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CRIMINAL LAW

PSYCHOLOGICAL ABNORMALITY AS A FACTOR IN GRADING CRIMINAL LIABILITY: DIMINISHED CAPACITY, DIMINISHED RESPONSIBILITY, AND THE LIKE

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INTRODUCTION

During early 1969, the trial of Sirhan B. Sirhan for the killing of Senator Robert Kennedy provided a sixty day, $900,000 public demonstration of California's efforts to integrate creatively contemporary psychological knowledge with criteria for criminal responsibility. The demonstration did not prove an unqualified success. Testimony by defense expert Doctor Martin M. Schorr, a clinical psychologist, that Sirhan lacked the capacity to entertain the state of mind required under California law for murder was translated by a prosecutor for newsmen as, "If you hate a guy a little bit and kill him it's murder; if you hate a guy a lot and kill him, you're sick."[1] When Doctor Bernard L. Diamond, well-known for his writings on law and psychology and his personal participation in leading California cases,[2] presented his theory that Sirhan had shot Senator Kennedy while in an abnormal state of mind induced by flashing lights and mirrors at the scene, he cautioned the jury that his theory was "an absurd, preposterous story, unlikely and incredible, which in a unique case such as Sirhan's does raise the gravest problems of clinical proof and credibility."[3] In his closing argument to the jury, the prosecutor declared, "I have heard that Charles Dickens wrote in a book that 'the law is an ass.' I think the law became an ass when it let the psychiatrist get his hand on it. It would be a frightening thing for justice to decide a case of this magnitude on whether [Sirhan] saw clowns playing patty-cake or kicking each other in an ink blot test."[4] After sixteen hours and forty-two minutes of deliberation, the jury returned a verdict of guilty to first degree murder; the next week the same jury imposed the death penalty. "I think the jury took the testimony of the psychiatrist and psychologist into consideration fairly", one juror told newsmen, "but the feeling was that they contradicted each other and even themselves from time to time."[5]

The obvious difficulty, experienced by both participants and observers in the Sirhan trial in evaluating testimony as to Sirhan's state of mind stems from the controversy surrounding California's so-called diminished capacity rule[6] under which evidence of the defendent's state of mind was admitted. California's rule is, however, merely one possible answer to a broader question that has troubled the criminal law for many years: Is proof of the defendant's psychological abnormality, that is, the manner in which he differs from the rational, utilitarian man of the classical criminologists,[7] admissible other than for the purpose of establishing the "insanity" defense and may it be considered by the trier of fact in assessing criminal liability? The issue is, of course, intimately related to the

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[1] N.Y. Times, March 12, 1966, at 24, Col. 3.

[2] *See* the discussion of People v. Gorshen, 51 Cal.2d 716, 336 P.2d 492 (1959), at note 81 *infra*.

[3] N.Y. Times, March 28, 1966, at 19, Col. 1.

[4] *Id.*, April 15, 1966, at 18, Col. 1.

[5] Arizona Republic, April 25, 1966, at 14, Col. 2. An interesting discussion of Sirhan's psychological condition as well as the trial testimony and tactics is KAISER, R.F.K. MUST DIE! (1970).

[6] This is the position that evidence of psychological abnormality is admissible to disprove the state of mind required for the crime, adopted by the California Supreme Court in People v. Wells, 33 Cal.2d 330, 202 P.2d 53 (1949). *Wells* is discussed in the text accompanying note 29 *infra*, and the diminished responsibility rule is discussed in the text accompanying note 62 *infra*.

[7] This is not an indisputable definition of psychological abnormality. Many mental health professionals would, of course, argue that the classical utilitarian man would not be "normal," if indeed he could be found at all. Some might argue that psychological abnormality, assuming it can be defined, should not be legally significant in determining criminal liability unless it is of a given degree of severity, i.e., enough to constitute "mental illness." But since the matter is wide open in this regard and the criminal law assumes the rational utilitarian man, psychological abnormality seems best defined as any deviation from this model.

grading of offenses[8] and amounts to an attempt to integrate grading and the psychology of the offender. The question may arise when such evidence is offered by a defendant, when instructions are requested directing the jury to consider such evidence and telling them how to do so, and when a defendant challenges the sufficiency of the evidence to support a verdict.

The attempt to integrate grading of offenses and the psychology of the offender is by no means a recent development; it has received relatively extensive consideration by both courts and commentators. In its only consideration of the matter,[9] the United States Supreme Court in 1946 refused to overturn, either as a matter of evidentiary law or in the exercise of its supervisory powers, the decision of the Court of Appeals of the District of Columbia that a trial court in a homicide prosecution had not erred in refusing to instruct the jury to consider the accused's mental illness in determining whether he had harbored "malice aforethought" at the time of the alleged killing. Suggesting that experience had not clearly demonstrated the fallacy of the position taken by the Court of Appeals, the Supreme Court declined to express an opinion on the merits of the issue and relegated the matter to legislative action or the discretionary powers of the lower courts.[10]

The issue seems, however, to have experienced a recent revival in the state appellate courts. Several courts, for example, have recently held such proof not entitled to evidentiary significance despite earlier language in their decisions suggesting that it would properly be considered.[11] On the other hand, one state court has apparently assumed that constitutional considerations required that proof of psychological abnormality be given full evidentiary significance in regard to the state of mind of the defendant at the time of the alleged offense.[12] Despite the significant amount of literature on the subject,[13] the recent flurry of attention the problem has received in the popular press as well as in the case law and legal commentaries suggests that a reexamination is in order.

Doctrinal work in this area must be done with frank acknowledgement of the difficulty of relating

[8] It has been suggested that insofar as the matter has been litigated in American courts, it applies only to homicide cases. State v. Gilmore, 242 Ore. 463, 469 n. 2, 410 P.2d 240, 243 n. 2 (1966). It has also been suggested that the "diminished responsibility" doctrine is, in fact, applied only in capital cases as a means of voiding a death penalty not voidable on other grounds. United States v. Hazeltine, 419 F. 2d 579, 581 n. 3 (9th Cir. 1969). Although it is true that the appellate cases often involve homicide cases in which the death penalty has been imposed, there is no doctrinal reason why it could not be raised in other situations. In California, for example, several of the major cases have involved homicide convictions in which the death penalty was not imposed. *See* People v. Conley, 64 Cal.2d 310, 411 P.2d 911, 49 Cal. Rptr. 815 (1966); People v. Wolff, 61 Cal.2d 794, 394 P.2d 959, 40 Cal. Rptr. 271 (1964). The cases state that the California Supreme Court does not disapprove of its "diminished capacity" rule being applied in nonhomicide cases. *See* People v. Wells, 33 Cal.2d 330, 202 P.2d 53 (1949) ("leading case," in which court approved of such evidence in prosecution for assault by a prisoner); People v. Gentry, 257 Cal. App.2d 607, 65 Cal. Rptr. 235 (1968) (Diminished capacity unsuccessfully invoked in bad check case).

[9] Fisher v. United States, 328 U.S. 463 (1946). *See* note 47 *infra*.

[10] 328 U.S. at 476.

[11] Painter v. Commonwealth, 210 Va. 360, 171 S.E.2d 166 (1969) (Offer of psychological evidence as to whether defendant acted with malice aforethought or whether he premeditated properly refused) (Does not mention language in Dejarnette v. Commonwealth, 75 Va. 867, 880–81 (1881):

> there are, doubtless, cases in which, whilst the prisoner may not be insane . . . yet he may be in that condition from partial aberration or enfeeblement of intellect which renders him incapable of the sedate, deliberate and specific intent necessary to constitute murder in the first degree);

Curl v. State, 40 Wis. 2d 474, 162 N.W.2d 77 (1968), *cert. denied*, 394 U.S. 1004 (1969) (disapproving any suggestion in Hempton v. State, 111 Wis. 127, 86 N.W. 596 (1901), that mental abnormality short of insanity was relevant to guilt). *Cf.* Hashfield v. State, 247 Ind. 95, 210 N.E.2d 429 (1965), *cert. denied*, 384 U.S. 921 (1966), making clear that language in Sage v. State, 91 Ind. 141 (1883) (A defendant has a right to have his mental condition at the time of the crime put before the jury) did not authorize a defense of "partial insanity."

[12] Shaw v. State, 106 Ariz. 103, 471 P.2d 715 (1970), *cert. denied*, 39 U.S.L.W. 3313 (U.S. Jan. 18, 1971). In dicta, the Arizona Supreme Court indicated that the bifurcated trial procedure, which separated the trial of "guilt" from that of "insanity," violated the due process rights of the accused. The legislative intent was that evidence of mental illness be admitted only at the second trial on the sanity issue, the court reasoned, and since this deprived the accused of his right to have all relevant evidence as to his state of mind introduced at the first trial (including any proof of mental illness), the procedure must fall. For a discussion of the case and the issues raised by it, *see* Dix, *Mental Illness, Criminal "Intent," and the Bifurcated Trial*, LAW AND THE SOCIAL ORDER 559 (1970).

[13] *See, e.g.*, S. GLUECK, MENTAL DISORDER AND THE CRIMINAL LAW 199–208 (1925); M. GUTTMACHER & H. WEIHOFEN, PSYCHIATRY AND THE LAW 426–33 (1951); R. PERKINGS, CRIMINAL LAW 878–83 (2d ed. 1969); H. WEIHOFEN, MENTAL DISORDER AS A CRIMINAL DEFENSE 175–95 (1954); Keedy, *Insanity and Criminal Responsibility*, 30 HARV. L. REV. 535 (1917); Keedy, *A Problem of First Degree Murder: Fisher v. United States*, 99 U. PA. L. REV. 26 (1950); Taylor, *Partial Insanity as Affecting the Degree of Crime—A Commentary on Fisher v. United States*, 34 CAL. L. REV. 625 (1946); Weihofen, *Partial Insanity and Criminal Intent*, 24 ILL. L. REV. 505 (1930).

it to reality. While the relationship between formal doctrine and the administration of the law-in-fact is still a highly uninvestigated area, there is a growing body of literature that suggests what every practicing lawyer knows: the relationship between doctrine and administration is neither as simple and direct nor as important as has traditionally been postulated.[14] But this does not mean that doctrinal analysis is of no value or that more careful consideration of the empirical effects of doctrinal alternatives cannot assist the criminal justice system in accomplishing its goal.

I. Subjective and Objective Factors in Determining Criminal Liability

The use of psychological abnormality is only one of numerous ways in which the substantive criminal law might investigate the subjective state of mind of the offender. To place the issue of psychological abnormality in proper perspective, it is necessary to review briefly the significance of the offender's mental state in criminal liability doctrine. This can best be done by positing two polar models and then examining the extent to which these models have been accepted in formal doctrine.

A. *The Models of Liability*

The use of models is often helpful to the understanding of the relationship between apparently conflicting approaches of the law to related issues.[15] By carefully examining the choices which must be made on each issue, variations in the way the choice is made can often be better understood. This is as true with the substantive criminal law as with other areas. The models, for the sake of convenience, can be labeled the "subjective model of criminal liability" and the "objective model of criminal liability."

1. *The Subjective Model*

The subjective model emphasizes the characteristics of the particular offender. Liability is properly imposed only if it is established that (1) the individual has violated or endangered a social interest, (2) the individual's actions or failure to act violated a rule of which the offender was aware, (3) the offender himself acknowledged at the time that this rule "should" have been obeyed, and (4) the offender's decision to violate the rule was not significantly influenced by factors other than the philosophical decision to violate the norm. This model, of course, emphasizes "moral culpability" by authorizing liability only when the offender has voluntarily, in the broadest sense of the word, violated a norm which he himself recognized as deserving his adherence. It also serves the utilitarian function of restricting the imposition of punishment to those cases in which it is most likely to serve the preventive objective. Assuming that the preventive function is performed by specific and general deterrence, the subjective model also represents reliance upon the assumption that punishment can only be effective upon those who are aware of its existence, who are aware of their choice to incur liability or not, and who are free from any influence that renders freedom to exercise this choice nonexistent.

