

Morality, Equality, and Expertise: Renegotiating the Relationship Between Psychiatry and the Criminal Law

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Not since the 1950s has there been such great ferment in the relationship between psychiatry and the criminal law. Hardly a day passes without some new declaration of wisdom by the bar, one of the mental health professions, or some legislative committee or task force. In the courts, issues concerning the admissibility and scope of opinion testimony by mental health professionals are being litigated with unprecedented frequency throughout the country. Indeed, the United States Supreme Court has issued opinions in more cases involving psychiatry and the criminal law during its last several terms than in all of its previous history.

On the surface it appears the current controversy centers on the proper scope of psychiatric expertise. We hear the standard complaints about the battle of the experts and the unreliability of clinical opinion. One is given the impression that psychiatrists have forced their way into the courtroom, displaying and selling opinions like so many pots and pans, and in so doing, have irredeemably compromised the search for justice.

I stand here as a defender of psychiatric participation in the criminal process. Administration of the penal law sometimes requires the resolution of questions that can be answered only by approximation. A person's mental condition at some time in the past cannot be reconstructed with confidence or precision. As I have said elsewhere, the law's reliance on mental health experts in these reconstructive inquiries has been "marked less by a faith in the scientific basis of the inquiry than by considerations of fairness and a vision of humane, enlightened justice."¹

This is not to say a claim of expertise should be credited simply because it is made by a psychiatrist or other mental health professional. Of course the law should be sensitive to the limits of professional understanding. But it should not ignore clinical perspectives on human behavior simply because they fall short of the physicist's understanding of the laws of motion.

It is ironic that whenever public attention is directed to the supposed deficiencies of psychiatric testimony, the criticism is trained on the experts rather than on the lawyers or the courts.

The bench and bar are ultimately responsible for improving the administration of justice. If judges and juries are confused or misled by expert testimony, this usually means there has been poor lawyering. If experts give conclusory testimony, encompassing so-called ultimate issues — and fail to explain the basis for

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their opinions — the fault lies with the bench and bar, not with the experts. If forensic evaluators do not have access to the same information and reach different opinions for this reason, the fault lies with the legal system, not with the experts.

This group has long been aware of tensions and ambiguities in the relationship between psychiatry and criminal justice. By and large, however, the bar has been indifferent to them. For this reason, I believe the ABA should be commended for undertaking the Criminal Justice-Mental Health Standards Project. A systematic effort to clarify roles and expectations is long overdue.

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This is all by way of preface. I called attention earlier to the currently unsettled nature of the relationship between psychiatry and the criminal law. It would be a mistake I think, to view the current controversy as a firestorm ignited by the *Hinckley* case. Instead, I'd like to emphasize the importance of two larger forces at work — retrenchment within psychiatry and an ideological shift in the law.

For the last decade or so, the psychiatric profession has been seeking a more scientific and less impressionistic approach toward diagnosis and treatment. Such a powerful intellectual influence is inevitably leading to a professional retrenchment regarding the scope of psychiatric expertise and the proper social roles of the psychiatrist. The profession's current self-doubt stands in marked contrast to the effusive optimism so characteristic of psychiatric pronouncements during the 1950s and 1960s.

Undoubtedly this retrenchment has been reinforced by several larger developments outside the profession. One is the pervasive emphasis on accountability that has touched virtually every institution in contemporary American society. Few forces are more likely to generate professional humility than the prospect of being held to account for one's mistakes or of being asked to document one's successes.

Another important influence on the shape of the current controversy is a discernible shift in the prevailing ideology of criminal justice. Thirty years ago, the "rehabilitative ideal" was in full bloom, and "punishment" was often seen as a necessary evil rather than a coherent philosophy of justice. Even the word "punishment" was customarily eschewed in favor of the more benign terms, "treatment" or "disposition." Meanwhile, concepts of criminal responsibility were being loosened to accommodate moral doubts about the desirability of punishment and to increase the likelihood of supposedly therapeutic dispositions.

Today, retributivist ideology has won renewed respect among intellectuals. Rehabilitation is now seen as a faint hope, no longer as a creed. Rights of offenders have taken a back seat to rights of victims and to the right of the public to be protected from crime. This is not merely a shift in political currents; I believe we have witnessed a major reorientation of the governing ideology of punishment in American society, one that will remain dominant for the foreseeable future.

One important feature of this ideological shift is a reinvigoration of the moral basis of punishment. This shows most clearly in the fact that the death penalty

now has respectable intellectual support. In his book, *For Capital Punishment*, Walter Berns argues that capital punishment is morally right regardless of whether it reduces crime. He argues that the punishment of death, like all punishment, rests on moral indignation — as he puts it — on anger, the “passion that recognizes and cares about justice.” One hears, in Berns, the echo of Sir James Fitzjames Stephen who said that punishment is to the moral sentiment of the community “what a seal is to hot wax.”

