

The Theory of Substantial Cognitive Capacity of Criminal Defendants with Mental Disorders in China: Theoretical Content and Judicial Application

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Abstract

When dealing with criminal cases involving defendants with mental disorders in China, the theory of substantial cognitive capacity holds significant importance. Although derived from the insanity defense rule of the *U.S. Model Penal Code*, this concept exhibits certain distinctions. Forensic experts in China frequently deem defendants with mental disorders as lacking substantial cognitive capacity, thus rendering them not criminally responsible. The Chinese theory of substantial cognitive capacity possesses its unique characteristics, setting China apart from other countries in addressing the insanity defense issue. Consequently, introducing this Chinese theory to scholars in other jurisdictions holds considerable academic value. However, the interpretation of substantial cognitive capacity and its relation to cognitive capacity remain subjects of controversy in China, with inconsistent application of this theory. Specifically, some scholars have advocated the theory of common sense cognitive capacity, effectively challenging the mainstream theory of substantial cognitive capacity. The author contends that substantial cognitive capacity should be comprehended from the perspective of the dialectical unity of “phenomenon” and “essence”. The term “substantial cognitive capacity” should be employed from a negative standpoint to underscore the progressive link between the possession of “formal” cognitive capacity and the loss of “substantial” cognitive capacity, while the theory of common sense cognitive capacity should be dismissed. The proper judicial application of the theory of substantial cognitive capacity aids in adhering to the normative requirements of criminal law, emphasizes the logic of stratified criminal theory, and furnishes the judiciary with a theoretical instrument for appropriately handling criminal cases.

Keywords: mentally ill persons, cognitive capacity, substantial cognitive capacity, criminal responsibility

1. Introduction

In criminal proceedings, it is a common occurrence for defendants to have mental disorders. It is widely acknowledged that defendants suffering from mental disorders, who lack *mens rea* or can assert an insanity defense, are exempt from criminal liability. This ethical requirement of criminal law serves as a safeguard for the fundamental human rights of the defendants. The proper handling of these cases crucially depends on identifying the specific mental disorders affecting the defendants and determining the extent to which their cognitive and control capacities are impaired, thereby warranting recognition as criminally insane. However, it's worth noting that laws related to this issue vary significantly across countries worldwide.

In the English literature, the majority of research focuses on the laws and cases of common law countries, such as England and the United States of America. There is limited literature available on how China deals with criminal cases involving defendants with mental disorders. While many legal professionals, judges, and forensic psychiatrists may be well-versed in concepts like the McNaughton Rule, the American Law Institute Rule, and the Durham Rule, it's important to note that these concepts are primarily derived from experiences in judicial practices within common law countries and may not have universal applicability.

China, however, has a unique approach. Similar to countries like Germany and Japan, China requires a defendant to possess a certain level of criminal responsibility capacity as a prerequisite for criminal liability. This capacity comprises both cognitive and control capabilities. According to Article 18 of China's *Criminal Law*, an individual with mental disorders who causes harmful consequences while being unable to appreciate or control their own behavior, as

confirmed through legal forensic assessment procedures, shall not be held criminally responsible. However, if a person with mental disorders has not completely lost their capacity of cognition and control, they may still be held criminally responsible, although their punishment may be mitigated or reduced. In essence, a defendant who undergoes a forensic psychiatric evaluation in China and is determined to have lost cognitive capacity would not be subjected to criminal sanctions.

In China, the issue of assessing cognitive capacity deserves special attention. Hu Feng et al. (2017, p.190) have pointed out that, "For a long time, the assessment of criminal responsibility capacity in individuals with mental disorders has been a focal point of societal concern, with debates primarily centered around the determination of 'inability to recognize' as stipulated in our country's criminal law". Forensic psychiatrists play a de facto dominant role in assessing cognitive capacity. These experts make professional judgments regarding the cognitive capacity of mentally ill individuals based on the *Guidelines for Assessing the Criminal Responsibility Capacity of Persons with Mental Disorders* (hereafter referred to as "Assessment Guidelines"), issued by China's Ministry of Justice Forensic Assessment Bureau in 2016. The authors of these guidelines explicitly mention references to the M'Naghten Rule, the Irresistible Impulse Rule, and the ALI Rule (Substantial Capacity Rule). Building upon the concept of "cognitive capacity", the guidelines introduce the term "substantial cognitive capacity" along with corresponding evaluation criteria. However, there is a considerable amount of theoretical and practical controversy surrounding the understanding and assessment of substantial cognitive capacity. Additionally, some scholars have put forward the theory of "common sense cognitive capacity" to challenge the prevailing mainstream theory. Several questions arise in this regard. What exactly is substantial cognitive capacity? Does it align with cognitive capacity under criminal law? How should it be evaluated? These questions contribute to the uncertainties and contradictions in the understanding of forensic psychiatrists and legal practitioners in China. As Zheng Zhanpei (2017, pp.57-58), a prominent forensic identification expert, aptly pointed out, "This issue can be described as a profound challenge within the field of forensic psychiatric evaluation in China. When discussing relevant cases, the core point of contention, whether in academic theory or practical application, revolves around the recognition and interpretation of substantial cognitive capacity".

2. Substantial Cognitive Capacity: An Overview of Diverse Academic Perspectives in China

The "Assessment Guidelines" defines cognitive capacity as "the actor's ability to distinguish and recognize the meaning, nature, effect, and consequences of their actions in terms of criminal law". It can also be understood as "the individual's capacity to discern and appreciate the rightness or wrongness of their actions, whether they have violated criminal law or posed a threat to society". Furthermore, the "Assessment Guidelines" introduces the concept of substantial cognitive capacity, stipulating that the loss of cognitive capacity encompasses the loss of substantial cognitive capacity. "Loss of cognitive capacity" implies that the individual being assessed is entirely incapable of comprehending the meaning, nature, effect, and consequences of their actions within the context of criminal law, while "loss of substantial cognitive ability" means that the individual being assessed cannot appreciate the necessity of committing the crime, even though they may understand the moral and societal implications. Substantial cognitive capacity and cognitive capacity are not identical; they possess relatively independent criteria for evaluation. In practical judicial proceedings, forensic experts and legal professionals widely employ the term "substantial cognitive capacity" as a basis for determining the criminal responsibility of an individual with mental disorders.

The "Assessment Guidelines" were drafted by the Institute of Forensic Science and Technology under the Ministry of Justice of China. They are not legally binding and do not mandate universal application. In the realm of judicial practice, some courts have held that the "Assessment Guidelines" constitutes a technical specification recommended by the Ministry of Justice but does not serve as a mandatory standard.¹ Consequently, expert opinions based on the guideline are not given preference. Disagreements with the "Assessment Guidelines" and the accompanying *Scale of Criminal Responsibility Capacity of Mental Patients* exist among some forensic psychiatric experts. Nevertheless, the mainstream viewpoint, as endorsed by the "Assessment Guidelines", supports the concept of substantial cognitive capacity.

Within the academic community, scholars have extensively examined the notion of substantial cognitive capacity of criminal defendants with mental disorders from various angles, leading to both consensus and controversy. This discourse encompasses several key aspects:

2.1 Interpretation of "Substantial" in the Context of Substantial Cognitive Capacity

2.1.1 Relevance of the Object of Cognition

According to Ji Shumao and others (2012, p.14-15), "substantial cognition capacity" pertains to "the individual's ability to comprehend matters that bear a causal relationship with the case, excluding cognition of unrelated matters". In essence, it signifies "the actor's capability to discern the meaning, nature, effect, and consequences of their actions within the scope of criminal law, based on the logical connection between these elements". The term "substantial" in "substantial cognitive capacity" implies that the cognitive capacity is pertinent to the case, possesses relevance to the

case's facts, and holds legal significance in the case's adjudication. Thus, the term "substantial" is defined based on the "relevance" of the object of cognition. Additionally, Li Jianming (2009, p.25) posits that "cognitive capacity does not pertain to the abstract recognition and judgment of the right or wrong of general objects and phenomena; rather, it relates to the substantial cognition capacity of specific actions". The term "specific actions" refers to actions that are associated with the case at hand. In my view, undoubtedly, recognition of actions by the individual that bear no relevance to the facts of the case holds no legal significance. Defining the "substantiality" of cognitive capacity based on the "case-relatedness" of the object of cognition may not inherently imbue it with valuable or distinctive connotations.

