


4-15-1989

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### Recommended Citation

Harlow M. Huckabee *Evidence of Mental Disorder on Mens Rea: Constitutionality of Drawing the Line at the Insanity Defense*, 16 Pepp. L. Rev. 3 (1989)

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# Evidence of Mental Disorder on Mens Rea: Constitutionality of Drawing the Line at the Insanity Defense

Harlow M. Huckabee\*

## I. INTRODUCTION

Many jurisdictions authorize evidence of mental disorder to be admitted directly on mens rea.<sup>1</sup> This article is an analysis of the evidentiary and constitutional issues involved in *excluding* mental disorder evidence not meeting insanity defense requirements. Opinions differ on whether it is constitutional to completely exclude such evidence.<sup>2</sup> Some courts have held that evidence of mental disorder may not be sufficiently material, probative, relevant, competent, or reliable to be admitted.<sup>3</sup> Conversely, various authorities state that such evidence should be admissible even though it does not meet the requirements of the insanity defense. These authorities claim that preclusion of this evidence may be unconstitutional.<sup>4</sup>

This article posits that, under appropriate circumstances, it is *constitutional* to establish a general rule completely precluding mental

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1. See generally Huckabee, *Avoiding The Insanity Defense Strait Jacket: The Mens Rea Route*, 15 PEPPERDINE L. REV. 1-32 (1987).

2. *Id.* at 2. Relevant constitutional provisions include the clauses in the fifth and fourteenth amendments stating that no person shall be deprived of "life, liberty or property without due process of law . . ." U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1. Also involved is a clause in the sixth amendment stating that the accused shall "have compulsory process for obtaining witnesses in his favor . . ." U.S. CONST. amend. VI. Although not focusing on mental disorder issues, two United States Supreme Court cases cited frequently in the debates are *Chambers v. Mississippi*, 410 U.S. 284 (1973) and *Washington v. Texas*, 388 U.S. 14 (1967).

3. Huckabee, *supra* note 1, at 31.

4. *Id.* at 29; see also G. MELTON, J. PETRILA, N. POYTHRESS & C. SLOBOGIN, *PSYCHOLOGICAL EVALUATIONS FOR THE COURTS* 128-30, 460 nn.125-26 (1987) [hereinafter MELTON & PETRILA].

disorder evidence on mens rea below the insanity defense line. No attempt is made here to pass judgment on whether admission of such evidence should be authorized, despite many jurisdictions allowing it in one form or another. However, for jurisdictions desiring to reduce the use of mental disorder in criminal cases, this article demonstrates that drawing a firm line at the insanity defense (as opposed to evaluating the mental disorder evidence on a case-by-case basis) can be constitutional. As discussed throughout this article, disagreement exists among jurisdictions, courts, and authorities which helps to demonstrate that the issue does not reach constitutional dimensions.

An underlying consideration is that the insanity defense is needed as a legal framework in order to place in context the evidence regarding mental disorder on mens rea. This provides juries with a tool to evaluate mental disorders of defendants in terms of the legal requirements as well as render social and moral judgments.<sup>5</sup> Evidence of mental disorder going directly to mens rea, without an insanity defense framework, tends to leave juries, courts, attorneys, and mental health professionals adrift concerning the effect of the evidence on the issue of responsibility.

Over forty years ago, the United States Supreme Court faced this issue in *Fisher v. United States*;<sup>6</sup> however, the Court did not hold that excluding mental disorder evidence below the insanity defense line is unconstitutional.<sup>7</sup> More recently, decisions in the Fifth,<sup>8</sup> Seventh,<sup>9</sup> Ninth,<sup>10</sup> and Eleventh<sup>11</sup> federal circuits have been consistent with *Fisher*. The Supreme Court denied certiorari in four of these cases. Furthermore, subject to frequently changing case law (including cases emphasizing only expert opinions), thirteen states plus the District of Columbia have refused to admit evidence of mental disorder

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5. See A. GOLDSTEIN, *THE INSANITY DEFENSE* 18-20, 81-82, 84-86, 89-92, 211-14 (1967); H. HUCKABEE, *LAWYERS, PSYCHIATRISTS AND CRIMINAL LAW: COOPERATION OR CHAOS?*, 42-48, 61-63, 86, 91 (1980) [hereinafter HUCKABEE, *COOPERATION OR CHAOS?*]; cf. Huckabee, *supra* note 1, at 21, 27; Huckabee, *Resolving The Problem of Dominance of Psychiatrists in Criminal Responsibility Decisions: A Proposal*, 27 Sw. L.J. 790, 792-93, 798-99, 804-05 (1973) [hereinafter Huckabee, *Problem of Dominance*], reprinted in *Reform of the Federal Criminal Laws: Hearings Before the Subcomm. on Criminal Laws and Procedures of the Comm. on the Judiciary, United States Senate, 93d Cong., 2d Sess. 7031, 7093, 7096-97, 7102-03, 7108-09* (1974) [hereinafter *Reform of the Federal Criminal Laws*].

6. 328 U.S. 463 (1946).

7. *Id.*

8. *Welcome v. Blackburn*, 793 F.2d 672, 674-75 (5th Cir. 1986), *cert. denied*, 107 S. Ct. 1985, *reh'g denied*, 107 S. Ct. 3245 (1987).

9. *Brown v. Trigg*, 791 F.2d 598, (7th Cir. 1986); *Muench v. Israel*, 715 F.2d 1124 (7th Cir. 1983), *cert. denied sub nom. Worthing v. Israel*, 467 U.S. 1228 (1984).

10. *Wahrlich v. Arizona*, 479 F.2d 1137 (9th Cir.), *cert. denied*, 414 U.S. 1011 (1973).

11. *Campbell v. Wainwright*, 738 F.2d 1573, 1580-82 (11th Cir. 1984), *cert. denied*, 475 U.S. 1126 (1986).

der on mens rea if it does not meet insanity defense requirements.<sup>12</sup> Constitutional attacks in these jurisdictions have been unsuccessful in causing the Supreme Court to modify its position.

An in-depth discussion of extreme emotional disturbance, heat of passion on sudden provocation, and similar concepts, is beyond the scope of this article.<sup>13</sup> However, cases involving these concepts will be discussed in other contexts.

## II. LABELS

Various labels have been used to describe evidence of a mental disorder not meeting insanity defense requirements. They include diminished capacity, the mens rea model (including strict as well as diminished capacity mens rea), and diminished responsibility.<sup>14</sup> In *United States v. Pohl*,<sup>15</sup> the United States Court of Appeals for the Third Circuit discussed variations of these labels in detail. The emphasis is on the mens rea model, which is referred to in the opinion as "strict mens rea."<sup>16</sup> With reference to this concept, the court noted: "Properly understood, it is . . . not a defense at all but merely a rule of evidence."<sup>17</sup> The Supreme Court of New Jersey refers to the mens rea model as the "mental state" model.<sup>18</sup> However, throughout this article the label "mens rea model" will be used to describe this rule of evidence.

*Pohl* describes other concepts which function as "affirmative defenses" to "excuse" misconduct instead of disproving an element of the crime. These labels include: diminished capacity;<sup>19</sup> partially diminished capacity (particularly as developed earlier in California);<sup>20</sup> the diminished capacity defense;<sup>21</sup> diminished responsibility;<sup>22</sup> and

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12. The 13 states are as follows: Arizona, Delaware, Florida, Georgia, Indiana, Louisiana, Minnesota, North Carolina, Ohio, Oklahoma, Virginia, Wisconsin, and Wyoming. Huckabee, *supra* note 1, at 28-29. Maryland recently moved out of this group and now allows such evidence on mens rea. *Hoey v. State*, 311 Md. 473, 493-95, 536 A.2d 622, 632-33 (1988).

13. See *Patterson v. New York*, 432 U.S. 197 (1977); *Mullaney v. Wilbur*, 421 U.S. 684 (1975). Also, there will be no specific discussion in this article of defenses such as those based on automatism or intoxication. See MELTON & PETRILA, *supra* note 4, at 126-27, 130-31.

14. Huckabee, *supra* note 1, at 1-12, 15-19, 22-26, 31-32.

15. 827 F.2d 889 (3d Cir. 1987), *cert. denied*, 108 S. Ct. 710 (1988).

16. *Id.* at 897-900, 903-05.

17. *Id.* at 897 (footnote omitted).

18. *State v. Breakiron*, 108 N.J. 591, 601, 532 A.2d 199, 204-05 (1987).

19. *Pohl*, 827 F.2d at 897-99, 903.

20. *Id.* at 903-05, 907.

21. *Id.* at 903.

the diminished responsibility defense.<sup>23</sup>

### III. PETITIONS FOR WRITS OF CERTIORARI

In focusing on the development of issues before the Supreme Court, reference will be made to documents filed with the Court in three cases in which petitions for writs of certiorari have been denied. The first case, *Muench v. Israel*,<sup>24</sup> is an opinion by the United States Court of Appeals for the Seventh Circuit upholding the constitutionality of Wisconsin's exclusion of mental disorder evidence not meeting insanity defense requirements. The appellants in the case were Robert Muench and Richard Worthing.<sup>25</sup> Because Worthing filed the writ petition, his name was used in the Supreme Court's denial of certiorari.<sup>26</sup>

In their brief in opposition to the *Worthing* writ petition,<sup>27</sup> attorneys for the respondent, Wisconsin Attorney General Bronson C. La Follette and Assistant Attorney General Thomas J. Balistreri, made two major points. They stated that no substantial federal question existed because:

A State May Constitutionally Refuse To Recognize A Defense Of Diminished Capacity, Thereby Rendering The Expert Evidence Irrelevant, [and] Expert Opinion Testimony On A Defendant's Capacity To Intend To Commit A Crime Is Sufficiently Unreliable That The Federal Constitution Permits The States To Experiment With Rules Of Evidence Restricting Or Excluding Its Admission.<sup>28</sup>

The brief in opposition asserts that the former point is "a matter of substantive law"<sup>29</sup> whereas the latter point refers to the right of states to "compel a criminal defendant to comply with rules of evidence reasonably designed and applied to insure reliability in the truth-determining process."<sup>30</sup> The brief emphasizes that these provide "two discrete bases for the state exclusionary rule" and thus, should one fail, review should still be denied by the Supreme Court.<sup>31</sup>

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22. *Id.* at 898, 903-05.

23. *Id.* at 903. Diminished responsibility is also sometimes called partial responsibility. *State v. Breakiron*, 108 N.J. 591, 601, 532 A.2d 199, 204 (1987).

24. 715 F.2d 1124 (7th Cir. 1983), *cert. denied sub nom.* *Worthing v. Israel*, 467 U.S. 1228 (1984).

25. *Id.*

26. 467 U.S. 1228 (1984).

27. Brief in Opposition to the Petition for a Writ of Certiorari, *Muench v. Israel*, 715 F.2d 1124 (7th Cir. 1983) (No. 83-6358), *cert. denied sub nom.* *Worthing v. Israel*, 467 U.S. 1228 (1984) [hereinafter Brief in Opposition].

28. Brief in Opposition, *supra* note 27, at i.

29. *Id.* at 1.

30. *Id.* at 2.

31. *Id.* at 3. It may not be completely clear that an "affirmative defense" excusing misconduct is involved and thus, whether or not the substantive law approach would be appropriate. *Cf. supra* notes 19-23 and accompanying text. In case law and literature, the distinction is not always clear between an affirmative defense and the mens

In the second case, *Welcome v. Blackburn*,<sup>32</sup> the United States Court of Appeals for the Fifth Circuit upheld the constitutionality of Louisiana's exclusion of mental disorder evidence not meeting insanity defense requirements. The United States Supreme Court again denied certiorari.<sup>33</sup>

In answer to Welcome's petition for a writ of certiorari, an opposition brief was filed by respondent's attorneys: William J. Guste, Jr., Attorney General of Louisiana; Bernard E. Boudreaux, Jr., District Attorney, Sixteenth Judicial District, New Iberia, Louisiana; and Dracos D. Burke, Assistant District Attorney.<sup>34</sup> Because of a timing problem, a regular brief in opposition was not filed. Instead, the opposition to the petition for certiorari incorporated by reference the "Brief On Behalf Of Respondent-Appellee" previously filed by Messrs. Boudreaux and Burke with the Fifth Circuit.<sup>35</sup>

The Fifth Circuit brief emphasizes the constitutionality of refusing to recognize the defense of diminished capacity.<sup>36</sup> This approach is consistent with the substantive law position referred to in the brief in opposition to the *Muench-Worthing* petition.<sup>37</sup> The Fifth Circuit brief also uses language consistent with the *Muench-Worthing* brief in opposition<sup>38</sup> regarding preclusion of mental disorder for evidentiary reasons. This includes the statement that "evidence of mental disability short of legal insanity cannot negate specific intent or reduce the degree of the crime."<sup>39</sup>

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rea model (rule of evidence) concept. See *supra* notes 16-18 and accompanying text. Cf. *State v. Breakiron*, 108 N.J. 591, 599-604, 532 A.2d 199, 203-06 (1987). The problem can be resolved by considering both the substantive law approach and the use of evidentiary reasoning.