Abolitionists have argued that imposition of the death penalty is an act of “unsurpassable moral arrogance” because it denies the value of the offender’s life and treats him as a means rather than an end in himself. Berns argues, in response, that the death penalty actually affirms the moral dignity of the offender by holding him to account as a responsible being and by demonstrating that mere survival is not the moral purpose of living; as he puts it, the universe is not benignly indifferent to *how* human life is lived.

Although I do not believe Berns has made a convincing case for the punishment of death, his insistence on the moral necessity of punishment does seem to me to reflect the moral intuition of the general public. Even more significantly, the retributive view of punishment is prominently defended in the modern academic literature in philosophy and law.

The renewal of retributivist ideology has important implications for the doctrines of criminal responsibility. For many centuries, the law has accepted the principle that punishment should *not* be imposed on those who are blameless and should not be excessive or disproportionate to the *degree* of blameworthiness — that is, retribution has long been viewed as a principle that *limits* punishment. However, the ideology endorsed by Berns views retribution as a *justification* for punishment: under this view those who *are* blameworthy *ought* to be punished, and ought to be punished in a manner commensurate with the seriousness of the offense.

The revival of retributivism already has had a discernible impact on the controversy surrounding the insanity defense. Thirty years ago, to use the *Durham* era as a marker, it seems the primary consideration was avoiding conviction (and occasionally execution) of the blameless; since these were the “moral mistakes” to be avoided, the tendency was to facilitate a broader and more flexible inquiry on criminal responsibility. With the renewed emphasis on the moral necessity of punishing the blameworthy, one also sees renewed attention to the risk of another type of “moral mistake” — the failure to punish those who *ought* to be punished notwithstanding their psychopathology.

I emphasize that I am describing an ideological shift, not endorsing it. Nor is the ideological trend necessarily predicated on the accuracy of any empirical proposition. If I am right, this trend is important on its own terms — regardless of the actual frequency of such mistakes and regardless of the fact that persons acquitted by reason of insanity are not, in some sense, escaping punishment.

This shift in the prevailing ideology of criminal justice, together with the retrenchment within psychiatry, explains why the relationship between psychiatry and the criminal law has become unsettled in recent years. In the space of a

generation it seems, we have passed from a world in which the law was tentative about the moral wisdom of punishment while psychiatry was confident about the utility of clinical expertise, to one where there is more moral conviction and less expertise.

If these observations are at all accurate, it seems to me inescapable that one should expect some renegotiation of the relationship between psychiatry and the criminal law — not necessarily a revolutionary change, but at least a change in emphasis.



It always should be remembered that the role of the expert in the criminal process is derivative. A defendant's psychological functioning is relevant to the adjudication of his liability or the severity of his punishment only if the law chooses to *individualize* the criteria of exculpation or mitigation (or aggravation). If the law were to refrain from individualizing the inquiry, claims based on the defendant's actual mental or emotional processes would be irrelevant, and there would be no place for mental health professionals in the courtroom. Thus, the underlying substantive issue in any dispute about clinical expertise is usually whether the law *ought to* individualize the criteria of exculpation or mitigation, and, if so, what the criteria should be.

These judgments should be influenced by current clinical understanding — that is, by the scope of expertise — but they ultimately do not depend on such an assessment. In some contexts, an individualized inquiry may be morally indispensable regardless of how little we know; consideration of claims of diminished responsibility in capital sentencing proceedings represents the polar case in point. As Justice Stewart put it, the law must take account of the “diverse frailties of humankind” as “an indispensable part of the process of inflicting the penalty of death.”² In other contexts, however, individualized inquiry is eschewed, notwithstanding available clinical insight, because of the overriding importance of equality in the administration of the law.

The latter point is well illustrated by the insanity defense. I believe the insanity defense should be narrowed. But I do not base the argument on the proposition that clinicians don't know anything about volition. To the contrary, if I thought the volitional inquiry to be morally necessary, I would be reluctant to abandon it solely because of imperfect clinical expertise. However, I believe the inquiry is *not* morally necessary and compromises equal administration of the law.

I would raise a similar objection to the Supreme Court's recent decision in *Barefoot v. Estelle*.³ This decision was erroneous because the Court overlooked the critical importance of reliability in the proof of an essential predicate for a death sentence — in this case, a finding of future dangerousness was prerequisite to the imposition of a death sentence under Texas law. The underlying problem in *Barefoot* was the question being asked; the imposition of a death sentence simply should not turn on speculation regarding the likelihood that the defendant, who will probably spend most, if not all, of his remaining years in confinement, will be a danger to society. I should add that the case for the dangerousness inquiry

would not be strengthened even if psychiatrists could make such predictions more reliably than they now can. The problem runs much deeper than clinical expertise.

The law governing capital sentencing epitomizes the tension between equality and individualization in the administration of the penal law. The criteria that define the class of offenders punishable by death should be framed with precision and administered with maximum attention to the ideal of equality. However, once an offender is included within the death-eligible class, he is entitled to individualized consideration of his claims in mitigation.