2.1.2 Causal Link between Mental Disorder and the Case's Facts

As per Jia Yicheng, even if the individual undergoing assessment is afflicted by a mental illness and perceives hallucinations and delusions as objective reality, it is imperative to conduct a "specific analysis of whether a substantial connection exists between their psychopathological state and the factual causal relationship of the case". (Ji, S. et al., 2012, p.15) In criminal cases, if such hallucinations and delusional symptoms lack a causal relationship with the case's facts, forensic psychiatry deems them as insubstantial. In the case of paranoid psychiatric offenders, Jia Yicheng (1988, p.394) posits that "if the person's criminal act is directly linked to their pathological delusions, then they lack substantial cognitive capacity and should be assessed as lacking responsibility". Conversely, "if the person's criminal act is unrelated to their pathological delusions, they should be deemed criminally responsible". In judicial practice, it is customary to investigate whether a causal relationship or substantial connection exists between the mental disorder and the case's facts when assessing substantial cognitive capacity. This examination is not limited to defendants with pathological symptoms such as delusions and hallucinations. For instance, in the case of Yang Shuang's smuggling of goods prohibited by the state, the forensic psychiatric experts found that the defendant exhibited mild cognitive impairment at the time of the crime. However, it was determined that "there was no causal link between his mild cognitive impairment and the harmful act, and he possessed substantial capacity to recognize and control his own behavior".ⁱⁱ In my view, assessing cognitive capacity necessitates an exploration of the causal nexus between mental impairment and cognitive capacity, so defining substantial cognitive capacity in terms of a causal or substantial link fails to capture the full essence of the concept.

2.1.3 Cognition of Necessity of the Act

According to the "Assessment Guidelines", the loss of substantial cognitive capacity is defined as an individual's inability to recognize the necessity of their actions, even though they can distinguish between right and wrong or understand the societal harm involved. In the field of judicial psychiatry in China, interpretations of "cognition of necessity" are relatively scarce. Generally, it is understood to mean "indispensable" or "essential". In certain cases, the actions of defendants with mental disorders, when compared to the triggering factors or causes, lack a fundamental rationale or are disproportionately severe, which may seem irrational to ordinary individuals. These individuals, while formally grasping the concepts of "right and wrong" or "legality", lack the capacity to comprehend the absence of causality and the excessive nature of their actions. In essence, they lack the necessary understanding of "necessity". It is noteworthy that scholars who adhere to the theory of common-sense cognitive capacity follow these criteria when assessing substantial cognitive capacity. For instance, Hu Feng et al. (2016, p. 298) argue that substantial cognitive capacity is directed toward "the act of committing a crime", with its core revolving around "the motive for committing a crime", and the emphasis is placed on the "cognition of necessity".

2.1.4 Essential Capacity to Appreciate the Act

Zhou Jue contends that "when a person commits a crime while mentally deranged, they often understand that their behavior is unlawful". (Lin, Z., 1996, p.36) Therefore, it is essential to consider not only whether they can phenomenologically recognize their behavior but also whether they have lost the capacity to appreciate the essence of their behavior as harmful to society and in violation of criminal law. The concept of "substantial" holds pivotal significance in this context. Li Congpei (1992, p.248), citing a case, argued that "this case involves schizophrenia, and the perpetrator, under the influence of the disease, exhibits judgment and reasoning disorders. In essence, they cannot appreciate the harmfulness of their behavior and fall under the category of committing crimes under the domination of psychopathology, rendering them incapable of responsibility". Li Congpei (1992, p.267) further suggests that, although paranoid psychiatric defendants understand the consequences of their behavior, their actions are motivated by pathological delusions or the direct impact of intellectual disorders. "Their behavior is driven by pathological mental activity, and the planning and premeditation of the criminal act precisely manifest their delusional conviction", thus leading to a loss of substantial cognitive capacity. Additionally, Zeng Chengxu (2002, p.29) argued in a case that a perpetrator cannot be simply assessed as having cognitive capacity based on factors such as premeditation, choice of tools, timing, or surrender. Instead, the core of cognitive capacity lies in the substantial recognition of the motive, nature,

and consequences of the crime. It does not hinge on the tools used, the occasion chosen, or the actions taken after the crime. These scholars collectively assert that, while some mentally ill individuals may comprehend the actions involved in the case, they lack the capacity to appreciate them in their “essence”. This viewpoint aligns with the perspective endorsed by the “Assessment Guidelines” and is widely accepted by the majority of forensic psychiatrists in China.

2.2 *The Relationship Between Cognitive Capacity and Substantial Cognitive Capacity*

2.2.1 Equating Cognitive Capacity with Substantial Cognitive Capacity

Some scholars directly equate cognitive capacity with substantial cognitive capacity. For instance, Ji Shumao (2011, p.7) suggests that “the cognitive capacity stipulated in Article 18 of Chinese *Criminal Law* also refers to substantial cognitive capacity”. He Ji (2000, p.1266), similarly, argues that the cognitive capacity refers to the actor’s substantial ability to recognize their act of committing a crime, not their understanding of other general life common sense. Zheng Zhanpei concurs, stating that a mentally ill person who “knows to kill with a knife and also knows to choose the time, place, and object of the crime” does not necessarily indicate complete cognitive capacity. He asserts that the crucial question is the purpose and motive behind this specific act. He notes that forensic psychiatry sometimes employs the term “substantial cognitive capacity” to better reflect its essence and avoid misunderstandings. (Jia, F. et al., 2015, p.340)

In practice, some forensic experts do not differentiate between cognitive capacity and substantial cognitive capacity. They directly assess substantial cognitive capacity in individual cases and use it as the basis for determining criminal responsibility capacity. For example, in an intentional assault case, a forensic expert believed that the appraisee suffered from bipolar disorder, was in a manic state during the crime, experienced delusions of victimization and relationship delusions, and that the crime was directly influenced by these delusions. The expert concluded that the appraisee’s substantial cognitive capacity was lost, rendering him incapable of criminal responsibility. (Guo, Z., & Chang, L., 2012, p.160) Furthermore, Hu Feng, Li Yi, and others (2016, p. 298) argue that China’s forensic psychiatric experts may be influenced by the “substantial capacity rule” observed in common law countries, leading to the interchangeable use of the terms “substantial cognitive capacity” and “cognitive capacity” within the context of criminal law.

2.2.2 Substantial Cognitive Capacity as a Distinct Type of Cognitive Capacity

Hu Zeqing (2016, p.39) posits that cognitive capacity can be interpreted at multiple levels: first, recognizing the physical nature of the behavior; second, understanding the social harmfulness of the behavior; and third, comprehending the necessity of the behavior. According to Hu Zeqing (2016, p.39), “patients with paranoid mental disorders, under the influence of delusional symptoms, make inferences and judgments about their environment and interpersonal relationships that do not align with objective reality. When they purposefully harm someone due to their delusional beliefs, they fail to realize that there was no actual need to commit the act”. Therefore, according to this scholar, “necessity of the act” is the true essence of “substantial cognitive capacity”. In other words, substantial cognitive capacity is the third level of cognitive capacity and represents a distinct type of cognitive capacity. The “Assessment Guidelines” also adhere to this viewpoint.

2.2.3 Fundamental Differences between Substantial Cognitive Capacity and Cognitive Capacity

While Gao Beiling and Li Xuewu et al. (2012, pp.512-513) acknowledge the term “substantial cognitive capacity”, they believe that the cognitive capacity stipulated in China’s criminal law pertains to common sense cognitive capacity, and that substantial cognitive capacity does not affect the assessment of criminal responsibility capacity. Gao Beiling and others applied this theory in practice. In one case, the court found that experts from two institutions disagreed, with the Forensic Psychiatric Institute of Shenzhen Kangning Hospital confirming the defendant’s loss of substantial cognitive capacity while also finding common sense cognitive and control capacity.ⁱⁱⁱ The court concluded that the defendant was conscious during the crime, recalling the details of the crime, acting with clear intent, targeting a specific victim, adapting the criminal act appropriately, and showing self-preservation behavior afterward. According to the court, the evidence demonstrated that the defendant had common sense capacity to recognize the nature, meaning, and consequences of the real environment and the act. Therefore, he had not completely lost the ability to recognize and control his own behavior at the time of the crime. Consequently, the court accepted the expert’s opinion, which applied the theory of common sense cognitive capacity.^{iv}

