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Subnormal Mentality As a Defense in the Criminal Law

John E. V. Pieski*

What attitude ought the law to take toward the effect of feeble-mindedness on the capacity to commit crime? Mr. Pieski addresses his article to this question, and reaches the following conclusions: first, a series of presumptions similar to the common law presumptions favoring children should be constructed for a defendant who has proved his subnormality; second, the doctrines of diminished responsibility and partial insanity should be either adopted or more effectively applied.

I. INTRODUCTION

There was a period in the history of American criminal law scholarship when it was fashionable to attribute virtually all criminality to mental abnormality and subnormality. The fad was touched off by the work of an Italian criminal anthropologist, Cesare Lombroso, who formulated a theory of criminality based entirely upon biological criteria.¹ Lombroso saw in the criminal a biological throwback to the primitive man, in both body and mind.² The theory of imputing criminality to mental defectiveness, thus inspired by Lombroso's ideas, reached a peak at the time of the First World War,³ continued during the Roaring Twenties,⁴ and then

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1. See BARNES, *THE REPRESSION OF CRIME* (1926); see also McCORD, McCORD & ZOLA, *ORIGINS OF CRIME* 64 (1959): "Spurred by . . . Lombroso's opinions concerning the 'born criminal,' they contended that no man of intelligence could look on crime as a legitimate way of life; thus *ipso facto*, criminality derived from stupidity." Rousseau had previously contended that society causes criminality. See SHEEN, *PEACE OF SOUL* ch. vii, n. 8 (1949).

2. "He held that the typical criminal was characterized by certain definite physical stigmata, such as, among many others, a low slanting forehead, long ear lobes or none at all, a large jaw with no chin, heavy supraorbital ridges and either excessive hairiness of the body or an abnormal absence of hair." BARNES, *op. cit. supra* note 1, at 22.

3. Cook, *The Innocent Criminal*, 7 *SOUTHERN MEDICAL J.* 717 (1914), concluded that 20% of all crimes are due to a hereditary disposition to feeble-mindedness. Another author found 40% of the one hundred inmates he studied feeble-minded. Fernald, *Practical Applications of Psychology to the Problems of a Clearing House*, 7 *J. CRIM. L., C. & P.S.* 722 (1917). Peyton noted that many prisoners have mental defects, and in the vast majority there is a distinct lack of development of the mental function.

gradually declined until the present day, when only sporadic remnants

Peyton, *Some Essentials of Constructive Criminology*, 8 J. CRIM. L., C. & P.S. 911 (1918).

The proposals of that time were drastic, and often dangerous. E.g., "[L]et us not think of killing our criminals, or studying how to punish them or even emasculating them. Let us have government supervision of the health of our young population and crime will disappear. Let us turn our jails and penitentiaries into schools and hospitals." Davis, *The Psychology of Crime and the Stigmata of Degeneration*, 19 CASE & COM. 820, 826 (1913).

Some of the early scholars believed that criminality was inherited through germ plasm, and this obviously led to proposals advocating sterilization. See, e.g., Parsins, *The Prophylaxis of Criminality*, 44 AMERICAN PRACTITIONER & NEWS 348 (1910); Foster, *Hereditary Criminality and Its Certain Cure*, 22 PEARSON'S MAGAZINE 565 (1909); Boagart, *Assexualization of the Unfit*, 1910 MEDICAL HERALD 298. With the development of vasectomy, the surgical method of assexualization, the voices grew louder. With time the concept of inherited criminality, demonstrated to be fallacious, fell into well deserved disrepute, but the theory that certain types of mental defects are inherited became prominent. Compulsory sterilization of the unfit naturally was then advocated. See, e.g., Smith, *Marriage, Sterilization and Commitment Laws Aimed at Decreasing Mental Deficiency*, 5 J. CRIM. L., C. & P.S. 364 (1914); Hunter, *Sterilization of Criminals*, 5 J. CRIM. L., C. & P.S. 514 (1914) (which may be construed as advocating such measures); Richmond, *Sterilization in Wisconsin*, 25 J. CRIM. L., C. & P.S. 586 (1935) (which espouses the cause of sterilization and segregation). The feeble-minded were sterilized in some jurisdictions, and the practice was subsequently held constitutional by Mr. Justice Holmes in the United States Supreme Court decision, *Buck v. Bell*, 274 U.S. 200 (1927), although some scholars, (e.g., Boston, *A Protest Against Laws Authorizing the Sterilization of Criminals and Imbeciles*, 4 J. CRIM. L., C. & P.S. 326 (1913)) at the time considered sterilization unwise because of a lack of adequate scientific knowledge. Two of the main problems are: (a) which mental diseases, if any, are hereditary, and (b) whether the particular person is so affected. Today, compulsory sterilization is criticized by many, and there is even some new question as to its constitutionality. See O'Hara & Sanks, *Eugenic Sterilization*, 45 GEO. L.J. 20 (1956). Of course, there is a morality factor here which cannot be overlooked if our law is to have a moral basis. It is unwise to make expediency or usefulness a sole criterion for law. It is not always expedient to have rights, but it is folly to sacrifice them. These sterilization laws are unsound.

4. "[T]he criminal, in the very restricted meaning of the word as used by the psychiatrist, is either born without capacity to develop the social instinct and the moral sense, or has lost them by disease . . ." Burr, *Crime From a Psychiatrist's Point of View*, 16 J. CRIM. L., C. & P.S. 519, 536 (1926). Erickson on one occasion found a definite relation between crime and deficiency of intelligence. In particular, 30% of the delinquents he studied were found to be mentally deficient or feeble-minded, whereas in the general population the percentage is 15-60 times smaller. But he found little relation between the degree of intelligence and either recidivism or the gravity of the offense. Erickson, *Study of the Relationship Between Intelligence and Crime*, 19 J. CRIM. L., C. & P.S. 592 (1929). In another experiment he concluded "that over 50% of the criminal classes are married and tend, despite the prevalence of disrupted marriages, to reproduce themselves to the same extent as our leading intellectual classes and are an indisputable ill to society." Erickson, *Marriage and Propagation Among Criminals*, 46 MEDICO-LEGAL J. 25, 30 (1929). (At the outset of his article, though, he said that "marriage has long been recognized as a significant stabilizing influence in individual and social life.") See note 3 *supra*. Anderson determined that 50% of the juveniles he studied were afflicted with some form of mental or nervous condition. Anderson, *Medical and Psychopathic Approach to the Delinquent Problem*, 12 J. CRIM. L., C. & P.S. 404 (1922). A few years earlier he found only 73% of the 350 cases he studied normal. Some of his findings in that

are to be found.⁵ The most influential work in causing the theory's rejection was that of Michael and Adler, *Crime, Law, and the Social Science*, published in 1933.⁶

study are: mental defectives 31½%; constitutional psychopaths 24½%; subnormal 20½%; dementia praecox 3½%; epilepsy 3½%. Anderson, *A Comparative Study of Feeble-mindedness Among Offenders in Court*, 8 J. CRIM. L., C. & P.S. 428 (1917). In one of his many speeches Clarence Darrow told the audience that "the principal thing to remember is that we are all the products of heredity and environment . . . we have little or no control, as individuals, over ourselves . . ." Darrow, *What To Do About Crime*, 6 NEB. L.B. 117, 133 (1926). He further stated: "You almost never find an educated man in prison." *Id.* at 125. By scholarly standards the article is a farce. In answer to his proposition, a question can be raised: Why do we not sit back and let heredity and environment stop crime for us, for if it controls us, what can we do? Furthermore, can a "mass" act or is it made up of individuals? (And of course, logically, the less intelligent are less adept at evading the police.)

As during the prior decade, there were dangerous proposals during the twenties. There should be a "gradual transformation of prisons into laboratories for the study of human behavior and the conditioning of human conduct." White, *Need for Cooperation Between Lawyers and Psychiatrists in Dealing with Crime*, 13 A.B.A.J. 551, 555 (1927). Certain deformed persons and idiots should be put to death, said Slumaker, *Those Unfit To Live*, 29 LAW NOTES 165 (1925). See also Burr, *Crime From a Psychiatrist's Point of View*, 16 J. CRIM. L., C. & P.S. 519, 536 (1926).

5. "I am convinced that many persons make their first appearance in the criminal court because of some mental defect or disorder, which, if scientifically detected, may be properly treated and corrected. . . . Sex crimes invariably result from some mental aberration." Ruth, *A Proposed Scientific Approach to the Crime Problem*, 60 DICK. L. REV. 85 (1958).

6. See also, e.g., Bromberg & Thompson, *Relation of Psychosis, Mental Defect and Personality Types to Crime*, 28 J. CRIM. L., C. & P.S. 70, 87-88 (1937): "Psychiatric studies conducted on approximately 10,000 convicted offenders in the Psychiatric Guild of the Court of General Sessions reveal that Mental Defectiveness and Insane (Psychotic) offenders constitute a small proportion of the whole (2.4% and 1.5% respectively). . . . Our studies contrast with the results quoted by investigators particularly a decade or two ago, in that we find a low percentage of individuals who evidence mental abnormality. . . . 82% comprise the so-called normal or average group, and it is these that constitute the essential problem of criminology . . . a shift in accent The concepts of anthropological reservation, insanity, mental defect and psychopathic personality have claimed less attention than that of personality of the offender." Even before Michael and Adler's work it was said that "it may be critically maintained that not one single generalization has been formulated on the basis of fact in terms of which the tendency to commit certain crimes can be predicated or the conditions generating them controlled. . . . How poverty, feeble-mindedness, psychopathic personality, juvenile delinquency, etc., are related to crime has never been proven. All that is known is that these factors are sometimes in some way related to some crimes." Cantor, *The Search for the Causes of Crime*, 22 J. CRIM. L., C. & P.S. 854, 863 (1932). (Some italics omitted.) See also another article by Cantor, *Law and the Social Sciences*, 16 A.B.A.J. 385 (1930) where he advocates the application of experimental methods of natural science to the study of human behavior in a sane manner.