2. *The Objective Model*

The objective model, on the other hand, emphasizes the threat which an individual poses directly to social interests protected by criminal sanctions. Liability is properly imposed if the individual in fact has demonstrated that he poses a threat to social interests, that is, if it is established that the individual has, by his actions or omissions, violated or endangered a social interest.

The objective model may rest upon acceptance of the retributive justification for punishment: punishment is justified if the individual has caused the damage or danger that the law prohibits.[16] But it may also represent a conclusion that imposing objective liability serves the preventive function of the law. Imposing liability without regard to state of mind may serve the "educating" or "moralizing" function by demonstrating and emphasizing social disapproval of the action.[17] It may also serve to deter those who might otherwise

[14] For work regarding the effect of the doctrinal formulation of the insanity defense, *see* A. Goldstein, The Insanity Defense (1967); R. Simon, The Jury and the Defense of Insanity (1967).

[15] H. Packer, The Limits of the Criminal Sanction 152–54 (1968), develops the value of models as a way to discuss a system which must accommodate competing value systems and the value systems themselves. Such an analysis focuses attention on the overall competition between or among value systems and the need to examine each aspect of the process to determine what choice has been made at that point.

[16] *See e.g.*, P. Brett, An Inquiry into Criminal Guilt 51 (1963).

[17] For a good summary of the terminology involved and the issues presented by the policy difference, *see* Hawkins, *Punishment and Deterrence: The Educative, Moralizing, and Habituative Effects*, 1969 Wis. L. Rev. 550 (1969).

rely upon being erroneously found not responsible by virtue of their subjective state of mind.[18]

Substantive criminal law doctrine represents a series of compromises between these two models of liability. Doctrinal development has been piecemeal and, many would argue, less sophisticated than in most other areas of American law. But the problem of consideration of psychological abnormality cannot be adequately evaluated without an adequate understanding of the various compromises at other points which the law has made.

B. *Doctrinal Choices Between the Models*

Liability for criminal punishment is traditionally said to require that the individual have entertained an "evil" mind and have translated that state of mind into action or, in a limited number of situations, inaction. But the general state-of-mind requirement[19] for liability is itself a compromise. Although there is historical evidence that it initially required a bad motive or purpose, demand that the criminal law be used to protect society against individuals who are less culpable but nevertheless dangerous has led to a dilution of the evil mind requirement to the point of requiring only an awareness of acts, circumstances, or the occurrence of results that are evaluated objectively as antisocial.[20] The requirement is now one of conscious awareness alone. As Helen Silving has stated:

> The law proceeds on the assumption that any given 'intentional act' is ascribable to a particular 'intent,' which psychologically appears as an isolated event or at least as an event separable from other psychological phenomena. It thus singles out from the dynamic continuity of a human life one act and a particular intent, directed towards it or its consequences. Inquiry into total personality development, which culminated in the particular act in issue, indeed even into the specific motive which produced the intent to carry out the act, is barred.[21]

In addition, no conscious acknowledgement of the wrongfulness of the situation is usually required for liability; even an awareness of the law's formal proscription seldom need be established.

Moreover, reluctance to extend every criminal trial into a full examination of the offender's mind has prompted the law to grant the prosecution the benefit of the presumption that every man intends the natural consequences of his actions.[22] Both in

[18] *See, e.g.*, Andenaes, *General Prevention*, 43 J. CRIM. L. C. & P.S. 176, 179–81 (1952).

[19] Although the use of the terms *mens rea*, general intent, and specific intent has given rise to much confusion, they are used here in what is probably the least confusing manner. *Mens rea* means the state of mind required by the substantive law for liability; this varies, obviously, from offense to offense. General intent means purpose, knowledge, or recklessness with regard to each element of the offense. Whether general intent is part of the *mens rea* for any crime depends upon the substantive law definining that crime. Specific intent means a substantive requirement of a state of mind in regard to something that is not itself an element of the offense. *See generally* R. PERKINS, CRIMINAL LAW 739–45 (2nd ed. 1969).

There is some indication that psychological abnormality might be relevant in the determination of whether a criminal defendant has committed a "willed act." Thus an act committed while unconscious does not give rise to criminal liability. *See* People v. Wilson, 66 Cal.2d 749, 427 P.2d 820 59 Cal. Rptr. 156 (1967); State v. Mercer, 275 N.C. 108, 165 S.E.2d 328 (1969). But it seems clear that if the alleged unconsciousness was purportedly caused by a psychological abnormality that might give rise to legal "insanity," the effect of it must be judged by the insanity criteria and not by the "unconsciousness" test. *See* State v. Wilson, 66 Cal. 2d 749, 756 n.2, 427 P.2d 820, 825 n. 2 59 Cal. Rptr. 156, 161 n. 2, (1967). It has also been asserted that if an act was "involuntary," as by reason of alcoholism, the defendant has not thereby committed an "act" within the meaning of the traditional *actus reus* requirement. Tao, *Legal Problems of Alcoholism*, 37 FORDHAM L. REV. 404, 407 (1969). As in the case of the "unconsciousness" defense, however, doctrinal order seems to demand that this rule be limited to "involuntariness" caused by factors that could not be within the ambit of the insanity defense. In any case, insofar as psychological abnormality gives rise to "unconsciousness" or "involuntariness" within the meaning of these doctrines, it results in absolving the accused of criminal liability. Since this is an all-or-nothing proposition, it has little relevance to the present problem, the grading of the liability of one admittedly criminally liable.

[20] *See, e.g.*, J. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 83 (2nd ed. 1960). *But see* Mueller, *On Common Law Mens Rea*, 42 MINN. L. REV. 1043, 1059 (1958).

[21] Silving, *Psychoanalysis and the Criminal Law*, 51 J. CRIM. L. C. & P.S. 19, 24 (1960).

Some courts, however, fail to recognize this limitation. *See, e.g.*, State v. Linn, 93 Idaho 430, 437 462 P.2d 729, 736 (1969): "Authority holds that the word intentional is synonymous with 'voluntary.'"

[22] The presumption is often invoked in appellate cases to sustain a verdict under circumstances containing adequate circumstantial proof of the requisite state of mind. *See, e.g.*, State v. Smith, 157 Conn. 351, 254 A.2d 447 (1969); State v. LeVier, 202 Kan. 544, 451 P.2d 142 (1969). But in some cases it is invoked where adequacy of proof of intent is questionable. In State v. Carlson, 5 Wis. 2d 593, 93 N.W.2d 354 (1958), for example, the defendant was charged with arson which the court acknowledged required intent to burn the structure. The defendant admitted having lighted a candle under a stairway of the structure, holding the candle to an inner tube, trying to squeeze the fire out when it began to hiss and bubble, and finally running away. In sustaining the convinction, the court held that the fire was the "natural and probable result" of the acts which defendant's admissions proved, there

substance and in manner of proof then, the general *mens rea* requirement represents a significant compromise between the subjective and objective models of liability.

Deviations from the general state of mind requirement complicate the picture. So-called "strict liability" offenses—in which general intent is not required in regard to one or more elements of the offense[23]—are relatively common, although inadequate judicial analysis often makes the exact requirements for liability difficult to determine. Requirements beyond general intent—so-called "specific" intents—usually represent, where they exist, a swing towards the subjective model. But such specific intents have developed piecemeal in regard to a number of attempt-like offenses, and no overall consistent approach is generally discernible.

The compromises and their variety become even more obvious in an examination of the traditional defenses to criminal liability. The rule that only a reasonable mistake of fact can negate a "general" intent has as its results the potential imposition of liability for a failure to live up to an objective standard.[24] The limitation often imposed upon the availability of intoxication as negating state of mind—that it too may only negate a specific intent—is an equally obvious compromise.[25] But the M'Naghten formulation of the insanity defense[26] is perhaps the most blatant. By restricting the legal relevance of a defendant's psychological abnormality to proof of a defect of his cognitive abilities of such a nature as to render it impossible for him to know the nature and quality of his act, or to know that it is "wrong," the law formally ignores much of the actual impact of psychological abnormality upon an offender.[27]

This brief discussion of the varying approach of the substantive criminal law towards the competing models makes the doctrinal problem posed by any attempt to integrate the psychological abnormality of offenders and the grading of criminal liability clearer: although the law has sometimes publicly embraced the proposition that there is no guilt without an evil mind, substantive criminal law doctrine in fact represents a series of varying compromises between subjective and objective models of liability. The extent to which guilt depends upon the offender's personal psychology—his actual state of mind—differs with the crime involved as well as the defenses asserted. Having developed no consistent approach to the legal relevance of the offender's psychology, the law is understandably less than prepared to respond to another demand to integrate the offender's state of mind into the scheme for determining or grading his criminal liability.

The purpose of this article is to examine the actual or potential relationship of psychological abnormality and the grading of liability. Before examining the specific ways in which this might be accomplished, the task undertaken in Part III, it would be valuable to consider how courts have formally responded to requests that they consider psychological abnormality in some manner other than raising the defense of insanity. This is the subject of Part II.

II. Judicial Consideration of Psychological Abnormality Short of "Insanity"

As both the legal and the lay community have gained psychological sophistication, attempts to

was a presumption that he intended such results, and the jury reasonably concluded that the defendant failed to rebut this presumption by raising a reasonable doubt as to his state of mind. *But see* State v. Lundstrom, 285 Minn. 130, 171 N.W.2d 718 (1969) (Evidence, including battery upon wife, left substantial doubt as to whether defendant had intended death of wife which followed battery). The presumption may also be used as a compromise in situations involving strong policy support for strict liability. *See* People v. Vogel, 46 Cal.2d 798, 299 P.2d 850 (1956), rejecting the general rule that a bigamy defendant's awareness of the facts making his marriage bigamous is irrelevant, but holding that showing the second marriage is part of a prima facie case and the defendant bears the burden of proving lack of knowledge of facts leaving him free to marry. In a final category of cases, the presumption is relied upon for holdings that impose liability which is strict in the sense of not requiring at least "general intent." *See* People v. Allen, 117 Ill. App.2d 20, 254 N.E.2d 103 (1969), concluding that since the defendant criminally invaded the victim's home and an injury to the victim resulted, the defendant's conviction of battery must stand since "everyone is held to comtemplate and be responsible for the natural consequences of his act". *See also* State v. Viekel, 2 Conn. Cir. 459, 202 A.2d 250 (1964), in which the court expressly acknowledged that it was imposing liability for resisting arrest without regard to whether the defendant was aware of the legality of the attempted arrest.

[23] *See generally* Morissette v. United States, 342 U.S. 246 (1952). For a recent case holding a "strict liability" felony unconstitutional, *see* Speidel v. State, 460 P.2d 77 (Alas. 1969).

[24] R. Perkins, Criminal Law 940-41 (2nd ed. 1969).

[25] *See* People v. Hood, 1 Cal.3d 444, 462 P.2d 370, 82 Cal. Rptr. 618, (1969).

[26] M'Naghten's Case, 8 Eng. Rep. 718 (Lords 1843).

[27] Some courts have failed to recognize that traditional formulations of the insanity defense do not simply permit a defendant to convince the trier of fact that he did not have the state of mind required for the crime. *See, e.g.*, United States v. Henry, 417 F.2d 267 (2d Cir. 1969); Smith v. State, — Miss. —, 220 So. 2d 313 (1969).

use psychological knowledge in assessing criminal liability have increased. Given the rapid development of psychology, especially since World War II, only relatively recent cases are of any real value; the general language in the early cases suggesting that such abnormality is properly a factor in assessing criminal liability was written under such different conditions than those now existing that it deserves only minimal attention.