For a comprehensive discussion and different point of view regarding a number of issues in this article, see generally Note, *Restricting The Admission Of Psychiatric Testimony On A Defendant's Mental State: Wisconsin's Steele Curtain*, 1981 WIS. L. REV. 733-89. Since publication of the above-mentioned article, *Muench-Worthing* has been decided by the Seventh Circuit and certiorari has been denied by the United States Supreme Court. See *supra* notes 24-30 and accompanying text.

32. 793 F.2d 672 (5th Cir. 1986), *cert. denied*, 107 S. Ct. 1985 (1987), *reh'g denied*, 107 S. Ct. 3245 (1987); see *supra* note 8 and accompanying text.

33. *Id.*

34. Opposition to Petition for Certiorari to the United States Court of Appeals for the Fifth Circuit and Response for Application For Stay, *Welcome v. Blackburn*, 793 F.2d 672 (5th Cir. 1986) (No. 85-4546), *cert. denied*, 107 S. Ct. 1985 (1987), *reh'g denied*, 107 S. Ct. 3245 (1987) (No. 86-5544) [hereinafter Fifth Circuit brief].

35. *Id.*

36. *Id.* at 18-21.

37. See *supra* notes 28-30 and accompanying text.

38. See *supra* notes 28, 30 and accompanying text.

39. Fifth Circuit brief, *supra* note 34, at 8; see also *id.* at 16-21.

The Fifth Circuit brief submitted by the Louisiana officials to the Supreme Court was successful in opposing certiorari in *Welcome*. Because certiorari in *Welcome* was denied in 1987, the Supreme Court also had the benefit of the earlier *Muench-Worthing* litigation, including the brief in opposition to the *Worthing* petition.<sup>40</sup>

The third case, *United States v. Pohlot*,<sup>41</sup> is an opinion by the United States Court of Appeals for the Third Circuit which focuses on the 1984 Federal Insanity Defense Reform Act.<sup>42</sup> The court opined that the subject under consideration here raised a significant constitutional issue. However, the decision avoided a firm position on the constitutional question. The defendant, Pohlot, was convicted in the United States District Court for the Eastern District of Pennsylvania and his conviction was affirmed by the Third Circuit. Thereafter, he filed a petition for writ of certiorari with the United States Supreme Court; the Solicitor General waived the right of the federal government to file a response to that petition; on January 11, 1988, the Supreme Court denied certiorari.<sup>43</sup>

In evaluating the Supreme Court's denial of certiorari in *Pohlot* it is important to remember both the earlier denials of certiorari in *Muench-Worthing* and *Welcome*, as well as the Court's possession of documents filed in connection with these earlier cases.<sup>44</sup> The precedential value of denials of certiorari should not be overemphasized. Nevertheless, evaluating the documents filed with the Supreme Court can provide at least some indication of the Court's reasons and rationale for such denials.

Consistent with the substantive law position,<sup>45</sup> the court of appeals in *Pohlot* held that concepts in the nature of affirmative defenses are precluded by the 1984 Act.<sup>46</sup> These include diminished capacity, partially diminished capacity, the diminished capacity defense, diminished responsibility (also known as partial responsibility), and the diminished responsibility defense.<sup>47</sup> In addition, the Third Circuit added to this list the use of psychiatric evidence regarding the defendant's subconscious motivation. In reference to this, the *Pohlot* court stated: "Pohlot therefore offered his evidence of mental abnormality in support of a legally unacceptable theory of lack of mens rea that amounts covertly to a variation of the partially diminished ca-

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40. See *supra* notes 24-31 and accompanying text.

41. 827 F.2d 889 (3d Cir. 1987), *cert. denied*, 108 S. Ct. 710 (1988).

42. Insanity Defense Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 2057 (1984).

43. Petition for Writ of Certiorari, *United States v. Pohlot*, 827 F.2d 889 (3d Cir. 1987) (No. 87-857), *cert. denied*, 108 S. Ct. 710 (1988).

44. See *supra* notes 24-40 and accompanying text.

45. See *supra* notes 28-29, 36-37 and accompanying text.

46. *Pohlot*, 827 F.2d at 890-91, 903-07.

47. See *supra* notes 19-23 and accompanying text.

capacity defense . . . ."<sup>48</sup>

On the other hand, the *Pohlot* court agreed with the defense that the 1984 Federal Insanity Defense Reform Act did not prevent the defendant from introducing evidence of mental abnormality to disprove an element of the crime under the mens rea model.<sup>49</sup> The opinion states that an evidentiary rule, having the effect of barring all evidence of mental abnormality on the issue of mens rea, "may be unconstitutional so long as we determine criminal liability in part through subjective states of mind."<sup>50</sup> Nevertheless, the court noted that "[e]ven the cases upholding the exclusion of psychiatric evidence on mens rea . . . would appear to justify a blanket exclusion in federal cases only if Congress had determined that *psychiatric evidence on the issue of mens rea was inherently irrelevant or unreliable*."<sup>51</sup> The *Pohlot* opinion avoided a decision on the constitutional issue, stating: "We do not decide the constitutionality of any Congressional attempt to bar evidence of mental abnormality from the issue of mens rea."<sup>52</sup> Nevertheless, the Court did preclude the mental disorder, in effect relying on the substantive law position.<sup>53</sup> Because of this preclusion, *Pohlot* petitioned the Supreme Court for a writ of certiorari which was denied.

Expressing reservations on the constitutional issue, *Pohlot* refers to the Supreme Court's opinion in *Fisher*, and federal appellate cases which have rejected constitutional challenges to the exclusion of psychiatric evidence on the issue of mens rea. The opinion states: "These cases do not distinguish . . . as Congress has done, between the use of evidence to negate mens rea and a broader diminished capacity defense."<sup>54</sup> Nevertheless, it can be argued that these cases (as well as the cases in thirteen states and the District of Columbia)<sup>55</sup> base their positions on the substantive law approach,<sup>56</sup> evidentiary reasoning,<sup>57</sup> or a combination of the two.

It is important to reiterate that the issues were made clear to the

48. *Pohlot*, 827 F.2d at 907; see also *id.* at 890, 906.

49. *Id.* at 890, 895-903; cf. *supra* notes 16-18 and accompanying text.

50. *Pohlot*, 827 F.2d at 901 (footnote omitted).

51. *Id.* at 902 n.12 (emphasis added).

52. *Id.* at 903.

53. See *supra* notes 45-48 and accompanying text.

54. *Pohlot*, 827 F.2d at 902 n.12.

55. Huckabee, *supra* note 1, at 28-29; see *supra* notes 6-12 and accompanying text.

56. See *supra* notes 28-29, 37, 45-48, 53 and accompanying text.

57. See *supra* notes 28, 30, 38, 51-52 and accompanying text; cf. *supra* note 31, stating that a combination of the substantive law and evidentiary approaches is preferable.



Supreme Court in the *Muench-Worthing* case in terms of (1) the substantive law approach and (2) the use of mental disorder evidence to negate mens rea.<sup>58</sup> Thus, despite the reasoning in the lower courts, the Supreme Court in both *Muench-Worthing* and *Welcome* had the opportunity to focus on the appropriate distinctions and concepts in denying certiorari in those cases.

As noted earlier, the Third Circuit approved of precluding mental disorder evidence in *Pohlot*, in effect using only the substantive law position, and the Supreme Court denied certiorari.<sup>59</sup> Thus, the Supreme Court's action in *Pohlot* is consistent with the denials of certiorari in *Muench-Worthing* and *Welcome*. However, with reference to the evidentiary basis for precluding mental disorder evidence directly on mens rea, it is important to remember the denials of certiorari in *Muench-Worthing* and *Welcome*. In both of these cases, the documents submitted to the Supreme Court focused on evidentiary reasoning as well as the substantive law approach.<sup>60</sup>

#### IV. SUBSTANTIVE LAW APPROACH

The brief in opposition to the *Worthing* petition asserts that the first basis for excluding mental disorder evidence below the insanity defense line is that the diminished capacity defense can be precluded as a matter of substantive law.<sup>61</sup> The brief states that, in addition to an evidentiary rationale, this appears to be the basis for the position of the Wisconsin Supreme Court in *Steele v. State*.<sup>62</sup> Further, in *Muench-Worthing* the Seventh Circuit "found it necessary to consider only the substantive justification for *Steele's* exclusionary rule."<sup>63</sup> As already noted, the *Pohlot* decision is also consistent with this approach.<sup>64</sup>

As to the substantive law approach stated in the *Worthing* brief in opposition,<sup>65</sup> the Seventh Circuit concluded: "[A] state is not constitutionally compelled to recognize the doctrine of diminished capacity and hence a state may exclude expert testimony offered for the purpose of establishing that a criminal defendant lacked the capacity to form a specific intent."<sup>66</sup> The brief further points out<sup>67</sup> that this decision was based on Supreme Court's decision in *Fisher v. United*

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58. See *supra* notes 24-31 and accompanying text.

59. See *supra* notes 43-53 and accompanying text.

60. See *supra* notes 24-40 and accompanying text.

61. Brief in Opposition, *supra* note 27, at 1, 4.

62. *Id.* at 3-4; see *Steele v. State*, 97 Wis. 2d 72, 294 N.W.2d 2 (1980).

63. Brief in Opposition, *supra* note 27, at 4-5; see *Muench v. Israel*, 715 F.2d 1124, 1144-45 (7th Cir. 1983), *cert. denied*, 467 U.S. 1228 (1984).

64. *Pohlot*, 827 F.2d at 889; see *supra* notes 45-48, 59 and accompanying text.

65. Brief in Opposition, *supra* note 27, at 4-5.

66. *Muench*, 715 F.2d at 1144-45.

67. Brief in Opposition, *supra* note 27, at 4-5.

*States*<sup>68</sup> and the Court's orders in *Coleman v. California*<sup>69</sup> and *Troche v. California*.<sup>70</sup>

The brief in opposition argues that "[t]he cases on which the Seventh Circuit relied [cited in the foregoing paragraph] are not ripe for reexamination merely because . . . [the Supreme Court] has more recently recognized the constitutional dimensions of a defendant's right to present relevant and competent evidence in his defense."<sup>71</sup> The brief further states: "No one disputes the right to present such evidence to prove *facts* which constitute a recognized defense to criminal liability. But the initial question here is of a completely different nature, whether a state must recognize diminished capacity as a defense."<sup>72</sup> Referring to the 1946 *Fisher* case,<sup>73</sup> the brief notes that "[n]one of the changes in criminal and constitutional law since 1946 suggest that a state might now be required to fundamentally change the common law theory of responsibility."<sup>74</sup> The brief argues:

If diminished capacity is not a valid defense, expert psychiatric opinion evidence that a defendant lacked the capacity to form an intent to commit a crime . . . is not relevant to a proper issue in the case. There can be no serious dispute that irrelevant evidence may be excluded, even when offered by a criminal defendant.<sup>75</sup>

The Fifth Circuit brief<sup>76</sup> discusses use of the mens rea model and contains language consistent with the substantive law approach<sup>77</sup> to support precluding mental disorder evidence below the insanity defense line. The brief asserts that "[t]his long-standing principle of Louisiana law does not offend traditional notions of justice under the federal constitution."<sup>78</sup> In support of this position the brief quotes the Supreme Court's opinion in *Patterson v. New York*:<sup>79</sup>

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68. 328 U.S. 463 (1946).

69. 317 U.S. 596 (1942).

70. 280 U.S. 524 (1929).

71. Brief in Opposition, *supra* note 27, at 5.

72. *Id.* (emphasis added).

73. *Fisher v. United States*, 328 U.S. 463 (1946); *see supra* notes 6-7.

74. Brief in Opposition, *supra* note 27, at 5.

75. *Id.* On the other hand, Professor Paul H. Robinson points out that some cases and statutes say that even where evidence of mental disorder does not constitute a *defense*, it is still relevant and admissible on mens rea. *See* 1 P. ROBINSON, CRIMINAL LAW DEFENSES § 64(a), at 273-74 n.3 (1984 & Supp. 1988); *see also id.* at 277-78 n.13; *id.* § 64(d), at 283-84. However, such cases and statutes refer to the mens rea model involving evidentiary reasoning, a topic where there is much divergence of opinion. *Cf. supra* notes 16-18, 28, 30-31, 38-39, 49-52, 58, 60 and accompanying text.

76. *See supra* note 34 and accompanying text.

77. *See supra* notes 34-39 and accompanying text.

78. Fifth Circuit brief, *supra* note 34, at 17.

79. 432 U.S. 197 (1977); *see also* *Martin v. Ohio*, 480 U.S. 228 (1987) (Court discussing jury instruction requiring the state carry the burden of production and persuasion).