Criminal sentencing traditionally has been based on a philosophy of individualization. Judges usually have had wide discretion and have been expected to take into account the various goals of punishment and to tailor the particular sentence to the offender as well as his offense. In recent years, however, concerns have been raised about the disparities in sentences received by what appear to be similarly situated offenders convicted of similar offenses. To the extent that states try to eliminate disparity by establishing determinate, "act-oriented" sentences, individualization is being abandoned and there will be a reduced role for clinical opinion during the sentencing process. However, most of the contemporary reform statutes do not take such a rigid approach; instead, these statutes "structure" the exercise of sentencing discretion by normative criteria that establish presumptive sentences and specify mitigating and aggravating circumstances justifying a departure from such a sentence. Quite often, the statutes include criteria of diminished responsibility among the mitigating circumstances. They also may include predictive criteria regarding the likelihood of recidivism. One of the inevitable consequences of these reforms has been to reaffirm, and perhaps increase, the use of clinical opinion in the sentencing process.

The role of mental disorder and clinical opinion under the new generation of sentencing statutes requires systematic attention that I am unable to give here.⁴ For present purposes, I merely want to emphasize that the clinicians' role will be derivative: it will depend on the degree to which the sentencing criteria remain individualized and on the degree to which application of these criteria can be reliably aided by opinions within the specialized knowledge of psychiatrists and other mental health professionals.



Having called your attention to the tension between individualization and equality in the administration of criminal justice, I now want to emphasize the dominant, though not unqualified, influence of equality in the shape of the exculpatory doctrines of the penal law. I do so as a necessary prelude for several observations on the insanity defense.

We begin with the proposition that the imposition of criminal liability, with the attendant stigma of a criminal conviction, ordinarily should be predicated on a determination that the offender can fairly be blamed for his offending conduct. A corollary of this proposition is the principle of proportionality — the severity of the punishment imposed should not exceed that which is justly deserved in rela-

tion to the offender's degree of blameworthiness. This is retributivism as a limiting principle. So far, so good. But what are the proper criteria for assessing blameworthiness? How much should this determination be individualized?

One could take the view that the offender's character and moral worth are on trial in every criminal case. Accordingly, it might be said, each defendant should be judged on his own terms, taking into account his motives, his weaknesses, and the myriad influences that influenced or constrained his choices to engage in the offending conduct. If the assessment of blameworthiness were wholly individualized, each defendant would be permitted to put his bare moral claim before the "collective conscience of the community"; the jury would be instructed, in so many words, to acquit the defendant if he could not justly be blamed for his conduct. Upon conviction, the nature and severity of punishment would be determined, whether by a judge or a jury, in rough proportion to the defendant's *personal* blameworthiness.

You will not be surprised, of course, when I say that our system does *not* proceed on such a view. Instead, the assessment of blameworthiness is disciplined by the rule of law. A criminal trial is not the occasion for judging the moral worth of the defendant; ultimate verdicts of this sort are left to whoever is sitting in divine judgment of us all. The law of man rests on the more determinate inquiries embodied in the specific proscriptions of the penal code. The imposition of criminal liability does not require a determination that the defendant was evil but only that he consciously undertook actions that violated the penal law.

Conditioning the imposition of criminal liability upon an undisciplined assessment of personal blameworthiness would have two undesirable consequences. First, it would make the determination of liability in any given case ultimately dependent, at best, on the moral intuitions of the judge or jury sitting in that case — and, at worst, upon their biases and prejudices. Second, such unfettered discretion to acquit would undermine the preventive functions of the penal law. If the penal law is designed, as it ought to be, to establish the minimum requirements for socially acceptable conduct, these norms should be uniformly applied, and decisions to withhold a criminal conviction should be predicated on objectifiable and determinate criteria. The structure of Anglo-American penal law embodies a strong commitment to the rule of law and to the ideal of equality in the adjudication of criminal liability.

The strength of this commitment is nicely illustrated by the proposition that criminal liability does not require proof of an evil motive and is not erased by demonstration of a "good motive." Consider, for example, the conviction, a decade ago, of antiwar activists who broke into the offices of the Selective Service System and spilled blood on draft records⁵ or, in current times, of those who obstruct public passageways or trespass on property belonging to abortion clinics or nuclear power plants.⁶ In such cases, it might be said the defendants' motives are praiseworthy and, whether or not we endorse their views, the law ought to take into account their claims that they felt compelled by conscience and a belief in a higher law to act as they did. However, the law does not regard such conscientious beliefs as justification for conduct; otherwise enforcement of the law

would be contingent on whether an offender agrees with it. Nor does the law recognize "compulsion of conscience" as an excuse. These defendants are *not* entitled to put their moral claims before the jury. They are *not* entitled to an instruction that they should be acquitted if the jury regards their conduct as praiseworthy or finds them blameless; *nor* are they entitled to advise the jury of its power to nullify the law.⁷ The severity of their punishment may take their motives into account, but the imposition of criminal liability does not.

Now consider the case of a 19-year-old woman who kills her abusive father, not because she was, or claimed to be, in imminent danger of death or bodily harm at her father's hands, but rather because she wanted to end the climate of fear, hatred, and turmoil occasioned by his persistently violent and cruel behavior.⁸ I'm certain we would all have great sympathy for this young woman; perhaps it could even be said that her father got what he deserved. Yet, I'm sure we also recognize such a killing is not justified in the absence of a reasonably apparent need to protect oneself or others from death or serious bodily harm. The law does not entitle this defendant to an individualized assessment of her personal blameworthiness or her moral worth.