A. *Consideration Favorable to the Use of Such Evidence*

Those courts that have found evidence of psychological abnormality properly accepted and considered[28] have generally done so on the theory that such evidence is relevant to the issue of the defendant's state of mind. The leading case on this point is the California Supreme Court's decision in *People v. Wells*.[29] Wells, charged with an assault "with malice aforethought," offered evidence that at the time of the assault he was in a "state of tension" and as a result had an abnormal fear for his personal safety. Consequently, defense experts submitted, Wells would fear for his personal safety and react accordingly in situations in which a "normal" person would not entertain any such fear or would not entertain as great a fear.[30] Commenting that if Wells had acted only on the basis of honest (though unreasonable) fear he necessarily would have lacked "malice aforethought," the court found the materiality of the offered evidence "patent."[31] Apparently assuming that the determination of materiality settled the issue, the court found error in the refusal to admit the testimony. The *Wells* analysis is typical. Convinced of the logical relevancy of such evidence to the state of mind issue, courts approving of its use have not carefully examined objections to it. Instead, they have jumped from logical relevancy to admissibility.[32]

B. *Judicial Rejection of Evidence of Psychological Abnormality*

Those courts that have rejected or disapproved of use of evidence of a defendant's psychological abnormality have generally been more extensive in their explanation than courts approving such use. Judicial discussions of this nature run the gamut from expressions of broad fears of releasing dangerous criminals to sophisticated analyses of the charged offense which conclude that liability is in fact objective.

The Pennsylvania Supreme Court, on which a decreasing majority has vigorously opposed the use of evidence on psychological abnormality,[33]

[28] Beckstead v. People, 133 Colo. 72, 292 P.2d 189 (1956) (Trial court erred in rejecting at first portion of bifurcated trial evidence tending to show that defendant lacked ability to form intent required for first degree murder); State v. Clokey, 83 Idaho 322, 364 P.2d 159 (1961) (Instruction that abnormal mental condition might be considered in determining whether "specific mental factor" existed "properly stated the law"); State v. Gramenz, 256 Iowa 134, 126 N.W.2d 385 (1964) (Trial court properly instructed jury to consider mental abnormality as going to whether defendant premeditated, but refusal to instruct jury to consider this evidence as going to whether defendant had general intent or malice aforethought also proper); Washington v. State, 165 Neb. 275, 85 N.W.2d 509 (1957) (Error to instruct jury that evidence of low I.Q. and "inferior thinking capacity and inferior judgement" would go to punishment only, since it could also establish failure to deliberate and premeditate); State v. De Paolo, 34 N.J. 279, 168 A.2d 401 (1961) (Evidence of mental illness or deficiency admissible to prove lack of premeditation if it rationally bears on that issue); State v. Padilla, 66 N.M. 289, 347 P.2d 312 (1959) (Defendant entitled to jury instruction that mental condition and defects could be considered in determining whether he had the power to deliberate); Fox v. State, 73 Nev. 241, 316 P.2d 924 (1957) (Evidence of insanity may be used to show that although the defendant was presumptively capable of premeditating he in fact did not, although it may not be used to prove lack of capacity to premeditate), disapproving language in State v. Fisko, 58 Nev. 65, 70 P.2d 1113 (1937) to the contrary; State v. Green, 78 Utah 580, 6 P.2d 177 (1931) (In view of evidence defendant's abnormality, trial court erred in failing to instruct on voluntary manslaughter, since mental illness can render one incapable of deliberating, premeditating, forming malice aforethought or forming the intent to take life).

[29] 33 Cal.2d 330, 202 P.2d 53 (1949).

[30] *Id.* at 344–45, 202 P.2d at 62.

[31] *Id.* at 345, 202 P.2d at 62–63.

[32] *See* cases cited in note 28 *supra*. The American Law Institute recommended that evidence of a mental disease or defect be admissible "whenever it is relevant to prove that the defendant did or did not have a state of mind which is an element of the offense." MODEL PENAL CODE §4.02 (Proposed Official Draft, 1962) The comments, although acknowledging that some jurisdictions do not accord such evidence an admissibility co-extensive with its relevance, do not discuss the reasons for such limitations and simply conclude that the drafters "see no justification for a limitation of this kind." MODEL PENAL CODE, Comments to §4.02 (Tent. Draft No. 4, 1955). *Cf.* MODEL PENAL CODE §4.02(2) (Proposed Official Draft, 1962), making evidence of impaired capacity to appreciate the criminality of the act or to conform conduct to the law admissible when the issue is whether to impose the death penalty.

[33] *Compare* Commonwealth v. Ahearn, 421 Pa. 311, 218 A.2d 561 (1966) (4–3 decision) (Verdict of guilty of first degree murder supported by evidence, and testimony that defendant lacked ability to form intent to kill because of his mental state induced by feeling the breasts of the victim or hearing her screams while being beaten was not properly admitted as disproving state of mind) *and* Commonwealth v. Phelan, 427 Pa. 265, 234 A.2d 540 (1967) (5–2 decision) (Medical testi-

emphasized the increased danger to "law abiding citizens" that would follow its use.[34] The Nevada Supreme Court relied on the more specific objection that the use of such evidence could lead to outright acquittal, in which case there would be no procedural device available to assure protection of society.[35] Other objections relate to the type of issues which use of such evidence would raise and the type of testimony that would be used to resolve them. The opinions of the Pennsylvania Supreme Court, for example, evince a strong distrust of the reliability of expert mental health testimony in general.[36]

Courts have also urged that the issue would be too complex to reasonably expect lay jurors to resolve[37] and, as a result, they fear that the issue would be turned over to experts to decide, excluding both judge and jury from the decision-making process.[38]

Some courts in jurisdictions strongly attached to the *McNaghten* formulation of the insanity defense have seen the use of evidence of psychological abnormality as either inconsistent with the insanity defense[39] or rendered unnecessary by it.[40] The insanity defense might be affected in one of two ways. Evidence of lack of volition might be received when it would not be admissible under the jurisdiction's formulation of the insanity rule. Or, carefully phrased requirements that only a total or near-total loss of capacity to comply with legal requirements would be subverted by permitting proof of mere reduced capacity to comply. In either case, the courts apparently have feared that use of the evidence would subvert the resolution of the conflicting interests which the insanity rule represents. On the other side of the coin is the argument that the relevancy of the evidence is its tendency to disprove the state of mind required for liability and if the defendant lacked that state of mind, he would also come within the insanity defense.[41] Under this view, the function served by a rule permitting the use of such evidence is already served by the insanity defense.

The Arizona Supreme Court took another approach in rejecting such evidence. The court, considering the use of evidence of psychological abnormality in a homocide case, affirmed a trial court's refusal to instruct the jury to consider such evidence in determining whether the defendant had the state of mind required for murder (malice aforethought). The court relied upon a statutory directive that malice "is implied when no considerable provocation appears"[42] in concluding that the distinction was essentially objective.[43] Thus the proof, which related only to the subjec-

mony offered during first phase of bifurcated trial to prove lack of ability to form intent to kill and to conform to the law properly refused) *with* Commonwealth v. Rightnor, 435 Pa. 104, 253 A.2d 644 (1969) (*Phelan* rule affirmed by equally divided court).

[34] Commonwealth v. Rightnor, 435 Pa. 104, 119–20, 253 A.2d 644, 651 (1969).

[35] Fox v. State, 73 Nev. 241, 244–45, 316 P.2d 924, 926 (1957). Provisions for automatic or quasi-automatic commitment following a verdict of not guilty by reason of insanity serve this function upon such a final disposition of a criminal trial. Similar provision might be made, of course, for commitment following service of a sentence imposed upon a finding of "reduced guilt;" *see* note 103 *infra*.

[36] *See, e.g.*, Commonwealth v. Carroll, 412 Pa. 525, 535–36, 194 A.2d 911, 917 (1963). Although *Carroll* dealt with the sufficiency of the evidence, the attitude expressed by the court in this case was clearly influential in the cases cited in note 33 *supra*.

[37] Curl v. State, 40 Wis. 2d 474, 485 162 N.W.2d 77, 83 (1968): "Judge and jury ought not to be required to identify, classify and evaluate all categories and classifications of human behavior beyond establishing the fact of sanity."

[38] Commonwealth v. Rightnor, 435 Pa. 104, 119, 253 A.2d 644, 651 (1969). *See also* Painter v. Commonwealth, 210 Va. 360, 368, 171 S.E.2d 166, 172 (1969), asserting that permitting use of such evidence would invade the province of the jury.

[39] State v. Rideau, 249 La. 1111, 193 So. 2d 264 (1966), *cert. denied*, 389 U.S. 861 (1967) (Statute codifying M'Naughten requires rejection of evidence of mental illness negating intent or reducing degree of crime); Commonwealth v. Rightnor, 435 Pa. 104, 253 A.2d 644 (1969); Armstead v. State, 227 Md. 73, 175 A.2d 24 (1961); State v. Fisko, 58 Nev. 65, 70 P.2d 1113 (1937), *disapproved in part*, Fox v. State, 73 Nev. 241, 316 P.2d 924 (1957); State v. Schantz, 98 Ariz. 200, 403 P.2d 521 (1965).

[40] *See* State v. Gramenz, 256 Iowa 134, 126 N.W.2d 285 (1964). *Cf.* Pinana v. State, 76 Nev. 274, 352 P.2d 824 (1960) (Instruction that "a mind capable of knowing right from wrong is a mind capable of entertaining intent and of deliberating and premeditating" correctly states the law).

[41] In State v. Gramenz, 256 Iowa 134, 126 N.W.2d 285 (1964), the court found no reversible error in a refusal to instruct the jury to consider testimony as to the defendant's "state of severe emotional turmoil" in regard to the defendant's state of mind. If the defendant lacked the capacity to harbor malice aforethought, the court concluded, he could also lack the capacity to know right from wrong and therefore would be entitled to acquittal under the insanity instructions. *Id.* at 142, 126 N.W.2d at 290.

[42] ARIZ. REV. STAT. ANN. §13-451(B) (1956).

[43] People v. Schantz, 98 Ariz. 200, 403 P.2d 521 (1965). In an earlier case, the same court made even clearer the objective nature of its view of homicide liability. In Foster v. State, 37 Ariz. 281, 294 P.268 (1930), the court emphasized that the power to reason, or intelligence, did not affect the degree of a homicide offense; if the accused is "sane," "the law implies deliberation and premeditation from the circumstances of the killing." *Id.* at 290, 294 P. at 271.

tive state of mind of the offender, was held immaterial.

The final objection raised to the introduction of evidence relating to psychological abnormality recognizes the full complexity of the entire matter. Viewing the issue as involving more than a minor evidentiary matter, the District of Columbia circuit in 1960[44] adhered to its earlier view that such evidence would not be admissible.[45] Seeing the underlying task as consolidating gradations of criminal responsibility and psychological abnormality, the Court found the task inappropriate for judicial undertaking:

> The problem of classifying, assessing and analyzing the results of the application of modern psychiatry to administration of criminal law as it relates to gradations of punishment according to the relative intelligence of the defendant is beyond the competence of the judiciary. Courts are neither trained nor equipped for this delicate and important task. The basic framework for sentences of punishment must be established by the legislative branch. Indeed, one can hardly conceive of a process less suited to formulating general rules in this sensitive area, than an adversary proceeding. That must be done by long range studies by competent public and quasi-public entities and by legislative committees with trained staffs aided by objective technical and scientific witnesses who can deal with all aspects of the problem, not confined as we are to the facts of an individual case.[46]

C. *Evaluation*

American case law evaluation of the relevance of evidence of a criminal defendant's psychological deviation from the hypothetical rational man has been distressingly unsatisfactory. Judicial discussion ranges from almost hysterical diatribes against mental health personnel in general to relatively detailed doctrinal analyses which ultimately conclude that the purported doctrinal requirement of a subjective state of mind is in fact a fiction. But underlying many such discussions is another deficiency that may to some extent help to explain the inadequacies of the judicial analyses. This is the frequent lack of apparent relevance of offered testimony to the allegedly applicable legal doctrine. It is most obvious in cases in which psychodynamically-oriented experts testify in conclusory terms that a defendant lacks "intent" or in which the testimony is offered for the purpose, although the substance of the testimony is that the act was to some extent influenced by the unconscious operation of defense mechanisms.