In FRYER, HENRY & SPARKS, *GENERAL PSYCHOLOGY* 243-44 (1954) it is stated that the main criticisms of the research are that the studies were based on inmates of institutions, and (1) it seems likely that a greater percentage of the less intelligent offenders are apprehended, and (2) only a portion of those apprehended are incarcerated and thus afford an experimental group which is definitely a biased sample.

A recent English book, WOOTTON, *SOCIAL SCIENCE AND SOCIAL PATHOLOGY* (1959),

Although little is left of the theory which ascribed to mental deficiency causative force in criminal conduct, the entire episode taught at least two valuable lessons to modern criminologists. First, it served as a warning against superficial research and hasty conclusions, thus inducing subsequent scholars to take a more scientific approach to similar problems. Second, it aided in alerting others that, although not all or even most criminals are mentally deficient, there are an appreciable number of criminals who possess a subnormal mentality, and who must be reckoned with in the criminal law.

Notwithstanding that the legal profession has utilized the first lesson, it has not benefited appreciably from the second. To this day, the question of what attitude the law should take toward the effect of feeble-mindedness on capacity to commit crime has been largely neglected. This article attempts to suggest a first step towards the solution of the problem.

II. THE MEANING OF SUBNORMAL MENTALITY

The term "subnormal mentality" has been utilized by the courts as synonymous with "feeble-minded," "weak-minded," "subnormal mental age," "stupid," and "mentally deficient."⁷ Webster defines subnormal mentality as intelligence below the range of the normal.⁸ Intelligence, in turn, is defined as the capacity for knowing and understanding, or the faculty of understanding.

The standard method of determining intelligence is the Stanford Revision of the Binet-Simon Tests. The tests are based primarily on a mental age (M.A.) concept. If a child, for example, can perform tasks which the average 10-year-old can accomplish, he is given an M.A. of ten, regardless of his chronological age (C.A.). Psychologists interpret this as meaning that the subject has the mental ability of a 10-year-old.

Terman, following in the footsteps of Stern who originated the notion of "mental quotient," then developed the concept of "intelligence quotient" (I.Q.). The I.Q. is determined by multiplying 100 times the quotient of

is an excellent criticism of the American research in much the same vein. See also 2 AMERICAN HANDBOOK OF PSYCHIATRY 1289-90 (1957).

7. An annotation of a generation ago stated that "the courts have rarely used the modern term 'subnormal mentality', or compared chronological with mental age, but have referred to the accused as 'stupid', 'weak-minded' and the like." Annot., 44 A.L.R. 586 (1926). Anderson, in a more recent work, 1 WHARTON, CRIMINAL LAW AND PROCEDURE § 41 (12th ed. 1957) has adopted the statement verbatim (incidentally, without acknowledgment). However accurate the statement may have been thirty years ago, today the courts frequently *do* use the term "subnormal mentality."

8. WEBSTER, NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE (2d ed. 1955). "Normal" is defined, for psychological purposes, as "(a) of or indicating average intelligence or development; free from mental defect. (b) free from mental disorder, not insane or neurotic." However, see note 35 *infra* and accompanying text.

the M.A. divided by the C.A. (I.Q. = $100 \times \text{M.A.}/\text{C.A.}$). If the C.A. and M.A. are identical, the I.Q. is 100. In practice, however, the range of 91-100 is considered normal or average. The following classification is used in grouping I.Q. less than 91: 81-90, low normal; 71-80, borderline; 51-70, moron; 26-50, imbecile; and 0-25, idiot.⁹

At the inauguration of the tests the C.A. for persons above sixteen was so stabilized at sixteen, that this was the figure used as the divisor in the formula for all persons sixteen or over.¹⁰ Later psychologists, taking cognizance of the fact that there is a leveling off of the M.A. at sixteen (while the C.A. continues to increase,) decided that the C.A. must be "corrected" in order to ascertain a more accurate I.Q. The formula for this correction is rather complex, and in 1937 Terman and Merrill constructed a table for facilitating the determination of the corrected C.A.¹¹

The modern tests use both verbal and performance items.¹² There are both group tests and individual tests, the latter being superior.

It has been noted that there are many defects in the tests. They fail to tell us much about such factors as native ability, competency in planning, etc.¹³ Likewise, feigning or fright are elements which may affect the validity of the tests.¹⁴ Moreover, since "the Stanford Binet I.Q. for adults is not so reliable as it is for younger individuals . . . the practice of using the I.Q. as an indicator of adult intelligence is seriously questioned by many psychologists."¹⁵ The Gower's Commission stated that the I.Q. is a

9. See CRUZE, *GENERAL PSYCHOLOGY FOR COLLEGE STUDENTS* ch. 15 (1951); TERMAN, *THE MEASUREMENT OF INTELLIGENCE* 79 (1916). There are slight variations, seemingly dependent only on the fact that a different person is writing the report. See also, *e.g.*, *THE NEW YORK STATE STATISTICAL MANUAL FOR INSTITUTIONAL USE* (1941); HILGARD, *INTRODUCTION TO PSYCHOLOGY* ch. 18 (2d ed. 1957); GUTTMACHER & WEIHOFFEN, *PSYCHIATRY AND LAW* 178 (1952). The former also notes that all persons with an I.Q. below 70 are mentally defective. The latter, in addition, distinguishes between high grade and low grade morons. CRONBACH, *ESSENTIALS OF PSYCHOLOGICAL TESTING* 123 (1949), warns that these groupings are not "rigid pigeonholes." Usually psychologists allow for an error of five points in either direction. WICKENS & MEYER, *PSYCHOLOGY* 292 (1955).

The tests were originally formulated in order to determine whether school children failed because of a lack of ability or lack of motivation.

10. BARNES, *THE NEW HISTORY AND THE SOCIAL STUDIES* 151 (1925).

11. ROCH, *PSYCHOLOGY AND LIFE* 88 (4th ed. 1953).

12. HILGARD, *op. cit. supra* note 9. The Wechsler Intelligence Tests for children separate these items.

13. Meagher, *Crime and Insanity: A Discussion of Some Modern Radical Theories*, 16 *J. CRIM. L., C. & P.S.* 360 (1925).

14. Bronner, *A Research in the Proportion of Mental Defectives Among Delinquents*, 5 *J. CRIM. L., C. & P.S.* 561 (1914).

15. CRUZE, *op. cit. supra* note 9, at 315. "Because the Stanford-Binet was standardized on a group whose highest age was 18, it is by no means the ideal test for adults." HILGARD, *op. cit. supra* note 9, at 438. It has also been stated that the results of the test must be looked at as no more than a "measure of the performance of the standard population." WICKENS & MEYER, *op. cit. supra* note 9, at 310.

more valid guide for lower than for higher ranges of intelligence.¹⁶

Although my discussion has dealt with the psychological classification of mental deficiency, there are two other major classifications: (a) clinical and (b) etiological. A differentiation between physiological and pathological mental deficiency is made in the latter category.

It must also be stressed that other factors are of significance in the diagnosis of mental deficiency, such as general behavior, emotional attainment, emotional maturity, personality traits and educational attainment. In such clinical diagnosis tests as the Vineland Social Maturity Scale various projective techniques are important but basically the clinical judgment of the trained psychiatrist is determinative. Anamnestic data has been said to be of particular importance in the standard medical methodology here.¹⁷

III. LACKING CAPACITY AS A DEFENSE

For purposes of substantive criminal law and this article, capacity may be defined as the factual mental ability of an individual to be criminally responsible. The common law rule for determining whether a person has such capacity was formulated by the House of Lords in the so-called "*M'Naghten's case*," in 1843.¹⁸

16. GOWER'S COMMISSION, ROYAL COMMISSION ON CAPITAL PUNISHMENT, cmmd. 169, ¶¶ 190, 192, 339, 349, 350 (1953). See Edwards, *Diminished Responsibility—A Withering Away of the Concept of Criminal Responsibility?*, in *ESSAYS IN CRIMINAL SCIENCE* 301 (Mueller ed. 1961).

17. See AMERICAN HANDBOOK OF PSYCHIATRY 1290-93 (Jervis 1959).

18. 10 Clark & F. 200, 210, 8 Eng. Rep. 718, 722 (H.L. 1843). This is basically the majority American standard; there are of course a myriad of rules in the United States. *E.g.*, (a) The *Durham* rule, *Durham v. United States*, 214 F.2d 862 (D.C. Cir. 1954) (see notes 31, 62 *infra* and accompanying text) now adopted in Maine (ME. REV. STAT. ANN. c. 149, §§ 38A-38B (Supp. 1961)) and substantially in the Virgin Islands (V.I.C. § 14(4) (1957)); (b) The American Law Institute Model Code rule adopted in Illinois (ILL. CRIM. CODE § 6-2 (1961)) (see *United States v. Cain*, 30 U.S.L. WEEK 2360 (7th Cir. Jan. 25, 1962)) commenting on the Illinois test and noting that the rule it applied was substantially the same) and in Vermont, with some modification (VT. STATE ANN. tit. 13, § 4801 (1959)) (see text accompanying note 63 *infra*); (c) *United States v. Currens*, 290 F.2d 751, 775 (1961); (d) the New Hampshire rule (see Reid, *Understanding the New Hampshire Doctrine of Criminal Insanity*, 69 YALE L.J. 367 (1960); see also WEIHOFEN, *MENTAL DISORDER AS A CRIMINAL DEFENSE* 113 (1954)) (there is some debate as to whether *Durham* and New Hampshire are identical); (e) Wisconsin utilizes only the right and wrong portion of *M'Naghten* (see *Kwosek v. State*, 8 Wis. 2d 640, 100 N.W. 2d 339 (1960)); (f) Washington apparently necessitates a negation of *both* (1) nature and quality and (2) right and wrong—so the court benefits the defendant by using only one prong. (*State v. Collins*, 314 P.2d 660, 666 (Wash. 1959). *But see* note 68 *infra*.) Oklahoma's test is *at least* so poorly worded that it amounts to the same illogical rule. See *Revard v. State*, 332 P.2d 967 (Okla. Crim. App. 1958).