It goes without saying that preventing and dealing with crime is much more the business of the States than it is of the Federal Government and that we should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States. Among other things, it is normally 'within the power of the State to regulate procedures under which its laws are carried out, including the burden of producing evidence and the burden of persuasion,' and its decision in this regard is not subject to proscription under the Due Process Clause unless it 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'<sup>80</sup>

In further support of this position, the Fifth Circuit brief<sup>81</sup> cites the Supreme Court's opinion in *Fisher v. United States*,<sup>82</sup> and several court of appeals opinions: *Muench v. Israel*,<sup>83</sup> *Wahrlich v. Arizona*,<sup>84</sup> and *Campbell v. Wainwright*.<sup>85</sup> Commenting that "[d]espite much discussion in recent years concerning the wisdom of adopting the 'diminished capacity' rule, Louisiana still retains the 'all or nothing' concept of the *M'Naghten* case,"<sup>86</sup> the brief concludes: "Under the principles of *Fisher v. United States* . . . and *Patterson v. New York* . . . this choice is within the prerogatives of the legislature of the sovereign state of Louisiana, and should not be disturbed."<sup>87</sup>

## V. POLICY CONSIDERATIONS

The previous discussion focused on the substantive law approach. The next section will discuss evidentiary reasoning. These sections cover the authority of the states to administer their own criminal law systems and procedures, and to draw the line at the insanity defense without violating the constitution. This section focuses on the policy reasons which have led some jurisdictions to conclude that drawing that line is desirable. It is undoubtedly these policy considerations that cause some jurisdictions to use the substantive law approach and evidentiary reasoning in order to draw the line at the insanity defense.

The cases and authorities focusing on policy reasons take the position that even if evidence of mental disorder below the insanity defense line may be material, probative, relevant, competent, and reliable, it may still be precluded from admission for significant policy reasons without violating the constitution.<sup>88</sup>

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80. Fifth Circuit brief, *supra* note 34, at 17-18 (quoting *Patterson*, 432 U.S. at 201-02 (citations omitted)).

81. *Id.* at 18-20.

82. 328 U.S. 463 (1946); *see supra* notes 6-7.

83. 715 F.2d 1124 (7th Cir. 1983), *cert. denied sub nom.* *Worthing v. Israel*, 467 U.S. 1228 (1984).

84. 479 F.2d 1137 (9th Cir. 1973), *cert. denied*, 414 U.S. 1011 (1973).

85. 738 F.2d 1573 (11th Cir. 1984), *cert. denied*, 475 U.S. 1126 (1986).

86. Fifth Circuit brief, *supra* note 34, at 20 (citations omitted).

87. *Id.*

88. *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973); *Muench v. Israel*, 715 F.2d

One major policy consideration involves the objective theory of criminal liability. Under this theory, inferences drawn from both the nature of the offense and the surrounding acts are used to demonstrate the existence of mens rea. Consideration of mental illness is not authorized unless it is presented under the insanity defense.<sup>89</sup> Thus, instead of evaluating mens rea subjectively, based on possible minor mental disorders, the mental disorders must meet the minimum threshold of the insanity defense.

Policy considerations are sometimes expressed in broad and sweeping terms. For example, in *Muench-Worthing*, the Seventh Circuit analyzed positions taken in other cases and stated:

[I]njecting questions about mental abnormalities into a trial on first-degree murder detracts attention from the real issues and has as its basis a theory about culpability which the court is unprepared to accept against the interwoven and delicately crafted fabric of its substantive definitions of murder, its view of *scienter*, its conception of insanity, its assessment of the limitations of jurors, and its evaluation of the state of the developing discipline of psychology.<sup>90</sup>

In rejecting evidence of mental disorder below the insanity defense line other courts have made similar broad statements.<sup>91</sup>

Another policy consideration is the potential danger to the community. Some courts and authorities recognize that some defendants, acquitted following a determination of lack of mens rea based on mental disorder not meeting insanity defense requirements, cannot be released without endangering public safety. Some authorities contend that civil commitment may not be sufficient protection of the public.<sup>92</sup> In *State v. Wilcox*,<sup>93</sup> the Supreme Court of Ohio summa-

1124, 1134-35 (7th Cir. 1983), *cert. denied sub nom.* *Worthing v. Israel*, 467 U.S. 1228 (1984); *Hughes v. Mathews*, 576 F.2d 1250, 1258-59 (7th Cir.), *cert. dismissed sub nom.* *Israel v. Hughes*, 439 U.S. 801 (1978); *Wahrlich v. Arizona*, 479 F.2d 1137, 1138 (9th Cir.), *cert. denied*, 414 U.S. 1011 (1973); *Steele v. State*, 97 Wis. 2d 72, 84-85, 294 N.W.2d 2, 7-8 (1980).

89. *Bethea v. United States*, 365 A.2d 64, 87-88 (D.C. 1976), *cert. denied*, 433 U.S. 911 (1977); *State v. Bouwman*, 328 N.W.2d 703, 705 (Minn. 1982); A. GOLDSTEIN, *supra* note 5, at 191-202; *Arenella, The Diminished Capacity and Diminished Responsibility Defenses: Two Children of a Doomed Marriage*, 77 COLUM. L. REV. 827, 856-61 (1977); *Huckabee, supra* note 1, at 5.

90. *Muench*, 715 F.2d at 1143.

91. *State v. Wilcox*, 70 Ohio St. 2d 182, 198-99, 436 N.E.2d 523, 533 (1982); *Stamper v. Commonwealth*, 228 Va. 707, 716-17, 324 S.E.2d 682, 688 (1985).

92. *People v. Wetmore*, 22 Cal. 3d 318, 328-30, 583 P.2d 1308, 1315-16, 149 Cal. Rptr. 265, 272-73 (1978); *Bethea*, 365 A.2d at 85, 90-92; *Wilcox*, 70 Ohio St. 2d at 196-99, 436 N.E.2d at 532-33; 2 ABA STANDARDS FOR CRIMINAL JUSTICE 314 (2d ed. 1980 & ch. 7, Supp. 1986) [hereinafter ABA STANDARDS]; A. GOLDSTEIN, *supra* note 5, at 202, 206-07; *Morse, Failed Explanations and Criminal Responsibility: Experts and the Unconscious*, 68 VA. L. REV. 971, 1039-42 (1982) [hereinafter *Morse, Experts and the Uncon-*

rized statements in *Bethea*,<sup>94</sup> *Fisher*,<sup>95</sup> and comments by Professor Goldstein<sup>96</sup> regarding the danger to public safety. The *Wilcox* court concluded that excluding mental disorder evidence below the insanity defense line may be supported as a matter of policy in order to protect society.

A further policy consideration, mentioned by some courts, involves the effect in the guilt phase of bifurcated trials of admitting mental disorder evidence not reaching the insanity defense level. In *Steele v. State*,<sup>97</sup> the Supreme Court of Wisconsin referred to "safeguards designed for the protection of the defendant, as well as of society" and to "the problems of the duplicative evidence in the various stages of the bifurcated trial which result in cumulative evidence and jury confusion."<sup>98</sup>

Policy matters are important in supporting decisions to draw the line at the insanity defense. Thus, courts should consider policy in their reasoning, in addition to the substantive law and evidentiary approaches.

## VI. EVIDENTIARY REASONING

As noted earlier, the emphasis according to *Pohlot* is on the admissibility of evidence under the mens rea model.<sup>99</sup> However, it is also significant that *Pohlot* recognizes the possibility that a blanket exclusion of mental disorder evidence below the insanity defense line might be justified "if Congress had determined that psychiatric evidence on the issue of mens rea was inherently irrelevant or unreliable."<sup>100</sup> *Pohlot* did not rule on the constitutionality of a blanket exclusion as the court had reservations about this issue.<sup>101</sup>

This section demonstrates that, despite reservations on the constitutional issue expressed in *Pohlot*, various courts have held that mental disorder evidence on mens rea below the insanity defense line is so inherently irrelevant and unreliable that a blanket exclusion is not unconstitutional. This is consistent with the position argued by Wisconsin and Louisiana officials in the documents filed with the

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scious]. But see *United States v. Brawner*, 471 F.2d 969, 1001-02 (D.C. Cir. 1972) (en banc); Morse, *Undiminished Confusion In Diminished Capacity*, 75 J. CRIM. L. & CRIMINOLOGY 1, 9, 13-17, 22 (1984) [hereinafter Morse, *Undiminished Confusion*].

93. 70 Ohio St. 2d at 196-99, 436 N.E.2d at 531-33.

94. 365 A.2d at 84-85, 90-92.

95. *Fisher v. United States*, 149 F.2d 28, 29 (D.C. Cir. 1945), *aff'd*, 328 U.S. 463 (1946).

96. A. GOLDSTEIN, *supra* note 5, at 202.

97. 97 Wis. 2d 72, 294 N.W.2d 2 (1980).

98. *Id.* at 97, 294 N.W.2d at 13-14; *cf.* Note, *supra* note 31, at 734, 739, 756, 781-86.

99. See *supra* notes 15-18, 49, 52, 54 and accompanying text.

100. *Pohlot*, 827 F.2d at 902 n.12; see *supra* note 51 and accompanying text.

101. See *supra* notes 49-53 and accompanying text.

Supreme Court in *Muench-Worthing* and *Welcome*; certiorari was denied in both cases.<sup>102</sup> As stated in the 1988 supplement to Professor Robinson's treatise: "Exclusion of evidence that is either unreliable or that is not relevant to the mental state or states that are elements of the offense charged does not raise constitutional issues."<sup>103</sup>

The term "inherently irrelevant" involves the definition of relevance under the rules of evidence, which also encompass the concepts of materiality and probativeness. The term "inherently unreliable" is a broad concept incorporating the lack of reliability of mental health professionals in rendering expert opinions regarding the effect of mental disorder on mens rea below the insanity defense line. This involves the purported lack of competency of mental health professionals (under the rules of evidence) to render expert opinions on this issue. Also contributing to the lack of reliability are any deficiencies in mental disorder evidence under other rules of evidence, as well as the inherent nature of mental disorder evidence.

#### A. *Reliability*

Beyond the specific requirements of rules of evidence involving materiality, probativeness, relevance, and competency, is the broader issue of whether the evidence is "reliable." Thus, the brief in opposition to Worthing's petition for certiorari refers to the right of states to require defendants "to comply with rules of evidence reasonably designed and applied to insure reliability in the truth-determining process."<sup>104</sup> The brief further says that "[t]he unreliability of psychiatric opinion testimony relating to the mental state of a criminal defendant has been well documented."<sup>105</sup>

The reliability concept has been specifically discussed by the Supreme Court in reference to hearsay evidence. As stated by the Court in *Chambers v. Mississippi*,<sup>106</sup> "untrustworthy evidence should not be presented to the triers of fact. Out-of-court statements are traditionally excluded because they lack the conventional indicia of reliability."<sup>107</sup> The *Chambers* opinion further states that there must be compliance "with established rules of procedure and evidence

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102. See *supra* notes 28, 30-31, 39, 60 and accompanying text.

103. 1 P. ROBINSON, *supra* note 75, § 64(a), at 37 n.13 (Supp. 1988).

104. Brief in Opposition, *supra* note 27, at 2.

105. *Id.*

106. 410 U.S. 284 (1973).

107. *Id.* at 298.

designed to assure both fairness and reliability in the ascertainment of guilt and innocence."<sup>108</sup> Other courts have extended this concept to mental disorder evidence below the insanity defense line,<sup>109</sup> citing *Fisher*<sup>110</sup> for support.

Unreliability is particularly a problem in opinions of mental health professionals involving psychodynamic psychology. Professor Stephen Morse, psychologist and lawyer,<sup>111</sup> writes that "psychodynamic formulation[s] [are] . . . unverifiable and unreliable causal account[s] . . . [providing] the factfinder with little more than a false sense of security based on the incorrect assumption that a reasonably accurate scientific explanation has been provided."<sup>112</sup> He states that "[p]sychodynamic formulations are so inherently unreliable that they cannot aid decision-making in the criminal justice system. They should not be admitted at trials, at sentencing hearings, or at any other stage of the criminal process."<sup>113</sup>

However, Professor Morse states that there is room for contributions by mental health professionals. He notes that "mental health professionals are acute observers of behavior and can therefore efficiently provide the rich behavioral data—observations about thoughts, feelings, and actions—that are necessary to decide mental health law questions."<sup>114</sup> He also states that these experts can "present quantitative data based on empirical studies using reasonably sound methodologies to help triers of fact understand the effect craziness exerts on other behavior."<sup>115</sup>

Despite the more limited admissibility of testimony of mental health professionals advocated by Professor Morse, various jurisdictions go further and preclude such testimony on mens rea below the insanity defense line.<sup>116</sup> Thus, even the limited admissibility proposed by Professor Morse would produce disagreement in these jurisdictions in the context of mental disorder evidence on mens rea below the insanity defense line. Perhaps these jurisdictions subscribe to the following statement by Professor Morse: "Three basic factors probably are primarily responsible for the battle of the experts: the softness of mental health theory, data, and collection methods; the

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108. *Id.* at 302.

109. See *Bethea v. United States*, 365 A.2d 64, 86-89 (D.C. 1976), *cert. denied*, 433 U.S. 911 (1977); *Steele v. State*, 97 Wis. 2d 72, 95-97, 294 N.W.2d 2, 13 (1980).

110. 328 U.S. 463 (1946); see *supra* notes 6-7.

111. See Morse, *Experts and the Unconscious*, *supra* note 92, at 971.

112. *Id.* at 1026.

113. *Id.*

114. *Id.* at 983.

