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Dedication to Chesterfield H. Smith

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ARTICLE

FROM INSANITY TO BEYOND DIMINISHED CAPACITY: MENTAL ILLNESS AND CRIMINAL EXCUSE IN THE POST-*CLARK* ERA

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I. INTRODUCTION

In summer 2006, the U.S. Supreme Court decided *Clark v. Arizona.*[1] In *Clark*, a seventeen-year-old defendant shot and killed police officer Jeffrey Moritz in Flagstaff, Arizona.[2] Moritz had pulled over Clark's truck in response to a noise complaint call about a pickup truck blaring loud music in a residential neighborhood.[3] At trial, Clark admitted that he shot and killed Moritz, but contended that he should be excused from criminal responsibility because he suffered from paranoid schizophrenia. Specifically, Clark sought to offer psychiatric evidence to support an insanity-based defense (i.e., that he did not know that what he did was wrong) and prove that he failed to act with the mens rea required for a murder conviction because he delusionally thought he was shooting an alien.[4] Relying on Arizona state precedent, the trial court refused to allow Clark to present evidence of mental illness to rebut mens rea, limiting such evidence strictly to consideration of his insanity claim.[5] The Court held that Clark failed to prove he was insane by clear and convincing evidence, as required under Arizona's narrow formulation of the insanity defense.[6] Clark was convicted and sentenced to life in prison with the possibility of parole after serving twenty-five years.[7] Clark challenged his conviction on due process grounds,[8] but ultimately, the U.S. Supreme Court affirmed Clark's conviction.[9]

The Court's decision has multiple, unfortunate consequences. It has the practical effect of adding another seriously mentally ill convict to an already over-burdened prison system that is not designed to cope with such inmates.[10] More significantly, *Clark* limits the options of mentally ill

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1. Clark v. Arizona, 126 S. Ct. 2709 (2006).
2. *Id.* at 2716.
3. *Id.*
4. *Id.* at 2717 (citing ARIZ. REV. STAT. ANN. § 13-1105(A)(3) (2005)).
5. *Id.* (citing State v. Mott, 931 P.2d 1046, 1051 (Ariz. 1997), *cert. denied*, 520 U.S. 1234 (1997) (refusing "to allow psychiatric testimony to negate specific intent" and holding that "Arizona does not allow evidence of a defendant's mental disorder short of insanity . . . to negate the *mens rea* element of a crime")).
6. *Clark*, 125 S. Ct. at 2717-18 (citing ARIZ. REV. STAT. ANN. § 13-502(C) (2001)).
7. *Id.* at 2718.
8. *Id.*
9. *Id.* at 2737.
10. *See, e.g.*, JAMIE FELLNER & SASHA ABRAMSKY, ILL-EQUIPPED: U.S. PRISONS AND OFFENDERS WITH MENTAL ILLNESS (Human Rights Watch 2003), *available at* http://www.hrw.org/reports/2003/usa1003/usa1003.pdf (last visited Feb. 17, 2007).

criminal defendants and their attorneys in future cases, thereby calling into question the future of criminal excuse defenses based on mental illness.

Few people, if any, would argue that Clark belongs on the streets. At issue is whether he belongs in prison or in a secure mental hospital where he may receive treatment for his schizophrenia. Unfortunately, Clark now is one of the many severely mentally ill people who will be incarcerated in an inappropriate venue in which his condition is likely only to deteriorate.[11]

Mentally ill criminal offenders often receive inadequate treatment for their mental dispensation while incarcerated.[12] "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."[13] Sadly a mentally ill inmate fails to adapt to life in jail or prison on every measure of psychological adaptation.[14]

Yet, an indifferent criminal justice system keeps treating mentally ill criminal offenders as if they were common criminals, a trend that has been labeled the "criminalization of . . . mental illness []."[15] Changes in the law concerning excuse defenses since the early 1980s have severely curtailed the ability of people like Clark to be removed from society and properly

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11. *See generally* HEATHER BARR, PRISONS AND JAILS: HOSPITALS OF LAST RESORT (Urban Justice Center 1999); Alina Perez et al., *Reversing the Criminalization of Mental Illness*, 49 CRIME & DELINQ. 62 (2003); H. Richard Lamb & Linda E. Weinberger, *Persons With Severe Mental Illness in Jails and Prisons: A Review*, 49 PSYCHIATRIC SERVS. 483 (1998). Estimates of the percentage of incarcerated people with serious mental disorders range from a conservative 7.2% to 20%. *See, e.g.*, Fox Butterfield, *Asylums Behind Bars: A Special Report; Prisons Replace Hospitals for the Nation's Mentally Ill*, N.Y. TIMES, Mar. 5, 1998, at A1; T. Howard Stone, *Therapeutic Implications of Incarceration for Persons with Severe Mental Disorders: Searching for Rational Health Policy*, 24 AM. J. CRIM. L. 283, 288 (1997) (estimates to upwards of 44% of certain homicide offenders as serious mental disorders). *See* Sheilagh Hodgins, *Assessing Mental Disorder in the Criminal Justice System: Feasibility Versus Clinical Accuracy*, 18 INT'L J.L. & PSYCHIATRY 15, 19 (1995).

12. FELLNER & ABRAMSKY, *supra* note 10, *passim*; Earl Stahl & Mary West, *Growing Population of Mentally Ill Offenders Redefines Correctional Facility Design*, 63 CORRECTIONS TODAY 72 (2001).

13. Stone, *supra* note 11, at 285; *cf.* Jarrod S. Steffan & Robert D. Morgan, *Meeting the Needs of Mentally Ill Offenders: Inmate Service Utilization*, 67 CORRECTIONS TODAY 38 (2005) (suggesting ways to better improve care of mentally ill inmates).

14. Stone, *supra* note 11, at 299 (citing HANS TOCH & KENNETH ADAMS, COPING: MALADAPTATION IN PRISONS 42, 50-54 (1989)).

15. *See generally* Treatment Advocacy Center, *Fact Sheet, Criminalization of Americans with Severe Mental Illnesses*, *available at* http://www.psychlaws.org/GeneralResources/fact3.pdf (last visited Sept. 11, 2006); Cameron Quanbeck et al., *Mania and the Law in California: Understanding the Criminalization of the Mentally Ill*, 160 AM. J. PSYCHIATRY 1245 (July 2003).

treated in a rehabilitative setting. The Supreme Court's decision in *Clark* is likely to only exacerbate that problem, as the decision condones the prison punishment of morally blameless actors like Clark.

Furthermore, the Supreme Court's decision in *Clark* limited the use and significance of mental health evidence in courts of law. First, the Court cast doubt on both mental health diagnostic standards and mental heath clinicians, stating that evidence concerning psychiatric diagnoses could "mislead jurors,"[16] and that mental disease expert testimony had inherent risks.[17] Moreover, the Court created what dissenting Justices suspect will be an "evidentiary framework that . . . will be unworkable in many cases."[18] Worse yet, the *Clark* decision will force juries "to decide guilt in a fictional world with undefined and unexplained behaviors but without mental illness."[19]

In order to understand the significance of the *Clark* decision and its likely impact on the criminal justice system, this Article begins by tracing the development of criminal excuse defenses based on mental illness. Specifically, Part II explains the evolution of the insanity defense from early common law to the present. Part III examines problems and ambiguities in all formulations of the insanity defense, especially those problems created by the *Clark* decision. Part IV explores diminished capacity, and Part V examines the ways in which diminished capacity has been expanded to create a variety of pseudo-defenses that have met with varying degrees of success. Having covered the major criminal excuse defenses based on mental illness, Part VI examines *Arizona v. Clark* in detail. Finally, Part VII concludes with public policy concerns regarding the future of mental illness based criminal defenses.

II. THE INSANITY DEFENSE

A. *Common Misperceptions Regarding the Insanity Defense*

In a two-year research study on insanity defense, Professor Michael Perlin found much evidence to support two propositions regarding public perceptions of the insanity defense.[20] First, he found that people believed

16. Clark v. Arizona, 126 S. Ct. 2709, 2734 (2006).

17. *Id.* at 2735.

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

19. *Id.* at 2749.

20. 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.

the defense was much more widely used than it really is, and second, he found that public sentiment toward the defense was overwhelmingly negative:[21]

> According to the news media, the allegedly "popular" insanity defense is nothing more than a "legalistic slight of hand" and a "common feature of murder defenses" is viewed as a reward to mentally disabled defendants for "staying sick," a "travesty," a "loophole," a "refuge," a "technicality," "one of the absurdities of state law," perhaps a "monstrous fraud." It is used again, allegedly in cases involving "mild disorders or a sudden disappointment or mounting frustrations . . . or a less-than-perfect childhood." It is reflected in "pseudoscience [that] can only obfuscate the issues," and is seen as responsible for "burying the traditional Judeo-Christian notion of moral responsibility under a tower of psychobabble."[22]

In fact, the insanity defense is used quite rarely. It is only raised in approximately 1% of all felony cases, and when invoked, the insanity defense is successful less than 25% of the time.[23] It is used nearly twice as much for non-homicide offenses as it is for those offenses involving a human death.[24] Thus, contrary to popular misperceptions, the insanity defense is raised infrequently, and even when it is raised, it is unsuccessful three-quarters of the time.[25]

There is also much public concern about defendants who fake their

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REV. 1375 (1997).

21. *Id.* at 1380.

22. *Id.* at 1403 (internal citations omitted).

23. *Id.* at 1404 (citing Lisa A. Callahan et al., *The Volume and Characteristics of Insanity Defense Pleas: An Eight-State Study*, 19 BULL. AM. ACAD. PSYCHIATRY & L. 331, 334 (1991); Joseph H. Rodriguez et al., *The Insanity Defense Under Siege: Legislative Assaults and Legal Rejoinders*, 14 RUTGERS L.J. 397, 401 (1983)); *see also* Stuart M Kirschner & Gary J. Galperin, *Psychiatric Defenses in New York County: Pleas and Results*, 29 J. AM. ACAD. PSYCHIATRY & L. 194, 198-200 (2001) (reporting that out of 172 felony defendants raising a psychiatric defense in a decade in New York City, only 17 juries heard arguments on the insanity defense and, of those, only 4 resulted in insanity acquittals).

24. Perlin, *supra* note 20, at 1404 (citing Rodriguez et al., *supra* note 23, at 402).

25. *See* Jeffrey S. Janofsky et al., *Defendants Pleading Insanity: An Analysis of Outcome*, 17 BULL. AM. ACAD. PSYCHIATRY & L. 203, 205 (1989) (reporting that 143 (1.2%) of 11,497 defendants in Baltimore County initially pled insanity, but after forensic evaluation, only 16 defendants (.001%) maintained the plea to the trial stage. Of these 16, the parties stipulated to the defendants' insanity in 13 cases, leaving only 3 cases contested. One of the 3 cases was dropped, one resulted in acquittal, and one resulted in a conviction.).

mental illnesses in order to escape a conviction and who simply hire clinicians to engage in an expert battle with the prosecution at trial.[26] While these cases make for good media play, they are the rare exception and not the rule. In fact, there is overwhelming agreement on a clinical diagnosis between clinicians on both sides of the criminal dispute. One study put the clinician agreement rate at 88%;[27] another at 92%.[28] Moreover, the media and Hollywood exacerbate the fears of a defendant feigning mental illness to avoid criminal punishment. However, such fears are ill-founded.[29] In practice, modern diagnostic instruments and procedures allow clinicians to distinguish correctly those who are truly mentally ill and those who are faking between 92% and 95% of the time.[30] Thus, when defendants fake mental illness, it is extraordinarily difficult for them to "get away with" it.

B. *Evolution of the Insanity Defense*

1. The Wild Beast Defense

The insanity defense has a long history, having roots in Moslem, Hebrew, and Roman law.[31] Justice Tracy, a thirteenth-century judge in King Edward's court, first formulated the foundation of an insanity defense when he:[32]

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26. Perlin, *supra* note 20, at 1404.

27. *Id.* at 1405 (citing Jeffrey L. Rogers et al., *Insanity Defenses: Contested or Conceded?*, 141 AM. J. PSYCHIATRY 885, 885-86 (1984)).

28. *Id.* (citing Kenneth Fukunaga et al., *Insanity Plea: Interexaminer Agreement and Concordance of Psychiatric Opinion and Court Verdict*, 5 LAW & HUM. BEHAV. 325, 326 (1981)); *cf.* Daniel C. Murrie & Janet I Warren, *Clinician Variation in Rates of Legal Sanity Opinions: Implications for Self-Monitoring*, 36 PROF. PSYCHOL., RES., & PRAC. 519-24 (2005) (reviewing clinician agreement rates on determinations of legal insanity).

29. Recent carefully-crafted empirical studies have clearly demonstrated that malingering among insanity defendants is, and traditionally has been, statistically low." Perlin, *supra* note 20, at 1410 (citing Dewey G. Cornell & Gary L. Hawk, *Clinical Presentation of Malingerers Diagnosed by Experienced Forensic Psychologists*, 13 LAW & HUM. BEHAV. 375, 380-81 (1989) (discussing a study in which "clinicians diagnosed 8% of criminal defendants as malingering psychotic symptoms"); Linda S. Grossman & Orest E. Wasyliw, *A Psychometric Study of Stereotypes: Assessment of Malingering in a Criminal Forensic Group*, 52 J. PERSONAL. ASSESSMENT 549, 549 (1988) (finding a minority of defendants clearly malingered)).

30. *Id.* (citing David Schretlen & Hal Arkowitz, *A Psychological Test Battery to Detect Prison Inmates Who Fake Insanity or Mental Retardation*, 8 BEHAV. SCI. & L. 75, 75 (1990)).

31. MICHAEL S. MOORE, LAW AND PSYCHIATRY 65-66 (1984).

32. Michael L. Perlin, *Unpacking the Myths: The Symbolism Mythology of Insanity Defense Jurisprudence*, 40 CASE W. RES. L. REV. 599, 645 (1990) (citing Rex v. Arnold, Y.B. 10 Geo. 1

> [i]nstructed the jury that it should acquit by reason of insanity if it found the defendant to be a madman which he described as "a man that is totally deprived of his understanding and memory, and doth not know what he is doing, no more than an infant, than a brute, or a wild beast, such a one is never the object of punishment."[33]

Justice Tracy's wild beast test "set the standard which would be applied in English courts throughout the eighteenth century."[34] There are few records about how the wild beast test was actually applied, but "commentators of the period consistently spoke of a requirement that the defendant lack understanding of good and evil or be devoid of all reason, and often equated the insane with animals or infants."[35] Interestingly, there was no separate or special verdict that excused a defendant on the basis of his insanity. Rather, after conviction, an appeal was made to the king for a pardon.[36]

The defense evolved significantly in 1800 when James Hadfield shot King George III, because he believed he had acted on orders from God.[37] At his trial for treason, defense counsel argued that Hadfield's delusions, stemming from head trauma suffered during battle, caused his actions.[38] Several physicians offered testimony corroborating Hadfield's head trauma

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(1724), *reprinted in* 16 A COMPLETE COLLECTION OF STATE TRIALS 695 (Thomas Bayly Howell ed., London, T.C. Hansard 1812)).

33. *Id.* at 632 n.142; *see also* RITA JAMES SIMON, THE JURY AND THE DEFENSE OF INSANITY 17 (1967). Perlin goes on to explain that the word "brute" as used in Arnold's case referred to "farm animals such as 'badgers, foxes, deer, and rabbits.'[] Thus, the emphasis was apparently meant to focus on a lack of *intellectual ability*, rather than the savage beast-like image the phrase calls to mind." Perlin, *supra* note 32, at 632 n.142 (emphasis added).

34. Anne C. Gresham, *The Insanity Plea: A Futile Defense for Serial Killers*, 17 LAW & PSYCHOL. REV. 193, 194 (1993) (citing SIMON, *supra* note 33, at 18-19).

35. Christopher Slobogin, *An End to Insanity: Recasting the Role of Mental Disability in Criminal Cases*, 86 VA. L. REV. 1199, 1208 (2000). Slobogin states: "In medieval times, the insanity finding was implemented not through a formal verdict after judicial instructions, but via pardon from the king. There are several accounts of pardons before the sixteenth century, but the precise grounds for these actions are not clear." *Id.* at 1208 n.32.

36. *Id.* (quoting THOMAS MAEDER, CRIME AND MADNESS: THE ORIGINS AND EVOLUTION OF THE INSANITY DEFENSE 5 (1985) ("There was no need for tests of exculpatory insanity because the only criteria for a pardon were those dictated by the king's opinion and conscience.")).

37. Gerald Robin, *The Evolution of the Insanity Defense*, 13 J. CONTEMP. CRIM. JUST. 224, 226 (1997).

38. *Id.* at 226.

claims.[39] The jury acquitted Hadfield because "the prisoner appear[ed] to be under the influence of insanity at the time the act was committed."[40]

The *Hadfield* case represented a departure from the wild beast test in two ways. First, "it rejected the argument that the defendant 'must be totally deprived of all mental faculty before acquitt[al].'"[41] Second, it was the first time that a verdict of not guilty by reasons of insanity (NGBI) "became a separate verdict of acquittal."[42] However, within a few years of the *Hadfield* decision, English jurisprudence reverted to using Justice Tracy's wild beast test, which did require a near complete deprivation of mental faculties for an acquittal.[43]

2. The *M'Naghten* Test

In 1843, the *M'Naghten* case[44] set forth a legal standard for insanity that many U.S. jurisdictions still use today.[45] M'Naghten was indicted for the first-degree murder of Edward Drummond, the secretary to the English Prime Minister Sir Robert Peel.[46] M'Naghten had intended to kill Peel, but mistook Drummond for him.[47] He explained to the police that he wanted to kill the Prime Minister "because the Tories in my city follow and persecute me wherever I go, and have entirely destroyed my peace of mind. They do everything in their power to harass and persecute me; in fact, they wish to murder me."[48]

At M'Naghten's trial, his defense attorneys argued that he suffered from paranoid persecutory delusions.[49] To support this defense, "[M'Naghten] had the assistance of four of the most able barristers in

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39. *Id.*

40. *Id.*; *see generally* Richard Moran, *The Origin of Insanity as a Special Verdict: The Trial for Treason of James Hadfield*, 19 LAW & SOC'Y REV. 487 (1985).