The majority American rule states that "wrong" means *either* morally or legally wrong (see *State v. DiPaolo*, 34 N.J. 279, 168 A.2d 401 (1961)) as opposed to merely legally wrong (see *State v. Andrews*, 357 P.2d 739 (Kan. 1960)).

The original *delusional* test in *M'Naghten* has been rarely referred to in American

[T]o establish a defense on the ground of insanity,¹⁹ it must be clearly²⁰ proved that, at the time of the committing of the act,²¹ the party accused was labouring under such a defect of reason,²² from disease of the mind, as not to know the nature and quality of the act he was doing;²³ or, if he did know it, that he did not know he was doing what was wrong.²⁴

Although it probably is true that "a man who does not know what he is doing is in no position to distinguish between right and wrong in reference to the happening which he does not understand, although he might know what he is doing without being able to distinguish between right and wrong as to such act,"²⁵ it is important to include both elements in the test. If a person does not know the nature and quality of his act there is no *actus reus* (no meaningful rational human conduct), and one need

cases. See *People v. Schmidt*, 216 N.Y. 234, 110 N.E. 945 (1915); *People v. Taylor*, 138 N.Y. 398, 34 N.E. 275 (1893) (discussing a "mistake of fact" test also).

There are also many variations to the *M'Naghten* rule, including the "irresistible impulse" appendage. See *Parsons v. State*, 81 Ala. 577, 2 So. 854 (1887). See notes 22, 23 *infra* for other variations. Research indicates a much greater diversity than is commonly considered to be the situation, but all of these facets cannot be explored to any great detail in this article (*e.g.*, note the variations of the "disease" portion of the rule, *infra* note 41).

19. "*Insanity*" . . . has no technical meaning either in law or in medicine, and it is used by courts and legislators indiscriminately to convey either of two meanings: (1) any type or degree of mental defect or disease, or (2) such a degree of mental defect or disease as to entail legal consequences (*i.e.* . . . to avoid a contract or relieve from responsibility for crime)." WEIHOFEN, *INSANITY AS A DEFENSE IN CRIMINAL LAW* 11-12 (1933); WEIHOFEN, *MENTAL DISORDER AS A CRIMINAL DEFENSE* 5 (1954). Insanity, as used in this paper, refers to the legal insanity which relieves a person from responsibility for crime.

20. See note 78 *infra*.

21. In this paper, the discussion of capacity refers to the state of mind of the criminal at the time of the perpetration of the act *only*, unless otherwise indicated, in distinction to other related matters, as fitness to proceed. Use of fitness to proceed concepts could, though, solve many subnormal mentality problems. WHARTON, *op. cit. supra* note 7, § 39 indicates that some courts speak of capacity "in respect to the act charged," and others in the abstract or general. These are probably oversights.

22. See *Holloway v. United States*, 148 F.2d 665, 666-67 (D.C. Cir. 1945), *cert. denied*, 334 U.S. 852 (1948): "This sense of justice assumes that there is a faculty called reason which is separate and apart from instinct emotion, and impulse, that enables an individual to distinguish between right and wrong and endows him with moral responsibility for his acts. . . . To punish a man who lacks the power to reason is as undignified and unworthy as punishing an inanimate object or an animal. A man who cannot reason cannot be subjected to blame. Our collective conscience does not allow punishment where it cannot impose blame." This case was pre-*Durham*. See note 18 *supra*. Hall states that "*M'Naghten* is the test of reason. To be insane, to be psychotic, means to be irrational." Hall, *Mental Disease and Criminal Responsibility*, 33 *IND. L.J.* 212, 213 (1958).

23. An addition of "or consequences" is made in some states. See, *e.g.*, *Commonwealth v. Stewart*, 255 Mass. 9, 151 N.E. 74 (1926). Another variation is to utilize "character" instead of "quality."

24. This clause has been referred to as the "right and wrong test." See note 18 *supra*. The word "know" should be broadly interpreted.

25. PERKINS, *CRIMINAL LAW* 749 (1957).

not be concerned with the latter part of the test which relates to *mens rea*. Where there is no rational human conduct there is no crime.²⁶ In deciding that a horse has not committed a crime by knocking over a cart we need only reason that it did not—could not—engage in the requisite rational (human!) conduct, and in such case we need never concern ourselves with the question of *mens rea*.

The *M'Naghten* test, by accomodating both *actus reus* and *mens rea*, is in harmony with the four justifications for punishment:²⁷ (a) retribution or a "sense of justice"—punishing only the person who has done wrong knowingly;²⁸ (b) reformation, resocialization, or rehabilitation—attempting to improve a mind theretofore inclined toward wrongdoing;²⁹ (c) deterrence—attempting to sway a mind inclined toward wrongdoing prior to perpetration of the proposed wrong;³⁰ neutralization or restraint—limiting a person's freedom for the period during which the mind is still inclined toward wrongdoing.³¹

26. Professor Mueller tells us of *actus reus*: "Just as the law can neither command mountains to move, nor birds to stop flying, it cannot command the behavior of human beings who are incapable of perceiving sensory data, ranging from the perception of one's own existence to the reception of sensory stimuli of whatever sort, and including the capacity to direct one's own volition. This restricts the law's regulatory functions to the prescription or proscription of conduct." He explains that *actus* means conduct and *reus* that the conduct is legally prohibited. Mueller, *Criminal Theory: An Appraisal of Jerome Hall's Studies in Jurisprudence and Criminal Theory*, 34 IND. L.J. 206, 218-19 (1959).

27. See HALL, GENERAL PRINCIPLES OF CRIMINAL LAW (2d ed. 1960) where, in chapter 9 ("Sanction-Punishment"), he discusses in detail various justifications of punishment.

28. It is not "just" to punish a man who has no *actus reus* or *mens rea*. In this respect, it is essential to remember that retribution is not identical with vengeance, which cannot be considered a valid ground for punishment by humans although the two concepts are at times used indiscriminately. See BARKER, PRINCIPLES OF SOCIAL AND POLITICAL THEORY 182-83 (1951), where the author seems to equate retribution with retaliation with vengeance. He gives a very interesting but questionable discussion of retribution. *E.g.*, "It is the mental rule of the law which pays back a violation of itself by a violent return, much as the natural rules of health pay back a violation of themselves by a violent return. The *lex talionis* does not mean that the person or body of persons you hurt shall hurt you in return; it seems that the order you disturb will disturb you in order to restore itself." He makes reference to SAINT AUGUSTINE, DE CIVITATE DEI bk. XIX, c. xiii. Professor Barker relates a fine discourse on the conception of justice, looking at it as the reconciler and the synthesis of the values liberty, equality, and fraternity or cooperation. *Id.* at 97-183, especially 102. On that page he quotes Aristotle as saying that justice is: "What answers to the whole of goodness . . . being the exercise of goodness as a whole . . . toward one's neighbor." ETHICS, bk. V, c. ii, § 10, (1130 b. 18-19). *We must, of course, realize that only God can be completely just, and do complete justice.*

29. See notes 30, 31 *infra*.

30. "If it is desirable conduct we are trying to stimulate by criminal law, our courts are obviously right in excluding, as non-responsible, those unable to respond rationally to the stimulus of the threat of punishment." Mueller, *Criminal Law and Procedure*, 1959 ANNUAL SURVEY OF AMERICAN LAW 111, 112 (1960).

31. In respect to capacity we must ask whether or not the state of incapacity will continue, and whether it is best for the individual and the society that he be restrained

IV. DISEASE AND SUBNORMAL MENTALITY

In order to accommodate subnormal mentality within the framework of the *M'Naghten* test, two problems must be resolved:

- (a) Is subnormal mentality a disease?
- (b) How will subnormal mentality affect a person's knowledge of the nature and quality of an act and his knowledge of the wrongfulness of his act?

There is no universally recognized majority definition of the term "disease," legally, psychologically, or psychiatrically. In the famous—or infamous—*Durham v. United States*, the court said: "We use 'disease' in the sense of a condition which is considered capable of either improving or deteriorating. We use 'defect' in the sense of a condition which is not considered capable of either improving or deteriorating and which may be either congenital, or the result of injury, or the residual effect of a physical or mental disease."³² The same court a few years later said that "mental 'disease' means mental illness."³³ Professor Perkins states that "disease as so used will be interpreted to include congenital defect or traumatic injury."³⁴ Professor Jerome Hall informs us that a "disease is said to be an abnormal condition, and if one therefore seeks the meaning of 'normal,' *i.e.*, the condition or standard by reference to which 'disease' must be defined, one encounters the greatest diversity imaginable."³⁵

Consequently, one must seek to discover what particular conditions have thus far been included within the generic term disease, rather than at-

and treated in an asylum or "punished" in a penal institution, not forgetting that penal institutions must be designed to "correct" the individual. A great harm to the individual and society may occur if a person is wrongly sent to a mental institution. As a New York court said in referring to Byron's "Prisoner of Chillon": "Constant association with imbeciles, and suffering from the personal behavior associated with many of them, doubtless tend, in the normal, following Byron's thought, to crush the 'Eternal spirit of the chainless mind', and to 'destroy the mysterious balance between mind and matter,' and to force the normal to grow like them, otherwise to impose on the prisoner a loneliness among his fellows akin to solitary confinement, 'a fixedness without a place.'" *People ex rel Cirrone v. Hoffmann*, 255 App. Div. 404, 8 N.Y.S.2d 83, 86 (1938).

32. *Durham v. United States*, 214 F.2d 862, 875 (D.C. Cir. 1954). The test "is simply that an accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect." *Id.* at 874-75. *Quaere*: What, then, is not a disease or defect? Furthermore, with scientific development and the possibility that many previously permanent conditions can to some extent be alleviated, it may become a complex problem to determine what conditions are capable of improving or deteriorating.

33. *Carter v. United States*, 252 F.2d 608, 617 (D.C. Cir. 1956).

34. PERKINS, *op. cit. supra* note 25, at 747. (Emphasis omitted.)

35. HALL, *op. cit. supra* note 27, at 450. Hall cites Szacz, *A Contribution to the Philosophy of Medicine*, 97 A.M.A. ARCH. INT. MED. 5 (1956): "[T]he notions of 'normal,' 'abnormal,' 'symptom,' 'disease,' and the like are social conventions." *Id.* at 451 n.7.

tempt to formulate an all-inclusive definition.

