Did They Forget to Zero the Scales?: To Ease Jury Deliberations, the Supreme Court Cuts Protection for the Mentally Ill in *Clark v. Arizona*

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Introduction

On June 29, 2006, the United States Supreme Court affirmed Eric Clark's conviction for first-degree murder in *Clark v. Arizona*.[1] At age seventeen, Clark fatally shot a police officer while suffering from paranoid schizophrenia.[2] A trial court originally convicted Clark and sentenced him to a life term, and the Arizona Court of Appeals affirmed the trial court's conviction.[3] The Supreme Court held that neither Arizona's insanity test nor its restriction on the consideration of mental illness and incapacity evidence on the issue of mens rea violates due process.[4]

The decision in *Clark v. Arizona* violates the Constitution and should be reversed. *Clark* directly bears on the future treatment of mentally-ill offenders within our legal system. This Article seeks to highlight its flaws and, at the same time, bring attention to the grander, pre-existing problems created by current methods of dealing with mental illness in the legal system. The first Section of this Article traces the incorporation of the mens rea requirement and the insanity defense into the criminal justice system, confirming that the principle of punishing only those individuals who have criminal intent has a substantial history. This Section includes a special focus on Arizona's unique insanity test. Next, this Article outlines the Supreme Court's recent determination that due process does not require an insanity test that contains a cognitive prong or the admission of expert

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1. Clark v. Arizona, 126 S. Ct. 2709, 2737 (2006).
2. *Id.* at 2716.
3. *Id.* at 2718.
4. *Id.* at 2716.

testimony used to negate mens rea. After detailing the facts in *Clark* and the Court's reasoning for its decision, this Article's third Section critiques the Court's holding and its justification for that holding by delving into the issue of jury confusion and identifying future problems which might arise from the *Clark* decision.

I. Law Prior to *Clark*: Mens Rea and the Insanity Defense

A. History of the Concept of Mens Rea

A criminal offense usually requires both an actus reus and mens rea.[5] Actus reus refers to the voluntary act, while mens rea—"literally, a 'guilty mind'"—refers to the mental state of the perpetrator.[6] The Court has defined mens rea as "the ancient requirement of a culpable state of mind;"[7] however, some scholars say the phrase defies definition.[8] These scholars find the exact meaning of mens rea to be "notoriously elusive due to its history of imprecise and ambiguous exposition at the hands of common law courts, legislators, and commentators alike."[9] While many societies have manipulated the concept to fit into their existing moral scheme, the term can be understood generally to refer to the intent behind a criminal act.[10]

In early medieval times, the concept of mens rea did not exist, and evidence that an individual had committed the act in question might have been sufficient to convict him.[11] Roman, Hebrew, Greek, and canon law, however, all drew a line between acts committed intentionally and those committed unintentionally.[12] While written law in the Anglo-Saxon period still supported the belief that no mens rea needed to be shown to impose criminal liability, in reality the absence of a culpable mental state sometimes led to reduced punishment.[13] The Church of England and universities became the main advocates for

5. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 115 (3d ed. 2001).

6. *Id.*

7. Morissette v. United States, 342 U.S. 246, 250 (1952).

8. *E.g.* Martin R. Gardner, *The Mens Rea Enigma: Observations on the Role of Motive in the Criminal Law Past and Present*, 1993 UTAH L. REV. 635, 637–38 (1993).

9. *Id.* at 638 ("[T]he mens rea concept is so riddled with verbal imprecision that it lacks meaning.").

10. *Id.* at 634–35.

11. Christopher Slobogin, *An End to Insanity: Recasting the Role of Mental Disability in Criminal Cases*, 86 VA. L. REV. 1199, 1215 (2000).

12. Henry T. Miller, *Recent Changes in Criminal Law: The Federal Insanity Defense*, 46 LA. L. REV. 337, 338 (1985).

13. Gardner, *supra* note 8, at 652–54.

formally adding a mens rea element to English criminal law.[14] Saint Augustine first used the term mens rea to argue that behavior cannot be judged without considering mental state.[15] By the end of the twelfth century, canon law exerted a strong influence over the formation of criminal law, and "Christian ethics had long emphasized mental culpability as essential to sinfulness."[16] In the thirteenth century, most felonies required criminal intent.[17] Starting in the fifteenth century, courts began to distinguish between mental states and to designate different levels of culpability.[18] By the middle of the twentieth century, the United States legal system began to require that prosecutors prove the mens rea element of a crime beyond a reasonable doubt.[19]

Over hundreds of years, the mens rea requirement became a central tenet of criminal justice.[20] The American legal code by and large exemplifies the principle that moral culpability justifies punishment,[21] and "moral blameworthiness require[s] that the offender make a free, voluntary, and rational choice" to commit the evil act.[22] According to this conception of justice, offenders who act under mistaken factual beliefs or in self-defense do not merit the same punishment and should not be treated analogously to offenders with a morally malevolent intent.[23]

B. History of the Insanity Defense

1. England Refines an Ancient Concept

While formal incorporation of an insanity defense did not come until later, history shows the concept of mitigating responsibility for those suffering from mental illnesses has figured in legal discourse for several hundred years. The insanity defense can trace its roots back to biblical times.[24] During the fourteenth century, the definition of insanity centered on the ability to tell

14. Miller, *supra* note 12, at 338.
15. Gardner, *supra* note 8, at 654–55.
16. *Id.* at 654.
17. Miller, *supra* note 12, at 339.
18. Slobogin, *supra* note 11, at 1216.
19. John Gibeaut, *A Matter Over MIND: The Supreme Court Is Poised to Review the Insanity Defense, an Issue That Has Confounded Courts, Psychiatrists, and Lawyers*, 92 A.B.A. J., Apr. 2006, at 32, 37.
20. Gardner, *supra* note 8, at 655.
21. DRESSLER, *supra* note 5, at 115.
22. Gardner, *supra* note 8, at 665.
23. *Id.* at 666.
24. Gibeaut, *supra* note 19, at 37.

good from evil.[25] By the fifteenth century, English judges frequently instructed juries on the idea that total deprivation of the ability to reason could mitigate an individual's criminal culpability.[26]

Standardized jury instructions on the insanity defense originated with the trial of Daniel M'Naghten in 1843.[27] M'Naghten killed Edmund Drummond in an attempt to assassinate Sir Robert Peel,[28] the British Prime Minister.[29] At trial, M'Naghten's counsel introduced evidence, including medical testimony,[30] to show M'Naghten suffered from delusions[31] and thus believed that killing Peel would save his own life.[32] The judge instructed the jury to determine whether, at the time M'Naghten committed the act, he "had or had not the use of his understanding, so as to know that he was doing a wrong or wicked act."[33] The jury came back with a verdict of not guilty by reason of insanity and sent M'Naghten to a criminal lunatic asylum.[34]

After *M'Naghten*, the English House of Lords worked with judges to establish a standard rule for cases involving the insanity defense.[35] The resulting test consisted of two prongs.[36] To establish a defense of insanity, an individual must show that he 1) did not know the nature or quality of the act, or 2) did not know what he was doing was wrong.[37] This second prong refers to an individual's ability to tell the difference between right and wrong.[38] By the middle of the twentieth century, every state in the United States except for New Hampshire had established, and

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25. Miller, *supra* note 12, at 339–40.

26. Jenny Williams, *Reduction in the Protection for Mentally Ill Criminal Defendants: Kansas Upholds the Replacement of the* M'Naughten *Approach with the Mens Rea Approach, Effectively Eliminating the Insanity Defense [*State v. Bethel, *66 P.3d 840 (Kan. 2003)]*, 44 WASHBURN L.J. 213, 235 (2004).

27. *Id.* at 217.