One of the best illustrations of this problem is the much-criticized case of *Fisher v. United States*.[47] Fisher, a custodian, had assaulted and killed a librarian who had complained about the inadequacies of his work and called him a "black nigger" in his presence. At trial,[48] a clinical psychologist testified that Fisher had an I.Q. of 76. The defense rested primarily, however, upon the testimony of Ernest Y. Williams, M.D., a neurologist and psychiatrist on the Howard Medical School faculty. Dr. Williams testified that Fisher had a psychopathic personality associated with chronic alcoholism and early schizoic tendencies. He noted a flattening of affect and limitations of information, judgment, and comprehension and testified that in his opinion Fisher had been unable to resist the impulse to kill. He declined to respond categorically to whether Fisher was insane at the time of the killing. At one point, Dr. Williams made the conclusory statement that "I doubt whether he was able to entertain an intent to kill her." A government rebuttal witness testified that an individual of Fisher's mental age had eighty percent of normal intellectual function. The case appears to have been tried on an insanity theory, although defense counsel did request instructions that the jury consider Fisher's entire personality and his mental, nervous, and emotional characteristics in determining the existence of the state of mind. On appeal, the District of Columbia Circuit affirmed the denial of the instructions on the alternative ground that there was no evidence justifying them.[49] On certiorari to the Supreme Court, the government argued that even if such instructions were required in an appropriate case, the evidence in this case was not of that degree of specificity that would enable the jury to determine

[44] Stewart v. United States, 275 F.2d 617 (D.C. Cir. 1960), *rev'd on other grounds*, 366 U.S. 1 (1961).

[45] In Fisher v. United States, 149 F.2d 28 (D.C. Cir. 1945), *aff'd*, 328 U.S. 463 (1946), the court had held that the jury was properly not instructed to consider psychological abnormality as disproving state of mind. In Stewart v. United States, 214 F.2d 879 (D.C. Cir. 1954), the court was urged to reconsider the matter but declined on the basis that a reevaluation should await some evidence of the effect of the expanded insanity defense announced in Durham v. United States, 214 F.2d 862 (D.C. Cir. 1954).

[46] Stewart v. United States, 275 F.2d 617, 624 (D.C. Cir. 1960), *rev'd on other grounds*, 366 U.S. 1 (1961). This view was adhered to in Stewart v. United States, 394 F.2d 778 (D.C. Cir. 1968).

[47] 328 U.S. 463 (1949).

[48] The testimony is summarized in Transcript of Record at 83–95, Fisher v. United States, 328 U.S. 463 (1946).

[49] Fisher v. United States, 149 F.2d 28, 29 (D. C. Cir. 1945).

whether or not Fisher had the capacity to deliberate or premeditate.[50] Nevertheless, the Supreme Court elected to treat the case as if there had been extensive trial development of Fisher's capacity to entertain the conscious desire to cause the victim's death. The Court held that trial juries need not be instructed to consider psychological abnormality in determining the existence of premeditation.

The Court's treatment of the record as extensively developed on the issue of mental capacity was ill-founded. While Dr. Williams' testimony as to Fisher's limitations might have been related to capacity to premeditate, no attempt was made to develop this. The psychiatrist's statement that he entertained doubt as to Fisher's ability to entertain intent to kill was never explained or developed and, as the record stood, remained an unsupported assertion. Given the actual development of the facts before the jury, it would have been quite reasonable to resolve the case as the government suggested—there was simply not sufficient information before the jury, qualitatively or quantitatively, to justify having them determine the defendant's capacity to entertain desire or awareness or to perform the evaluations necessary for premeditation. Indeed, it is likely that the inadequate record in *Fisher* affected the willingness of the Supreme Court to resolve the issue. In *Fisher*, the defense was really asking the jury to consider inability to control conduct under the rubric of incapacity to entertain the requisite state of mind. Given this logical inconsistency between the testimony and the theory under which it was offered, there is an understandable basis for what might be regarded as an inadequate judicial treatment of the issue.

The case law, then, has been characterized by a failure to analyze carefully the substance of the testimony offered or accepted, and, consequently, by a failure to formulate and resolve the doctrinal issues skillfully. Part III attempts a clarification of this area by distinguishing among the principal doctrinal vehicles under which evidence of a defendant's psychological abnormality might be considered and broadly outlines the issues raised by each.

III. Alternative Ways in Which Psychological Abnormality Might Be Used in Assessing Criminal Liability

The case law, as Part II indicated, seldom evaluates critically the logical relevance of evidence offered regarding a defendant's psychological abnormality. Consequently, the doctrinal issues are seldom well-defined and evaluated. The first task, therefore, is to distinguish carefully the alternative ways in which such evidence might be relevant to criminal liability. There seem to be four alternatives. The evidence might go to establish a general mitigating factor (the "partial responsibility" approach). It might go to establish the absence of the state of mind required by the existing law defining the crime, either by proving inability to entertain that state of mind (the "diminished capacity" approach) or by proving that despite the capacity to entertain that state of mind the defendant did not in fact entertain it. It might also tend to prove a lack of a causal relationship between traditional *mens rea* and the act relied upon to establish liability. Finally, the required state of mind might be modified in a manner that makes the psychological abnormality more meaningful, and the evidence would then go to the absence of this modified state of mind. To some extent these different doctrinal formulations of the issues raise significantly different underlying policy issues. They must, then, be considered separately.

A. *Psychological Abnormality as a Mitigating Factor Based on the European Model*

One means of relating a defendant's psychological abnormality to criminal liability is followed in a number of European countries.[51] This alternative, however, does not purport to relate directly the elements of the offense and the reduction in responsibility, but gives the court or the jury the power to reduce the penalty for the offense.[52] Under the English Homicide Act of 1957,[53] a similar approach is taken to liability for homicide offenses, although the relevance of the abnormality is not only the punishment but the formal grade of the offense. A defendant may avoid conviction for murder by reducing the degree of the offense to manslaughter if he establishes that, at the time of the crime, he was suffering from an "abnormality of the mind" which "substantially impaired his mental responsibility" in regard to the killing.

[50] Respondent's Brief at 36–38, Fisher v. United States, 328 U.S. 463 (1946).

[51] *See generally* Royal Commission on Capital Punishment 1949–53, Report, App. 9, at 414–16 (1953) for a summary of the European provisions.

[52] The Italian Penal Code, for example, permits a sentence below the standard minimum for the offense if, at the time of the offense, the accused was in such a state of mind because of partial insanity that his capacity for understanding and his volition were greatly diminished. *Id.* at 415.

[53] English Homicide Act of 1957, 5 & 6 Eliz. 2, c. 11, §2.

Some American courts seem to have interpreted offers of evidence of psychological abnormality as arguing for the recognition of a similar doctrine in this country. The District of Columbia Circuit, for example, in assuming that the task before it would involve "classifying, assessing and analyzing the results of the application of modern psychiatry to administration of criminal punishment as it relates to gradations of punishment," [54] apparently anticipated that the use of psychological abnormality would not be tied to existing gradations and definitions of offenses but rather would require a complete reworking of the grading of offenses. Nevertheless, it is unlikely that such a proposal has been seriously proposed to American courts. The confusion is undoubtedly traceable, in part, to the fact that courts are asked to use, in disproving state of mind, evidence that simply does not logically relate to the existing requirements for liability.

In any case, it is doubtful whether such an alternative could be easily integrated into the usual framework of criminal liability. The general pattern of American criminal law does not lend itself to simplified grading of offenses. In some limited areas the task would not be extremely difficult. The homicide offenses, for example, provide the basic framework for several grades of criminal homicide which could conceivably be differentiated by means of subjective psychological factors, and this to some extent is already done by the substantive law in most jurisdictions. The existence of simple and aggravated assault and battery crimes provides a somewhat less wieldy possibility in that area. But in general, there is not sufficient organization of the statutory crimes to permit the application of a general defense which has the effect of reducing the grade of the offense. Those jurisdictions that have revised their substantive criminal law and fit all offenses into a limited number of gradations offer better possibilities.[55] There would be little mechanical difficulty caused by simply providing that if a defendant establishes that at the time of the crime his responsibility was substantially impaired, the conviction must be for an offense one grade below what it would otherwise be.

But even under such favorable mechanical conditions, such a step would cause difficulty. One problem would be the relationship between this doctrine and the "insanity" defense or its equivalent which, if successfully asserted, completely absolves the defendant of criminal responsibility.[56] Related to this is the danger that such a rule would run contrary to the function of grading of offenses. Grading of offenses serves two purposes. First, it differentiates among offenses on the grounds of degree of blameworthiness which the law attaches to the offense. Second, it differentiates among offenses on the basis of the extent to which punishment or incapacitation is necessary to protect society from the offender or others potentially like him. Reducing the degree of the offense because of psychological abnormality might appropriately reflect the reduced blameworthiness which society attaches to the crime, but it would also decrease the extent to which society could look to the criminal system for protection. While an offender who is psychologically abnormal may well be less blameworthy, he may also be more dangerous than one without his impairments. Thus, to reduce the maximum period of incarceration to which he may be subjected furthers one purpose of legislative grading but is inconsistent with the other. In this regard, the evidence of the offender's psychological abnormality only highlights an inconsistency in the entire grading structure. But special problems are raised by the inconsistency in this context. The analogous problem raised by the insanity defense has been resolved by automatic or quasi-automatic "civil" commitment procedures put into motion by a verdict of not guilty by reason of insanity. Such a solution cannot as easily be engrafted onto a scheme in which the evidence of psychological abnormality does not result in acquittal but merely in a reduction in liability. To some extent this problem might be met by authorization to impose either noncriminal hospitalization or further incarceration in the criminal system at the end of a sentence upon a finding of continued dangerousness. But this is less than an entirely satisfactory solution. For one thing, "fundamental fairness" would probably be seen as endangered, if not violated, by a scheme which imposed both criminal punishment and noncriminal detention for the same act. In addition, the problem of determining dangerousness at the end of a period of imprisonment is such a difficult one that there is doubt that it can be relied upon to protect both the public interest in protection and the offender's interest in minimizing the deprivation of liberty.

There is also the problem of determining what characteristics or which psychological abnormali-

[54] *See* text accompanying note 46 *supra*.

[55] *See, e.g.*, N.Y. PENAL CODE §55.05 (McKinney 1967).

[56] *See* text accompanying note 39 *supra*.

ties would be relevant to responsibility under such an approach. This, of course, raises the objection of many courts that to permit consideration of factors (such as impairment of volition) under this rubric is to destroy the jurisdiction's insanity defense by the back door. In practice, of course, this may be an artificial argument –the formal definition of the insanity defense may be of no effect whatsoever upon trial court functions and results.[57] But assuming that the doctrine is an important matter, there is no necessary inconsistency. Insofar as a jurisdiction refuses to consider loss of volition as giving rise to insanity because of the difficulty of establishing it accurately and because of doubts as to whether punishing even those without volitional control might prevent offenses by others, an appropriate balancing of the competing factors might well lead to the conclusion that the risks would be worthwhile if the maximum effect would not be acquittal but merely a reduction in the grade of the offense.[58]

The problem of defining the showing necessary to reduce the grade of the offense under such a system also raises potential constitutional questions. If the standard is phrased as generally as that in the English Homicide Act,[59] the statutory structure might be subject to attack on grounds of vagueness.[60] To some extent, such a general formulation offends the interests the preciseness requirement is designed to protect. While it is unlikely that it infringes upon a potential offender's right to advance notice of what constitutes an offense, it arguably leaves the courts without sufficient guidelines to administer the defense. This, of course, raises the danger of arbitrary administration and unequal application. On the other hand, it seems clear that preciseness is a matter of balancing rather than an inherent characteristic of language.[61]

[57] *See* text accompanying note 14 *supra*.