It appears that from the viewpoint of psychologists and psychiatrists subnormal mentality is not a disease. Mental abnormality is usually associated with "insanity" and disease, while mental subnormality is considered as mental deficiency—a condition of mental dwarfness in which the mentality simply never developed fully.³⁶ But there is no universal agreement on the point among the writers, and although the professions have tried to be exact in their use of terms—a characteristic essential to any scholarly endeavor—this very particularity has led to confusion.³⁷

The problem is actually more subtle and complicated than has heretofore been inferred by myself or recognized by the law, the term disease rarely being used by the contemporary medical profession. There is both pathological and physiological (a clinical subculture) mental deficiency, the latter being a nebulous part of psychiatry. Mental deficiency may be due to dominant gene, single recessive gene, undetermined genetic mechanisms, infections, trauma, endocrine disturbances, psychosis, and other causes (*e.g.*, toxic mental defect which may be due to endogenous or exogenous toxic agents, etc.). Deprivation (cultural special disabilities of school-children, etc.) has also been considered a "cause" but this mental deficiency is more apparent than real and has been called pseudo feeble-mindedness.³⁸

Nonetheless, the overwhelming majority of cases treat "subnormal mentality" *as if it were* a disease. But though the cases so treat the condition for purposes of determining legal insanity, the point is rarely specifically mentioned, and this author has not found a single case which adequately explains why it is done, or manifests that the court is consciously so doing. However, there are reasons why this is, and should be the law.

The first main reason why the law is such is that the courts often gloss over the problem of what type of disease a defendant is alleged to be afflicted with. There are no special rules (except perhaps in rare cases in minority states) for different types of "diseases."³⁹

36. See Lewis, *Mental Deficiency and Criminal Behavior*, in MENTAL ABNORMALITY AND CRIME—INTRODUCTORY ESSAYS 96-103 (1944). See also Berliner, *Some Aspects of Mental Abnormality in Relation to Crime*, 46 J. CRIM. L., C. & P.S. 67 (1955).

37. See WILLIAMS, CRIMINAL LAW 447 (2d ed.): "Subnormality . . . is a congenital defect, whereas insanity in the narrow sense manifests itself later in life. In the year 1843, when M'Naghten's case was decided, the words 'mental deficiency' were not used, the accepted expression then being 'imbecility' . . . medically regarded as a form of insanity . . . [N]o doubt it was intended to be included in M'Naghten . . ."

38. AMERICAN HANDBOOK OF PSYCHIATRY 1293-313 (Jervis 1959).

39. See WHARTON, *op. cit. supra* note 7. However, one must not rely heavily on his citations. For example, he cites *People v. Hector*, 104 Cal. App. 2d 392, 231 P.2d 916 (Dist. Ct. App. 1951) in support of the general proposition, but actually the case is authority for the exception (a special procedure had to be followed because the accused was allegedly a sexual psychopath). *Commonwealth v. Neill*, 362 Pa. 507, 67 A.2d 276 (1949), which he also cites, is an illustration of the normal practice of

Secondly, at an early stage of our historical development a lack of scientific development definitely obscured the picture as to what was and what was not a mental disease, and some courts thought of feeble-mindedness as a disease.⁴⁰ In consequence of that, with time, no one bothered to note that the picture was obscured.

A third reason is that the American jurisdictions are either consciously or unconsciously using variations of the term. The Australian case of *King v. Porter* has commendably used the terms, disease, disorder, disturbance or derangement of the mind.⁴¹

This third reason seems to represent the most appropriate and logical trend. In the opinion of this writer the important point is whether the defendant was *capable of—i.e.*, had the capacity of—knowing the nature, character, or consequences of his act, and/or discerning the wrongfulness of his conduct.⁴² The crucial question is: "Are the functions of understanding . . . through some cause, whether understandable or not, thrown into derangement or disorder [?]"⁴³ "The test of the law in all cases is,

the courts. Also note the cases cited in Mueller, *Criminal Law and Procedure*, 1959 ANNUAL SURVEY OF AMERICAN LAW 111, 113, where the defendants were afflicted with schizophrenia, pyromania, and St. Vitus Dance.

40. See *Parsons v. State*, 81 Ala. 577, 2 So. 854 (1887).

41. 55 Commw. L.R. 182 (Austl. High Ct. 1933), as reproduced in HALL, *CASES ON CRIMINAL LAW AND PROCEDURE* 596-99 (1949). In *Davis v. United States*, 160 U.S. 469 (1896) (and see *Davis v. United States*, 165 U.S. 373 (1897)) the court approved the charge used "such as insane condition of mind" instead of "disease" for *M'Naghten* and "disease or other cause over which he had no control" in the irresistible impulse portion. See *United States v. Smith*, 5 U.S.C.M.A. 314 (1954) and relevant manual citations therein utilizing "mental defect, disease, or derangement." Variations are most common in many American cases.

42. In the *Porter* case the court states: "Mere excitability of a normal man, passion, or even stupidity, obtuseness, lack of self-control and impulsiveness, are quite different things from what I have attempted to describe as a state of disease or disorder or mental disturbance arising from some infirmity, temporary or of long standing. If that existed it must have been of such a character as to prevent him from knowing the physical nature of the act he was doing or of knowing that what he was doing was wrong." HALL, *op. cit. supra* note 41, at 597.

It is the opinion of this author that *M'Naghten* is basically a sound test, embodying accurate principles first conceived in ancient Biblical and Grecian thought. Nevertheless, the term "disease" perhaps had a different meaning in the pre-twentieth century world and the *Porter* rule is a valid "expansion," or, *clarification* of the *M'Naghten* test. There are, of course, other improvements possible, such as diminished responsibility, reduced grade of the offence, and a more specific negation of the element of the crime standard. See *People v. Colavecchio*, 11 App. Div. 161, 202 N.Y.S.2d 119 (1960) for a discussion of negation of *animus furandi* in larceny.

43. See Mueller, *The Failure of Concepts of Criminal Theory in Judging the Psychopathic Offender?*, 4 ARCHIVES OF CRIMINAL PSYCHODYNAMICS 10-11 (1960): "The defendant must be capable of appreciating the stimulus (cognition) [of a sanction—a counter deprivation] in all its ramifications, capable of the complete process of relating this appreciation to the proposed conduct (relation) and capable of directing his efforts accordingly (volition). A human mind disintegrated by psychosis or organic mental disorders, severely disturbed by neurosis or behavioral disorders or underdeveloped by reason of congenital mental defect or infancy, may not thus be capable

Did the accused, as applied to the act in question, have the mental capacity to understand the character, consequences, and quality of such act, and successfully to resist the impulse to do it?"⁴⁴ "It has become a maxim of the law that in cases where insanity is relied upon as a defense, 'Every act of the party's life is relevant to the issue.'⁴⁵ Indeed, psychiatrists find the meaning of the term "disease" perplexing and shy away from its use.

Another justification for fitting mental subnormality into the *M'Naghten* rule is that, even though not a "disease" itself, it may well be the result of a disease, and the *effect* of subnormal mentality is the same whether or not it is caused by a disease. "Whether due to morbid heredity or toxic effects upon the spermatozoa or traumatic injuries suffered by the brain during the process of birth,—the psychic content of the imbecile mind invariably evinces a lack of perception, and ideation, and an almost complete inability of forming abstract conceptions."⁴⁶

In this respect, it is interesting to note that over two hundred years ago subnormal mentality was looked at purely from the vantage point of its effects, and not from the view of its cause. In 1739 Fitzherbert defined an idiot as follows:

Such a person who cannot account or number twenty pence, nor can tell who was his father or mother, nor how old he is, etc. so as it may appear that he hath no understanding of reason what shall be for his profit, or what for his loss: but if he hath such understanding, that he know and understand his letters, and read by teaching or information of another man, then it seemeth he is not a . . . natural idiot.⁴⁷

. . . crime can only be committed by persons possessed of rational minds" BRASOL, *ELEMENTS OF CRIME* 345 (1927) notes: "It will be recalled that according to the author's conception of crime, the act must be a prohibited and punishable deed, constituting a willful attempt *against the social order*. This means that in perpetrating an offense, the actor must be aware of: (a) what the social order is, (b) the relation between the act which he is about to commit and the social order, and (c) the penal effect of the transgression

"Now, there are many modes of insanity in which these elements of cognition are nonexistent. The defective has no comprehension of the complex phenomenon known as the social order. The idea itself of the state, with its penal code, the administration of criminal justice, punishment, and other means of legal coercion, does not enter into his mental operations. He knows them not."

44. *State v. Kelsie*, 93 Vt. 450, 452, 108 Atl. 391, 392 (1919).

45. *Hall v. State*, 248 Ala. 33, 26 So. 2d 566, 568 (1956) citing *Brothers v. State*, 236 Ala. 448, 183 So. 433, 435 (1938). But it cannot be said that the proposition is a maxim of law.

46. BRASOL, *op. cit. supra* note 43, at 347. See the discussion of juvenile meningo vascular neurosyphilis in *AMERICAN HANDBOOK OF PSYCHIATRY* 1016, 1017 (Jervis 1959); Ferguson & Critchley, *A Clinical Study of Congenital Neurosyphilis*, 27 BRIT. J. CHILD. DIS. 1 (1930); Finley, Rose & Solomon, *Electroencephalographic Studies on Neurosyphilis*, 47 ARCH. NEUROL. & PSYCHIAT. 718 (1942).

