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HOW *CLARK V. ARIZONA* IMPRISONED ANOTHER SCHIZOPHRENIC WHILE SIGNALING THE DEMISE OF CLINICAL FORENSIC PSYCHOLOGY IN CRIMINAL COURTS

Henry F. Fradella*

I. INTRODUCTION

Defenses of excuse based on mental illness have a long and interesting history.¹ The insanity defense and various other defenses based upon evidence of diminished capacity continue to challenge the criminal justice system in a multiplicity of ways, both philosophically² and practically.³ Public fascination with such defenses, as well as frequent public outrage over them, is fueled by Hollywood writers whose television and movie scripts inaccurately portray how these defenses are actually used in courts of law.⁴ But the most recent pronouncement by the U.S. Supreme Court deal-

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¹ See generally Henry F. Fradella, *From Insanity to Beyond Diminished Capacity: Mental Illness and Criminal Excuse in the Post-Clark Era*, 18 U. FLA. J.L. & PUB. POL'Y (forthcoming 2007) (comprehensively examining the development of various formulations of the insanity defense and related defenses of excuse based on mental illness, culminating with a critical analysis of the impact of the Court's decision in *Clark v. Arizona* on defendants' future use of such defenses).

² See, e.g., Vicki L. Plaut, Comment, *Punishment Versus Treatment of the Guilty but Mentally Ill*, 74 J. CRIM. L. & CRIMINOLOGY 428, 431 (1983) (discussing the philosophical tensions in the law caused by its dual desires to punish criminal wrongdoers and to mandate treatment and excuse "those who commit criminal acts while insane" because they are not morally culpable for their actions).

³ See, e.g., Bruce Winick, *Ambiguities in the Legal Meaning and Significance of Mental Illness*, 1 PSYCHOL. PUB. POL'Y & L. 534, 557-63 (1995) (discussing the practical problems with applying the legal tests for insanity and diminished capacity to various types of mental illnesses).

⁴ See, e.g., Stephanie K. Lashbrook, *The Insanity Defense*, 36 LOY. L.A. L. REV. 1596, 1620 (2003) ("Television shows and films . . . depict[] gleeful and devious defendants who use the insanity defense to 'get off' or 'beat the rap.' It is a misconception that is popular with the entertainment industry: defendant commits a crime but successfully raises an insanity defense. But, defendant is no longer insane at the time of the trial . . . so defendant goes free! A jury that subscribes to this misconception might deliberately ignore evidence of a defendant's legal insanity in order to avoid releasing a violent criminal to walk the streets as freely as each juror."). For an interesting guide to films as popular sources of information (and misinformation) about the law, see the collection of essays in *LEGAL REELISM: MOVIES AS LEGAL TEXTS* (John Denvir ed., 1996).

ing with evidence of mental illness as the basis for criminal excuse suggests that it is not only the general public that has grown increasingly skeptical of such defenses. Indeed, the Court's 2006 decision in *Clark v. Arizona*⁵ suggests that the judiciary is growing ever more weary of such defenses. And, tragically for seriously mentally ill people like the defendant in *Clark*, our increasing hesitancy to excuse criminal conduct caused by serious mental illness carries very unfortunate consequences.

The Court's decision in *Clark v. Arizona* casts doubt both on mental health diagnostic standards and on mental health clinicians, stating that evidence concerning psychiatric diagnoses has a "potential . . . to mislead jurors"⁶ and that "[t]here are . . . particular risks inherent in the opinions of the experts who supplement the mental-disease classifications with opinions on incapacity."⁷ Moreover, the Court created what dissenting Justices Kennedy, Stevens, and Ginsburg suspect will be an "evidentiary framework that . . . will be unworkable in many cases."⁸ And, worse yet, the *Clark* decision irrationally creates standards for the lower courts that will force juries "to decide guilt in a fictional world with undefined and unexplained behaviors but without mental illness."⁹

The *Clark* ruling will undoubtedly cause increasing pressure on an already over-burdened correctional system by adding more seriously mentally ill convicts to a prison system that is not designed to cope with such inmates.¹⁰ More significantly, *Clark* limits the options of mentally ill criminal defendants and their attorneys in future cases, thereby calling into question the future of criminal defenses of excuse based on mental illness.

II. DISCUSSION

A. *Factual Background*

Eric Clark killed a police officer in the line of duty, but Clark suffered from paranoid schizophrenia at the time the killing took place.¹¹ The Supreme Court summarized the facts of the incident as follows:

⁵ 126 S. Ct. 2709, 2716 (2006).

⁶ *Id.* at 2734.

⁷ *Id.* at 2735.

⁸ *Id.* at 2738 (Kennedy, J., dissenting).

⁹ *Id.* at 2749.

¹⁰ See, e.g., JAMIE FELLNER & SASHA ABRAMSKY, ILL-EQUIPPED: U.S. PRISONS AND OFFENDERS WITH MENTAL ILLNESS (2003), <http://www.hrw.org/reports/2003/usa1003/usa1003.pdf>.

¹¹ *Clark*, 126 S. Ct. at 2717.

In the early hours of June 21, 2000, Officer Jeffrey Moritz of the Flagstaff Police responded in uniform to complaints that a pickup truck with loud music blaring was circling a residential block. When he located the truck, the officer turned on the emergency lights and siren of his marked patrol car, which prompted petitioner Eric Clark, the truck's driver (then 17), to pull over. Officer Moritz got out of the patrol car and told Clark to stay where he was. Less than a minute later, Clark shot the officer, who died soon after but not before calling the police dispatcher for help. Clark ran away on foot but was arrested later that day with gunpowder residue on his hands; the gun that killed the officer was found nearby, stuffed into a knit cap.¹²

At Clark's trial, friends, family, classmates, and school officials all testified regarding his "increasingly bizarre behavior over the year before the shooting."¹³

Witnesses testified, for example, that paranoid delusions led Clark to rig a fishing line with beads and wind chimes at home to alert him to intrusion by invaders, and to keep a bird in his automobile to warn of airborne poison. There was lay and expert testimony that Clark thought Flagstaff was populated with "aliens" (some impersonating government agents), the "aliens" were trying to kill him, and bullets were the only way to stop them. A psychiatrist testified that Clark was suffering from paranoid schizophrenia with delusions about "aliens" when he killed Officer Moritz, and he concluded that Clark was incapable of luring the officer or understanding right from wrong and that he was thus insane at the time of the killing. In rebuttal, a psychiatrist for the State gave his opinion that Clark's paranoid schizophrenia did not keep him from appreciating the wrongfulness of his conduct, as shown by his actions before and after the shooting (such as circling the residential block with music blaring as if to lure the police to intervene, evading the police after the shooting, and hiding the gun).¹⁴

Although the trial court determined that Clark "was indisputably afflicted with paranoid schizophrenia at the time of the shooting," it found him guilty nonetheless, concluding that his mental illness "did not . . . distort his perception of reality so severely that he did not know his actions were wrong."¹⁵ Clark was sentenced to

¹² *Id.* at 2716.

¹³ *Id.* at 2717.

¹⁴ *Id.* at 2717–18.

¹⁵ *Id.* at 2718.

twenty-five years to life in prison.¹⁶ His attorney then moved to vacate the judgment and sentence on the grounds that both the exclusion of psychiatric evidence to disprove mens rea and Arizona's narrow formulation of the insanity defense violated his due process rights.¹⁷ The trial court denied this motion, the Arizona Court of Appeals affirmed in an unpublished disposition, and the Arizona Supreme Court denied discretionary review.¹⁸ The United States Supreme Court granted Clark's petition for certiorari on two separate due process issues, each of which will now be separately explored.

B. Clark's First Due Process Challenge: The Narrowing of M'Naghten

1. Background on the *M'Naghten* Test

In order to meaningfully explore the first of two due process issues raised in *Clark*, a short primer on the *M'Naghten* test for insanity is helpful. In 1843, the landmark case of Daniel M'Naghten was decided.¹⁹ The legal standard for insanity set forth in that case is still used in many U.S. jurisdictions today.²⁰ M'Naghten was indicted for the first-degree murder of Edward Drummond.²¹ Drummond was the secretary to Sir Robert Peel, the Prime Minister of England at the time.²² M'Naghten had intended to kill Peel, but mistook Drummond for him.²³ He explained to the court that he wanted to kill the Prime Minister because "[t]he Tories in my native city . . . follow, persecute me wherever I go, and have entirely destroyed my peace of mind. . . . [T]hey do everything in their power to harass and persecute me; in fact, they wish to murder me."²⁴

At trial, M'Naghten's defense attorneys argued, in essence, that he suffered from persecutory delusions.²⁵ M'Naghten was able

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *M'Naghten's Case*, 10 Cl. & F. 200, 8 Eng. Rep. 718 (1843). There are at least twelve different spellings of Daniel M'Naghten's last name, something that he himself likely contributed to since he appears to have spelled his own name differently on several occasions. RICHARD MORAN, KNOWING RIGHT FROM WRONG: THE INSANITY DEFENSE OF DANIEL MCNAUGHTAN xi-xiii (1981).

²⁰ Frontline: State Insanity Defense Laws, <http://www.pbs.org/wgbh/pages/frontline/shows/crime/trial/states.html> (charting states' legal standards for insanity defenses) (last visited Jan. 4, 2007).

