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Avoiding The Insanity Defense Strait Jacket: The *Mens Rea* Route

Harlow M. Huckabee*

I. INTRODUCTION

During the last few years there has been an emphasis on tightening or abolishing the insanity defense. This trend increased dramatically after the trial of John Hinckley, the would be assassin of President Ronald Reagan. In the forefront of this movement, under pressure from public opinion, are federal and state policy makers and legislatures, as well as organizations representing lawyers, physicians, and mental health professionals. Some of them have taken "law and order" bows for their efforts.

In many jurisdictions, mental illness can still be admitted as *evidence* in attempting to negate *mens rea* (i.e., guilty mind, wrongful purpose, or criminal intent as required in the mental state for the offense charged), even though such mental illness does not meet the requirements of traditional or newly-tightened insanity defenses. Some courts, using a broad brush, have called this the "diminished capacity" defense. However, in a 1977 *Columbia Law Review* article,¹ law professor Peter Arenella labels the concept the "*mens rea* model." He divides this into two subdivisions: (1) strict *mens rea* "which admits only evidence showing that the defendant did not entertain the requisite mental state"² and (2) diminished capacity *mens rea*, which allows evidence of virtually unlimited mental disorder since any showing that the defendant was less capable than a normal

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1. Arenella, *The Diminished Capacity and Diminished Responsibility Defenses: Two Children of a Doomed Marriage*, 77 COLUM. L. REV. 827 (1977).

2. *Id.* at 830.

person of entertaining the relevant mental state is admissible.³ He also describes how the diminished capacity *mens rea* concept tends to slip into the even more liberal "diminished responsibility" model. This model involves use of mental disorder to reduce the degree of crime without an attempt to specifically correlate the disorder to the *mens rea* elements.⁴

Professor Arenella recommends adoption of the strict *mens rea* approach, saying that it "admits evidence only of some consciously entertained thought or emotion which directly negates or confirms the requisite state of mind."⁵ He says that if trial judges realize how rare these cases are, "most expert testimony will be excluded from trial."⁶ Again, it should be noted that strict *mens rea*, diminished capacity *mens rea*, and diminished responsibility all refer to the admissibility of mental illness which does not necessarily have to meet the requirements of the *insanity defense*.⁷

Reasonable persons of good will, who are dedicated to public safety as well as to the rights of defendants, take contrasting positions on whether mental illness should be admitted regarding the issue of *mens rea* when it does not meet insanity defense requirements. Those taking a prosecution approach want to keep evidence of mental illness out. Defense attorneys, some treatment-oriented mental health professionals, and others with similar interests want to admit such evidence. Beyond this, there is a divergence of opinion on whether it is constitutional to preclude it. Thus, many who would ordinarily be prosecution-oriented have hesitated to keep evidence of mental illness out.

This article focuses on the relevant issues so that all concerned may understand them better. The concepts are buried in complexities and in massive reports, hearings, standards, court decisions, and legislation. It is clear that in many jurisdictions there are ways to avoid the insanity defense strait jacket.

II. EROSION OF THE INSANITY DEFENSE

An example of the insanity defense is the old *M'Naghten* rule⁸

3. *Id.* at 831.

4. *Id.* at 829.

5. *Id.* at 863.

6. *Id.*

7. *Id.* at 828-30. See also *infra* note 34 and accompanying text; Arenella, *Diminished Capacity*, 2 ENCYCLOPEDIA OF CRIME AND JUSTICE 612-17 (S. Kadish ed. 1983). Cf. *Muench v. Israel*, 715 F.2d 1124, 1142-43 (7th Cir. 1983), *cert. denied*, 467 U.S. 1228 (1984); SHAH, *Criminal Responsibility*, in W. CURRAN, A. MCGARRY & S. SHAH, *FORENSIC PSYCHIATRY AND PSYCHOLOGY* 181-83 (1986).

8. *M'Naghten's Case*, 10 Clark & Fin. 200, 210, 8 Eng. Rep. 718, 722 (1843).

which still exists in various jurisdictions around the country.⁹ The wording varies depending on the jurisdiction, but the rule provides that in order to establish a defense on the ground of insanity a person must "be laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong."¹⁰ A variation of the *M'Naghten* insanity defense was in effect in California when a series of court decisions developed the diminished capacity defense.¹¹

*People v. Wolff*¹² is one such case. In *Wolff*, the defendant obtained an axe handle for the purpose of killing his mother and hid it under a mattress. Several days later he struck her with it but she escaped to another room. He pursued her and choked her to death with his hands. Psychiatrists testified that the defendant suffered from schizophrenia. The California Supreme Court found he was legally sane under the *M'Naghten* insanity defense, and he had carefully planned the murder.¹³ Nevertheless, under a diminished capacity approach, the court reduced the degree of the offense from first to second degree murder, thus lowering the maximum punishment which could be given.¹⁴

The California case of *People v. White*¹⁵ is perhaps the best known example of the use of diminished capacity. Dan White was a disgruntled former San Francisco supervisor who was charged with killing San Francisco's Mayor, George Moscone, and Supervisor Harvey Milk on November 27, 1978. Earlier that year, the California Supreme Court had changed the insanity defense from *M'Naghten* to the more liberal American Law Institute (ALI) test.¹⁶ Among other things, the ALI test added a volitional (control) concept to *M'Naghten's* tighter knowledge of right and wrong (cognition) approach.¹⁷ It pro-

9. See e.g., *People v. Drew*, 22 Cal. 3d 333, 341, 583 P.2d 1318, 1321, 149 Cal. Rptr. 275, 278 (1978). See also A. GOLDSTEIN, *THE INSANITY DEFENSE* 45 (1967).

10. *M'Naghten's Case*, 10 Clark & Fin. at 210, 8 Eng. Rep. at 722.

11. See *People v. Drew*, 22 Cal. 3d 333, 347-48, 583 P.2d 1318, 1326, 149 Cal. Rptr. 275, 283 (1978); *People v. Wolff*, 61 Cal. 2d 795, 394 P.2d 959, 40 Cal. Rptr. 271 (1964); Arenella, *supra* note 1, at 836-49; R. REISNER, *LAW AND THE MENTAL HEALTH SYSTEM* 676-77 (1985); 1 P. ROBINSON, *CRIMINAL LAW DEFENSES* § 101 (1984 & Supp. 1987).

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

13. *Id.* at 823, 394 P.2d at 976, 40 Cal. Rptr. at 288.

14. *Id.* at 820-23, 394 P.2d at 975-77, 40 Cal. Rptr. at 287-89.

15. *People v. White*, 117 Cal. App. 3d 270, 172 Cal. Rptr. 612 (1981).

16. *People v. Drew*, 22 Cal. 3d 333, 336, 583 P.2d 1318, 1319, 149 Cal. Rptr. 275, 276 (1978).

17. *Id.* at 346, 583 P.2d at 1325, 149 Cal. Rptr. at 282.

vides as follows: "A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law."¹⁸

At trial, White did not attempt to show that he had a mental disorder serious enough to meet the relatively liberal requirements of the ALI insanity defense. Instead, he avoided it by successfully basing his defense on the more defense-oriented diminished capacity concept.¹⁹ The jury did not convict him of murder, but found him guilty of two counts of voluntary manslaughter.²⁰

The evidence against White consisted partially of an autopsy report which "revealed that the mayor had been shot four times: twice in the body and twice in the head. The wounds to the head were delivered after the mayor was lying on the floor, incapacitated by the body wounds, and were fired from a distance of one foot from the head."²¹ The evidence was similar in reference to Supervisor Milk who was shot five times, with two close range shots to the head.²² In reference to both victims, the court described the shots to the head as being "in the manner of a coup de grace, while the victim lay helpless on the floor."²³ The court also mentioned the "planning with which the crimes were carried out, indicating premeditation, prior to the actual events. . . ."²⁴

In his diminished capacity defense, White presented mental health professionals who testified that he was suffering from severe depression.²⁵ The most bizarre aspect of the testimony involved references to White's overconsumption of junk food, which the news media labeled the "Twinkie defense."²⁶ The jury bought the diminished capacity defense, thereby reducing the degree of crime and the maximum punishment. White was released from prison on parole a little over five years after committing the crimes. According to news reports, he committed suicide in October, 1985.²⁷ The verdict and sentence in *White* provoked widespread criticism of California's diminished capacity defense.

18. MODEL PENAL CODE § 4.01 (Proposed Official Draft 1962). See also *Drew*, 22 Cal. 3d at 345, 583 P.2d at 1324, 149 Cal. Rptr. at 281.

19. *White*, 117 Cal. App. 3d at 276, 172 Cal. Rptr. at 615.

20. *Id.* at 276-78, 172 Cal. Rptr. at 614-15.

21. *Id.* at 275, 172 Cal. Rptr. at 614.

22. *Id.*

23. *Id.* at 282, 172 Cal. Rptr. at 618.

24. *Id.*

25. *Id.* at 277-78, 172 Cal. Rptr. at 615.

26. R. REISNER, *supra* note 11, at 676; 1 P. ROBINSON, *supra* note 11, § 101, at 475 n.8; N.Y. Times, Oct. 22, 1985, at A18; Washington Post, Oct. 22, 1985, at A3.

27. Washington Post, Oct. 22, 1985, at A3.

The use of the *M'Naghten* or ALI test is designed to assist the jury in evaluating responsibility for the crime. Courts have said that mental illness alone is not determinative of criminal responsibility. The jury needs to have a tool by which it can evaluate the defendant's mental illness, in terms of what the law requires, and render a social and moral judgment. Thus, one purpose of these tests is to provide the jury with a framework—a bottom line—for placing the testimony of mental health professionals and evidence of mental illness in perspective.²⁸

Courts have also said that evaluating *mens rea* involves the fiction of determining actual thoughts or mental processes of defendants.²⁹ Direct evidence is usually unavailable because of the subjective nature of intent elements. Under the objective theory of criminal liability, inferences drawn from the nature of the offense and the surrounding acts are used to show the existence of intent or differentiation between its forms. Under the objective theory, consideration of mental illness in assessing the individual's subjective mental state is not authorized unless it is presented under the insanity defense (e.g., *M'Naghten* or ALI). Under this theory, the law presumes that all individuals are capable of the mental processes for *mens rea* (i.e., it presumes sanity). Also, it presumes that each person is equally capable of the same forms and degrees of intent. However, the insanity defense is a device used to draw a line in order to determine those to whom such presumptions do *not* apply.³⁰ Nevertheless, for many years in numerous jurisdictions there have been erosions of these principles of the objective theory of criminal liability (and erosions of the insanity defense) through the use of mental disorder evidence directly on *mens rea* under the diminished capacity label and its variations.³¹

In addition to diminished capacity, such labels include diminished responsibility, partial responsibility, and partial insanity. All involve the concept that mental disorder is to be used as evidence to negate *mens rea*. As earlier stated, the "diminished responsibility" model is a mitigation concept which has the effect of reducing the degree of

28. See *United States v. Currens*, 290 F.2d 751, 772-73 (3d Cir. 1961); H. HUCKABEE, LAWYERS, PSYCHIATRISTS AND CRIMINAL LAW: COOPERATION OR CHAOS 43-48, 61-63, 81, 86 (1980).