47. FITZHERBERT, *NEW NATURA BREVIVM* f. 233 (9th ed. 1739). See PERKINS, *op. cit. supra* note 25, at 739 (Fitzherbert's work discussed). It must be stressed that

V. THE MAJORITY RULE

The majority of the courts which apply *M'Naghten* allow "subnormal mentality" to be treated as a disease for purposes of the rule. The rule with respect to feeble-mindedness is stated by three of the standard texts as follows: "It is uniformly held or assumed without question that subnormal mentality is not a defense to crime unless the accused is by reason thereof unable to distinguish between right and wrong with respect to the particular act in question."⁴⁸ "Mere weakness of mind, where there is sufficient capacity to know that the act is wrong, is no ground of exemption."⁴⁹ (Both of these authors inadvertently refer to the *mens rea* aspect of the rule only, and not to the *actus reus* portion of the test.) "Criminal incapacity is not established by a mere showing of weakness of intellect, susceptibility to suggestion or subnormal mentality. Neither is it sufficient to show that a defendant is an illiterate, ignorant, or passionate, or (without additional showing) is suffering from shell shock"⁵⁰

The leading case on the matter is *Commonwealth v. Stewart*.⁵¹ Here the defendant was allowed to show that he was of low grade mental capacity. The jury was instructed that this would be a defense only if the defendant did not thereby have sufficient mental capacity to entertain an evil motive for killing. The jury decided that he had the requisite mental capacity, but the defendant wanted the mere fact of subnormal mentality to be a defense. The court rejected the plea:

Criminal responsibility does not depend upon the mental age of the defendant, nor upon the question whether the mind of the prisoner is above or below that of the ideal, or of the average, or of the normal man, but upon the question whether the defendant knows the difference between right and wrong, can understand the relation which he bears to others and which others bear to him, and has knowledge of the nature of his act so as to be able to perceive its true character and consequences to himself and to others.⁵²

In *State v. Johnson*,⁵³ an instruction to the jury as follows was approved on appeal:

Fitzherbert was more likely giving an *example*, as opposed to an inflexible *test*. *Quaere*: what is meant by "natural"? See note 79 *infra*.

48. WHARTON, *op. cit. supra* note 7, § 41. Again this is taken virtually verbatim from Annot., 44 A.L.R. 586 (1926). See note 7 *supra*. Both, though, are incorrect here because the term "uniformly" has been inaccurate for many years, as will be demonstrated in the following section of this paper.

49. CLARK & MARSHALL, *LAW OF CRIMES* 345 (6th ed. 1958). But see the subsequent section of this paper.

50. PERKINS, *op. cit. supra* note 25, at 767. This is a view which Professor Perkins has held for a long time. See Perkins, *Partial Insanity*, 25 J. CRIM. L., C. & P.S. 175 (1934). But see the next section of this paper.

51. 255 Mass. 9, 151 N.E. 74 (1926).

52. 151 N.E. at 81.

53. *State v. Johnson*, 233 Wis. 668, 290 N.W. 159, 161 (1940). See also Jessner v. State, 202 Wis. 184, 196, 231 N.W. 634, 639 (1930). But see note 18(e) *supra*.

In order that the plea of feeble-mindedness shall prevail, the evidence must be sufficient to justify you in finding that at the time he fired the fatal shot which resulted in the death of the deceased, that he did not have sufficient mental capacity to know the difference between right and wrong or the nature of the act which he was then doing.

The highest court of New York, over fifty years ago applied the test:

That the defendant has an inferior and untrained intellect is indisputable, and that her moral perceptions were of low order is clear. The jury were not required to pass upon the quality and strength of her intellect, or upon her moral perceptions, except as such questions affect the general question of the defendant's knowledge at the time of the homicide of the nature and quality of the act she was doing. A weak or even a disordered mind is not excused from the consequences of crime.⁵⁴

In *State v. Schilling* it was said:

The responsibility of an adult charged with a commission of a crime is not to be measured by a comparison of his mental ability with that of an infant of 12 years. . . . The true test is, Does he appreciate the nature and quality of his act, and that it is wrong? and if he does, he is responsible . . . without regard to his other mental deficiencies.⁵⁵

In this regard:

It is settled that the legal presumptions regarding the capacity of children to commit crimes do not apply to adult feeble-minded persons. The chronological age, not the mental age is the material fact.⁵⁶

The majority rule was applied in Nebraska⁵⁷ and Vermont⁵⁸ to defendants with a mental level of an 8-year-old child.

54. *People v. Farmer*, 194 N.Y. 251, 87 N.E. 457, 462 (1909). But what is meant by the last sentence? The New York statute on criminal responsibility excludes morons but specifically includes other lower mentality groupings by its terminology that "a person is not excused from criminal liability as an idiot, imbecile, lunatic, or insane person, except upon proof that he did not know the nature and quality of his act, or that it was wrong."

55. *State v. Schilling*, 95 N.J.L. 145, 112 Atl. 400, 405 (Ct. Err. & App. 1920).

56. *HALL, op. cit. supra* note 41, at 618 n.3, citing *Commonwealth v. Trippi*, 268 Mass. 227, 167 N.E. 354 (1929); *State v. Schabert*, 222 Minn. 261, 24 N.W.2d 846 (1946).

57. Guilty! *Washington v. State*, 165 Neb. 275, 85 N.W.2d 509, 511 (1957): "[S]ubnormal mentality is not a defense to crime unless the accused is by reason thereof unable to distinguish between right and wrong with respect to the particular act in question." The defendant's I.Q. was 50. He had an inferior thinking capacity and inferior judgment. See also 26 AM. JUR. *Homicide* § 77, at 209 (1940); 40 C.J.S. *Homicide* § 4, at 825 (1944).

58. Again, Guilty! *State v. Kelsie*, 93 Vt. 450, 452, 108 Atl. 391, 392 (1919). In *State v. Goyet*, 120 Vt. 12, 132 A.2d 623, 651 (1957) the court said: "A subnormal mentality is not a defense to a charge of crime unless the accused is by reason thereof unable to distinguish between right and wrong with reference to the particular act in question."

There are many other cases expounding the majority rule,⁵⁹ some of which are rather confusing.⁶⁰ This rule is consistent with the manner in which the courts generally treat abnormal conditions of the mind. "Neither abnormality nor subnormality precludes liability for crime where there exists sufficient mental capacity to entertain the requisite criminal intent."⁶¹

59. *E.g.*, *State v. Byrd*, 229 S.C. 593, 93 S.E.2d 900 (1956); *Martinez v. State*, 333 S.W.2d 370, 372 (Tex. Crim. App. 1960).

60. A very oft-cited case is *People v. Marquis*, 344 Ill. 261, 267, 176 N.E. 314, 316 (1931) where the court seems to adhere to the majority rule: "A subnormal mentality is not a defense to a charge of crime unless the accused is by reason thereof unable to distinguish between right and wrong with respect to the particular act in question." Yet, the court did not allow the defense to prove that the defendant had a mental age of twelve years. The rule of the case depends on the reason upon which the evidence was offered, but the appellate opinion does not inform us of the reason. *Nevertheless, courts and texts have used the case as authority in support of the majority rule, failing to note this possible inconsistency.* Since this case Illinois has adopted the American Law Institute Model Penal Code rule. See note 18 *supra*.

In *Wartena v. State*, 105 Ind. 445, 5 N.E. 20, 23 (1886), the instruction to the jury included: "Mere weakness of mind does not excuse the commission of crime. If one is of sound mind he is responsible for his criminal act, even though his mental capacity be weak or his intellect of an inferior order." The appellate court approved the trial judge: "The law does not undertake to measure the intellectual capacities of men. Imbecility of mind may be of such a degree as to constitute insanity in the eye of the law, but mere mental weakness, the subject of sound mind, is not insanity. . . . The law recognizes no standard of exemption from crime less than some degree of insanity or mental unsoundness. Immunity from crime cannot be predicated upon a merely weak or low order of intellect coupled with a sound mind." The major difficulty in the decision is that the court places great stress on a "sound mind" but it is impossible to determine what the court means by the phrase.

In *Rozier v. State*, 185 Ga. 334, 195 S.E. 172, 175 (1938) the court indicates that there is a different test to be applied when the defendant is an imbecile or idiot in comparison to other degrees of feeble-mindedness. It is possible to interpret the case as holding that only these two degrees of mental deficiency can be considered by the jury in determining whether the defendant knew the nature or wrongness of his act. But in *Woods v. State*, 214 Ga. 546, 105 S.E.2d 896 (1958) the Georgia court implied that the normal majority rule applied. The same problem is found in the Missouri decision of *State v. Jackson*, 346 Mo. 474, 142 S.W.2d 45, 49 (1940). Later cases by the same court also indicate that the majority rule applies in the state. See, *e.g.*, *State v. Pinski*, 163 S.W.2d 785, 787-88 (Mo. 1942); *State v. Sapp*, 356 Mo. 705, 203 S.W.2d 425, 430 (1947).

There is language in *State v. Wallace*, 170 Ore. 60, 131 P.2d 222, 229 (1942) and *State v. Branton*, 33 Ore. 533, 549, 56 Pac. 267, 270 (1899) which may be construed as saying that the mental weakness must be produced by a disease, although such a construction is doubtful under other Oregon holdings cited in the former opinion. See also *State v. Sapp*, *supra*.

61. *Lahey v. State*, 258 Ala. 116, 61 So. 2d 117, 120 (1952). The court also said that "generally, mere weakness of mind alone does not negative discriminating intelligence as to render a person irresponsible for crime."

And see *Lee v. State*, 265 Ala. 623, 93 So. 2d 757 (1957) where the court related that neither abnormality nor subnormality is a defense if the requisite criminal intent exists—if the sufficient mental capacity exists.

In *Cole v. State*, 212 Md. 55, 128 A.2d 437, 439 (1957), where the defendant was suffering from western equine encephalitis (an inflammation of the brain), it was said: "It is not a defence that the accused is suffering from a mental disorder or

Minority jurisdictions such as Washington, D.C.⁶² and Vermont⁶³ seem as if they should have the same basic pattern, considering subnormal mentality as a disease (or defect), although there is a dearth of cases.

Thus, the courts under the majority rule quite correctly are not concerned with the origin of the feeble-mindedness, *i.e.*, whether or not it be produced by a "disease," but only with the effect of the mental deficiency: Does it render the defendant incapable of forming the requisite *actus reus* or *mens rea* of crime?