In practice, many professionals support the arguments presented by Gao Beiling and others. In a survey conducted by Gao Beiling in Shenzhen around 2011, 79.2% of the respondents believed that Mr. Zeng had “the capacity to recognize and control” when he committed the murder, despite being assessed as having “lost substantial cognitive capacity”. Additionally, 62.2% of the respondents believed that “the loss of substantial cognitive capacity cannot be equated with the loss of cognitive capacity as stipulated in the Criminal Law”. (Li, X. et al., 2013, p.267)

2.3 Legal Consequences of the Loss of Substantial Cognitive Capacity

Typically, when a forensic expert determines that an individual with mental disorder involved in a crime lacks substantial cognitive capacity, they are considered legally incapable of criminal responsibility. This standard is consistent with the “Assessment Guidelines”. For instance, Liu Xiehe (2011, p. 204) explains that the incapacity for criminal responsibility signifies that “due to the influence of psychiatric symptoms, the perpetrator has lost the capacity for substantial recognition or control of their own behavior at the time of the harmful act.” However, there are scholars who hold differing views. As mentioned earlier, Gao Beiling and others endorse the theory of common-sense cognitive capacity, differentiating it from the mainstream theory of substantial cognitive capacity. According to this perspective, even if the perpetrator is found to have lost substantial cognitive capacity, if they are found to possess common-sense cognitive capacity, their criminal responsibility capacity is assessed as limited. For instance, in a case involving intentional injury, the defendant, Mr. Yan, had a complete loss of substantial cognitive capacity but still retained some common-sense cognitive capacity. Consequently, he was evaluated as having limited responsibility capacity, resulting in a conviction with a lighter penalty.^v

It is important to note that in practice, some forensic experts have suggested that in situations where the perpetrator has lost substantial cognitive capacity or control capacity, “considering the feelings of the victim, the defendant can be assessed as having partial criminal responsibility capacity.” Ji Shumao (Ji, S., & Gao, B., et al., 2012, p. 20) has pointed out that this represents an arbitrary “discretionary” approach, which is erroneous in its assessment and not an appropriate legal consequence of the loss of substantial cognitive capacity. This aspect will not be further addressed in this article.

3. Understanding Substantial Cognitive Capacity in China from an Essential Perspective

The term “substantial cognitive capacity” originates from the standards established by the American Law Institute for the insanity defense. Nevertheless, the legal standards for the insanity defense in the United States exhibit more diversity, and forensic experts in the United States place less theoretical emphasis on, and make less practical use of, the term “substantial capacity” compared to their Chinese counterparts. The routine assessment of substantial cognitive capacity and the frequent usage of this term have become distinctive features of forensic psychiatric evaluation in China. China should maintain this distinctiveness and resist efforts to weaken or even eliminate the insanity defense. To achieve this, it is crucial to clarify the underlying essence of substantial cognitive capacity to address challenges from competing theories. In my view, upholding the dialectical logic of “phenomenon” and “essence”, “form” and “substance” is essential in elucidating the true connotation of substantial cognitive capacity.

3.1 The Meaning of “Substantial” in Substantial Cognitive Capacity

Substantial cognitive capacity is a term rooted in “cognitive capacity” but extends beyond it. The “substantial” aspect of substantial cognitive capacity underscores the dichotomy between appearance and essence. In other words, on the surface, the actor may appear to possess the ability to discern the “right or wrong” or “legal or illegal” nature of their behavior. However, when examining the specific circumstances of each case, it becomes evident that this ability is lacking at its core. This perspective was first put forth by Zhou Jue, a researcher at the Institute of Applied Law of the Supreme People’s Court of China, as early as the 1990s. Zhou Jue (Lin, Z., 1996, pp.36-37) asserted that when a paranoid schizophrenic individual, under the influence of pathological delusions, committed a homicide, “phenomenologically, the defendant did not lose all capacity to recognize their actions, but fundamentally, they did lose the ability to grasp the essence of their actions”. According to Zhou Jue, under the sway of delusions, “the defendant’s judgment regarding the rightness or wrongness of the homicidal act, as well as its societal implications and criminal law violations, were entirely distorted when compared to objective reality”. Furthermore, “certain isolated phenomena of ‘being able to recognize’ also lost their independent significance”. (Lin, Z., 1996, pp.36-37) A similar viewpoint was presented by Jia Yicheng (1988, p.58) in 1988, arguing that even if harmful acts committed under the influence of pathological victimization and jealous delusions are “intentional”, they differ from the “intentional” harmful acts of ordinary criminals because they result from a loss of substantial cognitive capacity and rational judgment. Li Congpei (1992, p.267) also expressed a similar opinion in 1992. Evidently, Chinese academia has a longstanding tradition of understanding and applying the concept of substantial cognitive capacity and its loss from an “essence” perspective.

In judicial practice, some mentally ill individuals involved in crimes may possess objective and specific knowledge of the case’s facts, and may even plan their actions and choose the means, but they are dominated by mental disorders, preventing them from understanding the normative aspects of their actions from a moral or legal standpoint. The treatment of such mentally ill individuals is a subject of debate. Prior to the establishment of the People’s Republic of China, a 1937 court ruling held that “if the individual loses all perception and judgment of external affairs at the time of the act, and lacks the ability to freely express intent, it constitutes a loss of mental faculties”. (Lin, P., 2016, p.78) This verdict implies that the perpetrator would be found not criminally responsible. However, when the Taiwan district of

China revised its criminal law, this earlier opinion was discarded. Zhang Liqing (2012, p.244) from Taiwan argued, “‘Loss of mental faculties’ does not imply a complete loss of the ability to perceive, contemplate, and judge, but rather that the act was influenced by the individual’s condition at the time, leading to an unlawful act, without implying ‘knowing nothing’. The aforementioned precedent is entirely inconsistent with psychiatric knowledge and should be discarded”. Similar to this argument, American scholar Felthous (2022, p.2) discussed the “instrumental capacity” of mentally ill individuals, which pertains to their ability to intentionally plan and carry out their intentions. Mentally ill individuals involved in criminal acts may possess this capacity, allowing them to form the intent to commit a particular crime. Still, they may lack the “moral capacity”, which is the core of “rational capacity”. Such mentally ill individuals, who have criminal intent but lack “rational capacity”, should have the right to assert an insanity defense. For individuals with mental disorders who seem to have some objective cognition, criminal intent, and even knowledge of “right and wrong”, but genuinely fail to understand the normative nature of their actions and lack “rational capacity”, the terminology of substantial cognitive capacity and its loss could be more scientifically and aptly applied.

As mentioned below, the terminology of substantial cognitive capacity should be employed exclusively from a negative standpoint, emphasizing its use in terms of “loss of capacity” or “incapacity”. If a defendant suffering from mental disorder appears to possess nominal cognitive capacity but fundamentally lacks it, how can we determine this “loss” or “incapacity”? Answering this question can lead to a deeper comprehension of the meaning of substantial cognitive capacity. According to the “Assessment Guidelines”, “the loss of substantial cognitive capacity means that the appraisee can recognize the wrongfulness or social harm of the act but cannot recognize its necessity”. However, the absence of an awareness of necessity alone is insufficient to establish the substantial cognitive incapacity of an individual suffering from mental disorder. In my opinion, based on the theory of normative responsibility, the prerequisite for a perpetrator to assume criminal responsibility is that he is a rational individual possessing the ability to recognize the physical properties of the act, comprehend the normative meaning of the act, and choose to act of their own free will. The exercise of the actor’s rational capacity requires identifying the act’s practical rationality, encompassing considerations of reasonableness, necessity, appropriateness, feasibility, and practicality, to effectively weigh the pros and cons and lay the foundation for independent choice. When the actor retains rational capacity, their awareness of the normative meaning of the behavior involved is not merely a matter of “knowing” but of “appreciating” its substance. Therefore, to determine whether an individual suffering from mental disorder is incapable of substantial cognition, the key criterion is whether they have lost the aforementioned rational capacity, making them incapable of comprehending the normative nature of the criminal act. Forensic experts and judicial personnel should evaluate whether the mentally ill individual can recognize the act’s practical reasonableness, including considerations of reasonableness, necessity, appropriateness, feasibility, and practicality. This assessment should be made based on the morality, values, and common experiences held by the general public, not on the subjective standards of the mentally ill individual influenced by their condition.