²¹ *M'Naghten's Case*, 8 Eng. Rep. at 719. See also MORAN, *supra* note 19, at 1.

²² MORAN, *supra* note 19, at 1, 11.

²³ *Id.*

²⁴ *Id.* at 10.

²⁵ Gerald Robin, *The Evolution of the Insanity Defense: Welcome to the Twilight Zone of*

to "assemble four of the most able barristers in Britain . . . [and] nine prominent medical experts."²⁶ The prosecution, on the other hand, called "no expert witnesses."²⁷ Lord Chief Justice Tindal charged the jury as follows:

The question to be determined is, whether at the time the act in question was committed, the prisoner had or had not the use of his understanding, so as to know that he was doing a wrong or wicked act. If the jurors should be of opinion that the prisoner was not sensible at the time he committed it, that he was violating the laws of both God and man, then he would be entitled to a verdict in his favour: but if, on the contrary, they were of opinion that when he committed the act he was in a sound state of mind, then their verdict must be against him.²⁸

The jury found M'Naghten "not guilty on the ground of insanity."²⁹ M'Naghten was committed to Bedlam, the notorious asylum, "where he remained until his death 22 years later."³⁰ Much public outrage over the acquittal followed, including condemnation of the case from Queen Victoria who herself had been the target of assassination attempts.³¹ The House of Lords subsequently set down what became known as the *M'Naghten* test for insanity:

[I]t must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong.³²

For a defendant to be excused from criminal culpability on the basis of insanity under the *M'Naghten* test, it must be proven as a threshold matter that he or she suffered from a qualifying "mental disease or defect" at the time the offense was committed.³³ But proof of such a "mental disease or defect" is insufficient; the

Mental Illness, Psychiatry, and the Law, 13 J. CONTEMP. CRIM. JUST. 224, 226 (1997) (citing JOHN BIGGS, JR., *THE GUILTY MIND: PSYCHIATRY AND THE LAW OF HOMICIDE* 97 (1955)).

²⁶ MORAN, *supra* note 19, at 90.

²⁷ SANFORD H. KADISH & STEPHEN J. SCHULHOFER, *CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS* 969 n.20 (5th ed. 1989) (citing MORAN, *supra* note 19, at 90).

²⁸ *M'Naghten's Case*, 10 Cl. & F. 200, 8 Eng. Rep. 718, 719–20 (1843).

²⁹ Robin, *supra* note 25, at 226.

³⁰ *Id.*

³¹ *Id.* (citing BIGGS, *supra* note 25, at 99).

³² *M'Naghten's Case*, 8 Eng. Rep. at 722.

³³ For a comprehensive discussion about what constitutes a "qualifying mental disease or defect" for insanity defense purposes, see Fradella, *supra* note 1, at Part III.A.

mental disease or defect must have caused one of two things: *cognitive incapacity*—the inability to know the nature and quality of the act committed—or *moral incapacity*—the inability to know that the act committed was wrong.³⁴ The cognitive incapacity part of the test relieves the defendant of criminal liability when he or she is incapable of forming mens rea. If one does not know the quality of one's acts, how can one be criminally reckless, negligent, or purposeful? For example, if a man strangled another person believing that he was squeezing the juice out of a lemon, he did not understand the nature and quality of his act.³⁵ This type of cognitive incapacity is reasonably rare. It would occur when a person suffers from such a severe psychotic disorder as to be so removed from reality that the person would not even know what he or she is doing. Take Daniel M'Naghten's case, for example. He knew the nature and quality of his act. He wanted to kill the Prime Minister and attempted to do so. He was, therefore, not cognitively incapacitated under the first prong of this formulation of the insanity test.

The second part of the *M'Naghten* test—the inability to distinguish right from wrong—is usually at the crux of an insanity defense, as it was in Daniel M'Naghten's case. This moral incapacity part of the insanity test relieves a defendant from criminal liability even if he or she forms the requisite mens rea (as Daniel M'Naghten formed intent to kill) so long as the defendant does not understand that his or her act, even though committed with specific intent, is wrong.

2. *M'Naghten* and *Clark*

Eric Clark asserted that Arizona's "guilty except insane" formulation of the insanity defense violated due process because it lacked the first prong of the *M'Naghten* test—the one aimed at the cognitive capacity to know the nature and quality of one's acts.³⁶ While Arizona had used the true *M'Naghten* test in the past, the legislature omitted the cognitive incapacity part when it enacted its "guilty except insane" formulation, thereby leaving only the part

³⁴ These terms for the two prongs of the *M'Naghten* test were not widely accepted when *Clark* was decided. A search in Westlaw's law review database yields no articles using these terms in relation to the prongs of the *M'Naghten* test prior to the time *Clark* was decided. Yet, these are the terms the Supreme Court elected to use in *Clark*, even though the Court had never used them before. *Clark v. Arizona*, 126 S. Ct. 2709, 2719 (2006).

³⁵ Marc Rosen, *Insanity Denied: Abolition of the Insanity Defense in Kansas*, 8 KAN. J.L. & PUB. POL'Y 253, 261 (1999).

³⁶ *Clark*, 126 S. Ct. at 2719.

about knowing right from wrong.³⁷ A change to the state's insanity law appears to have been prompted by the acquittal of a man for the murder of his wife because he was found legally insane; he was committed to a psychiatric institution but then released after just six months, following a determination that he was no longer a danger to himself or others.³⁸ It appears, however, that the statutory change was not intended to alter substantively the test for insanity, but rather the state legislature determined that "a streamlined standard with only the moral capacity part would be easier for the jury to apply."³⁹

Clark argued that the new statutory language in Arizona deprived him of his due process rights because eliminating the "nature and quality" prong of *M'Naghten's* formulation of the insanity test "'offend[ed a] principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'"⁴⁰ Indeed such an argument had worked before the Nevada Supreme Court in *Finger v. State*,⁴¹ although it had been rejected in Utah, Idaho, and Montana.⁴² The U.S. Supreme Court sided with the weight of state authority on the issue. It dismissed Clark's fundamental right argument outright, stating, "History 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."⁴³ In support of this conclusion, the Court pointed to the many variations in the insanity defense between states.⁴⁴ States are therefore free to de-

³⁷ *Id.* (citing Act effective Jan. 2, 1994, ch. 256, 1993 Ariz. Sess. Laws 1500).

³⁸ Renée Melançon, Note, *Arizona's Insane Response to Insanity*, 40 ARIZ. L. REV. 287, 290 (1998).

³⁹ *Clark*, 126 S. Ct. at 2723 n.24; see H.R. 41-156, 1st Sess., at 3 (Ariz. 1993); 1 RUDOLF GERBER, CRIMINAL LAW OF ARIZONA 502-06, 502-11 (2d ed. 1993 & Supp. 2000).

⁴⁰ *Clark*, 126 S. Ct. at 2719 (quoting *Patterson v. New York*, 432 U.S. 197, 202 (1977)).

⁴¹ 27 P.3d 66, 80 (Nev. 2001) ("Recognition of insanity as a defense is a core principle that has been recognized for centuries by every civilized system of law in one form or another. Historically, the defense has been formulated differently, but given the extent of knowledge concerning principles of human nature at any given point in time, the essence of the defense, however formulated, has been that a defendant must have the mental capacity to know the nature of his act and that it was wrong."), *cert. denied*, *Nevada v. Finger*, 534 U.S. 1127 (2002).

⁴² *State v. Herrera*, 895 P.2d 359 (Utah 1995); *State v. Searcy*, 798 P.2d 914 (Idaho 1990); *State v. Korell*, 690 P.2d 992 (Mont. 1984).

⁴³ *Clark*, 126 S. Ct. at 2719.

⁴⁴ *Id.* at 2720-21. See also, e.g., Fradella, *supra* note 1, at Part II.D (tracing the evolution of various legal tests for insanity from the early "Wild Beast Defense," which subsequently evolved into the *M'Naghten* test, to several modern formulations including the Model Penal Code test, the modern federal formulation of the test under the

fine insanity as they see fit without running afoul of the Due Process Clause of the Fourteenth Amendment.

While seemingly unnecessary to do so, the Court took issue with Clark's underlying logic, noting that, in practice, the cognitive incapacity prong of the *M'Naghten* test and its moral incapacity prong are intertwined.

[C]ognitive incapacity is itself enough to demonstrate moral incapacity. Cognitive incapacity, in other words, is a sufficient condition for establishing a defense of insanity, albeit not a necessary one. As a defendant can therefore make out moral incapacity by demonstrating cognitive incapacity, evidence bearing on whether the defendant knew the nature and quality of his actions is both relevant and admissible. In practical terms, if a defendant did not know what he was doing when he acted, he could not have known that he was performing the wrongful act charged as a crime.⁴⁵

Accordingly, the Court felt that the first prong of the *M'Naghten* test somewhat duplicated the second prong and, therefore, the statutory omission of the cognitive incapacity test had little, if any, effect on the overall fairness of an insanity case.⁴⁶

C. Clark's Second Due Process Challenge: Arizona's Mott Rule

The second of Clark's due process challenges concerned the rule set forth under Arizona law in *State v. Mott*.⁴⁷ That case involved the conviction of Shelly Kay Mott for "child abuse under circumstances likely to produce death or serious bodily injury" and for felony murder in the death of her daughter.⁴⁸ Mott knew that her daughter was being physically abused by her boyfriend; yet, she not only failed to remove her daughter from the abusive environment, but also failed to obtain necessary medical care after her boyfriend severely injured her daughter.⁴⁹ At her trial, Mott sought to introduce evidence through expert testimony that she lacked the capacity to save her daughter because her own mental status was significantly impaired due to the Battered Woman Syndrome.⁵⁰ The defense tried to use such evidence to rebut the prosecution's argument that the child abuse via omission had been either know-

Insanity Defense Reform Act, and various unique state formulations such as "Guilty But Mentally Ill" and "Guilty Except Insane").