41. Gresham, *supra* note 34, at 194 (quoting SIMON, *supra* note 33, at 19).

42. Robin, *supra* note 37, at 226 (citing B. Caesar, *The Insanity Defense: The New Loophole*, 16 PROSECUTOR 19 (1982)).

43. Gresham, *supra* note 34, at 194 (citing SIMON, *supra* note 33, at 19).

44. M'Naghten, 8 Eng. Rep. 718 (H.L. 1843). There are at least twelve different spellings of M'Naghten's last name, something that he himself likely contributed to since he spelled his own name differently on several occasions. RICHARD MORAN, KNOWING RIGHT FROM WRONG: THE INSANITY DEFENSE OF DANIEL M'NAGHTEN xi (1981).

45. Public Broadcasting Service, Frontline: State Insanity Defense Laws (2005), *available at* http://www.pbs.org/wgbh/pages/frontline/shows/crime/trial/states.html (last visited Sept. 11, 2006).

46. Robin, *supra* note 37, at 226.

47. *Id.*

48. SANFORD H. KADISH & STEPHEN J. SCHULHOFER, CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS 969 (5th ed. 1989) (citing MORAN, *supra* note 44, at 90).

49. *See* Robin, *supra* note 37, at 226 (citing JOHN BIGGS, THE GUILTY MIND 97 (1955)).

Britain and nine prominent medical experts."[50] In contrast, the prosecution put on no experts. Lord Chief Justice Tindal charged the jury as follows:

> The question to be determined is whether at the time of 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 not violating the laws of both God and man, then he would be entitled to a verdict in his favor; 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.[51]

The jury found M'Naghten not guilty by reason of insanity.[52] M'Naghten was committed to Bedlam, the notorious asylum, where he lived until his death.[53] Much public outrage over the acquittal followed, including condemnation of the case from Queen Victoria, who herself had been the target of assassination attempts.[54] The House of Lords subsequently enacted what became known as the *M'Naghten* test for insanity.[55]

Under *M'Naghten*, the defense must clearly prove that, at the time the defendant committed the act, he or she was laboring under such a defect of reason, from a 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 what he was doing was wrong.[56] In comparison, the *M'Naghten* test states that:

1) A person is not responsible for criminal conduct if, at the time of the offense;

2) the defendant suffered from a mental disease or defect;

3) that caused the defendant either:

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50. KADISH & SCHULHOFER, *supra* note 48, at 969 n.20 (citing MORAN, *supra* note 44, at 90).
51. *M'Naghten*, 8 Eng. Rep. at 718, *quoted in* KADISH & SCHULHOFER, *supra* note 48, at 969.
52. Robin, *supra* note 37, at 226.
53. *Id.*
54. *Id.* (citing BIGGS, *supra* note 49, at 97).
55. *See* M'Naghten's Case, 8 Eng. Rep. 718 (H.L. 1843).
56. *Id.* at 722.

(a) not to know the nature and quality of the act he or she committed; or

(b) knowing the quality or nature of the act, nonetheless not to know that the act was wrong.[57]

The first *M'Naghten* test element illustrates that the insanity defense is not concerned with a defendant's mental state at the time of trial, but rather with the defendant's state of mind at the time the criminal act is alleged to have taken place. The second element requires that the defendant suffer from a "mental disease or defect."[58] The third part of the test concerns the legal doctrine of causation.

The doctrine of causation applicable in criminal law requires two distinct types of causation: cause-in-fact and proximate cause.[59] The *M'Naghten* test is concerned with the former. Cause-in-fact is what we normally think of as "causing": if a person does some act that directly brings about a particular result, then the person is said to have caused the result.[60] In other words, would the result have occurred "but for" the defendant's conduct? If the result would not have occurred but for the defendant's conduct, then the defendant's conduct is the cause-in-fact of the result.[61]

It is important to legal causation and insanity interplay. The relevant question concerning causation for insanity purposes is: "But for the mental disease or defect, would the criminal act have occurred?"[62] If the answer to that question is "yes," then the mental illness was not the cause-in-fact of the crime; only if the answer to the question is "no" is there causation for insanity purposes. In conducting this inquiry, courts "make no distinction between 'conscious' and 'unconscious' causes of behavior. . . ."[63] Thus, "even if one assumes that a person's behavior is 'caused' by unconscious beliefs, the environment, or some other factor,

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57. *See id.*

58. *Id.* What constitutes a mental disease or defect for the purposes of the insanity defense is a somewhat complicated matter that will be addressed in Part III of this Article.

59. *See generally* MODEL PENAL CODE § 2.03 (1963).

60. *Id.* cmt. 258 ("The Code thus poses an initial factual inquiry, asking whether the conduct of the defendant is an antecedent but for which the result in question would not have occurred.").

61. For an excellent discussion of causation in criminal law, see Eric A. Johnson, *Criminal Liability for Loss of a Chance*, 91 IOWA L. REV. 59, 66-71 (2005).

62. *See, e.g.*, Carter v. United States, 252 F.2d 608, 616 (D.C. Cir. 1957).

63. GARY B. MELTON ET AL., PSYCHOLOGICAL EVALUATION FOR THE COURTS 122 (1987).

that person is nonetheless 'responsible' for his or her behavior" unless the specific legal requirements of the insanity defense are met.[64]

Under the *M'Naghten* test, the mental disease or defect that existed at the time of the offense, 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.[65] The cognitive incapacity part of the test relieves the defendant of liability when the defendant is incapable of forming mens rea. 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.[66] Finding cognitive incapacity is rare because it requires that a person suffer from a psychotic disorder of such severity so as to be removed from reality and not know what he or she is doing.[67] For example, in *McNaghten*, the defendant 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 moral incapacity to distinguish right from wrong—is usually at the crux of an insanity defense.[68] This part of the insanity test relieves a defendant from criminal liability, even if the person forms the requisite mens rea (as M'Naghten formed intent to kill), as long as the actor does not understand that his act, even though committed with specific intent, is wrong.[69]

3. Shortcomings of the Cognitive Focus of the *M'Naghten* Test

For years, scholars criticized the *M'Naghten* test because it only looked at the cognitive and moral aspects of the defendant's actions.[70] The test

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64. *Id.*

65. These terms for the two prongs of the M'Naghten test were not widely accepted when *Clark* was decided. In addition, there are currently no articles using these terms in relation to the prongs of *M'Naghten*. Yet, these are the terms the Supreme Court elected to use in *Clark*, even though the Court had never before used these terms. *See* Clark v. Arizona, 126 S. Ct. 2709, 2719 (2006).

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

67. *Id.* at 261.

68. *Id.* at 261-62.

69. *Id.* at 261; *see also* M'Naghten's Case, 8 Eng. Rep. 718 (H.L. 1843).

70. When I teach criminal law, I illustrate the distinction between pure cognitive knowledge of something and an understanding of that same thing using Einstein's classic equation $E=MC^2$. Nearly all students have heard of the equation and most know that it represents: energy = mass multiplied by the speed of light, squared. Few, however, understand the equation well enough to

had no element that evaluated the volition of the defendant.[71] *M'Naghten*'s focus on the cognitive, to the full exclusion of the affective and volitional elements of human behavior, failed to consider "that mentally ill offenders might be aware that their behavior is wrong, yet nonetheless be emotionally unable to restrain themselves or control their conduct."[72] Thus, to many scholars and practitioners of the mental health sciences, the test was incomplete and "scientifically outdated."[73]

Practitioners and scholars also criticized the *M'Naghten* test for being too rigid. "Even if one accepts the premise that cognitive dysfunction is the only appropriate focus of the insanity defense, the *M'Naghten* [test] . . . did not fairly pose the question. . . . '[I]f the test language were taken seriously . . . it would excuse only those totally deteriorated, drooling hopeless psychotics of long-standing and congenital idiots.'" [74]

Finally, scholars criticized the *M'Naghten* test for its focus on "right" and "wrong," a standard that often required clinicians to make moral judgments about defendants.[75] These problems with the *M'Naghten* test led to the development of other formulations of the insanity defense that included an affective component.

4. The Short-Lived *Durham* Rule

Dissatisfied with the *M'Naghten* test, the U.S. Court of Appeals for the District of Columbia Circuit formulated a new insanity test in *Durham v. United States*.[76] In *Durham*, the Court held that "an accused is not criminally responsible if his unlawful act was the product of a mental disease or defect."[77] This finding came to be known as the "*Durham* Product Test" or the "*Durham* Rule."

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explain what it means or how it can be applied. Thus, they have cognitive knowledge, but not true understanding.

71. *See, e.g.*, Gov't of Virgin Islands v. Fredericks, 578 F.2d 927, 937 (3d Cir. 1978) (Adams, J., dissenting); *see also* Durham v. United States, 214 F.2d 862 (D.C. Cir. 1954) (rejecting *M'Naghten* test), *overruled by* United States v. Brawner, 471 F.2d 969, 981 (D.C. Cir. 1972).

72. Robin, *supra* note 37, at 227.

73. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 321 (2d ed. 1995).

74. MELTON ET AL., *supra* note 63, at 116 (quoting GREGORY ZILBOORG, MIND, MEDICINE, & MAN 273 (1943)).

75. *Durham*, 214 F.2d at 862 (rejecting *M'Naghten* test), *overruled by Brawner*, 471 F.2d at 981; *see also* Robin, *supra* note 37, at 228.

76. *Durham*, 214 F.2d at 874-75, *overruled by Brawner*, 471 F.2d at 981.

77. *Durham*, 214 F.2d at 874-75.

While the *Durham* rule did away with both the cognitive focus and moral judgments embedded in the *M'Naghten* test, it proved to be an unworkable standard. The rule led to an "influx" of expert witnesses whose testimony largely narrowed the jury's role as fact-finders.[78] Additionally, the number of criminal acquittals on the basis of the *Durham* rule rose.[79] While this increase was not necessarily problematic in and of itself, some viewed it as having had the effect of abolishing the notion of insanity as a limited excuse. In place of the traditional limited insanity defense, *Durham* appears to have judicially legislated a rule that excused all mentally ill persons from criminal responsibility, regardless of either the type or degree of impairment.[80] The *Durham* rule was eventually overruled by the D.C. Court of Appeals in 1972 in *United States v. Brawner*,[81] which adopted a formulation of the insanity defense based on the standards suggested by the American Law Institute (ALI) in its 1962 Model Penal Code.

5. The ALI/MPC Affective Test

The ALI, a prestigious, non-partisan group of judges, lawyers, and scholars from both law and related disciplines, developed a Model Penal Code (MPC) in 1962. Its formulation of the insanity defense is usually referred to as the ALI/MPC Affective test and provides that "a person is

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78. LAWRENCE S. WRIGHTSMAN ET AL., PSYCHOLOGY AND THE LEGAL SYSTEM 297 (4th ed. 1998); *see also* Robin, *supra* note 37, at 229.

> Psychiatric witnesses were prone to testify in conclusory terms that the defendant was or was not suffering from a mental disease and that the criminal act was or was not the product of the illness. By doing so, expert witnesses were essentially deciding the ultimate issue of the defendant's criminal responsibility . . . .

Robin, *supra* note 37, at 229.

79. SIMON, *supra* note 33, at 203 (reporting a 0.24% success rate for the insanity defense at trials in Washington, D.C., in the four years preceding *Durham*, and a 2.29% rate at trials in the six years following *Durham*); RICHARD ARENS, INSANITY DEFENSE 17 (1974) (reporting 0.4% success rate for the insanity defense in trials in Washington, D.C., in 1954, the year proceeding *Durham*, and a 7.2% success rate in the twelve years following the *Durham* decision).

80. *See, e.g.*, Frigillana v. United States, 307 F.2d 665, 668 (D.C. Cir. 1962) ("If our objective is to excuse all mentally or emotionally disturbed persons from criminal responsibility we should frankly and honestly say that and proceed accordingly, for that is precisely where our rule, as applied, is taking us."). *See generally* Herbert Wechsler, *The Criteria of Criminal Responsibility*, 22 U. CHI. L. REV. 367, 373 (1955) (stating that the *Durham* Rule constituted "a legal principle beclouded by a central ambiguity, both unexplained and unsupported by its basic rationale").

81. *Brawner*, 471 F.2d at 981.

not responsible for criminal conduct if, at the time of such conduct as of a result of a mental disease or defect, [the defendant] lacks the substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law."[82] Although the ALI/MPC formulation of the insanity defense did not define what a mental disease or defect[83] was (just as the *M'Naghten* test failed to do), it did include a provision that purposefully excluded those who were suffering from antisocial personality disorder from being considered to have a mental disease or defect.[84] For the sake of being able to make element by element comparisons among the various formulations of the insanity defense, the ALI/MPC Affective test can be expressed in this way:

1) A person is not responsible for criminal conduct if, at the time of the offense;

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82. MODEL PENAL CODE § 4.01(1) (1962).

83. The primary tool used in the United States for defining mental disorders is the Diagnostic and Statistical Manual of Mental Disorder (DSM) of the American Psychiatric Association (APA). The DSM was first created by the APA in 1952. Since then, it has gone through five major revisions: DSM-II (1968), DSM-III (1980), DSM-III revised edition (1987), DSM-IV (1994), and its most current edition published in 2000. *See* AMERICAN PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDER (4th ed., text rev. 2000) [hereinafter DSM-IV-TR].

84. According to the DSM-IV-TR, antisocial personality disorder is a:

> [P]ervasive pattern of disregard for and violation of the rights of others occurring since age 15 years, as indicated by three or more of the following: (1) failure to conform to social norms with respect to lawful behaviors as indicated by repeatedly performing acts that are grounds for arrest; (2) deceitfulness, as indicated by repeated lying, use of aliases, or conning others for personal profit or pleasure; (3) impulsivity or failure to plan ahead; (4) irritability and aggressiveness, as indicated by repeated physical fights or assaults; (5) reckless disregard for safety of self or others; (6) consistent irresponsibility, as indicated by repeated failure to sustain consistent work behavior or honor financial obligations; and (7) lack of remorse, as indicated by being indifferent to or rationalizing having hurt, mistreated, or stolen from another.

Id. at 687, 702-06. The person being diagnosed with this disorder must be at least eighteen years of age, and, prior to age fifteen, must have exhibited evidence of a conduct disorder such as aggression to people and animals (bullying, threatening, initiating fights, using a weapon, robbery, forcing sexual activity); destruction of property (including by fire); deceitfulness or theft (including breaking & entering, shoplifting); and serious rule violations (truancy or running away). *Id.* at 706. Finally, to qualify for the diagnosis, the person cannot have exhibited such behaviors exclusively during an active psychosis, such as one prompted by schizophrenia or a manic episode. *Id.*

2) the defendant suffered from a mental disease or defect (other than antisocial personality disorder and/or any other abnormality manifested only by repeated criminal or otherwise antisocial conduct);

3) that caused the defendant to lack either:

(a) the substantial capacity to appreciate the criminality (wrongfulness) of his or her conduct; or

(b) the substantial capacity to conform his conduct to the requirements of law.[85]

The first two elements of the ALI/MPC Affective test are the same as those required under the *M'Naghten* test. Both look at the defendant's conduct at the time of the offense, and both require a mental disease or defect. However, a slight difference in the mental disease or defect requirement between the *M'Naghten* test and the ALI/MPC formulation of the insanity defense is that the latter specifically excludes antisocial personality disorder.[86]

The principal difference between the two formulations is in the third element. As discussed earlier, the *M'Naghten* test focused on the cognitive aspects of behavior: did the defendant know what he or she was doing, and if so, did the defendant know it was wrong? It was an all or nothing standard that required total (or near total) impairment. The ALI/MPC formulation avoided a purely cognitive focus by adding a volitional element. Further, the ALI/MPC test replaced the *M'Naghten* test's focus on pure cognitive knowledge of the wrongfulness of one's acts with a less stringent test requiring that the defendant lack the "substantial capacity to appreciate" the wrongfulness of his actions.[87] As a result, mental health experts and ultimately, juries, were permitted to "consider the defendant's moral, emotional, and legal awareness of the consequences of his or her behavior . . . [in recognition that] there are gradations of criminal responsibility and that the defendant need not be totally impaired to be absolved of such responsibility."[88]

Additionally, the ALI/MPC test was less strict than the *M'Naghten* test since it allowed even those who knew and appreciated that their acts were

85. *See* MODEL PENAL CODE § 4.01(1) (1962).
86. *See supra* text accompanying note 85.
87. MODEL PENAL CODE § 4.01(1) (1962).
88. Robin, *supra* note 37, at 230 (citing United States v. Freeman, 357 F.2d 606 (1966)).

wrong to assert the insanity defense by claiming they were unable to abide by the law. This aspect is known as the "irresistible impulse test."[89] The ALI/MPC formulation of the insanity defense sought to implement the irresistible impulse test nationwide in response to its recognition that the evolving state of behavioral science knowledge clearly acknowledged that one's volition was often impacted by mental illness.[90] Thus, with the implementation of the ALI/MPC insanity test, "defendants' inability to control their actions [became] an independent criterion for insanity."[91]

The ALI/MPC formulation of the insanity defense was repeatedly criticized by scholars, lawyers, and psychiatrists for the inclusion of the irresistible impulse test.[92] These critics argued that an irresistible impulse was really just an impulse that was not, in fact, resisted.[93] For example, would a criminal defendant have committed the crime if a policeman had been next to him? Since the answer to this hypothetical question in all likelihood would be "no," it suggests that the impulse was not truly irresistible, but rather one that was simply not resisted. Moreover, allowing volitional impairment to qualify as the basis of a defense of excuse is inconsistent "with a criminal justice system premised on free will."[94] In spite of the criticisms, a majority of the states and all but

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89. The irresistible impulse test excused "a defendant whose mental illness 'so subverts his will as to destroy his free agency by rendering him powerless to resist by reason of the duress of the disease.'" Julie E. Grachek, *The Insanity Defense in the Twenty-First Century: How Recent United States Supreme Court Case Law Can Improve the System*, 81 IND. L.J. 1479, 1484 (2006) (quoting Parsons v. State, 2 So. 854, 866 (Ala. 1887)). Largely as a result of the inflexible nature of the *M'Naghten* test, the irresistible impulse test had become a part of the insanity defense formulations of seventeen states by the 1920s. Slobogin, *supra* note 35, at 1212 n.41 (citing ABRAHAM S. GOLDSTEIN, THE INSANITY DEFENSE 241-42 n.1 (1967)).

