they lacked mens rea, there will be fewer such motions. Finally, error on the side of admissibility and the consequent clutter are far outbalanced by the justice of allowing the defendant full latitude to cast a reasonable doubt on the mental element of the crime charged.

In sum, the dominant American approach, the limited mens rea variant, is illogical and unfair as well as unconstitutional. Recent cases evince the same confusion and make the same errors as did older cases. No new policy arguments for the limitations have been deployed and the traditional arguments are no more persuasive now than they were in the past. The law should adopt a complete mens rea variant that allows evidence of abnormality to be introduced to negate all mens rea in any case in which the defendant presents a reasonable claim for such negation.

B. THE PARTIAL RESPONSIBILITY VARIANT

Partial responsibility is a form of lesser legal insanity: The defendant is claiming that, as a result of mental abnormality, he is not fully responsible for the crime proven against him.⁶³ Even if the technical elements of an offense are satisfied, the defendant is less culpable and should be convicted of a lesser crime, or, at least, should be punished less severely. In this subsection of the Article, I shall consider the logic of the partial responsibility variant. Then I shall map the forms in which it has been adopted, demonstrating that they do not comport with the logic of the variant.

The rationales for holding a defendant partially responsible and for excusing him by reason of insanity differ only in degree. The preconditions for moral and legal responsibility are, *inter alia*, that the actor is reasonably rational and in control of his actions. Actors, such as small children, who lack reasonable cognitive or volitional capacity through

⁶³ The evidence of mental abnormality may or may not rise to the level where an insanity defense is possible. A defendant could logically claim both partial responsibility and legal insanity.

no fault of their own may be dangerous, but are not considered fully responsible as moral agents. This basic intuition about the way cognitive and volitional capacity relate to responsibility is tracked by the insanity defense tests, which all focus on the actor's irrationality (e.g., lacks substantial capacity to appreciate the criminality of his actions)⁶⁴ and/or lack of self-control (e.g., lacks substantial capacity to conform his actions to the requirements of law).⁶⁵

Although the law draws a bright line for legal responsibility, human cognitive and volitional capacities and behaviors are clearly distributed along a very lengthy continuum of competence. All legally sane defendants will not be equally rational or equally in possession of self-control at the time of the prohibited act. When a legally sane defendant has impaired rationality or self-control because of mental abnormality—a cause he is allegedly unable to control—an argument for some form of lessened responsibility arises. According to this view, there are infinite degrees of responsibility because there are infinite variations in cognitive and volitional competence. Developing a sensible system for taking such differences into account is thus only a practical, and not a theoretical, problem.⁶⁶

In Anglo-American law, partial responsibility has been adopted in four basic forms: (1) the "diminished responsibility" doctrine created by Section 2 of the English Homicide Act of 1957;⁶⁷ (2) the "extreme emotional disturbance" doctrine promulgated in the Model Penal Code⁶⁸ and now adopted in a substantial number of American jurisdictions;⁶⁹ (3) *de facto* partial responsibility adopted in the guise of interpreting *mens rea* elements; and (4) the use of mental disorder to reduce sentences. The first three limit the doctrine illogically or senselessly, and the last is accomplished in a largely arbitrary manner.

Section 2 of the English Homicide Act of 1957 straightforwardly provides that a murder defendant whose responsibility is substantially decreased by mental abnormality should be convicted only of manslaughter:

Where a person kills or is a party to the killing of another, he shall not be convicted of murder if he was suffering from such abnormality of mind

⁶⁴ M'Naghten's Case, 8 Eng. Rep. 718 (H.L. 1843); MODEL PENAL CODE § 4.01 (Proposed Official Draft 1962).

⁶⁵ MODEL PENAL CODE § 4.01 (Proposed Official Draft 1962); e.g., *Parsons v. State*, 81 Ala. 577, 2 So. 854 (1887) (irresistible impulse test).

⁶⁶ A workable system of partial responsibility is possible, as I argued in Morse, *Diminished Capacity*, *supra* note 1, at 291-96; see also Wasik, *Partial Excuse in Criminal Law*, 45 MOD. L. REV. 516 (1982).

⁶⁷ 5 & 6 Eliz. 2, ch. 2.

⁶⁸ Section 210.3(1)(b) (Proposed Official Draft 1962).

⁶⁹ E.g., NEW YORK PENAL LAW §§ 125.20(2), 125.25(1)(a) (McKinney 1975).

(whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) *as substantially impaired his mental responsibility for his acts and omissions* in doing or being a party to the killing. . . . A person who but for this section would be liable . . . to be convicted of murder shall be liable instead to be convicted of manslaughter.⁷⁰

A defendant convicted of manslaughter under Section 2 may be sent to prison or a hospital.⁷¹ There have been recent calls for modification in the language of Section 2,⁷² but the principle remains the same: the murder defendant should be convicted only of manslaughter if he is less than fully responsible.⁷³

Limiting the doctrine's application to the crime of murder makes little sense. One can understand that in Britain the "diminished responsibility" doctrine is useful to avoid the mandatory term of life imprisonment for murder (and, in the past, to avoid the death penalty), but the logic of the doctrine applies with equal force to all crimes. As a result of mental abnormality, one can be less responsible for burglary or assault, for instance, as well as for murder. There probably will not be unacceptable public danger if partially responsible defendants convicted of other crimes are punished less severely;⁷⁴ no defendant would be freed completely. Nevertheless, the British show no inclination to extend the "diminished responsibility" doctrine to other crimes.

The Model Penal Code doctrine of "extreme emotional disturbance," which reduces a homicide from murder to manslaughter, is also a form of partial responsibility. The Code defines manslaughter as:

homicide which would otherwise be murder [but] is committed under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse. The reasonableness of such explanation or excuse shall be determined from the viewpoint of a person in the actor's situation under the circumstances as he believes them to be.⁷⁵

As the recent commentaries on the Model Penal Code note, "it is clear that personal handicaps and some external circumstances must be

⁷⁰ 5 & 6 Eliz. 2, ch. 2, § 2 (emphasis added).

⁷¹ Mental Health Act, 1959, 7 & 8 Eliz. 2, ch. 72, § 60.

⁷² Dell, *Diminished Responsibility Reconsidered*, 1982 CRIM. L. REV. 809, 817.

⁷³ There have also been suggestions that § 2 should be abolished altogether now that the death penalty has been abolished in Britain, but the prospects for this seem dim. Dell, *supra* note 72, at 814-17. On the other hand, proponents of partial responsibility have argued that it should be expanded to apply to all crimes. Walker, *Butler v. The CLRC and Others*, 1981 CRIM. L. REV. 596, 597. Interestingly enough, in recent years there has been an increasing tendency to send those convicted of homicide under § 2 to prison rather than a hospital. Dell, *The Detention of Diminished Responsibility Homicide Offenders*, 23 BRIT. J. CRIMINOLOGY 50 (1983).

⁷⁴ Cf. *supra* notes 43-44 and accompanying text. Indeed, under indeterminate sentencing schemes, judges already have the power to impose light sentences for almost all crimes.

⁷⁵ MODEL PENAL CODE § 210.3(1)(b) (Proposed Official Draft 1962).

taken into account.”⁷⁶ Surely a mental disorder or defect should be considered, whether it is viewed as a handicap or as an external circumstance.⁷⁷ The rationale for this doctrine clearly is that “extreme mental or emotional disturbance” compromises an actor’s rationality or self-control and, consequently, his responsibility for deeds committed while under the sway of such a disturbance.

One can make a formal, technical argument that extreme emotional disturbance is an element of manslaughter,⁷⁸ but, like Britain’s “diminished responsibility,” it is in fact a mitigating factor akin to an affirmative defense. Some jurisdictions, such as New York, explicitly recognize this by placing the burden of proving such disturbance on the defendant.⁷⁹ Even if the prosecution retains the persuasion burden *de jure*, however, the *de facto* burden will be on the defendant. In the usual case, once the prosecution proves that a homicide has been committed purposefully or knowingly, the charge will be murder unless the defend-

⁷⁶ II MODEL PENAL CODE AND COMMENTARIES 62 (Official Draft and Revised Comments 1980).

⁷⁷ An “external circumstance” here means something that happens to a person over which he or she has little control.

⁷⁸ This was the argument made by appellant in *Patterson v. New York*, 432 U.S. 197 (1977) (upholding the constitutionality of placing the burden of persuasion on the defendant to prove that he acted under the influence of extreme emotional disturbance). The appellant unsuccessfully analogized New York’s extreme emotional disturbance doctrine, NEW YORK PENAL LAW §§ 125.20(2), 125.25(1)(a) (McKinney 1975), to Maine’s doctrine of legally sufficient provocation, considered by the Supreme Court in *Mullaney v. Wilbur*, 421 U.S. 684 (1975) (declaring unconstitutional Maine’s procedure, which placed on the defendant the burden of persuasion on the provocation/passion issue). The Court was able to distinguish the cases on the extraordinarily narrow, technical ground that the New York homicide law was drafted so as clearly to make extreme emotional disturbance an “affirmative defense” to murder, thus reducing the grade of the homicide to manslaughter, whereas the Maine statute followed the common law formulation and defined manslaughter directly as a killing occurring in the heat of passion upon legally adequate provocation. Although there is a technical difference between the two forms of distinguishing murder from manslaughter, operationally the two statutes are identical and no constitutional distinction should have been drawn between them. Perhaps the Supreme Court feared in *Patterson* that it had gone “too far” in *Mullaney*, which could fairly be read to require that the burden of persuasion on any issue involving blameworthiness, including affirmative defenses such as insanity and duress, should be placed on the prosecution. In *Mullaney*, the Supreme Court stated:

[T]he criminal law of Maine, like that of other jurisdictions, is concerned not only with guilt or innocence in the abstract but also with the degree of criminal culpability. Maine has chosen to distinguish those who kill in the heat of passion from those who kill in the absence of this factor. Because the former are less “blameworth[y]” . . . , they are subject to substantially less severe penalties. By drawing this distinction, while refusing to require the prosecution to establish beyond a reasonable doubt the fact upon which it turns, Maine denigrates the interests found critical in [*re Winship*, 397 U.S. 358 (1970)].

Mullaney, 421 U.S. at 697-98 (citing *State v. Lafferty*, 309 A.2d 647, 671, 673 (Me. 1973)).

⁷⁹ NEW YORK PENAL LAW §§ 125.20(2), 125.25(1)(a) (McKinney 1975). The constitutionality of placing the persuasion burden on the defendant was upheld in *Patterson v. New York*, 432 U.S. 197 (1977).

ant provides sufficient evidence to cast a reasonable doubt on the assumption that he was not extremely emotionally disturbed. Manslaughter convictions occur because the prosecution fails to counteract the defendant's evidence of such disturbance, not because the prosecution affirmatively proves it. Extreme emotional disturbance is clearly a form of partial responsibility, and is not best understood as an element of any crime.

Like its English Homicide Act cousin, the Model Penal Code doctrine is also illogically limited to the crime of homicide. If the rationale for the doctrine is that criminal responsibility is lessened by extreme emotional disturbance, a disturbed defendant who commits any crime is not fully blameworthy. Unlike limitations on the *mens rea* variant, however, limitations in the English Homicide Act and Model Penal Code might protect the public by preventing mitigation of conviction or punishment in any crime save homicide. Whereas mental abnormality rarely negates *mens rea*, it arguably compromises rationality and self-control in a large number of cases. Consequently, a substantial number of nonhomicide defendants might succeed with partial responsibility claims and obtain comparatively light sentences if the partial responsibility variant were extended to all crimes. Still, the logic of the variant compels the conclusion that if it is adopted at all, as a moral matter it should be applied to all crimes. Further, no defendant will be freed entirely, as is possible with an unlimited *mens rea* variant.