⁴⁵ *Clark*, 126 S. Ct. at 2722.

⁴⁶ *Id.* at 2723-24.

⁴⁷ 931 P.2d 1046 (Ariz. 1997), *cert. denied*, 520 U.S. 1234 (1997).

⁴⁸ *Id.* at 1049, 1047-48.

⁴⁹ *Id.* at 1048-49.

⁵⁰ *Id.* at 1049.

ing or intentional within the meaning of these terms as mens rea for criminal liability.⁵¹ The trial court refused to allow such evidence, however, ruling that “the testimony regarding the battered-woman syndrome was an attempt to establish a diminished capacity defense” that was inadmissible under Arizona law.⁵² The defendant was convicted and appealed.⁵³ The Arizona Court of Appeals reversed, holding that the “trial court’s preclusion of defendant’s proffered testimony regarding battered-woman syndrome violated due process.”⁵⁴ The Arizona Supreme Court vacated the decision of the intermediate appellate court and reinstated the defendant’s conviction and sentence.⁵⁵ The court reasoned that the proffered expert testimony was, in fact, diminished capacity evidence that was inadmissible because “Arizona does not allow evidence of a defendant’s mental disorder short of insanity either as an affirmative defense or to negate the *mens rea* element of a crime.”⁵⁶ But the *Mott* court’s broad holding was not required by state law. The court could have strictly interpreted the state legislature’s failure to adopt a diminished capacity defense as a limitation on using diminished capacity as an affirmative defense⁵⁷ without barring the admissibility of psychological testimony shy of insanity to negate mens rea.⁵⁸ The dissent in *Mott* explained this critical distinction as follows:

As the majority acknowledges, “the evidence of defendant’s history of being battered and of her limited intellectual ability was . . . offered . . . as evidence to negate the *mens rea* element of the crime. The majority further acknowledges that “[s]uch evidence is distinguishable from an affirmative defense that excuses, mitigates, or lessens a defendant’s moral culpability due

⁵¹ *Id.* at 1053.

⁵² *Id.* at 1049.

⁵³ *Id.*

⁵⁴ *Id.* (citing *State v. Mott*, 901 P.2d 1221, 1225 (Ariz. Ct. App. 1995)).

⁵⁵ *Id.* at 1057.

⁵⁶ *Id.* at 1051 (citing ARIZ. REV. STAT. § 13-502(A) (1995)).

⁵⁷ See, e.g., *id.* at 1050 (“The Arizona legislature . . . declined to adopt the defense of diminished capacity when presented with the opportunity to do so.”). See also *State v. Schantz*, 403 P.2d 521, 529 (Ariz. 1965) (en banc) (refusing to judicially recognize the diminished capacity defense on the grounds that the legislature is responsible for promulgating the criminal law and that it “ha[d] not recognized a disease or defect of mind in which volition does not exist . . . as a defense to a prosecution” for a crime), *cert. denied*, 382 U.S. 1015 (1966).

⁵⁸ See *Mott*, 931 P.2d at 1058 (Zlaket, C.J., concurring) (“I am unprepared to agree that expert testimony must be strictly limited to *M’Naghten* insanity under all circumstances in any and every case, or that psychological evidence tending to negate an essential element of the crime charged can never be admitted. Such an expansive holding seems both unwise and unnecessary.”).

to his psychological impairment.” Yet, despite recognizing this distinction, the majority takes the inconsistent position that use of psychiatric evidence to negate *mens rea* is the same as an attempt to prove diminished capacity.⁵⁹

The result in *Mott* is interpreted as barring the admissibility of all evidence of mental illness to disprove *mens rea* if not offered as part and parcel of an insanity defense.⁶⁰ The *Mott* rule thus prevented the defendant in *Mott* from arguing that she did not entertain the requisite *mens rea* for child abuse and murder in the same way that it prevented Eric Clark from introducing evidence tending to show that he did not entertain the *mens rea* for murder.

The U.S. Supreme Court felt that resolution of Clark’s challenge to the constitutionality of *Mott* required an exploration of three categories of evidence that affect *mens rea* within the *Mott* framework. The first of these categories was termed “observation evidence” by the Court.⁶¹ This category of evidence concerns the observations of experts and laypersons alike regarding someone’s behavior—what someone said, how they behaved, their “tendency to think in a certain way.”⁶² Such evidence may be offered to support a clinical diagnosis or as evidence of an actor’s state of mind at the time of the commission of an offense. The testimony of Eric Clark’s family and schoolmates about his bizarre behavior in the year leading up to the shooting falls under this category of evidence. The second type of evidence relevant to proof of *mens rea* is “mental-disease evidence”—opinion testimony, usually by a qualified expert based on clinical assessment, that an actor fits the criteria for a particular mental illness diagnosis.⁶³ The testimony of mental health professionals that Eric Clark suffered from paranoid schizophrenia is an example of such evidence. The third subtype of evidence the Supreme Court felt was relevant to prove *mens rea* is “capacity evidence”—that which demonstrates a “defendant’s capacity for cognition and moral judgment (and ultimately also his capacity to form *mens rea*).”⁶⁴ The Court explained that such evidence, like “mental-disease evidence,” is usually offered in the form of expert opinion testimony. In *Clark*, the mental health experts proffered by the defense opined that Eric Clark lacked the capacity to know his actions were wrong, while the opinions of the prosecu-

⁵⁹ *Id.* at 1061 (Feldman, J., dissenting) (omissions in original) (citations omitted).

⁶⁰ *See id.* at 1054 (majority opinion).

⁶¹ *Clark v. Arizona*, 126 S. Ct. 2709, 2724 (2006).

⁶² *Id.*

⁶³ *Id.* at 2725.

⁶⁴ *Id.*

tion's experts were that Clark had such capacity in spite of his psychotic state.⁶⁵

The Court's tripartite evidentiary structure in *Clark* does not appear anywhere in *Mott*. Moreover, the "razor-thin distinction[s]" drawn by the Court did not get to the crux of Eric Clark's due process challenge.⁶⁶

Mott's holding was not restricted to mental-disease evidence. The Arizona Supreme Court did not refer to any distinction between observation and mental-disease evidence, or lay and expert testimony. Its holding was stated in broad terms: "Arizona does not allow evidence of a defendant's mental disorder short of insanity either as an affirmative defense or to negate the *mens rea* element of a crime."⁶⁷

It was precisely the exclusion of evidence of mental illness from being used to determine whether Eric Clark had acted with the requisite underlying *mens rea* that formed the basis of his second due process challenge. His defense at trial centered on his diagnosis of paranoid schizophrenia. Separate and apart from whether this debilitating psychotic disorder rendered him legally insane, he asserted that his mental illness made him delusional. Part of his delusional belief system was that his town was inhabited by aliens. Of particular relevance was his belief that the aliens were governmental workers, including municipal personnel in Flagstaff like Officer Moritz. If he delusionally thought Officer Moritz was an alien and not a police officer, then he did not "knowingly" shoot another human being, much less knowingly shoot an officer of the law.⁶⁸ Eric Clark would therefore not be guilty under the Arizona first-degree murder statute, an important point that the majority failed to comprehend.

⁶⁵ *Id.* at 2725 n.30. The Supreme Court noted that although Arizona permits testimony on capacity evidence, as that term is defined by the Court, many jurisdictions do not allow testimony on the ultimate issue to be decided in a case. ARIZ. R. EVID. 704 ("Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact."). *But see, e.g.,* FED. R. EVID. 704(b) ("No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or a defense thereto. Such ultimate issues are matters for the trier of fact alone.").

⁶⁶ *Clark*, 126 S. Ct. at 2741 (Kennedy, J., dissenting).

⁶⁷ *Id.* (quoting *State v. Mott*, 931 P.2d 1046, 1050 (Ariz. 1997) (en banc) ("The legislature's decision . . . evidences its rejection of the use of psychological testimony to challenge the *mens rea* element of a crime.") (omission in original), *cert. denied*, 520 U.S. 1234 (1997)).

⁶⁸ *Clark*, 126 S. Ct. at 2743 (Kennedy, J., dissenting).