29. See *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 (Minn. 1982).

30. *Bethea*, 365 A.2d at 87-88; *Bouwman*, 328 N.W.2d at 705; A. GOLDSTEIN, *supra* note 9, at 191-94; Arenella, *supra* note 1, at 859-63; Arenella, *supra* note 7.

31. See A. GOLDSTEIN, *supra* note 9, at 191-202.

crime and, hence, reducing the punishment. It does not have a specific correlation to the evaluation of the exact nature of the *mens rea* elements.³² In his article, Professor Arenella explains how the defense-oriented diminished capacity *mens rea* concept moves toward the even more liberal diminished responsibility model.³³ In any event, all of the labels refer to concepts which amount to a "second bite at the *mens rea* apple" (the insanity defense is usually the first bite).³⁴ Different meanings have been given to the labels, and they have been used in an inconsistent manner in the literature and cases. Some courts have lumped them all under the diminished capacity rubric.³⁵

III. DEFENSE ORIENTATION OF THE *MENS REA* MODEL

There is a general, defense-oriented advantage involved when mental disorders, uncontrolled by the insanity defense, are directly applied to the *mens rea* elements. The usual confusion resulting from mental disorder testimony and evidence is increased because the insanity defense framework (which, to say the least, is not particularly helpful for eliminating confusion) is absent. This added confusion is helpful to defendants.

In addition, the *mens rea* model and related concepts can have specific effects on trials. For example, under such concepts the prosecution still has to prove the mental elements beyond a reasonable doubt. Thus, the effect of recent legislation or standards placing the burden of proof regarding the insanity defense on the defendant is somewhat neutralized since the *mens rea* route is available to avoid that burden.³⁶

Another consideration is that in some circumstances the defendant might have the opportunity for outright acquittal under the *mens rea* model. This could occur without triggering an automatic commit-

32. Arenella, *supra* note 1, at 829.

33. *Id.* at 831.

34. See *United States v. Brawner*, 471 F.2d 969, 998-1002 (D.C. Cir. 1972) (en banc); ABA Standing Comm. on Association Standards For Criminal Justice, *Criminal Justice Mental Health Standards*, 2 ABA STANDARDS FOR CRIMINAL JUSTICE 311-17 (2d ed. Ch. 7, Supp. 1986) [hereinafter ABA STANDARDS]. See also H. HUCKABEE, *supra* note 28, at 32-33, 38-39, 48-51; R. REISNER, *supra* note 11, at 668-69; 1 P. ROBINSON, *supra* note 11, § 64 at 272-73, § 101 at 474-75; Lewin, *Psychiatric Evidence in Criminal Cases For Purposes Other Than the Defense of Insanity*, 26 SYRACUSE L. REV. 1051-52, 1054-57 (1975). See generally Arenella, *supra* note 1; Arenella, *supra* note 7.

35. See *Muench v. Israel*, 715 F.2d 1124, 1142-43 (7th Cir. 1983), *cert. denied* 467 U.S. 1228 (1984); *Bethea v. United States*, 365 A.2d 64, 83-92 (D.C. 1976) *cert. denied*, 433 U.S. 911 (1977).

36. ABA STANDARDS, *supra* note 34, at 347, 352. See also *The Insanity Defense: Hearings Before The Senate Comm. on the Judiciary*, 97th Cong., 2d Sess. 110, 122 (1982) (statements of William L. Cahalan and Frank Maloney respectively) [hereinafter *Insanity Defense Hearings*]; 1 P. ROBINSON, *supra* note 11, § 64 at 276.

ment statute such as the one governing John Hinckley's "not guilty by reason of insanity" acquittal (although the defendant might have to face civil commitment procedures). This possibility could arise where the *mens rea* model is applicable to the offense charged as well as to all lesser degrees of the offense. Furthermore, even in cases where there might not be full acquittal, the *mens rea* model and related concepts could have the effect of reducing the degree of crime and the related punishment below that which was intended by the legislature.³⁷

It should also be noted that the *mens rea* model and similar concepts are particularly useful in the defense of the numerous white-collar criminal defendants within the federal system. This is because such defendants often cannot establish lack of responsibility under the stricter insanity defense requirements.³⁸

An often reiterated point is that the insanity defense is rarely used. For example, a 1983 report³⁹ prepared by the National Commission on the Insanity Defense stated that "every study and indication is that the use of the insanity defense is very rare and the number of successful pleas is rarer still."⁴⁰ Similarly, in 1982, the American Psychiatric Association found "[S]uccessful invocation of the defense is rare (probably involving a fraction of one percent of all felony cases)."⁴¹ An American Bar Association (ABA) committee commented that the defense is raised in "less than [one] percent of all felony cases in the United States and is successful in about a fourth of these."⁴² Thus, the ABA committee summarized that in "terms of its incidence, the defense occupies a very small nook of the criminal justice system."⁴³

It should be noted, however, that these reports focus on the narrow term "insanity defense." Thus, they do not reflect statistics regarding the *mens rea* model, diminished capacity, or other variations on such concepts. A different perspective is seen in the statement of William

37. See *People v. Wetmore*, 22 Cal. 3d 318, 328-30, 583 P.2d 1308, 1315-17, 149 Cal. Rptr. 265, 272-74 (1978); *Bethea*, 365 A.2d at 90-92; ABA STANDARDS, *supra* note 34, at 314-15; A. GOLDSTEIN, *supra* note 9, at 192, 202. Cf. *Browner*, 471 F.2d at 1001-02; 1 P. ROBINSON, *supra* note 11, § 64 at 273, 276.

38. H. HUCKABEE, *supra* note 28, at 39-42.

39. MYTHS AND REALITIES: A REPORT OF THE NATIONAL COMMISSION ON THE INSANITY DEFENSE (1983) (sponsored by the National Mental Health Association).

40. *Id.* at 14-17.

41. *American Psychiatric Association Statement On The Insanity Defense* 140 AM. J. PSYCHIATRY 682 (1983).

42. ABA STANDARDS, *supra* note 34, at 287.

43. *Id.* at 287-88.

L. Cahalan, prosecuting attorney for Wayne County, Michigan, submitted to the United States Senate Judiciary Committee during his testimony on July 28, 1982.⁴⁴ He was commenting on bills regarding the abolition of the insanity defense and complete focus on *mens rea*, but his remarks are also relevant to the *mens rea* model generally, including diminished capacity. He stated, "Presently the insanity defense is only raised in about two or three percent of all criminal cases. However, almost all criminal cases where the insanity defense might be raised involve a specific intent. Therefore, the defense of 'diminished capacity' would invite that defense in all specific intent cases."⁴⁵ His remarks indicate that the low figures regarding use of the "insanity defense" do not reflect the complete picture concerning the effect of mental disorders on the responsibility issue in criminal cases. There are still many opportunities for defendants to use mental disorders focusing on the *mens rea* model, diminished capacity, and similar concepts in trials, plea bargains, and in influencing decisions against prosecution.

IV. RECENT CALIFORNIA DEVELOPMENTS

As a result of the *White* case and others, the California legislature has taken action in recent years in an attempt to tighten use of mental disorders in criminal cases. Section 25 of the California Penal Code was added by initiative and approved by the people of the state on June 8, 1982. Section 25(a) abolishes the defense of diminished capacity.⁴⁶ Section 25(b) returns the insanity defense to a version of the *M'Naghten* rule.⁴⁷

Section 28 of the California Penal Code⁴⁸ was adopted in 1981 and amended in 1982 and 1984. Section 28(a) provides: "Evidence of mental disease, mental defect, or mental disorder shall not be admitted to show or negate the capacity to form any mental state," but adds that the evidence is admissible "solely on the issue of whether or not the accused actually formed" the required mental state.⁴⁹ Section 28(b) states that there "shall be no defense of diminished capacity, diminished responsibility or irresistible impulse."⁵⁰

44. *Insanity Defense Hearings*, *supra* note 36 (statement of William L. Cahalan).

45. *Id.* at 110.

46. CAL. PENAL CODE § 25(a) (West Supp. 1987).

47. *Id.* § 25(b).

48. CAL. PENAL CODE § 28 (West Supp. 1987).

49. *Id.* § 28(a).

50. *Id.* § 28(b). See also *Muench v. Israel*, 715 F.2d 1124, 1142 (7th Cir. 1983), *cert. denied*, 467 U.S. 1223 (1984); R. REISNER, *supra* note 11, at 676-77; 1 P. ROBINSON, *supra* note 11, § 64 at 274 n.4, 281 n.27, 285 n.49, § 101 at 478 n.21; Comment, *Admissibility of Psychiatric Testimony in the Guilt Phase of Bifurcated Trials: What's Left After the Reforms of the Diminished Capacity Defense?*, 16 PAC. L.J. 305 (1984); *Review of Se-*

In a June, 1982 article,⁵¹ Stephen J. Morse, professor of law, psychiatry, and behavioral sciences at the University of Southern California, and Edward (Ned) Cohen, project director of the State Legislature's Joint Committee for Revision of the Penal Code, explain the new legislation.⁵² They believe that one purpose of the legislation was to abolish any independent defense of diminished capacity. They explain by dividing the diminished capacity defense into two versions. The first authorizes a defendant to use mental disability "to negate the *mens rea* that is part of the definition of the charged offense."⁵³ They label this the "*mens rea* variant." The second version provides that even if all of the elements of the highest offense charged are satisfied, the defendant is allowed to be convicted of a lesser offense because he is less responsible as a result of mental disorder.⁵⁴ They call this the "partial-responsibility variant."