[58] This is the approach that has been taken under the English Homicide Act. In Regina v. Byrne, [1960] 2 Q.B. 396, the court rejected the suggestion that the psychological abnormality that would justify reducing murder to manslaughter under the statute meant the same nature of abnormality as is required for the insanity defense under the M'Naghten rule, except that it need not be as extreme as is required to successfully assert a complete defense. To satisfy the requirements of the Act, the court held, an accused must show "(a) that he was suffering from an abnormality of mind, and (b) that such abnormality of mind (i) arose from a condition of arrested or retarded development of mind or any inherent causes, or was induced by disease or injury and (ii) was such as substantially impaired his mental responsibility for his acts in doing or being a party to the killing." *Id.* at 403. "Abnormality of mind" was not defined as in M'Naghten, but rather was held to mean only "a state of mind so different from that of ordinary human beings that the reasonable man would term it abnormal." *Id.* This, the court made clear, was broad enough to include not only the ability to perceive reality and form a judgment as to whether an act is right or wrong, but also "the mind's activities in all its aspect," including "the ability to exercise will power to control his physical acts." *Id.* Whether an impairment of self control substantially impaired responsibility for the act, the court continued, is a question incapable of scientific proof. The jury must approach the issue "in a broad, commonsense way" and should only be instructed that the criterion involves "a mental state which in popular language (not that of the M'Naghten Rules) a jury would regard as amounting to partial insanity or being on the border-line of insanity." *Id.* at 404.

In the particular case before it the accused had killed a young girl and mutilated her body. The uncontradicted testimony of three defense experts was that the accused was a "sexual psychopath," that he suffered from perverted sexual desires which he found it difficult or impossible to control, and that the killing for which he was being tried had been committed under the influence of these desires. After holding that the trial court erred in instructing the jury that the defense of diminished responsibility was not available on these facts, the Queen's Bench substituted a verdict of guilty of manslaughter for the verdict of murder, on the ground that under proper instruction the jury could have come to no other conclusion. *Id.* at 405.

How the doctrine has been applied in practice is not clear. Wooton, *Diminished Responsibility: A Layman's View*, 76 L.Q. REV. 224 (1960) reports that in the first twenty-seven months of operation the defense was asserted in seventy-three cases. In fifty-three it was successful. A previous history of mental disorder seems to have most impressed juries, Lady Wooton reports, and "other distinctions between the successful and the unsuccessful cases are not easy to find." *Id* at 225–26. This study, of course, does not address itself to what effect the availability of the defense had upon cases disposed of other than by formal trial.

On the basis of this study, Lady Wooton concluded that the diminished responsibility approach of the Homicide Act posed factual issues in individual cases that were impossible to reliably resolve. *Id.* at 232. After more extensive study, she adhered to this view. B. WOOTON, CRIME AND THE CRIMINAL LAW 66 (1963). H.L.A. Hart has agreed. See H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 186–209 (1968), rejecting Lady Wooton's argument that no state of mind should be required for criminal liability but agreeing that because of the difficulties of proof, psychological abnormality should not be a factor in determining the existence of the state of mind. These arguments are, of course, more sophisticated versions of objections that have appeared in American case law. *See* text accompanying notes 37–38 *supra*.

[59] *See* text accompanying note 53 *supra*.

[60] *See, e.g.*, Winters v. New York, 333 U.S. 507 (1948).

[61] *See* the discussion by Justice Frankfurter, *id.* at 524–25 (dissenting opinion). *Cf.* Giaccio v. Pennsylvania, 382 U.S. 399, 405 n. 8 (1966):

> In so holding [that an authorization for a jury acquitting a person charged with nonfelonies to impose costs upon the defendant was void for vagueness] we intend to cast no doubt whatever on the constitutionality of the settled practice of many states to leave to juries finding defendants guilty

In this context, there are strong arguments in favor of permitting the law to proceed, feeling its way as it goes, and formulating more precise standards as the law becomes accustomed to the subject matter with which it deals. This would also provide flexibility for the rule to change as knowledge regarding the dynamics of antisocial behavior improved. The vagueness issue is really a question of whether the social interest in permitting the law flexibility in this new area is outweighed by the danger that abuse of this flexibility will operate to the detriment of specific individuals. On balance, the value of the flexibility seems to outweigh the danger.

B. *Psychological Abnormality As Proof of Nonexistence of Traditional Mens Rea*

In American criminal litigation, psychological abnormality is most often offered as bearing on whether the defendant entertained the state of mind required by the substantive law for liability.[62] This, of course, is the most logically appealing formulation. By tying psychological abnormality to the existing doctrinal framework, the admission and consideration of the evidence seems not only to leave intact traditional criminal law principles but also to be consistent with them. The law is not only doing what it has always done, but it is doing it better with the help of contemporary scientific knowledge.

The basic question which this raises, which has been almost ignored in the case law, is whether the traditional state of mind rules are appropriate vehicles for integrating contemporary psychological theories and criminal liability. There is no reason why they necessarily should be. Although the *mens rea* doctrine has a colorful history and has undergone significant development,[63] its present framework was established long before the availability of the types of psychological explanations for the behavior of particular offenders that are now offered. There are several characteristics that make the *mens rea* doctrine an inappropriate vehicle for accommodating the new knowledge. First, it is apparent that the traditional state-of-mind requirement is only one factor, and not necessarily the most significant one, in grading liability. Only in unusual situations, such as the homicide offenses and assaultive crimes, are there identifiable gradations based on the mental elements. Thus the grading pattern of most jurisdictions' substantive criminal law is such that offenses are not uniformly graded by state of mind. In addition, as Part I demonstrated, the various aspects of the *mens rea* rule and its corollaries are in fact compromises between the objective and subjective models of liability. For this reason they may be poor vehicles for the integration of psychological abnormality into the grading scheme. As a matter of doctrine, the requirement of an "evil mind" does not always in fact cause liability to turn upon the subjective state of mind of the offender. Not only, then, does the traditional framework sometimes preclude inquiry into the subjective state of mind, it is arguable that it does so for reasons unrelated to the purpose for which it would be used in the diminished responsibility defense. For example, those advocating consideration of psychological abnormality frequently point to the relevance of intoxication to absence of state of mind. Yet does this mean that psychological abnormality should be usable to disprove "specific" intents but not "general" intents? Insofar as there is justification for

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of a crime the power to fix punishment within legally prescribed limits.

If there is more flexibility in defining the standard for setting punishment than for imposing liability, it would seem to follow that the distinctions between degrees of liability would not have to meet the same standard of precision as the standards for imposing any liability.

[62] In 1917, the Institute of Criminal Law and Criminology proposed that the sole legal rule relating to criminal responsibility and mental illness be the following:

> No person hereafter shall be convicted of any criminal charge, when at the time of the act or omission alleged against him, he was suffering from mental disease and did not have by reason of such disease the particular state of mind which must accompany such act or omission in order to constitute the crime charged.

Note, *The Proposed Model Statute on Insanity and Criminal Responsibility*, 30 HARV. L. REV. 179, 179 (1916) (criticising the proposal). *See also* Keedy, *Insanity and Criminal Responsibility*, 30 HARV. L. REV. 534 (1917) (defending it). Morris, *Psychiatry and the Dangerous Criminal*, 41 So. CAL. L. REV. 514, 518–19 (1968), supports this position. This same suggestion was recently served to the National Commission on Reform on Federal Criminal Laws by its consultant, Professor David Robinson. Robinson, *Consultant's Report on Criminal Responsibility—Mental Illness: Section 503*, WORKING PAPERS OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS (1970). The Commission, however, rejected this formulation of the general insanity defense in favor of a criterion turning on substantial capacity to appreciate the criminality of conduct or to conform conduct to the requirements of law. NATIONAL COMMISSION ON REFORM ON FEDERAL CRIMINAL LAWS, STUDY DRAFT OF A NEW FEDERAL CRIMINAL CODE §503 (1970). The Comments do not explain this choice. *Id.* at Comment to §503.

[63] *See generally* Sayre, *Mens Rea*, 45 HARV. L. REV. 974 (1932).

limiting disproof of state of mind by intoxication to specific intents, does such justification extend equally to psychological abnormality?[64]

But even insofar as traditional doctrine does make the offender's psychological condition at the time of the offense a subject of inquiry, it arguably requires the inquiry to be resolved by application of criteria which bear little relationship to contemporary psychological knowledge. Aside from the objection that this will lead to simply unsatisfactory results, this raises a preliminary danger that in practice the doctrine and the testimony will bear little or no relationship to each other. The *mens rea* requirement is based upon assumptions which, if not inconsistent with those of contemporary mental health personnel, at least do not provide them with a familiar framework. The basic problem, therefore, is the same one that has traditionally plagued the *M'Naghten* formulation of the insanity defense. The state of mind requirement is one of cognition or awareness [65] Mental health personnel find it no easier to restrict their comments to an offender's awareness when the issue is the existence of a specific state of mind than when the issue is the insanity defense. Some states of mind do lend themselves to the type of analysis that mental health personnel feel is appropriate. "Premeditation" is one such state of mind, or, more accurately, one such mental process. An example of satisfactory testimony as to the existence of this process is the testimony offered in the trial of Charles R. Starkweather for first degree murder. A defense expert testified in that trial as follows:

> [I]n the sense ... we think of premeditation ... as considering an act, its possible consequences, various alternatives, ... he was not capable of that; in the sense of proceeding from an impulse to an action, in which the action is broken down into separate stages, it is possible that he did that. ... I believe that when he decides to do something, he goes ahead and does it. He may plan it; it may be an act which takes a certain amount of time, requires certain stages. In taking his car, he has to think, "Well, where can we stop and let them off?" This is part of the planning. I don't think he thinks of all these things at once, but as he goes along he thinks of what he has to do next in order to accomplish his intent.' [66]

This testimony distinguishes between "intent" in the sense of a conscious desire, "planning" in the sense of considering the mechanical feasibility of of effectuating that desire, and "premeditation" in the sense of critically evaluating the pros and cons of proceeding to effectuate the desire. It explains in understandable terms how a person could logically entertain an intent, plan the effectuation of that intent, but not premeditate regarding the objective of that intent.

In contrast with this is the situation in the Pennsylvania case of *State v. Sikora*.[67] Sikora had shot an individual with whom he had earlier had a tavern dispute. He returned to his apartment following the dispute, loaded a gun, test-fired and reloaded it, and left a note saying "The first bullet is for [the victim] and the second is for Stella Miller." The defense testimony was relatively typical of the type dynamic psychiatrists offer in such situations: Sikora had been subjected to numerous situations which increased his psychic tension, including rejection by his girlfriend and the remarks made by the victim during the tavern dispute. The stress became so great that his personality responded with an unconscious defense mechanism, a manner of dealing with stress on an unconscious level determined by Sikora's individual personality history and development. When his attention was directed to the functioning of Sikora's conscious mind, the expert was somewhat more vague: Sikora was "thinking," the expert indicated, but "the thinking was automatic". There were "strong elements of automatism" present, and Sikora was not "fully conscious of his activities" and not "completely aware of what he was doing." He could not, the psychiatrist concluded, conceive the intent to kill.

The evidence in *Sikora*, like that in many other cases, demonstrates the difficulty of using con-

[64] The limitations upon the availability of intoxication as a defense represent a combination of fear that drunkenness can be feigned, a desire to deter intoxication, moral judgments regarding the consumption of intoxicants, and a desire to secure protection against dangerous drunks, whether they meet the formal criteria for criminal liability or not. *But see* the opinion of Chief Justice Traynor in People v. Hood, 1 Cal.3d 444, 462 P.2d 370, 82 Cal. Rptr. 618 (1969), suggesting that the distinction has a factual basis:

> A drunk man is capable of forming an intent to do something simple, such as strike another, unless he is so drunk that he has reached the stage of unconsciousness. What he is not as capable as a sober man of doing is exercising judgment about the social consequences of his acts or controlling his impulses towards antisocial acts.

Id. at 458, 462 P.2d at 379, 82 Cal. Rptr. at 627.

[65] *See* text accompanying note 21 *supra*.

[66] Starkweather v. State, 167 Neb. 477, 484, 93 N.W. 2d 619, 623 (1958).