90. Robin, *supra* note 37, at 230.

91. WRIGHTSMAN ET AL., *supra* note 78, at 298.

92. *See, e.g.*, Stephen J. Morse, *Culpability and Control*, 142 U. PA. L. REV. 1587, 1600 (1994) (distinguishing an "impulse" from a bona-fide "compulsion," thereby criticizing the notion of an irresistible impulse). Even the American Bar Association and the American Psychiatric Association joined in this criticism of the volitional aspect of the ALI/MPC test. MELTON ET AL., *supra* note 63, at 117 (citing AMERICAN BAR ASS'N, CRIMINAL JUSTICE MENTAL HEALTH STANDARDS, standard 7-6.1, at 329-32 (1984); AMERICAN PSYCHIATRIC ASS'N, STATEMENT ON THE INSANITY DEFENSE 12 (1982)).

93. *Id.* at 1599-1602; *see also, e.g.*, Michael S. Moore, *Responsibility and the Unconscious*, 53 S. CAL. L. REV. 1563, 1665 (1980) (distinguishing causation of behavior from compulsion).

94. Christopher Slobogin, *The Interactionist Alternative to the Insanity Defense: Reflections on the Exculpatory Scope of Mental Illness in the Wake of the Andrea Yates Trial*, 30 AM. J. CRIM. L. 315, 320 (2003).

one federal circuit[95] eventually adopted the ALI/MPC formulation of the insanity defense.[96]

6. The *John Hinckley* Case

In the late 1970s, John Hinckley, an obsessed fan of Jodie Foster, made several attempts to woo Foster while she was a first-year student at Yale University.[97] When Foster rebuffed his overtures, Hinckley decided he needed to do something that would make an impression on her—some "historic deed [that would] finally gain her respect and love for him."[98] On March 30, 1981, he carried out his plan by attempting to assassinate then-President Ronald Reagan as he was leaving the Washington Hilton Hotel in Washington, D.C.[99]

At his trial for attempted murder, Hinckley asserted the insanity defense; the ALI/MPC formulation of the insanity defense governed his trial.[100] In response to the defense raising the insanity defense, the government had to prove that Hinckley was sane beyond a reasonable doubt at the time he made his assassination attempt on President Reagan.[101]

"After weeks of conflicting testimony by defense and prosecution psychiatrists–testimony that struck some as an affront to common sense–the jury found Hinckley not guilty by reason of insanity."[102] At least for some jurors, the ALI/MPC formulation of the insanity defense determined the outcome of the case. One juror reported feeling "trapped" by the test: "My conscience had me voting one way, but the law would not allow me to vote that way."[103] Hinckley's acquittal using the insanity defense sparked a furor over the defense and focused critical, national

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95. Robin, *supra* note 37, at 231 (citing United States v. Torniero, 735 F.2d 725 (1984), *cert. denied*, 469 U.S. 1110 (1995)).

96. *Id.*; *see also* MELTON ET AL., *supra* note 63, at 117.

97. PETER W. LOW, JR. ET AL., THE TRIAL OF JOHN W. HINCKLEY, JR.: A CASE STUDY IN THE INSANITY DEFENSE 23-24 (1986). Hinckley sent Foster love letters, poems, and had two "awkward" phone conversations with her. *Id.* at 25.

98. *Id.* at 32.

99. *Id.* at 27.

100. United States v. Hinckley, 525 F. Supp. 1342 (D.D.C. 1981).

101. Robin, *supra* note 37, at 231.

102. *Id.* (quoting *Insane on All Counts: Is the System Guilty?*, TIME, July 5, 1982, at 26-27); *see also* Stuart Taylor, Jr., *Hinckley Cleared But Is Held Insane in Reagan Attack*, N.Y. TIMES, June 22, 1982, at A1, D27.

103. Robin, *supra* note 37, at 231 (quoting Walter Isaacson, *Insane on All Counts: Is the System Guilty?*, TIME, July 5, 1982, at 26).

attention on it.[104] "Within days [of the verdict], the most 'celebrated' insanity trial in American history had instantly become the most 'outrageous' verdict."[105]

In the wake of the *Hinckley* verdict, the insanity defense underwent sweeping reforms in both the federal system and in many states.[106] After twenty-six different pieces of legislation were introduced in Congress to either abolish or restrict the insanity defense at the federal level,[107] Congress enacted the Insanity Defense Reform Act of 1984 (IDRA).[108] In doing so, Congress codified the federal insanity defense for the first time and legislatively overruled the application of the ALI/MPC insanity test in all federal cases.[109]

7. The Provisions of the IDRA

A defense based on IDRA will prevail if: "At the time of the commission of the acts constituting the offense, the defendant, as of 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."[110]

Again, it is helpful to consider the requirements of IDRA in terms of its specific elements:

1) A person is not responsible for criminal conduct if, at the time of acts constituting the offense;

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104. George L. Blau & Richard A. Pasewark, *Statutory Changes and the Insanity Defense: Seeking the Perfect Insane Person*, 18 LAW & PSYCHOL. REV. 69, 70 n.6 (1994) (citing Valerie P. Hans & Dan Slater, *John Hinckley, Jr. and the Insanity Defense: The Public's Verdict*, 47 PUB. OPINION Q. 202, 203 (1983); Valerie P. Hans & Dan Slater, *"Plain Crazy": Lay Definitions of Legal Insanity*, 7 INT'L J.L. & PSYCHIATRY 105 (1984); Nightline: Insanity Plea on Trial (ABC television broadcast June 22, 1982); Otto F. Wahl, *Post*-Hinckley *Views of the Insanity Defense*, 8 AM. J. FORENSIC PSYCHOL. 3, 5-7 (1990)).

105. Perlin, *supra* note 32, at 637.

106. *See, e.g.*, Lisa A. Callahan et al., *Insanity Defense Reform in the United States Post*-Hinckley, 11 MENTAL & PHYSICAL DISABILITY L. REP. 54, 54-59 (1987).

107. Michael L. Perlin, *The Things We Do For Love: John Hinckley's Trial and the Future of the Insanity Defense in the Federal Courts* (Book Review), 30 N.Y.L. SCH. L. REV. 857, 860 (1985).

108. Pub. L. No. 91-190, 98 Stat. 1837 (1984) (codified as amended at 18 U.S.C. § 17 (2000)).

109. Perlin, *supra* note 32, at 638; Brian E. Elkins, *Idaho's Repeal of the Insanity Defense: What Are We Trying to Prove?*, 31 IDAHO L. REV. 151, 155 (1994).

110. 18 U.S.C. § 17.

2) the defendant suffered from a severe mental disease or defect

3) that caused the defendant to be unable to appreciate either:

(a) the nature and quality of his or her acts; or

(b) the wrongfulness of his or her acts.[111]

In effect, IDRA returns the law of insanity to where it was at the time the *M'Naghten* test was adopted. Like the previous insanity defense formulations, the first element looks at the mental state of the defendant at the time of the commission of the offense.[112] The second element, just like *M'Naghten* test and the ALI/MPC formulation of the insanity defense, requires a mental disease or defect.[113] But IDRA added the requirement that the mental disease or defect be severe.[114] This requirement of severity effectively limited the applicability of the defense to people suffering from psychoses and mental retardation, thereby effectively eliminating neurosis, disabilities, and personality disorders as predicate mental diseases or defects.[115]

The third element is similar to all prior formulations of the insanity defense insofar as there must be a causal nexus between the mental illness and the crime committed.[116] However, the third element changed the insanity defense as it existed in the federal courts quite significantly in two important ways. First, the third element effectively abolished the volitional aspect of the ALI/MPC insanity defense as expressed in the irresistible impulse test. Thus, under IDRA, an inability to conform one's conduct to the requirements of the law no longer qualifies as the basis of an insanity defense. Second, the third element effectively reinstated the *M'Naghten* test with a slight modification. Instead of requiring a lack of "knowledge" that one's conduct is wrong to qualify as legally insane, IDRA requires an inability to "appreciate" the wrongfulness of one's conduct.[117] This leaves

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111. *See id.*

112. *See id.*

113. *See id.*

114. *See id.*

115. *See infra* Part III.A; *see also* Perlin, *supra* note 32, at 639 n.175 (stating that the word "severe" was added as a qualifier "to ensure that relatively minor disorders such as nonpsychotic behavior disorders or personality defects would not provide the basis for an insanity defense") (citing HANDBOOK ON THE COMPREHENSIVE CRIME CONTROL ACT OF 1984 AND OTHER CRIMINAL STATUTES ENACTED BY THE 98TH CONGRESS 59 (1984)).

116. 18 U.S.C. § 17.

117. *See id.*

the slightest door open for the defense to introduce some affective component, rather than having to focus exclusively on the defendant's cognitive incapacities.

In addition to changing the elements of the insanity defense and standardizing the defense for the federal system, IDRA also made a critical procedural change in how the way the insanity defense is litigated. Up until the time of IDRA, once the defense announced its intention to use the insanity defense (i.e., once the defense met its burden of production), the prosecution bore the burden of persuasion to prove that, beyond a reasonable doubt, the defendant was legally sane at the time of a criminal offense.[118] But IDRA shifted both the burden of production and the burden of persuasion to the defense by making insanity an affirmative defense.[119] Accordingly, the defense must now prove that the defendant was insane at the time of the criminal offense by clear and convincing evidence.[120] Whether this shift in the burden of proof has had a significant impact on case outcomes is questionable in light of the few studies that have failed to demonstrate "any consistent relationship between the imposition of the burden of proof and the acquittal rate."[121]

Finally, IDRA triggered a change to the law of evidence. With regard to expert witnesses:

> 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 of a defense thereto. Such ultimate issues are matters for the trier of fact alone.[122]

However, at least two studies using simulated trials have demonstrated that this change in the law of evidence regarding the "ultimate issue" has had no significant effects on jury verdicts.[123]

By 1985, thirty-three states had followed the lead of Congress and re-evaluated the insanity defense as it applied in their respective state

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118. *Id.*

119. *See id.*

120. *See id.*

121. Renee Melançon, Note, *Arizona's Insane Response to Insanity*, 40 ARIZ. L. REV. 287, 297 (1998) (citing MELTON ET AL., *supra* note 63, at 202).

122. FED. R. EVID. 704(b).

123. *See* Richard Rogers et al., *Effects of Ultimate Opinions on Juror Perceptions of Insanity*, 13 INT'L J.L. & PSYCHIATRY 225, 230 (1990); Solomon M. Fulero & Norman J. Finkel, *Barring Ultimate Issue Testimony: An "Insane" Rule?* 15 LAW & HUM. BEHAV. 495, 504 (1991).

jurisdictions.[124] Many states followed IDRA and made insanity an affirmative defense, thereby shifting the burden of persuasion from the prosecution to the defense to prove the defendant's insanity, usually by a preponderance of the evidence.[125] Other states left the burden of persuasion with the government to show the defendant's sanity, but tightened the substantive test for insanity by requiring a severe mental disease or defect or some equivalent.[126] Twelve states replaced the insanity defense with some variant of the "guilty, but mentally ill" verdict.[127] Four states—Utah, Montana, Idaho, and Kansas—abolished the insanity defense altogether.[128]

C. *Alternative Verdicts for Defendants Claiming Mental Illness*

1. Michigan's "Guilty But Mentally Ill" Verdict

Some states provide juries with a number of verdicts to consider in cases that rely on insanity defenses. For example, in August 1975, Michigan was the first U.S. state to supplement its NGBI verdict by adding another verdict alternative termed "guilty but mentally ill" (GBMI).[129] The impetus for enacting the new verdict came largely from the case of John Bernard McGee.[130] McGee was found NGBI at his murder trial and was committed to a mental institution.[131] While institutionalized, he admitted to twenty-five additional killings.[132] Two months later, in a civil commitment hearing mandated for NGBI acquittees by an unrelated Michigan Supreme Court case,[133] McGee was found "not presently insane" and was released.[134] He again was arrested one month later for beating his wife to death.[135] Public outcry led the state legislature to adopt the GBMI

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124. Callahan et al., *supra* note 106, at 54-56.

125. *Id.*; *see also* Melançon, *supra* note 121, at 297.

126. Callahan et al., *supra* note 106, at 54-56.

127. *Id.*

128. The abolition of the insanity defense is discussed *infra* Part III.G.

129. MICH. COMP. LAWS § 768.36(1) (1992) (enacted Aug. 6, 1975).

130. Ira Mickenberg, *A Pleasant Surprise: The Guilty But Mentally Ill Verdict Has Both Succeeded in Its Own Right and Successfully Preserved the Traditional Role of the Insanity Defense*, 55 U. CIN. L. REV. 943, 973-74 (1987).

131. *Id.* at 973 (citing Brown & Wittner, *Criminal Law*, 25 WAYNE L. REV. 335, 355 (1979) (included in annual survey of Michigan law)).

132. *Id.*

133. *See* People v. McQuillan, 221 N.W.2d 569 (1974).

134. Mickenberg, *supra* note 130, at 973.

135. *Id.*

verdict in an effort to "to reduce the number of successful [NGBI] pleas and insure lengthy confinement for those defendants who are found insane."[136]

Under the Michigan GBMI law, a jury would return a verdict of GBMI if the following three criteria were found beyond a reasonable doubt: "(a) That the defendant is guilty of an offense[;] (b) That the defendant was mentally ill at the time of the commission of the offense[; and] (c) That the defendant was *not* legally insane at the time of the commission of the offense."[137] This verdict was, in effect, a "compromise."[138] It allowed juries to acquit those defendants who were clearly insane under a traditional NGBI verdict while also giving jurors a "middle ground" verdict to convict those who were not clearly insane, but who did suffer from a mental illness at the time of the commission of a criminal offense.

Under the Michigan GBMI scheme, a defendant so adjudicated would be sentenced just as if he or she had been found guilty of the crime, with one exception: a court must make a determination if the GBMI defendant needs treatment.[139] If a court finds the defendant does need treatment, then the defendant would be remanded into the custody of either the department of corrections or the state's department of mental health services for treatment.[140]

Other states followed Michigan's lead and adopted the GMBI verdict.[141] This movement was largely in response to NGBI verdicts in those states that brought public outcry over the insanity defense, especially after the successful "Twinkie Defense" of Dan White in 1979[142]–a version

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136. *Id.* at 974.

137. MICH. COMP. LAWS § 768.36(1) (1992) (enacted Aug. 6, 1975) (emphasis added).

138. Perlin, *supra* note 32, at 1379.

139. MICH. COMP. LAWS § 768.36(1), (2) (1992) (enacted Aug. 6, 1975).

140. *Id.* § 768.36(3). Interestingly after treatment, the defendant must serve whatever time remains on his or her sentence in a correctional facility. *Id.* However, the law provides that a judge can order the remainder of the term to be served on probation if the defendant continues with mandatory mental health treatment. *Id.* § 768.36(4).

141. HENRY J. STEADMAN ET AL., BEFORE AND AFTER *HINCKLEY*: EVALUATING INSANITY DEFENSE REFORM 38 (1993); *see also* ALASKA STAT. § 12.47.040 (1990); DEL. CODE ANN. tit. 11, §§ 401(b), 408 (1990); GA. CODE ANN. § 17-7-131 (1985); ILL. COM. STAT. ANN. ch. 720, act. 5, tit. II, art. 6 (West 1990); IND. CODE § 35-36-2-3 (1982); KY. REV. STAT. ANN. § 504.120 (LexisNexis 1990); MONT. CODE ANN. § 46-14-312 (1993); N.M. STAT. ANN. § 31-9-3 (LexisNexis 1984 & Supp. 1994); 18 PA. CONS. STAT. § 314 (1983); S.C. CODE ANN. § 17-24-20 (1993); S.D. CODIFIED LAWS ANN. § 23A-26-14 (1988).

142. White killed San Francisco Mayor George Moscone and fellow City Supervisor Harvey Milk. His trial for two counts of first-degree murder resulted only in convictions for voluntary manslaughter after the jury ostensibly found White, a hypoglycemic, to have suffered from

of diminished capacity discussed later in this Article.[143] In most of the jurisdictions that adopted the GBMI verdict, all three elements (i.e., the defendant (1) is guilty of the offense charged; (2) was mentally ill at the time of the commission of the offense; and (3) was not legally insane at the time of the commission of the offense) must be proven beyond a reasonable doubt by the government.[144]

The very phrase "guilty, but mentally ill" is an oxymoron. It allows jurors to affix guilt, while simultaneously allowing a finding of excuse for that guilt. The contradiction of a lack of moral blameworthiness due to mental illness, coupled with a determination of factual guilt, should be intellectually irreconcilable. But supporters argue that it has a two-fold benefit: it allows jurors to feel better about returning NGBI verdicts when someone is truly mentally ill, and conversely, it allows jurors to convict those who are mentally ill, but not insane, while still recognizing mental illness as a contributing factor that mitigates the need for punishment.[145]

The GBMI verdict received much criticism from scholars.[146] Notably, empirical research demonstrated that the verdict had little if any effect on the NGBI adjudication rate. For example, Smith and Hall found that NGBI acquittals represented .026% of all arrests before the GBMI law went into effect and .024% of all arrests in the six years after the new verdict was available.[147] They concluded the new GBMI verdict "merely substituted a new name for certain defendants who, in the absence of the new statute, probably would have been found guilty."[148]

Moreover, one of the primary objectives of the GBMI verdict was to get treatment for those defendants who, although mentally ill, did not have their cognitive abilities so impaired as to be rendered legally insane. In reality, however, "GBMI prisoners are treated like any other prisoners;

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diminished capacity during a sugar and caffeine induced reactive psychosis, brought about by a combination of depression and having gorged himself on Twinkies and Coca-Cola. *See generally* KENNETH W. SALTER, THE TRIAL OF DAN WHITE (1991).

143. *See infra* Part IV.