28. DONALD H.J. HERMANN, THE INSANITY DEFENSE 34 (1983).

29. Williams, *supra* note 26, at 218.

30. LOUIS H. COHEN, MURDER, MADNESS AND THE LAW 35 (1952).

31. HERMANN, *supra* note 28, at 34.

32. Williams, *supra* note 26, at 218.

33. M'Naghten's Case, 10 Cl. & Fin. 200, 8 Eng. Rep. 718 (1843), *reprinted in* SANFORD H. KADISH & STEPHEN J. SCHULHOFER, CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS 932 (6th ed. 1995). This case may also be properly referred to as "*M'Naghten*," "*M'Naughten*," or "*M'Naughten's Case*."

34. COHEN, *supra* note 30, at 35.

35. HERMANN, *supra* note 28, at 35.

36. DRESSLER, *supra* note 5, at 346.

37. *Id.*

38. *Id.*

put into use, the *M'Naghten* rule as the test for insanity.[39]

2. The States Add a Few New Twists

English courts continue to follow *M'Naghten*, but other tests have developed in the United States.[40] In the mid-nineteenth century, concerns that the *M'Naghten* test focused exclusively on cognitive disability led some of the states to use the Irresistible Impulse test to supplement *M'Naghten*.[41] The Irresistible Impulse test recognizes volitional impairment.[42] Sometimes described as the "Policeman at the Elbow" test, this test asks whether the individual would have committed the act even if a policeman had been standing by his side because he was so unable to control his behavior.[43] In 1954, Judge Bazelon and the D.C. Circuit articulated another volitional test, the *Durham* test.[44] The *Durham* test excuses defendants whose unlawful act is the product of a mental disease or defect and offers the "possibility for an expansive definition of insanity."[45] Finally, the American Legal Institute created the Model Penal Code ("MPC") test in 1962, which considers whether, at the time of the act, an individual lacked substantial capacity to either appreciate the wrongfulness of his behavior or conform to the law.[46]

During the 1960s and 1970s, U.S. courts saw a dramatic rise in the use of the insanity defense.[47] This liberal era in American criminal law emphasized rehabilitation instead of punishment for mentally-ill offenders.[48] An abrupt shift took place in 1981 when John Hinckley successfully asserted a defense of insanity for his attempt to assassinate President Ronald Reagan.[49] Professor Michael Perlin of New York Law School argues: "The acquittal of

39. Williams, *supra* note 26, at 219.

40. Cynthia G. Hawkins-León, *"Literature as Law": The History of the Insanity Plea and a Fictional Application Within the Law & Literature Canon*, 72 TEMP. L. REV. 381, 392 (1999).

41. HERMANN, *supra* note 28, at 38.

42. Slobogin, *supra* note 11, at 1211–12.

43. Christine Michalopoulos, *Filling in the Holes of the Insanity Defense: The Andrea Yates Case and the Need for a New Prong*, 10 VA. J. SOC. POL'Y & L. 383, 394 (2003).

44. Julie E. Grachek, *The Insanity Defense in the Twenty-First Century: How Recent Supreme Court Case Law Can Improve the System*, 81 IND. L.J. 1479, 1484 (2005).

45. *Id.*

46. Hawkins-León, *supra* note 40, at 397.

47. Grachek, *supra* note 44, at 1483.

48. *Id.* at 1486.

49. *See* Williams, *supra* note 26, at 220–21 (describing the response to the Hinckley verdict and the resulting enactment of the Insanity Defense Reform Act).

John W. Hinckley galvanized the American public in a way that led directly to the reversal of 150 years of study and understanding of the complexities of psychological behavior and the relationship between mental illness and certain violent acts."[50] In the three years following the Hinckley scandal, thirty-four states changed their insanity laws.[51] Demands from the public for complete abolition of the defense grew, with support from the Reagan administration.[52] A shift in priority from the individual rights of the mentally ill to the safety of the general public caused the abandonment of rehabilitation goals in favor of punishment.[53]

On the federal level, the reaction to Hinckley's successful defense resulted in the Insanity Defense Reform Act of 1984, which provides:[54]

> It is an affirmative defense to a prosecution under any Federal statute that, at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts. Mental disease or defect does not otherwise constitute a defense.[55]

This was the first time Congress ever enacted legislation defining criminal insanity.[56] The new federal standard required the defense to prove insanity by a clear and convincing standard and the test did not include a volitional prong.[57] With the Act, federal law returned to the *status quo ante* when the *M'Naghten* test stood as the one and only test for insanity.[58]

Senate Reports show the Senate Judiciary Committee sought to allow admission of behavioral evidence that might be relevant to challenging the requisite state of mind as one element of the offense.[59] At the same time, the Senate planned to prevent such evidence from being used for affirmative defenses, like diminished capacity.[60] Accordingly, the Act allows the admission of evidence

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50. Michael L. Perlin, *"The Borderline Which Separated You from Me": The Insanity Defense, the Authoritarian Spirit, the Fear of Faking, and the Culture of Punishment*, 82 IOWA L. REV. 1375, 1380–81 (1997).

51. Renée Melançon, *Arizona's Insane Response to Insanity*, 40 ARIZ. L. REV. 287, 296 (1998).

52. Gibeaut, *supra* note 19, at 37; Perlin, *supra* note 50, at 1381–82.

53. Grachek, *supra* note 44, at 1486.

54. Williams, *supra* note 26, at 221.

55. 18 U.S.C. § 17 (2000).

56. Miller, *supra* note 12, at 349.

57. Williams, *supra* note 26, at 221.

58. Perlin, *supra* note 50, at 1382.

59. Judi S. Greenberg, Recent Case, United States v. Pohlot, *827 F.2d 889 (3d Cir. 1987)*, 61 TEMP. L. REV. 955, 975 (1988).

60. *Id.*

of mental disease or defect only with the insanity defense and no other affirmative defenses.[61] Congress specifically intended to reduce the possible confusion that expert testimony might cause.[62] The Act explicitly prohibits an expert from giving an opinion on whether the defendant had the required mental state;[63] however, the lack of other explicit restrictions on expert testimony opens the door for arguments supporting the admission of other expert testimony describing the defendant's state of mind.[64] Since its enactment, circuit courts have read the Act in contradictory ways. Some have interpreted it to allow the admission of psychiatric testimony to negate mens rea, while others to forbid psychiatric testimony outside of the insanity defense.[65]

Jurisdictions in the United States currently embrace all of the insanity standards described in this section.[66] According to a 2002 American Academy of Psychiatry and the Law study, twenty-five states continue to use the *M'Naghten* test.[67] Seventeen have adopted the MPC test, while three use the Irresistible Impulse test and one uses the *Durham* test.[68] The Insanity Defense Reform Act of 1984 continues to guide the insanity defense in the federal system.[69] Because states use different tests, an individual meeting the definition of legal insane in one state might not be considered legally insane in another.

3. Movements Aimed at Abolishing the Insanity Defense Achieved Limited Success

Four states have eliminated the insanity defense altogether.[70] Proponents of abolition claim that eliminating the insanity defense will improve the criminal justice system's public image and the public's perception of the mentally ill by showing that the system holds the mentally ill accountable for their actions the same as everyone else.[71] Abolitionists also argue that more

61. *Id.* at 974.
62. *Id.* at 976.
63. *Id.*
64. *Id.*
65. *Id.* at 977.
66. *See* Grachek, *supra* note 44, at 1485.
67. *Id.*
68. *Id.*
69. *See* Williams, *supra* note 26, at 220–23.
70. Grachek, *supra* note 44, at 1485. Idaho, Kansas, Montana, and Utah do not provide an affirmative insanity defense. Clark v. Arizona, 126 S. Ct. 2706, 2721 n.20 (2006).
71. *See* Slobogin, *supra* note 11, at 1243–44 (explaining different views that support the elimination of the insanity defense).

efficient treatment for the mentally ill will result from eliminating the defense by pushing defendants to recognize their illness and to receive proper treatment.[72] Additionally, abolitionists point to statistics that suggest white defendants are disproportionately found not guilty by reason of insanity because of their race.[73] Also, "the insanity defense can be weighed heavily towards those who are well-off"[74] because they can afford to hire a skilled team of psychiatrists. This inequality combined with the often disgraceful conditions of public mental hospitals, which may actually inhibit rehabilitation, presents a compelling case for altering the insanity defense.[75]

Faced with abolition movements using such arguments, Idaho, Montana, Utah, and Kansas all passed legislation to abolish the insanity defense and restrict the admission of psychiatric evidence on the issue of mens rea.[76] The Kansas Supreme Court upheld the state statute, finding the insanity defense was not fundamental.[77] Idaho's Supreme Court also upheld its state statute.[78] The United States Supreme Court has yet to decide on the constitutionality of abolishing the insanity defense.[79]

C. Bifurcated Trials

Some jurisdictions have utilized procedural manipulations to alter the insanity defense. One such procedural alteration is the bifurcated trial, which originated in Wisconsin in 1878.[80] A bifurcated trial splits a criminal trial into two parts.[81] Guilt and insanity receive separate consideration.[82] Bifurcation is designed

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72. *Id.* at 1245.