The third means by which partial responsibility has been adopted is through the judicial back door. Because partial responsibility is in fact a comparatively new affirmative defense,⁸⁰ even the most activist courts would be loathe to adopt it directly in an era when promulgation of new substantive criminal law is considered properly within the legislative province. Courts are often faced, however, with defendants whose conduct meets the technical *mens rea* requirements, yet whose mental abnormality seems to require mitigation of culpability by providing a form of excuse in addition to a reduction in sentence. Some activist and "creative" courts have solved the quandary by interpreting the *mens rea* elements in a way that adopts the partial responsibility variant. These courts have often tortured the ordinary meanings of *mens rea* terms in order to achieve a result they perceive is just.

⁸⁰ The doctrine was first adopted in Scotland in the 19th century, *HM Adv. v. Dingwall*, 5 Irvine 466, 479-80 (1867) (defendant's alcoholism and peculiarities of mental constitution were extenuating circumstances justifying reduction in conviction from murder to culpable homicide), but the doctrine did not develop in England or elsewhere until after the Second World War. On the development of the Scottish doctrine and the "importation" of diminished capacity in England, see 1 N. WALKER, *CRIME AND INSANITY IN ENGLAND* 138-64 (1968).

The most blatant example of such de facto adoption of partial responsibility occurred in California in the law of homicide. In a series of decisions,⁸¹ the California Supreme Court interpreted the mens rea element of premeditation and the conclusory term "malice aforethought"⁸² to make of each a "mini-insanity defense" that was indistinguishable from the other or from the real insanity defense.⁸³ For instance, in *Wolff*,⁸⁴ "premeditation" was defined as the ability to maturely and meaningfully contemplate the gravity of one's acts,⁸⁵ and in *Poddar* and *Conley*, "malice aforethought," which formerly had no independent meaning, was defined as the ability to comprehend and act according to one's duty to obey the law.⁸⁶ One can, of course, play with the connotations of the words in these two tests, but as moral and legal criteria they are indistinguishable from each other and from an American Law Institute or *M'Naghten* type of insanity defense.

These vague definitions allowed a defendant whose conduct satisfied the elements of some degree of murder to introduce evidence of mental abnormality to reduce his conviction to either murder in the second degree or manslaughter. The California doctrine was confusing,⁸⁷ and led to what were popularly perceived as unjust or even absurd results in some cases.⁸⁸ Finally, in 1982, legislation went into effect that

⁸¹ For an extended discussion of the California doctrine, see Morse, *Diminished Capacity*, *supra* note 1, at 278-88.

⁸² "Malice aforethought" is a conclusory term because it has no independent meaning. It is merely a shorthand for those mens reas that make a homicide murder. This point has been recognized for over a century. J. STEPHEN, *DIGEST OF THE CRIMINAL LAW* 161-62 (1878). Thus, once a prosecutor has proven that the defendant killed with one of the requisite mental states, nothing more needs to be proven to convict the defendant of murder.

⁸³ Morse, *Diminished Capacity*, *supra* note 1, at 285.

⁸⁴ *People v. Wolff*, 61 Cal. 2d 795, 394 P.2d 959, 40 Cal. Rptr. 271 (1964).

⁸⁵ *Id.* at 821, 394 P.2d at 975, 40 Cal. Rptr. at 287.

⁸⁶ *People v. Poddar*, 10 Cal. 3d 750, 758, 518 P.2d 342, 348, 11 Cal. Rptr. 910, 916 (1974); *People v. Conley*, 64 Cal. 2d 310, 322, 411 P.2d 911, 918, 49 Cal. Rptr. 815, 822 (1966).

⁸⁷ See Morse, *Diminished Capacity*, *supra* note 1, at 285-86.

⁸⁸ The most vivid example was the case of Dan White, a former San Francisco supervisor, who was convicted of voluntary manslaughter for the intentional and apparently premeditated killings of Mayor Moscone and Supervisor Milk of San Francisco. *People v. White*, 117 Cal. App. 2d 270, 172 Cal. Rptr. 612 (1981). The facts raised no credible claim that the killing was done in the heat of passion upon legally adequate provocation, but voluntary manslaughter was possible through application of the doctrine of *People v. Conley*, 64 Cal. 2d 310, 411 P.2d 911, 49 Cal. Rptr. 815 (1966). The *White* case created particular outrage because the defendant claimed that his mental abnormality was aggravated by the extensive ingestion of sugar-laden junk food, a claim that gave rise to the appellation of diminished capacity as the "Twinkie defense."

The *Conley* case is itself a good example. Conley consistently threatened over the course of an entire weekend to kill his ex-lover, bought a gun expressly for the purpose of doing so, engaged in target practice, and then proceeded to shoot to death both the ex-lover and her husband, with whom she had been reconciled. *Id.* at 315, 411 P.2d at 914, 49 Cal. Rptr. at 817-18. This is a classic case of premeditated and thus first degree murder, but the California Supreme Court held that a verdict of voluntary manslaughter would be possible on retrial if

overruled the series of cases that had judicially created partial responsibility in the law of homicide.⁸⁹ California restored the mens rea elements of murder to their usual, sensible meanings⁹⁰ and adopted a true mens rea variant.⁹¹

Some courts still are enticed by the lure of adopting partial responsibility in the guise of interpreting the elements of crimes. A recent, instructive example is *Commonwealth v. Gould*,⁹² decided by the Supreme Judicial Court of Massachusetts. Dennis Gould was charged with and convicted of first degree murder for killing a former girlfriend. The prosecution's theory was that Gould had killed "with extreme atrocity or cruelty," one of the criteria for first degree murder in Massachusetts.⁹³ Gould had brutally killed his victim by stabbing her thirty-one times. The alleged motive was a delusional belief that he had a divine mission to do so because she was impure. As the dissent pointed out, the traditional test for "atrocity or extreme cruelty" was objective in Massachusetts: the factfinder looked simply to the manner of the killing.⁹⁴ Nevertheless, the majority held that consideration of the defendant's impaired mental capacity as well as the manner of killing was necessary if the jury was to serve fully and fairly as the community's conscience in

Conley lacked "malice" because he was unaware of his duty to act within the law. *Id.* at 322, 411 P.2d at 917, 49 Cal. Rptr. at 821.

⁸⁹ 1981 Cal. Stat. ch. 404. This was popularly known as S.B. 54 because it originated in the California Senate. The history and meaning of S.B. 54 is explored in Morse & Cohen, *Diminishing Diminished Capacity in California*, CAL. LAW., June 1982, at 24.

⁹⁰ Section § 189 of the California Penal Code now reads in part: "To prove the killing was deliberate and premeditated, it shall not be necessary to prove the defendant maturely and meaningfully reflected upon the gravity of his or her act." CAL. PENAL CODE § 189 (West 1984). This language was meant specifically to abolish the definition of premeditation adopted in *People v. Wolff*, 61 Cal. 2d 795, 394 P.2d 959, 40 Cal. Rptr. 271 (1964). Morse & Cohen, *supra* note 89, at 25. Section 188 of the California Penal Code now reads in part:

When it is shown that the killing resulted from the intentional doing of an act with express or implied malice . . . , no other mental state need be shown to establish the mental state of malice aforethought. Neither an awareness of the obligation to act within the general body of laws regulating society nor acting despite such awareness is included within the definition of malice.

CAL. PENAL CODE § 188 (West 1984). This language was meant specifically to abolish the definition of "malice" adopted in *People v. Conley*, 64 Cal. 2d 310, 411 P.2d 911, 49 Cal. Rptr. 815 (1966), and *People v. Poddar*, 10 Cal. 3d 750, 518 P.2d 342, 11 Cal. Rptr. 910 (1974). Morse & Cohen, *supra* note 89, at 25.

⁹¹ 1981 Cal. Stat. ch. 404, § 4 (adding § 28(a) to the Penal Code, which provided that evidence of mental abnormality was admissible on the issue whether the accused actually formed a requisite mental state). This legislation was immediately amended by 1982 Cal. Stat. ch. 894, § 3, to reintroduce the distinction between specific and general intent, and to allow negation only of the former by evidence of mental abnormality. CAL. PENAL CODE § 28(a) (West 1984); see *supra* note 44.

⁹² — Mass. —, 405 N.E.2d 927 (1980). All descriptions in the text are taken from the court's opinion.

⁹³ MASS. GEN. LAWS ANN. ch. 265, § 1 (West 1970).

⁹⁴ *Gould*, — Mass. at —, 405 N.E.2d at 939.

deciding when extreme atrocity or cruelty was sufficient to warrant a verdict of murder in the first degree.⁹⁵ To help it decide whether the defendant killed with extreme atrocity or cruelty, the jury could properly be instructed to consider the effect of the defendant's impairment on "his ability to appreciate the consequences of his choices."⁹⁶

Note well what the *Gould* court has and has not done. It has not imposed a traditional mens rea requirement: it does not hold that the defendant must consciously risk, know, or intend that he is causing the victim unusually great pain or suffering. Rather, the court is allowing the jury to consider mental abnormality in order to determine if the lower verdict of second degree murder is more consonant with justice. This is partial responsibility language, much akin to the language of the *Wolff* case in California (and to the cognitive branch of insanity defense tests), but it is adopted in the guise of interpreting the elements. The court has adopted true partial responsibility, but has limited its application to a theory of first degree murder. If the ability to appreciate the consequences of one's choices is relevant to one's responsibility for a killing committed in an objectively brutal manner, why is it not relevant to responsibility for any crime? If the law will consider partial responsibility at all, is not the ability to appreciate the consequences of choices a factor in one's moral capacities that should bear on accountability for all actions? As the California experience demonstrated and *Gould* confirms, it is difficult to avoid illogical limitations on partial responsibility if one adopts this partial defense in the guise of interpreting the elements of specific crimes.

The last context in which partial responsibility has been adopted is sentencing practices. Mental disorder is used formally or informally to justify a reduction in punishment because the court perceives the defendant as less responsible.⁹⁷ This practice reaches its most obvious expression in capital punishment statutes, which provide that mental disorder is a mitigating factor when it affects the defendant's ability to know right from wrong or to control his actions.⁹⁸ Such statutes have simply incorporated the insanity defense into death penalty proceedings, a classic instance of adopting partial responsibility.

The virtue of employing mental disorder to reduce sentences is that, generally, there are no illogical limitations placed on this use. De-

⁹⁵ *Id.* at —, 405 N.E.2d at 935.

⁹⁶ *Id.* at — n.16, 405 N.E.2d at 935 n.16.

⁹⁷ A useful analysis of this practice is contained in N. MORRIS, *MADNESS AND THE CRIMINAL LAW* 129-60 (1982).

⁹⁸ *E.g.*, CAL. PENAL CODE § 190.3(h) (West 1984); CONN. PENAL CODE § 53a-46a(f)(2) (1980). Both these statutes adopted the definition of legal insanity found in the MODEL PENAL CODE § 4.01 (Proposed Official Draft 1962), as the criterion for mitigation.

defendants convicted of any crime can have their sentences reduced, and in theory there is no limit to the amount of reduction. Any defendant might be sentenced to unsupervised probation if a judge thought him sufficiently irresponsible, and if he were not dangerous.⁹⁹ There are two defects in this approach, however. First, the assessment of responsibility is usually a high visibility task left to the factfinder as the moral representative of the community. Considering partial responsibility at sentencing hides this essential moral evaluation from the community and treats it more as a matter of penal tinkering. Moreover, to the extent that public safety is compromised by a judge's sympathies, this too is usually hidden. More important, there are simply no normative or factual criteria to guide the determination of how mental disorder in its various manifestations affects responsibility. In jurisdictions with indeterminate sentencing schemes, where the range of sentences available for each crime may be very wide, this inevitably creates arbitrary practices and unequal punishment.¹⁰⁰

III. MENTAL ABNORMALITY AND DESERT: THE WISDOM OF PARTIAL RESPONSIBILITY

Those who believe that mental abnormality reduces legal responsibility usually take this belief for granted. A common expression of this unexamined belief occurs in the sentencing process, for instance, where mental health evidence is generally accepted as highly relevant without question. In the prior subsection of this Article,¹⁰¹ I provided a rationale for this belief based on the assumption that an actor's cognitive and volitional competence at the time of an act are relevant to his or her moral and legal responsibility. The partial responsibility doctrine is therefore coherent, and, as I argued in a previous paper, workable if it is kept within reasonable bounds.¹⁰² Nevertheless, I believe that partial responsibility should not be adopted, and will offer a normative theory of criminal responsibility and punishment to justify this position.