It is their position that the *mens rea* variant is not abolished by the legislation since it is *not* a separate defense at all, "nor is diminished capacity a proper label for it."⁵⁵ Instead, they say it is merely an effort by the defense "to cast doubt on the prosecution's *prima facie* case by showing that a required mental element did not exist."⁵⁶ Thus, they surmise that the preclusion of the defense of diminished capacity, referred to in sections 25 and 28 of the California Penal Code, does not apply to what they have labeled the *mens rea* variant. Also, under their interpretation of the legislation, the *mens rea* variant would be admissible under the language of section 28(a) authorizing admissibility of mental illness "solely on the issue of whether or not the accused actually formed" the required mental state.⁵⁷ Ac-

lected 1981 California Legislation: *Criminal Procedure; Diminished Capacity, Mental Disease, Voluntary Intoxication*, 13 PAC. L.J. 651 (1982).

51. Morse & Cohen, *Diminishing Diminished Capacity in California*, CAL. LAW., June 1982, at 24.

52. Professor Morse also presented extensive testimony and materials on September 9, 1982, and April 21, 1983, regarding bills proposing a federal insanity defense. This was in hearings before the Subcommittee on Criminal Justice of the Committee on the Judiciary of the U.S. House of Representatives. See *Insanity Defense in Federal Courts: Hearings Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 97th Cong., 2d Sess. 1, 208-43 (1982) [hereinafter *Insanity Defense in Federal Courts*]; *Reform of the Federal Insanity Defense: Hearings Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 98th Cong., 1st Sess. 1, 295-402 (1983) [hereinafter *Reform of the Federal Insanity Defense*].

53. Morse & Cohen, *supra* note 51, at 24.

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

cordingly, they conclude that by enacting sections 25 and 28 the legislature intended to abolish the concept labeled the "partial-responsibility variant."⁵⁸

Morse and Cohen maintain that with respect to the *mens rea* variant, which they say is authorized under the new statutes, mental disabilities do not prevent formation of *mens rea* except in rare cases. They point out that the legislature "heard ample and scientifically sound expert testimony" to the effect that "even severe mental disabilities virtually never negate *mens rea*."⁵⁹ Thus, they believe that in order to assert the *mens rea* variant successfully, a defendant must demonstrate that "because of his mental disability he completely lacked the culpable state of mind which is an element of the crime charged."⁶⁰ With reference to this, they state that purposes of the new legislation included the return of the *mens rea* definition to its traditional meaning and clarification of the admissibility of mental disabilities for the *mens rea* elements.⁶¹

Although the foregoing explanations by Morse and Cohen are important, their article should not be considered an official "legislative history." This is clear from the fact that the publisher states the disclaimer that due to the controversial nature of the subject, the article "presents the views and perceptions of the co-authors."⁶² This is significant because it is clear that the legislation can be interpreted in a more defense-oriented manner than Morse and Cohen's article suggests. Almost certainly, defense attorneys and those with treatment rather than punishment orientations have a far different agenda in mind than Morse and Cohen. For example, it is all very well to say that to be successful under the *mens rea* variant and section 28(a) the defendant must show a *complete* lack of a culpable state of mind. But how are courts, juries, prosecutors, defense attorneys, and expert witnesses going to focus on whether the *mens rea* variant has been *successfully* raised and whether the lack of a culpable state of mind is *complete* unless each issue is fought out in court? This creates at least the potential for defense attorneys to present to courts and juries variations of the diminished capacity, diminished responsibility, and partial responsibility concepts which were previously beneficial to defendants in California.

Interestingly, the *mens rea* variant, as described by Morse and Cohen (including strict adherence to the narrow meaning of the *mens rea* elements), is analogous to Professor Arenella's strict *mens rea*

58. *Id.* See also *United States v. Frisbee*, 623 F. Supp. 1217, 1222 n.3 (N.D. Cal. 1985).

59. Morse & Cohen, *supra* note 51, at 25 (italics in original).

60. *Id.* at 24.

61. *Id.* at 24-26.

62. *Id.* at 24.

category. Also, the former's partial-responsibility variant seems to include Professor Arenella's diminished capacity *mens rea* concept as well as diminished responsibility, partial responsibility, and similar concepts.⁶³ Even though the defense of diminished capacity has now been abolished in California (and if in fact concepts such as diminished responsibility and partial responsibility can effectively be precluded), it is still a fact that even under the strict *mens rea* concept the mental disability does not necessarily have to meet the requirements of the insanity defense (i.e., *M'Naghten* under section 25(b) of the new California legislation).⁶⁴ It is true that California and certain other states have special problems with bifurcated trials. For the purposes of this discussion, the important point is that under the new legislation mental disorders not meeting insanity defense requirements are still allowed to be introduced in evidence in attempts to negate the *mens rea* elements. Thus, there continues to be the potential for erosion of the objective theory of criminal law and the insanity defense.

When news reports referring to the *White* trial state that the so-called "Twinkie defense" was later "banned by the state legislature," they may be technically accurate.⁶⁵ Nevertheless, it can be expected that defense attorneys will continue to press for a defense-oriented interpretation of section 28(a) rather than the strict interpretation of *mens rea* contemplated by Professor Morse and Mr. Cohen.

In a later article regarding diminished capacity,⁶⁶ Professor Morse reiterates his argument that even severe mental disability virtually never negates *mens rea*, and he also refers to a continuing problem involving irrelevant, confusing, and prejudicial testimony of mental health professionals. He believes that lawyers who encourage such testimony and judges who permit it are "to be faulted for failing to maintain the integrity of the adversary process."⁶⁷

On the other hand, it is not easy for courts to control these matters. One fundamental reason is that the myriad of issues surrounding *mens rea* and intent involve areas in which mental health professionals do not necessarily have particular expertise (at least

63. See *supra* notes 1, 34, 48, 50 and accompanying text.

64. CAL. PENAL CODE § 25(b) (West Supp. 1987); Arenella, *supra* note 1, at 828-31.

65. Washington Post, Oct. 22, 1985 at A3.

66. Morse, *Undiminished Confusion In Diminished Capacity*, 75 J. CRIM. L. & CRIMINOLOGY 1 (1984). Compare Dresser, *Reaffirming The Moral Legitimacy Of The Doctrine of Diminished Capacity: A Brief Reply To Professor Morse*, 75 J. CRIM. L. & CRIMINOLOGY 953 (1984).

67. Morse, *supra* note 66, at 17-18, 20, 24, 36-40, 45.

not in the technical legal sense that would qualify them to express expert opinions). Psychiatrist Loren Roth made this point in his testimony on July 22, 1982, before a subcommittee of the United States House of Representatives Judiciary Committee.⁶⁸ He discussed various bills involving the so-called “*mens rea* insanity defense” then pending before Congress. However, his statements are also relevant to all *mens rea* models, diminished capacity, and similar issues. He testified that under the *mens rea* insanity defense approach, mental health professionals would have to make judgments about intent “which they should not and cannot do.”⁶⁹ Referring to articles by Professor Stephen Morse⁷⁰ and Doctor Charles R. Clark,⁷¹ he testified:

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 [does] or who does not have intent—which issue is even more ambiguous than the traditional insanity defense standards under which we are presently working.⁷²

In his article,⁷³ Doctor Clark points out that mental health professionals are often not given sufficient guidance by courts and do not understand what they are being asked to do. He believes that this involves problems regarding how narrowly *mens rea* is to be interpreted. He discusses this in terms of “intent viewed narrowly” (i.e., strict *mens rea* as discussed herein) versus “intent viewed broadly” (analogous to diminished capacity *mens rea* and similar concepts).⁷⁴ Throughout his article he discusses the limitations of mental health professionals in applying clinical data and methods to the complex legal issues involved in the *mens rea* elements.⁷⁵

In his 1984 article,⁷⁶ Professor Morse, referring to a defendant’s capacity to form *mens rea*, states that the law has allowed mental health professionals to provide unscientific testimony. However, he argues that testimony of mental health professionals should be admissible as to whether or not *mens rea* was formed in fact.⁷⁷ Adopting his argument would raise the issue as to whether, in fact, mental health professionals are competent under the legal rules of evidence

68. *Insanity Defense in Federal Courts*, *supra* note 52, at 58-62.

69. *Id.* at 59.

70. Morse, Diminished capacity: A Moral and Legal Conundrum, 2 INT’L J.L. & PSYCHIATRY (1979).

71. Clark, *Clinical Limits of Expert Testimony on Diminished Capacity*, 5 INT’L J. L. & PSYCHIATRY 155 (1982).

72. *Insanity Defense in Federal Courts*, *supra* note 52, at 59.

73. Clark, *supra* note 71.

74. *Id.* at 157.

75. *Id.* at 155-70.

76. Morse, *supra* note 66.

77. *Id.* at 5, 42-45. See also *infra* note 86 and accompanying text.

to express opinions on the *facts* of intent, as distinguished from the *mental capacity* for intent.

In spite of clarification regarding the meaning of *mens rea* elements, or the clarification of admissibility of mental disorder for *mens rea* purposes by the new California legislation, the problems mentioned by Doctors Clark, Morse, and Roth will undoubtedly continue to exist in varying degrees. Thus, under the adversary system, it can be expected that defense attorneys and mental health professionals will continue to take advantage of ambiguities and confusion.

In the 1982 article by Morse and Cohen and the 1984 article by Professor Morse, there are discussions of the new section 29 of the California Penal Code which, in the guilt phase of the trial, precludes opinions by experts on the ultimate issue of whether or not the defendant formed the requisite *mens rea*.⁷⁸ However, in his 1984 article, Professor Morse states that "the expert should simply describe in as much rich clinical detail as possible what was going on in the defendant's mind—what the defendant thought, believed, perceived, and so on. The expert's source of knowledge about such matters will come largely from the defendant's self-report."⁷⁹ This does not seem to close the door very tightly. It may keep experts from expressing opinions in the exact language of the *mens rea* elements, but they may accomplish essentially the same thing by describing in detail "what was going on in the defendant's mind."

Professor Morse seems to think that precluding opinions of experts directly on the ultimate legal issue (i.e., *mens rea* in this case) will tend to reduce unbelievable and confusing expert testimony.⁸⁰ In a 1973 article, I took somewhat the same position.⁸¹ Nevertheless, Professor Arenella, whose articles have previously been referred to, has presented another point of view.

On August 12, 1982, Professor Arenella testified before the Subcommittee on Criminal Justice of the United States House of Representatives Committee on the Judiciary.⁸² He was questioned about

78. CAL. PENAL CODE § 29 (West Supp. 1987). See Morse & Cohen, *supra* note 51, at 26; Morse, *supra* note 66, at 48-52.

79. Morse, *supra* note 66, at 48.

80. *Id.* at 48-53.