The Court seems to have unnecessarily created its own narrow evidentiary scheme based upon its reading of the way *Mott* distinguished another Arizona case, *State v. Christensen*.⁶⁹

Christensen is distinguishable from the present case because the evidence offered by the defendant in that case was not evidence of his diminished mental capacity. Rather, the defendant merely offered evidence about his behavioral tendencies. He attempted to show that he possessed a character trait of acting reflexively in response to stress. The proffered testimony was not that he was *incapable*, by reason of a mental defect, of premeditating or deliberating but that, because he had a tendency to act impulsively, he did not premeditate the homicide. Because he was not offering evidence of his diminished capacity, but only of a character trait relating to his lack of premeditation, the defendant was not precluded from presenting the expert testimony.⁷⁰

First of all, the distinction made by the *Mott* court—between character trait evidence about behavioral tendencies and diminished capacity evidence—was plainly wrong. “Character trait” evidence of “behavioral tendencies” to act impulsively is diminished capacity evidence. Such a “character trait” is part and parcel of an impulse control disorder, defined as “the failure to resist an impulse, drive or temptation to perform an act that is harmful to the person or to others.”⁷¹ Testimony classified as concerning “character traits” and “behavioral tendencies” may well fall under the *Clark* majority’s definition of “observation evidence,” but labeling such traits and behaviors with the appropriate clinical diagnosis would make them “mental-disease evidence” under *Clark*’s evidentiary rubric. The admissibility of the evidence, however, ought not to turn on such a definitional distinction because both work together to help jurors understand human behavior. And, regardless of the definitional label, nothing changes the fact that both the observed behaviors and the diagnosis which flows from them are evidence of diminished capacity, as attested to by the facts of the *Christensen* case. The defendant’s impulse control disorder led him to commit a murder under stress. The Arizona Supreme Court reversed the defendant’s conviction in *Christensen* because he was not permitted to offer a psychologist’s testimony that, for him, killing under

⁶⁹ 628 P.2d 580 (Ariz. 1981).

⁷⁰ *Mott*, 931 P.2d at 1054 (citation omitted) (emphasis omitted).

⁷¹ AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 663 (4th ed. text rev. 2000) [hereinafter DSM-IV-TR].

stressful circumstances was more “reflexive” than “reflective.”⁷² The outcome in *Christensen* is surprising since impulse control disorders,⁷³ both historically and today, do not qualify as the basis of excusing criminal conduct.⁷⁴ In fact, several years after the *Christensen* decision, Arizona changed its insanity statutes to specifically exclude impulse control disorders as qualifying mental diseases or defects for insanity defense purposes⁷⁵—a change not mentioned in *Mott* or in *Clark*. Thus, the fact that *Christensen* was still relied upon in *Mott* is somewhat befuddling.

Second, like the defendant in *Christensen*, the defendant in *Mott* offered diminished capacity evidence not as an affirmative defense, but rather as evidence to negate mens rea. Yet, such evidence was permitted in *Christensen* and not in *Mott*, apparently because in *Christensen* the Arizona Supreme Court simply decided the evidence proffered by the defense was not diminished capacity evidence while the evidence proffered in *Mott* was. Specifically, the defendant in *Mott* sought to introduce Battered Woman’s Syndrome evidence not to excuse her conduct, but rather to show that she did not neglect her children knowingly, intentionally, recklessly, or with criminal negligence. The defendant in *Mott* wanted her expert to address the personality and character traits shared by women who suffer from domestic violence and show how these could lead someone in the defendant’s position to fail unintentionally to protect her children from her boyfriend, who physically abused both her and her children. She was denied the ability to do so.⁷⁶

The inconsistency in *Christensen* and *Mott* appears to be due, in part, to the confusing nature of diminished capacity evidence. The defense is not available in nearly half of all U.S. jurisdictions.⁷⁷

⁷² *Christensen*, 628 P.2d at 582–83.

⁷³ See, e.g., Winick, *supra* note 3, at 573–74.

⁷⁴ ARIZ. REV. STAT. § 13-502(A) (2001) (“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.”).

⁷⁵ *Id.*

⁷⁶ *State v. Mott*, 931 P.2d 1046, 1049–50 (Ariz. 1997) (en banc), cert. denied, 520 U.S. 1234 (1997).

⁷⁷ See Lucy Noble Inman, Note, *Mental Impairment and Mens Rea: North Carolina Recognizes the Diminished Capacity Defense in State v. Shank and State v. Rose*, 67 N.C. L. REV. 1293, 1308–09 (1989); see also, e.g., CAL. PENAL CODE § 28(a)–(b) (West 1999) (“(a) Evidence of mental disease, mental defect, or mental disorder is admissible solely on the issue of whether or not the accused actually formed a required specific intent, premeditated, deliberated, or harbored malice aforethought, when a specific intent crime is charged. (b) As a matter of public policy there shall be no defense of diminished capacity, diminished responsibility, or irresistible impulse in a criminal

Moreover, the jurisdictions that recognize diminished capacity vary greatly in the ways in which they permit the doctrine to be used. Some jurisdictions restrict the use of diminished capacity evidence to specific intent crimes.⁷⁸ Other states further limit its use to cases in which evidence of diminished capacity might cast doubt on the specific intent requirements for murder liability only.⁷⁹ And still other jurisdictions have adopted the Model Penal Code's approach, which allows diminished capacity evidence in any case where the defendant's mental state is at issue.⁸⁰ Section 4.02 of the Model Penal Code reads, "Evidence that the defendant suffered from a mental disease or defect is admissible whenever it is relevant to prove that the defendant did or did not have a state of mind that is an element of the offense."⁸¹ The Model Penal Code approach has been endorsed by the American Bar Association⁸² and is the one most frequently followed in those states recognizing diminished capacity.⁸³

Regardless of whether diminished capacity evidence is accepted as a complete or partial defense of excuse or not at all, the separate factual question of whether a defendant actually entertained the particular level of mens rea necessary for a criminal conviction may well depend on whether the defendant's mental illness interfered with his or her ability to act with the requisite mens rea. The dissent in *Mott*⁸⁴ and Justice Kennedy's dissent in *Clark* both

action or juvenile adjudication hearing."); see also *Mott*, 931 P.2d at 1049-50; *State v. Schantz*, 403 P.2d 521, 529 (Ariz. 1965) (en banc), cert. denied, 382 U.S. 1015 (1966).

⁷⁸ Inman, *supra* note 77, at 1309 (citing *Wagner v. State*, 687 S.W.2d 303 (Tex. Crim. App. 1984), superseded by statute, TEX. PENAL CODE ANN. § 8.01(a) (2003), as recognized in *Jackson v. State*, 160 S.W.3d 568 (Tex. Crim. App. 2005); *State v. Holcomb*, 643 S.W.2d 336 (Tenn. Crim. App. 1982)).

⁷⁹ *Id.* (citing *Commonwealth v. Garcia*, 479 A.2d 473 (Pa. 1984); *Commonwealth v. Gould*, 405 N.E.2d 927 (Mass. 1980)).

⁸⁰ See, e.g., COLO. REV. STAT. § 18-1-803(1) (2005) (evidence of mental impairment admissible to negate mental element of any offense).

⁸¹ MODEL PENAL CODE § 4.02(1) (1985).

⁸² CRIMINAL JUSTICE MENTAL HEALTH STANDARDS § 7-6.2 (1984) ("Evidence, including expert testimony, concerning the defendant's mental condition at the time of the alleged offense which tends to show the defendant did or did not have the mental state required for the offense charged should be admissible.").

⁸³ Jennifer Kunk Compton, Note, *Expert Witness Testimony and the Diminished Capacity Defense*, 20 AM. J. TRIAL ADVOC. 381, 388 (1996-1997) (citing the Third Circuit and fourteen states in support of this approach; namely, Alaska, Arizona, Arkansas, Colorado, Connecticut, Idaho, Kentucky, Maine, Missouri, Montana, New Hampshire, New Jersey, Utah, and Vermont).

⁸⁴ *State v. Mott*, 931 P.2d 1046, 1060 (Ariz. 1997) (en banc) (Feldman, J., dissenting) ("[W]e deal here with evidence 'not offered as a defense to excuse [Defendant's] crimes, but rather [with] evidence to negate the mens rea element of the crime.' In other words, the evidence was offered to help the jury determine whether

make this distinction clear.⁸⁵ The majority opinions in both cases, however, conflate the issue.

Third, notwithstanding *Mott*'s flawed understanding of both the psychological evidence at issue in *Christensen* and the nature of diminished capacity evidence, the *Clark* Court's reliance on *Mott*'s interpretation of *Christensen* is still problematic. Assuming *arguendo* that the "character trait" at issue in *Christensen* did not concern "mental-disease evidence" (which it did), using *Mott*'s reasoning, the outcome of *Clark* should still be different. The *Mott* court accepted that the defendant in *Christensen* was offering evidence of his inability to control his impulses as evidence that he did not entertain the requisite mens rea for murder.⁸⁶ Specifically, the *Christensen* court held that denying the defendant the ability to argue that his mental status interfered with his ability to act deliberately or with premeditation violated principles of "fundamental justice."⁸⁷ Why, then, was Eric Clark denied the ability to argue that his mental status interfered with his ability to act knowingly? This inconsistency is exacerbated by the fact that the defendant in *Christensen* was not psychotic, and Eric Clark was. Accordingly, Clark had a much stronger case for demonstrating why his mental illness interfered with his ability to form mens rea than did the defendant in *Christensen*.