73. Jonathan Rowe, *Why Liberals Should Hate the Insanity Defense*, *in* TAKING SIDES 100, 105 (M. Ethan Katsh & Willliam Rose eds., 2002).

74. *Id.*

75. *See id.* at 108–09 (noting that over half of the staff in the country's public mental hospitals are graduates of foreign medical schools and illustrating this problem with an anecdote about a staff member who did not know .8 and .80 equaled the same amount of medication).

76. Recent Development, State v. Searcy, *798 P.2d 914 (Idaho 1990)*, 104 HARV. L. REV. 1132, 1132 (1991); Williams, *supra* note 26, at 213.

77. Williams, *supra* note 26, at 213–14 (citing State v. Bethel, 66 P.3d 840, 851 (Kan. 2003)).

78. State v. Searcy, 798 P.2d 914, 921 (Idaho 1990).

79. Stephen J. Morse, *Excusing the Crazy: The Insanity Defense Reconsidered*, 58 S. CAL. L. REV. 777, 805 (1985).

80. Verla Seetin Neslund, *The Bifurcated Trial: Is It Used More Than It Is Useful?*, 31 EMORY L.J. 441, 445 (1982).

81. *Id.* at 441.

82. *Id.*

to "prevent evidence on the issue of insanity from prejudicing the jury during the guilt-innocence determination."[83] By determining which evidence applies to which part of the trial, proponents claim bifurcation can reduce juror confusion.[84] Never a popular technique, courts in Arizona, Florida, and Wyoming have held that state statutes requiring bifurcation during insanity proceedings are unconstitutional, and the use of bifurcation significantly decreased in the 1970s.[85] Arizona became the first state to overturn its statute on due process grounds.[86] In *State v. Shaw,* the court found bifurcation violated a defendant's right to a fair trial by creating an "irrebuttable presumption of intent" during the first stage.[87] Since then, statutes with bifurcation schemes "[have] consistently generated due process challenges."[88]

D. Arizona's Insanity Defense

Arizona's original insanity law closely resembled the *M'Naghten* rule.[89] In response to public outcry surrounding sensational cases, Arizona has "toughened" the standards of the insanity defense twice.[90] The first change came in response to two crimes that occurred in 1981: in the first, a court acquitted by reason of insanity a man who stabbed his wife while allegedly sleepwalking; in the second, the defendant shot his wife and her lover when he found them in bed together.[91] The Arizona Senate formed a subcommittee to examine the state's insanity law, and in 1983 the legislature shifted the burden of proof to the defendant and raised the burden to a clear and convincing evidence standard.[92]

A second reform resulted from another jury verdict of not guilty by reason of insanity.[93] In this sensationalized case, Mark Austin, the defendant, bought duct tape and nylon cord before

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83. *Id.*
84. *Id.*
85. *Id.* at 442.
86. *Id.* at 475–76.
87. State v. Shaw, 471 P.2d 715, 725 (Ariz. 1970).
88. Neslund, *supra* note 80, at 486.
89. Melançon, *supra* note 51, at 294 (citing the Arizona Penal Code of 1901, which states that "[a]ll persons are of sound mind who are neither idiots nor lunatics nor affected with insanity" and that "[a]ll persons are capable of committing crimes except those belonging to the following classes: . . . (2) idiots, (3) lunatics and insane persons").
90. *Id.* at 295.
91. *Id.* at 296.
92. *Id.* at 296–97.
93. *Id.* at 288–89.

going to the home of his separated wife and fatally stabbing her and seriously wounding her boyfriend.[94] Austin then slit his own wrists and throat, but he survived.[95] Despite being committed to a state mental hospital, the defendant was free after only six months.[96] Proposals for reform suggested limiting access to the insanity defense to defendants who demonstrate a long history of mental illness (effectively preventing young people from asserting the defense) and raising the standard from clear and convincing to a higher standard never before used, "evidence that produces . . . a firm belief and conviction of the truth of defendant's legal insanity."[97]

The actual law passed in 1994 remains Arizona's current insanity law.[98] It requires a defendant to establish the affirmative defense by clear and convincing evidence,[99] and Arizona is the only state that uses this heightened standard.[100] The Statute also states:

> A person may be found guilty except insane if at the time of the commission of the criminal act the person was afflicted with a mental disease or defect of such severity that the person did not know the criminal act was wrong. A mental disease or defect constituting legal insanity is an affirmative defense. Mental disease or defect does not include disorders that result from acute voluntary intoxication or withdrawal from alcohol or drugs, character defects, psychosexual disorders or impulse control disorders. Conditions that do not constitute legal insanity include but are not limited to momentary, temporary conditions arising from the pressure of the circumstances, moral decadence, depravity or passion growing out of anger, jealousy, revenge, hatred or other motives in a person who does not suffer from a mental disease or defect or an abnormality that is manifested only by criminal conduct.[101]

This "guilty except insane" test effectively eliminates the first prong of the *M'Naghten* test.[102] Mark Austin's defense relied on that first prong of *M'Naghten*[103]—not knowing the nature or

94. *Id.*
95. *Id.*
96. *Id.* at 290.
97. *Id.* at 298–99.
98. *See id.* at 303 (describing the 1994 Arizona law).
99. ARIZ. REV. STAT. ANN. § 13-502(C) (2007).
100. Melançon, *supra* note 51, at 297.
101. § 13-502(A).
102. Melançon, *supra* note 51, at 304.
103. *Id.* (noting that usually all the prosecution has to show is that the defendant had an awareness of the probable results of his acts and that Austin's success was an exception, as defendants usually have great difficulty proving this

quality of the act.[104] The 1994 change also limits what can be considered a "mental disease or defect" with a formal list of exceptions, and it identifies conditions which cannot constitute insanity.[105]

Arizona's case law provides some insight into how the state's insanity law has evolved. In 1970, the Arizona Supreme Court held the bifurcated trial procedure, then in place, violated due process by giving rise to a presumption of intent in the first stage that became an irrebuttable presumption in the second.[106] That same year, the court determined that "mental capacity to commit a crime is a material part of total guilt for there can be no crime without mens rea."[107] In 1981, in a premeditated murder case, the Supreme Court of Arizona held it was a due process violation to exclude relevant expert testimony that negates the mens rea element.[108] After the 1994 adoption of section 13-502, the state's highest court affirmed a defendant's death sentence despite the fact that the trial court had prohibited expert testimony on the defendant's state of mind at the time of the crime because the defendant had not properly preserved the issue for appeal.[109]

In 1997, *State v. Mott* provided the Supreme Court of Arizona with another chance to interpret the state's insanity laws.[110] The court determined that the legislature's decision not to adopt a diminished capacity defense "evidences its rejection of the use of psychological testimony to challenge the mens rea element of a crime."[111] *Mott* remains good law, although in a later unpublished case a federal judge ordered Mott's release because she had been denied the right to present a complete defense.[112] Despite earlier Arizona cases suggesting that courts should allow expert testimony as evidence to negate the mens rea element of a crime, the *Mott* case now prevents such a course of action.