81. Huckabee, *Resolving the Problem of Dominance of Psychiatrists In Criminal Responsibility Decisions: A Proposal*, 27 Sw. L.J. 790 (1973), reprinted in *Reform of the Federal Criminal Laws: Hearings Before The Subcommittee on Criminal Laws and Procedures of the Committee On The Judiciary, United States Senate, 93rd Cong., 2d Sess.* 7031, 7093-7109 (1974).

82. *Insanity Defense in Federal Courts, supra* note 52, at 114-15.

the “*mens rea* insanity defense,” then pending before Congress. His testimony is particularly relevant as to whether precluding opinions on ultimate legal issues involved in *mens rea* would be effective. Included in his testimony was the statement: “I think it is fair to say that if Congress were to abolish the insanity defense and restrict evidence of mental abnormality to the question of *mens rea* you would find many judges in many courts throughout this country admitting all sorts of psychiatric evidence under the diminished capacity approach.”⁸³ Upon being asked if restricting expert witnesses from expressing opinions on ultimate *mens rea* issues would cure the problem, Professor Arenella responded in the negative. He reasoned:

[T]he expert would not have to testify about whether in fact the defendant possessed the criminal intent. Your bill would stop the expert from giving a conclusion but all of the psychiatric evidence that usually comes in under insanity, all of the clinical description about the defendant’s problems that he has been suffering for x number of years, all of that could come in under the diminished capacity approach.⁸⁴

Certainly, there are differing views about the effectiveness of an ultimate issue limitation. In spite of the position stated in my 1973 article on this issue, I have moved toward the opinion expressed above by Professor Arenella. Under any ultimate issue restriction on the testimony of mental health professionals, defense attorneys can still have a field day in clouding the *mens rea* issues with such testimony. It seems questionable, therefore, whether section 29 of the California Penal Code will be as effective as its proponents expect in limiting opinions of expert witnesses on the ultimate issues involved in *mens rea*.

Another point to consider, as already noted, is that the new California legislation includes section 28(a), which precludes admissibility of mental disorder on the “capacity” to form a mental state, but allows it to be considered when questioning whether the mental state was actually formed.⁸⁵ However, it can be argued that this may be moving the opinions of mental health professionals too far into the province of the jury and into areas where they do not qualify as experts under the legal rules of evidence.⁸⁶

In his authoritative 1967 book, *The Insanity Defense*,⁸⁷ Yale Law School professor Abraham S. Goldstein discusses the objective theory of criminal liability and the insanity defense. His comments refer not

83. *Id.* at 115.

84. *Id.* See also July 22, 1982, testimony before the same committee by Doctor Alan Stone, Professor of Law and Psychiatry at Harvard Medical and Law Schools. *Id.* at 73-74.

85. See *supra* note 48 and accompanying text.

86. See also *supra* notes 67-76 and accompanying text. Cf. *Rhodes v. United States*, 282 F.2d 59, 62 (4th Cir. 1960); *Clark*, *supra* note 71, at 168-70. But see *Morse*, *supra* note 66, at 5, 42-45, 50, 55.

87. A. GOLDSTEIN, *supra* note 9.

only to developments known at that time, but some are in the nature of predictions regarding what might happen in the future. He believes that persons who want to avoid the insanity defense:

may decide to attack the objective theory directly—by offering both the evidence traditionally excluded and requests for instructions to the jury which call upon it to apply a subjective theory; or they may try to mitigate the objective theory by offering subjective evidence as probative of words like “intent,” “malice,” etc. Their hope will be that the evidence, once admitted, will persuade the jury to apply the words subjectively in accordance with their apparent meaning.⁸⁸

The entire history of this problem, before and after publication of Professor Goldstein’s book, fully confirms the accuracy of his statement. Furthermore, under section 28(a), California defense attorneys can certainly be expected to press hard, both directly and indirectly, as suggested by Professor Goldstein. They have the opportunity to do this because under section 28(a) they have a direct shot at *mens rea* outside the strictures of the insanity defense.

Stating it another way, there will undoubtedly be continuing attempts to move from Professor Arenella’s strict *mens rea* concept to his diminished capacity *mens rea* concept or even to diminished responsibility (or from the *mens rea* variant to the partial responsibility variant, as described by Professor Morse and Mr. Cohen). Ambiguities in the new California legislation are causing confusion, thus creating the opportunity for such maneuvering.⁸⁹ It would not be surprising if the use of the insanity defense in California diminishes—not only because the defense has been tightened, but also because defendants may be able to do as well or better under section 28(a).

V. AMERICAN BAR ASSOCIATION STANDARDS

In February, 1983, the members of the American Bar Association House of Delegates adopted a new standard for the insanity defense (7-6.1(a)) which, among other things, rejects a volitional (control) aspect such as that in the American Law Institute insanity test.⁹⁰ But eighteen months later, in August, 1984, the ABA House of Delegates adopted an *additional* standard which authorizes admissibility of ex-

88. *Id.* at 191-93.

89. See *supra* notes 1, 51-64 and accompanying text. See also Comment, *supra* note 50, at 319-23.

90. See ABA STANDARDS, *supra* note 34, at ch. 7 Title Page, XVII, 290, 294, 298-99, 303-306. Cf. *supra* notes 16-18 and accompanying text (showing California’s 1978 adoption of the ALI test including its volitional concept).

pert testimony and evidence of mental disorder which does *not* have to meet the requirements of the insanity defense. That Standard (7-6.2) states: "Evidence, including expert testimony, concerning the defendant's mental condition at the time of the alleged offense which tends to show the defendant did or did not have the mental state required for the offense charged should be admissible."⁹¹ Although section 28(a) of the California Penal Code is not mentioned, the language of Standard 7-6.2 and related commentary indicate that the Standard is similar to the portion of section 28(a) which authorizes admissibility of mental illness "solely on the issue of whether or not the accused actually formed" the required mental state.⁹²

Standard 7-6.2 is an example of how California's section 28(a) concept can be expanded beyond the strict *mens rea* interpretation contemplated by Morse and Cohen.⁹³ As previously noted, under the Morse-Cohen interpretation of section 28(a), mental disabilities do not prevent formation of *mens rea* except in rare cases, and even severe mental disabilities virtually never negate *mens rea*. Thus, they believe that a defendant must show complete lack of the culpable state of mind.

By contrast, ABA Standard 7-6.2 merely states that mental disability evidence which *tends* to show that the defendant did or did not have the required mental state should be admissible.⁹⁴ Furthermore, in the discussion of Standard 7-6.2, the committee commentary points out that the "standard makes evidence of abnormal mental condition admissible to the extent it bears on the mental state required for the offense charged;"⁹⁵ the Standard "places no 'mental disease or defect' restriction on the relevant condition of mind;"⁹⁶ and it says that evidence, including properly qualified expert testimony, "that *tends* to show a defendant did or did not have the mental state for a charged offense should be admissible."⁹⁷

The ABA committee commentary further provides that the evidence may often take the form of expert testimony, and "the only limitation on such testimony under Standard 7-6.2 should be relevance and the normal requirements of expert opinion."⁹⁸ On this

91. ABA STANDARDS, *supra* note 34, at ch. 7 Title Page XIV, 311. See also *id.* at 312-17; George, *The American Bar Association's Mental Health Standards: An Overview*, 53 GEO. WASH. L. REV. 345-46, 363 (1985).

92. ABA STANDARDS, *supra* note 34, at 311-17. The commentary is not ABA policy since it has not been approved by the ABA House of Delegates which takes positions only on the *standards*. Nevertheless, the committee commentary is published in order to assist practitioners. See also George, *supra* note 91, at 340 n.8.

93. See *supra* notes 46-65 and accompanying text.

94. ABA STANDARDS, *supra* note 34, at 311.

95. *Id.* at 312.

96. *Id.*

97. *Id.* at 313 (emphasis added).

98. *Id.* at 315.

point, the committee commentary also states:

Some courts, perhaps fearful that a rule of logical relevance will open the door to unstructured clinical opinion in a wide array of cases, have misguidedly placed other restrictions on expert opinion. Thus, one finds decisions forbidding expert testimony in cases not involving a severe mental disease or limiting such testimony to the issue of whether defendants possessed a capacity to form the requisite mental state.⁹⁹

With reference to this, the commentary responds: "Once more, based on fundamental evidentiary and constitutional principles and the assumption that courts adequately can monitor the qualifications of expert witnesses, the standard does not adopt these artifices."¹⁰⁰ The commentary does say, however, that the scope of the standard does not involve a "volitional impairment" test (i.e., as involved in insanity defenses).¹⁰¹ On the other hand, the commentary provides that expert testimony on mental condition "should be admissible on a *mens rea* issue even if a defendant has not pleaded a specific mental non-responsibility [insanity] defense, as long as it is relevant to a determination of guilt, innocence, or level of culpability."¹⁰²

All of this leads to the conclusion that, rather than adopting the strict interpretation of *mens rea* contemplated by Morse and Cohen, ABA Standard 7-6.2 more closely resembles the defense-oriented diminished capacity *mens rea* concept described by Professor Arenella.¹⁰³ Referring again to the quotation from Professor Abraham Goldstein's book, under Standard 7-6.2 one can certainly expect that defense attorneys will take full advantage of the opportunity to focus directly on *mens rea* and thus avoid the strictures of the insanity defense.¹⁰⁴ There is nothing in Standard 7-6.2 or the related committee commentary that specifically states that strict *mens rea* interpretation should be applied. Thus, judges may allow use of the liberal diminished capacity *mens rea* approach.

The ABA Standards are not law, but they are important guides for legislatures, policy makers, and courts regarding what the ABA thinks the law *ought* to be. For example, under section 28(a) of the California Penal Code it seems entirely possible that some California courts may be guided by Standard 7-6.2 and its related commentary, rather than the strict *mens rea* interpretation set forth in the article by Morse and Cohen. This is also true regarding the potential effect

99. *Id.* See also *United States v. Bright*, 517 F.2d 584 (2d Cir. 1975).

100. ABA STANDARDS, *supra* note 34, at 315.

101. *Id.* at 315-16.

102. *Id.* at 121 (emphasis added).

103. See *supra* notes 1, 45-64 and accompanying text.

104. See *supra* notes 87-89 and accompanying text.

of Standard 7-6.2 in other jurisdictions, including the federal system, which retain the *mens rea* model as an adjunct to the insanity defense.