A clarification concerning the use of the English term “substantial cognitive capacity” is warranted. The insanity defense rule within the United States *Model Penal Code* employs the term “substantial”. Similarly, China’s “Assessment Guidelines”, referencing the aforementioned rule, also employ the term “substantial”. According to the *Oxford Advanced Learner’s English-Chinese Dictionary* (Hornby, A. S., & Li, B., 1997, p.1525), “substantial” carries two pertinent meanings: 1. “large in amount; considerable” and 2. “concerning the most important part of something; essential.” The former underscores the magnitude, size, or quantity of something, while the latter accentuates the fundamental nature or essence of something. In the context of the latter definition, “substantial” and “substantive” are synonymous, as the aforementioned dictionary explains “substantive” as “genuine or actual; real”. (Hornby, A. S., & Li, B., 1997, p.1525) However, according to the customary English usage, “substantive” more commonly characterizes the intrinsic qualities or core attributes of an object, concept, or argument. This paper delves into the concept of “substantial cognitive capacity”, with a particular focus on the assertion that individuals deemed criminally insane may exhibit a false façade of cognitive capacity, but in essence, they lack genuine cognitive capacity. This pertains not only to the quantitative aspects but also the qualitative essence of cognition capacity. Perhaps substituting “substantive cognitive capacity” for “substantial cognitive capacity” would better convey this paper’s perspective on the substantive interpretation of this form of capacity. It appears that, in the context of evaluating cognitive capacity, employing the term “substantive cognitive capacity” can effectively communicate the notion that the assessment centers on the essential and intrinsic nature of cognitive capacity, transcending mere quantity or degree.

3.2 The Theory of Common Sense Cognitive Capacity: Insufficient Justification as a Competing Theory

Gao Beiling and other scholars (Hu, F. et al., 2020, p.459) have proposed the theory of common sense cognitive capacity, gaining recognition and support from certain forensic appraisal institutions and courts. Common sense cognitive capacity, as defined, pertains to “whether the perpetrator recognizes the content, meaning, and consequences of their own behavior”. This assessment of common sense cognitive capacity remains independent of the motive behind the crime and does not consider the perpetrator’s understanding of necessity. (Hu, F. et al., 2016, p.298) The central

tenet of the common sense cognitive capacity theory posits that cognitive capacity, as understood in criminal law, is synonymous with common sense cognitive capacity. According to this theory, an actor lacking substantial cognitive capacity may still possess common sense cognitive capacity, and criminal responsibility should be assessed based on the latter rather than the loss of substantial cognitive capacity. (Gao, B. et al., 2012, pp.512-513) While Gao Beiling et al. acknowledge the term “substantial cognitive capacity”, they dispute its legal significance in determining culpability.

The theoretical foundation of the common sense cognitive capacity theory is rooted in China’s traditional “four elements” coupled crime theory.^{vi} Viewed through the lens of stratified crime theory,^{vii} the “common sense cognition” of mentally ill individuals, as posited by the theory of common sense cognitive capacity, equates to an objective perception of the physical aspects of the act in the context of “constitutive element appropriateness” and a formal comprehension of the normative nature of the act in terms of “culpability”. However, these perceptions and understandings are merely surface-level and necessitate further scrutiny and evaluation. When a perpetrator is under the sway of a mental disorder, they may exhibit common sense cognitive capacity at the “form” level while losing cognitive capacity at the “essence” level, i.e., they lose substantial cognitive capacity and consequently lack criminal responsibility capacity. For instance, consider a scenario where an individual, driven by severe depressive episodes and compassion, kills their loved ones before committing suicide to spare them from potential suffering. While the actor may appear to possess common sense cognitive capacity, their comprehension of the act of killing and its illegality, though concrete and clear, remains a superficial phenomenon devoid of substance. In essence, this mentally ill individual fails to grasp the moral and legal significance of killing a loved one. For such psychiatric actors engaged in “extended suicide”, we can adopt a dialectical approach to distinguish between “phenomenon” and “essence”, “form” and “substance”, and reject their cognitive capacity in the essential sense, thereby avoiding a pursuit of criminal responsibility. This approach aligns with the cognitive principles of human beings and upholds the reasonable expectations of a civilized society. Gao Beiling and other scholars regard common sense cognitive capacity as synonymous with cognitive capacity in the context of criminal law, which inevitably limits the review process to the levels of “form” and “phenomenon” while interrupting the necessary analytical progression. This stance contradicts the fundamental epistemological requirement of “grasping the essence through the phenomenon”.

While it is true that the Chinese criminal law text only includes the term “cognitive capacity”, substantial cognitive capacity still holds significant legal relevance. The assessment of substantial cognitive capacity constitutes a specific method to accurately, authentically, and appropriately determine cognitive capacity. One possible outcome of evaluating a mentally ill individual’s cognitive capacity is the determination of their loss of substantial cognitive capacity. The term “substantial” in substantial cognitive capacity introduces notions of scrutiny, negation, and transcendence, enabling forensic experts and legal professionals to comprehensively analyze case-related information, delve deeper into the nature of the crime, and engage in legally sound discussions about “culpability”. A mentally ill individual involved in a crime who loses substantial cognitive capacity is legally incapable of cognition. The theory of common sense cognitive capacity risks expanding the scope of determining limited criminal responsibility capacity improperly, a notion explicitly challenged by the editorial board of the Chinese Journal of Psychiatry in 2016.^{viii} Such an expansion could result in individuals lacking rationality being held criminally responsible, undermining the legitimacy of criminal prosecution and contravening the reasonable expectations of a civilized society.

3.3 The Appropriate Connotation of Substantial Cognitive Capacity in China

Building upon the aforementioned arguments, we can provide the following conceptual definition for the substantial cognitive capacity of mentally ill individuals involved in criminal cases. Substantial cognitive capacity pertains to the mentally ill individual’s ability to appreciate the normative implications of the behavior in question based on their understanding of the behavior’s physical properties. Physical properties, also known as objective properties, encompass elements such as the time, place, means, methods, and consequences of the act in question. Normative implications refer to the moral or legal significance associated with the act. “Appreciate” is used in contrast to the formal “know”, indicating the genuine and clear perception, comprehension, and understanding of whether the act in question violates moral or legal standards. It’s worth noting that the “Assessment Guidelines”, as well as most scholars, describe the normative implications of the act as “meaning and nature within the context of criminal law”. Specifically, the “Assessment Guidelines” describes the normative meaning as “right or wrong” or “illegality and social harm”. The attached *Scale of Criminal Responsibility Capacity of Mental Patients* also introduces the term “perception of guilt and wrongness”. The academic community holds diverse views on this matter, and there are variations in the laws and precedents of different countries. In this paper, terms like moral wrong, legal wrong or criminality are considered synonymous and can be used interchangeably.

As discussed below, the concept of substantial cognitive capacity should be employed from a negative perspective, focusing on the understanding of “loss of substantial cognitive capacity”. The loss of substantial cognitive capacity in mentally ill individuals refers to a situation where, despite their ability to superficially and formally understand the

normative meaning of their actions, they lack the capacity to fully appreciate this normative meaning in essence and substance due to the influence of mental disorders. In the case of mentally ill individuals with normative perceptions such as “right or wrong” and “violation of the law”, an examination should be conducted to ascertain whether they are incapable of recognizing the rationality, necessity, appropriateness, and feasibility of the actions in question. This serves as a specific method for assessing their rational capacity to understand the normative meaning of the actions. When mentally ill individuals lose substantial cognitive capacity, they do not possess the cognitive capacity in the legal sense and should consequently be evaluated as lacking criminal responsibility capacity.

4. Corroboration of Essential Explanation from Other Legal Jurisdictions

In the realm of forensic psychiatry theory and practice in China, the use of the term “substantial cognitive capacity” and its interpretation from an essential perspective constitute the prevailing doctrines. The theory of common sense cognitive capacity, which has emerged in recent years, presents a robust challenge to the theory of substantial cognitive capacity. The theory of common sense cognitive capacity has gained recognition among numerous judicial professionals and the general populace, and its influence should not be underestimated. Therefore, China should vigorously uphold the doctrine of substantial cognitive capacity explained from an essential perspective and adhere to it in practice. As described below, this is a requirement of the stratified crime theory, which distinguishes between wrongfulness and culpability, a necessity for safeguarding the fundamental interests of mentally ill individuals involved in criminal activities, and a requirement for ensuring the basic legitimacy of criminal prosecution. China’s experience in this regard is not isolated. In countries like the United States and Japan, although the terminology of “substantial cognitive capacity” may not be explicitly employed, an analysis of judicial precedents reveals that some scholars and judicial professionals in these nations or districts still adhere to the perspective of understanding cognitive capacity from a substantial and intrinsic standpoint. These experiences validate and serve as one of the justifications for China’s own experience in the field of forensic psychiatry.