The *Clark* Court should have discerned the inconsistencies in *Mott* and *Christensen*. It did not. It accepted *Mott* as settled state law without regard to the due process implications that were argued by Eric Clark. Moreover, the majority in *Clark* distilled a triad of evidence types tending to establish mens rea from the illogical web of strained reasoning in both *Christensen* and *Mott*. These evidentiary distinctions were unnecessary. They are misleading enough that Justice Kennedy called them an "evidentiary framework that . . . will be unworkable in many cases."⁸⁸ The Court's handling of "observation evidence" provides a good example.

The Supreme Court is undoubtedly correct that laymen and

Defendant acted knowingly, intentionally, recklessly, or with criminal negligence—the only real issues in the case."), *cert. denied*, 520 U.S. 1234 (1997).

⁸⁵ *Clark v. Arizona*, 126 S. Ct. 2709, 2747 (2006) (Kennedy, J., dissenting) ("Criminal responsibility involves an inquiry into whether the defendant knew right from wrong, not whether he had the *mens rea* elements of the offense.").

⁸⁶ *Mott*, 931 P.2d at 1053.

⁸⁷ *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 elements which comprise the offense.").

⁸⁸ *Clark*, 126 S. Ct. at 2738 (Kennedy, J., dissenting).

experts alike have insights into a person's behavior, especially when it is bizarre, and, therefore, their testimony concerning their personal observations of a defendant's behavior is both relevant and admissible.⁸⁹ Presumably, this led the Court to interpret *Mott* as having no effect on "observation evidence" regardless of whether it was offered by a layperson or a qualified expert.⁹⁰ In contrast, the Court viewed *Mott* as limiting expert testimony with regard to both "mental-disease evidence" and "capacity evidence."⁹¹

But "mental-disease evidence" is not a separate and distinct construct from either "observation evidence" or "capacity evidence." Forensic clinical assessment involves not only the administration of cognitive and personality tests, but also observations of human behavior.⁹² Moreover, a person's capacity to understand right from wrong is dependent not only upon a particular diagnosis, but also on how the disorder manifests itself in a given person—something deduced by observing the patient. Thus, the Court's categorization of evidentiary types creates a false trichotomy, as all three types of evidence are intertwined with each other. Justice Kennedy points this out in his dissent:

The mental-disease evidence at trial was also intertwined with the observation evidence because it lent needed credibility. Clark's parents and friends testified Clark thought the people in his town were aliens trying to kill him. These claims might not be believable without a psychiatrist confirming the story based on his experience with people who have exhibited similar behaviors. It makes little sense to divorce the observation evidence

⁸⁹ See, e.g., *State v. Bay*, 722 P.2d 280, 284 (Ariz. 1986). The general rule in Arizona is that a lay witness may testify on the issue of the defendant's sanity, provided that the lay witness

had an opportunity to observe the past conduct and history of a defendant; the fact that he is a lay witness goes not to the admissibility of the testimony but rather to its weight. If lay testimony is admitted, logically, a jury is free to accept it as a basis for its verdict. This is so even if there is conflicting medical testimony on the issue.

Id. (citations omitted).

⁹⁰ *Clark*, 126 S. Ct. at 2726.

⁹¹ *Id.*

⁹² See generally DAVID L. SHAPIRO, FORENSIC PSYCHOLOGICAL ASSESSMENT: AN INTEGRATIVE APPROACH (1991) (discussing practical ways to integrate the law into clinical practice including assessing defendants' competency to stand trial, evaluating their criminal responsibility, and preparing psychologists to serve as expert witnesses by utilizing long-term observation of defendants' behavior to provide a more comprehensive description of mental state than traditional psychological testing, which may only capture a microcosmic picture).

from the explanation that makes it comprehensible.⁹³

Having unnecessarily created these three confusing and misleading categories of behavioral evidence, the Court construed Clark's due process challenge to *Mott* as limited to its prohibition on "mental-disease evidence" from being used to establish diminished capacity.⁹⁴ This challenge failed.⁹⁵ But by construing Clark's claim so narrowly, the majority missed the gravamen of his second issue. Clark's due process challenge was to *Mott* entirely. Not only did he argue that barring diminished capacity evidence was a due process violation, he also argued that even if it were constitutionally permissible to bar diminished capacity evidence, it would nonetheless be unconstitutional to apply that rule in a manner that prohibited a criminal defendant from attempting to prove that he lacked *mens rea*. To compound matters, the majority's substantive holding on its narrow interpretation of Clark's challenge to *Mott* is critically flawed for the reasons set forth below.

Justice Souter's majority opinion offers several bases for upholding the *Mott* rule. First, the Court reasoned that by confining such evidence to the ultimate question of insanity, it preserved Arizona's decision to allocate to the defendant the entire burden to overcome the presumption of sanity.⁹⁶ If the Court did not uphold the *Mott* rule:

[T]he presumption of sanity would then be only as strong as the evidence a factfinder would accept as enough to raise a reasonable doubt about *mens rea* for the crime charged; once reasonable doubt was found, acquittal would be required, and the standards established for the defense of insanity would go by the boards. Now, a State is of course free to accept such a possibility in its law. After all, it is free to define the insanity defense by treating the presumption of sanity as a bursting bubble, whose disappearance shifts the burden to the prosecution to prove sanity whenever a defendant presents any credible evidence of mental disease or incapacity. In States with this kind of insanity rule, the legislature may well be willing to allow such evidence to be considered on the *mens rea* element for whatever the factfinder thinks it is worth. What counts for due process, however, is simply that a State that wishes to avoid a second avenue for exploring capacity, less stringent for a defendant, has a good reason for confining the consideration of evidence of mental disease

⁹³ *Clark*, 126 S. Ct. at 2739 (Kennedy, J., dissenting).

⁹⁴ *Id.* at 2729 (majority opinion).

⁹⁵ *Id.* at 2737.

⁹⁶ *Id.* at 2732.

and incapacity to the insanity defense.⁹⁷

Thus, when a government makes a policy judgment—as Arizona, many other states, and the federal government have done—to place the burden on a defendant to prove his insanity by clear and convincing evidence, allowing expert testimony on the defendant's mental illness could usurp that allocation of the burden by allowing such evidence to cast reasonable doubt on the defendant's *mens rea*.

While logical, the practical effect of the Court's reasoning is two-fold. First, it reaffirms the right of any U.S. jurisdiction to refuse to allow a diminished capacity defense.⁹⁸ Second, as Justice Kennedy's dissent makes clear, it undercuts the basic principle of due process that the prosecution must prove *mens rea* beyond a reasonable doubt. The insanity defense merely allows someone who committed a criminal act (meaning they did a proscribed *actus reus* with the requisite *mens rea*) to be excused from his criminal conduct due to significant mental impairment. Thus, the insanity defense separates "nonblameworthy from blameworthy offenders."⁹⁹ The insanity defense does not, however, have any effect on a determination of the actor's underlying guilt, which turns on whether the government can prove each and every element of a criminal offense—including *mens rea*—beyond a reasonable doubt.¹⁰⁰ A defendant like Daniel M'Naghten may well have formed specific intent to commit a crime, but he may have done so under totally morally blameless circumstances as a result of psychosis. It is an entirely separate question whether a defendant formed *mens rea*. The *Mott* rule, therefore, interferes with a defendant's fundamental right to present evidence that calls into question whether he entertained *mens rea*—an element on which the prosecution bears the burden of persuasion beyond a reasonable doubt.¹⁰¹

While states have latitude to exclude relevant evidence offered

⁹⁷ *Id.* at 2732–33.

⁹⁸ *Id.* at 2733 n.42 (citing *Fisher v. United States*, 328 U.S. 463, 466–76 (1946) (upholding a refusal to instruct a jury that it could consider the defendant's mental deficiencies, which did not rise to the level of insanity, in determining the elements of premeditation)).

⁹⁹ *Id.* at 2731 (citing DONALD H. HERMANN, *THE INSANITY DEFENSE: PHILOSOPHICAL, HISTORICAL AND LEGAL PERSPECTIVES* 4 (1983)).

¹⁰⁰ See *Patterson v. New York*, 432 U.S. 197, 210–11 (1977); *In re Winship*, 397 U.S. 358, 361–64 (1970).

¹⁰¹ Cf. *Sandstrom v. Montana*, 442 U.S. 510, 524 (1979) (holding that a jury instruction that had the effect of placing the burden on the defendant to disprove that he had the requisite mental state violated due process).

by a criminal defendant,¹⁰² they are constrained from doing so when it interferes with that defendant's "meaningful opportunity to present a complete defense."¹⁰³ The deprivation of Eric Clark's constitutional right to present a defense as to the element of mens rea was at the heart of his due process challenge to *Mott*. Yet, the majority decision in *Clark* dismissed this essential point because it found that mental disease or "capacity evidence" was unreliable enough to warrant a rule of evidence excluding it in spite of its relevance,¹⁰⁴ much like is done for hearsay evidence.¹⁰⁵

"While the Constitution . . . prohibits the exclusion of defense evidence under rules that serve no legitimate purpose or that are disproportionate to the ends that they are asserted to promote, well-established rules of evidence permit trial judges to exclude evidence if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury."¹⁰⁶

The *Clark* Court found that both mental disorder evidence and moral capacity evidence suffer from sufficient reliability issues that Arizona was justified in limiting such evidence exclusively to the question of insanity. In support of this conclusion, the Court made three related arguments. First, it relied on language in the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders*¹⁰⁷ (*DSM-IV-TR*) that its classifications reflect a "consensus" about mental disorders at the time of publication that may change as "[n]ew knowledge generated by research or clinical experience" becomes available.¹⁰⁸ Thus, the Court reasoned, the *DSM-IV-TR* masks "vigorous debate" within the psychiatric commu-

¹⁰² *E.g.*, *United States v. Scheffer*, 523 U.S. 303, 308 (1998).