115. *Id.*; *cf. id.* at 979, 1045, 1055-56 (speculation, theoretical disagreement among mental health experts, and the "softness" of mental health data, theory, and collection methods, all contribute to the unreliability and unverifiability of mental health expert testimony).

116. See *supra* notes 6-12 and accompanying text.

nonscientific character of legal issues; and the inevitable bias of mental health experts as they enter the criminal justice system as advocates."<sup>117</sup> Professor Morse's statement is consistent with the argument that testimony and opinions of mental health professionals are inherently unreliable regarding the effect of mental disorder on mens rea below the insanity defense line. To reiterate, this is consistent with the latter point of the brief in opposition to the *Worthing* petition for a writ of certiorari, which referred to the evidentiary basis (involving unreliability) for precluding expert opinion testimony on the mental capacity to form intent.<sup>118</sup>

Set forth below are discussions of the related rules of evidence. Deficiencies in mental disorder evidence under these rules contribute to the unreliability of such evidence.

### B. Materiality

To be material, evidence must tend to influence the trier of fact because of a logical connection to the issue under consideration. It must have an effective influence or bearing on that issue.<sup>119</sup>

### C. Probativeness

Probative evidence tends to prove, or actually proves, an issue.<sup>120</sup> Professors John Kaplan and Jon Waltz note that the first ingredient of relevance is materiality, and the second ingredient is probativeness.<sup>121</sup> They assert that in order to determine probativeness the following question should be asked: Does "the evidence tend to establish the material fact-proposition?"<sup>122</sup> Alternatively, "[d]oes the offered evidence tend to make the fact-proposition more probably true or untrue, than it would be without that evidence?"<sup>123</sup>

In *Steele v. State*,<sup>124</sup> the Supreme Court of Wisconsin considered

117. Morse, *Experts and the Unconscious*, *supra* note 92, at 1055; *see also* Faust & Ziskin, *The Expert Witness In Psychology and Psychiatry*, 241 *SCI.* 31 (July 1, 1988). *But cf.* Note, *supra* note 31, at 735, 751-53, 756-70.

118. *See supra* notes 28, 30 and accompanying text.

119. BLACK'S LAW DICTIONARY 881 (rev. 5th ed. 1979) (definition of "material evidence"); *cf.* J. KAPLAN & J. WALTZ, *BASIC MATERIALS ON CRIMINAL EVIDENCE* 8 (1980) [hereinafter KAPLAN & WALTZ] (focus is on "the wording of the charge against the defendant, the rulings of the trial judge, and the stipulations of the prosecuting attorney and the defense counsel").

120. BLACK'S LAW DICTIONARY 1082 (rev. 5th ed. 1979).

121. KAPLAN & WALTZ, *supra* note 119, at 8.

122. *Id.*

123. *Id.*

124. 97 Wis. 2d 72, 294 N.W.2d 2 (1980); *see supra* notes 62, 97-98.



expert opinion testimony regarding the defendant's mental capacity to form criminal intent. Referring to *Fisher*,<sup>125</sup> the court noted the Supreme Court "questioned the *probativeness* of psychiatric evidence which tended to cast doubt upon the defendant's intent and premeditation."<sup>126</sup>

The *Steele* opinion pointed out that criminal responsibility is "essentially a moral issue."<sup>127</sup> The court then stated:

To make that [criminal responsibility under the insanity defense] determination requires no fine tuning. It is, rather, a gross evaluation that a person's conduct and mental state is so beyond the limits of accepted norms that to hold him criminally responsible would be unjust. This is a far cry from accepting testimony which purports to prove or disprove a specific intent, as distinguished from criminal responsibility. While some courts may have blind faith in all phases of psychiatry, this court does not. There is substantial doubt whether evidence such as was sought to be introduced here is scientifically sound, and there is substantial legal doubt that it is *probative* on the point for which it was asserted in this case.<sup>128</sup>

The concept of probativeness may cause evidence to be excluded even if it otherwise meets evidentiary requirements. For example, rule 403 of the Federal Rules of Evidence states: "Although relevant, evidence may be excluded if its *probative value* is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."<sup>129</sup> In the area of mental disorder below the insanity defense line there is particularly a problem of confusing the issues and misleading the jury.

#### D. Relevance

To be relevant, evidence must have a tendency to make the existence of any fact that is of consequence to the determination of the case either more probable or less probable than it would be without the evidence. Evidence is relevant if reasonable inferences can be drawn from it regarding a contested matter. This is true not only when the evidence tends to prove or disprove a fact in issue, but also when it tends to establish a fact from which the existence or nonexistence of a fact in issue can be directly inferred.<sup>130</sup> As noted by Professors Kaplan and Waltz, "materiality and probativeness, taken in combination, add up to relevance."<sup>131</sup>

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125. 328 U.S. 463 (1946); *see supra* notes 6-7.

126. *Steele*, 97 Wis. 2d at 95, 294 N.W.2d at 13 (emphasis added).

127. *Id.* at 96, 294 N.W.2d at 13.

128. *Id.* at 96-97, 294 N.W.2d at 13 (emphasis added).

129. FED. R. EVID. 403 (emphasis added); *see also* 1 S. GARD, JONES ON EVIDENCE § 4:6 (6th ed. 1972 & Supp. 1987).

130. FED. R. EVID. 401; 1 C. TORCIA, WHARTON'S CRIMINAL EVIDENCE § 91 (14th ed. 1985 & Supp. 1986); 1 S. GARD, *supra* note 129, §§ 4:2, 4:4, 4:5; BLACK'S LAW DICTIONARY 1160 (rev. 5th ed. 1979).

131. KAPLAN & WALTZ, *supra* note 119, at 8-9.

An example of the relevance problem occurs when claims of mental disorder regarding lack of volition are made which are not relevant to cognitively oriented criminal law concepts.<sup>132</sup> Various authorities have recognized that "volitional difficulties simply do not negate the cognitive mental states, such as intent and knowledge, that are required elements of criminal culpability."<sup>133</sup>

### *E. Competency*

As stated by Kaplan and Waltz: "Even if both branches of the relevance question (materiality and probativeness) can be answered in the affirmative, there still remains a large additional question: Is the offered evidence nonetheless incompetent (inadmissible) because of some special exclusionary rule of law?"<sup>134</sup> Citing hearsay as an example, they say that "[e]vidence can be probative of a material issue, [but can] . . . still be excluded by some special rule because the particular type of evidence is thought to be generally unreliable . . . ."<sup>135</sup>

A significant problem in testimony of mental health professionals directly on mens rea below the insanity defense line involves whether they are competent under the rules of evidence to express expert opinions on mens rea issues. Some courts draw the competency line of the mental health professionals at the insanity defense. Others disagree, asserting mental health professionals are competent to render opinions directly on mens rea. In any event, this competency issue may be considered one of the "special exclusionary rules" which may exclude otherwise material and probative evidence.<sup>136</sup> Thus, in discussing *Steele v. State*,<sup>137</sup> the brief in opposition to the *Worthing* petition states: "As a matter of the law of evidence, the court excluded expert opinion testimony on the defendant's capacity to form a criminal intent because it considered such testimony to be incompetent, due to substantial doubt about its trustworthiness and reliability."<sup>138</sup>

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132. Bonnie & Slobogin, *The Role Of Mental Health Professionals In The Criminal Process: The Case For Informed Speculation*, 66 VA. L. REV. 427, 473 n.142 (1980).

133. Morse & Cohen, *Diminishing Diminished Capacity In California*, 2 CAL. LAW., 24 (June 1982); cf. Morse, *Undiminished Confusion*, *supra* note 92, at 41.

134. KAPLAN & WALTZ, *supra* note 119, at 9.

135. *Id.*; see also 1 S. GARD, *supra* note 129, § 1:4 (evidence is "competent" when it is "relevant, material, and not barred by any exclusionary rule"); BLACK'S LAW DICTIONARY 257 (rev. 5th ed. 1979).

136. KAPLAN & WALTZ, *supra* note 119, at 9.

137. 97 Wis. 2d 72, 92-97, 294 N.W.2d 2, 11-13 (1980).

138. Brief in Opposition, *supra* note 27, at 4 (citation omitted).

A fundamental consideration is that even in testifying under the existing insanity defense, many mental health professionals say that they are beyond their area of expertise. Thus, the obvious question is: How can they be experts on mens rea elements which move even further into legal issues and the intricacies of criminal law?<sup>139</sup> The problem is highlighted by the testimony of psychiatrist Loren Roth before a congressional subcommittee. Roth was the chairperson of the Insanity Defense Work Group which prepared the December, 1982 *American Psychiatric Association Statement On The Insanity Defense*.<sup>140</sup> Roth testified before a subcommittee of the United States House of Representatives Judiciary Committee,<sup>141</sup> and he commented on the so-called "mens rea insanity defense," then pending before Congress. However, his statements are also particularly applicable to diminished capacity, the mens rea model, and similar concepts. In his testimony, Roth opined that under the mens rea insanity defense approach "psychiatrists would have to be making judgments about intent, which they should not and cannot do."<sup>142</sup> Referring to articles by Professor Stephen Morse<sup>143</sup> and Doctor Charles R. Clark,<sup>144</sup> Roth argued:

These papers spell out in great detail the limitations and problems, and really the clinical nonsense that are involved in having psychiatrists testify as to who or who does not have intent—which issue is even more ambiguous than the traditional insanity defense standards under which we are presently working. . . . You should not have experts testifying in this gray area.<sup>145</sup>

Such statements raise questions regarding whether opinions of mental health professionals on mens rea below the insanity defense line are scientific enough to be admissible as expert testimony under the legal rules of evidence. The often cited *Frye v. United States*<sup>146</sup> notes that "while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field

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139. HUCKABEE, COOPERATION OR CHAOS?, *supra* note 5, at 43-45, 104-05, 109-10, 145-50; Huckabee, *Problem of Dominance*, *supra* note 5, at 797-98; *Reform of the Federal Criminal Laws*, *supra* note 5, at 7101-02.

140. Insanity Defense Work Group, *American Psychiatric Association Statement On The Insanity Defense*, 140 AM. J. PSYCHIATRY 681 (June 1983).

141. *Insanity Defense In Federal Courts: Hearings Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 97th Cong., 2d Sess. 56, 58-62 (1982) [hereinafter *Insanity Defense Hearings*] (testimony of Dr. Loren Roth).

142. *Id.* at 59.

143. Morse, *Diminished Capacity: A Moral And Legal Conundrum*, 2 INT'L J.L. & PSYCHIATRY 271 (1979).

144. Clark, *Clinical Limits Of Expert Testimony On Diminished Capacity*, 5 INT'L J.L. & PSYCHIATRY 155 (1982).

145. *Insanity Defense Hearings*, *supra* note 141, at 59-60.

146. *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923) (lie detector test held not to be a judicially acceptable detection method). *Cf. Ibn Tamas v. United States*, 407 A.2d 626, 637-38 (D.C. 1979).

in which it belongs."<sup>147</sup> Under this test, in view of Roth's testimony, do mental health professionals qualify as expert witnesses on mens rea below the insanity defense line?

Actually the question is not whether a "science" is involved, but whether the expert witness has specialized knowledge of the subject.<sup>148</sup> The basic conditions of expert testimony are that opinions, inferences or conclusions of an expert witness must depend upon: (1) "special knowledge, skill, or training not within the ordinary experience of lay jurors"; (2) qualification "as a true expert in the particular field of expertise"; (3) testimony "to a reasonable degree of certainty (probability)" regarding [the] opinion, inference or conclusion"; and (4) an adequate description of "the data (facts) on which [the] opinion, inference or conclusion is based or, in the alternative, . . . [testimony] "in response to a hypothetical question that sets forth the underlying data."<sup>149</sup>

A statement in the commentary of an American Bar Association criminal justice mental health standards committee notes: "Even if critics of mental health and mental retardation professional opinion evidence are correct in asserting that the operating theories underlying psychiatry and psychology have not been verified scientifically, rule 702 [of the Federal Rules of Evidence] does not limit 'specialized knowledge' to scientific knowledge."<sup>150</sup> Again, even under the less stringent "specialized knowledge" rule, in view of Roth's testimony,<sup>151</sup> do mental health professionals have sufficient specialized knowledge to render opinions on mens rea below the insanity defense line? There are varying opinions among courts, jurisdictions, and authorities concerning this major issue.

The aforementioned American Bar Association committee commentary states that most courts have held that mental health professional testimony is admissible concerning a defendant's state of mind when proof of specific intent is required.<sup>152</sup> The commentary states:

147. *Frye*, 293 F. at 1014; cf. *Ibn-Tamas*, 407 A.2d at 637-39; *Dyas v. United States*, 376 A.2d 827, 832 (D.C. 1977).

148. See J. KAPLAN & J. WALTZ, *CASES AND MATERIALS ON EVIDENCE* 807-08 (1987) [hereinafter Kaplan & Waltz]; see also FED. R. EVID. 702; ABA STANDARDS, *supra* note 92, at 117 (ABA Criminal Justice Mental Health Standard 7-3.9(a) allows expert testimony regarding mental condition when "the testimony is . . . within the specialized knowledge of the witness").