I shall begin inductively, by presenting cases that strongly support the intuitions *in favor* of partial responsibility. First, compare the case of Mrs. Tempest with that of a killer-for-hire or political terrorist, all of whom are first degree murderers. Mrs. Tempest is a person with an

⁹⁹ If he were dangerous, some deal involving civil commitment might be arranged.

¹⁰⁰ Morse, *Justice, Mercy and Crazyness*, 37 STAN. L. REV. — (forthcoming) (copy on file with the *Journal of Criminal Law and Criminology*). There may be a workable solution to the arbitrariness problem, as I suggested in Morse, *Diminished Capacity*, *supra* note 1, at 291-96, but as I argue in section III, *infra* notes 101-21 and accompanying text, it is unwise to adopt partial responsibility.

¹⁰¹ See *supra* notes 63-66 and accompanying text.

¹⁰² Morse, *Diminished Capacity*, *supra* note 1, at 291-96.

extended history of disordered behavior, much of it severe, and although the motivation for her offense meets minimal notions of rationality, it is nonetheless puzzling and, in some fundamental way, inexplicable. If she wished to be rid of her son and husband in order not to face them or the social interactions attendant upon her son growing up, she could simply have left the home. Drowning the child in such a pitiless fashion hardly comports with our notions of a reasonable solution to what is, after all, not an uncommon domestic situation.

Mrs. Tempest's behavior seems utterly different from that of the hired killer or political terrorist. Their motives—money and political belief—are perfectly understandable. Those types of killers may be perfectly rational and without a history of mental disorder. Of course, one can argue that anyone who kills for money or kills innocent non-combatants because of a political belief must be "sick," but this argument blurs the distinction between madness and badness, and reduces moral to medical analysis. In short, there appears to be something "wrong" with Mrs. Tempest that led her to kill, whereas there is nothing medically or quasi-medically wrong with the mercenary or terrorist. It is precisely this aberration, this "wrongness," in Mrs. Tempest's case that supposedly necessitates treating her differently. Is it not morally obtuse to place her and the others in the same moral and legal category?

Consider also the provocation/passion formula by which the common law and most homicide statutes reduce an intentional killing from murder to voluntary manslaughter.¹⁰³ An actor who kills after being provoked to the heat of passion by circumstances that would have so provoked a reasonable person is deemed less culpable than if the killing were done in cold blood or if the provocation were insufficient to incite a reasonable person. The theory underlying the mitigation of culpability is that the offense is substantially a product of circumstances, rather than primarily the result of the actor's bad character. Further, those circumstances affected the actor's rationality and self-control to a morally and legally cognizable degree. It takes little imagination to recognize that the provocation/passion formula is a form of partial responsibility, although not one based on mental abnormality arising from mental disorder or defect.

The law's traditional acceptance of the provocation/passion

¹⁰³ For the background of this doctrine, see Ashworth, *The Doctrine of Provocation*, 35 CAMBRIDGE L.J. 292, 292-306 (1976). A recent attempt to justify and suggest reforms of the doctrine in light of supposed advances in the knowledge of human behavior is Dressler, *Rethinking Heat of Passion: A Defense in Search of a Rationale*, 73 J. CRIM. L. & CRIMINOLOGY 421 (1982). For the empirical and normative reasons I gave in Morse, *Crazy Behavior*, *supra* note 29, and Morse, *Failed Explanations*, *supra* note 29, and will give in this section of the present Article, I am unconvinced by Professor Dressler's article, although there is much of interest and use in it.

formula to reduce murder to manslaughter poses a challenge to opponents of partial responsibility. If one accepts the traditional assumption that the provoked and therefore less rational and self-controlled actor is less responsible, how can one deny similar mitigation to an actor whose problems with rationality or self-control are the product of mental disorder or defect? Indeed, a powerful argument can be mounted that the disordered person deserves mitigation more than his provoked counterpart. The provoked actor is presumptively mentally normal and therefore supposedly in possession of the capacity to resist the homicidal intention aroused by the provoking circumstances. Because the truly reasonable person does not kill under even highly provoking circumstances, the provoked actor who does kill must have some moral or character defect that permits him to yield to his intention to kill. And, of course, because we are generally held to be responsible for our characters, it may fairly be argued that the provoked killer's lack of rationality or self-control is his own fault. By contrast, the irrationality or self-control problems of the disordered person are not considered his fault; they are not a product of moral weakness or character defect. Thus the law already appears to accept partial responsibility for actors less deserving than the mentally abnormal.

In light of these considerations, what argument is there for rejecting partial responsibility, and thus for treating Mrs. Tempest and the political terrorist alike? The conclusion for which I wish to argue is that actors who commit the same acts with the same *mens rea* should, on moral grounds, be convicted of the same crime and punished alike without regard to differences in background, mental or emotional condition, or other factors often thought to necessitate mitigation. Thus, there should be no affirmative defense of partial responsibility and sentencing should be determinate. The task is to provide a nonconsequentialist justification for ignoring undoubted psychological differences between actors who technically commit the same offense.¹⁰⁴

Analysis of responsibility usually begins by asking about all the difficulties, burdens, problems, and misfortunes suffered by the perpetrator, all the criminogenic reasons why obeying the law seemed so hard, why offending seemed so inevitable. But suppose we start with a different question: How hard is it not to offend the law? How hard is it not to

¹⁰⁴ The consequentialist arguments for doing so are relatively clear. Taking account of those differences at either trial or sentencing creates such an arbitrary exercise of discretion, however, that the moral claim to be treated differently is overwhelmed by the impracticality of doing so evenhandedly. In contrast, I have argued and continue to maintain that a reasonably workable, although highly imperfect, compromise is possible if one accepts the moral claim. Morse, *Diminished Capacity*, *supra* note 1, at 291-96. The burden of this Article is to deny the validity of the moral claim for legal purposes.

kill, burgle, rob, rape, and steal? The ability to resist the temptation to violate the law is not akin to the ability required to be a fine athlete, artist, plumber, or doctor. The person is not being asked to exercise a difficult skill; rather, he or she is being asked simply to refrain from engaging in antisocial conduct. Think, too, of all the factors mitigating against such behavior: parental, religious, and school training; peer pressures and cultural expectations;¹⁰⁵ internalized standards ("superego"); fear of capture and punishment; fear of shame; and a host of others. Not all such factors operate on all actors or with great strength: there will be wide individual differences based on life experiences and, perhaps, biological factors.¹⁰⁶ Nonetheless, for all persons there are enormous forces arrayed against lawbreaking. It is one thing to yield to a desire to engage in undesirable conduct such as to gossip, brag, or treat one's fellows unfairly; it is another to give in to a desire to engage in qualitatively more harmful conduct such as to kill, rape, burgle, rob, or burn.¹⁰⁷

The substantive criminal law sets minimal ethical and legal standards that ask very little of us and are easy to meet. Even if an actor has rationality or self-control problems, it is not hard for a legally responsible person to avoid offending. This is a morally relevant empirical claim that cannot be rigorously confirmed or disconfirmed, but I believe the assumption is every bit as plausible as the opposite and I wish to rely on it.¹⁰⁸ If the empirical claim is correct, the differences that exist be-

¹⁰⁵ Peer pressure or subcultural expectations might be criminogenic rather than inhibitory in some cases. One wonders, however, to what degree members of any subculture are generally committed to the "rightness" of antisocial conduct. See D. MATZA, *DELINQUENCY AND DRIFT* 48-50 (1964).

¹⁰⁶ For an examination of the possible biological predisposing causes of criminal behavior, see S. MEDNICK & K. CHRISTIANSEN, *BIOLOGICAL BASES OF CRIMINAL BEHAVIOR* (1977). It does not follow from the possible existence of predisposing biological causes of crime (or any other behavior) that individuals are not responsible for their behavior. Concluding otherwise confuses causation with excuse. See A. AYER, *Freedom and Necessity*, in *PHILOSOPHICAL ESSAYS* (1954). This point is discussed in the context of criminal responsibility in Morse, *Failed Explanations*, *supra* note 29, at 1027-30, 1033-37.

¹⁰⁷ The distinction in the immorality and harmfulness of the two "classes" of conduct is identified by criminalization of the latter but not the former.

¹⁰⁸ As noted in the text, this is an impossible-to-prove empirical assertion with substantial moral consequences. One could note in support that most persons do not offend the law in nontrivial ways and that a small group of so-called "career" criminals commits the vast majority of crimes. U.S. DEPT. OF JUSTICE, *REPORT TO THE NATION ON CRIME AND JUSTICE* 30-31, 34 (1983); Morse, *The Twilight of Welfare Criminology: A Reply to Judge Bazelon*, 49 S. CAL. L. REV. 1247, 1252 n.17 and sources cited therein (1976). Such data are simply not dispositive, however, because they do not truly plumb the subjective psychological experience of most persons. Until dispositive data are available—and they may never be—we must rely on common sense, intuition, and everyday experience.

We might also ask normatively, in light of the lack of dispositive data, which empirical assumptions or intuitions imply legal rules that are likely to promote greater respect for persons and a safer society. I recognize, of course, that if one disagrees with my empirical claim on the basis of his or her contrary *empirical* intuitions, then this section will not be convincing.

tween offenders convicted of the same crime are morally insignificant compared to the similarities. The great value of this position, placing the burden of persuasion on those who believe it is hard to obey the law, is that it treats people with greater respect and dignity than the opposing view, which treats them as helpless puppets buffeted by forces that rob them of responsibility for their deeds. Moreover, I do not believe it is a harshly unrealistic view. Rather, it goes to the heart of what it means to be a responsible person in a world that cannot exist without vast amounts of restraint and forbearance towards our fellows.

As long as the function of conviction and sentencing is to punish the actor for what he has done, rather than for who he is, there is no injustice in treating alike actors whose behavior satisfies the elements of the same crime and meets the low threshold standard for legal responsibility.¹⁰⁹ So little self-control and rationality are necessary to obey the law, that when all the elements of a *prima facie* case are present, the person should be held fully legally culpable. The culpability of those who satisfy the *prima facie* case is fundamentally equivalent, although there may be differences in their characters or psychologies. Legally relevant differences in culpability can be captured by the different definitional act and mental state elements and by the definitions of defenses.¹¹⁰

Let us apply these principles to the example used to begin this subsection of the Article. Viewed in the way I have suggested, Mrs. Tempest's act seems far more sinister than if it is examined primarily from the viewpoint of her alleged mental aberration. It is, of course, impossible to prove this point, but I believe it is completely plausible to assume that it was not so hard to avoid killing her six-year-old son by holding

On the other hand, if one's empirical assumptions depend upon a normative view that we *ought* to behave as if it were hard to obey the law because a society which makes such an assumption is more just, then one's view of empirical reality might shift because my normative vision may be convincing.

¹⁰⁹ The point in the text assumes that the actor is not legally insane and thus does meet the admittedly low standards for legal responsibility. The discussion in the text is clearly not relevant to legally insane actors.

¹¹⁰ In other words, desert should be a defining limit on punishment. To argue a more complete theory of desert and sentencing, however, would go far beyond the purposes of this Article. Many of the arguments may be found in Morse, *Justice, Mercy and Craziness*, *supra* note 100. For now, it is sufficient to note that a determinate sentencing scheme is a coherent outcome of my presuppositions about responsibility.