144. *See supra* text accompanying note 141. Some states, however, require only that the prosecution prove the first element—the guilt of the defendant—beyond a reasonable doubt. *See, e.g.*, S.C. CODE ANN. § 17-24-20(B) (2006). Then the burden shifts to the defendant to prove that he or she was mentally ill at the time of the offense by a preponderance of the evidence. *See, e.g.*, State v. Lewis, 494 S.E.2d 115, 117 (S.C. 1997).

145. Mickenberg, *supra* note 130, at 988-89.

146. *See generally* Christopher Slobogin, *The Guilty But Mentally Ill Verdict: An Idea Whose Time Should Not Have Come*, 53 GEO. WASH. L. REV. 494 (1985) (summarizing and analyzing critiques of the GBMI verdict).

147. Gare A. Smith & James A. Hall, *Evaluating Michigan's Guilty But Mentally Ill Verdict: An Empirical Study*, 16 U. MICH. J.L. REFORM 77, 107 (1982).

148. *Id.* at 80.

they will get extra treatment if they need it, but that's the same treatment [the prison will] give everyone else."[149] In fact, Smith and Hall reported that 75% of GBMI defendants in Michigan received no psychiatric treatment at all, usually due to financial constraints.[150] Of all the states using a GBMI verdict, only Alaska, Kentucky, and South Carolina actually guarantee treatment.[151] But whether treatment in these three states is any more effective than in the others is quite questionable. The chair of the Parole Board in Kentucky stated, "From psychological evaluations and treatment summaries, the Board can detect no differences in treatment or outcome for [inmates adjudicated GBMI] from those who have been adjudicated as simply 'guilty.'"[152]

2. Guilty Except Insane

Not all states structured their variations on the GBMI verdict. Consider Arizona's approach–the one upheld in *Clark v. Arizona*.[153] Under it, a person may be found "guilty except insane" (GEI) if:

1) at the time of the commission of the criminal act,

2) the person was afflicted with a mental disease or defect of such severity,

3) that the person did not know the criminal act was wrong.

4) A mental disease or defect constituting legal insanity is an affirmative defense. The defendant shall prove the defendant's legal insanity by clear and convincing evidence.

5) 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

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149. Mickenberg, *supra* note 130, at 993-94 (citing Smith & Hall, *supra* note 147, at 105 n.138 (quoting Dr. John Prelesnick, Superintendent of the Reception and Guidance Center at Michigan's Jackson State Penitentiary)).

150. *Id.* at 994 (citing Smith & Hall, *supra* note 147, at 105 n.137).

151. For two excellent critiques of the GBMI verdict, see generally Mark A. Woodmansee, Note, *The Guilty But Mentally Ill Verdict: Political Expediency at the Expense of Moral Principle*, 10 NOTRE DAME J.L. ETHICS & PUB. POL'Y 341 (1996); Slobogin, *supra* note 146.

152. WRIGHTSMAN ET AL., *supra* note 78, at 309.

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

> 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.[154]

The GEI verdict abolished the NGBI verdict in its entirety. It holds the person responsible (i.e., "guilty"), but simultaneously exempts the legally insane (under the narrow definition set forth in the statute) from criminal punishment. But, as at least one critic of the statute has said, "the 'guilty but insane verdict' is a contradiction in terms. . . . [O]ne cannot be both guilty from a legal standpoint and insane from a legal standpoint."[155] This conflict aside, the statute is one of the most restrictive insanity-related statutes in the United States in some aspects, while being arguably the most progressive in other ways.

Arizona's statute returns to the *M'Naghten* test's concept of defining insanity as not knowing right from wrong. As a result, it suffers from the same criticisms levied against the *M'Naghten* test for its exclusive focus on cognitive aspects of thought and behavior to the exclusion of affective elements.[156] But Arizona's GEI statute is more restrictive than both the *M'Naghten* test and the modern federal variation of the old *M'Naghten* test for two reasons.

First, like the modern federal formulation of the insanity defense under the IDRA, a "severe" mental disease or defect is required.[157] Also, like the modern federal formulation of the insanity defense, Arizona's GEI statute makes the defense an affirmative one, placing the burden of persuasion on the defendant to prove his or her insanity by clear and convincing evidence.[158] But, unlike previous formulations of the insanity defense, Arizona's formulation contains the most restrictive exclusions of mental disorders from qualifying as a "mental disease or defect" for insanity purposes. These restrictions range from antisocial personality disorder, psychosexual disorders, and impulse control disorders, to "disorders that result from acute voluntary intoxication or withdrawal from alcohol or drugs, character defects, . . . momentary, temporary conditions arising

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154. *See* ARIZ. REV. STAT. ANN. § 13-502 (1997). Although the statute itself is not broken into elements, it is presented above in enumerated elements for comparative purposes.

155. Melançon, *supra* note 121, at 313.

156. *See supra* Part II.C.

157. 18 U.S.C. § 17 (2000).

158. *Id.*

from the pressure of the circumstances, moral decadence, depravity, or passion growing out of anger, jealousy, revenge, hatred or other motives."[159]

The second major change to the traditional *M'Naghten* test under the Arizona law is the elimination of the cognitive incapacity prong of the test (i.e., not knowing the nature and quality of one's acts) from the definition of legal insanity. The omission of this prong narrows the *M'Naghten* test's definition of insanity. This change appears to be one merely in form over substance since the first part of the *M'Naghten* test was the much more stringent part of the test.[160] Indeed, the U.S. Supreme Court recognized the overlap between the two prongs of the *M'Naghten* test in *Arizona v. Clark*, noting that "[i]n 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."[161] Thus, while slightly more restrictive than the *M'Naghten* test, Arizona's narrowing of the test for insanity may be of little practical consequence.

While Arizona's GEI approach seems harsher than the GMBI approach taken by other states, the treatment of the offender after a GEI verdict is actually more humane than in other jurisdictions. In Arizona, a defendant found GEI of a crime involving a death or physical injury does not go to a correctional institution, but rather enters the custody of a state-run mental health facility.[162] The person remains confined until it is shown by clear and convincing evidence that he or she no longer suffers from the mental disease or defect. However, a conditional release is available if the person is still mentally ill, but the illness is under control and the person poses no danger to his or herself or to others.[163] Additionally, if the person's crime did not involve a death or physical injury, then a court must release the person upon a judicial determination that he or she poses no risk of danger to himself and herself or to others.[164] On the other hand, if there is a risk of dangerousness, then civil commitment proceedings are instituted along with their strict due process supervision requirements.

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159. ARIZ. REV. STAT. ANN. § 13-3994(A) (1997). For a critique of many of these restrictions, see Melançon, *supra* note 121, at 306-12 (including a discussion of the potential convictions of those suffering from brief reactive psychoses under the statute).

160. *See, e.g.*, MELTON ET AL., *supra* note 63, at 123 ("[p]resumably, an accused who does not meet the first test [under *M'Naghten*] will not meet the second."). *But cf.* Melançon, *supra* note 121, at 305-06 (arguing that the omission of the first part of the *M'Naghten* test could lead to absurd results).

161. Clark v. Arizona, 126 S. Ct. 2709, 2722 (2006).

162. ARIZ. REV. STAT. ANN. § 13-3994(A) (1997).

163. *Id.* § 13-3994(F).

164. ARIZ. REV. STAT. ANN. §§ 13-3994(B)-(C) (1997).

These post-verdict procedures are among the most progressive in the United States. Arizona's statute is clearly designed to ensure that those who need mental health care actually get it–quite a different result than appears to occur in GBMI jurisdictions. Equally important, the length of any period of detention in the mental health facility is not tied to any potential criminal sentence, but rather to the person's recovery. Finally, someone adjudicated GEI does not serve any time in a correctional institution, even if a fast recovery is made. Thus, although the law labels someone "guilty," its aim is clearly not to punish someone who is insane under its quirky definition of insanity, a fact further demonstrated by the provision of the law which states, "A guilty except insane verdict is not a criminal conviction for sentencing enhancement purposes [for future crimes, if any]. . . ."[165]

3. Abolition of the Insanity Defense: The Mens Rea Approach

Montana, Idaho, Utah, and Kansas have no insanity defense[166] and allow the introduction of mental illness evidence only to show that the

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165. *Id.* § 13-502(E).

166. The constitutionality of a state abolishing the insanity defense was first challenged in Montana. *See* State v. Korell, 690 P.2d 992, 994 (Mont. 1984). In *Korell*, the Montana Supreme Court rejected the challenge, relying primarily on the U.S. Supreme Court's decision in *Leland v. Oregon*. *Id.* at 1000 (citing Leland v. Oregon, 343 U.S. 790 (1952)). The Court in *Leland* upheld an Oregon statute requiring the defendant to prove insanity beyond a reasonable doubt. *Leland*, 343 U.S. at 798-99. The *Leland* Court reasoned this was constitutionally permissible because the burden to prove the requisite mens rea remained with the prosecution. *Id.* at 799; *see also In Re* Winship, 397 U.S. 358, 368 (1970) (holding the prosecution must prove beyond a reasonable doubt every element constituting the crime charged). Relying on this holding, the *Korell* court upheld the abolition of the insanity defense since the state still had to prove the state of mind element of the underlying criminal offense beyond a reasonable doubt. *Korell*, 690 P.2d at 1000. It should be noted that empirical research has shown that the abolition of the insanity defense resulted in a "statistically significant increase in the number of defendants found permanently incompetent to stand trial." Perlin, *supra* note 20, at 1423 n.316 (citing Rita Buitendorp, *A Statutory Lesson from "Big Sky Country" on Abolishing the Insanity Defense*, 30 VAL. U. L. REV. 965, 993-96 (1996) (discussing the research reported in Henry J. Steadman et al., *Maintenance of an Insanity Defense Under Montana's "Abolition" of the Insanity Defense*, 146 AM. J. PSYCHIATRY 357, 359-60 (1989)). The highest courts of Idaho, Utah, and Kansas all reached similar conclusions. *See* State v. Searcy, 798 P.2d 914 (Idaho 1990); State v. Bethel, 66 P.3d 840 (Kan. 2003); State v. Herrera, 895 P.2d 359 (Utah 1995). *But see* Finger v. State, 27 P.3d 66 (Nev. 2001) (striking down Nevada's legislative abolition of the insanity defense on due process grounds).

level of mens rea the state is required to prove as an element of a crime was not possessed by the defendant due to his or her mental condition.[167]

Normally, the insanity defense would apply to the same types of cases as the mens rea approach. However, the technicalities of a true insanity defense function quite differently than the mens rea approach when dealing with a delusional defendant. For example, suppose a defendant killed another person because he delusionally believed that God had ordered him to kill that person. Under a traditional insanity defense, the psychosis responsible for such a delusionary belief system would likely excuse the defendant's criminal act because the defendant did not know that what he did was wrong if he believed he was doing God's will.[168] But under the mens rea approach, the defendant could be convicted of premeditated murder since he acted purposefully when killing his victim. The fact that a serious mental illness was responsible for forming the defendant's specific intent to kill would be irrelevant for determining his guilt. It would, however, be relevant in sentencing.[169]

D. *Post-Verdict Consequences of Not Guilty by Reason of Insanity*

The public bases its primary criticism of the insanity defense on the misperception that people found NGBI go free. Such is not the case. For example, John Hinckley was acquitted and institutionalized via a NGBI verdict in 1981.[170] Twenty-six years later, he is still housed at St. Elizabeth's Hospital in their wing for the criminally insane.[171] If Teddy Roosevelt's attempted assassin, who served thirty-one years in a mental hospital, serves as any indicator, John Hinckley is likely to be at St. Elizabeth's for many years to come.[172]

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167. *See* IDAHO CODE ANN. § 18-207 (1982); KAN. STAT. ANN. § 22-3220 (1995); *see also* Raymond L. Spring, *Farewell to Insanity: A Return to Mens Rea*, J. KAN. B. ASS'N, May 1997, at 38, 39; MONT. CODE ANN. §§ 46-14-101, 102, 103 (1981); UTAH CODE ANN. § 76-2-305 (1986).

168. *See, e.g.*, Andrew J. Demko, Note, *Abraham's Deific Defense: Problems with Insanity, Faith, and Knowing Right from Wrong*, 80 NOTRE DAME L. REV. 1961 (2005); Grant H. Morris & Ansar Haroun, *"God Told Me to Kill": Religion or Delusion?*, 38 SAN DIEGO L. REV. 973 (2001).

169. *See, e.g.*, UTAH CODE ANN. § 76-2-305(1)(b) (2006) ("Mental illness is not otherwise a defense, but may be evidence in mitigation of the penalty in a capital felony . . . and may be evidence of special mitigation reducing the level of a criminal homicide or attempted criminal homicide. . . .").

170. Robin, *supra* note 37, at 231.

171. Douglas Mossman, *Is Prosecution "Medically Appropriate"?*, 31 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 15, 57-58 n.188 (2005).

172. WRIGHTSMAN ET AL, *supra* note 78, at 304.

John Hinckley's lengthy post-acquittal confinement is the rule, not the exception.[173] Most states automatically commit someone found NGBI for at least a sixty-day period and then place the burden on the person committed to show when they are no longer mentally ill and dangerous.[174] The overwhelming number of people found NGBI are confined in mental hospitals for years beyond what they would have served in prison had they been criminally convicted. For example, in New York and California, defendants found NGBI serve more than double the average length of criminal incarceration.[175]

States differ markedly on how long an insanity acquittee may be incarcerated.[176] Some states limit the period of confinement in a mental health facility to no longer than the maximum potential sentence would have been if the defendant had been convicted of the offense.[177] But other states impose an indefinite period of treatment[178] of "one day to life."[179] Under this standard, the defendant who is committed as mentally ill and posing a risk of danger to himself or to others remains committed in that mental institution until he or she is no longer mentally ill or no longer dangerous.[180] Normally, state law presumes a person so committed

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173. Only a minority of states do not automatically commit someone to a mental facility upon a NGBI verdict. New Jersey's statute is representative of this minority approach, which requires that a defendant first go through psychiatric examination and thereafter, requires the Court to determine whether the defendant ought be committed. *See* N.J.S. 2C:4-8 (1996) (Supp. 2005).

174. MELTON ET AL., *supra* note 63, at 113.

175. Grant H. Morris, *Placed in Purgatory: Conditional Release of Insanity Acquittees*, 39 ARIZ. L. REV. 1061, 1063 (1997) (citing Eric Silver, *Punishment or Treatment? Comparing the Lengths of Confinement of Successful and Unsuccessful Insanity Defendants*, 19 LAW & HUM. BEHAV. 375, 382-85 (1995); Grant T. Harris et al., *Length of Detention in Matched Groups of Insanity Acquittees and Convicted Offenders*, 14 INT'L J.L. & PSYCHIATRY 223, 225, 234 (1991)).

176. *See generally* Joanmarie Ilaria Davoli, *Reconsidering the Consequence of an Insanity Acquittal*, 31 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 3 (2005).

177. *See* Maura Caffrey, *A New Approach to Insanity Acquittee Recidivism: Redefining the Class of Truly Responsible Recidivists*, 154 U. PA. L. REV. 399, 423 n.127 (2005) (citing RALPH REISNER ET AL., LAW AND THE MENTAL HEALTH SYSTEM, CIVIL AND CRIMINAL ASPECTS 842 (4th ed. 2004).

178. Caffrey, *supra* note 177, at 423 n.127 ("The length of . . . commitment will not depend on the severity of the crime . . . committed. Rather, it will rest on . . . continuing illness and dangerousness.").

179. *See, e.g.*, Jessica Butterfield, *Blue Mourning: Postpartum Psychosis and the Criminal Insanity Defense, Waking to the Reality of Women Who Kill Their Children*, 39 J. MARSHALL L. REV. 515, 531 n.111 (2006) (citing Christopher Slobogin, Symposium on the ABA Criminal Justice Mental Health Standards: *The Guilty But Mentally Ill Verdict: An Idea Whose Time Should Not Have Come*, 53 GEO. WASH. L. REV. 494, 500 (1985)).

180. *Id.*

remains both mentally ill and dangerous and places the burden of proving otherwise on the person committed.[181]

E. *Summary of the State of the Insanity Defense*

Whether the changes that occurred in the aftermath of *Hinckley* have had any significant impact on the rate of acquittals on the basis of insanity is questionable. Empirical research on the actual effects of IDRA is woefully lacking. However, it would appear that the changes in the law have had little impact from the few studies conducted examining this issue.

One study by Norman J. Finkel that compared the rate of insanity acquittals in California under the ALI/MPC formulation of the insanity defense to the rate following the state's return to the *M'Naghten* test after the *Hinckley* case found the acquittal rate to have remained relatively constant before and after the legislative change.[182] Finkel used an experimental design in which undergraduate students were presented with scripts whereby five female defendants, each with a unique diagnosis, had been charged with a homicide and pled insanity in her defense. He found that the particular version of the insanity defense that the evaluating students were told to apply did not significantly alter the proportion of defendants determined to be insane in each diagnostic category.[183] In a simulated trial study, researcher James R.P. Ogloff altered not only the actual insanity test used as an experimental condition, but also the level of proof required and the side bearing the burden of persuasion.[184] Ogloff found no significant differences for the acquittal rate among the experimental conditions.[185] On the other hand, in contrast to those studies examining acquittal rates, at least one study found that the post-*Hinckley*

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181. *See, e.g.*, Jones v. United States, 463 U.S. 354, 357 (1983) (upholding the continued confinement of a man who was acquitted on insanity grounds of the misdemeanor charge of petty larceny beyond the one-year maximum period of time he could have served had he been convicted by holding commitment may be for as long as necessary to treat the mental illness). *But cf.* Foucha v. Louisiana, 504 U.S. 71, 77-78 (1992) (declaring unconstitutional a Louisiana statute that allowed confinement of insanity—acquitted defendants who were no longer mentally ill solely on the basis of their dangerousness to society).

182. Margaret A. McGreevy et al., *The Negligible Effects of California's 1982 Reform of the Insanity Defense*, 148 AM. J. PSYCHIATRY 744, 745-47 (1991).

183. Norman J. Finkel, *The Insanity Defense Reform Act of 1984: Much Ado About Nothing*, 7 BEHAV. SCI. & L. 403 (1989).

184. James R.P. Ogloff, *A Comparison of Insanity Defense Standards on Juror Decision Making*, 15 LAW & HUM. BEHAV. 509 (1991).