149. KAPLAN & WALTZ, *supra* note 148, at 808.

150. ABA STANDARDS, *supra* note 92, at 120.

151. See *supra* notes 141-42, 145 and accompanying text.

152. ABA STANDARDS, *supra* note 92, at 121.

"Expert opinion evidence from qualified professionals should be admissible on a mens rea issue even if a defendant has not pleaded a specific mental nonresponsibility [insanity] defense, as long as it is relevant to a determination of guilt, innocence or level of culpability."<sup>153</sup> Nevertheless, as earlier stated, a number of jurisdictions disagree and draw the line at the insanity defense.<sup>154</sup>

In summary, the foregoing evidentiary discussion (involving materiality,<sup>155</sup> probativeness,<sup>156</sup> and relevance<sup>157</sup>) supports the argument that evidence of mental disorder below the insanity defense line is "inherently irrelevant."<sup>158</sup> Additionally, the "inherently unreliable"<sup>159</sup> position is supported by the foregoing discussion of incompetency of mental health professionals to testify and render expert opinions on mental disorder below the insanity defense line.<sup>160</sup> Other evidentiary deficiencies also contribute to the unreliability of mental disorder evidence.<sup>161</sup>

## VII. AVOID ARBITRARY OR MECHANISTIC DECISIONS

In order to preclude successful constitutional attacks, courts should not make "arbitrary" or "mechanistic" decisions regarding the admissibility of evidence. In other contexts this has been emphasized by the United States Supreme Court.<sup>162</sup> However, in view of the controversial nature of mental disorder evidence below the insanity defense line, and the reasonable arguments that may be made for its exclusion, the Supreme Court has not ruled that it is arbitrary to do so.<sup>163</sup>

Some courts have taken the position that if evidence of voluntary intoxication is considered admissible to show lack of specific intent, then evidence of mental disorder not meeting insanity defense requirements should also be admissible.<sup>164</sup> Other courts disagree with this proposition. For example, in *Wahrlich v. Arizona*,<sup>165</sup> the United States Court of Appeals for the Ninth Circuit held that precluding such evidence of mental disorder and admitting evidence of intoxication on specific intent is not "an unreasonable or arbitrary

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153. *Id.*

154. See *supra* notes 6-12 and accompanying text.

155. See *supra* note 119 and accompanying text.

156. See *supra* notes 120-29 and accompanying text.

157. See *supra* notes 130-33 and accompanying text.

158. See *supra* note 100 and accompanying text.

159. *Id.*

160. See *supra* notes 136-53 and accompanying text.

161. See *supra* notes 104-33 and accompanying text.

162. See *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973) (hearsay); *Washington v. Texas*, 388 U.S. 14, 23-25 (1967) (Harlan, J., concurring).

163. See *supra* notes 6-12 and accompanying text.

164. *United States v. Brawner*, 471 F.2d 969, 999 (D.C. Cir. 1972) (en banc).

165. 479 F.2d 1137, 1138 (9th Cir.), *cert. denied*, 414 U.S. 1011 (1973).

classification."<sup>166</sup>

In *Fisher v. United States*,<sup>167</sup> the United States Supreme Court was presented with the "analogy to intoxication" argument; however, the Court still held that precluding evidence of mental disorder below the insanity defense line does not reach a constitutional dimension.<sup>168</sup> Other courts which have faced the issue have held that because of the problems involved in admitting mental disorder evidence below the insanity defense line it can be distinguished from intoxication and, hence, may be precluded.<sup>169</sup>

There is some merit to the argument stressing the analogy between intoxication and the mens rea model in order to show that precluding mental disorder on mens rea is an arbitrary decision. Nevertheless, there are reasonable arguments advocating the opposite position, as indicated in court decisions, including the Supreme Court.<sup>170</sup>

Another area in which it has been argued that decisions are arbitrary is where mental disorder evidence is excluded for some purposes but admitted for others. The brief in opposition to the *Worthing* petition for a writ of certiorari discusses this issue; if there is a reasonable basis for believing that such testimony is unreliable, then there is no constitutional reason for disturbing such a decision.<sup>171</sup> The brief states: "Reasonable people can be convinced that psychiatrists are competent to make some, but not any and all, determinations about the mental processes of those who commit criminal acts."<sup>172</sup> The brief further argues that "evidence relevant to a defense of diminished capacity may be virtually identical to that relevant to a defense of insanity, but the purposes for which the evidence is used are different. It is fundamental that the same evidence may be admissible for one purpose but inadmissible for another."<sup>173</sup>

The issue is brought into focus by the Ohio Supreme Court in *State v. Wilcox*,<sup>174</sup> where the court stated that in view of the problem courts and juries face when evaluating expert evidence to "make the

166. *Id.* at 1138.

167. 328 U.S. 463 (1946); *see supra* notes 6-7 and accompanying text.

168. *Fisher*, 328 U.S. at 473-75.

169. *Bethea v. United States*, 365 A.2d 64, 85-86, 88-89 (D.C. 1976), *cert. denied*, 433 U.S. 911 (1977); *State v. Wilcox*, 70 Ohio St. 2d 182, 186-87, 436 N.E.2d 523, 526 (1982); *Steele v. State*, 97 Wis. 2d 72, 94-95 n.7, 294 N.W.2d 2, 12 n.7 (West 1980).

170. *See supra* notes 163, 165-69 and accompanying text.

171. Brief in Opposition, *supra* note 27, at 9-10.

172. *Id.* at 10.

173. *Id.* at 10 n.3.

174. 70 Ohio St. 2d 182, 436 N.E.2d 523 (1982); *see supra* notes 91-93.

'bright line' insanity determination, we are not at all confident that similar evidence will enable juries, or the judges who must instruct them, to bring the blurred lines of diminished capacity into proper focus so as to facilitate principled and consistent decision-making in criminal cases."<sup>175</sup> Other courts have made similar rulings, and have disagreed with the argument that because evidence of mental disorder is admissible on insanity it should also be admissible on mens rea below the insanity defense line.<sup>176</sup>

On the other hand, there are arguments to the effect that since evidence of mental disorder is admitted on other issues, including insanity and competency to stand trial, it should also be admitted directly on mens rea.<sup>177</sup> Nevertheless, reasonable arguments may be made both ways on this issue. Thus, the decisions are not arbitrary and, under the law as it now exists, the issue does not reach constitutional dimensions.

#### VIII. REMOVING BURDEN OF PROOF AND PERSUASION PROBLEMS

Earlier discussions have demonstrated that jurisdictions may constitutionally draw the line at the insanity defense and preclude mental disorder evidence on mens rea below that line. However, many jurisdictions have variations of diminished capacity, diminished responsibility, partial responsibility and the mens rea model incorporated in their criminal justice systems. If they decide to retreat from these concepts and draw the line at the insanity defense, some of them may have difficulty in doing so.

In order to draw a line at the insanity defense so as to completely bar use of mental disorder evidence below that line, jurisdictions need to review their criminal justice systems. Such review is necessary to verify that mental disorder evidence on mens rea is not recognized in a way that creates a constitutional problem involving the requirement that the prosecution has the burden of proof beyond a reasonable doubt. This is best illustrated by a further discussion of the *Pohlot* case.

The *Pohlot* opinion<sup>178</sup> notes that the Court in *In re Winship*<sup>179</sup>

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175. *Wilcox*, 70 Ohio St. 2d at 193, 436 N.E.2d at 530. *But cf.* Note, *supra* note 31, at 770-80.

176. *Campbell v. Wainwright*, 738 F.2d 1573, 1581-82 (11th Cir. 1984), *cert. denied*, 475 U.S. 1126 (1986); *Muench v. Israel*, 715 F.2d 1124, 1136-37 (7th Cir. 1983), *cert. denied sub nom.* *Worthing v. Israel*, 467 U.S. 1228 (1984); *Steele v. State*, 97 Wis. 2d 72, 95-97, 294 N.W.2d 2, 12-13 (1980).

177. *Hughes v. Mathews*, 576 F.2d 1250, 1256-57 (7th Cir.), *cert. dismissed sub nom.* *Israel v. Hughes*, 439 U.S. 801 (1978); Morse, *Undiminished Confusion*, *supra* note 92, at 10-11; *cf.* Note, *supra* note 31, at 757-63.

178. *United States v. Pohlot*, 827 F.2d 889, 900-01 (3d Cir. 1987), *cert. denied*, 108 S. Ct. 710 (1988).

179. 397 U.S. 358 (1970).

held that due process requires the government to prove every element of a criminal offense beyond a reasonable doubt.<sup>180</sup> *Pohlot* then acknowledges: "The defendant's right to present a defense to one of those elements generally includes the right to the admission of competent, reliable, exculpatory evidence, and the Supreme Court has struck down 'arbitrary rules that prevent whole categories of defense witnesses from testifying.'"<sup>181</sup> The *Pohlot* Court further stated that "courts have focused not just on whether a state might determine the evidence to be inherently unreliable or irrelevant but also on whether the state had in fact made that judgment."<sup>182</sup>

According to *Pohlot*, in the 1984 Insanity Defense Reform Act, Congress and the Administration did make that judgment. The opinion extensively discusses the legislative history of the Act, including Congressional debates and hearings regarding attempts to abolish the insanity defense.<sup>183</sup> The opinion states that the "entire structure of the Congressional debate suggests that Congress did not intend to bar evidence of mental abnormality to prove a lack of mens rea."<sup>184</sup> Further, the legislative history "suggests that admitting psychiatric evidence on the mens rea issue may be more relevant and reliable than admitting it for the insanity defense."<sup>185</sup> Finally, *Pohlot* concludes: "We are unwilling on our own to find this use of psychiatric evidence inherently unreliable."<sup>186</sup>

The Court emphasizes that Congress and the Administration did not draw a firm line at the insanity defense and thus the mens rea model exists in the legislation. Full confrontation of the constitutional issue involved in completely banning mental disorder below the insanity defense line was avoided; *Pohlot* ruled that the evidence was inadmissible only under the substantive law approach.<sup>187</sup> Thus, the mens rea model is available for use by defendants in other federal criminal cases. Although other jurisdictions have drawn a firm line at the insanity defense,<sup>188</sup> Congress and the Administration have chosen not to draw that line.

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180. *Id.* at 363-64.

181. *Pohlot*, 827 F.2d at 900-01. In support of this, the *Pohlot* opinion cites *Crane v. Kentucky*, 476 U.S. 683 (1986); *Chambers v. Mississippi*, 410 U.S. 284 (1973); and *Washington v. Texas*, 388 U.S. 14 (1967).

182. *Pohlot*, 827 F.2d at 902 n.12.

183. *Id.* at 897-903.

184. *Id.* at 899.

185. *Id.* at 902 n.12.

186. *Id.*

187. See *supra* notes 45-48 and accompanying text.

188. See *supra* notes 6-12 and accompanying text.



It would seem that this decision will have a significant effect in other federal prosecutions. As stated in *Pohlot*: "The government contends that admitting evidence to prove a lack of mens rea effectively places the burden of proving a defendant's sanity back on the government."<sup>189</sup> Notably, in light of this, the United States Solicitor General filed a document with the Supreme Court waiving the government's right to file a response to *Pohlot*'s petition for certiorari.<sup>190</sup> In any event, it may now be very difficult for Congress and the Justice Department to eliminate the mens rea model from the federal system even if such a desire exists.

Other jurisdictions may have similar problems in retreating from the mens rea model. This will be particularly true if they have adopted a "facts" of mens rea approach rather than a "mental capacity" for mens rea approach. Some legal scholars urge that the mental capacity concept be abandoned, allowing mental health professionals to express opinions in terms of facts of mens rea.<sup>191</sup>

California has adopted such an approach. Section 28 subdivision (a) of the California Penal Code states: "Evidence of mental disease, mental defect, or mental disorder shall not be admitted to show or negate the capacity to form any mental state." However, such evidence is admissible "solely on the issue of whether or not the accused actually formed" the required mental state.<sup>192</sup> American Bar Association Criminal Justice Mental Health Standard 7-6.2 also appears to have moved in this direction.<sup>193</sup> Although it is not as specific as the California statute in precluding mental capacity evidence, the 1984 Federal Insanity Defense Reform Act seems to lean toward California's facts of mens rea approach.<sup>194</sup>

A major problem exists with the movement toward attempting to bracket mental disorder evidence below the insanity defense line into a "facts" context rather than mental capacity. Mental health professionals are not experts regarding the facts of mens rea. Significant authorities support this obvious fact and focus on the danger of intrusion by experts into the province of the jury.<sup>195</sup>

Some jurisdictions preclude opinions of experts on "ultimate is-

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189. *Pohlot*, 827 F.2d at 900.

190. See *supra* note 43 and accompanying text.

191. *Morse*, *Undiminished Confusion*, *supra* note 92, at 5, 42-52, 55-58; cf. *Bonnie & Slobogin*, *supra* note 132, at 475-77 (arguing that relevant expert testimony should be allowed to establish the plausibility of defendant's claim of abnormality).

192. CAL. PENAL CODE § 28(a) (West 1988); cf. *Huckabee*, *supra* note 1, at 8-15.

193. ABA STANDARDS, *supra* note 92, at 311-17; see also *Huckabee*, *supra* note 1, at 16.

194. *Pohlot*, 827 F.2d at 903, 905.