¹⁰³ *Holmes v. South Carolina*, 126 S. Ct. 1727, 1731 (2006) (quoting *Crane v. Kentucky*, 476 U.S. 683, 690 (1986)) (citation omitted).

¹⁰⁴ *Clark*, 126 S. Ct. at 2734.

¹⁰⁵ For example, in *Montana v. Egelhoff*, the Supreme Court upheld a statutory ban on the consideration of evidence of voluntary intoxication even though such evidence was highly relevant to the defendant's ability to form mens rea. 518 U.S. 37, 42 (1996). In so holding, the Court cited the evidentiary rules generally barring hearsay evidence as an example of a prohibition on "the introduction of testimony which, though unquestionably relevant, is deemed insufficiently reliable." *Id.* In dismissing Clark's ability to introduce evidence of his mental state to prove he did not act with the mens rea necessary for a murder conviction, the Court appears to have treated mental illness evidence the same way it considered hearsay evidence and evidence of voluntary intoxication in *Egelhoff*.

¹⁰⁶ *Clark*, 126 S. Ct. at 2731-32 (quoting *Holmes*, 126 S. Ct. at 1732) (citing *Crane*, 476 U.S. at 689-90; *Egelhoff*, 518 U.S. at 37; *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973)).

¹⁰⁷ *DSM-IV-TR*, *supra* note 71, at xxxiii.

¹⁰⁸ *Clark*, 126 S. Ct. at 2734 (citing *DSM-IV-TR*, *supra* note 71, at xxxiii).

nity.¹⁰⁹ While the Court was careful to state that the consequence of this masking was not to “condemn [mental-disease evidence] wholesale,” it concluded that “this professional ferment is a general caution in treating psychological classifications as predicates for excusing otherwise criminal conduct.”¹¹⁰

The Court’s second reason for affirming the holding in *Mott* was its concern that, even when the diagnostic criteria is “broadly accepted” and “uncontroversial,” “mental-disease evidence” still has the potential “to mislead jurors” by suggesting “that a defendant suffering from a recognized mental disease lacks cognitive, moral, volitional, or other capacity, when that may not be a sound conclusion at all.”¹¹¹ This, according to the Court, is “because of the imperfect fit between the questions of ultimate concern to the law and the information contained in a clinical diagnosis.”¹¹² But this is an absurd line of reasoning since forensic psychological or psychiatric testimony concerning a defendant’s cognitive, moral, or volitional capabilities not only remains admissible to prove insanity, but also to prove a host of other criminal competencies ranging from a mentally ill defendant’s competency to stand trial, waive *Miranda* rights, act as his or her own attorney, and be sentenced and punished.¹¹³

Finally, the Court asserted that there are “particular risks inherent in the opinions of the experts who supplement the mental-disease classifications with opinions on incapacity.”¹¹⁴ The Court reasoned,

Unlike observational evidence bearing on *mens rea*, capacity evidence consists of judgment, and judgment fraught with multiple perils: a defendant’s state of mind at the crucial moment can be elusive no matter how conscientious the enquiry, and the law’s categories that set the terms of the capacity judgment are not the categories of psychology that govern the expert’s professional thinking. . . . And even when an expert is confident that his understanding of the mind is reliable, judgment addressing

¹⁰⁹ *Id.*

¹¹⁰ *Id.* (quoting Brief for Am. Psychiatric Ass’n et al. as Amici Curiae Supporting Petitioner at 15, *Clark v. Arizona*, 126 S. Ct. 2709 (2006) (No. 05-5966)).

¹¹¹ *Id.* at 2735, 2734.

¹¹² *Id.* at 2735.

¹¹³ See generally HENRY F. FRADELLA, FORENSIC PSYCHOLOGY: THE USE OF BEHAVIORAL SCIENCE IN CIVIL AND CRIMINAL JUSTICE (2007) (explaining the evolution and application of various legal standards and competencies that rely on forensic psychological evidence); RALPH REISNER ET AL., LAW AND THE MENTAL HEALTH SYSTEM: CIVIL AND CRIMINAL ASPECTS (4th ed. 2004) (same).

¹¹⁴ *Clark*, 126 S. Ct. at 2735.

the basic categories of capacity requires a leap from the concepts of psychology, which are devised for thinking about treatment, to the concepts of legal sanity, which are devised for thinking about criminal responsibility.¹¹⁵

This argument is not novel. It has been made by courts and scholars alike insofar as it posits that a mental health professional is no more qualified than anyone else to decide whether a particular defendant falls within the legal definition of insanity.¹¹⁶ And while an arguable position, it nonetheless misses the point in *Clark* because the evidence was not being restricted in the consideration of insanity!¹¹⁷ Rather, the evidence was being restricted under *Mott* for the purposes of establishing mens rea—an entirely different line of analysis.¹¹⁸

All three arguments offered by the majority opinion in support of its conclusion that Arizona may constitutionally limit the introduction of “mental-disease evidence” and “capacity evidence” to disprove mens rea collectively demonstrate a deep distrust of forensic psychiatric or psychological clinical assessment. Do laypeople understand that clinical depression can be so severe as to cause psychotic breaks with reality?¹¹⁹ Would the common juror understand that the auditory hallucinations experienced by schizophrenics often cause them to play music loudly to drown out the voices in their heads—something particularly relevant in the *Clark* case?¹²⁰ Who, if not a mental health professional, is more qualified to give an opinion regarding whether a particular mental illness interferes with a person’s ability to act with specific intent? Justice Kennedy makes this point quite eloquently in his dissent:

The existence of . . . functional psychosis [in this case] is beyond dispute, but that does not mean the lay witness understands it or

¹¹⁵ *Id.* at 2735–36.

¹¹⁶ *Id.* at 2736 (citing DSM-IV-TR, *supra* note 71, at xxxii–xxxiii; PAUL C. GIANNELLI & EDWARD J. IMWINKELRIED, SCIENTIFIC EVIDENCE § 9-3(B), at 286 (The Mitchie Co. 1986); RALPH SLOVENKO, PSYCHIATRY AND CRIMINAL CULPABILITY 55 (1995)).

¹¹⁷ Such “ultimate issue” evidence is permissible under Arizona law. *See* ARIZ. R. EVID. 704, *supra* note 65. *See also* State v. Sanchez, 573 P.2d 60, 64 (Ariz. 1977) (“There is no inference, as a matter of law, that a defendant’s insanity is established because the state fails to call expert medical witnesses to rebut those of the defense. . . . [T]he jury may be instructed that they may so find [such an inference], but it is not required that they do so.”).

¹¹⁸ Mullaney v. Wilbur, 421 U.S. 684, 706 (1975) (Rehnquist, J., concurring) (“[T]he existence or nonexistence of legal insanity bears no necessary relationship to the existence or nonexistence of the required mental elements of the crime.”).

¹¹⁹ *See generally* DSM-IV-TR, *supra* note 71, at 369–76 (describing the criteria for clinical diagnosis of a major depressive disorder and listing associated features).

¹²⁰ *Clark*, 126 S. Ct. at 2739 (Kennedy, J., dissenting).

that a disputed issue of fact concerning its effect in a particular instance is not something for the expert to address. . . . [T]he opinion that Clark had paranoid schizophrenia—an opinion shared by experts for both the prosecution and defense—bears on efforts to determine, as a factual matter, whether he knew he was killing a police officer. The psychiatrist's explanation of Clark's condition was essential to understanding how he processes sensory data and therefore to deciding what information was in his mind at the time of the shooting. Simply put, knowledge relies on cognition, and cognition can be affected by schizophrenia.¹²¹

Justice Kennedy's assessment is thoughtful and displays an understanding of the often-complicated nuances of human behavior. And his point about how "mental-disease evidence" works hand-in-hand with "observation evidence" demonstrates why the Court's tripartite evidentiary structure is nonsensical.

Not being able to offer all relevant evidence of his inability to have killed Officer Moritz knowingly interfered with Clark's due process right to present evidence, casting significant doubt on the state's ability to meet its burden to prove mens rea beyond a reasonable doubt.¹²² While states are free to shift the burden of proof to the defendant to prove his own insanity,¹²³ the *Mott* rule has the practical effect of unconstitutionally placing a burden of disproving mens rea on the defendant while simultaneously limiting the defendant's ability to do so.¹²⁴ Arizona attempted to justify this by

¹²¹ *Id.*

¹²² See, e.g., *Patterson v. New York*, 432 U.S. 197, 210–11 (1977); *In re Winship*, 397 U.S. 358, 361–64 (1970).