[67] 44 N.J. 453, 210 A.2d 193 (1965).

temporary mental health personnel within the framework of a rule that makes psychological abnormality legally relevant to existence of actual state of mind. The psychiatrist mouthed the magic words that Sikora lacked the ability to form the intent or to entertain the desire to cause death, but a consideration of his testimony as a whole leaves little doubt that this misstates his position. Sikora, according to the expert, entertained a conscious desire to cause the death of his victim and perhaps considered acting on this desire to an extent sufficient to constitute premeditation. These conscious mental states and processes, however, like the actions of the defendant, were greatly influenced by unconscious factors. Sikora did not lack the mental state required for liability, but the mental state as well as his actions was the result of unconscious influences; this is the substance of the testimony in *Sikora* and numerous other cases. The Supreme Court of New Jersey, which has been more alert than most other courts to the discrepancy between the proof offered in many cases and the matters at issue under the applicable doctrine,[68] held that the proof was admissible only as going to sentence or punishment.

> If a person thinks, plans and executes the plan at [the conscious] level, the criminality of his act cannot be denied, wholly or partially, because, although he did not realize it, his conscious was influenced to think, to plan and to execute the plan by unconscious influences which were the product of his genes and his lifelong environment. [69]

Other courts, however, which either did not see the lack of logical relevance, or merely suspected it, would likely be reluctant to exclude such testimony on the ground that in a serious case the jury "should" have a full picture of the defendant.

The danger that this state of affairs poses is this: the use of psychological abnormality to disprove intent is sometimes logically valid. Traditional substantive criminal law doctrine, however, does not make relevant many of the theoretical considerations which many feel should be taken into account in determining whether to punish or how much to punish. There is a strong tendency to urge upon courts psychological explanations that are simply not logically relevant to the issue for which they are offered. The rule often, then, serves as a fiction, a vehicle for placing a full dynamic explanation of the offenders' behavior before the trier of fact.[70] This is not necessarily bad. It is arguable that the jury's inherent power to acquit or convict of lesser offenses (where mechanically possible) will inevitably be exercised on the basis of factors such as psychological abnormality. The use of this fiction puts as much evidence before the jury as possible and thereby maximizes the information on which the decision will be made. On the other hand, failure on the part of many courts to recognize that the rule often operates as a fiction creates confusion in the appellate cases which is likely to extend to the trial courtroom. In addition, the necessity of observing the niceties of the fiction prevents the court from assisting the jury in evaluating the evidence by appropriate instructions and

[68] In State v. Di Paolo, 34 N.J. 279, 168 A.2d 401 (1961), the court approved of admission of evidence of psychological abnormality which "rationally bears" upon the existence of the state of mind required. This language was relied upon in *Sikora* to emphasize that the court took its doctrinal position in *Di Paolo* seriously and would require logical relevancy.

[69] State v. Sikora, 44 N.J. 453, 470, 210 A.2d 193, 202 (1965).

[70] To some extent, existing rules admitting such evidence are undoubtedly intentionally used as a fiction to accomplish a result unrelated to the formal purpose of the rule. Dr. Bernard L. Diamond has admitted as much in discussing testimony which psychiatrists may give under the California rule:

> Actually, the law is not interested in... medical categorizing of who does or does not have malice aforethought. What it wants to know is whether, in the case of the particular individual on trial, did the criminal action result from a voluntary, deliberate choice such as normal, reasonable persons appear to make in their daily lives, or was it the result of pathological forces arising far below the conscious level over which the defendant had little power of control.

Diamond, *With Malice Aforethought*, 2 ARCHIVES OF CRIMINAL PSYCHODYNAMICS 1, 29 (1957). *Cf.* Meyers, *The Psychiatric Determination of Legal Intent*, 10 J. FORENSIC SCIENCE 347 (1965), in which the author clearly conceives of "legal intent" as including far more than conscious awareness.

These comments apply directly to the psychoanalytically-oriented mental health professionals. *See* P. ROCHE, THE CRIMINAL MIND 87–88 (1958), for an exposition of the psychoanalytic or "dynamic" view of "intent" and "motivation." Because of the law's preference for mental health experts with a medical background and the strong influence of psychoanalytic theory upon the medical profession, psychoanalytically-oriented psychiatrists are the primary source of testimony in criminal cases. There are, of course, other theoretical orientation among mental health professions. *See generally* U. NEISSER, COGNITIVE PSYCHOLOGY 4–5 (1967). But the principal alternative, behavioral theory, rejects (in its extreme views) any need or value to investigation of so-called mental processes. *Id.* at 5, 292–95. Cognitive psychology is directly concerned with the processes between experience and overt behavior: perception, memory, problem-solving, and thinking. *Id.* at 4. But little of this work has reached the point where it is of direct value to such complex tasks as evaluating the mental processes of an offender at a given past time.

comments. Even "gut equity" might benefit by the instructions or the summing up of an experienced trial judge.

Moreover, the use of the rule in this manner makes it subject to what is probably the most significant objection to the *M'Naghten* formulation of the insanity defense: it unfairly places the burden of formally invoking the fiction upon the expert witnesses.[71] For the law to operate with such a fiction, it would be necessary for expert witnesses to mouth the "magic words," as did the psychiatrist in *Fisher*. To some extent, this creates discomfort on the part of the experts and dissatisfaction among them with the legal process.[72] It thus works against the development of the "bridge between medicine and the law" [73] which is essential to the adequate administration of any legal rule which takes into account the psychology of the offender.

C. *Psychological Abnormality As Establishing a Lack of a Causal Relationship Between Mens Rea and the Act*

Traditional criminal law doctrine requires not only a state of mind and an act for liability, but also a concurrence of these elements.[74] Concurrence in this context has been regarded as meaning a causal relationship: to establish liability, the act must be the result of the offender's state of mind.[75] Although there has been no discussion of the relationship of this requirement to the offender's psychological abnormality, the possibility seems worth considering.

[71] ROYAL COMMISSION ON CAPITAL PUNISHMENT 1949–53, REPORT 103–04 (1953):

> [T]he burden of 'stretching' the M'Naghten Rules, so as to avoid the unfortunate results of their strict application, falls largely and unfairly on medical witnesses.... It is unfair to the medical witness to place him in a position where he is aware that his evidence as to the nature and degree of the prisoner's mental disease and its effect on his responsibility may be treated as irrelevant unless he is prepared to hazard the opinion that at the crucial moment the prisoner was probably unaware of the wrongfulness of his act.

[72] Diamond, *Criminal Responsibility of the Mentally Ill*, 15 STAN. L. REV. 59 (1961). Diamond states, "I don't like having to take refuge in such semantic devices." *Id.* at 62.

[73] *Id.* at 51. The Royal Commission on Capital Punishment concluded that relieving experts of the embarrassment of the fiction would "do much to improve the quality of psychiatric evidence" offered in insanity trials. ROYAL COMMISSION ON CAPITAL PUNISHMENT 1949–53, REPORT 104 (1953).

[74] *See generally* R. PERKINS, CRIMINAL LAW 834–36 (2nd ed. 1969).

[75] *Id.*

Much of the testimony regarding psychological abnormality received in those jurisdictions approving its use amounts not to a denial that the state of mind required for liability did exist but rather that factors other than the conscious desire or awareness were influential in causing the criminal conduct. While the "concurrence" requirement has, in the few cases in which it has been raised, been applied to situations in which the state of mind and the act existed at different times,[76] there is no reason why a state of mind that exists at the time of an act and which might have "caused" the act cannot be shown in fact, not to have caused the act. The traditional concurrence requirement could not, thereby, be established.

But this use of the concurrence requirement may be little more satisfactory than the use of the state of mind requirement itself. The concurrence requirement was formulated in a context far different from that of psychological abnormality, tending to show that actions were caused by factors other than the conscious "will" of the actor. Traditionally, it has not been regarded as involving the issue of volition, which has been relegated to the insanity defense. The use of psychological abnormality to disprove concurrence on the basis that it is within the logic, if not the substance, of the requirement is again subject to the objection that the concurrence requirement is a poor vehicle for grading offenses. Concurrence has traditionally been an all-or-nothing proposition; either the state of mind caused the act or it did not. To use this as a vehicle for grading offenses, it would be necessary that to grade offenses according to the comparative role conscious intent played in causing the act. Given the state of the clinical skills mental health professions have to work with, it is doubtful whether the law could administer a system that required that offenders be so categorized.

On the other hand, such an approach would be doctrinally easier to integrate with the insanity defense in those jurisdictions in which volitional impairment is a basis for the defense. An absence of "substantial" capacity to control conduct (and a corresponding "complete" domination by unconscious or mechanical factors) could give rise to a complete defense to liability. A showing of only a significant loss of control (or a significant

[76] *See, e.g.*, State v. Rider, 90 Mo. 54, 1 S.W. 825 (1886) (error to instruct jury in such a manner that defendant would be guilty of murder even if he abandoned his intent to kill the victim before the victim assaulted him).

influence by unconscious factors) could reduce the offense one grade (if offenses were graded generally).

D. *Psychological Abnormality As Proof of Nonexistence of a Modified Mens Rea*

If the traditional *mens rea* doctrines are inadequate vehicles for integrating the psychology of the offender and the imposition of criminal liability, an alternative would be to modify the *mens rea* requirement so as to make psychological assessment of offenders more meaningful. Several recent developments bear upon this possibility.

1. *Integration into Mens Rea of "Instrumentality"*

William J. Chambliss, summarizing the deterrent effect of criminal punishment, has concluded that the research suggests that the effectiveness of punishment depends upon two factors: the "instrumental" or "expressive" nature of the act, and the degree of the actor's commitment to crime as a "way of life." [77] If severe punishment is to be imposed where it is most likely to deter, then, it should be concentrated on those with little commitment to crime as a way of life and for whom the criminal act is instrumental rather than expressive. Neither factor is formally integrated into the substantive criminal law, although habitual criminal statutes make some minimal attempt to single out for more severe punishment those whose commitment to crime has manifested itself in several convictions. "The notion of intent," Chambliss correctly points out, "is not sufficient to differentiate expressive and instrumental acts." [78] "[T]he possibility of doing so," he continues, "through a similar legal category is certainly not farfetched." [79]

The suggestion that the *mens rea* requirement be modified to distinguish between instrumental and expressive acts raises numerous problems, however. Since it is largely a suggestion that a sophisticated notion of "motive" be integrated into *mens rea*, it is subject to the traditional criticism of considering motive as a general matter. If "expressive" is broadly defined as meaning expressive of a conscious or unconscious need, it would be difficult or impossible in specific cases to draw the line. In all cases, a crime is instrumental to some extent, although the instrumental nature of some acts may be more obvious than that of others. For example, the instrumental characteristic of the act of the heir who kills to secure an inheritance may be superficially clear, but is it really any different in nature than the act of the latent homosexual who kills to reassert his masculinity? Both acts are obviously instrumental but the goals differ most significantly in their susceptibility to proof.

Chambliss's suggestion would also be mechanically difficult to implement. Most statutory structures would not readily lend themselves to distinguishing between situations alike in all respects other than that one involved an instrumental act and the other an expressive act. Even those statutory schemes in which offenses are placed into a limited number of categories do not seem to offer significant possibilities. A rule that provided that if the defendant established that his act was "expressive" rather than instrumental the offense would be one grade below what it would otherwise be would seem to oversimplify the problem.

2. *Minor Modifications of Existing State of Mind Requirements: The California Experience*

An examination of the California homicide cases since *Wells*[80] suggests that the states of mind required for the homicide offenses in that jurisdiction have been undergoing significant changes. It is likely that this represents the effort by the California Supreme Court to integrate the substantive law with the evidence regarding the dynamics of offenders' behavior. Such evidence was coming before the courts in greater quantities after *Wells*. This effort potentially holds valuable lessons for the use of psychological abnormality in the homicide area for other jurisdictions and in offenses other than homicide in California as well as elsewhere.