4.1 The United States of America

At the outset, it should be noted that there are various rules governing the insanity defense in the United States. The United States Supreme Court has not explicitly specified which rules are constitutionally mandated. The American experience discussed in this paper is limited to the rules prescribed by the *Model Penal Code* in the United States. This paper’s interpretation of substantial cognitive capacity, viewed from an essential perspective, aligns with the provisions of the U.S. Model Penal Code and its interpretation. The commentary of the U.S. *Model Penal Code* regarding “mental disease or defect excluding responsibility” states, a defendant must lack the substantial capacity to appreciate the criminality (wrongfulness) of their conduct or the capacity to conform their conduct to the requirements of the law due to mental disease or defect in order to be found not criminally responsible. However, the standard does not necessitate a total lack of capacity; it is sufficient as long as that capacity is no longer substantial. (American Law Institute, 2005, p.64) The *AAPL Practice Guideline for Forensic Psychiatric Evaluation of Defendants Raising the Insanity Defense*, authored by the American Academy of Psychiatry and Law, also stipulate that impairment of comprehension or control need only be substantial and not a total loss. (AAPL, 2014, p.6) Furthermore, the *Model Penal Code*’s commentary suggests that a defendant’s failure to appreciate the criminality of their conduct can extend to “a failure to appreciate the significance of their conduct at a profound level”. (American Law Institute, 2005, p.65) It is evident that the defendant may retain some residual knowledge of the offense due to mental impairment, but as long as they lack substantial or profound understanding, they are not criminally responsible. This illustrates the dialectical relationship between the “phenomenon” and the “essence”, which is in line with the prevailing understanding of substantial cognitive capacity in China.

It is worth noting that the *American Psychiatric Defense Reform Act of 1984*, passed by Congress in response to the Hinckley case, removed the term ‘substantial’ from the *Model Penal Code*’s insanity defense rules. The ABA’s recommended standard also lacks a “substantial” qualification for the actor’s incapacity. The ABA explains that by employing the term “appreciate”, the *Model Penal Code*’s drafters aimed to avoid the cognitive rigidity of the M’Naughten Standard. “They correctly recognized that it is rarely possible to say that a mentally disordered person was totally unable to know what he was doing or to know that it was wrong; even a psychotic person typically retains some grasp of reality”. (AAPL, 2014, p.7) However, the ABA contends that retaining the term “substantial capacity” is unnecessary because the term “appreciate” offers ample flexibility. “By using the term appreciate to encompass affective dimensions of major mental illness, the tests take into account all aspects of the defendant’s mental and emotional functioning relating to an ability to recognize and understand the significance of personal actions”. (AAPL, 2014, p.7) Thus, the *American Psychiatric Defense Reform Act* and similar rules, although ostensibly eliminating the term “substantial”, effectively replace the McNaughton standard’s “know” with “appreciate”, still reflecting a substantial or essential assessment.

In the United States, there is room for substantial review of cognitive capacity in cases involving mentally ill individuals, as long as the states do not abolish the affirmative defense of insanity. States like Kansas and Montana have adopted the *mens rea* model, permitting a defendant to introduce evidence of mental illness solely to establish the absence of alleged *mens rea*, without using this evidence for an affirmative defense of insanity. The Texas case of Yates serves as a notable illustration of the distinction between the *mens rea* model and the affirmative defense model. In this case, the defendant, Andrea Yates, was suffering from postpartum depression when she filled a bathtub with water and drowned her children one by one. She explained that she did this to prevent her children from going to hell. During the trial, the presented evidence indicated that Yates not only committed the killings intentionally but also with premeditation. She was fully aware that she committed the intentional killings with criminal intent, and she would have been convicted if the case had occurred in Kansas. However, in the state of Texas, where the case took place, Yates was allowed to assert an affirmative defense of insanity based on the presence of mental illness, and the jury ultimately returned a verdict of not guilty by reason of insanity. (Corrado, 2020, pp.6-7) Yates' premeditated murder of her children and her clear *mens rea* for her actions were superficial phenomena; the defendant's inability to substantially discern the moral wrongness of her actions, influenced by a mental disorder, was essential. The jury's verdict in this case vividly demonstrates the "essential" model of review. If this case had occurred in China, the forensic expert would also have assessed Yates, who committed an "extended suicide", as lacking substantial cognitive capacity and, thus, incapable of criminal responsibility.

4.2 Japan

In Japan, although the criminal law does not explicitly employ the term "substantial cognitive capacity", its courts adopt a similar approach to that of China. In one particular case, a person identified as X, "who had schizophrenia, was convinced by hallucinations that he was being deceived by A and subsequently beat A to death in an attempt to silence him". The second instance court determined that the defendant was significantly influenced by hallucinatory delusions. However, upon examining the motive's formation, the manner in which the crime was committed, and the case's antecedents, the court found that the defendant likely comprehended their actions, concluding that the defendant possessed limited criminal responsibility. In contrast, in a 2008 ruling, the Supreme Court of Japan determined that the defendant frequently experienced hallucinations, and the motive for the crime was influenced by delusions. The court also observed that the defendant's awareness of the underlying facts was uncertain due to the impact of hallucinatory delusions. Consequently, the Supreme Court stated, "Even if X had some awareness that the act in this case constituted a crime and retained corresponding memories, it remains unclear whether he was substantially capable of discerning the facts and appreciating the wrongfulness of his actions." As a result, the Supreme Court of Japan overturned the original judgment and ordered a new trial. (Yoshihiro Matsubara, 2014, p.170) This case demonstrates that the Japanese Supreme Court effectively endorsed the approach of assessing whether the defendant possessed substantial cognitive capacity.

Japanese scholar Takashi Hashizume delved into the issue of cognitive capacity in cases involving mentally ill individuals who commit crimes. According to Hashizume (2021, p.149), many mentally ill individuals can recognize that the act of killing is a criminal offense. However, they may be influenced by delusions, perceiving the victim as a demon, a fierce beast, or something similar, leading them to believe that the act of killing the other person is justified. Hashizume (2021, p.149) emphasizes, "Here, the issue is not the usual ability to recognize the illegality but rather the actor's capacity to grasp the significance and wrongfulness of the act they intend to commit". This perspective closely aligns with that of Chinese scholars who support the theory of substantial cognitive capacity, which focuses on the analysis of mentally ill individuals' significant and essential understanding of the normative significance of their actions in question. Hashizume (2021, p.149) suggests that in these cases, "it can be argued that the perpetrator cannot be expected to appreciate the act beyond such mere knowledge at this point and, therefore, lacks awareness of the illegality of their actions", consequently, the perpetrator lacks the cognitive capacity. The conclusion reached by Hashizume aligns with the conclusions drawn by Chinese scholars based on the theory of substantial cognitive capacity.

4.3 Taiwan District

In Taiwan district of China, the practice of substantial review of cognitive capacity also exists. In a case, the defendant, Zhang Zhenzhen, was found by the forensic experts to be suffering from schizophrenia and did not have the capacity to recognize her actions as illegal. The prosecutor argued that when Zhang Zhenzhen accused the victim, she still knew the object and content of her complaint, which shows that her mental state did not reach the point where she could not recognize the violation of the law, so her capacity to recognize the violation of the law was only diminished. The court pointed out that "as to the issue of recognition of illegality, if only to ask the defendant whether she recognizes a certain behavior is a violation of the law, the expert would feel it is too simplified", "for the recognition of behavior illegal or not, the most basic thing is to based on the understanding of reality". In this case, defendant Zhang Zhenzhen was under the influence of schizophrenia and had hallucinations and delusions that someone was verbally abusing her, and

believed it to be true. Therefore, Zhang Zhenzhen's understanding of reality was completely distorted, and her perception of illegality was based on an erroneous foundation, making it difficult to find that she had the capacity to recognize the illegality of her actions. The court held that, in this case, "the defendant should not be judged to have the capacity to recognize the illegality of her conduct, because she knew the subject and content of the complaint at the time of filing the complaint and she knew that the false accusation was an illegal act".^{ix} Obviously, in this case, although the judge did not use the concept of substantial cognitive capacity, but its argument reflects the strong color of substantial, essential review, and there is no difference with the theory of substantial cognitive capacity held by mainland China scholars.

5. The Judicial Application of the Theory of Substantial Cognitive Capacity in China

The concept of substantial cognitive capacity and incapacity can accurately and effectively address the complexities associated with assessing the culpability of mentally impaired individuals in criminal cases. It provides a solid foundation for forensic experts and judicial officers to adopt a progressive review process. In the judicial practice of China, there is a certain degree of inconsistency in the use of the term "substantial cognitive capacity" and related terminologies. Normalizing the usage of these terms is essential to fully realize their value.