¹²³ See *Leland v. Oregon*, 343 U.S. 790, 798, 799 (1952) (holding that Oregon's statute requiring a criminal defendant pleading insanity to "establish that defense beyond a reasonable doubt"—a heavier burden than was required by any other state or by federal courts at the time—did not violate constitutional due process since "we cannot say that [Oregon's] policy violates generally accepted concepts of basic standards of justice").

¹²⁴ *Clark*, 126 S. Ct. at 2747 (Kennedy, J., dissenting). A "jury instruction that had the effect of placing the burden on the defendant to disprove that he had the requisite mental state violates due process." *Id.* (citing *Sandstrom v. Montana*, 442 U.S. 510, 524 (1979)). Also, a jury instruction that only permitted the jury to consider an accomplice's testimony "if it was true beyond a reasonable doubt 'place[d] an improper burden on the defense and allow[ed] the jury to convict despite its failure to find guilt beyond a reasonable doubt.'" *Id.* (quoting *Cool v. United States*, 409 U.S. 100, 103 (1972) (per curiam)). Kennedy also noted that a "[s]tate can shift the burden on a claim of self-defense, but if the jury were disallowed from considering self-defense evidence for purposes of deciding the elements of the offense, it 'would relieve the State of its burden and plainly run afoul of *Winship's* mandate.'" *Id.* (quoting *Martin v. Ohio*, 480 U.S. 228, 233–34 (1987)).

relying on *Montana v. Egelhoff*,¹²⁵ which upheld Montana's statutory ban on allowing a defendant to present evidence of voluntary intoxication to rebut mens rea.¹²⁶ But this reliance on *Egelhoff* is misplaced. Egelhoff chose to become intoxicated; Clark did not choose to have paranoid schizophrenia. The difference is a critical one because Egelhoff's purposeful decision to become intoxicated can serve as the basis of criminal liability,¹²⁷ while Clark lacks any responsibility for having a mental state that renders him unable to distinguish reality from a world filled with delusions and hallucinations.

Having shown why the exclusion of forensic psychiatric or psychological evidence on the issue of mens rea in *Clark* was a due process violation, Justice Kennedy's dissent then takes issue with the majority's argument that such evidence should be excluded due to its potential to mislead or confuse the jury. First, a per se ruling banning certain types of evidence as unreliable cannot be constitutionally applied when the evidence at issue "'may be reliable in an individual case.'"¹²⁸ Arizona has specialized rules of evidence dealing with the admissibility of expert testimony, including provisions to bar unreliable or speculative testimony as offered in a particular case.¹²⁹ These rules have been held by Arizona courts to allow a variety of types of psychological evidence to be used in cases varying from the "psychological characteristics of molestation victims"¹³⁰ to "psychiatric testimony regarding neurological deficits."¹³¹ And, courts across the nation apply similar rules of evidence to behavioral science testimony with surprising consistency.¹³² Thus, having a per se rule against *all* forms of forensic psychological testimony other than "observation evidence" is unnecessary. Moreover, even if such a rule were necessary (which it is

¹²⁵ 518 U.S. 37 (1996).

¹²⁶ *Clark*, 126 S. Ct. at 2748 (Kennedy, J., dissenting) (citing *Egelhoff*, 518 U.S. at 50).

¹²⁷ *Egelhoff*, 518 U.S. at 44 (noting that "the intoxicated defendant 'shall have no privilege by this voluntary contracted madness, but shall have the same judgment as if he were in his right senses'" and that "the law viewed intoxication 'as an aggravation of the offence, rather than as an excuse for any criminal misbehaviour'" (quoting MATTHEW HALE, 1 PLEAS OF THE CROWN *32; WILLIAM BLACKSTONE, 4 COMMENTARIES *25-26)).

¹²⁸ *Clark*, 126 S. Ct. at 2744-45 (Kennedy, J., dissenting) (quoting *Rock v. Arkansas*, 483 U.S. 44, 61 (1987)).

¹²⁹ *Id.* at 2745 (citing ARIZ. R. EVID. 403, 702).

¹³⁰ *Id.* (citing *State v. Lindsey*, 720 P.2d 73, 74-75 (Ariz. 1986) (en banc)).

¹³¹ *Id.* (citing *Horan v. Indus. Comm'n of Ariz.*, 806 P.2d 911, 914-15 (Ariz. Ct. App. 1991)).

¹³² See Henry F. Fradella et al., *The Impact of Daubert on the Admissibility of Behavioral Science Testimony*, 30 PEPP. L. REV. 403, 441-43 (2002-2003).

not), a state's interest in excluding potentially unreliable evidence in courts of law must be balanced against an individual defendant's due process rights.¹³³ And, ironically, it is "observation evidence" that is the least scientifically valid and reliable form of forensic mental health evidence. Consider that the diagnostic criteria in the *DSM-IV-TR*—which is the basis for forming an opinion with regard to "mental-disease evidence"—have been validated to varying degrees,¹³⁴ while the individual observations of a layperson or a particular clinician cannot be empirically validated. The *Mott* rule, therefore, bizarrely allows "unexplained and uncategorized tendencies to be introduced while excluding relatively well-understood psychiatric testimony regarding well-documented mental illnesses."¹³⁵

Justice Kennedy's dissent goes on to criticize the majority's contention that forensic behavioral science runs too high a risk of jury confusion. He attacks this faulty premise by noting that: "We have always trusted juries to sort through complex facts in various areas of law."¹³⁶ Although Justice Kennedy concedes that there are numerous psychiatric diagnoses that might be confusing or misleading to a jury, schizophrenia—the one at issue in *Clark*—is not such a diagnosis. Schizophrenia "is a well-documented mental

¹³³ *Clark*, 126 S. Ct. at 2744 (Kennedy, J., dissenting). Kennedy notes that the Court has invalidated various state rules because of the dangers of arbitrariness of application. First, it invalidated a rule that excluded, in certain cases, evidence that a third party may have committed the crime "even if that evidence, if viewed independently, would have great probative value and even if it would not pose an undue risk of harassment, prejudice, or confusion of the issues." *Id.* (citing *Holmes v. South Carolina*, 126 S. Ct. 1727, 1734 (2006)). A second rule was invalidated because it "exclud[ed] all hypnotically refreshed testimony [and] 'operate[d] to the detriment of any defendant who undergoes hypnosis, without regard to the reasons for it, the circumstances under which it took place, or any independent verification of the information it produced.'" *Id.* (quoting *Rock*, 483 U.S. at 56). Third, it invalidated a rule that "exclud[ed] accomplice testimony [since the rule] 'prevent[s] whole categories of defense witnesses from testifying on the basis of *a priori* categories that presume them unworthy of belief.'" *Id.* (quoting *Washington v. Texas*, 388 U.S. 14, 22 (1967)).

¹³⁴ See generally MICHAEL B. FIRST ET AL., *DSM-IV-TR GUIDEBOOK* 3–85 (2004). The authors note that while there is a usefulness in applying the diagnostic system provided by the *DSM-IV-TR* to legal questions of competency and criminal responsibility, *DSM-IV-TR* is a clinical document intended for "collegial use" in clinical practice. *Id.* at 63. Further, the goal and purpose of the *DSM-IV-TR* may be "mismatch[ed]" to the adversarial framework of the legal system, and "[m]ost legal questions require a black-and-white dichotomization that is very much at odds with the shades of gray that characterize most clinical situations." *Id.* Lastly, as a practical matter, the *DSM-IV-TR* definitions of mental disorder are clinical definitions "not equivalent" to the legal ones of "mental disorder, mental disability, mental disease, and mental defect." *Id.*

¹³⁵ *Clark*, 126 S. Ct. at 2749 (Kennedy, J., dissenting).

¹³⁶ *Id.* at 2745 (quoting *United States v. Booker*, 543 U.S. 220, 289 (2005) (Stevens, J., dissenting in part)).

illness, and no one seriously disputes either its definition or its most prominent clinical manifestations.”¹³⁷ The experts proffered by both Clark and the prosecution agreed that Clark suffered from paranoid schizophrenia, and they further agreed that Clark “was actively psychotic at the time of the killing.”¹³⁸ Justice Kennedy therefore concludes that if there were any jury confusion at all, it was “the result of the Court’s own insistence on conflating the insanity defense and the question of intent.”¹³⁹ He argues,

Considered on its own terms, the issue of intent and knowledge is a straightforward factual question. A trier of fact is quite capable of weighing defense testimony and then determining whether the accused did or did not intend to kill or knowingly kill a human being who was a police officer. True, the issue can be difficult to decide in particular instances, but no more so than many matters juries must confront.¹⁴⁰

III. CONCLUSION

Given how the Supreme Court’s decision in *Clark* limited criminal defendants’ ability to argue defenses of excuse, there is every reason to believe the sad trend of incarcerating mentally ill people in prisons, rather than treating them in mental hospitals, will continue to increase. By upholding the overbroad *Mott* rule, the *Clark* Court allows states to severely limit a mentally ill criminal defendant from offering some of the most probative evidence concerning his or her guilt. To prove that Eric Clark committed murder, the prosecution in the *Clark* case introduced evidence that the defendant had talked about wanting to kill police and then argued that, to carry out this plan, the defendant lured police to the scene by blaring music from his truck while circling a block in a residential neighborhood. The defendant, however, was barred from introducing largely undisputed evidence about the nature of paranoid schizophrenia and how the disease caused or could have caused his actions.