Those who wish to use desert as only a limiting and not a defining principle usually do so either for consequentialist reasons or because they believe that consideration of just deserts cannot possibly yield fixed terms of punishment for particular offenses. *See, e.g.*, Morris, *supra* note 97, at 148-55. For instance, they fear that determinate sentencing schemes will operate in an unduly harsh manner. They also assume, usually for unarticulated reasons, that individual differences in character or psychology should be taken into account in sentencing actors for the same act.

him under water as he struggled for his life. Mrs. Tempest knew what she was doing, knew it was wrong, thought it through, and killed intentionally. She did it cold-bloodedly and over a time period that forced her to confront what she was doing. What Mrs. Tempest *did* was as horrible, as merciless, and caused as much suffering as the acts of the terrorist or hired killer. All three are responsible for what they did. Mrs. Tempest may have had fewer mental and emotional resources than the others, but she had more than enough not to kill Gregory. Mrs. Tempest, the terrorist and the hired killer committed the same act and all deserve to be punished alike.¹¹¹ I have more sympathy in general for Mrs. Tempest because she has had a sadder life, perhaps, but I do not sympathize with this act in the slightest.¹¹²

The same type of analysis applies to the provocation/passion formula for reducing murder to voluntary manslaughter. I would abolish this hoary distinction and convict all intentional killers of murder.¹¹³ Reasonable people do not kill no matter how much they are provoked,¹¹⁴ and even enraged people generally retain the capacity to control homicidal or any other kind of aggressive or antisocial desires. We cheapen both life and our conception of responsibility by maintaining the provocation/passion mitigation. This may seem harsh and contrary to the supposedly humanitarian reforms of the evolving criminal law.¹¹⁵ But this "whig" interpretation of criminal law history is morally mis-

¹¹¹ How is one to explain Mrs. Tempest's behavior? One explanation, more theological than psychological, is that Mrs. Tempest's act was the product of evil. Such explanations are not fashionable and in some sense are tautological, but otherwise it is very hard to face the implications of Mrs. Tempest's deed. Psychiatric or psychological explanations do not fare much better, however. She was not out of touch with reality, but, perhaps, she was so characterologically depressed that she was not able to feel the impact of what she was doing. In other words, underlying depression may have anesthetized her ability to empathize with the pain of her son. Such failure of empathy would depersonalize Gregory, thus making it easier to take his life. It is harder, after all, to harm those with whom we identify and empathize as human beings. Even assuming that the psychological explanation approximates the truth, it does not vitiate responsibility in an otherwise rational adult. Depression could not have been the entire cause of the conduct and causation is not an excuse in any case. See *supra* note 106.

¹¹² One might fairly ask if the argument in the text would support the imposition of the death penalty on Mrs. Tempest as well as on the terrorist or killer-for-hire. The first answer is that the death penalty should not be imposed on anyone. If it must be, however, Mrs. Tempest should probably not be distinguished. She killed without a semblance of good reason for doing so and the deed was carried out in a pitiless way that caused immense suffering to the victim.

¹¹³ The conviction would simply be for murder where there are no degrees of murder, and, because of the absence of premeditation in most cases of provocation and passion, it would be for second degree murder where there are degrees.

¹¹⁴ This point is well recognized by the commentators, e.g., Williams, *Provocation and the Reasonable Man*, 1954 CRIM. L. REV. 740, 742. See also *supra* notes 104-110 and accompanying text.

¹¹⁵ See Ashworth, *supra* note 103, for the history of the developments.

taken.¹¹⁶ It is humanitarian only if one focuses sympathetically on perpetrators and not on their victims, and views the former as mostly helpless objects of their overwhelming emotions and irrationality. This sympathy is misplaced, however, and is disrespectful to the perpetrator. As virtually every human being knows because we all have been enraged, it is easy not to kill, even when one is enraged.

One may object at this point that there are provocation/passion cases that compel the need for such a formula. Imagine the following case. A parent returns home to find that his child has been brutally attacked by a perpetrator who is now running away. There is no further immediate danger to the child, the parent, or anyone else. Nevertheless, the understandably enraged parent shoots and kills the fleeing criminal. In jurisdictions that do not allow the use of deadly force for the purpose of civilian law enforcement under such conditions, it is a case of second degree murder unless the provocation/passion formula exists.¹¹⁷ The better solution, I believe, is to provide a total defense based on irrationality or lack of self-control where the provocation and consequent lack of rationality were both so great that it would be unjust to punish the defendant at all. The hypothetical may be just such a case. These cases, like all those where a complete defense is possible, will be extreme.¹¹⁸ This is as it should be. Most intentional killers deserve little sympathy.

A further argument in favor of the bright line, "all-or-none" tests of criminal responsibility that I have proposed is that bright line tests are not uncommon. We do not think that limits on other doctrines are unfair because they ignore allegedly relevant differences between offenders. Consider the excuse of duress, for example. The defendant claims that for nonculpable reasons—the uninvited and unassented-to threat of another—his self-control was impaired because of his fear of the threatened consequences of not performing the commanded act.¹¹⁹ The

¹¹⁶ In its most general form, a "whig" interpretation interprets the past in terms of the present and ratifies present arrangements as the inevitable result of beneficent progress in human affairs. The classic essay on this type of historical understanding is H. BUTTERFIELD, *THE WHIG INTERPRETATION OF HISTORY* (1931). By contrast, I believe the development is a case of unjustified sympathy. I also assume that abolition of the provocation/passion formula would be a constitutional exercise of a state's power to make substantive criminal law. See *Patterson v. New York*, 432 U.S. 197, 228 (1977) (Powell, J., dissenting) ("nothing in *Mullaney* or *Winship* precludes a State from abolishing the distinction between murder and manslaughter and treating all unjustifiable homicide as murder").

¹¹⁷ This assumes, too, that the State would prosecute under such circumstances.

¹¹⁸ Although passion produced by provocation usually compromises rationality or self-control, almost all impassioned persons nevertheless can and should be expected to control themselves. It is a matter of degree, however. In those cases where the loss of rationality or self-control is both extreme and nonculpable, there is ground for a complete excuse. The provocation/passion formula would then operate like the insanity or duress defenses.

¹¹⁹ Note, too, that defendants claiming duress do not usually allege that they lacked the

force of such threats can be arrayed along a continuum from mild to severe, with corresponding effects on the threatened actor's self-control. The effects of threats can thus be analogized to the effects of mental abnormality, but there is no partial responsibility excuse for duress. With little apparent resistance on moral grounds, we excuse entirely the defendant who offends under the influence of severe threats, but we hold entirely culpable those who act under the influence of lesser threats. There is thus precedent for all-or-none tests for excuse.¹²⁰

Consider also the *mens rea* of intent. People form intents with various degrees of strength and commitment. An actor who commits a heinous deed wholeheartedly is certainly different from one who commits the same deed with doubts and weak commitment to it. Nonetheless, we do not hold the latter guilty of a lesser degree of crime or consider him less responsible on grounds of "diminished intent." Once the threshold of culpability is reached, the structure of elements and defenses treats actors as fully culpable.

The existence of all-or-none tests does not normatively justify either accepting their continued existence or extending this approach to other contexts. It does imply, however, that partial responsibility proponents must claim and justify either that present all-or-none tests are improper, or that at least some of them can be distinguished from mental abnormality. Because what I am proposing is not new, I believe that the burden of persuasion should be on the proponents of partial responsibility to provide the indicated justification. In addition, the empirical and normative argument I provided for an all-or-none approach to mental abnormality can also form the foundation for a similar argument in favor of continuing an all-or-none approach to other doctrines.

It is also important not to confuse responsibility and culpability when we consider the propriety of an all-or-none test for excuse based on mental abnormality. There are cases in which the actor's behavior conforms to the elements of a crime, but the actor appears to deserve lesser or no punishment. Such cases are used to suggest the need for partial responsibility, but I believe this use confuses culpability and responsibility. Consider the case of a mercy killer. If we believe that the mercy

mens rea of intent. Indeed, the compelling threat explains precisely why defendants intended to act as they did.

¹²⁰ In some cases, there does seem to be a partial excuse. For example, in cases of so-called "imperfect self-defense," the actor kills under the influence of a mistaken, unreasonable belief that it is necessary to do so. Because the actor honestly believed deadly force was necessary, many jurisdictions provide for a conviction of only manslaughter. Rather than treating this as a case of partial excuse or mercy, however, it is more rationally appropriate to the defendant's culpability to convict him of negligent or reckless homicide—depending on his awareness of the risk that deadly force was necessary. This is the Model Penal Code position. MODEL PENAL CODE § 3.09(2) (Proposed Official Draft 1962).

killer—whose behavior usually satisfies the elements of first degree murder—should not be punished as harshly as a killer-for-hire, it is not because the mercy killer is less responsible for the killing. The real ground is that we do not believe that a true mercy killing, accomplished with the victim's consent, is as culpable as a mercenary killing. The sympathy many persons feel for a mercy killer does not imply the need for partial responsibility; rather, it suggests that the criminal law should adopt more generous principles of justification to exculpate rational actors whose behavior conforms technically to the elements of a crime.¹²¹

The law should not adopt the doctrine of partial responsibility. Responsible actors who commit crimes retain sufficient rationality and self-control to deserve whatever punishment the law decrees for the crime committed. This view evinces great respect for human capacities and does no defendant an injustice. In those cases where the actor's rationality or self-control is nonculpably compromised to an extreme degree, a defense based on "innocent irrationality" should be available. Moreover, to the extent that legal rules guide behavior by precept or by the creation of fear of punishment, strict rules of responsibility should decrease the incidence of lawbreaking.

IV. MENTAL ABNORMALITY, EXPERT TESTIMONY, AND MENS REA

This section of the Article will consider the use of expert testimony in diminished capacity cases. It will explore the uses and abuses of such testimony and propose reforms to enhance the quality of decisionmaking. After a general introduction, the discussion will address separately the mens rea and partial responsibility variants, and the relevance of diagnoses in diminished capacity cases.

One of the most striking phenomena that confronts the reader of diminished capacity cases is the utter incredibility of so much of the expert testimony that is presented. Mental health experts will testify that a defendant lacked the capacity to form a mens rea when it is blatantly apparent that the requisite mens rea was formed in fact. The *Tempest* case once more furnishes a prototypical example. Whatever else one may believe about Mrs. Tempest's mental state when she drowned Gregory by holding him under water for five minutes, she clearly intended to kill him. Her reason for killing him may seem irrational, sick, weird, nonsensical, appalling, unbelievable, or whatever, but there is no

¹²¹ The true mercy killer lacks neither rationality nor self-control. She is therefore fully responsible for her deed. We may acquit her because we believe the heartbreaking circumstances justify the choice-of-evils (necessity) defense, but it will not be because she has a mental abnormality that renders her less responsible. If the heartbreaking circumstances appeared to drive her beyond the threshold boundary of rationality, then an "irrationality" excuse as well as a choice-of-evils justification might be possible.

doubt that she intended to kill her son. Moreover, by her own admission, she had been considering doing it for days. Unless premeditation is given a meaning it never had in linguistic or legal usage, she also premeditated the killing. Finally, if a person performs an action, he or she necessarily had the capacity to do it. Mrs. Tempest had the capacity to kill Gregory with premeditated intent.

What, then, could two presumably competent mental health professionals have meant when they testified that Mrs. Tempest lacked the capacity to form the intent to kill or to premeditate?¹²² The first possibility is that they defined intent and premeditation in an idiosyncratic manner. These definitions would certainly not comport with legal or common usage, however, and, needless to say, intent and premeditation are not psychiatric terms that have a technical, unique meaning within that profession. The second possibility is that the experts understood full well that Mrs. Tempest had the capacity to form the requisite mental states and formed them in fact, but they also believed that she was not fully responsible because of her mental abnormality. Consequently, they were willing to "bend" their "scientific," "expert" testimony in order to promote a result they considered more just. The doctors' notions of justice are quite irrelevant to their scientific expertise on questions about mental states, of course, but one can understand their motivations as human beings. A third possibility is that both factors just discussed were operative at once, reinforcing each other. Whatever were the causes of the doctors' testimony, however, it is apparent that their testimony was absurd on both common sense and scientific grounds.