Arizona's insanity test[113] contrasts sharply with other states'

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prong of the *M'Naghten* test).

104. DRESSLER, *supra* note 5, at 346.

105. § 13-502(A).

106. State v. Shaw, 471 P.2d 715, 725 (Ariz. 1970).

107. State v. Daniels, 478 P.2d 522, 527 (Ariz. 1970).

108. State v. Christensen, 628 P.2d 580, 584 (Ariz. 1981) ("[I]t is inconsistent with fundamental justice to prevent a defendant from offering evidence to dispute the charge against him. This, of course, includes any of the elements which comprise the offense.").

109. State v. Gulbrandson, 906 P.2d 579, 592 (Ariz. 1995).

110. State v. Mott, 931 P.3d 1046 (Ariz. 1997).

111. *Id.* at 1050.

112. Gibeaut, *supra* note 19, at 37.

113. *See* ARIZ. REV. STAT. ANN. § 13-502 (2007).

tests, which consider a defendant's cognitive or volitional capacity, such as the MPC test[114] and the Irresistible Impulse test.[115] Both the Arizona test and the federal test require a heightened burden of proof.[116] The Arizona test, however, also conflicts with the federal government's test in that the federal test considers whether the defendant can appreciate the nature or the wrongfulness of the act.[117] Arizona's test does not consider the cognitive capacity of the defendant.[118]

II. *Clark v. Arizona*

On June 21, 2000, seventeen-year-old Eric Clark circled his truck around a residential block in the small city of Flagstaff, Arizona, blaring loud music from the speakers.[119] In the eighteen months prior, Clark transitioned from being a good student and athlete to a jumpy, moody teenager.[120] He told his parents that aliens had invaded their city and the water was poisoned.[121] Clark's strange behavior escalated—he slept with a gun,[122] spoke in gibberish,[123] took drugs, and tried to escape from a police trooper's car after a drunk-driving arrest[124]—and he eventually was committed to a psychiatric hospital until released against medical advice.[125] Clark's mother went to a lawyer to get information about civilly committing her son, against his will, to another hospital just one day before the murder.[126]

Clark told people he thought aliens were impersonating government agents and trying to kill him, and only bullets could stop them.[127] He also told a witness that he wanted to shoot a

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114. Hawkins-León, *supra* note 40, at 397.
115. Michalopoulos, *supra* note 43, at 394.
116. 18 U.S.C. § 17 (2000); § 13-502(C).
117. § 13-502(C).
118. § 13-502.
119. Clark v. Arizona, 126 S. Ct. 2709, 2716 (2006).
120. Gibeaut, *supra* note 19, at 32.
121. *Id.*
122. *Id.*
123. Steve Lash, *Justices Urged to Clarify Rules on Mental Illness*, CHI. DAILY L. BULL., Apr. 19, 2006, at 1, 24.
124. Gibeaut, *supra* note 19, at 38.
125. Lash, *supra* note 123, at 24.
126. Gibeaut, *supra* note 19, at 38.
127. Thomas L. Hafemeister, *Supreme Court Upholds Arizona's Ability to (1) Limit the Scope of the Insanity Defense and (2) Preclude the Use of Mental Health Expert Testimony in Conjunction with a Mens Rea Determination*, 25 DEV. MENTAL HEALTH L. 101, 101 (2006).

police officer after creating a disturbance as a trap.[128] As Clark circled the block on June 21, Officer Jeffrey Moritz responded to the noise complaints and arrived on the scene, signaling Clark to pull over.[129] Clark obeyed.[130] When Officer Moritz approached Clark's car, Clark fired six shots and fled the scene.[131] Moritz died shortly after.[132] Once law enforcement took Clark into custody and charged him with first-degree murder,[133] he was found incompetent to stand trial and was hospitalized until 2003 when a judge found his competency restored.[134] Experts for the defense and the prosecution agreed that Clark suffered from paranoid schizophrenia and "he was actively psychotic at the time of the shooting."[135] At trial, after ruling Clark could not use evidence bearing on insanity to argue he lacked the requisite mens rea for first degree murder,[136] the court found Clark guilty.[137] The trial court determined that Clark's illness did not prevent him from understanding his actions were wrong.[138] The Court of Appeals of Arizona affirmed the conviction and the United States Supreme Court granted certiorari.[139]

The Court considered two potential due process violations in Clark's appeal: the state's use of an insanity test which describes capacity only in terms of the ability to distinguish right from wrong and its restriction of evidence of mental illness from the mens rea element of the crime charged.[140]

The Supreme Court found Arizona's narrow insanity test caused no violation of due process.[141] First, the Court considered Clark's claim that the *M'Naghten* test represents the minimum

128. Gibeaut, *supra* note 19, at 39.

129. Clark v. Arizona, 126 S. Ct. 2709, 2716 (2006).

130. *Id.*

131. Gibeaut, *supra* note 19, at 38.

132. *Id.* at 33.

133. *Clark*, 126 S. Ct. at 2716. Under the Arizona Criminal Code, a person commits first degree murder if, "intending or knowing that the person's conduct will cause death to a law enforcement officer, the person causes the death of a law enforcement officer who is in the line of duty." ARIZ. REV. STAT. ANN. § 13-1105(A)(3) (2007).

134. Gibeaut, *supra* note 19, at 38.

135. *Id.*

136. *Clark*, 126 S. Ct. at 2717.

137. *Id.* at 2718.

138. *Id.*

139. *Id.* (citing 546 U.S. 1060 (2005)).

140. *Id.* at 2716.

141. *Id.* at 2722 ("Due process imposes no single canonical formulation of legal insanity.").

mental illness defense the government must provide.[142] The Court held "[h]istory shows no deference to *M'Naghten* that could elevate its formula to the level of fundamental principle, so as to limit the traditional recognition of a State's capacity to define crimes and defenses."[143] The Court held that although Arizona law judges insanity only in terms of a defendant's ability to discern right from wrong and forgoes an analysis of whether a defendant appreciated the nature of his act,[144] cognitive capacity alone can demonstrate moral incapacity.[145] As a result, evidence bearing on the defendant's understanding of the nature and quality of his actions still bears relevance in Arizona's test and is admissible.[146] The Court also noted that the trial judge admitted Clark's evidence of cognitive incapacity to be considered under the state's insanity formulation and that Clark could point to no evidence related to the insanity claim, which the trial court excluded.[147]

As to Clark's second claim of a due process violation regarding the evidence considered for the issue of mens rea, the Supreme Court again found no violation.[148] The Court began by breaking possible evidence into three categories: observation, mental disease, and capacity evidence.[149] Citing the Arizona Supreme Court's decision in *State v. Mott*, the Court determined that Arizona restricted only the mental disease and capacity evidence.[150] Because the defendant had not formally objected to the trial judge's restriction of observation evidence, the Supreme Court considered only the mental disease and capacity evidence issues.[151] The Court recognized Arizona's right to define its presumption of sanity through its definition of insanity[152] and held that to meet the demands of due process, a state must merely show good reason for restricting these two categories of evidence in the presentation of the insanity defense.[153] Arizona claimed the restrictions served to reduce juror confusion, and the Court found this justification for the restrictions met the "good reason"

142. *Id.* at 2719–20.
143. *Id.* at 2719.
144. *Id.* at 2722; *see also* ARIZ. REV. STAT. ANN. § 13-502(A) (2007).
145. *Clark*, 126 S. Ct. at 2722.
146. *Id.*
147. *Id.* at 2723.
148. *Id.* at 2737.
149. *Id.* at 2724–25.
150. *Id.* at 2726 (citing State v. Mott, 931 P.2d 1046, 1054 (Ariz. 1997)).
151. *Id.* at 2727.
152. *Id.* at 2732–33.
153. *Id.* at 2733.