195. *Rhodes v. United States*, 282 F.2d 59, 61-62 (4th Cir.), *cert. denied*, 364 U.S. 912 (1960); *Ibn-Tamas v. United States*, 407 A.2d 626, 632-33 (D.C. 1979); *Stamper v. Commonwealth*, 228 Va. 707, 715-16, 324 S.E.2d 682, 687-88 (1985); 2 S. GARD, *supra* note 129, § 14:27; cf. *Clark*, *supra* note 144, at 168-70.

sues." However, this does not cure the problem if, while avoiding ultimate issues, the expert moves into nonclinical, nonmedical, or nonpsychological matters that are before the jury and, in the process, weighs controversial factual issues, including credibility of factual witnesses. Such matters are for the jury alone.<sup>196</sup>

It is true that mental capacity is logically relevant to the facts of mens rea (i.e., if a defendant does not have the mental capacity for mens rea he does not have the mens rea). However, some jurisdictions do not agree that partially diminished capacity eliminates mens rea. In any event, a number of jurisdictions believe that the law has the right, for a variety of reasons, not to accept evidence of mental disorder below the insanity defense line.<sup>197</sup> The facts approach, as described above, should not be built into the system if jurisdictions desire to draw the line at the insanity defense. It presents the danger of confusing real factual evidence with mental capacity. Mental health professionals should be recognized for what they are—arguably experts on mental capacity. However, even as to this proposition, there are those who say they do not have sufficient expertise below the insanity defense line. As noted above, it may be conceded that mental capacity is arguably relevant to the facts of mens rea. However, jurisdictions are not necessarily required to build mental disorder evidence into their criminal justice systems in a manner that makes it unconstitutional to preclude such evidence below the insanity defense line.

A major hurdle in removing burden of proof and persuasion problems is that jurisdictions may separate the mental capacity concept from the elements of offenses. For example, mental capacity may be separated so that there is not a constitutional right to present mental capacity evidence on mens rea below the insanity defense line. Thus, with proper separation from mens rea elements, the bur-

196. See generally *supra* note 195. Bonnie & Slobogin, *supra* note 132, at 475-77, appear to disagree with this position. However, they seem to be focusing on the "ultimate issue" concept rather than on a second way an expert can preempt the jury's function. This involves testimony by the expert witness on nonclinical matters which may not be specifically focused on the ultimate issue. These are matters which the jury is just as competent as the expert to consider and weigh the evidence and draw the necessary conclusions. See *Ibn-Tamas*, 407 A.2d at 632-33. At another point in their article, Bonnie & Slobogin, *supra* note 132, at 480-81 n.161, recognize the distinction, however, by conceding that a mental health professional should not function as a "thirteenth juror." Cf. MELTON & PETRILA, *supra* note 4, at 128-29.

197. These reasons were presented earlier under the substantive law, policy considerations, and evidentiary reasoning discussions. See *supra* notes 61-161 and accompanying text.

den of persuasion regarding mental capacity may even be placed on the defendant. In support of this conclusion, six key points are noteworthy.

First, as long as the prosecution proves beyond a reasonable doubt the elements of the crime charged, the prosecution is not required to prove beyond a reasonable doubt separate concepts which are *not* a part of such elements.<sup>198</sup> Second, the burden of persuasion for the insanity defense which focuses on mental capacity may be placed on the defendant.<sup>199</sup> The defendant also may have the burden for the extreme emotional disturbance concept involving actions of the defendant "caused by a mental infirmity not arising to the level of insanity . . . ." <sup>200</sup>

Third, it is noteworthy that in Louisiana the defendant has the burden of persuasion to establish insanity under the insanity defense.<sup>201</sup> Nevertheless, in *Welcome*, the Supreme Court denied certiorari when the Court of Appeals for the Fifth Circuit upheld the constitutionality of the exclusion in Louisiana of mental disorder evidence not meeting insanity defense requirements.<sup>202</sup> This was done even though the burden of persuasion regarding insanity was on the defendant.

Fourth, a statute which places the burden of persuasion regarding diminished capacity on the defendant is not unconstitutional. This is true as long as the state retains the responsibility of proving essential elements of the crime beyond a reasonable doubt.<sup>203</sup>

Fifth, in a discussion of sections 25(a) and 28(a) of the California Penal Code,<sup>204</sup> Professor Morse states that "the legislature expressed its belief . . . that *capacity* evidence was *not* relevant to determining whether a defendant *actually* had mens rea."<sup>205</sup> Thus, he argues that the defendant's capacity does not have to be an element that the prosecution must prove, although the "prosecution still must prove that the defendant *actually* had the requisite mens rea and the defendant must be allowed to admit other relevant evidence that he did not have it in fact."<sup>206</sup> This is consistent with the point that mental capacity does not have to be part of the elements required to be

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198. *Martin v. Ohio*, 480 U.S. 228 (1987); *Patterson v. New York*, 432 U.S. 197 (1977).

199. *Patterson*, 432 U.S. at 202-07; *Leland v. Oregon*, 343 U.S. 790, 798 (1952); *United States v. Byrd*, 834 F.2d 145, 146 (8th Cir. 1987); *United States v. Amos*, 803 F.2d 419 (8th Cir. 1986). *Cf. Hoey v. State*, 311 Md. 473, 490-95, 536 A.2d 622, 630-33 (1988).

200. *Patterson*, 432 U.S. at 206 (citation omitted).

201. *State v. Andrews*, 369 So. 2d 1049, 1053-54 (La. 1979). *Cf. State v. Bouwman*, 328 N.W.2d 703, 705-06 (Minn. 1982).

202. *See supra* notes 32-40 and accompanying text.

203. *State v. Breakiron*, 108 N.J. 591, 612-13, 532 A.2d 199, 210 (1987).

204. CAL. PENAL CODE §§ 25(A), 28(A) (West 1988).

205. Morse, *Undiminished Confusion*, *supra* note 92, at 44-45 & n.145 (emphasis in original) (citations omitted).

206. *Id.* at 45.

proved under the constitution.<sup>207</sup>

Finally, *Martin v. Ohio*<sup>208</sup> does not alter the conclusion that mental capacity may be separated from the mens rea elements. *Pohlot* maintains that, under *Martin*, a state may place the burden on a defendant to prove self-defense. However, "a state's right to shift the burden on self-defense does not include the right to prevent a defendant from showing self-defense in an effort to prove that she did not act with the mens rea of 'prior calculation and design.'"<sup>209</sup> The petition for rehearing filed with the Supreme Court in *Welcome*<sup>210</sup> made a similar argument.<sup>211</sup> Nevertheless, *Martin* dealt with the facts involved in self-defense. Such facts may be very important in demonstrating that a defendant did not actually have the requisite mens rea. However, nothing in *Martin* precludes a jurisdiction from separating mental capacity from the mens rea elements, thereby avoiding a burden of proof problem. This is supported by *Welcome*, where the Supreme Court denied a rehearing even though the *Martin* argument was made in the petition for rehearing.<sup>212</sup>

Nonetheless, in *Leland v. Oregon*,<sup>213</sup> the Supreme Court implied it may be constitutionally required for the jury to properly consider mental disorder on mens rea if it does not meet insanity defense requirements.<sup>214</sup> Oregon law at that time authorized consideration of mental disorder on mens rea elements below the insanity defense line. Oregon is *not* one of the states that precludes such evidence below that line.<sup>215</sup> Thus, in *Leland*, the Supreme Court referred to the trial court's instruction which authorized use of such residual mental disorder evidence on mens rea. Nevertheless, this does not result in

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207. However, as earlier discussed, California has created a special problem by giving what may be considered too much recognition to mental disorder evidence on the facts of mens rea. This creates a constitutional problem that does not exist in jurisdictions where mental health professionals are considered potential experts merely on mental capacity, and thus in those jurisdictions the issue may be resolved on evidentiary and policy bases rather than involving the Constitution.

208. 480 U.S. 228 (1987).

209. *Pohlot*, 827 F.2d at 901.

210. Petition for Rehearing of Order Denying Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, *Welcome v. Blackburn*, 793 F.2d 672 (5th Cir. 1986) (No. 85-4546), *cert. denied*, 107 S. Ct. 1985 (1987), *reh'g denied*, 107 S. Ct. 3245 (1987). Petition for rehearing filed May 27, 1987, Supreme Court No. 86-5544.

211. *Id.* at 1-2.

212. *See supra* notes 210-11 and accompanying text.

213. 343 U.S. 790 (1952).

214. *Id.* at 794-96.

215. *Cf. supra* notes 6-12 and accompanying text. *See also* Huckabee, *supra* note 1, at 28-29.

a constitutional requirement in those states which firmly and properly draw the line at the insanity defense.

Justice Rehnquist refers to *Leland* in his concurring opinion in *Mullaney v. Wilbur*.<sup>216</sup> The Supreme Court in *Leland* noted that the insanity issue was considered only after the jury had "found that all elements of the offense, including mens rea . . . [as] required by state law, had been proved beyond a reasonable doubt."<sup>217</sup> As recognized by the trial court's instructions in *Leland*, "evidence relevant to insanity as defined by state law may also be relevant to whether the required mens rea was present, [however] the existence or nonexistence of legal insanity bears no necessary relationship to the existence or nonexistence of the required mental elements of the crime."<sup>218</sup>

An important point in Justice Rehnquist's statement is his reference to mens rea *as required by state law*. Although Oregon authorizes consideration of mental disorder evidence, not meeting insanity defense requirements, to be considered directly on mens rea,<sup>219</sup> other jurisdictions do not. Thus, it appears that Justice Rehnquist acknowledged that some jurisdictions (including Oregon) require such evidence.<sup>220</sup>

The *Pohlot* court referred to *Leland* and stated that the Supreme Court "did not sanction, and probably would not sanction, a jury charge that prevented a jury from considering evidence of mental abnormality in determining whether the state had proven premeditation and deliberation beyond a reasonable doubt."<sup>221</sup> However, this does not apply to *all* jurisdictions since the *Leland* Court was merely making comments in the context of the Oregon mens rea requirements, where mental disorder evidence not meeting insanity defense requirements was proper for jury consideration.<sup>222</sup>

Thus, comments regarding *Leland* and *Mullaney*,<sup>223</sup> as well as similar comments regarding New York by the Supreme Court in *Patterson*,<sup>224</sup> appear to be merely recognizing the existence of the mens rea model in these jurisdictions, rather than constitutional rulings. Jurisdictions should still be able to constitutionally draw a firm line at the

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216. 421 U.S. 684, 705-06 (1975) (Rehnquist, J., concurring).

217. *Id.* at 705 (emphasis added).

218. *Id.* at 705-06 (emphasis added).

219. See *supra* note 215 and accompanying text.

220. Cf. *Patterson v. New York*, 432 U.S. 197, 204 (1977). The Supreme Court refers to *Leland* and the requirement that in proving elements of the crime beyond a reasonable doubt "evidence going to the issue of insanity" should also be considered. Again, however, it should be noted that New York is not one of the states that completely precludes mental disorder evidence below the insanity defense line.

221. *Pohlot*, 827 F.2d at 901.

222. Cf. *supra* notes 213-20 and accompanying text.

223. See *supra* notes 216-18.

224. See *supra* note 220 and accompanying text.

insanity defense.<sup>225</sup> This may be accomplished by using the aforementioned substantive law approach, policy considerations, and evidentiary reasoning.<sup>226</sup> If this is done, and evidence of mental disorder below the insanity defense line is removed from the mens rea elements so as to avoid the burden of proof problem,<sup>227</sup> a firm line may be drawn at the insanity defense despite the comments in *Leland*, *Patterson*, and *Mullaney*. However, if a jurisdiction has not sufficiently separated mental disorder evidence,<sup>228</sup> then a constitutional problem would arise if the rules in the particular jurisdiction were not followed.

A related problem involves the type of jury instruction banned by the Supreme Court in *Sandstrom v. Montana*.<sup>229</sup> The instruction in *Sandstrom* was that "the law presumes that a person intends the ordinary consequences of his voluntary acts."<sup>230</sup> Such instructions should be avoided. It is of interest that in *Sandstrom* there was testimony of mental health experts in terms of the mens rea model. Again, however, this is because Montana was not a jurisdiction that drew a firm line at the insanity defense.<sup>231</sup> Thus, *Sandstrom* does not add support to the argument that drawing the line at the insanity defense is unconstitutional.

#### IX. MENS REA MODEL IN THE FEDERAL SYSTEM

Special problems surround the mens rea model in the federal system. These problems involve questions regarding the difficulty of removing this model from the system, if desired. Another major issue involves whether the model will be given a strict or diminished capacity mens rea interpretation. In varying degrees, such problems undoubtedly exist in other jurisdictions where the mens rea model has been adopted. Thus, a closer look at the federal system is appropriate.

##### A. *Is The Mens Rea Model Here To Stay?*

As noted earlier, Congress and the United States Department of Justice will have a difficult time if they now attempt to retreat from

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225. Cf. *supra* notes 6-12 and accompanying text.