What is so troubling is that the *Tempest* example is not unusual.¹²³ Trial and appellate courts are literally bombarded by irrelevant, confusing, and prejudicial testimony from mental health professionals who either do not understand what the law requires of them or who have not-so-hidden agendas. Lawyers who encourage such testimony and judges who permit it are also to be faulted for failing to maintain the integrity of the adversary process. Wide latitude should be given to the parties in a criminal trial, but it should not be so wide that it makes a mockery of truth-finding. In order to explore how the integrity of fact-finding in diminished capacity cases may be restored, let us systematically consider the nature of mens rea and partial responsibility, their

¹²² *Commonwealth v. Tempest*, 496 Pa. 436, 441, 437 A.2d 952, 954-55 (1981).

¹²³ *E.g.*, *State v. Billado*, 141 Vt. 175, 446 A.2d 778 (1982); *State v. Gallegos*, — Colo. —, 628 P.2d 999 (1982); *State v. Johnson*, 92 Wash. 2d 671, 600 P.2d 1249 (1979). On the other hand, juries often disbelieve these claims, many of which involve abnormalities resulting in whole or in part from drugs or alcohol. *E.g.*, *State v. Belieu*, 288 N.W.2d 895 (Iowa 1980).

relationship to mental abnormality, and the expertise possessed by mental health professionals and others about these topics.

A. MENS REA AND MENTAL ABNORMALITY

The common law history of mens rea has been a riot of confusing terms,¹²⁴ but many of the different terms have the same meaning and all the various terms can be categorized into a small number of culpable mental states. The Model Penal Code delineation of purpose (intent), knowledge, recklessness (awareness of substantial and unjustifiable risk), and negligence (culpable nonawareness of substantial and unjustifiable risk) is quite comprehensive.¹²⁵ The array of legally distinguishable mental states is not that broad. Furthermore, most mens reas have cognitive meanings that are closely tied to ordinary linguistic usage.¹²⁶ There is nothing fancy about the mens rea, "intent," for instance; it simply means purpose. One intends a result if achieving it is one's goal or purpose. A person who shoots another with the purpose of taking his victim's life intends to kill the victim. Knowledge is similarly prosaic: one must simply be aware of or have perceived the necessary facts. On occasion, one term will include another unrelated term within its definition—the requirement of intent is often satisfied by knowledge, for example.¹²⁷ There may often be confusion for historical or other reasons about which mens rea is actually required for liability, but once it is identified, there will be nothing complex about it. Once it is understood that knowledge is sufficient, although the statute ostensibly requires intent, one can proceed to determine if knowledge was present. The law's common confusion about which mental state is required does not lead to the conclusion that the required mental state is similarly confused or complex.

The question of what intent per se means, which I have argued is relatively simple, must also be distinguished from the thorny question of how to decide what a person intends. Philosophers and legal scholars have argued for decades about the proper way to individuate inten-

¹²⁴ THE LAW COMMISSION, REPORT ON THE MENTAL ELEMENT IN CRIME 3 (No. 89, 1978); P. LOW, J. JEFFRIES, JR. & R. BONNIE, CRIMINAL LAW 204-06 (1982).

¹²⁵ MODEL PENAL CODE § 2.02(2) (Proposed Official Draft 1962); see generally MODEL PENAL CODE § 2.02(2) Comments at 124-26 (Tent. Draft No. 4, 1955). For a useful analysis of the modern, "elements," approach to the definition of crimes, see Robinson & Grall, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 STAN. L. REV. 681, 685-91 (1983).

¹²⁶ E.g., *Commonwealth v. Weinstein*, — Pa. —, —, 451 A.2d 1344, 1347 (1982). Of course, some degree of normality of consciousness is necessary. G. WILLIAMS, TEXTBOOK OF CRIMINAL LAW 665 (2d ed. 1983).

¹²⁷ MODEL PENAL CODE § 2.02(2) Comments at 124-25 (Tent. Draft No. 4, 1955).

tions.¹²⁸ This problem occurs in a variety of criminal law contexts. For instance, the debate about whether an attempt is legally impossible and therefore not criminal often turns on how one fixes the object of the defendant's intention.¹²⁹ But whatever theory for individuating intentions is chosen, the meaning of intent is still relatively simple.

Although there is nothing mysterious about mens rea,¹³⁰ many mental health professionals either have misunderstood the law, attempted to impose their own preferred definitions on mens rea terms, or both. Bernard Diamond, a well-known writer in this area, provides a clear example. After quoting Professor Sayre's dictum that there are innumerable kinds of mens rea, Professor Diamond asserts "that there must exist innumerable degrees of any particular *mens rea*."¹³¹ Not only are the premise and the assertion/conclusion factually incorrect, but the conclusion is also a non sequitur. Although there may be innumerable mens rea terms, as already discussed, these may be collapsed into relatively few categories. Moreover, there is little evidence that the law treats any particular mens rea as a class containing innumerable degrees.¹³² Finally, the existence of innumerable, truly distinct mens reas would not logically entail degrees within a mens rea. The law could choose to grade culpability by creating a series of limited, discrete mens reas without also attempting to grade culpability by creating degrees within the distinct mens reas. The assertion about degrees of mens reas confuses general and special mens rea;¹³³ it is also special pleading for a species of partial responsibility that uses incorrect factual and logical arguments about mens rea.¹³⁴

Another counterargument is that "[o]ne can only 'intend,' in the

¹²⁸ See e.g., M. MOORE, *PSYCHIATRY AND LAW: RETHINKING THE RELATIONSHIP* ch. 1 (1984); Chinn, *Intentional Actions and Their Side Effects*, 15 S.J. PHIL. 161, 167 (1977); Moore, *Intentions and Mens Rea* (1984) (manuscript to be published in *Proceedings of the Conference on the Legal Philosophy of H.L.A. Hart*).

¹²⁹ In the celebrated case of *People v. Jaffe*, 185 N.Y. 497, 78 N.E. 169 (1906), the question was whether the defendant could be convicted of attempting to receive stolen goods when he believed they were stolen, though they had in fact been returned to their rightful owner before being passed to him. Did Jaffe intend to receive stolen goods? Some commentators have argued that he intended only to receive the goods received: because these were not stolen, he therefore did not intend to receive stolen goods. The obvious alternative (and far better) view is that we should individuate intentions according to the actor's subjective beliefs. This is the Model Penal Code § 5.01(a) view.

¹³⁰ Of course, it is often difficult to reconstruct what was in a person's mind in the past. See *supra* text accompanying notes 33 and 40.

¹³¹ Diamond, *Criminal Responsibility of the Mentally Ill*, 14 STAN. L. REV. 59, 73 (1961).

¹³² Neither statutory nor judicial formulations recognize degrees of intent, knowledge, or other mens reas if the threshold standard for formation of the mens rea is satisfied.

¹³³ For the distinction between the two, see *supra* note 23.

¹³⁴ Some courts recognize this. E.g., *Hensel v. State*, 604 P.2d 222 (Alaska 1979); *Gray v. State*, 441 A.2d 209 (Del. 1981); *State v. Dargatz*, 228 Kan. 322, 614 P.2d 430 (1980).

mens rea sense, if one possesses the capacity to choose a course of action and to substantially understand the nature of this choice."¹³⁵ This is an ipse dixit, not an argument, however. Moreover, what does it mean to say that a crazy defendant does not "choose" his behavior? Is intentional behavior motivated by a delusion any less "chosen" than intentional behavior motivated by rational reasons? Moreover, "intend" does not intrinsically mean that one understands the nature of the "choice." Intentional behavior motivated by normal ignorance is no less intentional than similar behavior motivated by delusions. Crazy actors are excused because they are crazy, not, typically, because their conduct is unintended.¹³⁶

These confusions cause the absurdities in mental health testimony such as the ones described above. For instance, mental health professionals who believe there are innumerable degrees of mens rea within the mens rea denominated "intent" might claim in good faith that Mrs. Tempest was so mentally abnormal that she did not intend to kill Gregory. Note again, however, that such a claim is really about partial responsibility, not special mens rea. This whole confusion is, of course, compounded if the mental health professional believes that mental abnormality necessarily relieves an actor of responsibility for his acts, despite the mental state with which these acts may have been carried out. These sorts of confusions and absurdities can be avoided only if judges remember that mental elements are cognitive and common-sensically defined.¹³⁷

Confusion and absurdity can also be avoided if one remembers that mens rea, properly understood, is rarely negated by mental abnormality, no matter how severe the disorder or defect.¹³⁸ This is not a point I can prove empirically with rigor, but experience with cases at the trial level,

¹³⁵ MacBain, *The Insanity Defense: Conceptual Confusion and the Erosion of Fairness*, 67 MARQ. L. REV. 1, 30 (1983).

¹³⁶ See *State v. Buzynski*, 330 A.2d 422 (Me. 1974). Of course, craziness or a mistaken belief can negate intent. The person who thinks he is shooting a tree does not intend to kill a person. See *supra* note 16 and accompanying text. However, this situation must be distinguished from that in which the craziness or ignorance has only the effect of motivating the legally proscribed intent.

¹³⁷ If mens reas were not cognitive mental states, then the law would be in the incongruous position of excusing all persons who suffer from Antisocial Personality Disorder. DSM-III, *supra* note 36, at 317-21. Almost all the criteria for the disorder, the modern diagnostic category that has replaced "psychopathy," are antisocial behaviors. Defendants suffering from this disorder, although cognitively intact, might rightly claim from the general mens rea/partial responsibility viewpoint that they lacked mens rea. This would be an absurd result.

¹³⁸ The possible exception is premeditation, because this mens rea has a temporal as well as a cognitive aspect. When an intent to kill produced by any factor is formed and acted upon suddenly, premeditation is negated. See *infra* text at p. 41; Morse, *Diminished Capacity*, *supra* note 1, at 277 n.26.

readings of hundreds of appellate diminished capacity cases, and my years of experience as a practicing mental health clinician have convinced me of its truth. From all that experience, I can find only one case¹³⁹ in which *mens rea* was truly negated, and even that case gives me substantial pause because I fear the defendant was a clever malingerer. When I have discussed this point with forensic mental health professionals and experienced criminal attorneys, I have discovered that, if *mens rea* is properly defined, they too are unable to adduce cases in which *mens rea* was negated by mental abnormality. Craziness seems to affect impulses, controls, and motivations for actions, but it does not stop persons from intending to do what they do or from narrowly knowing factually what they are doing. For instance, a person who kills because he feels totally controlled by an influencing machine operated by hostile forces may ultimately be legally insane, but surely he intends to kill his victims. It is no accident that he kills them; it is what he means to do. Absurd claims about mental disorder negating *mens rea* can only be maintained by blinking both the general truth that this rarely occurs and the specific truth presented by the utterly contradictory facts of almost all individual cases.

The only possible exception to the generalization that mental abnormality rarely negates *mens rea* applies to the premeditation formula that in many jurisdictions makes an intentional killing a first degree murder. On occasion, an effect of a mental disorder will cause a person to act on the spur of the moment. For instance, a person may react instantaneously to a command hallucination to kill. In such a case, there is no premeditation. Note, however, that the mental disorder did not necessarily destroy the capacity of the person to premeditate. Some persons acting on the basis of command hallucinations do premeditate their commanded acts, for example. Nor is it clear that the actor "had" to carry out the command instantaneously. Rather, the evidence of mental disorder would be used simply to support the defendant's contention that he did not premeditate in fact. It is the suddenness that negates premeditation, not the mental disorder *per se*.

An irresistible impulse or compulsion does not negate either intent or premeditation. Indeed, quite the opposite is true: the source of compulsion furnishes the reason for forming the intent. If I feel compelled to do something by mental disorder, a gun at my head, or whatever, I clearly intend to do it, and if I think about it enough beforehand, I may also be guilty of premeditation. We may wish to excuse partially or

¹³⁹ *People v. Wetmore*, 22 Cal. 3d 318, 583 P.2d 1308, 149 Cal. Rptr. 265 (1978). Another case that raises the possibility, but more weakly, is *R. v. Stephenson*, [1979] 1 Q.B. 695 (C.A.). Richard Bonnie kindly brought this case to my attention.

wholly those who act under compulsion, but it will not be because the compelled actor did not form the requisite mens rea. Rather, compulsion is an affirmative defense that is encompassed within the defenses of duress, where compulsion results from human threat, or insanity and partial responsibility, where compulsion results from mental abnormality.