standard.[154] The Court cited the need for "general caution" in allowing psychological classifications to excuse criminal conduct and the ability of mental illness evidence to lead misguided juries into assigning expert opinions too much power.[155]

Justice Kennedy dissented, joined by Justices Stevens and Ginsburg.[156] Kennedy argued the conviction for first-degree murder for the intentional or knowing killing of a police officer was improper when the trial court refused to admit evidence showing Clark lacked the required intent.[157] Because Kennedy would have reversed on these grounds, he did not consider the due process violation claims.[158] At the same time, Kennedy pointed to the constitutional guarantee that defendants have "a meaningful opportunity to present a complete defense."[159] The Arizona rule acts as a ban against all evidence on the mens rea issue.[160] Kennedy argued the state did not provide a valid reason for the rule, as it must when the burden is substantial.[161] Kennedy dismissed Arizona's proposed justifications regarding reliability and jury confusion, ultimately determining the application of Arizona's rule "is so plainly unreasonable that it cannot be sustained."[162] Kennedy found the defendant was charged and convicted of a crime he did not commit.[163]

III. The Supreme Court's Interpretation Errors

A. Due Process Concerns

1. The Insanity Defense Is a Fundamental Right

Clark asked the Court to recognize the insanity defense as a constitutional right.[164] He claimed the *M'Naghten* rule set a minimum standard for the government, and Arizona's elimination of one prong of the *M'Naghten* test violated a fundamental right.[165] The Court's test for a fundamental right is "[a] principle

154. *Id.* at 2736.
155. *Id.* at 2734–35.
156. *Id.* at 2738.
157. *Id.*
158. *Id.*
159. *Id.* at 2743 (quoting California v. Trombetta, 467 U.S. 479, 485 (1984)).
160. *Id.* at 2744–45.
161. *Id.*
162. *Id.* at 2744–45, 2749.
163. *Id.* at 2749.
164. *Id.* at 2718.
165. *Id.* at 2719.

of justice so rooted in the traditions and conscience of our people as to be ranked fundamental."[166] After considering Clark's claim, the Court determined "[h]istory shows no deference to *M'Naghten* that could elevate its formula to the level of fundamental principle, so as to limit the traditional recognition of a State's capacity to define crimes and defenses."[167] As support, the Court noted that the standards for insanity vary by state, and precedent shows the choice of a test is a matter of state policy.[168] The Court concluded: "[D]ue process imposes no single canonical formulation of legal insanity."[169]

History, however, shows the insanity defense is a fundamental principle.[170] The defense traces its roots back hundreds of years,[171] and has been a formal, standardized part of the law since Daniel M'Naghten's case in the 1800s.[172] Belief in punishing the morally blameworthy is at the foundation of our legal system, and punishing the insane does not meet this objective.[173] According to the Supreme Court, the Due Process Clause demands protection of principles "of the very essence of the scheme of ordered liberty."[174] These "fundamental principles are 'rooted in the traditions and conscience of our people.'"[175] To justify the identification of a fundamental principle, courts consider its history and its acceptance within jurisdictions.[176] Although judges have given jury instructions that require moral understanding for criminal culpability since the fifteenth century, a principle does not need to be a formal practice to be protected by the Due Process Clause guarantees.[177] Long before that, general disagreement with holding the insane criminally responsible had taken root.[178] The insanity defense's long history in English law is enough to justify its place as a fundamental principle.

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166. *Id.* (citing Patterson v. New York, 432 U.S. 197, 202 (1977)).

167. *Id.*

168. *Id.* at 2722 (citing Leland v. Oregon, 343 U.S. 790, 800–01 (1952)).

169. *Id.*

170. Williams, *supra* note 26, at 235.

171. Gibeaut, *supra* note 19, at 37 (noting the insanity defense traces its roots back to biblical times).

172. Williams, *supra* note 26, at 218–19.

173. *See* Melançon, *supra* note 51, at 291.

174. Palko v. Connecticut, 302 U.S. 319, 325 (1937), *overruled on other grounds by* Benton v. Maryland, 395 U.S. 784 (1969).

175. Williams, *supra* note 26, at 234 (citing Snyder v. Massachusetts, 291 U.S. 97, 105 (1934), *overruled on other grounds by* Malloy v. Hogan, 378 U.S. 1 (1964)).

176. *Id.*

177. *Id.* at 235.

178. *Id.*

Although the Court primarily looks to historical practice in determining if a principle is fundamental, the Court has also identified a second test: "unanimity of acceptance within American jurisdictions."[179] Only four states have abolished the insanity defense altogether—these states previously recognized the defense.[180] The federal system recognizes an insanity defense,[181] and twenty-five states continue to use the original *M'Naghten* test for insanity.[182] Ultimately, ninety-two percent of jurisdictions in the United States provide the insanity defense to criminal offenders.[183] Under the Supreme Court's two identified tests for determining if a principle warrants protection as a fundamental right under the Due Process Clause, the long history and wide acceptance of the insanity defense justify providing it with this heightened level of protection.

Determining if the specific *M'Naghten* test for insanity deserves the same protection presents a thornier dilemma. The *M'Naghten* test contains two prongs. A defendant may be found insane if she 1) did not know the nature or the quality of the act or 2) did not know the wrongfulness of the act.[184] The first prong refers to cognitive incapacity while the second refers to moral incapacity.[185] In contrast, Arizona's test applies the insanity defense only to defendants who have moral incapacity.[186] Because the Court has held that states have the discretion to mold their insanity tests as they see fit,[187] the Court reasoned that the Constitution did not require Arizona to adopt the *M'Naghten* test in its full form.[188] In addition, the Court recorded its belief that the Arizona test had the same impact as the full *M'Naghten* test, as cognitive capacity could be used to demonstrate moral incapacity.[189]

There are several reasons to question the Court's analysis on this issue. First, while the Court has held that states have discretion to choose their insanity test, the discussion came in the

179. *Id.* at 234–36.
180. Grachek, *supra* note 44, at 1485.
181. *See* 18 U.S.C. § 17 (1984).
182. Grachek, *supra* note 44, at 1485.
183. Williams, *supra* note 26, at 236.
184. DRESSLER, *supra* note 5, at 346.
185. *Id.* at 346–47.
186. *See* ARIZ. REV. STAT. ANN. § 13-502 (2007).
187. *See* Leland v. Oregon, 343 U.S. 790, 801 (1952) (allowing states to decide among different versions of the insanity test).
188. Clark v. Arizona, 126 S. Ct. 2709, 2722 (2006).
189. *Id.*

context of a case involving the choice between the *M'Naghten* test and the Irresistible Impulse test.[190] The Irresistible Impulse test, sometimes called the Irresistible Impulse exception, is used to supplement the *M'Naghten* test.[191] The Court thus debated between the *M'Naghten* test and the *M'Naghten*-plus test.[192] It did not consider the possible reduction of the *M'Naghten* standards.[193] Further, most insanity tests in the United States today either use *M'Naghten* as a model or broaden the insanity standard, adopting the *Durham* product test or the MPC test.[194] The vast majority of states using the *M'Naghten* test use the full test with both prongs.[195] Virginia, New Mexico, Iowa, Mississippi, New York, and South Carolina use the full *M'Naghten* test but add additional specifications.[196] Alaska has omitted the moral prong, but only Arizona has completely eliminated the cognitive prong.[197] These numbers offer strong evidence that cognitive capacity is a recognized piece of the insanity defense in U.S. jurisdictions. Because history and acceptance within American jurisdictions support the inclusion of a cognitive prong in the insanity test as a fundamental right, the Court erred in failing to recognize such a test as a constitutional requirement. As the *Clark* case shows, the use of a test that omits formal consideration of cognitive capacity allows for tragic results.