185. *Id.*

statutory changes to the insanity defense in Georgia and New York resulted in fewer defendants entering insanity pleas in both jurisdictions.[186]

The lack of empirical evidence to support the proposition that IDRA and state changes modeled after it, either in whole or in part, have actually had an effect on the incidence and success rates of the insanity defense is not surprising for a few reasons. First, "generally, in the absence of either exceptionally persuasive or 'objective' evidence, jurors reject the notion that an alleged mental disorder is severe enough to excuse criminal behavior."[187] Thus, regardless of the actual formulation of the insanity defense, juries tend to view the defense with skepticism.

Second, when faced with evidence of insanity, it appears jurors use their own views or constructs of what insanity is, such as:

> [P]erceptions of the defendant's incapacity, awareness, clarity of thinking, ability to control behavior, capability of evil motive, and whether any other person or persons were at fault for the criminal act . . . Essentially, jurors resort[] to their own common sense definition of insanity, one that seem[s] much more complex than the simplistic conceptualization of the insane person embodied in the major rules.[188]

Finally, and perhaps most importantly, jurors bring "their own personal sense of justice" to their insanity defense deliberations including "attitudes about the morality of the insanity defense and the punishment of mentally ill offenders."[189] If so, perhaps there are crimes so heinous that it offends one's sense of justice to the point where one cannot excuse criminal responsibility even in the face of strong evidence of insanity. Consider the sensational criminal prosecutions of Jack Ruby, Sirhan Sirhan, John Wayne Gacy, Jeffery Dahmer, Charles Manson, Colin Ferguson, and John Salvi. All pled insanity; all were convicted.[190]

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186. STEADMAN ET AL., *supra* note 141.

187. Perlin, *supra* note 32, at 721 (citing Richard Arens et al., *Jurors, Jury Charges and Insanity*, 14 CATH. U. L. REV. 1, 9 (1965); STEADMAN ET AL., *supra* note 141, at 44 (finding that severe psychosis "almost became a prerequisite for success")).

188. Blau & Pasewark, *supra* note 104, at 85; *see also* WRIGHTSMAN ET AL., *supra* note 78, at 298-99.

189. WRIGHTSMAN ET AL., *supra* note 78, at 298-99; *see also* Caton F. Roberts & Stephen L. Golding, *The Social Construction of Criminal Responsibility and Insanity*, 15 LAW & HUM. BEHAV. 349, 359-360 (1991); Norman J. Finkel, *De Facto Departures from Insanity Instructions*, 14 LAW & HUM. BEHAV. 105 (1990).

190. For interesting explorations of the particular problems with proving insanity in postpartum depression cases, see Jessica Butterfield, Comment, *Blue Mourning: Postpartum*

One scholar in discussing Jeffery Dahmer's case wrote that the careful manner in which Dahmer killed his victims so as to reduce his chances of being caught must have left the jury unconvinced that he suffered from a mental disease or defect sufficiently severe to rise to the level of insanity.[191] "This cautiousness suggested that he appreciated the wrongfulness of his behavior and could control it when it was opportune for him to do so."[192] While this explanation of Dahmer's conviction is plausible, it is equally plausible that the jury found what Dahmer did to be so heinous that they refused to acquit him using one of the most liberal of all the formulations of the insanity defense, the one that included the irresistible impulse test. Consider one commentator's summary of *Dahmer*:

> [A]ssuming that there might be degrees of insanity, I do not find it hard to accept that a jury might distinguish between Dahmer and Gacy. Gacy was an otherwise industrious, capable businessman, who carefully prepared in advance to commit numerous murders in secrecy, successfully hiding the bodies and his crimes for years. On the other hand, Dahmer was a maladjusted weirdo who drilled holes in the heads of his living victims for his own scientific purposes, killed a man after police responded to his apartment building and confronted him and his naked and bleeding victim, kept body parts in his closet and refrigerator for extended periods of time, and cannibalized his victims.[193]

Keep in mind, for comparison purposes, that John Hinckley was acquitted after being found insane under the same formal test for insanity that was rejected in *Dahmer*. The resulting harm in the two cases, however, was quite different. Although John Hinckley tried to kill the President, he did not succeed. His trial was, therefore, one of attempted murder. In contrast, Dahmer killed and dismembered fifteen victims, often had sex with their corpses, and in some cases, ate parts of their bodies.[194]

Psychosis and the Criminal Insanity Defense, Waking to the Reality of Women Who Kill Their Children, 39 J. MARSHALL L. REV. 515 (2006); Jessie Manchester, Comment, *Beyond Accommodation: Reconstructing the Insanity Defense to Provide an Adequate Remedy for Postpartum Psychotic Women*, 93 J. CRIM. L. & CRIMINOLOGY 713 (2003).

191. WRIGHTSMAN ET AL., *supra* note 78, at 299.

192. *Id.*

193. William J. Kunkle, Jr., *Counter-Point:* Gacy v. Dahmer*: An Informed Response,* 30 J. MARSHALL L. REV. 331, 335 (1997).

194. Maureen O'Donnell, *Jury Hears of Dahmer's Gruesome Past*, CHI. SUN-TIMES, Feb. 5, 1992, at 5.

In spite of the bizarre behaviors exhibited by Dahmer, he was convicted. But if Jeffery Dahmer was not insane, then who is?

III. AMBIGUITIES AND PROBLEMS WITH THE INSANITY DEFENSE

A. *What is a "Mental Disease or Defect"?*

1. Generally

What constitutes a mental disease or defect for the purposes of the insanity defense? Unfortunately, the question is difficult to answer. Rarely is there an answer to this question that turns on a pure matter of law. Courts have consistently refused to precisely define the term "mental disease or defect." Instead, they have held that the issue of whether a person is suffering from a mental disease is a question of fact to be decided at trial.[195]

When deciding the factual question of which mental illnesses will qualify as the basis for an insanity plea, courts reluctantly guide themselves by the medical categories of mental illnesses as defined by the psychiatric community in the DSM-IV-TR.[196] However, it is clear that courts do not rely on medical labels exclusively. "[W]hat definition of 'mental disease or defect' is to be employed by courts enforcing the criminal law is, in the final analysis, a question of legal, moral and policy—not of medical—judgment."[197] While the law does not recognize every psychiatric condition in the DSM as a qualifying mental disease or defect for insanity defense purposes, it does usually require the condition being offered as a qualifying mental disease or defect at trial to be

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195. United States v. Jackson, 19 F.3d 1003, 1006 (5th Cir.), *cert. denied*, 513 U.S. 891 (1994); United States v. Prescott, 920 F.2d 139, 146 (2d Cir. 1990); United States v. Steil, 916 F.2d 485, 487-88 (8th Cir. 1990); United States v. Smeaton, 762 F.2d 796, 798 (9th Cir. 1985).

196. *See, e.g.*, United States v. Cantu, 12 F.3d 1506, 1509, n.1 (9th Cir. 1993) (taking judicial notice that a condition listed in the DSM is a recognized psychiatric condition); United States v. Johnson, 979 F.2d 396, 401 (6th Cir. 1992) (taking judicial notice of an earlier edition of the DSM).

197. United States v. Murdoch, 98 F.3d 472, 478 (9th Cir. 1996), *cert. denied*, 521 U.S. 1122 (1997) (quoting United States v. Lyons, 731 F.2d 243, 246 (5th Cir.), *cert. denied*, 469 U.S. 930 (1984)).

recognized in DSM.[198] However, without a bona fide psychiatric diagnosis, courts rarely allow defendants to plead insane.[199]

A literal reading of the insanity defense would mean that any "mental disease or defect" would qualify.[200] Such a reading, however, is not warranted, as neither courts nor clinicians read the insanity defense literally.[201] For one thing, "courts and juries pay more attention to the degree of impairment than to the specific mental disability suffered by the defendant."[202] In support of this proposition, Melton et al. cite to the overwhelming number of successful insanity defenses involving one of only two types "of mental conditions: psychosis and mental retardation."[203]

Bruce Winick, one of the foremost scholars on the intersection of law and mental health, suggests that courts view mental diseases and defects with "a traditional medical model of illness," one that may be limited to conditions that until recently were labeled psychoses. These major mental disorders, schizophrenia, major depressive disorders, and bipolar disorder, seem to be the paradigmatic cases of mental illness."[204] In support of the proposition that the modern conceptualization of mental illness involves psychoses, Winick cites the American Psychiatric Association's *American Psychiatric Glossary* which defines a psychosis as follows:

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198. Judith E. Macfarlane, *Neonaticide and the "Ethos of Maternity": Traditional Criminal Law Defenses and the Novel Syndrome*, 5 CARDOZO WOMEN'S L.J. 175, 239 (1998) ("[T]he requirement that there be medical recognition of the disorder 'lends the necessary credibility to this objectively unconfirmable claim of abnormality.' The presence of the 'abnormality' in the DSM-IV as an authoritative source for mental disorders may help to satisfy the disability requirement in all insanity formulations.") (internal citations omitted).

199. *See, e.g.*, United States v. Torniero, 570 F. Supp. 721 (D. Conn. 1983), *aff'd*, 735 F.2d 725 (1984), *cert. denied*, 469 U.S. 1110 (1995) (refusing to recognize compulsive gambling disorder as a qualifying mental disease or defect). *See also Murdoch*, 98 F.3d at 472, in which the concurring judge specifically explained his reliance on the DSM as not being "in contradiction with the position . . . that the definition of mental disease or defect is a matter of legal and not medical judgment," but rather was necessary because "the law must ultimately be applied to the facts, but the facts can only be determined by trying to understand what evaluating doctors [see] when . . . examin[ing defendant-patients]. Those observations [are] recorded in the diagnosis which can only be understood through reference to the DSM." *Id.* at 479 n.5.

200. *See, e.g.*, McDonald v. United States, 312 F.2d 847, 851 (D.C. Cir. 1962) ("[A] mental disease or defect includes any abnormal condition of the mind which substantially affects mental or emotional processes and substantially impairs behavior controls.").

201. *See* MELTON ET AL., *supra* note 63, at 123.

202. *Id.*

203. *Id.*

204. Bruce Winick, *Ambiguities in the Legal Meaning and Significance of Mental Illness*, 1 PSYCH. PUB. POL'Y & L. 534, 558-59 (1995).

> A major *mental disorder* of *organic* or *emotional* origin in which a person's ability to think, respond emotionally, remember, communicate, interpret reality, and behave appropriately is sufficiently impaired so as to interfere grossly with the capacity to meet the ordinary demands of life. Often characterized by *regressive* behavior, inappropriate *mood*, diminished impulse control, and such abnormal mental content as *delusions* and *hallucinations*. The term is applicable to conditions having a wide range of severity and duration. See also *schizophrenia, bipolar disorder, depression, organic mental disorder*, and *reality testing*.[205]

While there can be no doubt that courts accept psychoses as "mental diseases or defects," it is important to keep in mind that the existence of a psychosis is not, in and of itself, sufficient to establish legal incompetency or insanity.[206] Other criteria, notably the psychosis being the legal cause of the defendant's inability to distinguish right from wrong, must also be satisfied.[207]

Courts rarely have problems determining how true psychoses fit within the frameworks of the varying forms of the insanity defense. The more problematic situation for courts is deciding if other psychiatric disorders qualify as a "mental disease or defect" for insanity purposes. Perhaps the most challenging of these other diagnoses are the personality disorders.

2. Personality Disorders

Some federal circuit courts of appeals have specifically held that personality disorders are not "mental diseases or defects" within the meaning of the insanity defense.[208] Other federal circuit courts have

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205. *Id.* n.102 (citing AMERICAN PSYCHIATRIC ASS'N, AMERICAN PSYCHIATRIC GLOSSARY 139 (6th ed. 1988)). For a neuro-psychological critique of the criminal law's narrowing of insanity, see Robert M. Sapolsky, *The Frontal Cortex and the Criminal Justice System*, 359 PHIL. TRANSACTIONS: BIOLOGICAL SCI. 1787 (2004) (arguing that damage to the prefrontal cortex should qualify as a mental disease or defect for insanity defense purposes even when no psychotic symptoms are present).

206. *See* PAUL S. APPELBAUM & THOMAS G. GUTHEIL, CLINICAL HANDBOOK OF PSYCHIATRY AND THE LAW 218, 221 (3d ed. 1991).

207. For interesting explorations of how Deific commands (i.e., orders from "God") play into understanding right from wrong, see *supra* note 168 and accompanying text.

208. *See* United States v. Bilyk, 29 F.3d 459 (8th Cir. 1994) (concluding that a severe antisocial personality disorder is not evidence of present mental illness); United States v. Prescott, 920 F.2d 139, 146 (2d Cir. 1990) (upholding a finding of no mental disease or defect where experts testified that a personality disorder was not considered a mental disease or defect in the mental

determined that although personality disorders are mental diseases or defects, they are not "severe enough" under the modern federal formulation of the insanity defense to serve as the basis for an insanity defense.[209] It appears that at least one federal circuit (the Ninth) refuses to adopt a rule covering personality disorders as a class of psychiatric diagnoses, considering instead the specific diagnosis on a case-by-case basis.[210]

There is a similar split of authority at the state level regarding whether personality disorders qualify as mental diseases or defects for insanity defense purposes. At least two states exclude personality disorders from the definition of mental disease or defect entirely.[211] Other states exclude only certain types of personality disorders, most notably antisocial personality disorder.[212] On the other hand, some states have very broad definitions of mental illnesses for purposes of an insanity defense. For

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health community).

209. *See generally* United States v. Salava, 978 F.2d 320, 323 (7th Cir. 1992) (suggesting that non-psychotic behaviors or neuroses are not severe mental diseases or defects); United States v. Shlater, 85 F.3d 1251 (7th Cir. 1996).

210. *See, e.g.*, United States v. Murdoch, 98 F.3d 472, 474 (9th Cir. 1996), *cert. denied*, 521 U.S. 1122 (1997) (upholding a district court determination that a "Personality Disorder, Not Otherwise Specified with Narcissistic and Passive-Aggressive traits" constituted a "mental disease or defect" sufficient to qualify as the basis of an insanity defense and continued incarceration in a mental hospital). In fact, the concurring judge in *Murdoch* wrote:

> Although I agree that mere personality quirks or characteristics cannot be construed as mental diseases or defects for purposes of determining legal sanity, I conclude that a personality disorder such as that suffered by Appellant is much more than a mere quirk. It is a systemic, enduring, and severe condition resulting in an extremely abnormal perception of and reaction to everyday events. In short, Appellant's condition is so encompassing and impairing that it rises to the level of a disease or defect.

Id. at 479 (Wilson, J., concurring).

211. *See* CAL. PENAL CODE § 25.5 (West 1997); OR. REV. STAT. § 161.295 (1997).

212. *See, e.g.*, ALA. CODE § 13A-3-1 (1997); ARIZ. REV. STAT. ANN. §§ 13-501 502 (West 1997) (distinguishing mental "disorders" from "character and personality disorders characterized by lifelong and deeply ingrained antisocial behavior patterns, including sexual behaviors which are abnormal and prohibited by statute unless the behavior results from a mental disorder"); 720 ILL. COMP. STAT. ANN. 5/6-2 (West 1998); FLA. STAT. § 394.455(18) (2006) (excluding "conditions manifested only by antisocial behavior or drug addiction" from the definition of mental disease or defect); IND. CODE ANN. § 35-41-3-6 (West 1997); ME. REV. STAT. ANN. tit. 17-A, § 39 (1997); OHIO REV. CODE ANN. § 5122.01(A) (West 1992) (defining "mental illness" as "a substantial disorder of thought, mood, perception, orientation, or memory that grossly impairs judgment, behavior, capacity to recognize reality, or ability to meet the ordinary demands of life"); TENN. CODE ANN. § 39-11-501 (West 1997); UTAH CODE ANN. § 76-2-305 (West 1997).

example, the Alaska law seemingly encompasses all personality disorders.[213] Kentucky specifically excludes antisocial personality disorder,[214] but appears to allow all other types of personality disorders to qualify as the basis of an insanity defense.[215]

As mentioned above, both the federal system and that of several states refuse to consider antisocial personality disorder as a qualifying mental disease or defect for the purposes of the insanity defense. Prior to the third edition of the DSM, people suffering from antisocial personality disorder were called sociopaths, psychopaths, or moral imbeciles.[216] Winick suggests there are three issues concerning the diagnosis which might justify the law's refusal to treat it as a mental disease or defect. First, he reasons that antisocial personality disorder is "exclusively behavioral in nature, involving certain behavioral manifestations and personality traits."[217] Second, unlike psychoses, antisocial personality disorder does not appear "to be biochemical in etiology."[218] And third, the disorder is not treatable in any predictable way.[219]

Using these same three criteria, Winick also explains why other personality disorders once labeled neuroses, as well as impulse control disorders like kleptomania, pyromania, and sexual disorders known as paraphilias (pedophilia and frotteurism), also do not appear to be mental diseases or defects for insanity purposes.[220] While Winick's explanations for why these non-psychotic disorders are not mental diseases or defects for insanity purposes are debatable, they are well-reasoned and consistent with logic, precedent, and clinical evidence.

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213. *Murdoch*, 98 F.3d at 479 (citing ALASKA STAT. § 12.47.130(3) ("[M]ental disease or defect means a disorder of thought or mood that substantially impairs judgment, behavior, capacity to recognize reality, or ability to cope with the ordinary demands of life.")).

214. KY. REV. STAT. ANN. § 504.020(2) (West 2005) ("As used in this chapter, the term 'mental illness or retardation' does not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct.").

215. KY. REV. STAT. ANN. § 504.060(6) (West 2005) (defining "mental illness" as "substantially impaired capacity to use self-control, judgment, or discretion in the conduct of one's affairs and social relations, associated with maladaptive behavior or recognized emotional symptoms where impaired capacity, maladaptive behavior, or emotional symptoms can be related to physiological, psychological, or social factors").

216. Winick, *supra* note 204, at 566.

217. *Id.* at 560.

218. *Id.*

219. *Id.*

220. *Id.* at 573-74.