5.1 *The Prerequisites for Employing the Concept of Substantial Cognitive Capacity*

5.1.1 Presence of Mental Disorders

When dealing with criminal cases involving suspects with potential mental illnesses, the initial step is to assess whether they indeed suffer from such disorders. Substantial cognitive capacity and incapacity are concepts in forensic psychiatry with significant implications in criminal law, and they are only relevant when the accused has a mental disorder. In the case of Luo Zhanghong's intentional injury, the court concluded that "Luo Zhanghong is not mentally ill; his mental state was normal at the time of the crime, and he had a clear motive for the crime. Consequently, he possessed substantial cognitive and control capacity, holding full criminal responsibility".^x Given that this defendant did not have a mental disorder, there was no need to delve into the assessment of responsibility capacity, let alone evaluate the loss of substantial cognitive capacity through an analysis of pathological mental symptoms.

5.1.2 Conformance with Criminal Constituent Elements

Evaluating the cognitive capacity and responsibility capacity of a mentally impaired defendant should follow a layered approach. Initially, an analysis should determine whether the defendant's actions align with the constituent elements of a particular crime. Subsequently, cognitive capacity, including substantial cognitive capacity, and control capacity should be assessed at the culpability level to gauge responsibility capacity. If the defendant's behavior does not meet the constituent elements of a specific crime, the examination process should be terminated, and there would be no need to assess cognitive capacity, particularly substantial cognitive capacity. Therefore, for a defendant with mental disorder whose actions do not meet the constituent elements of a particular individual crime, an acquittal should be issued directly, without invoking the terms of substantial cognitive capacity or incapacity.

5.1.3 Awareness of Wrongfulness

The awareness of the normative nature of their actions is a pivotal aspect to assess when determining the responsibility capacity of defendants with mental disorders. If evidence demonstrates that the defendant lacks an understanding of the wrongfulness of their actions, it can be straightforwardly concluded that they lack cognitive capacity, rendering them incapable of criminal responsibility. However, if a defendant diagnosed with a mental disorder confesses or provides evidence indicating that they "know" their actions are immoral, illegal, or even criminal, the evaluation should proceed to the substantial review phase. Here, the analysis should focus on whether the defendant cannot "appreciate" the legal or moral wrongfulness of their actions. Thus, for a defendant with mental disorder who is aware of the wrongfulness of their actions, allowing for a subsequent in-depth examination, the use of terms like substantial cognitive capacity and incapacity becomes relevant and valuable.

5.2 *The Normative Use of Substantial Cognitive Capacity*

In the context of American legal and forensic psychiatry academic papers, it is important to note that the term "incapacity" can directly reflect the specific lack of abilities in criminally insane individuals. However, in China, there are only specific phrases to express substantial cognitive capacity, and there is no equivalent phrase like "incapacity". "Incapacity" is conveyed indirectly through the loss of cognitive capacity. This results in the use of terms related to substantial cognitive capacity having two forms: affirmative (substantial cognitive capacity) and negative (loss of substantial cognitive capacity), which can lead to errors and confusions.

5.2.1 Affirmative Use

Some Chinese forensic experts and judicial professionals employ the term "substantial cognitive capacity" in an

affirmative manner. For instance, Ji Jumao et al (2011, p.7) argue that “the cognitive capacity specified in Article 18 of the Chinese *Criminal Law* also pertains to substantial cognitive capacity”, representing an affirmative use. In theory and practice, the affirmative use of substantial cognitive capacity should be limited to the context of defining “loss of substantial cognitive capacity” or to streamline terminology without introducing unnecessary complexity. It should not be applied in other scenarios. The following examples illustrate its misapplication.

Firstly, it is employed in cases where the defendant possesses full or unrestricted capacity of criminal responsibility. For instance, in a rape and forced prostitution case, the evaluating institution concluded that “the defendant Ma Ningbo, who suffered from somatization disorder, had a clear motive and purpose in committing the rape and forced prostitution case, possessed substantial cognitive and control capacities, and had full criminal responsibility capacity”.^{xii} In my opinion, if the forensic expert determines that the defendant meets the criteria of cognitive capacity in the legal sense, the term “cognitive capacity” can be used directly. Cognitive capacity is a legal term, and as per the provisions of the “Assessment Guidelines”, it already encompasses the notion of “fully comprehending the right and wrong of the behavior”, “fully grasping the illegality and social harm of the behavior”, and “fully appreciating the necessity of the behavior”. In this scenario, adding the word “substantial” before “cognitive capacity” is redundant.

Secondly, it is employed in cases where the defendant has limited capacity of criminal responsibility. For instance, in a theft case, the court maintained that “the defendant, Lan Wencheng, was in the residual stage of schizophrenia when he committed the crime, and had substantial cognitive capacity for the theft, so had limited criminal responsibility capacity”.^{xiii} In an intentional homicide case, the court asserted that the defendant, Lan Jinyan, possessed substantial cognitive capacity at the time of the crime, was in the onset of schizophrenia, and had limited criminal responsibility capacity.^{xiiii} In these instances, the court referred to “substantial cognitive capacity” as implying that the symptoms of the mental disorder had some adverse impact on the individual’s cognitive capacity but not to the extent of complete incapacitation. The individual still retained some ability to recognize the act. In this context, the term also carries a dialectical connotation, signifying the affirmation of the essence (“still possesses restricted recognition”) and negation of the appearance (“significant effects of the psychiatric disorder”). However, this interpretation of “substantial cognitive capacity” is erroneous. The “Assessment Guidelines” exclusively employ the term “loss of substantial cognitive capacity”, which signifies the essential negation of the superficial “cognitive capacity” of the mentally ill individual involved in the crime. The “Assessment Guidelines” never utilize the term “substantial cognitive capacity” to denote that “diminished cognitive capacity retains its essential attributes”. This meticulous approach to fundamental terminology is praiseworthy and deserves endorsement. In cases involving limited criminal responsibility capacity, the terminology of substantial cognitive capacity should not be utilized in the manner employed by the aforementioned courts, as it will inevitably result in confusion and misapplication.

5.2.2 Negative Use

The negative use of the term “substantial cognitive capacity” implies that the defendant with a mental disorder lacks or loses substantial cognitive capacity. This concept of “existence” of formal cognitive capacity and “loss” of substantial cognitive capacity, establishes a dialectical logic of “ostensible existence, but actual absence”. It creates a dichotomous analytical framework between formal and substantial assessments, shaping a progressive examination procedure. This is the fundamental essence of the substantial cognitive capacity theory. If the term is not employed in a negative context, the logic, structure, and procedure described above will cease to exist, and the associated benefits will be lost. Both the Chinese “Assessment Guidelines” and the U.S. *Model Penal Code* insanity defense rules use negative formulations of substantial cognitive capacity or similar terms.

6. The Value of Judicial Application of Substantial Cognitive Capacity Theory in China

6.1 Facilitating Compliance with Normative Requirements of Criminal Law

The normative requirements of criminal law encompass reasonable expectations placed upon the perpetrator within a well-ordered and civilized society, as well as the fundamental necessities for human survival. These requirements are a reflection of the moral values and noble aspirations inherent in criminal law. However, the absence of a normative perspective has, to a certain extent, entangled Chinese crime theory in the quagmire of natural causationism. (Feng, J., 2009, p.38) To address this issue, the normative theory of criminal responsibility should be embraced, integrating the value consensus of a civilized society into both the theoretical framework and practical application of criminal law. When dealing with defendants who suffer from mental disorders, the handling of their cases should exemplify the compassion and forgiveness embedded within our social community. Those individuals who lack culpability should be unequivocally excluded from the realm of criminal liability. In a civilized society, it is a moral imperative that individuals who have lost their capacity for rational judgment due to mental disorders should not be subject to criminal sanctions.

Utilizing the conceptual framework of substantial cognitive capacity and its loss aligns well with the epistemological

principles of delving “from the superficial to the essential” and “eliminating falsehoods to preserve truth”. This approach allows for a more accurate assessment of the free will of mentally ill individuals involved in criminal acts and, consequently, a more precise evaluation of whether they merit society’s forgiveness. Moreover, this framework serves as a warning mechanism for forensic experts and judicial officers to identify individuals who may ostensibly appear to possess cognitive capacity, preventing them from being erroneously held criminally responsible.