Consider, finally, the recurring cases of euthanasia. I recall, for example, the anguishing case of a 23-year-old New Jersey man whose older brother had been paralyzed from the neck down after a motorcycle accident.⁹ The defendant apparently walked into the hospital and asked his brother if he was in pain, and his brother nodded he was. Then according to the defendant: "I went to him and I said 'Well, I'm here today to end your pain. Is that all right with you?' He nodded yes, and the next I knew I had shot him." Again, one cannot help but feel extraordinary sympathy for the defendant. Yet, Anglo-American law has never regarded mercy killing as justifiable homicide, although the matter has not been free of moral controversy.

Of course, the law could open a door to exculpation in these cases by taking explicit account of the extraordinary pressures and circumstances that can compromise or overwhelm an otherwise law-abiding person's capacity to behave lawfully; in short, the law could recognize a general defense of situational compulsion or excuse. Whether the law should recognize such a defense is itself a difficult question that I will set to one side. Under the law, as it now stands, there is no such defense, and the defendant's liability does not turn on an individualized inquiry into his blameworthiness. To promote the longstanding social and legal judgment that it is wrong to kill under the circumstances presented in these two cases, the law requires conviction and leaves the exercise of compassion to the sentencing process.

A sensible argument can be made, of course, that the prevailing law reflects an undue fidelity to the value of equality. You might believe the law ought to permit an individualized moral inquiry that, as Dr. Halpern has put it, "unclosets the conscience of the jury."¹⁰ This is an issue that can be debated on its own terms. However, for present purposes, I emphasize that the law does not allow any of these cases to be submitted to the jury in a search for an individualized moral judgment. In theory at least, if the defendant's claim does not implicate a

recognized doctrine of justification (such as self-defense) or excuse (such as duress), the courts are expected to apply the law and thereby assure its general application.

You might be wondering what all of this has to do with you. The answer is that any claim based on mental abnormality, by definition, represents an effort to individualize the determination of blameworthiness. A defendant who wants the law to take into account his psychopathology or his unusual frailties and vulnerabilities is asking to be judged on his own terms. I want to demonstrate, however, that the doctrines of the penal law reflect a relatively coherent policy of rejecting the effort to individualize criteria of criminal liability in this manner. Instead, the law usually takes the defendant's abnormal characteristics into account only in determining the *grade* of the offense and the *severity* of the punishment.

Consider, for example, the case of a person charged with rape who claims he mistakenly believed the woman was a prostitute consenting to his advances. I want you to assume the woman was not, in fact, consenting and that a normal person would have known this. However, the defendant claims that, due to social and intellectual immaturity and to lack of sexual experience, he misunderstood the victim's actions; he says that he interpreted her pleas and her physical resistance as precursors to the act of intercourse. In technical terms, the defendant is claiming he did not actually "intend" to engage in intercourse by force and he therefore did not have the "*mens rea*" or state of mind required for conviction of rape; or to put it the way the issue would have been posed at common law, he is claiming he made a mistake of fact as to whether she was consenting.

What is the significance of his mistake and by what criteria will his blameworthiness be judged? At common law the answer was perfectly straightforward: in the absence of an insanity defense — let us assume that his disabilities are not so profound or pronounced as to meet the criteria for the insanity defense — his mistake would be ignored. He would be entitled to exculpation only if his mistake was a reasonable one — which is to say his blameworthiness, and hence his criminal liability, would be determined according to what the ordinary person would have believed under these circumstances. But the whole point is that the defendant is *not* an ordinary person. He is claiming he should be judged with reference to what he believed, not what an ordinary person would have believed. At common law, he would be convicted despite his claim that he was personally blameless.

Under the modern criminal codes, based on the Model Penal Code, the criterion would be a bit more subjective in theory although probably not much different in practice. Under the Model Penal Code, the defendant would be acquitted only if his mistake was not a reckless one; under this formulation, he would be guilty if he was aware of the risk that she might not be consenting, and if by acting nonetheless, he acted in a way that constituted a "gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation." Thus, so long as the defendant had even a glimmering awareness of the possibility that the victim was resisting, he would be judged not on his own terms but rather on the basis of an external standard. At common law, then, his actual

belief would be irrelevant, while under the Model Penal Code his belief is relevant though not dispositive on the question of his guilt.

Consider also an illustration drawn from the law of self-defense.¹¹ The 18-year-old defendant was employed as a bartender at a tavern. A patron complained about the price of drinks, claiming that the defendant was overcharging, and then hit the bar with his fist, saying "I will come back there and take my drink." As he did so, the defendant took a pistol from behind the cash register and warned the patron not to come any further. The patron then replied "That gun don't scare me" and entered the area behind the bar. The two men slowly walked toward each other until they met. The patron then nudged the defendant with his elbow, and the defendant stepped back, discharging the gun.