The first major development following *Wells* was *People v. Gorshen*,[81] decided in 1959. Although the court affirmed the conviction of Gorshen for second degree murder, the court in dicta made clear that

[77] Chambless, *Types of Deviance and the Effectiveness of Legal Sanctions*, 1967 WIS. L. REV. 703, 712 (1967).
[78] *Id.* at 718.
[79] *Id.*

[80] 33 Cal.2d 330, 202 P.2d 53, *cert. denied*, 338 U.S. 836 (1949). *See* text accompanying notes 29–31 *supra*.
[81] 51 Cal.2d 716, 336 P.2d 492 (1959), *affirming* 326 P.2d 188 (Cal. App. 1958). In People v. Baker, 42 Cal. 2d 550, 268 P.2d 705 (1954), the court had found error in an instruction that the defendant in a homicide trial was conclusively presumed "sane and of sound mind," since this told the jury not to consider evidence of the defendant's mental retardation and epilepsy in determining his ability to premeditate and deliberate. This, however, was a necessary result given *Wells*, and represents no significant expansion.

the evidence of Gorshen's mental illness had been properly received as proving lack of malice aforethought. But the opinion shows the beginnings of a recognition of inconsistency between the testimony admitted under the *Wells* rule and the substantive law governing the degrees of criminal homicide. First, voluntary manslaughter was defined under California law (as under the law of many states) as an intentional killing committed upon a "sudden quarrel or heat of passion" [82] which had been held to require reasonable provocation.[83] This seemed to preclude use of voluntary manslaughter as a lesser offense if lack of malice aforethought was proven. The court solved this doctrinal dilemma by creating a "new" category of voluntary manslaughter, defined simply as an unlawful killing without malice aforethought. The distinction between this category of voluntary manslaughter and murder, unlike the distinction between traditional voluntary manslaughter and murder, is subjective.

The subjective criterion to be applied, however, obviously caused the court some concern. The testimony at trial had been essentially as follows:[84] Gorshen, a longshoreman, had been severely schizophrenic for many years, and because of his hallucinations often came precariously close to psychological collapse. As he lost his sexual powers, his work as a longshoreman took on unconscious symbolic value as proof of his manhood. When the victim, Gorshen's foreman, asked Gorshen to leave work because of his drinking, this seemed to Gorshen's unconscious to be a deprivation of sexual normalcy and powers. Gorshen's unconscious reacted to this threat to his sexual powers by causing him to strike back violently at the source of the threat. Although the expert witness testified conclusorily that Gorshen did not have the mental state required for malice aforethought or premeditation "or anything which implies intention, deliberation or premeditation," he did not specifically controvert Gorshen's own testimony that at the time of the shooting he entertained the conscious desire to shoot the victim. Apparently, the court resolved this logical inconsistency between the testimony and the substantive law, under which an intent to kill or inflict serious bodily injury suffices for malice aforethought, by tacitly approving the definition of the "medical essense" of malice aforethought which the medical expert was permitted over objection to give at trial: malice aforethought exists when " 'an individual performs an act as a result of his own free will or intentionally,' " as opposed to those situations in which " 'the action is directly attributable to some abnormal compulsion or force, or symptom or diseased process from within the individual.' " [85] This, of course, makes the state of mind a volitional concept, and flies in the face of traditional state of mind doctrine. The court did not expressly approve the "medical" definition and in fact declined to "undertake the task of formulating an inclusive or comprehensive definition of malice aforethought." [86] Yet acceptance of the substance of this definition seems the only way in which the court could have found the medical testimony logically relevant. After this extensive doctrinal discussion, however, the court concluded that the trial judge had reasonably disregarded the expert testimony and that the conviction for second degree murder was supported by the evidence.[87]

The conflict between the psychological testimony received under the *Wells* rule and the substantive law was presented more directly in 1964 in *People v. Wolff*.[88] Wolff, a fifteen year old youth, had killed his mother pursuant to a bizzare plan to rape or photograph nude a number of girls. The plan required that his mother be gotten "out of the way." There was expert testimony that Wolff was schizophrenic. The jury, however, rejected the insanity plea. The court convicted Wolff of first degree murder and imposed a sentence of life imprisonment. The California Supreme Court found support for the jury finding of legal responsibility but held that Wolff, by virtue of his youth

[82] CAL. PENAL CODE §192(1) (West 1970). Evidence of provocation not sufficient to reduce a killing from murder to homicide had been earlier held relevant to the determination of whether the defendant had the intent to kill and whether he acted following premeditation. This, however, had the effect only of reducing the offense to second degree murder. People v. Valentine, 28 Cal.2d 121, 169 P.2d 1 (1946). Prior cases had, however, recognized that intoxication might disprove the existence of malice aforethought and reduce the offense to manslaughter. People v. Chesser, 29 Cal.2d 815, 178 P.2d 761 (1947). This implied recognition of a category of voluntary manslaughters other than those amounting to reductions by virtue of provocation.

[83] *See, e.g.*, People v. Valentine, 28 Cal.2d. 121, 136–44, 169 P.2d 1, 11–15 (1946). *But cf.* Coshow, *Classification of Homicide Law in California from Recent Decisions*, 1 HASTINGS L. J. 32 (1950).

[84] People v. Gorshen, 51 Cal.2d 716, 722–23, 336 P.2d 492, 495–96 (1959).

[85] *Id.* at 723, 336 P.2d at 496.

[86] *Id.* at 730 n. 11, 336 P.2d at 501 n. 11.

[87] *Id.* at 736, 336 P.2d at 504.

[88] 61 Cal.2d 795, 394 P.2d 959, 40 Cal. Rptr. 271 (1964).

and psychological abnormality, was not capable of the mental processes first degree murder requires. In so holding, the court significantly altered the substantive definition of premeditation. Drawing upon prior assertions that the extent of the reflection upon the contemplated crime is the benchmark of first degree premeditation, the court held that the defendant must "maturely and meaningfully" reflect upon the gravity of the contemplated act.[89] "Maturely and meaningfully" was defined functionally by observing that the degrees of murder are designed to distinguish among offenders according to their "quantum of personal turpitude" and "personal deprivaty." [90] Although Wolff had apparently reflected upon the killing of his mother to the full extent of which he was capable, he failed to realize the enormity of the evil and the consequences of the act. His conviction was therefore modified to second degree murder.

People v. Conley[91] presented the same question in regard to the distinction between murder and voluntary manslaughter, the "malice aforethought" issue with which *Wells* had dealt. Conley had killed his girl friend and her husband after a period of extensive drinking. In addition to Conley's own testimony that he did not intend to kill the victims and that he did not remember doing so, the defense introduced evidence that the amount of alcohol he had consumed would impair the judgment of an average person and, through a psychologist's testimony, that he "was in a dissociative state at the time of the killings and because of personality fragmentation did not function with his normal personality." [92] The California Supreme Court reversed the convictions for first degree murder on the ground that the trial court had erroneously failed to instruct the jury on manslaughter. In the course of its discussion, the court developed the concept of malice aforethought in a manner similar to that accorded premeditation in *Wolff*. "An awareness of the obligation to act within the general body of laws regulating society," it held, is implied in the statutory definitions of malice aforethought, even though it is not necessary that the defendant know that his particular act is prohibited.[93] "If because of mental defect, disease, or intoxication . . . the defendant is unable to comprehend his duty to govern his actions in accord with the duty imposed by law, he does not act with malice aforethought," [94] the court declared, pointing to *Gorshen* as evidence that a killer might act with intent and premeditation but not with malice aforethought. In the recommended instructions for such cases, the court directed that the jury be told that to have malice aforethought, a defendant must have the ability to comprehend the legal prohibition against endangering the lives of others and his obligation to conform his conduct to this standard.[95]

In a number of cases following *Wolff*, the California Supreme Court reduced convictions of first degree murder to second degree on the ground that the evidence failed to sustain a finding of premeditation within the *Wolff* definition.[96] These cases were followed, however, by several cases in which the court treated evidence of psychological abnormality with much less sympathy.[97] In *People v. Morse*,[98] for example, the court held that despite *Conley*, the trial court had not erred in refusing to instruct on voluntary manslaughter in a trial concerning a killing committed on death row. There was expert testimony that once the assault began, the killing was automatic and instinctual, and that because of a personality disorder Morse lacked "the capacity to think in terms of usual values of morality. He [was] without the ability, in other words, to think in moral terms." [99] Holding that this did not even raise the issue of his

[89] *Id.* at 822, 394 P.2d at 976, 40 Cal. Rptr. at 288.

[90] *Id.* at 820, 394 P.2d at 974–75, 40 Cal. Rptr. at 286–87.

[91] 64 Cal.2d 310, 411 P.2d 911, 49 Cal. Rptr. 815 (1966).

[92] *Id.* at 315, 411 P.2d at 914, 49 Cal. Rptr. at 818.

[93] *Id.* at 322, 411 P.2d at 918, 49 Cal. Rptr. at 822.

[94] *Id.*

[95] *Id.* at 324 n. 4, 411 P.2d at 920 n. 4, 49 Cal. Rptr. at 824 n. 4.

[96] People v. Bassett, 69 Cal.2d 122, 443 P.2d 777, 70 Cal. Rptr. 193 (1968); People v. Nicolaus, 65 Cal.2d 866, 423 P.2d 787, 56 Cal. Rptr. 635 (1967); People v. Goedecke, 65 Cal.2d 850, 423 P.2d 777, 56 Cal. Rptr. 625 (1967); People v. Ford, 65 Cal.2d 41, 416 P.2d 132, 52 Cal. Rptr. 228 (1966).

[97] In addition to *Morse*, *see* People v. Bandhauer, 1 Cal.3d 609, 463, P.2d 408, 83 Cal. Rptr. 184 (1970) (First degree murder conviction affirmed despite evidence of severe neurosis, mild to moderate paranoia, personality disorders, chronic alcoholism and psychomotor epileptic seizures when the alcohol in the accused's blood reached a certain level); *In re* Kemp, 1 Cal.3d 190, 460 P.2d 481, 81 Cal. Rptr. 609 (1969); People v. Risenhover, 70 Cal.2d 39, 447 P.2d 925, 73 Cal. Rptr. 553 (1968) (Emphasis placed on expert testimony that accused was not "psychotic" and that his capacity for deliberation was not below average, an apparently rational motive for the crime, the rational method of varrying the crime out, and lay testimony that nothing unusual was observed about accused).

[98] 70 Cal.2d 711, 452 P.2d 607, 76 Cal. Rptr. 391 (1967).

[99] *Id.* at 733 n. 15, 452 P.2d at 620 n. 15, 76 Cal. Rptr. at 404 n. 15.

capacity to entertain malice aforethought, the court noted that there was a lack of proof concerning whether Morse lacked the awareness that his action was contrary to law and, surprisingly, stated that mere incapacity or disinclination to obey law by virtue of personality disorder cannot establish lack of malice aforethought. These later cases resemble the treatment given the matter by the lower California appellate courts, which have generally been unwilling to second-guess trial courts' conclusions on the issue.[100]

How should the California experience be evaluated? First, it seems clear that the extensive use in trial courts of the *Wells* doctrine convinced the California Supreme Court that the traditional formulations of the state of mind requirements for homicide offenses were not adequate vehicles for using evidence of psychological abnormality. The objective distinction between murder and manslaughter that fell in *Gorshen* was the most obvious barrier. *Wolff* and *Conley*, however, represent attempts to modify the states of mind required for first and second degree murder. In both, however, the court spoke in cognitive terms: reflection, understanding of the act, comprehension of the legal prohibitions and the obligation to conform. This does not seem to have provided a very satisfactory vehicle for expert testimony. The experts speak in general terms of "disassociation" and impaired consciousness, but seem unable to be precise on the actual cognitional processes of the defendant. The experts talk in terms of conscious and unconscious factors in reacting to stress, and seem to feel little more comfortable under *Wolff* and *Conley* than under *M'Naghten*.