VI. MINORITY RULES

Although writers have indicated what the majority rule is, they often believe that it is the universal rule, and few, if any, have clearly indicated that there are at least three minority rules.⁶⁴

The first of these minority rules completely negates the majority test. For example, a Montana trial judge did not allow a witness to answer a question, the crux of which was: "At what age would a normal, intelligent child have a mentality or understanding equal to that of the defendant?"⁶⁵ The supreme court of the state upheld the omission because the witness was not asked about the "sanity" of the defendant. But the court does not tell us what is meant by sanity, and gives no other basis for its sustaining of the objection to the question concerning the defendant's mental age which, after all, is a basis for determining whether or not a person is mentally deficient.⁶⁶

Arkansas, in a recent case, has restricted the meaning of the word "disease" to "psychosis" rejecting subnormal mentality.⁶⁷

The two other minority rules are supplemental to the majority rule. A California statute states that a certain degree of subnormal mentality, *viz.* idiocy, is an absolute defense to crime.

weakness, if he is capable of a rational appraisal of the nature and consequences of his acts."

62. See note 18 *supra*; Carter v. United States, 252 F.2d 608, 617 (D.C. Cir. 1954). *But see* Moore v. United States, 277 F.2d 684 (D.C. Cir. 1960), rejecting the contention that a moron with an I.Q. of 69 has a mental disease or defect.

63. See note 18 *supra*.

64. See also the cases discussed in notes 53, 59 *supra*. Texas applies the majority rule, but is apt to refuse a charge on responsibility where the evidence merely shows that the defendant was not very strong-minded. See Powell v. State, 37 Tex. 348 (1872); Mitchell v. State, 52 Tex. Crim. 37, 106 S.W. 124 (1907). See generally WEIHOFEN, MENTAL DISORDER AS A CRIMINAL DEFENSE 194 (1954).

65. State v. Schlaps, 78 Mont. 560, 254 Pac. 858, 862 (1927).

66. The appellate court stated: "Protection is always afforded in courts of law to persons of unsound mind. Distinction is made between sanity and insanity in people, but not as respects their grade of intelligence. The law does not attempt to measure degrees of intellect, nor to make distinction with respect thereto, where the power of thought and reason exists." A possible interpretation of the case is that the offer of proof may have been unconnected with *M'Naghten*, but the trial record is not available to this author.

67. Stewart v. State, 345 S.W.2d 472 (Ark. 1961). See also notes 54, 62 *supra*.

All persons are of sound mind who are neither idiots nor lunatics, nor affected with insanity.⁶⁸

All persons are capable of committing crimes except those belonging to the following classes:

One—Children under the age of fourteen, in the absence of clear proof that at the time of committing the act charged against them, they knew its wrongfulness.

Two—Idiots.

Three—Lunatics and insane persons⁶⁹

However, the statute has never been judicially applied, at least on the appellate level, and it appears that the majority rule applies to cases of subnormal mentality outside the sphere of idiocy.⁷⁰

The other rule allows the mental age (M.A.) of a defendant to be conclusive.⁷¹

The earliest derivative of the rule is perhaps an early pre-*M'Naghten* English illustration, that the defendant "must be totally deprived of his understanding and memory [so that he] doth not know what he is doing, no more than an *infant*, than a brute or a wild beast" ⁷² Hale later stated that legal responsibility could be measured according to whether or not a man has as much understanding as a child of fourteen years.⁷³ A Connecticut court embodies the essence of Hale's rule into a charge to the jury which was affirmed on appeal in *State v. Richards*.⁷⁴

If this test be adopted the prisoner will upon the testimony be entitled to an acquittal. The principal witnesses for the prosecution say that he [the defendant] is inferior in intellect to children of ten years of age, and several very intelligent witnesses for the defense testify that they are acquainted with many children of six years who are his superiors in mental capacity.

I am inclined to recommend Lord Hale's rule to your adoption, not however without qualifications which I think it important to observe.

And first, this test, like all others which I know of, is imperfect.

Probably no two of us have the same idea of the capacity of children of

68. CAL. PEN. CODE § 21.

69. CAL. PEN. CODE § 26. Both sections of California's penal code are discussed in *People v. Baker*, 42 Cal. 2d 550, 268 P.2d 705 (1954).

70. See *People v. Phillips*, 102 Cal. App. 705, 283 Pac. 821 (Dist. Ct. App. 1929). See *People v. Day*, 199 Cal. 78, 248 Pac. 250 (1926) which indicates a possible contrary rule, but which is nebulous because the offer of proof of the mental age, which the court denied, was upon affidavit for a new trial, and the details are not spelled out by the supreme court. The court said that it was unimportant that the defendant had the mental age of fourteen years. Of course, this statute is also subject to two interpretations as to "idiocy."

71. *State v. Richards*, 39 Conn. 591 (1873). See Annot., 44 A.L.R. 586 (1926).

72. *Rex v. Arnold*, 16 How. St. Tr. 695, 765 (1724). (Emphasis added.)

73. 1 HALE, PLEAS OF THE CROWN 30 (1778). Perkins notes that the statement was merely an afterthought by Hale, and that there was no authority to support the proposition. PERKINS, *op. cit. supra* note 24, at 740 n.13. See also 1 HALE, *op. cit. supra* at 29.

74. 39 Conn. 591, 594 (1873). (Emphasis added.)

fourteen years of age, and then there is this further difficulty, that there can be no accurate comparison in detail between the healthy and properly balanced, though immature, mind of a child, and the unhealthy, *abnormal* and shriveled intellect of an imbecile. The comparison therefore is only of the general result in their respective appreciation of right and wrong and of consequences and effects.

This further consideration ought also to be borne in mind, that though in modern times persons under fourteen are seldom subjected to the penalties of the criminal code, yet in law children between seven and fourteen may be subjects of punishment if they are shown to be of sufficient capacity to commit crimes. In applying Lord Hale's rule therefore, the child to be taken as the standard, ought not to be one who has had superior advantages of education, but should rather be one in humble life, with only ordinary training.

It appears, though, that the rule has not been utilized since its adoption, and two subsequent cases utilize the majority rule without even mentioning *Richards*.⁷⁵

VII. THE EFFECT OF SUBNORMAL MENTALITY ON THE ACTUS REUS AND MENS REA AND SUGGESTIONS

By reason of a dearth of work on the precise point, especially from a psychiatric and psychological approach, the most difficult phase of this undertaking is to determine the effect of subnormal mentality on the ability to know the nature of the act and its consequences, and to know that it is wrong.⁷⁶

It is undoubtedly true that a person of subnormal mentality may be so affected by his condition that he will know neither the nature or the consequences of his act, nor that it is wrong.⁷⁷ Prima facie it would therefore appear that the majority rule is correct, for manifestly the heart of the *M'Naghten* rule is concerned with allowing the trier of fact to decide whether the incapacity of the defendant negated *actus reus* or

75. See *State v. Swift*, 57 Conn. 496, 18 Atl. 664 (1888); *State v. Saxon*, 87 Conn. 5, 86 Atl. 590 (1913); *State v. Wade*, 96 Conn. 238, 113 Atl. 458 (1921). The *Wade* case cites *Richards*, but for a proposition unconnected with the above text.

76. What was said in *Cline v. Commonwealth*, 248 Ky. 609, 59 S.W.2d 577, 578 (1933) a generation ago is to a great extent still true today, for there is a critical need for adequate, thorough, research: "It perhaps might be truthfully said, concerning every perpetrator of crime, that at the immediate moment of the commission thereof he was not in perfect normal mental condition, but we have yet to learn that such slight disturbances from normal mental conditions of a sane person creates that degree of insanity which the law recognizes as an excuse for crime."

77. See Glueck, *Psychiatry and the Criminal Law*, 14 VA. L. REV. 155, 171-72 (1928). Glueck's discussion, however, is extremely cursory. Berliner, *Some Aspects of Mental Abnormality in Relation to Crime*, 46 J. CRIM. L., C. & P.S. 67, 69 (1955), in speaking of responsibility in terms of adaptation to stimulus from outer environment, and inner causes, in formulating an equilibrium between psychic and physical says: "Some people are born with basically restricted powers of adaptation because of inferior intelligence, birth abnormalities, or other factors."

mens rea at the time he accomplished the harm. However, this majority rule presents us with a major difficulty by requiring that the defendant prove the negative. This places the defendant at a marked disadvantage. The courts and legislatures have recognized that a similar problem exists in many situations and have attempted to solve the difficulty by constructing various presumptions, as a consequence of proof of other facts. It is here proposed that certain inferences should be presumed after the proof of subnormal mentality because of the probability that certain effects (*viz.*, a negation of the *actus reus* and/or *mens rea*) are caused by the condition.

First, it must be emphasized that the defendant should have the initial burden of proving the existence and extent of his alleged subnormal mentality by a preponderance of the evidence, if he is to take advantage of presumptions as hereinafter detailed. Thus he begins with a greater disadvantage than is existent under the existing federal rule.⁷⁸

As mentioned at the outset, there are defects in the intelligence tests. But by predicating the application of the presumption upon proof that the condition existed for sometime—which is a matter of great likelihood if the defendant is indeed mentally deficient—any fear that tests are feigned is quite unjustified, for though a defendant may be able purposefully to feign mental deficiency for a short time by answering test questions incorrectly, it is improbable that he would or could do so for any length

78. There are a variety of rules as to the burden of proof in the American jurisdictions. The federal rule, which is perhaps utilized by a plurality of the states is roughly stated as follows: "If the whole evidence, including that supplied by presumption of sanity, does not exclude beyond reasonable doubt the hypothesis of insanity, of which some proof is adduced, the accused is entitled to an acquittal of the specific offence charged." *Davis v. United States*, 160 U.S. 469, 488 (1895). But exactly what is meant by "some proof" is quite unclear. See *Tatum v. United States*, 249 F.2d 129 (D.C. Cir. 1957); *Fitts v. United States*, 284 F.2d 108 (10th Cir. 1960). Arizona states its rule in the simple terminology that if there is a reasonable doubt, the defense prevails. See *Lautario v. State*, 23 Ariz. 15, 201 Pac. 91 (1921). In Mississippi the proof as to insanity must raise a reasonable doubt and then the prosecution must prove legal sanity beyond a reasonable doubt. See *Williams v. State*, 205 Miss. 515, 39 So. 2d 3 (1949). In Nebraska, "some proof" means "any evidence." See *Henton v. State*, 131 Neb. 622, 269 N.W. 116 (1936).