Obviously, on the facts, the defendant was not actually in imminent danger of a fatal assault. One can be reasonably confident that an ordinary person would not have believed himself in such danger and would not have reacted in panic as the defendant did. However, the defendant testified that he was bewildered when the patron said he was coming behind the bar, and that when the patron said the gun wouldn't stop him, he became afraid. Feeling himself in mortal danger, he reacted instinctively. As you might suspect, expert testimony was offered in support of his claim, indicating the defendant was "an emotionally unstable, immature individual whose thinking is often childish" and who "can become confused and almost disorganized with pressure."

The case involves a claim of mistaken self-defense. Is the defendant to be judged on his own terms, in light of his peculiar susceptibilities and infirmities? The traditional answer is "no," and this remains true under the modern codes. The traditional understanding was explained by Professor Beale, in 1903:¹²

The question is not generally held to be, was the apprehension reasonable in such a man as the defendant, but was it such fear as a reasonable man would have felt under the circumstances; and therefore the jury cannot consider the peculiarities of the defendant, as that he was a coward, or of immature judgment, or of a nervous temperament..."

Finally, let me give one other example. Under the defense of duress, a person is excused if his criminal act was committed in response to a threat by another to the defendant's own life and safety or that of a loved one. Obviously, the defense is not proved simply by showing that the defendant was fearful and succumbed to the intimidation; if this were enough, cowardice would be a defense. Instead, exculpation is conditioned on a determination that "a person of reasonable firmness in the defendant's situation would have been unable to resist." Thus, we see another context where the law does not assess the defendant's blameworthiness on his own terms but rather predicates liability on the failure to conform to the standards of the ordinary person.

These cases illustrate two basic points. First, the *mens rea* inquiries of the penal law do *not* involve individualized assessments of personal blameworthiness. I emphasize this because many forensic clinicians are in the habit of using the term "*mens rea*" as the functional equivalent of the requirement of blameworthiness in the criminal law, a meaning that seems to conform to the Latin

origins of the term (guilty mind). However, it is important to use the term in its precise meaning to refer to the specific mental elements in the definition of criminal offenses. As the examples demonstrate, *mens rea* in its modern usage usually refers only to various aspects of conscious awareness and occasionally to conscious intention. However, it does *not* have any qualitative dimension and does not encompass motivation or subtleties of thought and feeling. The exclusive focus on conscious perceptions and beliefs, often qualified by the requirement of reasonableness, enhances predictability, precision, and equality in the administration of the penal law and also avoids a debilitating individualization of the standards of criminal liability.

These cases also illustrate a related point. The law's reluctance to individualize the standards of liability serves the preventive goals of the penal law. Oliver Wendell Holmes was a determined spokesman for the need for external standards of criminal liability. In *The Common Law*, published in 1881, Holmes asserted that liability to punishment cannot be "absolutely determined" by considering "the actual personal unworthiness" of the criminal. "If punishment stood on [this] ground" he said, "the first thing to be considered would be those limitations in the capacity for choosing rightly which arise from abnormal instincts, want of education, lack of intelligence and all the other defects" that may be associated with criminality. He continued:¹³

When we are dealing with that part of the law which aims more directly than any other at establishing standards of conduct, we should expect there, more than elsewhere, to find that the tests of liability are external, and independent of the degree of evil in the particular person's motives or intentions. The conclusion follows directly from the nature of the standard to which conformity is required. These are not only external, but they are of general application. They do not merely require that every man should get as near as he can to the best conduct possible for him. They require him at his own peril to come up to a certain height. They take no account of incapacities, unless the weakness is so marked as to fall into the well-known exceptions, such as infancy or madness. They assume that every man is as able as every other to behave as they command.

Although the standards of criminal liability are probably somewhat more subjective today than Holmes thought they were a century ago, I hope I have demonstrated that the spirit of his argument still pervades the penal law. This is why the law has maintained an objective standard in claims of self-defense and duress, for example, and also in the doctrine of provocation in the law of homicide. It explains why most courts have strongly resisted proposals to adopt doctrines of diminished responsibility in the grading structure of the penal law and have taken such claims into account only at the sentencing phase where individualization traditionally has been the prevailing ideology.



This brings me to the insanity defense. Note that even Holmes acknowledged the moral legitimacy of the well-known exceptions of "infancy and madness." Since the exception for infancy has now been rendered obsolete by the creation of a separate system of juvenile justice, the insanity defense represents the only

individualized excuse that completely erases criminal liability. It is only in this limited context that blameworthiness is assessed entirely in the defendant's own terms.

Whether the defense is maintained should depend on whether a failure to do so would tear the law too far from widely shared moral beliefs and on whether the defense can be framed and administered in a way that does not unduly compromise the overriding value of equality in the penal law. Because debates about the insanity defense tend to focus on considerations of relative blameworthiness, the paramount importance of equality in the definition of the exculpatory doctrines of the criminal law is often overlooked.