For instance, consider a case of intentional homicide where the defendant, Xie Haiyi, was accused of killing her son. The forensic expert concluded that Xie Haiyi was aware of her actions and, therefore, had substantial cognitive capacity. However, this assessment might not suffice. Xie Haiyi had reportedly suffered from depression post-partum, and her crime was linked to an extended suicide attempt.^{xiv} The crucial question is whether Xie Haiyi had a pathological motive, whether she misinterpreted the nature of the murder under the influence of this motive, and whether her mental disorder was severe enough to dominate her actions. Without addressing these aspects, a proper evaluation of her culpability or pardonability cannot be made. If Xie Haiyi’s actions were driven by suicidal thoughts and pathological emotions to the extent that she did not recognize the moral wrongness of her actions but believed it was a way to protect her loved ones, she should be regarded as a “patient” incapable of substantial recognition of her criminal behavior and, thus, deserving of forgiveness. Such individuals are not morally reprehensible “wrongdoers”, and their formal knowledge of their actions being illegal holds no imputable meaning.

In cases where mentally ill defendants exhibit pathological or unknown motives and are controlled by pathological mental symptoms, even if they had premeditated and planned their crimes, selected the time, place, and means, and subsequently fled the scene, their admission of the illegality of their actions should not necessarily exempt them from an evaluation of substantial cognitive capacity. The mere presence of “common sense cognitive capacity” in mentally ill individuals should not be used to dismiss the assessment of “loss of substantial cognitive capacity” and the corresponding lack of criminal responsibility capacity. While the use of the substantial cognitive capacity theory may raise concerns about potential implications for crime prevention, it effectively aligns with the normative requirements of criminal law and upholds the principles of justice.

6.2 Maintaining the Logical Framework of Wrongfulness and Culpability in Crime Theory

In contrast to the theory of substantial cognitive capacity, there exists the theory of common sense cognitive capacity. In many complex criminal cases involving mentally ill individuals, the perpetrators often have pathological motives that drive their actions. Pathological motivation frequently leads the perpetrator to misinterpret the “right or wrong” of their criminal behavior, significantly impacting the examination of their capacity of criminal responsibility, assessment of culpability, and determination of whether their actions constitute a crime. However, in the context of common sense cognitive theory, this factor is considered valueless. According to Gao Beiling, traditional Chinese crime theory holds that a “crime constitution” requires four elements: the object of the crime, the objective aspect of the crime, the subject of the crime, and the subjective aspect of the crime. These four elements do not include “motive”, and “a good or bad motive is not considered a necessary condition for conviction”. Some mentally ill individuals who commit crimes under the influence of psychopathic motives possess these four elements, even though they may not fully consider the content, meaning, and consequences of their actions. (Gao, B. et al., 2012, p.512) Evidently, Gao Beiling’s argument is based on the traditional “four elements” coupled crime theory in China.

The traditional Chinese coupled crime theory does not differentiate between “wrongfulness” and “culpability”. Under the theory of common sense cognitive capacity within this framework, the evaluation of responsibility capacity is notably weakened and lacks practical significance. The common sense cognitive capacity mentioned by Gao Beiling pertains to an individual’s awareness of the content, meaning, and consequences of their actions, which is nearly indistinguishable from the cognitive element of criminal intent. Gao Beiling (Gao, B. et al., 2012, p.512) argues that individuals who have lost substantial cognitive capacity usually exhibit an unimpaired common sense ability to recognize the content, meaning, and consequences of their own actions. Therefore, common sense cognitive capacity should be considered the cognitive capacity referred to in criminal law. This approach essentially recognizes a mentally ill person’s capacity of criminal responsibility based on their recognition within the context of criminal intent, without considering pathological motives, medical conditions and case circumstances to assess whether they genuinely comprehend the normative significance of committing a crime. The examination of “cognitive capacity”, i.e., common sense cognitive capacity, can largely be replaced by evaluating the cognitive element within the realm of criminal intent. All examination work is confined within the scope of the four elements of the “crime constitution”. The examination of responsibility capacity in its truest sense has been neglected or even disregarded due to its poor alignment with the coupled crime theory. The presence of pathological motives and the loss of substantial cognitive capacity cannot serve to negate culpability through the assessment of criminal responsibility capacity.

The crime theory that aligns best with the theory of substantial cognitive capacity is the stratified crime theory.

According to this theory, the defendant's conviction should be analyzed in a sequential manner, considering conformity to the constituent elements, illegality, and culpability. Following this logical order, the review procedure should encompass three stages regarding the recognition of mentally ill defendants and their cognitive capacity. First, it should examine whether mentally ill defendants possess objective knowledge of the physical properties of the acts in question, which falls within the realm of "constitutive intention". This belongs to the review at the level of conformity with the constituent elements. Second, it should assess whether mentally ill defendants have a formal understanding of the normative significance (moral or legal wrongs) of the act in question. Third, it should determine whether mentally ill defendants possess a substantial appreciation of the normative significance of the act in question. The review of cognitive capacity regarding the normative significance belongs to the culpability review level. Clearly, the standardized use of the terminology of substantial cognitive capacity and its integration into judicial practice can effectively distinguish between formal and substantial reviews in the "culpability" phase. This prompts forensic experts and judicial personnel to pay attention to factors that result in the substantial and essential loss of cognitive capacity in mentally ill individuals, thus rendering them not culpable. These reviews cannot be encompassed by the examination of the "constitutive intention" at the "conformity to the constituent elements" stage. Therefore, the standardized utilization of the concept of substantial cognitive capacity and related concepts strongly elucidates and maintains the internal logic of the dichotomy between "wrongfulness" and "culpability" in the stratified crime theory.

6.3 Providing Theoretical Tools for Appropriate Case Handling by Judicial Personnel

Firstly, adopting the theory of substantial cognitive capacity assists forensic experts in offering more specialized information to judicial personnel. The inner workings of a mentally ill person's subjective world are often complex and challenging to understand. Judicial officers must rely on forensic psychiatric experts to provide comprehensive insights. The more detailed the professional information offered by experts, the less likely judicial officers are to make errors in judgment. Just as Judge Bazelon in the United States aimed to "unfreeze" the knowledge possessed by psychiatrists and revitalize an area that had suffered from a lack of information during the development of the Durham rule, (Bazelon, 1975, p.181) China should similarly incentivize forensic experts to provide thorough information. Embracing the concept of substantial cognitive capacity means that forensic experts must move beyond superficial perceptions and explore the profound aspects of mentally ill individuals' perceptions. This includes delving into various aspects such as the types and manifestations of relevant mental disorders, the extent of pathological motives, typical personality traits, and the psychology of the defendants. All these factors must be introduced and analyzed based on empirical research. Forensic experts can then offer this comprehensive information to judicial officers, strengthening their ability to make sound case decisions.

Secondly, the theory of substantial cognitive capacity offers a way to circumvent the cumbersome analysis of control capacity. Evaluating the responsibility capacity of mentally ill individuals involved in crimes requires prior assessments of both cognitive capacity and control capacity. However, evaluating control capacity poses significant difficulties worldwide. Scholars in Japan, for instance, highlight the difficulty in distinguishing between "inability to control" due to mental disorders and "failure to control despite the possibility of control". (Takashi Hashizume, 2021, pp.149-150) This distinction remains problematic in both Japan and the United States. Chinese scholars share similar views. In cases like "extended suicide", analyzing whether the perpetrator genuinely comprehends the moral or legal wrongness of their actions can eliminate the need for a separate assessment of control capacity. Zheng Zhanpei notes that "impaired capacity for control" is the primary pathological psychological mechanism underlying extended suicide. He argues that such individuals also suffer from distorted cognition, which impairs cognitive capacity. These individuals mistake brutality for mercy, and under the influence of pathological emotions, they fail to understand the normative meaning of their criminal actions. (Zheng, Z., 2017, p.146) Ji Shumao et al. (Ji, S. et al., 2012, pp.16-17) assert that "extended suicide" is closely related to cognitive capacity and that individuals commit suicide and homicide under the influence of pathological emotions and distorted cognition. In such cases, it is more efficient to directly assess the criminal responsibility incapacity using the theoretical framework of substantial cognitive capacity. When the substantial cognitive capacity is assessed to be lost, the criminal responsibility capacity is nullified logically, there will be no need to assess the control capacity. Similar theories have been proposed in Japan. (Takashi Hashizume, 2021, p.159)