3. Alcohol and Drug Addiction

The DSM-IV-TR classifies alcoholism and numerous drug addictions as Axis I "substance related disorders."[221] Involuntary intoxication on drugs or alcohol was a complete defense to a crime at common law and continues to be in most U.S. jurisdictions today.[222] Voluntary intoxication, however, has never been a complete defense under the criminal law.[223] At common law, voluntary intoxication was a partial defense that mitigated a crime of specific intent down to one of general intent if the defendant was so intoxicated that he or she could not form specific intent.[224] Today, some jurisdictions still follow this old common law approach, while other jurisdictions have abolished the defense of voluntary intoxication entirely.[225]

However, separate and apart from the criminal defense of intoxication are two issues regarding intoxication and insanity that continue to divide U.S. courts. The first is whether an addiction to drugs or alcohol can qualify as a mental disease or defect for the purposes of an insanity defense.[226] The second is whether a drug or alcohol induced psychosis (when unaccompanied by some other mental illness) is a qualifying mental disease or defect for an insanity defense.[227] The overwhelming number of U.S. jurisdictions answer both questions in the negative even though psychiatry recognizes a host of substance abuse disorders as mental illnesses in the DSM.[228] This is even true for addictions that result from medical treatment.

Alcohol and drug addiction is not a mental illness for insanity defense purposes for several reasons, but the primary justification is the voluntariness of the person's addiction.[229] People cannot choose to not be schizophrenic. But people can choose whether they will drink or take

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221. *See* DSM-IV-TR, *supra* note 83, at 16-19, 192.

222. Meghan Paulk Ingle, *Law on the Rocks: The Intoxication Defenses Are Being Eighty-Sixed*, 55 VAND. L. REV. 607, 616 (2002) ("[T]he involuntary intoxication defense enjoyed early recognition in Anglo-American common law. . . . Currently, American courts generally recognize the defense when the defendant's intoxication is the result of coercion, fraud, an unexpected effect from prescription medication, or 'pathological intoxication.'").

223. *Id.*

224. *Id.*

225. *Id.*

226. *See, e.g.*, People v. Bieber, 856 P.2d 811 (Colo. 1993).

227. *Id.* at 815-16.

228. *Id.* at 817.

229. *Id.* at 816 (stating that the defendant's settled insanity "resulted from his use of amphetamines and, as such, may be regarded [as voluntary, self-induced] intoxication . . . ."

drugs. Biological predispositions to alcoholism and addiction aside, the law takes the view that one should seek treatment for an illness he brought upon himself, not seek excuse from the harm he has caused by failing to control his own behavior.[230]

4. Summary of the Meaning of Mental Illness

Three generalizations can be made that might help make clear the insanity defense mental disease or defect requirement. First, neither intoxication nor addiction to drugs or alcohol, without more, constitutes a "mental disease or defect" for insanity defense purposes.[231] Second, DSM Axis I clinical disorders (i.e., "psychoses") nearly always qualify as bona fide mental diseases or defects for the purposes of the insanity defense.[232] Third, DSM Axis II personality disorders rarely qualify as bona fide mental diseases or defects for insanity purposes unless the etiology of the given personality disorder can be fit into the medical model of deviance (i.e., it is not purely behavioral in nature; it has some organic cause, and is treatable in some predicable fashion).[233] The reason for this distinction appears to be "a desire to guard against turning every personality quirk into a 'mental disease or defect' through the imprimatur of a psychiatric category."[234]

B. *What is "Wrong"?*

What is right, just, good, moral, and so on is a question that has perplexed philosophers for eons. The counter-question, what is bad, wrong, or immoral, is not much easier to answer.[235] The law, however, often avoids complex philosophical issues and leaves it to scholars to debate.[236] It certainly does so in defining what is meant by "wrong" for the purposes of the insanity defense, which requires that a mental disease or

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230. *See, e.g.*, United States v. Lyons, 731 F.2d 243 (5th Cir.), *cert. denied*, 469 U.S. 930 (1984).

231. *See supra* Part III.A.3.

232. *See supra* Part III.A.1.

233. *See supra* Part III.A.2.

234. United States v. Murdoch, 98 F.3d 472, 479 (9th Cir. 1996 (citing *Criminal Procedure: Insanity Plea—Inadmissible Mental Conditions*, 26 PAC. L.J. 254, 255 (1995)). For a more detailed analysis of this issue, see Ralph Slovenko, *The Meaning of Mental Illness in Criminal Responsibility*, 5 J. LEGAL MED. 1 (1984).

235. *See generally* Robert J. Lipkin, *The Moral Good Theory of Punishment*, 40 U. FLA. L. REV. 17 (1988) (exploring moral philosophy as it applies to criminal punishment and excuse).

236. *See, e.g.*, Peter Arenella, *Convicting the Morally Blameless: Reassessing the Relationship Between Legal and Moral Accountability*, 39 UCLA L. REV. 1511 (1992).

defect render a defendant unable to "know right from wrong" or to "appreciate the wrongfulness" of his or her acts.[237] The law simply looks at whether the defendant knew the act was wrong by societal standards. Imagine the consequences if one could argue that as a Satanic worshiper, it is not wrong to kill, but rather offering human sacrifice is required under the tenets of that religion.[238] To avoid the possibility of a defendant succeeding with such an argument, jurors aim to use an objective societal standard of right and wrong.

IV. INTRODUCTION TO DIMINISHED CAPACITY

The insanity defense is one way the law operates to relieve criminal responsibility from those who, as a result of mental illness, do not act with true moral culpability. But there are significant restrictions on the availability of the insanity defense. Consider people who are mentally ill, but not "severely" enough to qualify as legally insane under IDRA and its progeny. Alternatively, consider people who are severely mentally ill, but still knew both the nature and quality of their acts and the difference between right and wrong. Although the law generally does not recognize such conditions as qualifying for a total excuse defense, defendants with such impairments may not be as culpable as those who are not mentally ill. For such persons, the doctrine of diminished capacity might be available to mitigate their criminal responsibility, their sentence, or in some circumstances, even excuse their criminal responsibility altogether.

A. *Attempting a Definition of Diminished Capacity*

Unfortunately, there is no standard definition for the doctrine of diminished capacity. The doctrine exists, either statutorily or in case law, in more than half of all U.S. jurisdictions.[239] Although diminished capacity is often referred to as a defense, doing so is somewhat inappropriate. As commentators have often pointed out, it is not a defense at all, but rather deals with the admissibility of evidence concerning the accused's mental

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237. *Id. passim.*

238. *See* State v. Crenshaw, 659 P.2d 488 (Wash. 1983) (upholding a first-degree murder conviction of a man who claimed he was insane when he killed his wife, who he believed was having an affair, since his religion allowed such a killing).

239. Lucy Noble Inman, *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).

state.[240] It is most frequently invoked in first degree murder cases to negate premeditation.[241]

Although there are clearly "differing views regarding the meaning and application of the diminished capacity concept," the favored view of diminished capacity is that it is "a type of evidence . . . admitted to rebut the specific intent required to convict the defendant of the crime charged."[242] In other words, a defendant invoking the diminished capacity doctrine asserts that his or her mental state prevented him or her from forming the requisite mens rea for the crime. Without proof of the required mens rea element, the defendant should not be convicted of that crime.[243] But the use of diminished capacity evidence to negate the existence of mens rea "is not an affirmative defense and does not result in an acquittal unless there is a failure to establish intent for the offense and for all of its lesser included counterparts."[244] The burden of persuasion to prove intent remains with the prosecution when a defendant argues diminished capacity;[245] the defendant only needs to create a reasonable doubt with regard to state of mind in order to be acquitted.[246] Accordingly, diminished capacity is not only easier to use, but is also much "more likely to succeed than the insanity defense."[247]

The term diminished capacity is often used to encompass the related concept of diminished responsibility, but they are technically distinct concepts in the criminal law. Diminished responsibility is concerned not with capacity to form intent, but rather the propriety of punishment.[248] Diminished responsibility allows either a jury or a judge "'to mitigate the

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240. *See, e.g.*, Stephen J. Morse, *Undiminished Confusion in Diminished Capacity*, 75 J. CRIM. L. & CRIMINOLOGY 1, 44 (1984) (explaining that diminished capacity is usually not a true defense in its own right); Gayle Cohen, Johnson v. State—*Diminished Capacity Rejected as a Criminal Defense*, 42 MD. L. REV. 522 (1983).

241. Inman, *supra* note 239, at 1293.

242. Chesney E. Falk, Comment, *Criminal Law*—State v. Phipps*: The Tennessee Court of Criminal Appeals Accepts "Diminished Capacity" Evidence to Negate Mens Rea*, 26 U. MEM. L. REV. 373, 383 (1995).

243. Inman, *supra* note 239, at 1298.

244. State v. Phipps, 883 S.W.2d 138, 143 (Tenn. Crim. App. 1994) (citing United States v. Pohlot, 827 F.2d 889 (3d Cir. 1987), *cert. denied*, 484 U.S. 1011 (1988)).

245. *Id.* at 143.

246. *Id.*; *see also* J. Thomas Sullivan, *The Culpability, or Mens Rea, "Defense" in Arkansas*, 53 ARK. L. REV. 805, 816 (2000) (stating that diminished capacity actually serves as a means for rebutting the prosecution's proof on the essential element of the culpable mental state, rather than as an independent rationale either justifying or excusing the accused's behavior).

247. Inman, *supra* note 239, at 1299.

248. *See, e.g.*, Stephen J. Morse, *Diminished Rationality, Diminished Responsibility*, 1 OHIO ST. J. CRIM. L. 289 (2003).

punishment of a mentally disabled but sane offender in any case where the jury believes that the defendant is less culpable than his normal counterpart who commits the same criminal act.'"[249] Diminished responsibility has not been embraced by the courts of the United States, but has been in England.[250] However, ten U.S. jurisdictions, the Model Penal Code, and the Federal Sentencing Guidelines allow for the admission of mental abnormality evidence in sentence mitigation.[251]

B. *Applying Diminished Capacity*

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.[252] Other states further limit its use to cases where evidence of diminished capacity might negate the specific intent requirement for murder only.[253] Still other jurisdictions have adopted the MPC's approach, which allows diminished capacity evidence in any case where the defendant's mental state is at issue.[254] The Model Penal Code approach has been endorsed by the American Bar Association,[255] and is the one most frequently followed in the United States in those states recognizing diminished capacity.[256]

Before the defense may introduce any evidence of diminished capacity, the defendant must meet a burden of production by providing sufficient evidence of a mental disease or defect that would causally interfere with

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249. Jonas Robitscher & Andrew Ky Haynes, *In Defense of the Insanity Defense*, 31 EMORY L.J. 9, 26 n.66 (1982) (quoting Peter Arenella, *Diminished Capacity and Diminished Responsibility Defenses: Two Children of a Doomed Marriage*, 77 COLUM. L. REV. 827, 828-29 (1977)).

250. Jennifer Kunk Compton, Note, *Expert Witness Testimony and the Diminished Capacity Defense*, 20 AM. J. TRIAL ADVOC. 381, 386-87 (1997).

251. MODEL PENAL CODE § 210.6(4)(g) (1980); U.S. SENTENCING GUIDELINES MANUAL 5K2.13 (1998); *see also* Deborah E. Dezelan, *Departures from the Federal Sentencing Guidelines after* Koon v. United States*: More Discretion, Less Direction*, 72 NOTRE DAME L. REV. 1679, 1688-89 (1997) (recognizing diminished capacity as a mitigating factor to punishment).

252. Inman, *supra* note 239, at 1309 (citing Wagner v. State, 687 S.W.2d 303 (Tex. Crim. App. 1984); State v. Holcomb, 643 S.W.2d 336 (Tenn. Crim. App. 1982)).

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

254. *See, e.g.*, COLO. REV. STAT. § 18-1-803 (2006) (evidence of mental impairment admissible to negate mental element of any offense). Section 4.02(1) of the Model Penal Code reads: "[E]vidence 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 which is an element of the offense." MODEL PENAL CODE § 4.02(1) (1962).

255. AMERICAN BAR ASS'N, STANDARDS FOR CRIMINAL JUSTICE, CRIMINAL JUSTICE MENTAL HEALTH STANDARDS § 7-6.2 (1984).

256. Compton, *supra* note 250, at 388.

the ability to form the requisite mens rea.[257] Once the burden of production is met, the evidence used to show diminished capacity is essentially the same as the evidence that would be used to show insanity. Generally, the testimony of a mental health clinician is offered at trial to show that the defendant's capacity to form the requisite mens rea was "diminished" at the time of the crime due to some mental disease or defect.[258] Such expert testimony must not only be offered by a properly qualified expert, but must also conform to the other applicable rules of evidence with regard to expert testimony.[259]

C. *What Counts as a Predicate Mental Disorder for Diminished Capacity Purposes?*

What qualifies as a "mental disease or defect" for insanity defense purposes is often quite different from what qualifies as a mental disorder for diminished capacity purposes. In light of IDRA and the majority of states that adopted its approach, it is clear that cognitive impairment is necessary to find insanity in most of the United States today.[260] What qualifies for diminished capacity is significantly broader. For example, a learning disability generally does not constitute a "mental disease or defect" for insanity purposes.[261] But if a learning disabled person strikes someone but is unable to know that the blow could kill as a result of his or her disability, he or she might be able to assert diminished capacity to negate the mens rea of intent to kill if charged a crime.[262]

The broad scope of what can qualify as diminished capacity is illustrated by *United States v. McBroom*.[263] The defendant in *McBroom*

257. *See, e.g.*, Patterson v. New York, 432 U.S. 197, 230-31 (1977) (Powell, J., dissenting) (stating that even when the state has the burden of persuasion, a defendant may have the burden of producing evidence sufficient to raise a reasonable doubt about the issue); *see also* PAUL H. ROBINSON, CRIMINAL LAW DEFENSES § 64(a) (1984).

258. *See, e.g.*, Henry F. Fradella et al., *The Impact of* Daubert *on the Admissibility of Behavioral Science Testimony*, 30 PEPP. L. REV. 403, 421-23 (discussing use of expert testimony as part of defendants' attempts to rebut mens rea).

259. *Id.* at 421-23; *see also* State v. Weeks, 367 S.E.2d 895, 904 (N.C. 1988) (holding psychiatric testimony about a murder suspect's mental state was inadmissible because it used legal terms of art that were not readily understood by the expert).

260. Recent Case, *Criminal Law and Criminal Procedure: Criminal Law—Federal Sentencing Guidelines—Third Circuit Holds that Volitional Impairments Can Support a Claim of Diminished Mental Capacity*, 111 HARV. L. REV. 1122 (1998).

261. *See supra* Part III.A.1.

262. *See* State v. Breakiron, 532 A.2d 199 (N.J. 1987).

263. 124 F.3d 533 (3d Cir. 1997).

pled guilty to possessing child pornography.[264] At sentencing, he argued for mitigation in his sentence because "he suffered from a significantly reduced mental capacity due to the sexual abuse he had endured as a child, and that this reduced capacity compelled him to possess child pornography."[265] Although the trial court agreed that the defendant had fallen victim to repeated sexual abuse and suffered from bipolar disorder and multiple impulse control disorders, the circuit court determined that neither the abuse nor the disorders impacted the defendant's cognitive ability (i.e., knowing right from wrong).[266] Therefore, the Court held that a downward departure in sentencing was unwarranted.[267] The Third Circuit Court of Appeals reversed, holding that volitional impairment (including impulse control personality disorders) should be considered as evidence of diminished capacity under the U.S. Sentencing Guidelines when determining the appropriateness of sentence mitigation.[268]

Some jurisdictions have adopted such broad definitions of diminished capacity that a qualifying "mental disease or defect" need not even be recognized by the DSM. One of the leading cases in this area is the New Jersey Supreme Court's opinion in *State v. Galloway*.[269] In *Galloway*, the Court stated that "[f]orms of psychopathology other than clinically defined mental diseases or defects may affect the mental process and diminish cognitive capacity, and therefore may be regarded as a mental disease or defect in the statutory or legal sense."[270] As such, whether a mental disease or defect works to impair cognitive function is decided on a case by case basis in New Jersey.

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264. *Id.* at 534.

265. *Id.* at 539.

266. *Id.* at 540.

267. *Id.*

268. *McBroom*, 124 F.3d at 547-48; *see also* United States v. Pullen, 89 F.3d 368, 370-71 (7th Cir. 1996). *But see* United States v. Edwards, 98 F.3d 1364, 1371 (D.C. Cir. 1996) (requiring cognitive impairment); United States v. Johnson, 979 F.2d 396, 401 (6th Cir. 1992) (requiring cognitive impairment).

269. State v. Galloway, 628 A.2d 735 (N.J. 1993). In *Galloway*, the defendant was convicted of murder and endangering the welfare of a child when he caused the death of his girlfriend's baby by shaking the baby (i.e., "Shaken Baby Syndrome"). *Id.* at 738. The intermediate appellate court upheld the conviction, holding that the defendant's borderline personality disorder, even though it rendered the defendant unable to control his impulses, was not a sufficient "mental disease or defect" for diminished capacity purposes. *Id.* at 739 (citing 611 A.2d 651 (1992)). The high court reversed, holding that "all mental deficiencies, including conditions that cause a loss of emotional control, may satisfy the diminished-capacity defense if the record shows that experts in the psychological field believe . . . that kind of mental deficiency can affect a person's cognitive faculties. . . ." *Id.* at 743.

270. *Id.* at 741 (citing Slovenko, *supra* note 234, at 16).

It is somewhat ironic that the standard for qualifying a mental disease or defect for insanity defense purposes is rather stringent, while simultaneously being so much broader for diminished capacity purposes. This is especially true because of how much easier it is to get an acquittal by creating reasonable doubt, using a diminished capacity argument by reason of insanity, something the defendant must prove often by clear and convincing evidence. Moreover, those found not guilty by reason of insanity rarely go free; in contrast, those who successfully assert diminished capacity evidence are found not guilty and are therefore set free. Given the benefits of diminished capacity, it is not surprising that defendants have attempted to extend the doctrine in a multitude of ways. Part IV of this Article is devoted to examining the ways in which defendants have tried to do just that.