It must not be forgotten, however, that the defense does represent an *exception* to the most fundamental ideological postulate of the criminal law — the assumption that we are all capable of free choice and therefore deserve to be punished if we choose to do wrong. As my earlier comments indicated, the defense also represents an exception to the general applicability of the proscriptions of the penal code; it sacrifices the principle of equality to the perceived moral imperative of individualization. It should go without saying that an exception to two such fundamental propositions — the postulate of free will and the principle of equality — should be narrowly circumscribed if it is to be recognized at all.

The legal criteria establishing the exculpatory significance of mental disorder must accomplish two goals. First, the criteria must be framed to take adequate account of the morally significant effects of severe mental illness. My view is that the *mens rea* approach advocated by Professor Morris¹⁴ and Dr. Halpern,¹⁵ among others, is morally insufficient because it does not take adequate account of delusional motivation or the severe impairment of insight and judgment so manifestly demonstrable in cases of psychotic deterioration. Because the mental elements of criminal offenses focus only on conscious awareness, the exculpatory effect of the *mens rea* approach would technically be limited to gross perceptual incapacities. Yet such cases — of persons squeezing necks when they think they are squeezing lemons or shooting people when they think they are shooting trees — simply do not exist.

Professor Morris has argued that an exculpatory criterion that focuses on the defendant's ability to know or appreciate the wrongfulness of his behavior constitutes a "false or arbitrary classification." I do not agree. This criterion is necessary to take into account what I believe to be the morally significant effects of major mental disorder. Indeed, I think a scheme that limits the exculpatory significance of psychotic deterioration to *mens rea* represents a morally underinclusive (hence "false and arbitrary") classification.

Second, an exculpatory doctrine of insanity should be framed in a way that minimizes the risk of fabrication, abuse, and moral mistake; it should effectively preclude the use of the defense when it is *not* morally appropriate. This is necessary to preserve general application of the penal law and, in retributivist thinking, to assure that the guilty are punished. I believe the volitional test of insanity unduly broadens the defense and increases the risk of confusion, inequality, and moral mistake.

At bottom, my argument is predicated on a moral assertion; I believe a criterion that focuses on the defendant's appreciation of the wrongfulness of his behavior is both necessary and sufficient to encompass the universe of morally appropriate cases. Obviously I rely on my own personal moral judgment, one shaped by my own understanding of the purposes of the insanity defense and by my own experience in a forensic setting.

I realize some clinicians believe the appreciation test is *not* morally sufficient to encompass some cases of demonstrably severe psychotic deterioration, especially in cases involving major affective disorders. However, I have carefully considered every clinical situation brought to my attention, and I remain convinced that the concept of appreciation is a suitable device for framing the moral inquiry if it is given the meaning I envision and that was envisioned by the framers of the Model Penal Code.

"Appreciation" is *not* limited to superficial awareness of legal prohibitions or prevailing social morality. Instead, the concept is meant to have an affective dimension and to take into account the distortions of insight and judgment that dilute or attenuate the psychotic person's *understanding* of the external significance of his actions. In all such cases, the exculpatory claim is predicated on the same clinical realities: the person is so detached from the external world that he views the significance of his conduct solely, or primarily, through the prism of his own distorted intrapsychic processes; and there is a corresponding loss of ability to recognize and identify with the interests of others in the way that would be expected to illuminate the conduct's wrongfulness and thus operate to deter it.

It can be seen that the concept of appreciation is designed to invite expert testimony on all of the clinical dimensions of the psychotic person's condition, including impairments of the person's behavior controls. I recognize there are often discernible volitional correlates associated with psychotic disorders and such persons sometimes exhibit "loss of control" or constricted behavioral choices. I am not arguing that these observations are irrelevant or that they should be ignored in expert testimony; indeed, a test of insanity should be partly designed to facilitate presentation of the full clinical picture. However, I am arguing that any psychotic person whose volition was substantially impaired can also be said to have been unable to "appreciate" the wrongfulness of his or her conduct. As applied to psychotic deterioration, a separate volitional criterion is superfluous.

Yet, some may say, what is the harm of posing the criteria separately? Isn't "loss of control" morally significant on its own? Also, isn't it possible that judges or juries will give the concept of appreciation a purely cognitive meaning despite my insistence to the contrary?

These points are not without force, and I would have no major objection to retention of the volitional inquiry if it were available *only* in cases involving psychotic disorders. However, I believe the real dangers of the volitional inquiry arise when the test is combined with a broad definition of mental disease, as it has been under the Model Penal Code. Under these circumstances, the problems with the volitional test are virtually identical to those that plagued the *Durham* experi-

ment: unstructured clinical speculation regarding the "causes" of the behavior of every defendant who can be said to have any diagnosable abnormality, including impulse disorders and personality disorders.

It is noteworthy that examples usually given in support of the volitional prong of the defense are not cases of psychosis. The example usually given in the drafting of the Model Penal Code was kleptomania. Indeed, the most compelling cases for such a criterion from a clinical standpoint are the impulse disorders. Yet my own moral judgment (which I suspect is representative of a commonly shared judgment among laymen) is that exculpation is not warranted in such cases.