VI. FEDERAL SYSTEM

Similar to the California statutes and the ABA Standards, the 1984 Comprehensive Crime Control Act¹⁰⁵ tightens the *insanity defense* in the federal system by eliminating the volitional phase of the ALI test.¹⁰⁶ It also adds a requirement for establishing lack of responsibility under the insanity defense; the mental disease or defect must be "severe."¹⁰⁷ Furthermore, the burden of proof with reference to the insanity defense is shifted to the defendant,¹⁰⁸ and limits are established respecting testimony of experts, to prevent opinions on ultimate issues.¹⁰⁹ Nevertheless, the legislation retains a concept allowing the use of mental disorders to directly rebut the evidence of the formation of *mens rea* which do not meet the requirements of the insanity defense. Thus, similar to the California situation and ABA Standard 7-6.2, defendants can *avoid* the insanity defense framework.

This is not a new concept in the federal system. The point is, however, that in the 1984 Comprehensive Crime Control Act, Congress and the Administration did not completely close the door on the use of mental disorders, which do not meet insanity defense requirements, to negate *mens rea*. Instead, they reaffirmed the *mens rea* model described in this article, which has existed along with the insanity defense in the federal system for a number of years.

In *United States v. Brawner*,¹¹⁰ the United States Court of Appeals for the District of Columbia Circuit authorizes the *mens rea* model. In that sense, it is consistent with California's section 28(a) and ABA Standard 7-6.2.¹¹¹ However, although specifically declining to follow a diminished responsibility or partial responsibility doctrine, it is not clear from the *Brawner* opinion whether adherence to the strict *mens rea* approach is required. Thus, the potential for the defense-oriented diminished capacity *mens rea* interpretation remains

105. Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1976 (1984), reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS (98 Stat.) 1976, 2057-68.

106. 18 U.S.C. § 20 (Supp. III 1985); S. REP. NO. 225, 98th Cong., 1st Sess. 225-29 (1983), reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 3182, 3407-11.

107. 18 U.S.C. § 20 (Supp. III 1985); S. REP. NO. 225, *supra* note 106, at 229, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS at 3411.

108. 18 U.S.C. § 20 (Supp. III 1985); S. REP. NO. 225, *supra* note 106, at 229-30, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS at 3411-12.

109. FED. R. EVID. 704(b); S. REP. NO. 225, *supra* note 106, at 230-31, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS at 3412-13.

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

111. *Id.* at 998-1002. Cf. H. HUCKABEE, *supra* note 28, at 30-53.

open.¹¹²

The 1984 Comprehensive Crime Control Act does not include specific statutes similar to sections 25 and 28 of the California Penal Code. Nevertheless, the 1984 Act continues to recognize the *mens rea* model in two ways. First, it is included in the notice requirements of Rule 12.2 of the Federal Rules of Criminal Procedure.¹¹³ Second, it is recognized in the opinion on the ultimate issue limitation in Rule 704 of the Federal Rules of Evidence.¹¹⁴ The 1984 Act amended these rules (with Rule 12.2 being further amended by a statute effective in 1985). The significant point is that, although other amendments were made to these rules, Congress left in place the opportunity to use the *mens rea* model by allowing evidence of mental disorders not meeting insanity defense requirements.¹¹⁵

It is true that the purpose of the amended Rule 704 is to preclude opinions of expert witnesses on ultimate issues involving the *mens rea* elements and the insanity defense. This is an attempt to reduce the influence of experts by not allowing them to render opinions in the specific language of the mental elements or the insanity defense. Nevertheless, subject to that limitation, Rule 704 recognizes the *mens rea* model.

This conclusion is supported by the testimony and prepared statement of then United States Department of Justice Assistant Attorney General D. Lowell Jensen who testified before the Subcommittee on Criminal Justice of the United States House of Representatives Judiciary Committee on March 17, 1983.¹¹⁶ The day before Jensen testified, the President sent to Congress the Comprehensive Crime Control Act of 1983 (Senate Bill 829) which was the predecessor to Senate Bill 1762, upon which much of the 1984 Act was based (including mental disease and defect provisions).¹¹⁷

In his prepared statement, Mr. Jensen stated that he would discuss the administration's bill, as well as pending House bills.¹¹⁸ Thus, his

112. *Browner*, 471 F.2d at 998, 1002. See also *Arenella*, *supra* note 1, at 835-36.

113. FED. R. CRIM. P. 12.2.

114. FED. R. EVID. 704.

115. See FED. CRIM. CODE & RULES 60-64, 242-43 (West rev. ed. 1985).

116. *Reform of the Federal Insanity Defense*, *supra* note 52, at 237-61 (testimony and prepared statement of D. Lowell Jensen who is currently a federal district judge for the Northern District of California).

117. S. 829, 98th Cong., 1st Sess.; President's Message to Congress dated March 16, 1983, transmitting Comprehensive Crime Control Act of 1983, H.R. REP. NO. 1030, 98th Cong., 1st Sess. (1983); S. REP. NO. 225, *supra* note 106, at 1-3, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS at 3182, 3184-85.

118. *Reform of the Federal Insanity Defense*, *supra* note 52, at 254.

testimony and prepared statement are part of the legislative history of the 1984 Comprehensive Crime Control Act. With reference to Rule 704, Mr. Jensen said:

The Administration's bill would prohibit such testimony on the broader range of issues involving whether the defendant did or did not have the mental state or condition constituting an element of the offense or a defense thereto. In our view, it is preferable to prohibit ultimate opinion evidence on any mental element of the offense as well as on a defense.¹¹⁹

This statement recognizes that expert testimony generally referring to the effect of mental illness on the mental elements *outside* strictures of the insanity defense is permissible, as well as with reference to that defense, although the expert witness is precluded from expressing opinions on ultimate issues.

Mr. Jensen further confirmed the general admissibility of such testimony under questioning by Congressmen Howard L. Berman and Michael DeWine.¹²⁰ He testified that the proposed House bill "limits it [expert testimony] to the ultimate conclusion on the issue of legal insanity. Our bill would suggest that it limits any kind of testimony on ultimate conclusions on that and any other mental health state."¹²¹ The questioning focused on the *mens rea* issue rather than the insanity defense. Congressman Berman asked, "You don't think a psychiatrist should be able to answer the question: 'So and so did not have the capacity to form the intent required of the statute?'"¹²² Mr. Jensen replied, "That is right."¹²³ He also included in his answer: "The psychiatrist can testify, is free to testify, about the whole opinion range in terms of how it affects that issue, but rather than having the power to say, 'In my opinion, this is the ultimate result,' that they ought not to do that. That is a fact for the jury to determine."¹²⁴

Following up on this, Congressman DeWine asked:

Would it be a fair statement to say that under your proposal that psychiatrists could testify to just about everything up to the final question? As a former prosecutor, you normally go through an hour or two in leading the expert into this final question, and the defense attorney is doing the same thing. As a practical matter, are we going to be saying that all the questions can be asked except the last one?¹²⁵

Mr. Jensen included in his reply: "As long as the last one is that which the jury is finally to determine. . . ."¹²⁶

Mr. DeWine then asked, "But he is going to be able to get all the other expert testimony concerning the mental state of the individ-

119. *Id.* at 257.

120. *Id.* at 249-50.

121. *Id.* at 249.

122. *Id.*

123. *Id.*

124. *Id.* at 249-50.

125. *Id.* at 250.

126. *Id.*

ual?"¹²⁷ As an example, he referred to a case involving mental retardation and the "ability to form a mental intent," saying, in effect, that he assumed that such testimony would still be allowed.¹²⁸ Mr. Jensen replied:

That is correct. There would be no limitation on the mental health professionals' range of testimony about the state of mind and the description—as a matter of fact, we disagree a little bit with what seems to be in H.R. 1280, that says you should not use medical terminology, or limit that. . . .¹²⁹

The foregoing testimony, focusing on *mens rea* elements as distinguished from the insanity defense, is further confirmation of the general admissibility of mental disorder testimony directly related to *mens rea* under the 1984 Act. Mr. Jensen's testimony is also significant because it demonstrates that there are still broad areas where evidence of mental disorders not serious enough to meet the insanity defense requirements are admissible, in spite of the opinion on ultimate issue limitation.¹³⁰ For example, what would John Hinckley's team of defense attorneys and mental health professionals be able to do with an opportunity such as that described by Mr. Jensen? In spite of the ultimate issue limitation, the mental health professionals could range far and wide with a mass of testimony regarding mental disorders not meeting insanity defense requirements, together with a discussion of the relevant history of the defendant underlying such mental disorders. This could create the usual confusion surrounding testimony of mental health professionals, and in their arguments to the jury, defense attorneys could bridge any gap between the ultimate issues and the expert testimony. Mr. Jensen's testimony highlights the problems of moving outside the framework of an insanity defense. His testimony is fully consistent with the problems of operating without an insanity defense bottom line, as previously discussed in connection with the California situation.¹³¹

The insanity defense in the 1984 Federal Crime Control Act is as follows:

It is an affirmative defense to a prosecution under any federal statute that, at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts. Mental disease or defect

127. *Id.*

128. *Id.*

129. *Id.*

130. *Cf.* United States v. Frisbee, 623 F. Supp. 1217, 1223-24 (N.D. Cal. 1985). Compare 1982 *Insanity Defense in Federal Courts*, *supra* note 52, at 74 (testimony of psychiatrist Alan Stone).

131. See *supra* notes 68-82 and accompanying text.

does not otherwise constitute a defense.¹³²

On the surface the language seems to preclude use of mental diseases or defects which do not meet the insanity defense requirements. As already stated, however, this is not the case because mental diseases and defects *not* meeting the requirements of the insanity defense can come into evidence under the *Brawner mens rea* model.¹³³ This is true in view of the notice requirements of Federal Rule of Criminal Procedure 12.2, as well as recognition of the *mens rea* model in Federal Rule of Evidence 704, as previously discussed.¹³⁴

An obvious question remains: What is the meaning of the “does not otherwise constitute a defense” language? In an effort to explain it, Senate Report 98-225 states:

This is intended to ensure that the *insanity defense* is not improperly resurrected in the guise of showing some other *affirmative defense*, such as that the defendant had a ‘*diminished responsibility*’ or some similarly asserted state of mind which would serve to *excuse the offense* and open the door once again to needlessly confusing psychiatric testimony.¹³⁵

It is important to note, however, that the various labels and concepts in the foregoing quotation *do not* describe or apply to evidence coming in under the *mens rea* model. Thus, this is similar to the California situation described by Morse and Cohen, where there was an attempt to cut back somewhat by excluding expansive “diminished responsibility” and “partial responsibility” variants. Also, similar to section 28(a) of the California Penal Code, the *mens rea* model has been left in place in the 1984 Comprehensive Crime Control Act.¹³⁶

This conclusion is also supported by the fact that the language “excuse the offense” in Senate Report 98-225, clearly would *not* apply to the *mens rea* model.¹³⁷ Morse and Cohen say that their *mens rea* variant (i.e., the *mens rea* model) merely casts doubt upon the prosecution’s case “by showing that a required mental element did not exist.”¹³⁸ This does not “excuse the offense.” Instead, it shows that the defendant is *not guilty* of the offense or of a particular degree of the offense. This concept has been analyzed by Professor Paul H. Robinson.¹³⁹ Thus, the “diminished responsibility or some other similarly asserted state of mind” as used in Senate Report 98-225 does

132. 18 U.S.C. § 20 (Supp. III 1985).