The California rule is subject to the criticism that in practice, as far as can be determined, it emphasizes relatively superficial factors and detracts, therefore, from a sophisticated use of psychological insight. As the California Supreme Court has dealt with the rule, the cases have turned on such factors as youth, the presence of stereotyped symptoms of mental illness, the bizarre nature of the crime, or the existence of an apparent rational motive. It is no coincidence that many of the cases involved killings of family members by other family members—*Conley* involved a quasi-family situation. To some extent this undoubtedly represents the view stated by one of the experts in *People v. Nicolaus*[101] that anyone who kills his own children without provocation is not legally responsible, whether the test is "sanity" under *M'Naghten* or ability to premediate under *Wolff*.

Is this oversimplification inherent in the approach taken by the California Supreme Court, or is it rather the cautious early application of a doctrine that has the potential for more sophisticated application? It is probably inherent in the court's approach. Despite the effort the court has expended, it has gone no further than to develop the cognitive aspects of the state of mind requirements. Although the discussions in *Wolff* and *Conley* circle around problems other than those things within the conscious awareness of the defendant, they ultimately come to rest upon a rule phrased in traditional cognitive terms. The opinions give the impression that the underlying basis for the decisions is something other than the scope or intensity of the defendants' conscious awareness, but the court was unwilling or unable to justify the decision in terms of these other factors. In *Morse*, moreover, the court apparently recognized and disclaimed the glimmerings of a more expansive revision of the state of mind requirements.

This is not to say that the ameliorating effect of *Gorshen*, *Wolff* and *Conley* is not appropriate where it applies. It does not, however, provide a satisfactory vehicle for doctrinal analysis of more complex and sophisticated problems, such as the degree of liability which the law should attach to *Morse*.[102] The California development of the homi-

[100] *See* People v. Caylor, 259 Cal. App.2d 191, 66 Cal. Rptr. 448 (1968); People v. Juarez, 258 Cal. App.2d 344, 65 Cal. Rptr. 630 (1968). *See also* People v. Moore, 257 Cal. App.2d 740, 65 Cal. Rptr. 450 (1968) (upholding a conviction for second degree murder despite the absence of prosecution evidence on diminished capacity); People v. Hokie, 252 Cal. App.2d 901, 61 Cal. Rptr. 37 (1967) (Conviction for assault with intent to commit murder upheld despite evidence of psychological abnormality). In People v. Muszalski, 260 Cal. App.2d 611, 67 Cal. Rptr. 378 (1968), it was held not prejudicial error in a pre-*Conley* trial to fail to give instructions on the *Wells* rule despite defense evidence of psychological abnormality.

[101] 65 Cal.2d 866, 423 P.2d 787, 56 Cal. Rptr. 635 (1967).

[102] *Cf.* the problem posed by Professor Norval Morris in Morris, *Psychiatry and the Dangerous Criminal* 41 So. CAL. L. REV. 514 (1968):

> It is too often overlooked that one group's exculpation from criminal responsibility confirms the inculpation of other groups. Why not permit the defense of a dwelling in a Negro ghetto? . . . [A]dverse social and subcultural background is statistically more criminogenic than is psychosis; like insanity, it also severely circumscribes the freedom of choice which a nondeterministic criminal law (all present criminal law systems) attributes to accused persons.

By phrasing the issue as the availability of the "defense of living in a ghetto," Morris confuses the prob-

cide states of mind represents a valiant effort, but not one that seems to hold much promise for a general integration of gradation of criminal liability and psychological abnormality.

IV. Evaluation of the Attempt to Integrate the Grading of Offenses and the Psychological Abnormality of the Offender

Given the problems caused by attempts to integrate the psychology of the offender and the degrees of criminal liability in practice and others that can be anticipated from more extensive efforts,[103] is the task worth while? In part, this is merely a restatement of arguments that have long been made regarding the insanity defense and the entire concept of *mens rea*. But they are worth restating here.

Several arguments can be made for making such attempts. First, doctrinal consistency demands it. The law requires defined states of mind. If psychological abnormality of some type is logically inconsistent with these states of mind, fairness and logic demand that such abnormality be the subject of legal investigation. Second, psychological abnormality bears on "personal turpitude," and the law, if it is to maintain the community's respect, must grade its condemnation according to the moral turpitude of the offender as the community evaluates it. The need to have criminal law accurately express community condemnation therefore requires this investigation. Third, a humanitarian argument can be made that consideration of psychological abnormality minimizes the penal sanctions imposed upon those who, as a group, need "treatment." Although it does not, as the insanity defense does, release them immediately for "treatment," it does minimize the extent to which treatment must be postponed to permit the law to extract its vengeance. Fourth, consideration of psychological abnormality seems a logical corollary to the utilitarian premises of the criminal law: punishment must be justified by crime prevention, and the imposition of severe punishment upon the psychologically abnormal is not so justified. Consideration of psychological abnormality would help restrict the imposition of punishment to those cases in which it can most likely be expected to achieve its preventive effect. Finally, formally recognizing the relevance of psychological abnormality would amount to a realistic accommodation of the inevitable.[104] Triers of fact will continue to be confronted with the formal all-or-nothing choice of the insanity defense in cases where any reasonable man would seek a compromise. Rather than ignore this situation, the law would best serve its goals if it recognized the relevance of the psychological abnormality short of insanity and used formal doctrine to

lem. There is no defense of "psychosis." In both cases the issue is the effect of the factor upon the individual's psychology. Either psychosis or physical environment might affect an individual's psychological functioning so as to have some impact upon his criminal liability. But if the law seeks to determine the less blatant effects of such factors as ghetto living upon an offender's psychology and *then* integrates it into his criminal liability, it is necessary to have a doctrinal vehicle which not only makes the investigation relevant but integrates it into the scheme for determining and grading criminal liability in a manner which furthers the policy objectives of the criminal law. Use of the insanity defense, of course, may flounder upon restrictive (and probably unrealistic and indefensible) definitions of "mental illness." For present purposes, the issue is whether there is another doctrinal way of accomplishing this.

[103] There are several problems beyond the scope of this discussion which are probably not insurmountable. One is the problem of combining admissibility of psychological abnormality for purposes other than establishing the complete defense of insanity and "split trial" procedures. *See* State v. Shaw, 106 Ariz. 103, 471 P.2d 715 (1970), *cert. denied*, 39 U.S.L.W. 3313 (U.S. Jan. 18, 1971) (Dictum that split trial procedure did not permit evidence of "insanity" to be introduced as to state of mind and therefore violated due process). A trial could easily be split so as to separate factual issues other than those relating to state of mind from those that do relate to state of mind, whether state of mind goes to insanity, grade of offense, mitigation, or any other matter. The problem of a possible justification for preventive detention, following service of a prison term (*see* text accompanying note 35 *supra*) could be readily solved by invoking existing authority for "civil" hospitalization. Prior ciminal acts would certainly be relevant to a subject's present dangerousness.

[104] There is some evidence of the effect of such a change in the experience following the enactment of the English Homicide Act of 1957, 5 & 6 Eliz. 2, c. 11, §2, which made available a limited defense of diminished responsibility. *See* text accompanying note 53 *supra*. 1 N. Walker, Crime and Insanity in England: The Historical Perspective 158–59 (1968), studied murder trials from 1957 through 1963. His results suggest that the increasingly large number of defendants found guilty of manslaughter under the diminished responsibility rule developed at the expense of a reduced number of successful insanity defenses and, to a lesser extent, a decreased number of findings of incompetence to stand trial. This may mean that triers of fact were previously returning verdicts of not guilty in regard to defendants who were not in fact within the insanity criterion. If so, the rule increases the rationality of the system and maximizes the opportunity for the formal doctrine to helpfully guide actual practice.

On the other hand, if the doctrine causes triers of fact to find a lesser degree of criminal guilt in regard to defendants who are in fact legally entitled to a verdict of not guilty by reason of insanity, it can scarcely be said to be an improvement over the pre-1957 situation. Clearly more investigation is needed.

assist the trier of fact in considering such abnormality in a manner most consistent with the objectives of the criminal law.

On the other hand, it can be argued that a realistic evaluation of criminal law doctrine reveals that the so-called state of mind requirement is essentially a fiction. Doctrinal consistency does not require investigation of psychological abnormality, at least to the extent contemplated by some of the advocates. Nor does the need to have the criminal law reflect community judgments regarding morality require it. It is doubtful whether the community attaches much importance to the distinctions between degrees of liability, assuming that acquittal by reason of insanity does represent a community judgment of a lack of moral culpability. Further, it is doubtful whether community evaluations of moral culpability, whatever their contents, turn upon the type of distinctions which experience shows are considered if psychological abnormality is made the subject of investigation. Finally, assuming that there is a substantive difference between incarceration resulting from criminal conviction and other forms of treatment, considering psychological abnormality as a factor in grading the offense is an inefficient method of giving effect to a humanitarian desire to maximize the opportunity of the mentally ill to have treatment. Outright acquittal serves this function much better. The opportunity for transfer from correctional to mental health facilities after conviction and imprisonment accomplishes the same thing although it is probably less efficient.

Furthermore, it can be argued that insofar as imposing punishment serves to reinforce the community's prohibitions against criminal acts, minimizing the culpability of offenders by reducing the condemnation formally accorded their acts may ultimately reduce the effectiveness of the standard in preventing others from offending. Thus, consideration of psychological abnormality for this purpose is subject to the same objections as a broad general insanity defense. On a more mechanical and perhaps practical vein, it might well be doubted whether the task of making the judgments required by a sophisticated rule which grades offenses in part by psychological abnormality is within the power of present triers of fact, given the quality of expert assistance available.[105]

As the *Sirhan* case illustrated, the dispute is likely to leave a jury with little else to do but guess. No matter how doctrinally sound, an inquiry which is not mechanically feasible is scarcely a good investment of time and effort.

Nor does it necessarily follow that consideration of psychological abnormality is consistent with utilitarian policy. There is a lack of evidence that psychological abnormality renders an individual significantly less subject to the preventive function of the threat of criminal punishment. In fact, even if the assumptions of the psychodynamic psychologists are accepted, it is still reasonable to expect that the unconscious may be influenced by the experience that those who commit antisocial acts are punished.

On balance, the arguments in favor of considering psychological abnormality seem persuasive. Whatever the present limitation on accurately determining the psychological dynamics of particular offenders, the situation is likely to improve with practice. Mental health professionals, engaged in the treatment process, seldom have the opportunity to speculate concerning the mental processes of an offender as they relate to the criminal law. If the law expects such professionals to be of more help than they have been in the past, it must provide the opportunity for them to practice their analysis. Perhaps this is where the greatest value of the concept lies: it encourages courts, the general public, and mental health personnel to address themselves not only to broad questions of crime prevention and general philosophical issues related to punishment, but also to the problem of the specific offender and what should be done in "this case." From continued experimentation in this area, it is reasonable to expect the development of a more sophisticated ability to analyze particular cases as well as the development of a body of knowledge on which to build a more realistic substantive criminal law.

But the traditional state of mind requirements are not suited to serve as the vehicle for integration of criminal liability and psychological abnormality. Nor is there any apparent way of modifying or replacing the traditional state of mind doctrine with a more appropriate alternative. The best solution would probably be to authorize a trier of fact to find, in addition to guilt, that the defendant was suffering from a psychological ab-

[105] *See* text accompanying notes 37, 38 *supra*, raising the objections in the American cases, primarily in the context of the "diminished capacity" approach and accompanying note 58 *supra*, discussing the difficulties encountered with the "diminished capacity" approach under the English Homicide Act.

normality at the time of the offense which substantially reduced his culpability for the crime. If such a finding were to be returned, the sentencing authority should be required to take it into account and to impose a sentence less than the maximum authorized for the offense. Culpability should be defined for the trier of fact in terms of ultimate blameworthiness, encompassing both cognitive and volitional factors. This would permit the trier of fact to follow instructions regarding traditional state of mind requirements, and at the same time assure him that a conclusion about psychological abnormality would have some concrete effect upon the future of the offender. Ideally, perhaps, psychological abnormality should affect the formal liability imposed rather than the punishment, but given the inadequacies of the present doctrine, this is an unrealistic goal.