I want it understood I am not denying that some individuals whose reality testing is intact have pathologically compromised behavior controls. Nor do I deny that clinicians may offer insights that can contribute to judicial understanding of such behavior. However, I do not believe such individuals ought to be relieved of criminal liability; instead their claims of diminished responsibility should have an important place in the sentencing process, especially in capital cases.

Even if I were to assume, for purposes of argument, that a nonpsychotic person's behavior controls may be so pathologically impaired that criminal punishment would be unjust, I would still be inclined toward elimination of the volitional test. This would be one of those instances where an abstract commitment to the moral relevance of an exculpatory claim must yield to the need for reliability in the administration of the law.

The price of administering the volitional inquiry is simply too high because there is no objectifiable basis for applying the test. As I have said elsewhere, there is no way to calibrate the degree of impairment of behavior controls.¹⁶ Moreover, the volitional test maximizes psychiatric disagreement, a view elaborated in the APA's statement on the insanity defense.¹⁷ In the absence of an objectifiable basis for making the inquiry, the litigation of the volitional test degenerates into individualized moral guesses. I recognize that judges and juries will reject the defendant's claim in most cases. However, if the judge or jury is otherwise sympathetic to the defendant, the possibility arises that the claim will be accepted in morally inappropriate cases; there is a discernible risk of moral mistake at the margins.

Those who favor abolition of the insanity defense in favor of the *mens rea* inquiry have argued that the administration of the knowledge or appreciation test is subject to a similar criticism. I simply do not agree. An inquiry focusing on the defendant's knowledge or appreciation of the wrongfulness of his behavior has a point of reference in the defendant's actual thoughts and feelings and demands a more-or-less direct link between his conduct and the psychopathology. The jury is expected to decide whether the defendant's grasp of reality was distorted and, if so, how these distortions relate to those feelings and insights that normally can be expected to illuminate the wrongfulness of the person's conduct. In contrast, the volitional inquiry is altogether rudderless, lacking any objectifiable point of reference.

I admit the appreciation inquiry involves some risk of mistake because it requires more subtle moral judgments than those required in the adjudication of

mens rea issues. However, I do not believe the risk of confusion and moral mistake is unacceptably high in this limited context. The imprecision of the inquiry and the speculation inherent in its proof must be tolerated in deference to the moral imperative of individualization in the imposition of criminal punishment.



I want to make one final point about the insanity defense. At the outset, I emphasized the pervasive importance of the ideal of equality in shaping the exculpatory doctrines of the penal law. The defendant is not entitled to invite the jury's individualized moral judgment regarding his blameworthiness. I pointed out, for example, that *mens rea* is defined technically to refer to specific conscious states of awareness and is often qualified by an external or objective standard. In addition, the doctrines of justification and excuse are narrowly defined and are structured by relatively precise normative criteria. Specifically, the law does not recognize a general principle of situational excuse to take into account the external pressures and circumstances that can compromise or overwhelm an otherwise law-abiding person's capacity to conform his conduct to the law.

In practice, the insanity defense has sometimes functioned as a safety valve — and an instrument of nullification — for legally unrecognized claims of “situational excuse.” Let me remind you of two cases I mentioned earlier: one involving a young woman who killed her abusive father and another involving a young man who shot his severely injured brother, in mercy, to put him out of his pain. Neither defendant was mentally ill, and in neither case was there any clinical basis for an insanity defense. Yet, in each case, the insanity defense was successfully invoked as the vehicle for nullifying the law. Everyone here also is aware of the occasional case in which a policeman panicked and fired his gun under circumstances in which it was not legally justified and subsequently raised the insanity defense — again as a means of nullification.

I am of two minds about this phenomenon. On the one hand, these cases can be deployed as exhibits in the case for abolition. If the existing law of justification and excuse is regarded as a definitive statement of the community morality, insanity acquittals in these cases clearly represent “moral mistakes” in the administration of the law. On the other hand, these aberrational cases may illustrate an inevitable feature of any system governed by rules; some safety valve will be found to nullify the law when it pinches too tightly. If not the insanity defense, some other way will be found.

In any event, I do not think these aberrant cases should bear on the debate about the insanity defense. If one believes, as Dr. Halpern does, that the law ought to “uncloset the conscience of the jury” in such cases, the task is to formulate a principle of situational excuse that is properly structured to frame the moral inquiry without opening the door to wholesale individualization of the standards of criminal liability. However, such a doctrine should not be regarded as an alternative to the insanity defense. Principles of situational excuse are designed to make allowance for abnormal situations, not abnormal persons, and the inquiry should focus on the external realities of the situation with which the defendant

was confronted. The insanity defense focuses, in contrast, on the abnormal person and deals with the clinical realities of major mental illness (or profound retardation). Its moral basis should be assessed on its own terms.

Let me close by emphasizing my central point: The *relevance* of expert clinical opinion in the criminal law depends less on clinical understanding (on expertise) than on the normative structure of the law. Ultimately, the significance of evidence of psychological aberration depends on a sensitive resolution of the moral tension between the demands of equality and individualization. The insanity defense, for example, cannot be fully understood unless the doctrine is seen alongside the other exculpatory doctrines of the penal law. And the shape of this uniquely individualized defense should take into account the overriding importance of equality in the adjudication of criminal liability.