133. The *Brawner mens rea* model is comparable to ABA Standard 7-6.2 and the California Penal Code § 28(a). See *United States v. Brawner*, 471 F.2d 969 (D.C. Cir. 1972) (en banc).

134. See *supra* notes 110-129 and accompanying text.

135. S. REP. NO. 225, *supra* note 106, at 229, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS at 3411 (emphasis added).

136. See *supra* notes 46-89 and accompanying text.

137. See *supra* notes 46-64 and accompanying text.

138. See *supra* note 51.

139. See 1 P. ROBINSON, *supra* note 11, § 64 at 272-73, 276.

not apply to the *mens rea* model, and hence, use of that model is *not* precluded under the new law.

In his testimony on March 17, 1983, Mr. Jensen reached the same conclusion. He testified that the word "defense" in the "does not otherwise constitute a defense" language really means "affirmative defense."¹⁴⁰ With reference to this, he further testified:

But essentially, what we are saying is that we should limit that to affirmative defenses. You really can't go perhaps beyond that. You can't put in something that bars a defendant from interposing a defense as to one of the elements. It is either relevant and admissible or it is not.¹⁴¹

This testimony by Mr. Jensen, in the context of whether mental disabilities are admissible on the *mens rea* elements outside the scope of the insanity defense, confirms Mr. Jensen's position that the 1984 Comprehensive Crime Control Act does *not* make the insanity defense the bottom line regarding the admissibility of such mental disabilities. His testimony is fully consistent with the *Browner mens rea* model, which allows mental disabilities not meeting requirements for the insanity defense to be admitted directly on *mens rea*.¹⁴² His testimony is important legislative history for the 1984 Act.¹⁴³

The previous analysis concluding that the 1984 Act authorizes admissibility of mental disorder testimony and evidence (not meeting insanity defense requirements) directly on *mens rea* is supported by

140. *Reform of the Federal Insanity Defense*, *supra* note 52, at 253.

141. *Id.*

142. *United States v. Browner*, 471 F.2d 969, 998-1002 (1972).

143. *See Reform of the Federal Insanity Defense*, *supra* note 52, at 253 (testimony of Mr. Jensen). *See also supra* note 117 and accompanying text. Mr. Jensen was testifying about S. 829, the predecessor to S. 1762. The mental disease and defect phases of the Comprehensive Crime Control Act of 1984 were derived substantially from S. 1762 which, in turn, was derived from S. 829. On page two of the Senate report published as part of the legislative history of the Act as finally enacted, it is stated: "The Committee also noted the major contribution to this bill by the Administration. On March 16, 1983, the President sent to the Congress a 42-point proposal with 16 major titles entitled, as is this bill, the 'Comprehensive Crime Control Act of 1983' (S. 829)." S. REP. NO. 225, *supra* note 106, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS at 3184. It is significant that the proposed insanity defense, (18 U.S.C. § 20) in Title V, § 502 of S. 829 and as set forth in the President's March 16, 1983 message (House Document 98-32 at page 170), includes the exact language of the insanity defense as finally enacted (18 U.S.C. § 20) except that the word "severe" was added to describe "mental disease or defect." *See* S. REP. NO. 225, *supra* note 106, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS at 3411. It is also of interest that the proposed Rule of Evidence 704(b) in S. 829 (§ 506 of Title V), and as set forth in the President's March 16, 1983 message (House Document 98-32 at 195), contains the exact language of that rule as finally enacted into law. All of this demonstrates that Mr. Jensen's testimony is appropriately considered legislative history with reference to 18 U.S.C. 20 and Rule 704(b) as finally enacted.

United States v. Frisbee.¹⁴⁴ There is also support for this position in an analysis by Professor Robinson in the 1986 supplement to his treatise on criminal law defenses.¹⁴⁵

Frisbee and Professor Robinson analyze the new federal insanity defense (18 U.S.C. section 20), Federal Rule of Evidence 704(b), and Federal Rule of Criminal Procedure 12.2(b), using generally the same reasoning as in the foregoing discussion. Professor Robinson concludes that the federal law on the issue is unclear. In *Frisbee*, however, the court rendered a firm opinion that expert testimony regarding mental disorders, not meeting insanity defense requirements, could be admitted in evidence in determining whether the defendant had the requisite mental state to have committed first degree murder.

Further strengthening the opinion of the court in *Frisbee* and the analysis by Professor Robinson is the testimony of Mr. Jensen, previously discussed.¹⁴⁶ It is of interest, however, that neither the court in *Frisbee* nor Professor Robinson appear to have had the benefit of Mr. Jensen's testimony, possibly because there was no reference to it in the legislative history published in the *United States Code Congressional and Administrative News*. The testimony of Mr. Jensen and the analyses of *Frisbee* and Professor Robinson fully confirm my position that the *mens rea* model remains in the new federal legislation.

In *Frisbee*, the government made a motion contending "that the recently enacted section 20 of Title 18 of the United States Code, Comprehensive Crime Control Act of 1984 . . . prohibits the admission of psychiatric testimony to negate the existence of an element of the crime unless such testimony is admitted in conjunction with an insanity defense."¹⁴⁷ The court, however, ruled against the government and authorized admission of the testimony.

It is of interest that the American Bar Association committee commentary regarding the *mens rea* model (Standard 7-6.2)¹⁴⁸ refers to the new federal legislation and interprets it in a manner similar to the position taken in the government's motion in *Frisbee*.¹⁴⁹ The *White* opinion by the United States Court of Appeals for the First Circuit also seems to have moved toward that interpretation.¹⁵⁰ Nevertheless, based on the analyses in *Frisbee*, by Professor Robinson,

144. *United States v. Frisbee*, 623 F. Supp. 1217 (N.D. Cal. 1985).

145. 1 P. ROBINSON, *supra* note 11, § 64 at 26-27 (Supp. 1987).

146. *See supra* notes 116-130, 140-43 and accompanying text.

147. *Frisbee*, 623 F. Supp. at 1219.

148. *See supra* notes 90-104 and accompanying text.

149. ABA STANDARDS, *supra* note 34, at 313 n.4. *See also id.* at 298-99; George, *supra* note 91, at 363 n.182.

150. *White*, 766 F.2d at 24-25.

and herein, it seems clear that Congress intended to leave the *mens rea* model in the federal system.

If the Justice Department wants to use the approach set forth in the government's motion in *Frisbee*, the Comprehensive Crime Control Act of 1984 will have to be amended. In the relevant portions of the statute, the federal rules involved, and the legislative history, it should be made clear that mental disorder testimony and evidence *not meeting insanity defense requirements* are inadmissible on the responsibility issue. Thus, the semantic jousting concerning what is really meant by the ambiguous word "defense" will be eliminated. Congress and the Justice Department should take a further look at all of this if there is a real desire to remove the *mens rea* model from the federal system. It seems clear that with reference to the 1984 Act, the decision was made to leave it in.

VII. *MENS REA* MODEL IN OTHER JURISDICTIONS

Most jurisdictions retain a traditional insanity defense (e.g., *M'Naghten* or ALI) plus the *mens rea* model (or variation under another label) as an *adjunct* to that defense. At least three states, however, have adopted a *mens rea* model *in lieu of* a traditional insanity defense.¹⁵¹

A. *Adjunct to Insanity Defense*

Studies by various researchers show that through statutes or court decisions, between twenty-five and thirty states, as well as courts in the federal system, have adopted concepts allowing mental illness, not meeting insanity defense requirements, to be used directly on the *mens rea* elements.¹⁵² In most states, these concepts are adjuncts to the insanity defense. Some jurisdictions allow this in efforts to negate any culpable state of mind that is an element of the offense. Some limit it to reduction of degrees of crime in homicide cases. Others limit it to specific intent crimes involving the offender's subjective purposes and beliefs (i.e., requiring "proof of some particular mental state beyond the mere intent to engage in the proscribed conduct").¹⁵³ These latter jurisdictions do not allow use of the concept

151. See ABA standards, *supra* note 34, at 312-13 n.2.

152. *Id.* See Pfeiffer v. Maryland, 44 Md. App. 49, 57-58, 407 A.2d 354, 358-59 n.4 (1979). See also *Recent Developments, Diminished Capacity—Recent Decisions and an Analytical Approach*, 302 VAND. L. REV. 213, 217 n.27 (1977).