Another cause of trouble with expert testimony on the mens rea variant is the conceptualization of the issue in terms of the defendant's *capacity* to form a mens rea, rather than whether he formed it *in fact*. In California, this distinction is colloquially referred to as the difference between "capacity" and "actuality" evidence.¹⁴⁰ On the face of it, the capacity conceptualization appears to make sense. Although the law requires proof of whether a defendant formed a mens rea in fact, if he lacked the capacity to form it, he could not have formed it in fact. There are three problems, however. First, mental health professionals and others are confused about the relationship between mental abnormality and the capacity to form mens rea. Second, they and others mistakenly believe that capacity is totally distinct from actuality. Third, mental health professionals have little expertise about an individual's capacity to form a mental state.

Much as mental disorder virtually never negates mens rea in fact, it also seldom negates the capacity to form it. A mens rea is a relatively simple mental state; it requires little cognitive capacity to intend to do something or to know legally relevant facts, such as that the car one is driving across the border contains contraband in a hidden compartment. A mentally abnormal person may not form a requisite intent or have the required knowledge, but it will rarely be because he lacked the capacity to form the mens rea. For example, suppose a mentally disordered person abroad in the streets becomes disorganized and lost in a deserted part of town on a cold evening. Lacking the resources to find his way to proper shelter, he breaks into a building to get out of the cold. Caught by the police while doing so, he is charged with burglary on the theory that he intended to steal. Our poor defendant is innocent of burglary because he lacks the mens rea for theft—he only wanted to stay

¹⁴⁰ This usage is derived from the language of § 28(a) of the California Penal Code, which reads as follows:

Evidence of mental disease, mental defect or mental disorder shall not be admitted to negate the *capacity* to form any mental state Evidence of mental disease, mental defect, or mental disorder is admissible solely on the issue whether or not the accused *actually* formed a required specific intent, premeditated, deliberated, or harbored malice aforethought, when a specific intent crime is charged.

CAL. PENAL CODE § 28(a) (West 1984) (emphasis added). The purpose of this section was precisely to avoid the problems of focusing on the defendant's alleged capacities addressed in the text. Morse & Cohen, *supra* note 89, at 25-26.

warm, not to steal—but he does not lack mens rea because he did not have the capacity to form it. He was perfectly capable of intending to steal; it is simply the case, however, that he did not intend to do so on this occasion. The defendant's mental disorder is relevant to proving that he lacked mens rea, for it is the reason he became disorganized, got lost, and needed to get warm, but his mental disorder did not affect his capacity to form the mens rea. Once again, the capacity to form mens rea will virtually never be obliterated by mental disorder. In the very few cases where this might occur, the person would be wildly and obviously out of touch with reality.

A second difficulty with the "capacity" issue is that mental health professionals and some courts¹⁴¹ seem to believe that capacity is distinct from actuality in the mens rea variant. Perhaps, as one court concluded,¹⁴² they believe that the capacity question is one of partial responsibility and thus separate from the question of whether mens rea, strictly defined, was present. This is a mistake, however. Under the mens rea variant, the capacity question is simply whether the defendant was able to form strictly defined mens rea. It is not a partial responsibility question. In an early, important precedent, *Fisher v. United States*, Justice Frankfurter warned specifically about the allure of psychiatry and cautioned the law to focus on whether mens rea was formed in fact.¹⁴³

It is absurd to claim that a defendant who clearly did have a mens rea lacked the capacity to have it. By contrast, however, a defendant who had the capacity to form a mens rea did not necessarily form it. All persons at all times possess abilities or capacities that they do not exercise. Moreover, because most defendants, including the most severely mentally disordered, will be capable of forming mens rea, knowing that the defendant possessed the capacity to form a mens rea is not per se terribly probative on the ultimate legal question, which is whether he formed it in fact. Except in the extremely rare case in which it is possible that the defendant truly lacked the capacity to form mens rea, the capacity issue is largely irrelevant, and courts would do better to focus entirely on the actuality question. Even in those rare cases, it will still be better to avoid the capacity issue, because innocence can be more directly and certainly proven by showing that no mens rea was formed in fact, and also because testimony about capacity is generally too speculative to be admissible.

¹⁴¹ *E.g.*, *Mill v. State*, 585 P.2d 546, 550-51 (Alaska 1978); *State v. Lecompte*, 371 So. 2d 239, 242 (La. 1979); *Johnson v. State*, 292 Md. 405, 425 n.10, 439 A.2d 542, 554 n.10 (1982); see *State v. Bouwman*, 328 N.W.2d 703 (Minn. 1982).

¹⁴² *Johnson*, 292 Md. at 425 n.10, 439 A.2d at 554 n.10.

¹⁴³ 328 U.S. 463, 484-85 (1946).

Except in utterly rare cases that will generally be obvious to anyone and will rarely involve the criminal justice system, mental health professionals cannot determine if a person lacks the ability to form a mens rea, especially if the determination involves a judgment about the person's past capacities. There is simply no way to know this, no scientific test or technique that can provide the answer.¹⁴⁴ Of course, the claim that the person had the capacity to form a mens rea will almost always be correct, because we know this is true from everyday observation and common sense. Assessing whether a person could not have formed a mental state, however, is beyond current capabilities. If a mental state is not formed, we can never be certain whether the defendant simply did not form it or whether he could not. Testimony concerning lack of capacity to form mens rea is far too speculative to be helpful to the fact finder.

I recommend that the term capacity be dropped entirely from use with the mens rea variant and that testimony about capacity or its lack should be excluded. The real question is whether the defendant actually formed a requisite mens rea, and all testimony on this issue should be directed towards showing what actually went on in the defendant's mind. These steps will help erase confusion in the minds of both expert witnesses and factfinders about what is the real question to be decided and will improve the quality of expert testimony.

It has been argued that exclusion of evidence of a defendant's capacity to form mens rea is unconstitutional in mens rea variant cases because it undermines the presumption of innocence and creates a conclusive presumption that the defendant had the capacity to form a mens rea.¹⁴⁵ This argument has some force because, as I suggested, there is

¹⁴⁴ A defendant with a history of mental retardation might provide a counter-example. It is conceivable, for example, that such a person might never have given any indication of possessing the intellectual capacity necessary to know material circumstances that might be part of the elements of an offense. Such cases will be extremely rare, however, and will be obvious to any observer, whether lay or expert.

¹⁴⁵ *E.g.*, Note, *supra* note 14, at 1202-07, which criticizes CAL. PENAL CODE § 25(a) (West 1984). This subsection, which was added by Initiative Measure, June 8, 1982 (The Victims' Bill of Rights), abolished the defense of "diminished capacity." In language almost identical to that found in the opening sentence of § 28(a) of the California Penal Code, see *supra* note 140 for text, § 25(a) also prohibited the admission of evidence of mental abnormality for the purpose of negating the capacity to form mens rea. I think § 25(a) really has two purposes: to abolish any partial responsibility variant in California and to reinforce the policy behind the prohibition on capacity evidence contained in the opening sentence of § 28(a). The situation becomes confusing if §§ 25(a) and 28(a) are read in conjunction with another section of the Victims' Bill of Rights, the "Relevant Evidence" (Truth-in-Evidence) provision, which added subdivision (d) of section 28 to Article I of the California Constitution. This provision reads in part, "relevant evidence shall not be excluded in any criminal proceeding . . ." CAL. CONST., art. I, § 28(d) (West 1983). Although this provision was meant to limit the operation of the exclusionary rule, it has been argued that it is now unconstitutional to prohibit capacity evidence in diminished capacity cases because this provision takes precedence over the apparently contradictory § 25(a). This argument is wrong because the legislature expressed

clearly a logical and factual connection between a defendant's alleged inability to form a mens rea and whether he formed it in fact. Nevertheless, the contention is incorrect for the reasons already given: capacity to form a mens rea is almost never absent in fact and evidence about capacity is so confusing and unscientific that its probative value, if any, is far outweighed by the costs of admitting it. Moreover, even if the prohibition on capacity evidence operates as a conclusive presumption concerning capacity, this is not unconstitutional because the defendant's capacity is *not* an element of the crime that the prosecution must prove. The prosecution still must prove that the defendant *actually* had the requisite mens rea and the defendant must be allowed to admit other relevant evidence that he did not have it in fact.

Acts committed under the influence of alcohol present another major problem with evidence bearing on mens rea.¹⁴⁶ The most common mens rea variant claim is probably that the defendant lacked the requisite mental state because he had been drinking. The critical question is whether intoxication prevents defendants from having knowledge, forming intents, or being aware of risks. The answer, I believe, is that intoxication rarely has this effect.

Alcohol may loosen behavioral controls through a variety of biologically-induced psychological mechanisms, but intoxicated persons still know what they are doing and intend to do what they do. They might not have committed the same acts if they had been sober, but they still intended to do what they did when intoxicated. One who is sympathetic to intoxicated actors may wish to consider them less culpable in the partial responsibility sense because they have lessened controls, but intoxicated actors typically will not be less culpable because they lack mens rea.¹⁴⁷

its belief in S.B. 54, codified in CAL. PENAL CODE § 28(a) (West 1984), *supra* notes 76 & 121, that *capacity* evidence was *not* relevant to determining whether a defendant *actually* had mens rea. Morse & Cohen, *supra* note 89, at 25-26.

¹⁴⁶ The relationship of alcohol use to criminal behavior is an immense topic that deserves and has received extensive independent discussion. A complete discussion of this topic would go far beyond the purposes of this paper, yet it must be touched upon in any reasonably complete consideration of the mens rea variant of diminished capacity. See generally DRINKING AND CRIME (J. Collins, Jr. ed. 1981); Fingarette, *Philosophical and Legal Aspects of the Disease Concept of Alcoholism*, in 7 RESEARCH ADVANCES IN ALCOHOL AND DRUG PROBLEMS 1, 24-35 (R. Smart, F. Glaser, Y. Israel, H. Kalant, R. Popham & W. Schmidt eds. 1982); Note, *Alcohol Abuse and the Law*, 94 HARV. L. REV. 1660, 1681-87 (1981).

¹⁴⁷ Again, of course, an intoxicated person may lack mens rea for alcohol-related reasons, but not because the intoxication prevented him from forming mens rea. Consider again the hypothetical wanderer who breaks into a building to get warm, but now assume he is lost and disorganized because he is drunk rather than because he is mentally disordered. The mens rea for burglary is once more absent not because he lacked the capacity to form it, but simply because he did not form it. Evidence of his intoxication would be relevant to the defendant's claim that he did not intend to steal.

A critic might now object that I am ignoring alcoholic blackouts or unconsciousness. In such cases, it may be argued, mens rea really will be lacking because the defendant was unable to form it.¹⁴⁸ What does it mean to say that a person is in alcohol-induced "blackout" or unconsciousness? It does not mean, of course, that he or she is unconscious in the sense of being "knocked out."¹⁴⁹ It must refer to a rather peculiar mental condition, because the person is up and about and doing things, such as shooting, raping, or robbing, in a seemingly goal-directed manner. In what way, for example, was an accused robber unconscious and lacking mens rea if the actor confronted a victim with a weapon and demanded money with a direct threat of harm?