226. See *supra* notes 61-161 and accompanying text.

227. See *supra* notes 178-212 and accompanying text.

228. Cf. *supra* notes 183-90 and accompanying text.

229. 442 U.S. 510 (1979).

230. *Id.* at 515.

231. See *supra* notes 215, 220 and accompanying text.

the mens rea model.<sup>232</sup> The Justice Department has already made such an unsuccessful attempt. In court arguments since the 1984 Act was adopted, Department of Justice representatives have flatly taken the position that the mens rea model is not within this legislation. In effect, they have unsuccessfully reverted to an "all or nothing" position regarding the legislation (i.e., if the mental disorder is not presented under the insanity defense, it can be completely precluded).<sup>233</sup> The courts, however, have ruled against this argument, stating that the mens rea model is built into the new legislation.<sup>234</sup>

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232. See *supra* notes 178-90 and accompanying text.

233. *Pohlot*, 827 F.2d at 890-91, 897; *United States v. Gold*, 661 F. Supp. 1127, 1129-30 (D.D.C. 1987); *United States v. Frisbee*, 623 F. Supp. 1217, 1219 (N.D. Cal. 1985); see also *United States v. Bartlett*, 856 F.2d 1071, 1079 (8th Cir. 1988); cf. *United States v. Newman*, 849 F.2d 156, 163-66 (5th Cir. 1988); *United States v. Twine*, 853 F.2d 676 (9th Cir. 1988).

234. See cases cited *supra* note 233; see also Huckabee, *supra* note 1, at 18-25. Note particularly the references to the March 17, 1983 testimony before a congressional subcommittee by then Assistant Attorney General (now federal District Judge) D. Lowell Jensen. This testimony is specific legislative history regarding the Justice Department's view of the proposed legislation. It is inconsistent with the position recently taken by the Department in in-court arguments. See *supra* note 233 and accompanying text.

It is also of interest that Congress passed a 1986 statute conforming military law to the insanity defense provisions of the 1984 Federal Comprehensive Crime Control Act. See *Ellis v. Jacob*, 26 M.J. 90, 92-93 (C.M.A. 1988). Consistent with the position taken by Department of Justice representatives in *Pohlot*, *Gold*, and *Frisbee*, the President signed an Executive Order on March 3, 1987, which included language as follows:

A mental condition not amounting to a lack of mental responsibility under subsection (k)(1) of this rule [i.e., the insanity defense] is not a defense, nor is evidence of such a mental condition admissible as to whether the accused entertained a state of mind necessary to be proven as an element of the offense.

Exec. Order No. 12,586, 3 C.F.R. 204, 207 (1988); cf. *Ellis*, 26 M.J. at 92. This was incorporated as an amendment to the MANUAL FOR COURTS-MARTIAL, UNITED STATES rule 916(k)(2) 1984, (Change No. 3, June 1, 1987).

Language similar to that in rule 916(k)(2) is essentially what was needed in the 1984 federal Comprehensive Crime Control Act (and in its legislative history) in order to achieve the "all or nothing" result claimed by Justice Department representatives. See cases cited *supra* note 233; cf. 1 P. ROBINSON, *supra* note 75, § 64(a), at 36 n.6 (Supp. 1988). However, such language was not in the act or the legislative history. Instead, the legislative history includes the above-mentioned testimony of Mr. Jensen and other Justice Department officials as well as statements in Senate reports which are inconsistent with the language of rule 916(k)(2). Cf. *supra* notes 181-90 and accompanying text; see also *infra* notes 235-39 and accompanying text.

In view of this, it is not surprising that the United States Court of Military Appeals held that in the military justice system an expert's testimony on specific intent, below the insanity defense line, continues to be admissible. Furthermore, the President's rule-making power does not extend to substantive military criminal law; and the provision in the MANUAL FOR COURTS-MARTIAL which makes evidence of mental condition below the insanity defense line inadmissible is a nullity. *Ellis*, 26 M.J. at 90. Although the Court of Military Appeals expressed concern about the constitutional issue, it stated that "we confine ourselves to construction of our own statute." *Id.* at 93 n.6.

The new insanity defense in the military law, as passed by Congress, closely tracks the insanity defense in the 1984 federal Comprehensive Crime Control Act. S. REP. NO. 331, 99th Cong., 2d Sess. 249 (1986), reprinted in 1986 U.S. CODE CONG. & ADMIN. NEWS 6413, 6444. Thus, the military law is wedded to the same legislative history as

The pressure for a mens rea model actually dates back to 1973, when the Justice Department first recommended that Congress adopt a so-called "mens rea insanity defense." Since that time, department officials and Senate reports have stressed the merits of a mens rea model as a replacement for a traditional affirmative insanity defense.<sup>235</sup>

These representations by the Department of Justice and Senate reports continued into the period shortly before the passage of the 1984 Act.<sup>236</sup> As stated in *Pohlot*: "Even those favoring abolition . . . wished to preserve the defendant's right to use psychiatric evidence to prove lack of mens rea, and [Congress'] bills explicitly do so."<sup>237</sup>

In 1982, before a House of Representatives subcommittee, then-Associate Attorney General Rudolph Giuliani testified regarding the proposed mens rea insanity defense. He was asked whether that approach would reduce the amount of psychiatric testimony in criminal cases. Included in his answer was the following statement:

Those intents that you talk about are presently part of the law. They presently have to be proved by the Government beyond a reasonable doubt, and it would presently be available to any defense lawyer to call psychiatrists to testify, that the person was unable to form the intent to commit the crime or to form the specific intent that is required in the statute, so that our approach certainly does not expand the number of opportunities to do that.<sup>238</sup>

Giuliani was obviously referring to the existing state of the law in the federal system at that time. The Department of Justice was *not* taking the position, adopted in some jurisdictions, that a firm line could be drawn at the insanity defense in precluding all mental disorder evidence on mens rea below that line, using the substantive law ap-

the Federal Act. *Ellis*, 26 M.J. at 93. In order for the military to put into effect the language of rule 916(k)(2), it appears that legislation will be required. However, there may be difficulty in getting it through Congress in view of the climate created by the legislative history of the 1984 Comprehensive Crime Control Act. For a comprehensive analysis of these issues as they existed prior to Executive Order 12,586, the adoption of rule 916(k)(2), and the *Ellis* decision, see generally Carroll, *Insanity Defense Reform*, 114 MIL. L. REV. 183, 189, 196-211, 214-16, 223-24 (1986).

235. The Justice Department and the Senate appeared to have in mind a strict interpretation of the effect of mental disorder on mens rea rather than a more defense oriented concept such as diminished capacity mens rea or something similar. See generally Huckabee, *Problem of Dominance*, *supra* note 5; see also HUCKABEE, COOPERATION OR CHAOS?, *supra* note 5, at 73-95.

236. *United States v. Pohlot*, 827 F.2d 889, 899-900, 902-03 (3d Cir. 1987), *cert. denied*, 108 S. Ct. 710 (1988).

237. *Id.* at 899.

238. *Insanity Defense In Federal Courts: Hearings Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 97th Cong., 2d Sess. 36 (1982) (testimony of Rudolph Giuliani, Associate Attorney General); cf. *Pohlot*, 827 F.2d at 900 n.10.



proach, policy considerations, and evidentiary reasoning.<sup>239</sup> Nevertheless, in view of this, the *Pohlot* opinion, taking the position that the mens rea model is built into the federal system is understandable. It now appears that there are major problems in attempting to retreat from the mens rea model; a step which the Justice Department apparently wants to take.

### *B. Is It Strict Or Diminished Capacity Mens Rea?*

*Pohlot* places emphasis on the expertise of Professors Stephen Morse and Peter Arenella. This is consistent with the fact that their articles and testimony were considered by Congress during the development of the 1984 Insanity Defense Reform Act.<sup>240</sup> The opinion seems to have accepted the "strict mens rea" concept described by Professors Arenella<sup>241</sup> and Morse<sup>242</sup> as Congress's intent.<sup>243</sup>

It is understandable that *Pohlot* accepted the strict mens rea approach as the intent of Congress since, in fact, some Department of Justice officials and Senate reports emphasized this approach. For example, *Pohlot* refers to testimony before the 1982 Senate Judiciary Committee regarding the mens rea insanity defense. The opinion notes that then-Attorney General William French Smith stated that mental disorder evidence would rarely be admissible on the mens rea elements. *Pohlot* further refers to testimony before a House of Representatives subcommittee, where then-Associate Attorney General Giuliani made similar statements.<sup>244</sup> In a 1981 Senate report regarding the mens rea insanity defense there is a statement indicating that a strict version of the mens rea model would be used less frequently than the insanity defense. *Pohlot* cites this report as including the following language:

While the mens rea test, dependent as it is on the use of the phrase 'mental disease or defect,' may be said to suffer from some of the same vagueness problems [as the insanity defense] it should be noted that the reduction in availability of the defenses reduces the harm and impact of the necessary vagueness.<sup>245</sup>

This implies that under the mens rea insanity defense mental disorder evidence would be *less* admissible than under a traditional insanity defense.

The foregoing raises questions for serious consideration by federal courts, Congress, the Justice Department, federal prosecutors, and defense attorneys. These questions may be stated as follows:

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239. *Cf. supra* notes 6-12, 61-161 and accompanying text.

240. *Pohlot*, 827 F.2d at 898 n.5.

241. Huckabee, *supra* note 1, at 1-2, 10-11, 15, 32.

242. *Id.* at 10-11, 15-17, 32.

243. *Pohlot*, 827 F.2d at 900, 903-04.

244. *Id.* at 902-03.

245. *Id.* at 901 n.12.

(1) Is *Pohlot* correct in adopting the *strict mens rea* approach, based on positions expressed by Professors Morse and Arenella, as well as those of Justice Department officials in support of the *mens rea* insanity defense which Congress did not adopt? Or instead, should it not be expected that federal courts will continue with the apparently broader interpretation of the *mens rea* model in existing federal cases such as *United States v. Brawner*?<sup>246</sup>

(2) Since former Assistant Attorney General (now federal District Judge) D. Lowell Jensen specifically testified in 1983 regarding the Insanity Defense Reform Act which had been submitted by the Administration and was later passed by Congress and signed into law, would not his testimony delineating a more liberal version of the *mens rea* model more accurately reflect the correct legislative history rather than the strict interpretation reflected in *Pohlot*?<sup>247</sup>

(3) Consistent with (1) and (2) above, is there any assurance that other federal courts will follow the strict *mens rea* approach; or, will there be a tendency to follow more liberal concepts such as those which have occurred in California?<sup>248</sup>

(4) Consistent with all of the foregoing, will defense attorneys press for (and federal courts approve) a more liberal version of the *mens rea* model which has existed in the federal system for many years, and has been consistently used to admit into evidence mental disorders not serious enough to meet insanity defense requirements?<sup>249</sup>

246. 471 F.2d 969, 998-1002 (D.C. Cir. 1972) (en banc); cf. *United States v. Gold*, 661 F. Supp. 1127, 1130 (D.D.C. 1987); Huckabee, *supra* note 1, at 18-19.

247. *Reform Of The Federal Insanity Defense: Hearings Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 98th Cong., 1st Sess. 249-50 (1983); Huckabee, *supra* note 1, at 19-24.

248. *Pohlot*, 827 F.2d at 898, 900 n.10, 904-05; Huckabee, *supra* note 1, at 2-8, 10-14, 26-28.

249. HUCKABEE, COOPERATION OR CHAOS?, *supra* note 5, at 30-51, 73-95; Huckabee, *Problem of Dominance*, *supra* note 5, at 798-99; cf. Huckabee, *supra* note 1, at 20-21. For example, in *Ellis v. Jacob*, 26 M.J. 90, 91 (C.M.A. 1988) (presumably governed by military law patterned after the 1984 Federal Comprehensive Crime Control Act), the Court of Military Appeals stated that the accused "does not contend that he was suffering from some mental disease or defect, and he specifically does not tender any form of insanity defense. Indeed, his expert agrees that, given a few days' sleep, the accused was a perfectly normal, healthy person." However, the court held that a portion of the expert testimony should be admitted, stating: "We have no doubt whatever that a psychiatrist is within his realm of expertise in describing the effects of sleep deprivation, *et al.*, on the human mind." *Id.* at 94. This occurred in a case in which the accused was charged with unpremeditated murder of his eleven-year-old son. The case illustrates the reasons why the support exists for drawing the line at the insanity defense, which requires a mental disease or defect and provides a bottom line for evaluating the effect of mental disorder on criminal responsibility.

The *Pohlot* opinion recognizes that the mens rea model authorizes admission of mental disorders not meeting insanity defense requirements.<sup>250</sup> How will courts know where to draw the line?

(5) What effect will the liberal version of the mens rea model<sup>251</sup> adopted by the American Bar Association have on the interpretation of the new legislation by federal courts?<sup>252</sup>

(6) Is it not true that jurisdictions drawing a firm line at the insanity defense probably do so because they are worried about such potential problems as those mentioned in questions (1) through (5) above?

Idaho, Montana, and Utah have adopted the mens rea insanity defense, which Congress did not adopt.<sup>253</sup> It will be interesting to watch developments in those states to see whether some variation of the liberal, diminished capacity mens rea approach ultimately prevails over a strict mens rea interpretation.