153. Arenella, *supra* note 1, at 828 n.7.

in general intent crimes (i.e., ordinarily requiring only that the individual voluntarily commit the forbidden act).¹⁵⁴

In jurisdictions authorizing admissibility of mental disorder on *mens rea* as an adjunct to the insanity defense, defendants have a second shot at attacking *mens rea*, using mental disorders which do not meet the requirements of the insanity defense. Courts in some states have not ruled on the issue or are unclear about it.¹⁵⁵

B. *In Lieu of Traditional Insanity Defense*

Idaho,¹⁵⁶ Montana,¹⁵⁷ and Utah¹⁵⁸ have abolished the traditional insanity defense and *replaced* it with a *mens rea* rule.¹⁵⁹ This is consistent with proposals that have existed for a number of years which recommend abolishing the traditional insanity defense (e.g., *M'Naghten* or ALI) and allowing mental disorder evidence on criminal responsibility to be admitted only to show absence of *mens rea*.¹⁶⁰

Proponents of abolition have used strict *mens rea* rhetoric in their assertions that it is a "law and order" way to reduce use of mental disorders in criminal cases.¹⁶¹ Congress considered this concept for a number of years, but in 1982 the United States Senate Judiciary Committee rejected it.¹⁶² The Court appears to have been swayed by Alabama Senator Howell Heflin (former Chief Justice of the Alabama Supreme Court)¹⁶³ and various witnesses testifying before con-

154. See generally *Muench v. Israel*, 715 F.2d 1124, 1142-43 (7th Cir. 1983), *cert. denied*, 467 U.S. 1228 (1984); *Campbell v. Wainwright*, 738 F.2d 1573, 1581 (11th Cir. 1984), *cert. denied*, 106 S. Ct. 1652 (1986); *Pfeiffer v. Maryland*, 44 Md. App. 49, 57-58, 407 A.2d 354, 358-59 n.4 (1979); ABA STANDARDS, *supra* note 34, at 312-14; 1 P. ROBINSON, *supra* note 11, § 64 at 272-85, § 101 at 474-78; Arenella, *supra* note 1, at 828 n.7; *Recent Developments, Diminished Capacity—Recent Decisions And An Analytical Approach*, 30 VAND. L. REV. 213, 217, 228 n.64 (1977); Annotation, *Admissibility of Expert Testimony as to Whether Accused Had Specific Intent Necessary for Conviction*, 16 A.L.R. 4TH 666, 672-81 (1982 & Supp. 1987); 21 AM. JUR. 2D *Criminal Law* § 41 (1981 & Supp. 1987); Annotation, *Mental or Emotional Condition as Diminishing Responsibility for Crime*, 22 A.L.R. 3D 1228, 1238-43 (1968 & Supp. 1987).

155. See ABA STANDARDS, *supra* note 34, at 312-13 n.2; *Pfeiffer*, 44 Md. App. at 57-58, 407 A.2d at 358-59 n.4.

156. IDAHO CODE § 18-207 (1987).

157. MONT. CODE ANN. §§ 46-14-102, 201-203-212-213 (1985).

158. UTAH CODE ANN. § 76-2-305 (Supp. 1987).

159. See also ABA STANDARDS, *supra* note 34, at 300.

160. T. MAEDER, CRIME AND MADNESS, 147-66 (1985); H. HUCKABEE, *supra* note 28, at 54-99.

161. See Smith, *Limiting The Insanity Defense: A Rational Approach To Irrational Crimes*, 47 MO. L. REV. 605, 612, 615-19 (1982); MEESE, *Combating The American Epidemic*, in CRIMINAL JUSTICE REFORM 13-15 (P. MCGUIGAN & R. RADER ed. 1983); Hatch, *The Insanity Defense Is Insane*, READER'S DIGEST, Oct. 1982, 199-203. See also H. HUCKABEE, *supra* note 28, at 73-95; T. MAEDER, *supra* note 159, at 148, 150-52, 155.

162. 128 CONG. REC. S11391-92 (daily ed. Sept. 14, 1982) (statement of Sen. Thurmond); Riley & George, *Reform, Not Abolition*, 251 J. AM. MEDICAL ASS'N 2947-48 (June 8, 1984).

163. 128 CONG. REC. S7868-70 (daily ed. July 1, 1982) (statements of Sen. Heflin);

gressional committees, emphasizing how easily courts could give it the liberal, diminished capacity *mens rea* interpretation.¹⁶⁴

With reference to jurisdictions adopting the concept, questions are being raised in the literature regarding whether or not the liberal, diminished capacity *mens rea* approach will prevail over the strict *mens rea* interpretation.¹⁶⁵ Certainly, without the framework of a traditional insanity defense (e.g., *M'Naghten* or ALI), defense attorneys can be expected to press for the liberal, diminished capacity *mens rea* concept in Idaho, Montana, Utah, or other jurisdictions that may adopt the *mens rea* model in lieu of a traditional insanity defense.

In December, 1983, the House of Delegates of the American Medical Association approved a report by its Board of Trustees' Committee on Medicolegal Problems recommending adoption of the concept involving abolition of the traditional insanity defense and complete focus on *mens rea*.¹⁶⁶ Thus, it is now the policy of the American Medical Association, as well as the concept adopted in Idaho, Montana, and Utah.

Psychiatrist Loren Roth, Chairperson of the Insanity Defense

Limiting The Insanity Defense: Hearings Before The Subcomm. On Criminal Law Of The Senate Comm. On The Judiciary, 97th Cong., 2d Sess. 270, 316-19 (1982) [hereinafter *Limiting Insanity Defense*]; *Insanity Defense Hearings*, *supra* note 36, at 37, 40-44, 122, 446-48; T. MAEDER, *supra* note 159, at 157-58; R. REISNER, *supra* note 11, at 683-85.

164. *Limiting Insanity Defense*, *supra* note 162, at 269-70 (testimony of Psychiatrist Seymour Halleck); *Insanity Defense Hearings*, *supra* note 36, at 99, 110 (testimony and statement of Wayne County, Michigan prosecutor William L. Cahalan), at 444, 447-48 (testimony of U.S. District Judge Alexander Harvey, Chairman of the Committee on the Administration of the Criminal Law, Judicial Conference of the United States), at 122 (testimony of defense attorney Frank Maloney, appearing on behalf of the National Association of Criminal Defense Lawyers), at 203 (statement of Indiana Attorney General Linley E. Pearson, representing the National Association of Attorneys General), at 57, 59 (testimony of psychiatrist Randolph A. Read). *See also Insanity Defense in Federal Courts*, *supra* note 52, at 114-15 (testimony of Professor Peter Arenella), 73-74 (testimony of Doctor Alan Stone).

165. *See* T. MAEDER, *supra* note 159, at 146-66; I. KEILITZ & J. FULTON, *THE INSANITY DEFENSE AND ITS ALTERNATIVES*, 37-39, 57 nn.19 & 20 (1984); R. REISNER, *supra* note 11, at 683-87; Wickham, *Insanity Is Alive And Well In Idaho*, 25 *THE ADVOC.* 15-16 (1982). It is also of interest on this point that in 1986, the Utah legislature enacted an amendment to Utah's *mens rea* rule, providing that it "includes the defenses known as 'insanity' and 'diminished capacity.'" UTAH CODE ANN. § 76-2-305 (Supp. 1987) (emphasis added).

166. *See Board Of Trustees, Committee On Medicolegal Problems, American Medical Association, Report Of Conclusions And Recommendations Regarding The Insanity Defense*, 251 *J. AM. MED. A.* 2967 (1984) (adopted by House of Delegates of the American Medical Association in December, 1983). *See also* I. KEILITZ & J. FULTON, *supra* note 164, at 41, 58 nn.32-34.

Work Group of the American Psychiatric Association, has written about the American Medical Association Policy.¹⁶⁷ Consistent with those who are questioning whether the concept in Idaho, Montana, and Utah may be given a liberal, diminished capacity *mens rea* interpretation, Doctor Roth makes the following statement regarding the American Medical Association policy:

As recognized by the AMA, APA, and others, expert testimony will continue even under the *mens rea* approach. But how *mens rea* will be interpreted by judges, juries, and expert witnesses is open to question. It is at least possible that highly speculative expert testimony will result from the *mens rea* approach, to the consternation of the professions, the public, and the law.¹⁶⁸

It is of interest to compare this statement with Doctor Roth's previously quoted testimony at a congressional hearing on July 22, 1982, regarding the inability of mental health professionals to adequately render expert opinions on intent and *mens rea* issues.¹⁶⁹

VIII. JURISDICTIONS PRECLUDING *MENS REA* MODEL

A number of jurisdictions have *refused* to admit evidence of mental illness on the *mens rea* elements if it does not meet the requirements of the insanity defense (e.g., *M'Naghten* or ALI).¹⁷⁰ As of the date of this writing, it appears that fourteen states plus the District of Columbia¹⁷¹ take this position: Arizona,¹⁷² Delaware,¹⁷³ Florida,¹⁷⁴ Georgia,¹⁷⁵ Indiana,¹⁷⁶ Louisiana,¹⁷⁷ Maryland,¹⁷⁸ Minnesota,¹⁷⁹ North Carolina,¹⁸⁰ Ohio,¹⁸¹ Oklahoma,¹⁸² Virginia,¹⁸³ Wisconsin,¹⁸⁴

167. Roth, *Tighten But Do Not Discard*, 251 J. AM. MED. A. 2949 (1984). *Cf. supra* notes 162-164 and accompanying text.

168. Roth, *supra* note 167, at 2950.

169. *See supra* note 68 and accompanying text.

170. *Bethea v. United States*, 365 A.2d 64, 83-92 (D.C. 1976), *cert. denied*, 433 U.S. 911 (1977); ABA STANDARDS, *supra* note 34, at 312-13 n.2; 1 P. ROBINSON, *supra* note 11, § 64 at 275 n.6; Annotation, *Admissibility*, *supra* note 153, at 681-86; Annotation, *Mental*, *supra* note 154, at 1235-38.

171. *Bethea*, 365 A.2d at 83-92.

172. *See State v. Doss*, 116 Ariz. 156, 161, 568 P.2d 1054, 1059 (1977); *see also State v. Richardson*, 110 Ariz. 48, 50, 514 P.2d 1236, 1238 (1973), *cert. denied* 415 U.S. 929 (1974); *but Cf. State v. Gonzales*, 140 Ariz. 349, 681 P.2d 1368 (1984).

173. *Bates v. State*, 386 A.2d 1139, 1143-44 (Del. 1978).

174. *Zeigler v. State*, 402 So. 2d 365, 373 (Fla. 1981) *cert. denied*, 455 U.S. 1035 (1982); *Bradshaw v. State*, 353 So. 2d 188, 190 (Fla. Dist. Ct. App. 1977); *Tremain v. State*, 336 So. 2d 705, 706-07 (Fla. Dist. Ct. App. 1976).

175. *Dennis v. State*, 170 Ga. App. 630, 633, 317 S.E.2d 874, 876 (1984); *Chancellor v. State*, 165 Ga. App. 365, 367, 301 S.E.2d 294, 298 (1983).

176. *Brown v. State*, 448 N.E.2d 10, 19 (Ind. 1983); *but Cf. Neaveill v. State*, 474 N.E.2d 1045, 1048 (Ind. Ct. App. 1985).

177. *State v. Welcome*, 458 So. 2d 1235, 1240 (La. 1983), *cert. denied*, 470 U.S. 1088 (1985); *State v. Edwards*, 420 So. 2d 663, 678 (La. 1982); *State v. Andrews*, 369 So. 2d 1049, 1053-54 (La. 1979); *State v. Ncaise*, 466 So. 2d 660, 663-65 (La. Ct. App. 1985).