I believe the following is the most adequate explanation. At nearly all times, human beings are conscious of themselves, they perceive and are aware of what they are doing as they do it. As I am writing this sentence, I am also "watching" myself write it. This self-reflective split in consciousness that allows self-monitoring is an important regulator of behavior, for it provides constant feedback that allows us to correct maladaptive behaviors.¹⁵⁰ Too much split can be restricting or inhibiting, whereas too little can be maladaptively discontrolling. There is probably an optimum amount of self-monitoring for different activities, an amount that can be varied by training, practice, or similar interventions. A major effect of alcohol is to overcome the self-monitoring split in consciousness.¹⁵¹ This is why we often become less inhibited as we consume alcohol: the usual censoring monitors are less on the job. For those with a high tolerance for alcohol, and perhaps for others on some occasions, self-consciousness may be lost entirely at a point of great intoxication, although the person is not "knocked out." At this stage, the person at some level knows what he is doing and intends to do it, but there is no concurrent self-reflective consciousness. The best example from the domain of normal behavior would be so-called "highway hypnosis," where the driver may drive competently for many miles but is seemingly unaware of what he is doing and later has no memory of driving those miles. Similar states, known as dissociative, can be triggered

¹⁴⁸ *E.g.*, *Handley v. State*, 615 P.2d 627 (Alaska 1980). See generally Wolf, *Homicide and Blackout in Alaskan Natives*, 41 J. STUD. ALCOHOL 456 (1980).

¹⁴⁹ If they were in this condition, there would be no offense to concern the law (except, perhaps, public intoxication, but this is a separate problem).

¹⁵⁰ See R. SCHAFFER, ASPECTS OF INTERNALIZATION 89-109 (1968). Schaffer would today use a different theoretical language to explain the phenomenon described, see generally R. SCHAFFER, A NEW LANGUAGE FOR PSYCHOANALYSIS 123-163 (1976), but the description in the earlier work is both rich and apt.

¹⁵¹ See Linn, *Clinical Manifestations of Psychiatric Disorders*, in 1 COMPREHENSIVE TEXTBOOK OF PSYCHIATRY/III 990, 1005 (H. Kaplan, A. Freedman & B. Sadock 3d ed. 1980). All observers agree that controls are loosened. The theoretical language in the text applied to the effects of alcohol is mine, albeit borrowed from psychoanalytic theory.

by intense conflicts or stresses.¹⁵² This is what is meant by "unconsciousness" or "blackout."

Is this a state, however, in which *mens rea* is lacking? On the one hand, the defendant knows at some level what he is doing and intends to do it; on the other hand, he is not fully conscious of his actions in the usual sense. I believe that this situation is better handled as a matter of affirmative defense. *Mens rea* is present but the usual control structures are compromised.¹⁵³ Whether a defendant should be granted an affirmative defense when he is responsible for producing the condition that invokes the defense is a separate question that the law usually answers negatively. If unconsciousness or blackout at the time of the offense is to be considered, however, it should be recognized that, like insanity, it does not negate strictly defined *mens rea*.

The claim that a defendant was blacked out or unconscious should also be distinguished from another claim with which it is often confused. Many defendants claim afterwards that they do not remember the events in question.¹⁵⁴ Indeed, this claim is not limited to defendants who were allegedly intoxicated at the time. Persons who assert they were mentally disordered, enraged, or in other untoward mental or emotional states often make the same claim in the hope of proving they were suffering from some abnormality at the time of the offense. From the claim of amnesia, the fact finder is supposed to infer that they were also "blacked out" or otherwise mentally abnormal at the time of the events, but the inference does not necessarily follow. It is perfectly commonplace that persons may be well aware of what they are doing at a given time but are unable to remember what happened afterwards, especially if the events were highly upsetting. A later memory problem may indicate that a person has problems with alcohol, but it does not necessarily mean that he lacked various mental abilities or did not form certain mental states at the time in question.

Finally, let us consider the evidentiary charade in *mens rea* variant cases. The easiest theory to explain the absurdities in mental health tes-

¹⁵² DSM-III, *supra* note 36, at 253-57, 259-60 (description of dissociative disorders).

¹⁵³ Cf. G. WILLIAMS, *supra* note 126 (some normality of consciousness is necessary). Because there are not degrees within each *mens rea*, it is theoretically and practically clearer to separate the strict *prima facie* case, which is satisfied, from defenses which affect rationality and self-control. Of course, it would be possible to make all factors affecting blameworthiness, including those now treated as affirmative defenses, part of the prosecution's *prima facie* case. It would be very cumbersome and expensive to force the prosecution to prove threshold rationality and self-control in all cases, although the burden could be lessened by presumptions. This is not our present arrangement, however, and a full analysis of whether it should be would be far beyond the purposes of this Article.

¹⁵⁴ *E.g.*, State v. Roussel, 424 So. 2d 226 (La. 1982); State v. Johnson, 92 Wash. 2d 671, 600 P.2d 1249 (1979).

timony is that lawyers on both sides in an adversary system want to win. They will take any available latitude to convince the fact finder, including abetting testimony they must recognize is absurd. Another possibility that cannot be ignored is that many criminal lawyers are as confused as the mental health professionals about the meaning of *mens rea* and its relation to mental abnormality. A related alternative is that mental health professionals may have convinced a number of lawyers of a mistaken view. It is not uncommon for lawyers as well as mental health professionals to be ensnared by the confusion of legal with mental health issues. As usual, there is no rigorous empirical study one can adduce to support these speculations, but I suspect that these reasons account for much of the troubling evidence in cases involving the alleged negation of *mens rea* by mental abnormality.

The reasons judges allow the admission of irrelevant testimony are similarly speculative, but we may hazard some educated guesses. Judges are properly loathe to prevent criminal defendants from introducing what may be relevant evidence, and they can comfort themselves by rationalizing that defects in expert testimony can be brought out on cross-examination and are better treated as matters of weight rather than admissibility.¹⁵⁵ Such a position certainly comports with the liberal modern trend in evidence law,¹⁵⁶ but it ignores the confusion, prejudice, and inefficiency that result. Another reason judges may admit such testimony is that they too are bamboozled by mental health professionals or mistakenly believe that the *mens rea* issue is psychiatric rather than legal.

There is a simple solution to the problem: experts must be prevented from offering an opinion on the ultimate legal issue of whether the defendant formed the requisite *mens rea*. This is not a matter of scientific expertise in any case. Instead, the expert should simply describe in as much rich clinical detail as possible what was going on in the defendant's mind—what the defendant thought, believed, perceived, and so on. The expert's source of knowledge about such matters will come largely from the defendant's self-report. The expert should use the defendant's own words as much as possible, rather than paraphrasing in a fashion that promotes a particular conclusion. If one is able to obtain

¹⁵⁵ The best modern example is *Barefoot v. Estelle*, 103 S. Ct. 3383 (1983), in which the defendant challenged the constitutionality of imposing the death penalty primarily on the basis of clinical psychiatric predictions that the defendant would be dangerous. Although the Court noted the nearly universal acknowledgment that such predictions are highly inaccurate, it refused to exclude them as violations of due process in death penalty proceedings. Rather, opined the majority, the inaccuracy of such predictions was a matter of weight only, that could be tested on cross-examination and by other means. As Justice Blackmun said in his dissent, "This is too much for me." *Id.* at 3406 (Blackmun, J., dissenting).

¹⁵⁶ *Id.* at 3397.

transcripts or detailed process notes from clinical interviews, it is often striking to observe how the raw data are "translated" into clinical reports or courtroom testimony. Once the fact finder is in full possession of all the "untranslated" data about what was going on in the defendant's mind, the fact finder will be able competently to reach the ultimate legal conclusion of whether the requisite mens rea was formed.¹⁵⁷ This last step of reaching the legal conclusion is a process of common-sense inference and not scientific expertise.

Let us once again consider *Tempest* to understand the operation and merits of this proposal. If one reads Mrs. Tempest's confession, there is simply no doubt that she intended to kill Gregory and thought about it for a considerable time beforehand. She admits this directly; there is little if any inference needed to reach the legal conclusion. Remember, too, that she repeated essentially the same story to her husband and the doctors, so there are no contrary data. Here, perhaps, no expert was needed at all because she gave a full confession to the police that she never contradicted. Suppose, however, that the only "confession" she made was to one of the doctors, and that she did so because of his clinical skill in eliciting it. Under my proposal, the expert would simply repeat what he or she had learned as an expert interviewer/clinician/observer, without using a diagnosis.¹⁵⁸ The legal inference would be left to the jury or the judge.

Confusion is unavoidable in relatively clear cases if the expert is allowed to give an opinion on the ultimate legal issue that is in direct conflict with the evidence. This was the outcome in the *Tempest* case. Even conclusions by experts that are more sensible or that are offered in less clear cases are irrelevant because, again, reaching the conclusion about mens rea on the basis of behavioral evidence is not a scientific process, it is a common-sense inference. In such cases, the expert's legal conclusion may not be silly or contrary to the facts, but neither will it be

¹⁵⁷ California has adopted such a proposal. Section 29 of the Penal Code reads as follows:

In the guilt phase of a criminal action, any expert testifying about a defendant's mental illness, mental disorder, or mental defect shall not testify as to whether the defendant had or did not have the required mental states The question as to whether the defendant had or did not have the required mental states shall be decided by the trier of fact.

CAL. PENAL CODE § 29 (West 1984). The U.S. Senate recently voted in favor of similar legislation:

No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone.

S. 1762, 98th Cong., 2d Sess. § 406 (1984) (amending FED. R. EVID. 704).

¹⁵⁸ The reasons why diagnoses should not be used will be addressed in detail in section IV.C., *infra* notes 163-69 and accompanying text.

expert. Therefore it should be excluded.¹⁵⁹

B. PARTIAL RESPONSIBILITY AND MENTAL ABNORMALITY

If the partial responsibility variant is adopted, there can be no doubt that it will apply to some proportion of defendants, those whose rationality or self-control appears sufficiently compromised by mental abnormality. The problem here is a general difficulty with expert testimony: the experts will testify about diagnostic or legal conclusions¹⁶⁰ instead of providing detailed clinical portraits of defendants that would allow the fact finder to decide the ultimate legal question—is the defendant less than fully responsible as a result of mental abnormality that affected his criminal conduct?

In partial responsibility cases, there are likely to be fewer silly opinions that are contradicted by the facts because the issue of partial responsibility is primarily moral and non-empirical. By contrast, the *mens rea* issue is fundamentally factual—did the defendant actually form a mental state or not?¹⁶¹ Still, unless the law prevents the experts from offering legal conclusions, the confusing, unedifying, and unseemly battle of the experts will ensue much as it does in insanity defense cases. The solution again is relatively simple: exclude expert opinions about ultimate legal issues. This reform will encourage the experts to provide more clinical detail and will much reduce the battle of the experts.

The suggestion to bar experts from offering conclusions on the ultimate legal issue is gaining wide acceptance because of the recognition that the ultimate issue—here partial responsibility—is not a matter of scientific expertise.¹⁶² It is now increasingly recognized that when an expert offers such an opinion, he or she is operating as a thirteenth juror, not as a dispassionate scientist. Ultimate issue testimony does not aid

¹⁵⁹ A compromise that allows judges the discretion in “appropriate” cases to exclude legal conclusions will not work because they will seldom exclude experts’ opinions. In any case, they already have the general power to exclude confusing, prejudicial, or irrelevant testimony.

¹⁶⁰ The most vivid description of this practice and an attempt to correct it is *Washington v. United States*, 390 F.2d 444 (D.C. Cir. 1967) (barring experts from giving legal conclusions in insanity defense cases). *Washington’s* corrective efforts were overruled in *United States v. Brawner*, 471 F.2d 969 (D.C. Cir. 1972), but not without considerable criticism from Judge Bazelon, the author of the *Washington* opinion.

¹⁶¹ There is some room for “moral” judgment on the premeditation issue because how much forethought is required is not a precise, all-or-none issue.

¹⁶² Because partial responsibility is simply a lesser form of legal insanity, this conclusion is on all fours with the now widely accepted view that mental health professionals are not expert on the legal question of whether a defendant was legally insane. *See, e.g.*, AMERICAN BAR ASSOCIATION, CRIMINAL JUSTICE MENTAL HEALTH STANDARDS Standard 7-3.9(a) commentary 7.109-110 (First Tent. Draft 1983); AMERICAN PSYCHIATRIC ASSOCIATION, STATEMENT ON THE INSANITY DEFENSE 14 (1982).

the fact finder by dint of the expert's clinical or scientific training or experience.