Many jurisdictions require the defense to be proven "by a preponderance of the evidence." There are at least three other rules than those mentioned here. See WEHOFEN, *op. cit. supra* note 64, at 212-13. (His discussion on these pages should be considered with some reservation. Compare, *e.g.*, the detailed discussion of Pennsylvania Law at 263-64.)

Thus, the standards I herein propose *may* seem to make the defendant's task more difficult than the prevailing law in some jurisdictions. However, this is not necessarily the situation because of the vagary of the presently utilized tests in these jurisdictions. Also, because of this vagary, clarification is needed in the law today. Moreover, my purpose in making the proposals that I do is not to make the defense of legal insanity easier for the defendant, but rather to seek ways for the criminal law to more accurately fulfill its true philosophical purposes. See notes 26-30 *supra* and accompanying text.

of time before the commission of the act for which he is on trial. Moreover, his feeble-mindedness can be shown to have existed *because* of the manner in which he acted during this length of time, apart from any I.Q. tests he may take. In this regard it should be noted that an English statute specifies that the alleged mental deficiency must have existed before the defendant attained the age of eighteen years. It defines mental deficiency as "a condition of arrested or incomplete development of mind existing before the age of eighteen years, whether arising from inherent causes or induced by disease or injury."⁷⁹ It is suggested that this time limit be utilized in America and the defendant's actions be considered as significant symptomatic proof, in this situation.

Obviously, the various forms of subnormality should have a different probative effect on the presumption of capacity to act or to recognize one's act as unlawful (wrongful), since the greater the extent of general behavioral incapacity, the greater the likelihood of lacking capacity of legal relevancy. The forms of subnormality, with their general psychological incapacitating effects, are these:

Idiots.—Idiots seldom acquire coherent speech,⁸⁰ and some never learn to walk.⁸¹ In most cases they must be institutionalized.⁸² They have almost complete inability to form abstract conceptions.⁸³ *The idiot has the mental age of a 2-year-old child.*⁸⁴

By stressing that an idiot may not be able to walk because of his mental condition, it is seen that there is a likelihood of no *actus reus*. This likelihood is reinforced by the idiot's inability to think in the abstract. The capacity to conceive the abstract has been considered as a factor differentiating the human being from the mere animal.⁸⁵ Furthermore, in connection with the point that the M.A. of an idiot is two years or less, "according to the common law a child under the age of seven has no criminal capacity . . ."⁸⁶ (Statutes in some states have, however, altered the

79. Mental Deficiency Act, 1927, 17 & 18 Geo. 5, c. 33, § 1(2). See Edwards, *Diminished Responsibility—A Withering Away of the Concept of Criminal Responsibility?*, in *ESSAYS IN CRIMINAL SCIENCE* 301 (Mueller ed. 1961).

With many types of mental illnesses, the courts may over-emphasize bizarre action, or the lack of bizarre action, and thus it must be stressed that the proposals here are concerned only with one particular type of mental illness. "Rules" which vary with the different types of crime and mental illness are a possible solution to our many problems in the field of capacity.

80. FRYER, HENRY & SPARKS, *GENERAL PSYCHOLOGY* 239 (1954).

81. CRUZE, *GENERAL PSYCHOLOGY FOR COLLEGE STUDENTS* 313 (1951).

82. WICKENS & MEYER, *PSYCHOLOGY* 298-99 (1955).

83. See BRASOL, *op. cit. supra* note 43.

84. CRUZE, *op. cit. supra* note 81, at 313-14; ROCH, *PSYCHOLOGY AND LIFE* 89 (4th ed. 1953).

85. See CASSIRER, *AN ESSAY ON MAN* ch. 3 (1944) ("From Animal Reaction to Human Response").

86. PERKINS, *CRIMINAL LAW* 728 (1957). He makes it clear that such references in the common law are to physical age and not mental age.

common law rules somewhat.) The Gower's Commission stated that the defect in the intelligence of idiots is so gross "that we have no hesitation in saying that if they should commit . . ." crimes of violence they ought not to be responsible for their actions.⁸⁷

In view of these factors, it would seemingly be "safe" for the legislature to consider the possibility of creating a conclusive presumption of legal incapacity for an idiot, as California by statute has done generations ago.⁸⁸

Imbecility.—The imbecile is unable to learn how to spell, read, or do arithmetic,⁸⁹ although he can learn to walk and talk.⁹⁰ As the idiot, he too must usually be institutionalized,⁹¹ although to a lesser extent, he has an almost complete inability to form abstract conceptions.⁹² *The imbecile has the M.A. of a child from two to six or seven years.*⁹³

In view of what was said above, and noting that the Gower's Commission made the same remarks as to the imbecile as it did concerning the idiot,⁹⁴ it is "safe" to create a conclusive presumption or at least a rebuttable presumption of incapacity for imbecile defendants. The presumption can be rebutted by proof beyond a reasonable doubt. In this respect, it should further be stressed that "between the ages of seven and fourteen years there is a rebuttable presumption of criminal incapacity and conviction of crime is permitted only upon clear proof of such precocity as to establish a real appreciation of the wrong done."⁹⁵

Morosity.—A moron will require adequate supervision if he is to keep out of trouble. He frequently cannot foresee the consequences of his acts, and if left to himself he usually runs afoul of the law, for he is incapable of recognizing the moral obligation to pay for debts, or settle for goods bought on credit. *The moron has the M.A. of a child from six to eleven or twelve years old.*⁹⁶ As noted above, there is a rebuttable presumption of irresponsibility for children aged seven to fourteen, and only one who has reached the age of fourteen has the same capacity as an adult. The moronic defendant should be subject to the above suggested rule, with a rebuttable presumption or at least the "greater weight of the

87. GOWER'S COMMISSION, ROYAL COMMISSION ON CAPITAL PUNISHMENT, cmd. 8932 ¶¶ 340-58 (1953). See EDWARDS, *op. cit. supra* note 79.

88. See notes 68, 69 *supra*. Note that Sir Edward Coke in 1628, 2 Co. Litt. 247a (rev. ed. 1823) as noted in PERKINS, *op. cit. supra* note 86, at 739, stated that the born idiot was *non compos mentis*, and placed him in the same category as a madman. See also text accompanying note 75 *supra*.

89. FRYER, HENRY & SPARKS, *op. cit. supra* note 80, at 239.

90. CRUZE, *op. cit. supra* note 81, at 314.

91. Wickens & Meyer, *op. cit. supra* note 82, at 298-99.

92. CRUZE, *op. cit. supra* note 81, at 313-14; ROCH, *op. cit. supra* note 84, at 89.

93. PERKINS, *op. cit. supra* note 86, at 728.

94. See note 87 *supra*.

95. PERKINS, *op. cit. supra* note 86, at 728.

96. CRUZE, *op. cit. supra* note 84, at 313-14; ROCH, *op. cit. supra* note 84, at 89.

evidence" rule applicable to him as to the ability to know the nature of the act or its consequences, or its wrongfulness, once morosity is proven. If a rebuttable presumption is utilized, the prosecution should be able to rebut it by a preponderance of the evidence.

Borderline and Low Normal Cases.—The legislature should then codify the majority rule for other degrees of feeble-mindedness, or abrogate the defense entirely, unless there is an issue of partial insanity or diminished responsibility.

In considering these proposals it should be remembered that the healthy mind of a child may be quite different from the abnormal mind of a mentally deficient.⁹⁷

VIII. PARTIAL INSANITY, MITIGATION OF PUNISHMENT, AND DIMINISHED RESPONSIBILITY⁹⁸

A statute on presumption, as proposed in the previous section would help the courts to deal more realistically with offenders of sub-standard mentality than is possible under present law. But more than that must be done to give full recognition to the sliding-scale nature of incapacitating subnormal mentality.

A. Partial Insanity (Reduced Grade of Offense)

As is well known, each crime has its own *mens rea* requirement. Frequently the *mens rea* is a composite of various attitudes and frames of mind. Thus, generally speaking, murder in the first degree requires deliberation, premeditation, and malice aforethought (meaning, usually, an unmitigated, unexculpated, unjustified intent to take human life). A person not possessing the capacity to form deliberation and premeditation can only be guilty of second degree murder. Nothing within the *M'Naghten* test would prevent a court from thus operating with the basic principles of criminal law. This doctrine is well established in America as to intoxication,⁹⁹ but ironically and illogically, a majority of courts refuses to admit that a mental disease may dispossess a perpetrator of the capacity to form any one requisite *mens rea* element. On the whole, therefore, there is no doctrine of partial insanity as to persons afflicted with a mental defect, while there is one for those under the influence of intoxicants.¹⁰⁰ For-

97. See text accompanying note 70 *supra*. Note the discussion in AMERICAN HANDBOOK OF PSYCHIATRY 1292 (Jervis 1959) for modern psychiatric authority for the proposition.

98. With particular thanks to Professor Mueller for his advice on the diminished responsibility portion.

99. See, e.g., Commonwealth v. McCausland, 348 Pa. 275, 35 A.2d 70 (1944).

100. The leading American case on the matter is Fisher v. United States, 328 U.S. 463 (1946). In this case the court stated that the jury might have concluded that the defendant was mentally somewhere below the average with minor stigmata of

tunately, a minority rule contra is now expanding. One court recently explained the minority position thusly:

It means the allowing of proof of mental derangement short of insanity as evidence of lack of deliberate or premeditated design. In other words, it contemplates full responsibility, not partial, but only for the crime actually committed.¹⁰¹

There is little doubt that feeble-mindedness may render a person incapable of forming a "malice aforethought," etc.,¹⁰² or the meaningful intention to take human life, or a premeditation and deliberation, etc. As one court said in holding that an allegedly moronic defendant could attempt to prove he was a moron in order to prove a lack of capacity to deliberate and premeditate:

"Feebleness of mind or will, even though not so extreme as to justify a finding that the defendant is irresponsible, may properly be considered by the triers of the facts in determining whether a homicide has been committed with a deliberate and premeditated design to kill, and may thus be effective to reduce the grade of the offense."¹⁰³

Thus, on principle, it is mandatory that the so-called "partial insanity" test be adopted, in order to give full effect to the principle of responsibility on which our criminal law rests. Such a test will deal more realistically with persons of subnormal mentality.