Thirdly, the theory of substantial cognitive capacity lends robust support to judicial reasoning. In some cases, judicial officers might inherently lean towards offering compassion and forgiveness to mentally ill individuals involved in criminal acts. Without employing the terminology of substantial cognitive capacity and incapacity, there is a risk of inadvertently dismissing these individuals' subjective comprehension of the normative implications of their actions, which can result in reasoning that contradicts the evidence or common sense. Consider, for instance, a case in Taiwan where Zhang Guoxian, diagnosed with schizophrenia, was accused of breaking into a temple and stealing incense oil money while being caught in the act. The forensic expert determined that this person did not grasp the illegality of their actions or lacked the capacity to act in accordance with this understanding. However, the prosecutor argued that despite

the mental illness, the defendant did recognize the illegality because he used a handheld sander to break locks. The judge ultimately ruled in favor of the defendant, stating that using a sander to break locks did not necessarily imply comprehension of illegality, a decision that may seem counterintuitive.^{xv} By applying the terminology of substantial cognitive capacity, judges can give better judicial reasoning. Even if the defendant's actions suggest some understanding of illegality, a more thorough analysis could assess whether he fundamentally understood or appreciated the illegality of his actions under the influence of psychiatric symptoms, potentially rendering him non-culpable. This approach helps avoid the unnecessary denial of illegality recognition. The concept of substantial cognitive capacity and its loss incorporates dialectical logic that reconciles phenomena and essence, making it a powerful tool for judges when formulating their arguments.

7. Conclusion

In China, the approach to assess criminal responsibility for individuals with mental disorders and the treatment of the insanity defense shares some similarities with that of civil law countries such as Germany and France. China follows a stratified theory of crime, distinguishes between wrongfulness and culpability, and employs the concept of criminal responsibility capacity to assess the culpability of individuals with mental disorders. This legal framework and judicial practice differ notably from those of common law countries such as the United Kingdom and the United States. Within China, forensic psychiatric institutions and judicial organs frequently apply the theory of substantial cognitive capacity, holding that a loss of substantial cognitive capacity signifies a loss of cognitive capacity as defined by criminal law, thus rendering individuals non-culpable. While this theory finds its origins in the U.S. Model Penal Code's insanity defense rules, it is applied more extensively in China. Furthermore, in China, substantial cognitive capacity, effectively equivalent to "moral capacity" in U.S. forensic psychiatry, encompasses defendants' perception of the moral or legal wrongness of their actions rather than just the recognition of their physical aspects.

In China, various scholars advocate both for and against the theory of substantial cognitive capacity, with some, including Gao Beiling, promoting the theory of common sense cognitive capacity, which fundamentally challenges the legitimacy of the substantial cognitive capacity theory. In practice, forensic experts and judicial officers often disagree on the appropriate use of the terminology related to substantial cognitive capacity. The theory of substantial cognitive capacity, grounded in scientific principles, offers significant advantages for safeguarding the human rights of individuals with mental disorders, distinguishing it from the trend of restricting or denying the insanity defense in the United States. Therefore, this theory should be upheld and standardized in judicial practice.

In the field of forensic psychiatry, the prevailing perspective among many experts is to assess the cognitive capacity of individuals with mental disorders based on substance and essence. In this regard, the viewpoint of Zhou Jue, a former researcher at the Practical Law Institute of the Supreme People's Court of China, is accurate and should be maintained. Substantial cognitive capacity refers to the ability of mentally ill individuals to appreciate the normative significance of their actions based on recognition of the actions' physical aspects. Substantial cognitive incapacity, or the loss of substantial cognitive capacity, signifies that individuals with mental disorders can superficially acknowledge the legal or moral wrongness of their behavior but cannot genuinely understand or appreciate it. This approach is not only consistent with the views of the majority of China's forensic experts and judicial personnel but also corresponds to the practices of many countries, including the United States and Japan, in examining the culpability of mentally impaired defendants from an essential and substantial perspective.

The terminology related to substantial cognitive capacity is of paramount importance. In judicial practice, it should be used from a negative perspective to underscore the contrast between having "formal" cognitive capacity and losing "substantial" cognitive capacity. Employing the concept of substantial cognitive capacity and incapacity correctly can help implement the normative requirements of criminal law, reinforce the logical division between "wrongfulness" and "culpability", and provide judicial personnel with a valuable theoretical tool for appropriate judicial reasoning. China's theory of substantial cognitive capacity in forensic psychiatry and its judicial experiences offer essential references for countries worldwide to reevaluate insanity defense rules, counter the trend of denying the insanity defense, and protect the human rights of individuals with mental disorders.

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i Xie's Provocation and Disturbance Case, Criminal Judgment of Bao'an District People's Court of Shenzhen City, Guangdong Province. Docket Number: (2017) Yue 0306 Xing Chu 199.

- ii Yang Shuang's Smuggling of Goods and Items Prohibited for Entry and Exit Case. Criminal Judgment of Honghe Hani and Yi Autonomous Prefecture Intermediate People's Court, Yunnan Province. Docket Number: (2017) Yun 25 Xing Chu 65.
- iii Gao Beiling, Li Xuewu and other psychiatric experts, practice at the Forensic Psychiatric Institute of Shenzhen Kangning Hospital. This forensic assessment institution actively applies the theory of common sense cognitive capacity to its forensic assessments.
- iv Xie's Provocation and Disturbance Case, Criminal Judgment of Bao'an District People's Court of Shenzhen City, Guangdong Province. Docket Number: (2017) Yue 0306 Xing Chu 199.
- v Yan's Intentional Injury Case, Criminal Judgment of Luohu District People's Court of Shenzhen City, Guangdong Province. Docket Number: (2014) Shen Luo Fa Xing Yi Chu 1104.
- vi China's traditional "four elements" combined crime theory is a framework within criminal law used to establish the prerequisites for defining a crime. It comprises four key elements: the criminal subject, the criminal object, the objective aspect of the crime, and the subjective aspect of the crime. Currently, this traditional theory of crime faces significant scrutiny from Chinese legal scholars. Nevertheless, in judicial practice, many legal professionals continue to routinely apply this theory.
- vii Stratified crime theory is a criminal theory introduced to China by Chinese legal scholars influenced by German and Japanese legal theories. According to this theory, the establishment of a crime necessitates the fulfillment of three elements: conformity to constitutive elements, unlawfulness, and culpability. In judicial practice, legal professionals should examine these three elements sequentially. This theory has gradually gained recognition and support from an increasing number of scholars and practitioners. The research in this paper on the issue of the cognitive capacity and criminal responsibility capacity of mentally ill individuals is also based on this criminal theory.
- viii In 2016, the editorial board of the "Chinese Journal of Psychiatry" added an editor's note to the front of the paper published by Wang Zhiliang, noting: "In current forensic psychiatric assessments in criminal cases, there is a tendency towards the expansion of limited cognitive liability capacity due to a minority of evaluators confusing substantial cognitive capacity with common sense cognitive capacity. Moreover, the assessment opinions often become a focal point in society, placing significant pressure on the evaluators". See Wang, Z. (2016). A Brief Discussion on Substantial Cognitive Capacity and Its Controversy in Forensic Psychiatry Practice. *Chinese Journal of Psychiatry*, 49(06), 418.
- ix Zhang Zhenzhen's False Accusation Case, Criminal Judgment of the Supreme Court of Taiwan District. Docket Number: 107 Appeal Case No. 1343.
- x Luo Zhanghong's Intentional Injury Case, Criminal and Attached Civil Judgment of Chongqing First Intermediate People's Court. Docket Number: (2018) Yu 01 Xing Chu 88.
- xi Ma Ningbo's Rape and Forced Prostitution Case, Notice of Rejection of Appeal by Baoji Intermediate People's Court, Shaanxi Province. Docket Number: (2017) Shan 03 Xing Jian 16.
- xii Lan Wencheng's Theft Case, Criminal Judgment of Nankang City People's Court, Jiangxi Province. Docket Number: (2018) Gan 0703 Xing Chu 59.
- xiii Lan Jinyan's Intentional Homicide Case, Criminal Judgment of Xincheng County People's Court, Guangxi Zhuang Autonomous Region. Docket Number: (2014) Xin Xing Chu 71.
- xiv Xie Haiyi's Intentional Homicide Case, Criminal Ruling of the Guangdong Provincial High People's Court. Docket Number: (2020) Yue Xing Zhong 936.
- xv Zhang Guoxian's Theft Case, Criminal Judgment of the New Taipei District Court, Taiwan district. Docket Number: 107 Yi No. 402.

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