C. DIMINISHED CAPACITY AND DIAGNOSIS

A reform suggestion deserving separate attention is that in both mens rea and partial responsibility cases, experts should be prohibited from giving diagnoses.¹⁶³ A proposal to bar diagnoses, a fundamental part of clinical and scientific mental health work, is far more unusual than a proposal to bar legal conclusions and needs further discussion. First and most important, diagnoses are irrelevant in both mens rea and partial responsibility cases because they will not help the fact finder assess the legal issue that is properly before it. As I have already tried to show, the real issue is either whether mens rea was formed in fact or the moral and legal question of whether the defendant was less responsible because his contact with reality or self-control was impaired at the time. Diagnoses may be helpful and even theoretically useful shorthands in the clinic, consulting room, or research laboratory, but knowing whether a defendant suffers from a particular mental disorder according to the currently fashionable diagnostic nomenclature is of no use in a courtroom in assessing whether mens rea was formed or the validity of partial responsibility. The issue is not whether the defendant suffers from schizophrenia or another disorder; it is whether the legal criterion is met. Even the descriptive term "psychotic" is not useful because in the legal context it will be no more than a shorthand for "grossly out of touch with reality," and this can be demonstrated far more convincingly by factual descriptions than by ascription of a label. Knowing that a person has been diagnosed as schizophrenic or as suffering from any other disorder does not indicate with sufficient accuracy for legal purposes whether the person formed a mens rea (or was capable of forming one), or was sufficiently irrational or lacking in self-control to escape full responsibility for his actions.¹⁶⁴

To decide the legal question, the fact finder needs the fullest, rich-

¹⁶³ Other discussions of the same issue include Morse, *Crazy Behavior*, *supra* note 29, at 604-15 and Morse, *Failed Explanations*, *supra* note 29, at 1048-50, 1055-56, 1059-70. The present section is adopted from testimony concerning the insanity defense presented at Congressional hearings, *Reform of the Federal Insanity Defense: Hearings on H.R. 1280 and Related Bills Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 98th Cong., 1st Sess. 295, 319-27 (1983) (statement of Stephen J. Morse).

I recognize that both prosecutors and defense attorneys would prefer to retain the use of diagnoses. The former are able to use the problems with diagnoses to discredit defense experts, and the latter use them to convince the fact finder that the defendant suffers from a "real," medical entity with a name. Nevertheless, for the reasons to be given in the text, justice will be better served if diagnoses are prohibited.

¹⁶⁴ DSM-III, *supra* note 36, at 6, cautions that persons with the same diagnosis may be very different clinically.

est, most textured description possible of the defendant's mental and emotional state at the time of the commission of the offense. Lay persons and experts alike should tell the fact finder, with as much detail as possible, what the defendant was thinking, feeling, and doing at the time, and how this affected his criminal behavior. In many cases, a description of the history of the defendant's past mental and emotional state may help the fact finder comprehend the defendant's mental state at the time of the offense. The data needed for the jury or judge to assess mens rea or partial responsibility are usually not that difficult to obtain or evaluate. The fact finder must know whether the defendant was sufficiently out of touch with reality. Answering this question does not require arcane, psychiatric learning, although detailed clinical observations will surely help. Armed with these behavioral descriptions, the fact finder can decide the legal issue. It would be relevant in a homicide case, for instance, to know that the defendant killed because he delusionally believed the victim was an agent of the devil and he heard the Lord's voice command him to kill. If the fact finder possesses such relevant information, as it should and will, knowing that the defendant suffers from paranoid schizophrenia would add no additional, legally relevant information. The diagnosis is irrelevant.

Barring diagnoses implies no disrespect for mental health professionals or the way they function in mental health settings. Applying the Diagnostic and Statistical Manual of Mental Disorders (DSM-III) correctly is a proper issue for the psychiatric classroom or consulting room, but not for the courtroom. Whether or not mental health professionals can pull together diverse behaviors into apparently coherent disorders is likewise irrelevant in the courtroom.¹⁶⁵ Why should jurors be asked to try to assess legally irrelevant psychiatric skills or to understand legally irrelevant psychiatric concepts? Moreover, why should mental health professionals risk the loss of their dignity and public esteem caused by public disputes in a forum where those disputes are irrelevant? Such disputes are properly confined to mental health settings where they are relevant and may be resolved according to the canons of clinical science; they do not belong in a courtroom. I fully appreciate that mental health professionals use diagnoses in their everyday work for practical and theoretical purposes, but it implies no disrespect for them if the law limits their role in the courtroom to what is most useful and least confusing for the law's purposes.

Prohibiting diagnoses will still leave the expert complete latitude to

¹⁶⁵ I say "apparently" because there is much reason to question whether the DSM-III categories are valid. That is, there is reason to doubt whether DSM-III correctly slices the psychopathology pie into the right pieces. See Morse, *A Preference for Liberty*, *supra* note 53, at 71 n.75 and sources cited therein.

describe the defendant's emotional and mental state in as much detail as necessary. Mental health experts can tell the jury everything they learned about the defendant's behavior and how it relates to the criminal conduct. For example, nothing will prevent the expert from describing a delusion and how it relates to the alleged criminal conduct. The jury will learn everything it needs to know to decide questions of mens rea or partial responsibility that mental health professionals can relevantly tell.

Second, for at least four reasons, juries will be less confused and prejudiced if the law prohibits diagnoses: (1) jury attention will not be diverted to irrelevant issues; (2) jurors do not understand psychiatric labels; (3) jurors will be less likely to prejudge the question of responsibility if the issue is "demedicalized" as much as possible; (4) there will be less room for expert disagreement and the consequent "battle of the experts" that so compromise the dignity of the experts and the law.

The first point is simply a logical consequence of my argument that diagnoses are irrelevant. The second point is closely related. Jargon and other technical terms tend to confuse lay jurors, especially if jurors hold pre-existing incorrect beliefs. For instance, a common, erroneous lay belief is that schizophrenia is the "split personality" disease. If there is no way to explain a point without jargon, or if technical terms may be ultimately clarifying, then perhaps the law should admit such testimony at the risk of some misperception or confusion. But in the mens rea and partial responsibility contexts, the risk is unnecessary. Judges and juries need behavioral facts about the defendant's functioning, not labels that have been developed for nonlegal purposes.¹⁶⁶

Third, for various reasons, lay persons are more likely to assume a person somehow lacked a requisite mental state or was less responsible if they believe the person suffers from a disease. By no means do all disordered defendants lack mens rea; indeed, almost all have it. Nor are they necessarily less responsible for their conduct. Thus, it is a virtue to avoid providing any unnecessary information that may cause jurors to beg the questions that need to be decided. Although it may sometimes appear that using a diagnosis is a useful shorthand, a convenient way of presenting information, necessary data can be presented without diagnoses. Any possible efficiency gains are outweighed by the risk of confusion, prejudice, and question-begging.

Fourth, experts are far more likely to disagree about diagnoses than about descriptions of behavior. This is true even though it appears that

¹⁶⁶ Indeed, DSM-III, *supra* note 36, at 12, warns against using the diagnostic system for purposes different from those for which it was developed and particularly mentions the determination of legal responsibility as an example.

the reliability of the more severe DSM-III categories was quite acceptable in the DSM-III reliability field trials.¹⁶⁷ Despite the undoubted nosological gains of DSM-III, there is still ample room for expert disagreement about diagnosis. The DSM-III criteria are not absolutely precise. Moreover, a diagnosis is an inference at least one step removed from the primary data, the observed behaviors, upon which it is based. There is simply more likelihood of disagreement as one moves from observations to complex inferential judgments. Jurors will be better able to determine if an expert's description of behavior is persuasive and makes sense than if the expert has made a proper diagnosis. After all, assessments of thoughts, feelings, and actions are well within the everyday experience of lay persons, whereas diagnoses are not. Unlike the behavior upon which it is based, a diagnosis bears no necessary relationship to mens rea or partial responsibility. Consequently, if experts are allowed to testify about diagnoses and disagree about them, as surely they will, juries will be unnecessarily confused in general, and will be specifically confused about the difference between mental health and legal issues.

Let us now turn to some further anxieties about prohibiting diagnoses to see if they are warranted. One may argue that prohibiting diagnoses will lead to juror confusion because experts might describe behaviors in a disorganized fashion, without the organizing, guiding coherence that is supposedly provided by employing diagnoses. This fear is an indictment of the experts, however, rather than a reason to allow testimony about diagnoses. Jurors will not be confused unless experts provide their testimony in the form of disorganized lists. Competent professionals will focus their testimony in an organized fashion; they will coherently provide the description and history of the behaviors that are relevant to the legal criteria. Moreover, it is precisely the duty of a competent attorney to elicit the testimony in an organized, coherent form. If testimony is coherently presented, the lack of a diagnostic label will avoid rather than generate confusion. Finally, I must confess that if I were faced with the choice between a disorganized report of behaviors, that is, a "random" list of symptoms, and a conclusory diagnostic label, I far prefer the former as a tool for assessing partial responsibility, because it at least provides the proper factual foundation for reaching the legal conclusion.

One may also argue that if either statutory or judicial language admitting evidence of mental abnormality to negate mens rea or the

¹⁶⁷ I say "appears" because there are methodological problems with those field trials and recent evidence demonstrates that reliability is lower in the hurlyburly of everyday practice. See Morse, *A Preference for Liberty*, *supra* note 53, at 69-71.

tests for partial responsibility include the phrase "mental disease or defect"—as such language or tests probably will—it is bizarre, contradictory, and paradoxical to prevent mental health experts from giving a name to the disorder that is the threshold requirement for the defense. This argument, however, again confuses legal and mental health issues. In legal tests, the term "mental disease or defect" does not have precisely the same meaning as in mental health parlance. It refers simply to sufficient mental abnormality to raise the possibility that *mens rea* might be negated or that the defendant might be less responsible. In a related context, the American Psychiatric Association indicates that it recognizes this point because it provides a commonsense, nontechnical, legal definition of the phrase "mental disease or mental retardation" in its "Statement on the Insanity Defense."¹⁶⁸ Thus, the phrase "mental disease or defect" in a legal test does not refer to the medical mental disorder concept or to any particular mental disorder.¹⁶⁹

The proposal to bar diagnoses from the courtroom has the potential substantially to affect "business as usual" in cases involving mental abnormality issues. I cannot promise that it will do so or that clever attorneys will not find ways to evade the intent of the prohibition. But at a time when there is increasing concern about the abuse of mental defenses, such a prohibition may make a real difference that will redound to the benefit of both the law and the mental health professions.

V. CONCLUSION

Courts and legislatures are confused about the different variants of the diminished capacity doctrine and often place illogical limitations on them. The law needs to be clarified considerably, and proposed schemes should be tested carefully against their policy rationales to determine if they satisfy those rationales. The *mens rea* variant should be adopted everywhere as a matter of constitutional law and fairness to defendants; doing so will pose no threat to society. Partial responsibility should be rejected, however. Expert testimony should be limited substantially if diminished capacity cases are to be tried sensibly. The law should focus on whether defendants actually formed a *mens rea* rather than on whether they had the capacity to form it, and both ultimate conclusions and diagnoses should be prohibited.

¹⁶⁸ AMERICAN PSYCHIATRIC ASSOCIATION, *supra* note 162, at 12. The new House bill reforming the insanity defense has adopted a nontechnical definition of the phrase that follows the American Psychiatric Association's proposal. H.R. 3336, 98th Cong., 1st Sess. (1983).

¹⁶⁹ Of course, probably all defendants who are found to lack *mens rea*, to be partially responsible, or to be legally insane will also be mentally disordered in the medical/psychological sense and technically diagnosable, but this is beside the legal point.