2. Why the Arizona Test Violates Due Process: Evidence of Cognitive Incapacity Ties Directly to Mens Rea

The Arizona insanity test violates the Constitution's due process requirements. "It is generally conceded that substantive due process requires the presence of mens rea before criminal punishment may be imposed for nonregulatory offenses."[198] Due process concerns often arise when a state reduces the mens rea requirement for insanity.[199] If a statute identifies a required mens

190. *Leland*, 343 U.S. at 800.

191. MICHAEL L. PERLIN, THE JURISPRUDENCE OF THE INSANITY DEFENSE 84 (1st ed. 1994).

192. *Leland*, 343 U.S. at 800.

193. *Id.*

194. *See supra* text accompanying notes 40–46, 57, 67–69.

195. Deborah Giorgi-Guarnieri et al., *AAPL Practice Guideline for Forensic Psychiatric Evaluation of Defendants Raising the Insanity Defense*, 30(2) J. AM. ACAD. PSYCHIATRY & L. S3, S8–S9 (2002).

196. *Id.* at S8–S9.

197. *Id.* at S9.

198. Morse, *supra* note 79, at 805.

199. Recent Development, *supra* note 76, at 1137.

rea element, it logically follows that the accused must be permitted to present evidence to show he did not possess the required state of mind for the crime with which he is charged.[200] Arizona's test provides a direct barrier to this type of testimony.

The evidence excluded by the trial court relates directly to whether Clark could form the requisite mens rea for the crime for which he was convicted. Arizona charged Clark with violating section 13-1105(A)(3): "A person commits first degree murder if: . . . [i]ntending or knowing that the person's conduct will cause death to a law enforcement officer, the person causes the death of a law enforcement officer who is in the line of duty."[201] Clark denied having the specific intent to shoot a police officer and argued that his paranoid schizophrenia prevented him from having the knowledge that he was in fact shooting a police officer.[202]

Arizona courts have broken section 13-1105(A)(3) into three elements: intentionally or knowingly, causing the death of a police officer, and with premeditation or in the perpetration of specific felonies.[203] The contested evidence in *Clark*, falling under the Court's categorization of capacity and mental illness evidence,[204] bears a direct relation to whether Clark knew Moritz to be a law enforcement officer and whether Clark intended to kill a law enforcement officer when he shot Moritz. If Clark truly believed aliens were impersonating government agents and he could only prevent the aliens from killing him by shooting them, then Clark may have intended to shoot an alien when he aimed at Officer Moritz.[205] The trial court should have considered all of Clark's expert testimony evidence and its relation to Clark's ability to form the intent required for first-degree murder. The Supreme Court should have recognized the importance of this evidence and struck down Arizona's restriction on it.

By restricting the expert testimony, the statute may have created a presumption of intent. In a case challenging the state's old bifurcated trial procedure, the Arizona Supreme Court found that the bifurcated trial gave rise to a presumption of intent, which ran counter to constitutional concepts of criminal law.[206] The same court held that "[t]o prohibit the introduction of any or

200. Gardner, *supra* note 8, at 690.
201. ARIZ. REV. STAT. ANN. § 13-1105(A)(3) (2007).
202. Clark v. Arizona, 126 S. Ct. 2709, 2716 (2006).
203. State v. Woods, 687 P.2d 1201, 1213 (Ariz. 1984).
204. *Clark*, 126 S. Ct at 2716.
205. Hafemeister, *supra* note 127, at 101.
206. State v. Shaw, 471 P.2d 715, 724 (Ariz. 1970).

all the evidence bearing on proof of insanity at the trial of guilt or innocence would deprive a defendant of the opportunity of rebutting intent, premeditation, and malice, because an insane person could have none."[207]

In *Sandstrom v. Montana*, the United States Supreme Court found that a jury instruction, which created a presumption of intent, unconstitutionally shifted the burden to the defendant to prove that he lacked the requisite mens rea.[208] Clark sought to introduce evidence to challenge the state's assertion that he intentionally or knowingly killed a police officer.[209] By preventing the consideration of expert testimony on the defendant's state of mind at the time of the crime, the court prevented Clark from presenting a complete defense. If Clark had proved that he did not intentionally or knowingly kill a police officer, the court could not have convicted him of first-degree murder. By excluding the opinion evidence, the legal system prevented Clark from rebutting the prosecution's assertion of intent and effected a presumption of intent, which precedent shows to be unconstitutional.

Preventing the presentation of expert testimony relevant to mens rea might eliminate a defendant's chance to prove his innocence and violate his constitutional right to due process. Arizona did not provide a suitable justification for restricting the consideration of such evidence. Clark received a life sentence[210] for intentionally or knowingly killing a police officer.[211] He had evidence relevant to his capacity to form the intent required for the crime, yet the legal system prevented Clark from using it, thus Clark was denied a full opportunity for justice.

B. The Court's Offered Justification of Jury Confusion Is Not a "Good Reason"

The Court found that due process allows for restrictions on evidence used to rebut mens rea provided the state "has a good reason"[212] to justify the restriction. The main reason in *Clark* for the Court's approval of Arizona's restriction on such evidence lies with the jury. The Court worried that conflicting expert testimony

207. *Id.*

208. Sandstrom v. Montana, 442 U.S. 510, 519 (1979).

209. *Clark*, 126 S. Ct. at 2733.

210. John Gibeaut, *Status Quo for the Insanity Defense*, A.B.A. J. E-REPORT, June 30, 2006, http://www.abanet.org/journal/ereport/jn30insane.html (last visited Nov. 6, 2007).

211. *See* ARIZ. REV. STAT. ANN. § 13-1105(A)(3) (2007).

212. *Clark*, 126 S. Ct. at 2733.

would confuse jurors and thus found that the test met the "good reason" standard.[213] As Justice Kennedy pointed out, however, conflicting testimony makes the issue contested, not "irrelevant or misleading."[214] Further, a court "[is] capable of evaluating the competing conclusions, as factfinders do in countless cases where there is a dispute among witnesses."[215] The possibility that evidence would mislead the jury would only grow with the exclusion of expert explanations regarding the defendant's behavior and its relationship to his mental illness.[216]

The potential for a misguided jury is great, but the misperceptions of the jury usually weigh in favor of the prosecution. Research shows that the public at large tends to believe the insanity defense is used frequently and with great success, that defendants acquitted by reason of insanity often commit additional violent crimes, and that many sane defendants successfully use the defense.[217] One expert found that the public believes twenty to fifty percent of defendants in criminal cases attempt to use the insanity defense.[218] In reality, "only one percent of felony defendants nationwide raise the insanity defense," and the rate of success in pleading insanity is less than .002%.[219] The insanity plea offers little incentive unless the defendant has a very strong case because an unsuccessful attempt to invoke insanity might be viewed as admitting to committing the crime.[220] Despite the slim statistics, jurors operating under common misperceptions regarding abuse of the insanity defense might enter a courtroom believing that they have a responsibility to protest this perceived overuse by finding a defendant guilty.[221]

The procedure for evaluating a defendant's sanity has a standard formulation that demonstrates the careful consideration behind expert testimony in these cases. First, the mental health

213. *See id.* at 2736 (explaining that differing expert opinions may undermine the percieved reliability of expert opinions).

214. *Id.* at 2746 (Kennedy, J., dissenting).

215. *Id.*

216. *Id.* at 2746–47.

217. Hawkins-León, *supra* note 40, at 401.

218. Marc Rosen, *Insanity Denied: Abolition of the Insanity Defense in Kansas*, 8 KAN. J.L. & PUB. POL'Y 253, 258 (1999) (referring to one expert's study of public opinion).

219. Grachek, *supra* note 44, at 1487–88.

220. *Id.* at 1488.