For example, as Clark’s expert testified during the insanity-defense phase of his trial, schizophrenics often play music loudly to drown out the voices in their heads and not to lure police officers to their cars. But in the first phase of the trial, the judge hearing the case (Clark waived his right to a jury) couldn’t consider that evidence in deciding whether the prosecution had

¹³⁷ *Id.* at 2746.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

proved first-degree murder.¹⁴¹

One can only hope that since *Clark* upheld the *Mott* rule under Arizona law, the decision will have little impact beyond the state of Arizona. However, both the language used in *Clark* and the underlying rationale do not bode well for the future of defenses of excuse based on mental illness. Indeed, the decision calls into question the future admissibility of, and weight to be accorded to, forensic behavioral science evidence. While that is a shame since the behavioral sciences have much to offer the law, the real tragedy concerns Eric Clark and those like him.

Politicians don't like paying for care for the critically mentally ill. And the courts, in their zeal to protect the rights of the mentally ill, often neglect their welfare; the courts will generally not allow authorities to hold anyone for treatment in the absence of evidence that he poses a threat, evidence not always available before somebody gets hurt.¹⁴²

With such a sorry state of affairs being the sad reality in present times, the correctional system will likely continue to be burdened with mentally ill inmates who do not belong in prisons, but rather should be treated and cared for in secure mental hospitals. Worse yet, more defendants like Eric Clark may find themselves in a confusing web of unworkable evidentiary frameworks that prevent them from arguing what should be a "straightforward defense: [that they] did not commit the crime with which [they were] charged" because they lacked the requisite mens rea.¹⁴³

Few people, if any, would argue that Eric Clark belongs on the streets. The issue is whether he belongs in prison or in a secure mental hospital where he would receive treatment for his schizophrenia. Unfortunately, Eric Clark now is one of the many severely mentally ill people who will be incarcerated in an inappropriate venue where his condition is likely only to deteriorate.¹⁴⁴ Estimates

¹⁴¹ Emily Bazelon, *Crazy Law: The Supreme Court Beats Up on the Insanity Defense*, SLATE, July 6, 2006, <http://www.slate.com/id/2145139>.

¹⁴² *Insanity Offense: Too Often, Mentally Ill People and Their Families Can't Get Help*, WASH. POST, Apr. 22, 2006, at A20, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/04/21/AR2006042101548.html>.

¹⁴³ *Clark*, 126 S. Ct. at 2749 (Kennedy, J., dissenting).

¹⁴⁴ See generally Alina Perez et al., *Reversing the Criminalization of Mental Illness*, 49 CRIME & DELINQ. 62 (2003) (citing lack of states' investment in therapeutic facilities for increased numbers of mentally ill individuals in penal institutions); HEATHER BARR, PRISONS AND JAILS: HOSPITALS OF LAST RESORT (1999), available at <http://www.urbanjustice.org/pdf/publications/mentalhealth/PrisonsJails.pdf> (arguing that New York largely fails at diverting seriously mentally ill people to treatment rather than jail and further fails in discharge planning, leading to a "revolving door" of repeated hospitalizations and incarcerations); H. Richard Lamb & Linda E. Weinberger, *Per-*

of the percentage of incarcerated people with serious mental disorders range from a conservative 7.2%,¹⁴⁵ to 20%,¹⁴⁶ to upwards of 44% of certain homicide offenders.¹⁴⁷ Both empirical research and common sense tell us that the mentally ill criminal offender often does not receive adequate treatment while incarcerated.¹⁴⁸ "The lack of adequate mental health resources exacerbates existing serious mental conditions for inmates, resulting in decompensation in inmate mental and physical health, inmate suicides, and related complications in inmate management for correctional officials."¹⁴⁹ Scholars have repeatedly demonstrated that the mentally ill inmate fails to adapt to life in jail or prison on every measure of psychological adaptation.¹⁵⁰ This fact often manifests itself in significantly higher rates of disciplinary infractions¹⁵¹ and suicide

sons with Severe Mental Illness in Jails and Prisons: A Review, 49 PSYCHIATRIC SERVICES 483, 486, 490 (1998) (noting that, although "deinstitutionalization set the stage for increasing numbers of mentally ill persons to enter the criminal justice system," many of the ensuing problems could be addressed by increasing the availability of a wide range of mental health treatment options, which "would result in far fewer mentally ill persons' committing criminal offenses").

¹⁴⁵ T. Howard Stone, *Therapeutic Implications of Incarceration for Persons with Severe Mental Disorders: Searching for Rational Health Policy*, 24 AM. J. CRIM. L. 283, 287 (1996-1997) (citing E. FULLER TORREY ET AL., CRIMINALIZING THE SERIOUSLY MENTALLY ILL: THE ABUSE OF JAILS AS MENTAL HOSPITALS 13 (1992)).

¹⁴⁶ Fox Butterfield, *Prisons Replace Hospitals for the Nation's Mentally Ill*, N.Y. TIMES, Mar. 5, 1998, at A1; see also Traolach Brugha et al., *Psychosis in the Community and in Prisons: A Report From the British National Survey of Psychiatric Morbidity*, 162 AM. J. PSYCHIATRY 774, 776 (2005) (reporting a rate of psychosis in prisons more than ten times the rate that exists in the general population); Seena Fazel & John Danesh, *Serious Mental Disorder in 23 000 Prisoners: A Systematic Review of 62 Surveys*, 359 LANCET 545 (2002) (reporting that 3.7% of men had psychotic illnesses, 10% suffered from major depression, and 65% had a personality disorder; while 4% of women had psychotic illnesses, 12% suffered from major depression, and 42% had a personality disorder); Stone, *supra* note 145, at 288 (citing Linda A. Teplin, *The Prevalence of Severe Mental Disorder Among Male Urban Jail Detainees: Comparison with the Epidemiologic Catchment Area Program*, 80 AM. J. PUB. HEALTH 663, 665-66 (1990) (reporting range from 6.36% to 9.48%)).

¹⁴⁷ Sheilagh Hodgins, *Assessing Mental Disorder in the Criminal Justice System: Feasibility Versus Clinical Accuracy*, 18 INT'L J.L. & PSYCHIATRY 15, 19 (1995).

¹⁴⁸ FELLNER & ABRAMSKY, *supra* note 10, *passim*; Earl Stahl & Mary West, *Growing Population of Mentally Ill Offenders Redefines Correctional Facility Design*, CORRECTIONS TODAY, Aug. 2001, at 72.

¹⁴⁹ Stone, *supra* note 145, at 285; see also Graham J. Towl, *Suicide in Prisons*, 5 BRIT. J. FORENSIC PRAC. 28 (2003) (positing that high rate of suicides linked to lack of psychological support); cf. Jarrod S. Steffan & Robert D. Morgan, *Meeting the Needs of Mentally Ill Offenders: Inmate Service Utilization*, CORRECTIONS TODAY, Feb. 2005, at 38 (suggesting ways to better improve care of mentally ill inmates).

¹⁵⁰ Stone, *supra* note 145, at 299 (citing HANS TOCH & KENNETH ADAMS, COPING: MALADAPTATION IN PRISONS 42, 50-54 (1989)).

¹⁵¹ *Id.* at 300 (citing TOCH & ADAMS, *supra* note 150, at xvii, xix); see also Merrill Rotter et al., *The Impact of the "Incarceration Culture" on Reentry for Adults with Mental*

rates¹⁵² for inmates who are mentally ill than for those who are not. Yet, we keep treating mentally ill criminal offenders as if they were common criminals, a trend that has been labeled the “criminalization of the mentally ill.”¹⁵³ Changes in the law concerning defenses of excuse since the early 1980s have severely curtailed the ability of people like Eric Clark to be removed from society and properly treated in a rehabilitative setting rather than being punished in prison. The Supreme Court’s decision in *Clark* is likely to only exacerbate that problem.

Illness: A Training and Group Treatment Model, 56 PSYCHIATRIC SERVICES 265 (2005) (formulating a treatment model for mental hospital patients who were previously incarcerated because their behavior can pose special challenges to mental health providers).

¹⁵² Stone, *supra* note 145, at 302–03 (citing TORREY ET AL., *supra* note 145, at 60–61); see also Rotter et al., *supra* note 151; Stefan Fröhwald & Patrick Frottier, *Suicide in Prison*, 366 LANCET 1242, 1243 (2005) (noting that there is “a consistent finding worldwide that suicide rates in custody exceed those in the general male population”) (internal footnotes and citations omitted).

¹⁵³ E.g., Cameron Quanbeck et al., *Mania and the Law in California: Understanding the Criminalization of the Mentally Ill*, 160 AM. J. PSYCHIATRY 1245 *passim* (2003), available at <http://ajp.psychiatryonline.org/cgi/reprint/160/7/1245/>. See also, e.g., TREATMENT ADVOCACY CENTER, FACT SHEET: CRIMINALIZATION OF AMERICANS WITH SEVERE MENTAL ILLNESSES, <http://www.psychlaws.org/GeneralResources/fact3.pdf> (last visited Jan. 4, 2007).