IV. BEYOND DIMINISHED CAPACITY

The rationale underlying diminished capacity has been extended to a variety of situations. By its use, defendants share the common goal to reduce criminal liability "due to some extenuating circumstance that allegedly rendered the defendant unable to form the requisite mens rea of a crime or led to it being formed defectively–as a result of some mental condition rather than out of 'normal' criminal intent."[271] Accordingly, these "defenses" are really just extensions of diminished capacity.[272]

A. *Posttraumatic Stress Disorder Defense*

Extreme cases of Posttraumatic Stress Disorder (PTSD) may serve as the qualifying "mental disease or defect" for an insanity defense.[273] Of course, to do so effectively in the overwhelming majority of courts in the United States, the disorder would have to render the defendant unable to substantially appreciate the wrongfulness or criminality of his or her

271. HENRY F. FRADELLA, KEY CASES, COMMENTS, AND QUESTIONS ON SUBSTANTIVE CRIMINAL LAW 217 (2000).

272. This section focuses on some of the more commonly used variations of diminished capacity. There are less commonly used variations such as the so-called Twinkie Defense, see People v. White, 117 Cal. App. 3d 270, 172 Cal. Rptr. 612 (1981), and the XYY Syndrome Defense. *See, e.g.*, Sana Halwani & Daniel Brian Krupp, *The Genetic Defense: The Impact of Genetics on the Concept of Criminal Responsibility*, 12 HEALTH L.J. 35 (2004).

273. Debra D. Burke & Mary Anne Nixon, *Post-Traumatic Stress Disorder and the Death Penalty*, 38 HOW. L.J. 183 (1994); Michael J. Davidson, Note, *Post-Traumatic Stress Disorder: A Controversial Defense for Veterans of a Controversial War*, 29 WM. & MARY L. REV. 415 (1988).

actions.[274] But if the level of impairment does not rise to the level of insanity, the disorder may still be used as the predicate for a finding of diminished capacity.[275]

PTSD was first noted in America after the Civil War, though little was known about it then.[276] Subsequent wars, especially the two World Wars (during which time it was often referred to as "shell shock" and "combat fatigue")[277] and the Vietnam War,[278] led to study of the condition. PTSD was recognized as a mental disorder in 1980 by the American Psychiatric Association.[279] The condition originally applied only to veterans of wars who experienced intense "flashbacks" to times of combat.[280] During these flashbacks, individuals were known to have violent outbreaks, but PTSD evolved to encompass almost any individual who experienced extreme trauma or violence.[281] Such exposure remains a "necessary, but not sufficient, condition for the development of PTSD."[282] Because PTSD can affect one's perception of reality, including the circumstances in which one finds oneself even in "normal" situations, PTSD can interfere with the formation of mens rea and therefore serve as a predicate for introducing diminished capacity evidence.[283]

Since its acceptance as a bona fide medical condition,[284] courts have been more accepting of the PTSD defense than other excuse defenses since it appears to be the very type of disorder diminished capacity is designed to encompass. For example, in *State v. Phipps*,[285] the defendant was a Gulf War veteran who was on trial for murder.[286] On the day in question, Phipps

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274. *See supra* Part II.B.

275. *See supra* Part IV.C.

276. Davidson, *supra* note 273, at 417-18.

277. *Id.*; *see also* Michael J. Pangia, *Posttraumatic Stress Disorder: Litigation Strategies*, 64 J. AIR L. & COM. 1091, 1093 (1999).

278. Davidson, *supra* note 273, at 415.

279. Eric H. Marcus, *Post-Traumatic Stress Disorder: Facts and Myths*, 32 TRAUMA 49 (1990).

280. John E. Helzer et al., *Post -Traumatic Stress Disorder in the General Population*, NEW ENG. J. MED., Dec. 24, 1989, at 1630.

281. *See* Edgar Garcia-Rill & Erica Beecher-Monas, *Gatekeeping Stress: The Science and Admissibility of Post-Traumatic Stress Disorder*, 24 U. ARK. LITTLE ROCK L. REV. 9 (2001).

282. Patricia J. Falk, *Novel Theories of Criminal Defense Based Upon the Toxicity of the Social Environment: Urban Psychosis, Television Intoxication, and Black Rage*, 74 N.C. L. REV. 731, 761 (1996).

283. Davidson, *supra* note 273, at 422.

284. *See generally* PETER CONRAD & JOSEPH SCHNEIDER, DEVIANCE AND MEDICALIZATION: FROM BADNESS TO SICKNESS (1980).

285. State v. Phipps, 883 S.W.2d 138 (Tenn. Crim. App. 1994).

286. *Id.* at 139.

went to his wife's home, where upon he got into an argument with his wife's lover who threatened Phipps with a stick.[287] Phipps took the stick and hit the wife's lover repeatedly with it, eventually killing him.[288] At trial, the defense presented expert testimony that Phipps suffered from depression and posttraumatic stress disorder.[289] Even the prosecution's expert testified that his impairment was "'of a sufficient level to significantly affect his thinking, reasoning, judgment, and emotional well-being.'"[290] Moreover, his PTSD "'may have lessened his threshold or made him more sensitive to defending himself and protecting himself and increased the likelihood of him overreacting to a real or perceived threat.'"[291]

The trial court judge refused to give a jury instruction which would have allowed the jury to consider the evidence of mental disorders in relation to whether Phipps possessed the required mens rea for first-degree murder. The appeals court reversed the decision, holding that evidence of the defendant's mental state at the time of the offense is admissible to refute elements of specific intent in first-degree murder cases.[292]

But the acceptance of PTSD as a form of diminished capacity has not been universal, in spite of the generally accepted proposition that PTSD impairs an individual's mental functioning. Some critics have challenged the diagnosis of the disorder as being overly subjective, largely due to the fact that a PTSD diagnosis is based on patient testimonials and personal observations.[293] These critics fear that the disorder is often contrived just for the purposes of criminal defense.[294] Efforts are underway to provide a physiological basis for PTSD diagnosis, rather than relying on the patient's subjective assertions.[295] As of yet, no physiological evidence has been presented to a court. For now, in those jurisdictions that allow the use of diminished capacity evidence, mental health professionals are generally allowed to testify not only as to whether the defendant has PTSD, but also

287. *Id.* at 141.

288. *Id.*

289. *Id.*

290. *Phipps*, 883 S.W.2d at 141.

291. *Id.*

292. *Id.* at 149.

293. *See, e.g.*, Roger K. Pittman & Scott P. Orr, *Psychophysiologic Testing for Post-Traumatic Stress Disorder: Forensic Psychiatric Application*, 21 BULL. AM. ACAD. PSYCHIATRY L. 37, 39 (1993).

294. *Id.* at 39.

295. *Id.* at 40.

whether the disorder influenced the defendant's capacity to form the requisite criminal intent at the time of the offense.[296]

B. *Battered Women's Syndrome Defense*

1. Battered Women's Syndrome Defense

Dr. Lenore Walker first coined the term "Battered Women's Syndrome" (BWS) in her 1979 book, *The Battered Woman.*[297] In it, Walker put forth a theory that attempted to explain why abused women stayed in abusive relationships, and what finally triggers them to strike back.[298] Walker's research has been criticized as "little more than a patchwork of pseudo-scientific methods employed to confirm a hypothesis that its author and participating researchers never seriously doubted."[299] Such criticisms aside, there can be no doubt that Walker's work had a significant impact on the law, even if not on psychology. Her theory of BWS has been accepted in many U.S. courts and continues to enjoy widespread acceptance.[300]

As conceptualized by Walker, BWS develops as a result of exposure to a three-phase cycle of violence that typifies abusive relationships.[301] The first phase is called the "tension-building phase," which is characterized by arguments and ever increasing tensions and may include minor acts of violence, such as slapping.[302] Eventually, however, there is an event that triggers the second phase, which Walker calls the "acute battering incident." During this phase, the abuser explodes in a fit of rage and batters the victim.[303] Walker hypothesized that the acute battering incident

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296. *See, e.g.*, Alberto M. Goldwaser, *A Forensic Psychiatrist's Viewpoint Post-Traumatic Stress Disorder*, 229 N.J. LAW. Aug. 2004, at 28-33.

297. LENORE E. WALKER, THE BATTERED WOMAN (1979) [hereinafter WALKER I].

298. Walker's theory was based on her clinical observations of abused women, not on empirical research. Walker's second book followed in 1984, offering empirical data in support of her theory. LENORE E. WALKER, THE BATTERED WOMAN SYNDROME (1984) [hereinafter WALKER II].

299. David L. Faigman & Amy J. Wright, *The Battered Woman Syndrome in the Age of Science*, 39 ARIZ. L. REV. 67, 68 (1997).

300. *Id.*; *see also* Regina Schuller & Patricia A. Hastings, *Battered Woman Syndrome and Other Effects of Domestic Violence Against Women, in* MODERN SCIENTIFIC EVIDENCE: THE LAW AND SCIENCE OF EXPERT TESTIMONY ch. 8 (David L. Faigman et al. eds., 1997); Stephen J. Morse, *The Misbegotten Marriage of Soft Psychology and Bad Law: Psychological Self-Defense as a Justification for Homicide*, 14 LAW & HUM. BEHAV. 595 (1990).

301. WALKER II, *supra* note 298, at 95-96.

302. *Id.*

303. *Id.* at 95.

causes the abuser to feel and express remorse, apologize profusely, and engage in loving, caring, and helpful behaviors to promote reconciliation.[304] In spite of the abuser's promises that it will "never happen again," the cycle inevitably repeats itself.[305]

Walker also offered an explanation as to why the cycle repeats itself, borrowing from behavioral psychology's notion of learned helplessness as espoused by noted psychologist Martin Seligman.[306] Seligman conducted experiments on dogs during which time the animals were placed in harnesses and were electrically shocked at random intervals.[307] At first, the dogs tried to escape, but given that the physical restraints in which they were placed made it impossible, the dogs eventually stopped escape attempts.[308] In other words, they eventually accepted the fact that they were helpless to prevent the shocks. More importantly, though, after the dogs passively acquiesced to the shocks without resistance, Seligman changed the set up of the experiment by giving the dogs an opportunity to escape.[309] However, the dogs failed to avail themselves of the opportunity. Seligman concluded that the dogs viewed themselves as helpless and simply accepted their fate accordingly.[310] Some dogs were actually physically dragged out of the environment to show them how to escape the shocks.[311] Of these dogs, only some "unlearned" their learned helplessness; others never learned they could escape.[312]

Walker used the theory of learned helplessness to explain why battered women do not leave abusive relationships, building on the work of other researchers who had attempted to show how learned helplessness develops in humans.[313] According to Walker, a woman stays for a number of psycho-social reasons. She may have old-fashioned notions that "a woman's proper place is in the home."[314] She may be economically

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304. *Id.* at 96.

305. *Id.*

306. *See* Martin E.P. Seligman et al., *Alleviation of Learned Helplessness in the Dog*, 73 J. ABNORMAL PSYCHOL. 256 (1968).

307. *Id.* at 259-60.

308. *Id.* at 260.

309. *Id.* at 260-61.

310. *Id.* at 261.

311. Seligman et al., *supra* note 306, at 261-62.

312. *Id.* at 260-61.

313. MARTIN E.P. SELIGMAN, HELPLESSNESS: ON DEPRESSION, DEVELOPMENT, AND DEATH 216 (1975); Lyn Y. Abramson et al., *Learned Helplessness in Humans: Critique and Reformulation*, 87 J. ABNORMAL PSYCHOL. 49, 50 (1978).

314. WALKER II, *supra* note 298, at 31, 33-34.

dependent on the abuser.[315] They may have children and the woman may not want to separate them from their father.[316] The stigma that attaches to a woman who leaves the family without her children undoubtedly also acts as a further deterrent to moving out.[317] Some women may even perceive the battering cycle as normal, especially if they grew up in a violent household.[318] And even when battered women want to leave, they are typically unwilling to reach out and confide in their friends, family, or the police, either out of shame and humiliation, fear of reprisal by their husband, or the feeling they will not be believed.[319] But one of the most important factors for Walker in a woman's decision to stay with her abuser is the loving and caring behavior the batterer exhibits during the reconciliation phase.[320] For Walker, the abuser's contrite behavior acts as a "positive reinforcement for [the victim] remaining in the relationship."[321]

The combination of the above factors leads a victim of abuse to feel powerless to leave. Moreover, as she stays and tries to prevent the cycle of violence from repeating, she learns that it is not really within her power to control the abuser's feelings and temper. Her repeated failures to prevent tension from building up to an acute battering incident mirrors the learning of the dogs in Seligman's research.[322] The repeated, failed attempts "to control the violence would, over time, produce learned helplessness and depression as the repeated batterings, like electrical shocks, [would] diminish the woman's motivation to respond."[323]

The cycle of violence tends to worsen as time passes. Not only may acute battering incidents become more frequent, but also they may become more severe.[324] Eventually, however, the woman endures "so much frustration, despair, and isolation that her perceptions of violence are altered. The woman may violently strike back against the batterer in an effort to free herself from the cycle of abuse that she may believe

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315. *Id.* at 127-44; *see also* Victoria Mikesell Mather, *The Skeleton in the Closet: The Battered Woman Syndrome, Self-Defense, and Expert Testimony*, 39 MERCER L. REV. 545, 552 (1988).

316. Mather, *supra* note 315, at 552 (citing WALKER II, *supra* note 298, at 127-44).

317. *Id.* at 552; WALKER II, *supra* note 298, at 167; *see also* State v. Kelly, 478 A.2d 364, 372 (N.J. 1984).

318. *Kelly*, 478 A.2d at 371-72 (citing BATTERED WOMEN, A PSYCHOLOGICAL STUDY OF DOMESTIC VIOLENCE 60 (M. Roy ed. 1977)).

319. Mather, *supra* note 315, at 547-60.

320. WALKER II, *supra* note 298, at 95-96.

321. *Id.* at 96.

322. *See supra* notes 306-13 and accompanying text.

323. WALKER II, *supra* note 298, at 87 (internal quotation marks and citations omitted).

324. *See* Lamis Ali Safa, *The Abuse Behind Closed Doors and the Screams That Are Never Heard*, 22 T. MARHSALL L. REV. 281, 294 n.121 (1997) (citing WALKER I, *supra* note 297, at 43).

ultimately will lead to her death."[325] When the woman's strike-back leads to the filing of criminal charges against her for aggravated assault or homicide because the elements of the traditional defense of self-defense appear to be missing, BWS evidence will normally become the foundation of the woman's defense.[326]

2. Emergence of a Battered Women's Syndrome Defense

Whether there is actually a Battered Women's Syndrome Defense (BWSD) is a matter of some controversy. "The defense of battered women who kill their mates is slowly developing a distinct style or technique called the abused spouse defense," which is a hybrid of "the more familiar and established defenses of self-defense and diminished capacity."[327] Others insist it is not a defense in and of itself, but rather a psychological theory offered in support of the traditional defense of self-defense.[328]

The purpose of offering evidence of BWS is to fill a gap left by the law of self-defense and by the PTSD. BWSD is most frequently used in courts to explain the behavior of women who turn on their abusers and, in turn, to reduce their criminal responsibility.[329] BWSD is similar to PTSD in that the defendant's prior history or experience triggers a violent response. Battered women were frequently unable to assert PTSD, however, because they could not fulfill all of the diagnostic requirements of PTSD.[330]

The traditional self-defense doctrine recognizes the legitimacy of the use of force only when necessary to prevent an imminent attack from

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325. Tosha Yvette Foster, Note, *From Fear to Rage: Black Rage as a Natural Progression from and Functional Equivalent of Battered Woman Syndrome*, 38 WM. & MARY L. REV. 1851, 1859 (1997) (citing WALKER I, *supra* note 297, at 69-70).

326. *See, e.g.*, State v. Stewart, 763 P.2d 572 (Kan. 1988).

327. Elizabeth Vaughn & Maureen L. Moore, *The Battered Spouse Defense in Kentucky*, 10 N. KY. L. REV. 399, 399 (1983).

328. Roberta K. Thyfault, Comment, *Self-Defense: Battered Woman Syndrome on Trial*, 20 CAL. W. L. REV. 485, 495 (1984).

329. *See generally* John W. Roberts, *Between the Heat of Passion and Cold Bold: Battered Woman's Syndrome as an Excuse for Self-Defense in Non-Confrontational Homicide*, 27 LAW & PSYCHOL. REV. 135, 136-37 (2003).

330. Mary Ann Dutton, *Understanding Women's Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome*, 21 HOFSTRA L. REV. 1191, 1199-1200 (1993); *see generally* Brett C. Trowbridge, *The Admissibility of Expert Testimony in Washington on Post Traumatic Stress Disorder and Related Trauma Syndromes: Avoiding the Battle of the Experts by Restoring the Use of Objective Psychological Testimony in the Courtroom*, 27 SEATTLE U. L. REV. 453, 517-18 (2003).

unlawful force.[331] As such, when a battered woman uses force to defend herself from such an unlawful, imminent attack, there is no problem in using the defense of self-defense. But in many cases, battered women act against their abusers when they are not in "imminent danger" and, therefore, are not acting within the technical requirements of the law of self-defense.[332] Alternatively, battered women may use deadly force when they were confronted only with physical force, another requirement of the law of self-defense.[333] BWS evidence can help to explain why a woman might reasonably believe, in light of her history of abuse, her life was in danger, even though to the lay person she was not facing what objectively looked like a threat of imminent, unlawful force.[334]

Interestingly, the use of BWS evidence has not been confined to cases where an abused woman strikes out against her abuser. Where the state of mind of the defendant at the time of the crime is at issue, BWS evidence can be offered to show that the defendant did not possess the required mental state–a diminished capacity argument in its purest form.[335] For example, the family court in *In re Glenn G.* relieved a mother of liability for child abuse after evidence of BWS was offered.[336] The mother, however, was still held liable for child neglect, a strict liability offense.[337] In *United States v. Marenghi*, the defendant offered BWS evidence to show she lacked the intent necessary for a conviction on possession and distribution of controlled substances.[338] The *Marenghi* court reasoned that the evidence was not being offered as a defense to the charges themselves, but rather as part of an attempt to show that the defendant's capacity was diminished in such a way that she did not entertain the requisite mens rea.[339]

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331. Jane Campbell Moriarty, *"While Dangers Gather": The Bush Preemption Doctrine, Battered Women, Imminence, and Anticipatory Self-Defense*, 30 N.Y.U. REV. L. & SOC. CHANGE 1, 20 (2006) (citing WAYNE R. LAFAVE, CRIMINAL LAW § 10.4, at 539 (4th ed. 2003)).