#### X. USE OF MENTAL DISORDER AFTER UNSUCCESSFUL INSANITY DEFENSE

What is the fate of mental disorder testimony and evidence presented under the insanity defense if that defense is unsuccessful? May it still be considered by the jury directly on mens rea? In *Muench-Worthing*,<sup>254</sup> the Court of Appeals for the Seventh Circuit considered this issue,<sup>255</sup> noting that according to *Fisher*:<sup>256</sup>

it seems inescapable that it would have been proper to instruct the jury that the evidence it did in fact hear concerning the defendant's mental illness could not be considered by it in reaching its verdict on the mens rea question, but only in its deliberations on the insanity question.<sup>257</sup>

The *Muench-Worthing* opinion further stated "We take *Fisher* at its word: it condoned, though did not endorse as the wiser position, the view that mental abnormality short of legal insanity is not a relevant factor in determining whether an accused is guilty of murder in the first or second degree."<sup>258</sup> This would allow both a firm line to be drawn at the insanity defense, and an instruction to the jury to disregard the mental disorder evidence if it decides that insanity defense requirements have not been met. This is consistent with the princi-

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250. *Pohlot*, 827 F.2d at 900.

251. ABA STANDARDS, *supra* note 92, § 7-6.2 (Supp. 1986); *see supra* note 193 and accompanying text.

252. Huckabee, *supra* note 1, at 15-18, 32.

253. *Id.* at 26-28.

254. *Muench v. Israel*, 715 F.2d 1124 (7th Cir. 1982), *cert. denied sub nom. Worthing v. Israel*, 467 U.S. 1228 (1984); *see supra* notes 24-31 and accompanying text.

255. *Muench*, 715 F.2d at 1141-42.

256. *United States v. Fisher*, 328 U.S. 463, 473, 476 (1946); *see supra* notes 6-7 and accompanying text.

257. *Muench*, 715 F.2d at 1142.

258. *Id.*

ple that a firm line may be drawn at the insanity defense to preclude all evidence of mental disorder below that line, using the substantive law approach, policy considerations, and evidentiary reasoning.<sup>259</sup>

The issues regarding the mens rea model in *Pohlot*<sup>260</sup> arose from the residue of mental disorder evidence after an unsuccessful assertion of the insanity defense.<sup>261</sup> However, as earlier noted, the *Pohlot* opinion recognized the mens rea model.<sup>262</sup> Thus, the issue was discussed in terms of whether the trial court was specific enough in instructing the jury that the mental disorder evidence could be considered on mens rea. The court of appeals held that the instruction was not adequate.<sup>263</sup>

This residue problem is not new. As trial defense counsel in 1954, in a murder case tried before a United States Army court-martial, I requested an instruction in circumstances similar to those in *Pohlot*. Although military law recognized the mens rea model, the law officer refused the requested instruction. He stated that a more general instruction regarding the mens rea elements would allow the members of the court to adequately focus on the mental disorder evidence with reference to its effect on mens rea. This ruling was upheld on appeal.<sup>264</sup> However, in jurisdictions where the mens rea model has not been authorized and is properly precluded, an instruction to the jury to disregard mental disorder evidence remaining after an unsuccessful insanity defense should be constitutional.<sup>265</sup>

Additionally, if juries have heard a massive presentation of mental disorder evidence during an unsuccessful insanity defense, how is any instruction from the court going to erase this from their evaluation of mens rea? Nevertheless, jurisdictions desiring to reduce the effect of

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259. See *supra* notes 6-12, 61-161 and accompanying text. This is also consistent with the position of the Supreme Court in *Leland v. Oregon*, 343 U.S. 790, 794-95 (1952), which focused on the residue of mental disorder after the defendant had been found sane under the insanity defense requirements. As noted earlier, in *Leland*, the Court was discussing the issue in a state where the mens rea model was recognized. In a state where it is *not* recognized, and is otherwise properly excluded, it seems clear that an instruction to disregard the evidence of mental disorder could be given to the jury after an unsuccessful insanity defense.

260. *United States v. Pohlot*, 827 F.2d 889 (3d Cir. 1987), *cert. denied*, 108 S. Ct. 710 (1988).

261. *Pohlot*, 827 F.2d at 892, 894-95.

262. See *supra* notes 15-17, 49-51, 183-90 and accompanying text.

263. *Pohlot*, 827 F.2d at 895.

264. *United States v. Schick*, 7 C.M.A. 419, 421, 425-29, 22 C.M.R. 209, 210, 215-19 (1956).

265. See *supra* notes 255-59 and accompanying text.

having the mens rea model injected through this back door approach should see that such an instruction is requested.

## XI. TESTIMONY AND EVIDENCE OTHER THAN EXPERT OPINIONS

*Pohlot* refers to the fact that many of the cases focus on “‘expert psychiatric evidence’ [and] not the use of *any* evidence of mental abnormality to negate mens rea.”<sup>266</sup> “Evidentiary rules that would bar the testimony of the defendant himself, as would a rule barring all evidence of mental abnormality on the issue of mens rea, need particular justification.”<sup>267</sup> The opinion further indicates: “As this case shows . . . expert psychiatric evidence is not the only evidence of mental abnormality bearing on mens rea, for a defendant or other witness may testify about mental abnormality.”<sup>268</sup>

Obviously, any testimony or evidence that is relevant and otherwise admissible regarding the facts of mens rea should be admitted. Nevertheless, despite decisions by the Wisconsin Supreme Court,<sup>269</sup> if jurisdictions use the reasoning offered in this article, they should constitutionally be able to draw a firm line at the insanity defense and keep out *all* types of testimony and evidence regarding mental disorder—if the purpose of such testimony and evidence is to show the effects of mental disorder (not meeting insanity defense requirements) on mens rea elements. Even using a case-by-case approach, it is not at all clear how probative and relevant the history of psychiatric and social problems of the defendant would be on mens rea elements.

In regard to testimony of the defendant (or of other witnesses) concerning the defendant’s acts, conduct, or statements which may be

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266. *Pohlot*, 827 F.2d at 896 n.2 (emphasis added).

267. *Id.* at 901; *cf. id.* at 902 n.12.

268. *Id.* at 905; *cf. Note, supra* note 31, at 735-36, 738 n.17, 787. The Wisconsin Supreme Court has held that either psychiatric testimony or lay testimony detailing the psychiatric and personal history of the defendant may be admitted, if relevant, to cast doubt upon or to prove the defendant’s intent (although a psychiatrist’s *opinion* on intent should be excluded). *State v. Flattum*, 122 Wis. 2d 282, 301-08, 361 N.W.2d 705, 715-18 (1985); *State v. Repp*, 122 Wis. 2d 246, 256, 362 N.W.2d 415, 419 (1985); *see also supra* note 12 and accompanying text (indicating that some cases may only draw the line at precluding expert *opinions* on mental disorder below the insanity defense line); *cf. Comment, The Psychiatric Expert in the Criminal Trial: Are Bifurcation and the Rules Concerning Opinion Testimony On Ultimate Issues Constitutionally Compatible?*, 70 MARQ. L. REV. 493, 528-29 (1987). The comment emphasizes a less restricted approach to admissibility of mental disorder evidence than is presented here. However, the purpose of this article is to present the arguments which may have swayed the Supreme Court in denying certiorari regarding the constitutional issues. In addition to giving insight to jurisdictions desiring to limit the admissibility of mental disorder evidence, this article may also give those who want to broaden such admissibility the opportunity to focus the constitutional attacks more directly toward the issues in terms of arguments which have been made to the Supreme Court.

269. *See supra* note 268.

relevant to motive or intent,<sup>270</sup> the same line may be drawn. If the testimony or evidence is for the purpose of supporting a showing of lack of mental capacity because of mental disorder, it may be precluded below the insanity defense line, if that line is otherwise properly drawn.

## XII. REASONABLE DISAGREEMENT

Throughout this article there are indications of reasonable disagreements among jurisdictions, courts, and authorities. The brief in opposition to the *Worthing* petition for a writ of certiorari emphasizes that "the [C]onstitution does not compel the admission of evidence of questionable reliability, especially when reasonable people can and do reasonably disagree about the propriety of admitting it."<sup>271</sup>

## XIII. LEEWAY FOR EXPERIMENTATION

The brief in opposition to the *Worthing* petition asserts:

The states should be able to decide for themselves, within the bounds of reason, whether to admit psychiatric evidence on a particular issue, as long as there is a rational basis for their decision. Wisconsin should be given leeway to continue to experiment with its evidentiary rules in this troublesome area.<sup>272</sup>

Such experimentation should be allowed to encompass not only evidentiary rules but also policy considerations as well as the substantive law approach.<sup>273</sup> Further, the brief<sup>274</sup> cites three United States Supreme Court cases: *McKiever v. Pennsylvania*,<sup>275</sup> *Powell v. Texas*,<sup>276</sup> and *Fay v. New York*.<sup>277</sup> In other contexts, those cases support the position that the issue "is a subject of considerable controversy on which the states should be given leeway to experiment."<sup>278</sup>

It is of particular interest to note certain statements of the Supreme Court in *Powell v. Texas*.<sup>279</sup> Although the opinion focused

270. Cf. 1 C. TORCIA, WHARTON'S CRIMINAL EVIDENCE §§ 107-121 (14th ed. 1985 & Supp. 1986); Note, *supra* note 31, at 745 n.45.

271. Brief in Opposition, *supra* note 27, at 2-3.

272. *Id.* at 3.

273. Cf. *supra* notes 61-161 and accompanying text.

274. Brief in Opposition, *supra* note 27, at 10.

275. 403 U.S. 528, 547 (1971).

276. 392 U.S. 514, 536-37 (1968).

277. 332 U.S. 261, 296 (1947).

278. Brief in Opposition, *supra* note 27, at 10.

279. 392 U.S. at 536-37.

on chronic alcoholism, it discussed differences of opinions of medical experts. The Court said:

The doctrines of *actus rea*, *mens rea*, insanity, mistake, justification, and duress have historically provided the tools for a constantly shifting adjustment of the tension between the evolving aims of the criminal law and changing religious, moral, philosophical, and medical views of the nature of man. This process of adjustment has always been thought to be the province of the states.<sup>280</sup>

The Court then referred to the insanity defense, stating: "Nothing could be less fruitful than for this Court to be impelled into defining some sort of insanity test in constitutional terms."<sup>281</sup> The Court also discussed the experimentation with the insanity defense in the District of Columbia:

[F]ormulating a constitutional rule would reduce, if not eliminate, that fruitful experimentation, and freeze the developing productive dialogue between law and psychiatry into a rigid constitutional mold. It is simply not yet the time to write into the Constitution formulas cast in terms whose meaning, let alone relevance, is not yet clear either to doctors or to lawyers.<sup>282</sup>

*Powell*<sup>283</sup> clearly indicates that the Supreme Court is not yet ready to draw a constitutional line applicable to the states regarding the insanity defense. It is also probable that the Supreme Court would not set up a constitutional framework to specifically dictate rules regarding the even more controversial issues involved in mental disorder evidence below the insanity defense line.

The states are continuing to experiment. There remain major—and reasonable—disagreements among jurisdictions, courts, and authorities. The very existence of such disagreements helps keep the issue from reaching a constitutional level.

#### XIV. CONCLUSION

Individual jurisdictions may want to evaluate the possibility of reducing the use of mental disorder evidence in criminal cases. Jurisdictions not now drawing the line at the insanity defense may want to determine whether it is desirable and feasible to do so. Even jurisdictions currently drawing that line may want to determine if any loopholes exist through which mental disorder evidence is still being admitted below the insanity defense line. Whichever status a jurisdiction is in, evaluation of the criminal justice system in terms of the concepts discussed in this article may be helpful.

A major consideration, undoubtedly affecting the position of the Supreme Court, is that a ruling on the constitutionality of precluding mental disorder evidence below the insanity defense line would not

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280. *Id.* at 536.

281. *Id.*

282. *Id.* at 536-37.

283. *See supra* notes 279-82 and accompanying text.

merely affect the District of Columbia and the thirteen states now drawing that line.<sup>284</sup> In addition, it could significantly impact the numerous states presently admitting such evidence in only a limited capacity, such as to negate specific intent, purposefulness, or knowledge (but not general intent), or only in murder cases to negate malice or premeditation.<sup>285</sup> A ruling of unconstitutionality could cause these jurisdictions to require admissibility of mental disorder directly on mens rea across the board, and not limit it to the specific areas where it is now admissible. Consequently, such a ruling could have a major impact on the criminal justice systems in many jurisdictions. It appears that the Supreme Court will hesitate to take such a fundamental step in view of the major disagreements and the continuing need for the states to experiment.

A major difficulty continues to be the conceptual confusion regarding the insanity defense, mens rea, guilt, responsibility, and other criminal law concepts.<sup>286</sup> A greater emphasis on understanding these concepts could lead to more meaningful dialogue in the efforts to resolve these difficult problems.

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284. See *supra* notes 6-12 and accompanying text.

285. 1 P. ROBINSON, *supra* note 75, § 64(a), at 273-85; MELTON & PETRILA, *supra* note 4, at 128-29.

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