178. *Johnson v. State*, 292 Md. 405, 417-28, 439 A.2d 542, 549-56 (1982).

179. *State v. Bouwman*, 328 N.W.2d 703, 706 (Minn. 1982).

180. *State v. Kirkley*, 308 N.C. 196, 213, 302 S.E.2d 144, 154 (1983); *State v. Marshall*,

and Wyoming.¹⁸⁵ Courts move back and forth on the issue, thus, the law in a given jurisdiction is not always clear-cut.

Some of these jurisdictions use an "all or nothing" approach (i.e., making flat statements in court decisions that a person is either sane or insane, and since insanity defense requirements have not been met, the testimony or other evidence is not admissible directly on *mens rea*). This position was taken in *Stamper v. Commonwealth*,¹⁸⁶ a 1985 decision of the Virginia Supreme Court.

If mental disorders alleged to be relevant to the *mens rea* elements are to be completely precluded, controversial constitutional questions arise. The ABA committee commentary argues that evidence not meeting insanity defense requirements is logically relevant and, thus, allowing it into evidence is "probably constitutionally required."¹⁸⁷ In his September 9, 1982 testimony before the Subcommittee of the United States House of Representatives Judiciary Committee, Professor Morse stated:

A claim of no *mens rea* is not an affirmative defense. Instead, the defendant is simply claiming that the state cannot make out its prima facie case. I know there are some state supreme courts that hold otherwise, but I believe it is unconstitutional to prevent a defendant from presenting any relevant evidence that goes to whether he or she did not have the mental state required by the definition of the crime.¹⁸⁸

Professor Robinson has summarized arguments and authorities supporting the position that it is unconstitutional to keep out such evidence.¹⁸⁹ Nevertheless, federal courts of appeal in the Fifth,¹⁹⁰ Seventh,¹⁹¹ Ninth,¹⁹² and Eleventh¹⁹³ Circuits have held that it is

304 N.C. 167, 173-74, 282 S.E.2d 422, 426 (1981); *State v. Anderson*, 303 N.C. 185, 200, 278 S.E.2d 238, 247 (1981).

181. *State v. Wilcox*, 70 Ohio St. 2d 182, 199, 436 N.E.2d 523, 533 (1982).

182. *Gresham v. State*, 489 P.2d 1355, 1356-57 (Okla. Crim. App. 1971).

183. *Stamper v. Commonwealth*, 228 Va. 707, 715-17, 324 S.E.2d 682, 687-88 (1985).

184. *Steele v. State*, 97 Wis. 2d 72, 97-98, 294 N.W.2d 2, 13-14 (1980); *but Cf. State v. Repp*, 122 Wis. 2d 246, 362 N.W.2d 415 (1985); *State v. Flattum*, 122 Wis. 2d 282, 361 N.W.2d 705 (1985).

185. *Smith v. State*, 564 P.2d 1194, 1198-1200 (Wyo. 1977); *but Cf. Dean v. State*, 668 P.2d 639, 646-49 (Wyo. 1983) (Rose, J. concurring).

186. *Stamper*, 228 Va. at 716-17, 324 S.E.2d at 687-88.

187. ABA STANDARDS, *supra* note 34, at 313-14.

188. *Insanity Defense in Federal Courts*, *supra* note 52, at 209.

189. *See* I P. ROBINSON, *supra* note 11, § 64 at 277-78 n.13, 283-84.

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

191. *Brown v. Trigg*, 791 F.2d 598, 600-01 (7th Cir. 1986).

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

193. *Muench v. Israel*, 715 F.2d 1124 (7th Cir. 1983), *cert. denied*, 467 U.S. 1228

permissible under federal constitutional law to draw the line at the insanity defense and preclude admissibility of mental disorder evidence if it does not meet insanity defense requirements. The United States Supreme Court has denied certiorari in four of those cases which have had time to reach that court. Thus, the old Supreme Court opinion in *Fisher v. United States*,¹⁹⁴ still seems to be viable on the issue. Professor Ralph Reisner has summarized a number of cases which hold that it is constitutional to keep out such evidence.¹⁹⁵ The important point to consider is that, in spite of constitutional challenges, the United States Supreme Court has not ruled that it is unconstitutional to keep out mental disorder testimony and evidence which do not meet insanity defense requirements.

As noted earlier, some courts use the "all or nothing" approach.¹⁹⁶ Professor Morse, citing authorities, argues that if mental disorder evidence (including testimony of mental health professionals) is competent, probative, and relevant it should be admitted on the *mens rea* element, even if it does not meet insanity defense requirements.¹⁹⁷ He also recognizes that an exception could be made, precluding such evidence for powerful policy reasons, even though it is competent, probative, and relevant.¹⁹⁸ Nevertheless, with reference to the policy involving protection from danger to the community, for example, he argues that if there is strict adherence to what is admissible on the *mens rea* elements the "tiny number of defendants who might be fully acquitted and freed under an unlimited *mens rea* variant will not produce nearly enough danger to society to justify preventing all defendants from introducing evidence of their mental abnormality in attempting to defeat the prosecution's basic case."¹⁹⁹ Further, he says that states have involuntary civil commitment statutes which will help reduce such danger to the public.²⁰⁰

As indicated earlier, Professor Morse may be overly optimistic regarding how much some judges may limit the admissibility of evi-

(1984); *Campbell v. Wainwright*, 738 F.2d 1573, 1580-82 (11th Cir. 1984), *cert. denied*, 106 S. Ct. 1652 (1986).

194. *Fisher v. United States*, 328 U.S. 463 (1946) (holding that a refusal by a court to allow jury instructions relating to the personality of a defendant, in relation to intent, premeditation, and deliberation was a matter of local law, unless egregious error was committed).

195. R. REISNER, *supra* note 11, at 674-76.

196. *See, e.g., Stamper*, 228 Va. at 715-17, 324 S.E.2d at 687-88. *See also* A. GOLDSTEIN, *supra* note 9, at 191-94, 200-07. *Compare Morse, supra* note 66, at 9-13.

197. *Morse, supra* note 66, at 8, 10, 20.

198. *Id.* at 6 n.15, 8. *Cf. Muench v. Israel*, 715 F.2d 1124, 1134 (7th Cir. 1983), *cert. denied*, 467 U.S. 1228 (1984); *Wahrlich v. Arizona*, 479 F.2d 1137, 1138 (9th Cir. 1973), *cert. denied*, 414 U.S. 1011 (1973); *Bethea v. United States*, 365 A.2d 64, 88-89 (D.C. 1976), *cert. denied*, 433 U.S. 911 (1977).

199. *Id.* at 17.

200. *Id.* at 16-17.

dence under the *mens rea* variant.²⁰¹ His "tiny number" estimate may be too low. Courts should consider avoiding the "all or nothing" rhetoric and focus more on evidentiary and policy reasons for excluding mental disorder testimony and evidence below the insanity defense line. Courts using the "all or nothing" approach may seem to be saying that "the insanity defense is the only doctrine that considers nonresponsibility caused by mental abnormality."²⁰² However, some courts do a more comprehensive job of articulating the issues, focusing on evidentiary and policy reasons for drawing the line at the insanity defense.²⁰³ They emphasize that it is appropriate to draw the line at that particular point because mental disorder evidence may not be reliable, probative, or relevant when aimed below the insanity defense line. Also, there are arguments noted earlier that mental health professionals may not be competent under the legal rules of evidence to focus directly on *mens rea* since they have even less expertise on such matters than they have regarding the insanity defense.²⁰⁴

IX. CONCLUSION

Defendants will continue to avoid the insanity defense strait jacket by using the *mens rea* route. On the other hand, if legislatures, policymakers, courts, or others want to reduce use of mental disorders on the responsibility issue, they should study the jurisdictions where the line is drawn at the insanity defense. If this is done, however, careful attention should be given to the constitutional issues.

This article illustrates many of the areas causing fundamental problems between mental health professionals and the legal community regarding criminal law. Every effort should be made to clarify the issues rather than staying buried in the confusion that presently exists. Set forth below are some of the points that should be considered.

First, there should be more recognition by the public that tightening (or abolishing) the traditional *insanity defense* does not close the door on extensive use of mental disorder testimony and evidence on the responsibility issue in criminal cases. The *mens rea* route is still wide open.

201. See *supra* notes 67-82 and accompanying text.

202. Morse, *supra* note 66, at 7 n.19.

203. Muench v. Israel, 715 F.2d 1124 (7th Cir. 1983), *cert. denied*, 467 U.S. 1228 (1984).

204. Cf. *supra* notes 68-86 and accompanying text.

Second, with reference to the *mens rea* model, there should be wider recognition that it can be interpreted in either a strict *mens rea* or a diminished capacity *mens rea* manner. The question here is whether or not the ABA Standard 7-6.2 diminished capacity *mens rea* approach will prevail over the strict *mens rea* interpretation by Professors Morse and Arenella. Undoubtedly defense attorneys will press for diminished capacity *mens rea* (or one of its variations).

Third, Congress and the Justice Department should take another look at the 1984 Comprehensive Crime Control Act. Either the *mens rea* model is in that legislation or it is not. The analyses here, in the *Frisbee* opinion, and by Professor Robinson indicate that the *mens rea* model is in the legislation. If Congress and the Justice Department do not want it in there, action should be taken to close the loopholes.

Fourth, the potential effect of ABA Standard 7-6.2 should be spotlighted. What effect will it have on the California situation (i.e., Standard 7-6.2 versus the strict *mens rea* concept described by Professor Morse)? What effect will it have on the still existing *mens rea* model in the federal system, on the full *mens rea* model in Idaho, Montana, and Utah, and on variations of the *mens rea* model in other jurisdictions?

Fifth, there should be recognition that precluding expert opinions of mental health professionals on the ultimate issues involved in the *mens rea* elements will not fully resolve the problem. Ways will be found to continue to present confusing mental disorder testimony and evidence on the *mens rea* issues.

Sixth, this article demonstrates that the legal community is continuing to press mental health professionals into areas where they *concede* they are not experts. This shift of responsibility away from the law, to the mental health professionals, has been going on for many years. It may be futile to say so, but this trend should be reversed.

Finally, the public should be better educated on the issues. The confusion regarding labels and varying interpretations of concepts creates the opportunity for participants in the system to say one thing and mean something else. The public should realize that the *mens rea* model is alive and well in many jurisdictions. Thus, there continues to be ample opportunity for defendants to present evidence on the responsibility issue outside of the framework of traditional insanity defenses.