221. *See, e.g.*, RITA JAMES SIMON, THE JURY & THE DEFENSE OF INSANITY 144 (Transaction Publishers 1999) (1967) (referencing an experimental study in which participants were recorded while they believed they were deliberating as a jury in a case involving an insanity plea).

expert should refer to the defendant's medical and psychiatric records.[222] Second, the mental health expert should consult notes on statements of witnesses to the defendant's behavior at the time of the offense.[223] Such statements "are a rich source of information regarding the defendant's mental state at the time of the offense," offering indications of hallucinations, delusions, and other possible mental illness symptoms.[224] Third, the expert must interview the defendant as soon after the offense as possible.[225]

Experts base their opinions on a number of factors, including observation evidence offered by lay witnesses.[226] Only an individual trained in mental health issues possesses the necessary skills to distinguish psychiatric symptoms based on the defendant's own statements made during the interview.[227] These trained professionals should guide the jury through interpreting a defendant's mental illness, instead of forcing untrained jurors to sift through complicated data they lack the training to understand.[228] By eliminating expert testimony, the jury will miss out on important connections between lay persons' observations of the witness and what those observations suggest about the impetus behind the crime committed.

Consideration of how jurors view expert testimony also supports allowing more testimony to come into evidence. In studies, jurors have shown an intense interest in obtaining more information from mental health experts, including the expert's personal opinion on the defendant's sanity at the time of the crime.[229] At the same time, jurors have understood that they hold the ultimate responsibility for deciding the outcome of the case, and they did not wish to concede that power to the mental health expert.[230] This shows jurors are capable of distinguishing between the expert's role and their own role as the trier of facts. Allowing more expert testimony in as evidence will assist jurors in making

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222. *See* Stephen Noffsinger & Phillip Resnick, *Competency to Stand Trial and the Insanity Defense*, *in* THE AMERICAN PSYCHIATRIC PUBLISHING TEXTBOOK OF FORENSIC PSYCHIATRY 329, 340 (Liza Gold & Robert Simon eds., 2004).

223. *Id.* at 340–41.

224. *Id.* at 340.

225. *Id.* at 341.

226. *Id.* at 340–41.

227. *See id.* at 341 (detailing the process of the trained clinician during an evaluative interview).

228. *See* Robert Lowell Nygaard, *On Responsibility: Or, the Insanity of Mental Defenses and Punishment*, 41 VILL. L. REV. 951, 970 (1996) (arguing that only trained professionals should determine a defendant's mental capacity).

229. SIMON, *supra* note 221, at 169.

230. *Id.* at 89.

an informed decision when determining the ultimate fate of the defendant. The admission of such testimony will not prevent jurors from reaching an independent conclusion.

In its analysis, the *Clark* Court noted how capacity testimony, unlike observation testimony, consists of "judgment[s] fraught with multiple perils," including the distinction between legal capacity and psychological capacity.[231] The Court failed to recognize that expert testimony could be introduced without pushing a psychiatrist to make a concrete declaration on the defendant's ultimate state of mind at the time of the crime. Instead, a mental health expert might offer insight into the disease's general impact on a defendant's thought patterns. These insights would not force a jury determination in the defendant's favor, but would actually provide jurors with a more complete understanding of the defendant's disease and would better ensure that the system punishes sane offenders while providing proper treatment for insane offenders. The claim that expert testimony will result in juror confusion lacks the strength to justify restrictions on such evidence under the "good reason" test delineated by the Court.

C. *The Court's Categorizations for Evidence Are Ill-Conceived and Will Create Juror Confusion*

The Court divided evidence bearing on mens rea into three categories: observation, mental disease and capacity evidence.[232] Observation evidence consists of lay "testimony from those who observed what Clark did and heard what he said"[233] and expert testimony about the defendant's tendency to think and act in a certain way.[234] This observation evidence may support the mental illness diagnosis.[235] Mental disease evidence forms the second category and typically includes expert testimony by mental health professionals who have conducted examinations of the defendant.[236] Capacity evidence typically comes from experts who testify about the defendant's cognitive capabilities and his ability to form moral judgments.[237] This category, like the second,

231. Clark v. Arizona, 126 S. Ct. 2709, 2735 (2006).
232. *Id.* at 2724–25.
233. *Id.* at 2724.
234. *Id.*
235. *Id.*
236. *Id.* at 2725.
237. *Id.*

embraces opinion testimony.[238] The Supreme Court determined that the precedent set by *Mott* separated observation evidence from opinion evidence.[239] Arizona law does not restrict the use of observation evidence, while it does prevent the use of opinion evidence to rebut mens rea.[240]

The Court's classification of types of evidence is unworkable. Testimony from both lay and expert witnesses can fit into multiple categories. Observations of Clark's behavior in the days leading up to June 21, 2001 would be allowed as observation evidence, but descriptions of that behavior by experts would fit into the opinion evidence categories and thus be excluded.[241] Lay testimony on Clark's behavior in the days prior to the murder means little without a mental health professional's formal diagnosis of the disease and explanation of the illness's impact. Justice Kennedy's dissent recognized this problem.[242] Kennedy also highlighted the hypocrisy in the majority's use of possible juror confusion as a justification for its decision: "[T]he potential to mislead will be far greater under the Court's new evidentiary system, where jurors will receive observation evidence without the necessary explanation from experts."[243]

In a detailed study involving experimental trials and insanity pleas, researchers recorded jury deliberations and found most of the jurors "were irritated and frustrated by the incompleteness . . . of the psychiatrist's testimony. They wanted more guidance from the expert than the court permitted the expert to give."[244] Although the Court feared the experts' potential ability to confuse jurors,[245] most insanity trials do not involve a confusing "battle of the experts."[246] In fact, experts agreed on the diagnosis in eighty-eight percent of insanity cases.[247] Using the classification scheme devised by the Court can only result in inconsistent application

238. *Id.*

239. *Id.* at 2726.

240. *Id.*

241. *See id.* at 2738 (Kennedy, J., dissenting) (noting that the majority insists the expert description of Clark's behavior falls into the mental disease or capacity evidence categories).

242. *Id.* at 2739 ("It makes little sense to divorce the observation evidence from the explanation that makes it comprehensible.").

243. *Id.* at 2746–47.

244. SIMON, *supra* note 221, at 169.

245. *Clark*, 126 S. Ct at 2734.

246. Perlin, *supra* note 50, at 1405.

247. *Id.*; *see also* Rowe, *supra* note 73, at 110 ("Most psychiatric dispositions in the criminal process are arranged without fanfare, without disagreement among the experts, and without dissent by the prosecution.").

and the exclusion of valuable insight regarding the impact of mental illness on a person's thoughts and behavior.

The Court chose to exclude the most reliable evidence: testimony by experts who have researched the issues and have experience dealing with other people suffering from the same illnesses.[248] Mental health doctors can determine correctly if a defendant is faking mental illness in ninety-two to ninety-five percent of cases.[249] Some jurisdictions use special mental health courts consisting of a judge and attorneys with training in mental illness as an alternative to jury trials.[250] These mental health courts generally deal with nonviolent offenders and often require a defendant to waive his right to a jury trial to avoid violating his Sixth Amendment right.[251] Still, there is potential to expand the role of people with special mental health expertise in determining the appropriate punishment or treatment schedules for the mentally ill.[252] By allowing the exclusion of expert testimony, the Court ignored the gains of science, and it allows jurors to make uninformed decisions about insane individuals. The Court's blurry categories of evidence will merely add to the challenge of determining the mental health status of defendants and draw arbitrary distinctions between inadmissible and admissible testimony. With such results, the Court's categorizations will likely increase juror confusion, instead of preventing it as promised.

D. The Potential Impact of the Decision: Policy Implications

The decision in *Clark* also has important policy implications that demand consideration. First, by allowing only an extremely narrow insanity defense, *Clark* will result in the criminal conviction of more defendants with mental illnesses.[253] Instead of submitting these individuals to the care of mental health professionals, they will be sent to standard prisons like other

248. *See, e.g.*, *Clark*, 126 S. Ct. at 2749 (Kennedy, J., dissenting) ("[T]he State seems to exclude the evidence one would think most reliable by allowing unexplained and uncategorized tendencies to be introduced while excluding relatively well-understood psychiatric testimony regarding well-documented mental illnesses.").