B. Mitigation of Punishment

A majority of courts do not allow evidence of incapacity merely for the purpose of mitigating punishment. Pennsylvania, though nebulous on the matter to some extent, has adopted a rule allowing evidence for that purpose. Thirty years ago a Pennsylvania court rejected an offer of proof which had as its eventual purpose mitigation of punishment. The court said:

It will be noted that the purpose of the offer was not to prove lack of mental capacity to commit the crime . . . We have held that our test for insanity, as it relates to crime, is the ability to distinguish between right and wrong. . . . Persons are not below par, subnormal or mentally deficient in judg-

subnormal mentality. One witness stated that the defendant had a psychopathic personality. Other examples are *Hogue v. State*, 65 Tex. Crim. 539, 146 S.W. 905 (1912); *People v. Coleman*, 20 Cal. 2d 399, 126 P.2d 349 (1942). See *Stewart v. United States*, 275 F.2d 617 (D.C. Cir. 1960).

101. *State v. Padilla*, 66 N.M. 289, 347 P.2d 312, 314 (1959). This is not a case dealing with subnormal mentality, but the court wisely accepted the "partial insanity" doctrine.

102. *Weihofen, Partial Insanity and Criminal Intent*, 24 ILL. L. REV. 505, 506 (1930).

103. *Battalino v. People*, 118 Colo. 587, 199 P.2d 897 (1948). The case cited *People v. Moran*, 249 N.Y. 179, 163 N.E. 553 (1928) in support of the proposition, but this latter case did not actually hold favorable to partial insanity. See also *People v. Baker*, *supra* note 69.

ment, in determinative or discriminative power, or in self control, when considered in relation to criminal acts, if they know the difference between right and wrong. The general run of the criminal class is usually of a low mental degree.¹⁰⁴

Fifteen years ago a lower court noted that "the facts of the crime and the defendant's background" are important in assessing whether the punishment should be death or life. But in that case the death penalty was considered proper for a prisoner with an I.Q. of 82, and an M.A. of 12 years and 4 months.¹⁰⁵ Recently, the supreme court of the state was again faced with the issue when in an almost identical case a 15-year-old boy, with an I.Q. of 80 (which the court called a dull normal classification), received the death penalty for murder. The highest court of Pennsylvania reversed the conviction, saying: "Both the criminal act and the criminal himself must be thoroughly, completely and exhaustively examined before a court can exercise a *sound* discretion in determining the appropriate penalty."¹⁰⁶ It noted that

a famous commentator of the law once wrote: "But by the law, as it now stands, and has stood at least ever since the time of Edward the Third, the capacity of doing ill, or contracting guilt, is not so much measured by years and days as by the strength of the delinquent's understanding and judgment."¹⁰⁷

In this respect it is interesting to recall what Justice Musmano once said in a vigorous dissent a few years ago, in an analogous case: "Punishment is to be applied according to the capacity of the individual, as well as to the enormity of the delinquent act."¹⁰⁸

New Jersey has also recently adopted the principle of mitigating the sentence in borderline-mental cases.¹⁰⁹

C. Diminished Responsibility

If it is true that subnormal mentality can and should reduce the sentence, it is consequently true that it should not only reduce the punishment, but the responsibility itself. This is an absolutely logical sequitur. If the punishment is thus diminished, only because the defendant's liability is

104. *Commonwealth v. Szachewicz*, 303 Pa. 410, 416, 154 Atl. 483, 484 (1931).

105. *Commonwealth v. Black*, 62 Mont. Co. L.R. 330, 331 (Pa. 1946).

106. *Commonwealth v. Green*, 396 Pa. 137, 149, 151 A.2d 241, 247 (1959).

107. *Id.*, citing *Commonwealth v. Elliott*, 371 Pa. 70, 89 A.2d 782 (1952). See 3 CATHOLIC U.L. REV. 55 (1953). The court stated that the defendant's mental deficiency should be taken into consideration in determining what the punishment should be, but held that a mentality of a moron does not require, as a matter of law, the assessing of life imprisonment instead of the death penalty. See also *Commonwealth ex rel Elliott v. Baldi*, 373 Pa. 489, 96 A.2d 122 *cert. denied*, 345 U.S. 976 (1953).

108. *Commonwealth v. Elliott*, *supra* note 107, at 786. See Mueller, *Criminal Law and Administration*, 36 N.Y.U.L. REV. 111, 119-20 (1961).

109. *State v. Di Paolo*, 34 N.J. 279, 168 A.2d (1961); *State v. Forcella*, 35 N.J. 168, 171 A.2d 649 (1961).

not of normal strength or intensity, there should be a doctrine of diminished responsibility. Diminished responsibility posits both a reduction of culpability and punishment because of a reduced capacity to form *all* the required elements, in contrast to a reduction of *certain* elements in the partial responsibility concept.¹¹⁰ Such a theory is not inconsistent with the *M'Naghten* rule,¹¹¹ and although not applied in the United States, Scotland has long by common law recognized that an aberration or weakness of mind, bordering on, though not amounting to, insanity can render the prisoner only partially accountable for his actions,¹¹² and England, acting upon the findings of the Royal Commission (the ultimate recommendations of the Commission were not in accord with its primary determinations) passed the following statute:

Where a person kills or is a party to the killing of another, he shall not be convicted of murder if he was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired his mental responsibility for his acts and omissions in doing or being a party to the killing.¹¹³ . . . A person who but for this section would be liable, whether as principal or as accessory, to be convicted of murder shall be liable instead to be convicted of manslaughter.¹¹⁴

Of course, this is not fully logical. The weakminded defendant may not have lacked the capacity to form that element which distinguishes murder from manslaughter, but he may well have had capacity to form all requisite mental elements of murder, *though each one thereof only of a relatively weak intensity*. To use the American standard—he may have capacity to premeditate and deliberate, but not nearly as intensely as the normal murderer; and he may have been capable to form an intent to kill, but only a very weak, or feeble or distorted intent to kill. Thus, logic demands not that the homicide of a mentally subnormal offender be reduced from murder to manslaughter, or the larceny from grand larceny to petty larceny, but that the law statutorily recognize the addition of an explanation to the verdict, *e.g.*, “guilty of grand larceny committed under diminished re-

110. Mueller, *supra* note 108.

111. Hall states that *M'Naghten* does not require, and never did require, complete irrationality: “The rule requires serious mental abnormality, *i.e.*, ‘normal’ is the central guiding concept and there need only be serious departure, *i.e.*, going beyond mere neurosis.” Hall, *Mental Disease and Criminal Responsibility*, 33 *IND. L.J.* 212, 213 (1958). See MODEL PENAL CODE § 4.01 (Tent. Draft No. 4, 1955), which Professor Hall comments upon.

112. EDWARDS, *op. cit. supra* note 79. But Scotland does not carry the diminished responsibility rule to its logical conclusion.

113. Homicide Act, 1957, 5 & 6 Eliz. 2, c. 11, § 2(1). See EDWARDS, *op. cit. supra* note 79. See *Begina v. Byrne*, [1960] 3 *W.L.R.* 440 (C.C.A.), and *Rose v. Queen*, [1961] 2 *Weekly L.R.* 506 (P.C.) (Bahama I.).

114. Homicide Act, 1957, 5 & 6 Eliz. 2, c. 11, § 2(3). See the excellent discussion in WILLIAMS, *CRIMINAL LAW—THE GENERAL PART* 541-58 (2d ed. 1961).

sponsibility."¹¹⁵ The result, obviously, would be a mitigation of punishment, and the administrative imposition of special measures which might aid a convict of this sort.

IX. CONCLUSION AND SUMMARY

Although the prodigious amount of literature supporting the theory which ascribed to mental deficiency causative force in criminal conduct has been generally discredited, it has awakened our minds to the reality that there are many mentally deficient defendants who must be dealt with in the criminal law.

In comparing a person of subnormal mentality with a normal or average person, we find that in the make-up of the former there is "something missing"; this lack prevents him from forming some of the elements of crime which a normal man can easily form. A person lacking capacity so as not to be able to form various parts of the *actus reus* and *mens rea* is not unlike the bird which lacks the capacity to fly, as does a bird who is just born. And so the human, whose capacity has been traumatically injured, or whose capacity has not fully developed, may not have the necessary psychological forces which would enable him to know the nature, quality, and consequences of his act (*actus reus*), or to understand the wrongfulness of his act (*mens rea*). The law is bound to recognize this.

The majority of states do allow defendants to interpose subnormal mentality as a defense in the same manner as any "disease" of mind: If because of the condition the defendant did not know the nature and quality of his act or its consequences (*actus reus*), or did not know that it was wrong (*mens rea*), he will be relieved of criminal liability. It is proper that the courts should consider mental deficiency as a disease. Yet, this rule does not allow fully realistic results, because of the difficulty of proving the negative.

Also, although "sanity" is the normal condition of most people, and thus there is a presumption of sanity, we should not forget that once certain mental illnesses afflict a person there is in fact, though not in law today, a presumption of a negation of either *actus reus* or *mens rea*.

Therefore, it has here been proposed that a series of presumptions as to incapacity should be constructed to benefit the defendant who has proven the degree of subnormal mentality with which he is afflicted. These presumptions should roughly correspond to the common law presumptions in favor of children whose chronological age parallels the mental age of feebleminded defendants. The exact nature of this sliding scale has been outlined above. But, in addition, the legislature should further give effect to the doctrines of partial insanity (reduced grade of

115. This explanatory phrase was suggested by Professor Mueller.

offence) and diminished responsibility, so as to bring the legal standards of responsibility to full accord with the moral-ethical standards to which our society subscribes. If this is done, the law will better meet its obligations of punishing to accomplish the ends of reformation, deterrence, neutralization, and most important, justice.