Let me also emphasize that the *admissibility* of relevant clinical opinion raises an altogether separate question. When clinical opinion is relevant to issues of mental condition raised by the defendant in a criminal case, the law ought to facilitate the presentation of expert testimony, not obstruct it or curtail it. It is true, of course, that the operating assumptions underlying psychiatric testimony have not been scientifically verified and that clinical opinions may be unreliable; but an honest and realistic appraisal of expert assistance would not lead us to expect scientific precision or certainty. The case for admissibility is not based on any supposed analogy between mental health testimony and scientific evidence.

The case for psychiatric assistance on the reconstructive inquiries in the penal law rests squarely on notions of fairness. Notwithstanding the views of Professor Morse,¹⁸ the administration of the criminal process reflects a decided tilt in favor of the defendant. Ordinarily, for example, the prosecution bears the burden of proving the factual bases of liability beyond a reasonable doubt. However, whenever the law chooses to accord exculpatory or mitigating significance to a defendant's claim of abnormal mental or emotional functioning, the defendant bears a *de facto* burden of demonstrating to a naturally skeptical fact-finder the plausibility of his claim. Under such circumstances it would be unfair to preclude the defendant from offering relevant opinion testimony by properly qualified experts whose professional training and experience encompass mental disorder and the psychology of aberrant behavior.

It seems especially absurd to preclude the expert from giving an opinion about his diagnosis of the defendant so long as the existence of a "mental disease or defect" establishes a threshold for tests of criminal responsibility. The "mental disease" criterion reflects the settled understanding that the exculpatory doctrine of insanity is restricted to impairments arising from psychopathology; the law, in effect, is rooted in a medical model. It is true, of course, that diagnostic testimony may be confusing or even misleading; but its relevance cannot be denied. This is not to say that expert testimony should be permitted on whether the defendant's condition constitutes a "mental disease," a concept that ought to be given a legal meaning. But use of diagnostic nomenclature should not be barred.

Questions will remain, of course, regarding the proper boundaries of expert testimony, and resolution of these questions demands attention to the weight of opinion within the discipline regarding the legitimacy of the particular claim of expertise. Nonetheless, notwithstanding the major differences in theoretical orientation that now befuddle the clinical disciplines, the law should err on the side of admissibility when the defendant proffers otherwise relevant and admissible expert testimony in support of a claim that he lacked the mental state required for conviction or in support of a legally recognized individualized claim in exculpation or mitigation. The door should be open to clinical expertise not because it offers definitive answers, but because it will help illuminate individualized inquiries that the law, as a matter of justice, has chosen to undertake.

References

1. Bonnie R and Slobogin C, The role of mental health professionals in the criminal process: The case for informed speculation, 66 Va L Rev 427, 430 (1980)
2. Woodson v. North Carolina, 428 U.S. 280, 304 (1976) (plurality opinion of Stewart, Powell and Stevens, J.J.)
3. _____ U.S. _____, 103 S. Ct. 3383 (1983)
4. Professor Norval Morris has provided the first systematic treatment of the significance of mental disorder in the sentencing process in *Madness and the Criminal Law* 129-209 (1982)
5. See *United States v. Moylan*, 417 F.2d 1002 (4th Cir. 1969), *cert denied* 397 U.S. 910 (1970)
6. See, e.g., *State v. Warshow*, 138 Vt. 22, 410 A.2d 1000 (1979)
7. See *United States v. Moylan*, 417 F.2d 1002 (4th Cir. 1969). The opposing view, favoring explicit instructions on nullification, was articulated by Judge Bazelon in *United States v. Dougherty*, 473 F.2d 1113 (D.C. Cir. 1972). On this issue, as on many others, Judge Bazelon stands virtually alone.
8. This was an actual case litigated in Lynchburg, Virginia in 1982
9. *Washington Post*, November 6, 1973, at A-3
10. See Halpern A, Uncloseting the conscience of the jury — A justly acquitted doctrine. 52 *Psychiat Quart* 144 (1980)
11. This illustration is based on *State v. Bess*, 53 N.J. 10 247 A.2d 669 (1968)
12. Beale J: *Homicide in self-defense*, 3 *Colum L Rev* 526, 528 (1903)
13. Holmes OW Jr.: *The Common Law* 45, 50-51 (1881)
14. Morris N: *Madness and the Criminal Law* 53-87 (1982)
15. Halpern A: *The fiction of legal insanity and the misuse of psychiatry*. 2 *J Legal Med* 18 (1980)
16. Bonnie R: *The moral basis of the insanity defense*. 69 *ABAJ* 194, 196 (1983)
17. American Psychiatric Association: *Statement on the insanity defense*, 140 *Am J Psychiatry* 6 (1983)
18. Morse S: *Failed explanations and criminal responsibility*. 68 *Va L Rev* 971, 972-83 (1982) □