249. Grachek, *supra* note 44, at 1488.

250. *Id.* at 1495.

251. *Id.*

252. *Id.* at 1496.

253. *See* Melançon, *supra* note 51, at 306 (discussing how Arizona's narrow insanity defense will excuse too few persons with major cognitive impairments).

offenders. Society has long recognized one purpose of punishment to be deterrence, yet "[t]he mentally ill offender is essentially undeterrable since he has little, if any, moral culpability."[254] If the mentally-ill offender has no volitional control, punishment cannot deter him because he has no ability to choose to abstain from the behavior.[255] Further, imprisonment of the insane offender will not deter a sane offender because the sane offender cannot identify with the mentally ill.[256] Sentencing a mentally-ill offender to prison would neither provide him with the optimal medical treatment nor provide him with an effective incentive to refrain from committing future crimes.[257]

Containment offers another common justification for imprisoning offenders. Through containment, individuals are forcibly restrained from committing additional crimes.[258] Mentally-ill offenders could be contained just as easily in a mental hospital as in a state prison.[259] Rehabilitation presents another opportunity to defend incarceration, yet most recognize that the rehabilitation of the mentally ill can be achieved more easily through hospitalization than imprisonment.[260]

Under the final major rationale behind our system of punishment, retribution, the sanity of a criminal offender matters a great deal.[261] A retributivist rationale holds: "[P]unishment is deserved when the wrongdoer freely chooses to violate society's rules."[262] If a key objective of our criminal justice system demands we punish only the morally blameworthy,[263] mentally-ill offenders who do not know the nature or wrongfulness of their actions do not deserve the same punishment as sane offenders who do. Moral blameworthiness allows punishment of offenders making free, rational, and voluntary choices,[264] but offenders like Eric Clark do

254. *See* Grachek, *supra* note 44, at 1482.

255. *Id.*

256. *Id. Contra* Nygaard, *supra* note 228, at 956 ("[I]t would be irrelevant that the punishment did not affect the insane offender's behavior because punishing insane offenders would have positive consequences overall as a result of the exemplary effects on other persons.").

257. *See* Gracheck, *supra* note 44, at 1489 (discussing the unavailability of adequate mental health and rehabilitative treatment for the mentally ill in prisons).

258. Nygaard, *supra* note 228, at 957.

259. Melançon, *supra* note 51, at 301.

260. *Id.* at 302–03.

261. Nygaard, *supra* note 228, at 957–58.

262. DRESSLER, *supra* note 5, at 16.

263. Melançon, *supra* note 51, at 291.

264. Gardner, *supra* note 8, at 665.

not fit into this category. To demonstrate a continuing commitment to ensure just punishment, everything possible must be done to ensure the defendants are morally blameworthy, including allowing the consideration of testimony by mental health experts on the issue of mens rea.

More treatment for the mentally ill might prevent further criminal behavior and reduce the overrepresentation of the mentally ill within the criminal system.[265] Approximately sixteen percent of the prison population suffers from a mental illness;[266] the use of narrow insanity tests and restrictive expert testimony rules will only serve to increase that number. The criminal justice system should aim to channel the mentally ill into rehabilitative treatment programs instead of "anti-therapeutic" penitentiaries.[267] Studies show "mentally ill offenders receiving prison sentences often serve longer sentences than similarly situated sane offenders."[268]

The decision in *Clark v. Arizona* may have implications for other segments of society as well. Traditionally, people with mental retardation have been grouped with the mentally ill as individuals who should not be held criminally liable.[269] The American Association on Mental Retardation recognized this link and sent an amicus brief supporting Clark's position.[270] The lawyer who authored the amicus brief participated in an interview with the American Bar Association shortly before the *Clark* decision in which he noted the importance of the mens rea issue for defendants with mental retardation.[271] The problems created by the holdings in *Clark* will harm more than just persons suffering from mental illnesses.

Arizona's insanity statute, like those of several other states,[272] enumerates specific illnesses not included in "mental disease or defect."[273] This method of excluding a list of specified

265. Chris Kempner, *Unfair Punishment of the Mentally Disabled? The Constitutionality of Treating Extremely Dangerous and Mentally Ill Insanity Acquittees in Prison Facilities*, 23 U. HAW. L. REV. 623, 627 (2001).

266. *Id.* at 643.

267. Grachek, *supra* note 44, at 1489.

268. *Id.* (referencing findings by the Bureau of Justice).

269. Nygaard, *supra* note 228, at 962–63.

270. Gibeaut, *supra* note 19, at 36 (citing Brief for the American Psychiatric Association et al., Supporting Petitioner, Clark v. Arizona, 126 S. Ct. 2709 (2006) (No. 05-5966)).

271. *Id.*

272. Giorgi-Guarnieri, *supra* note 195, at S8.

273. ARIZ. REV. STAT. ANN. § 13-502(A) (2007) ("Mental disease or defect does not include disorders that result from acute voluntary intoxication or withdrawal from

disorders raises the issue of co-morbidity.[274] Diagnosis of more than one concurrent mental illnesses, or co-morbidity, is frequent,[275] presenting a likely dilemma when a defendant seeking to use the insanity defense has a mental disease excluded by section 13-502(A) and one that is not. Will the statute automatically prevent him from asserting an insanity defense? Or will someone be forced to make a determination on which of his illnesses caused the behavior? If the latter is true, certainly the decision should rest with trained experts, not the inexperienced members of the jury. The myriad of frightening scenarios that become possible as a result of its decision offer practical support for challenging the way the Court chose to deal with insanity in *Clark*.

Conclusion

Society has long recognized the need to include a mens rea requirement in criminal law. Since the 1800s, American courts have considered cognitive capacity in determining whether an individual should be held criminally liable for his actions. Further, although the exact formulation of the test has varied, the insanity defense is a well-entrenched part of American criminal law. In *Clark*, the Court applied faulty logic in refusing to recognize an insanity test with a cognitive prong as a fundamental principle essential to our scheme of ordered liberty. It thereby denied Clark the chance to present a complete defense when it excluded expert testimony on the issue of mens rea. The Court attempted to justify these ill-advised findings by claiming they will reduce jury confusion, yet the Court's decision will actually increase jury confusion by excluding critical evidence and creating illusory categories. The *Clark* decision is unconstitutional and should be reversed before the test is used again to violate our deepest principles of justice.

By preventing the introduction of expert testimony on the element of mens rea, the Supreme Court suggested the practice of

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alcohol or drugs, character defects, psychosexual disorders or impulse control disorders. Conditions that do not constitute legal insanity include but are not limited to momentary, temporary conditions arising from the pressure of the circumstances, moral decadence, depravity or passion growing out of anger, jealousy, revenge, hatred or other motives in a person who does not suffer from a mental disease or defect or an abnormality that is manifested only by criminal conduct.").

274. Melançon, *supra* note 51, at 309.

275. *Id. See generally* AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (4th ed. 1994) (classifying mental disorders and aiding psychiatrists in diagnosing mental disorders).

psychiatry lacks sufficient legitimacy to have a proper place in our legal system. This will serve only to perpetuate myths that defendants abuse the insanity defense and increase the stigma associated with those who openly acknowledge their mental illnesses. Treatment for psychiatric disorders faces a challenging obstacle to gain respect when the law refuses to recognize the different degrees to which mental illness influences a person's ability to reason. The *Clark* decision means twenty-four-year-old Eric Clark will serve a life sentence, but its impact will spread much further than one paranoid schizophrenic. Justice demands that the mentally ill and the mentally disabled receive different consideration, yet *Clark* will be another barrier to implementing procedures to safeguard the rights of people with special needs.