332. *See, e.g.*, Trowbridge, *supra* note 330, at 495; Joshua Dressler, *Battered Women and Sleeping Abusers: Some Reflections*, 3 OHIO ST. J. CRIM. L. 457 (2006) (arguing against allowing BWS evidence to be used to expand traditional notions of self-defense).

333. Moriarty, *supra* note 331, at 20; *see also* Faigman & Wright, *supra* note 299, at 81.

334. State v. Kelly, 478 A.2d 364, 377 (N.J. 1984) (allowing BWS testimony because it aided juries "in determining whether, under the circumstances, a reasonable person would have believed there was imminent danger to her life."); Ibn-Tamas v. United States, 407 A.2d 626, 634 (D.C. 1979) (same).

335. Faigman & Wright, *supra* note 299, at 95.

336. *In re* Glenn G., 587 N.Y.S.2d 464 (Fam. Ct. 1992), *aff'd*, 630 N.Y.S.2d 348 (N.Y. App. Div.), *leave to app. denied*, 662 N.E.2d 791 (N.Y. 1995).

337. *Id.* at 470.

338. United States v. Marenghi, 893 F. Supp. 85, 90 (D. Me. 1995).

339. *Id.* at 89-91.

3. Validity of the BWS Defense

As noted above, Walker's research suffered from serious methodological flaws.[340] In fact, the research fails to demonstrate that abused women experience the cycle of violence as explained by Walker or that abused women learn they are helpless to prevent it.[341] Consequently, some courts have excluded BWS evidence as unreliable.[342] However, in spite of these shortcomings, many courts continue to embrace BWS testimony in BWS cases.[343] Some believe this is driven by political motivation (i.e., not wanting to seem unsympathetic to the plight of the battered woman), while others see it as blind adherence to precedent established in the wake of Walker's initial research without critically examining the questionable reliability and validity of the BWS as elucidated by contemporary research.[344] Regardless of the reasons underlying its continued acceptance, it is clear that many states continue to allow BWS evidence.[345] The presentation of psychological evidence concerning both the syndrome itself and the application of it to the facts of any particular case, therefore, remains an important function of forensic psychologists and psychiatrists.

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340. *See supra* notes 297-98 and accompanying text.

341. OLA W. BARNETT & ALYEE D. LAVOLETTE, IT COULD HAPPEN TO ANYONE: WHY BATTERED WOMEN STAY 105-07 (1993); Regina A. Schuller & Neil Vidmar, *Battered Woman Syndrome Evidence in the Courtroom: A Review of the Literature*, 16 LAW & HUM. BEHAV. 273, 280 (1992); JULIE BLACKMAN, INTIMATE VIOLENCE: A STUDY OF INJUSTICE 192 (1989); RICHARD J. GELLES & CLAIRE PEDRICK CORNELL, INTIMATE VIOLENCE IN FAMILIES 77 (1985).

342. *See, e.g.*, Hill v. State, 507 So. 2d 554, 555 (Ala. Crim. App. 1986); Buhrle v. State, 627 P.2d 1374, 1377 (Wyo. 1981) (criticizing not only Walker's methodology, but also finding that the defendant's case did not mirror that of the typical battered woman and, therefore, Walker inadequately explained and apparently ignored many of the troubling facts in the case "in arriving at an opinion").

343. *See, e.g.*, United States v. Brown, 891 F. Supp. 1501 (D. Kan. 1995) (finding BWS evidence to satisfy the *Daubert* test).

344. *See generally* Faigman & Wright, *supra* note 299.

345. *See* People v. Aris, 264 Cal. Rptr. 167 (Ct. App. 1989); Knock v. Knock, 621 A.2d 267 (Conn. 1993); Ibn-Tamas v. United States, 407 A.2d 626 (D.C. 1979); Hawthorne v. State, 408 So. 2d 801 (Fla. Ct. App. 1982); Smith v. State, 277 S.E.2d 678 (Ga. 1981); People v. Minnis, 455 N.E.2d 209 (Ill. App. Ct. 1983); State v. Green, 652 P.2d 697 (Kan. 1982); State v. Anaya, 438 A.2d 892 (Me. 1981); State v. Hennum 441 N.W.2d 793 (Minn. 1989); State v. Kelly, 478 A.2d 364 (N.J. 1984); State v. Gallegos, 719 P.2d 1268 (N.M. 1986); State v. Leidholm, 334 N.W.2d 811 (N.D. 1983); Commonwealth v. Stonehouse, 555 A.2d 772 (Pa. 1989); State v. Wilkins, 407 S.E.2d 670 (S.C. 1991); State v. Furlough, 797 S.W.2d 631 (Tenn. 1990); Fielder v. State, 756 S.W.2d 309 (Tex. 1988); State v. Allery, 682 P.2d 312 (Wash. 1984).

C. *Black Rage Defense*

The Black Rage defense is arguably the most controversial extension of the diminished capacity doctrine. Although discussed in the literature from time to time, the defense was brought into the spotlight during the trial of Colin Ferguson.[346] Ferguson had opened fire on a Long Island railroad car full of passengers, killing six people and injuring nineteen more.[347] After his arrest for the 1994 shooting, police discovered writings in which Ferguson wrote of his hatred for "whites, Asians and Uncle Tom Negroes," which led his lawyer, the late, celebrated civil rights attorney William Kunstler, to formulate a variant of the PTSD defense predicated upon "black rage."[348] Before trial, however, Ferguson fired Kunstler and was granted permission to represent himself pro se.[349] When acting as his own attorney (his competence to do so being highly questionable), Ferguson did not argue Black Rage. Instead, and in spite of a train car full of eyewitnesses, he argued that he had fallen asleep on the train and someone else stole his gun from his bag and committed the shootings.[350] The Black Rage defense, therefore, was never tested in court. It did, however, provoke national debate over the legitimacy of such a defense.[351]

The first case to assert something akin to the Black Rage defense in the United States occurred in 1846 in the trial of William Freeman.[352] Freeman, the son of an ex-slave, was wrongly convicted and incarcerated for stealing a horse.[353] He escaped from jail, was recaptured, and was then sentenced to a prison term of hard labor.[354] During his prison sentence, Freeman suffered extensive psychological and physical abuse that included whippings and beatings of such severity that he was rendered

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346. *See* Deborah L. Goldklang, *Post-Traumatic Stress Disorder and Black Rage: Clinical Validity, Criminal Responsibility*, 5 VA. J. SOC. POL'Y & L. 213 (1997).

347. John T. McQuiston, *Jury Finds Ferguson Guilty of Slayings on the L.I.R.R.: Families of the Dead and the Survivors Cheer the Verdict*, N.Y. TIMES, Feb. 18, 1995, at A1.

348. Goldklang, *supra* note 346.

349. *See* John T. McQuiston, *In the Bizarre L.I.R.R. Trial, Equally Bizarre Confrontations*, N.Y. TIMES, Feb. 5, 1995, at 13LI.

350. *Id.*

351. *Compare* Kimberly M. Copp, Note, *Black Rage: The Illegitimacy of a Criminal Defense*, 29 J. MARSHALL L. REV. 205 (1995) (arguing against recognition of the defense), *with* Foster, *supra* note 325, at 1865-75 (arguing for recognition of the defense).

352. Goldklang, *supra* note 346, at 217 (citing Freeman v. People, 4 Denio 9 (N.Y. Sup. Ct. 1847)).

353. *Id.* at 239.

354. *Id.*

nearly completely deaf.[355] After his release from prison, Freeman unsuccessfully sought employment from a Caucasian couple.[356] Freeman killed the couple and other members of their family.[357]

> Freeman's attorney, William Henry Seward, argued an early version of the insanity defense to the jury, contending that mistreatment by whites left his client with a life "'so filled with neglect, injustice, and severity, with anxiety, pain, disappointment, solicitude, and grief, [that it] would have its fitting conclusion in a madhouse.'" Although the jury rejected Freeman's insanity defense, the appellate court reversed and ordered a new trial, in part due to the trial court's limitation of expert testimony concerning Freeman's sanity. Before the retrial commenced, however, Freeman died in jail of tuberculosis.[358]

The theoretical underpinning of the Black Rage defense is clearly the diminished capacity doctrine. Psychiatrists William H. Grier and Price M. Cobbs first advanced the notion of Black Rage in 1969 when they asserted that African-Americans, as an insular racial minority in the United States, have endured years of discrimination starting in colonial days with slavery and continuing to the present.[359] This discrimination resulted in inadequate educational and employment opportunities for African-Americans as a group, and thus disproportionate suffering from poverty and high unemployment.[360] As a result of this significant inequality, African-Americans suffer both "pent-up frustration" and "'cultural paranoia' in which every member of the white race is a possible enemy."[361] The frustration and the paranoia eventually builds to a point of "blind rage, hatred, and ultimately, lethal violence" when someone suffering from Black Rage retaliates against one or more of the perceived oppressors, namely members of the white race.[362]

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355. Falk, *supra* note 282, at 749 n.99; Jennifer L. Larkin, *The Insanity Defense Founded on Ethnic Oppression: Defending the Accused in the International Criminal Tribunal for the Former Yugoslavia*, 21 N.Y.L. SCH. J. INT'L & COMP. L. 91, 102 (2001).

356. Larkin, *supra* note 355, at 102.

357. *Id.*; Goldklang, *supra* note 346, at 239.

358. Goldklang, *supra* note 346, at 239 (internal citations omitted).

359. WILLIAM H. GRIER & PRICE M. COBBS, BLACK RAGE 161 (1968).

360. *Id.*; *see also* Copp, *supra* note 351, at 223.

361. Copp, *supra* note 351, at 228 (citing ALEXANDER THOMAS & SAMUEL SILLEN, RACISM & PSYCHIATRY 54-55 (1972)).

362. *Id.* at 229 (citing THOMAS J. SCHEFF & SUZANNE M. RETZINGER, EMOTIONS AND VIOLENCE: SHAME AND RAGE IN DESTRUCTIVE CONFLICTS 65-66 (1991)).

The notion of building frustration leading to violence embodied in the concept of Black Rage is referred to as frustration–aggression.[363] The Black Rage defense does not seek to excuse conduct along the lines of the insanity defense. Rather, it seeks to explain the evolution of anger so intense that it can impair someone's capacity to form mens rea in a normal way.[364]

The Black Rage defense has been criticized as an invalid extension of other forms of diminished capacity. PTSD, for example, seeks to explain the conduct of a single person which arose in connection with an identifiable, traumatic event that is generally outside the range of usual human experience, such as "military combat, violent personal assault, being kidnapped, being taken hostage, terrorist attack, torture, [and] incarceration as a prisoner of war or in a concentration camp."[365] Although there is no doubt that African-Americans have endured invidious discrimination, it is highly questionable whether discrimination in the post-civil rights era would qualify as a trauma of such magnitude that it could cause something akin to PTSD.[366] Moreover, to the extent that it might qualify, even harsh discrimination is quite different from a traumatic occurrence. For example, if one witnessed a family member as the victim of a racially motivated lynching, such an experience would be well within the diagnostic predicate for PTSD and its associated defense based on diminished capacity. However, blanket assertions of racism over one's lifetime do not demonstrate the same clear requisite trauma. Other groups have faced intense forms of racism and oppression, including women, Jews, homosexuals, and certain ethnicities at various points in history.[367] Yet, there has been no significant movement to classify any such groups as candidates for a variant of PTSD sufficient to diminish the capacity to form mens rea.

Some might argue that Black Rage is more similar to the development of BWS, since a cycle of mistreatment over time is allegedly responsible for both, and the victim feels helpless to overcome or escape from that which inflicts the suffering. Copp pointed out, however, that when a battered woman strikes back, she does so at her abuser.[368] In doing so, she insulates herself from future abuse at his hands. In contrast, someone with

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363. *Id.* at 228 (citing SCHEFF & RETZINGER, *supra* note 362, at xix).

364. *Id.* at 229.

365. AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL 424 (4th ed. 1994); *see also* DSM-IV-TR, *supra* note 83, at 463-65.

366. Copp, *supra* note 351, at 233-34.

367. *Id.*

368. *Id.* at 234.

Black Rage has no readily identifiable person at the root of his or her oppression, nor will striking out against someone eliminate racism or discrimination.[369]

To date, the debate about the propriety of using Black Rage as a criminal defense has been mostly academic. It is feasible that forensic mental health professionals might be called upon to assess someone suffering from Black Rage. But in light of the fact that it is not recognized as a mental disorder in the DSM-IV-TR, it is questionable whether it would be accepted in court as a bona fide defense. This conclusion is further bolstered in light of the *Daubert* requirements concerning the reliability of expert testimony and the methods they use.[370] Since Black Rage is more a sociological construct than a disorder validated by any reliable empirical support, the debate over Black Rage is likely to remain academic.

D. *The PMS Defense*

1. Background on PMS

Premenstrual Syndrome (PMS) was first described in medical literature in 1931 by endocrinologist Robert Frank.[371] Frank described personality changes in women that corresponded to changes in hormone levels in the time period prior to menstruation.[372] The syndrome was defined in 1965 as "any combination of emotional or physical features which occurs cyclically in a female before menstruation and which regresses and disappears during menstruation."[373] PMS is commonly typified by behavioral symptoms, which include irritability, anger, confusion, and mood swings,[374] and physical symptoms such as headaches, bloating, and breast tenderness.[375]

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369. *Id.*

370. *See generally* Henry F. Fradella et al., *The Impact of* Daubert *on the Admissibility of Behavioral Science Testimony*, 30 PEPP. L. REV. 403 (2003) (reviewing judicial application of *Daubert* to expert testimony from behavioral scientists).

371. Lee Solomon, *Premenstrual Syndrome: The Debate Surrounding Criminal Defense*, 54 MD. L. REV. 571, 573 (1995) (citing Robert T. Frank, *The Hormonal Causes of Premenstrual Tension*, 26 ARCHIVES NEUROLOGY & PSYCHIATRY 1053 (1931)).

372. *Id.*; *see also* Joseph H. Morton, *Chronic Cystic Mastitis and Sterility*, 6 J. CLINICAL ENDOCRINOLOGY 802 (1946).

373. Solomon, *supra* note 371, at 573 (citing Hamish Sutherland & Iain Stewart, *A Critical Analysis of the Premenstrual Syndrome*, 1 LANCET 1180, 1182 (1965)).

374. *Id.*

375. *Id.*

Experts cannot agree on the cause of PMS.[376] Some believe an excess of estrogen in relation to progesterone causes the syndrome.[377] Other theories include: "the rise and fall of both estrogen and progesterone; the rapid decline in a metabolite of a neurotransmitter; yeast overgrowth in the intestines; [progesterone] allergies; . . . psychological stress,"[378] as well as fluid retention, vitamin deficiencies, hypoglycemia, nutritional deficiencies, endometrial toxins, and endogenous opiate excess or withdrawal.[379] The DSM-IV-TR brought official recognition to a new mental disorder called Premenstrual Dysmorphic Disorder (PMDD), formerly known as Late Luteal Phase Dysphoric Disorder (LLPDD).[380] It is a more severe form of PMS that affects an estimated two to five percent of menstruating women.[381] One commentator explained the difference between PMS and PMDD by analogizing the former to a cold and the latter to full-blown pneumonia.[382]

2. The PMS Defense

PMS was first used to mitigate criminal culpability in England where it was first recognized as a variant of diminished responsibility.[383] Defendants in the United States, however, have attempted to use PMS as a type of diminished capacity defense to wholly excuse their conduct. In *People v. Santos*, one of first cases to attempt such a use of the PMS defense, the legitimacy of the defense was not tested at trial since the parties negotiated a plea bargain after the defendant gave notice of her

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376. *Id.* at 573 (citing Robert M. Carney & Brian D. Williams, *Recent Decisions*, 59 NOTRE DAME L. REV. 253, 255 (1983)); *see also* Robert L. Reid & S.C. Yen, *Premenstrual Syndrome*, 139 AM. J. OBSTETRICS & GYNECOLOGY 85, 86 (1981) ("Efforts to compare epidemiologic data on PMS are likely to be misleading because of variable interpretation of the clinical manifestations and the obvious difficulties encountered in quantitating [sic] the severity of symptoms.").

377. Solomon, *supra* note 371, at 573.

378. *Id.* at 574 (internal citations omitted).

379. Nicole R. Grose, Note, *Premenstrual Dysphoric Disorder as a Mitigating Factor in Sentencing: Following the Lead of English Criminal Courts*, 33 VAL. U.L. REV. 201, 203-08 & n.33 (1998) (citing, inter alia, William R. Keye, Jr. & Eric Trunnell, *Premenstrual Syndrome: A Medical Perspective*, 9 HAMLINE L. REV. 165, 170-73 & n.23 (1986)).

380. Solomon, *supra* note 371, at 577.

381. Grose, *supra* note 379, at 209 n.54 (citing Meir Steiner, *Premenstrual Syndromes*, 48 ANN. REV. MED. 448 (1997); Barbara L. Parry, *Psychobiology of Premenstrual Dysphoric Disorder*, 15 SEMINARS IN REPROD. ENDOCRINOLOGY 55 (1997)).

382. Jamie Talan, *Are Monthly Blues a Mental Disorder?*, NEWSDAY, July 10, 1993, at 10.

383. Grose, *supra* note 379, at 209-14 (citing Regina v. Craddock, 1 C.L. 49 (1980); Regina v. Smith, No. 1/A/82 (C.A. Crim. Div. 1982), (LEXIS, Enggen Library, Cases File at *1); Regina v. English, Norwich Crown Ct. 1981 (unreported); Regina v. Reynolds, Crim. L.R. 679 (C.A. 1988), (LEXIS, Enggen Library, Cases File, at *1)).

intent to use the defense.[384] Other cases attempting to use PMS as a defense were rejected in the years following *Santos*.[385]

In 1991, however, the first successful PMS defense in the United States was used in a Virginia trial in *Commonwealth v. Richter*.[386] The defendant was a physician who was stopped for erratic driving.[387] She had her children in the car with her.[388] The state trooper who pulled her over noticed a strong smell of alcohol on her breath. The defendant

> refused to take field sobriety tests, tried to kick the officer in the groin, used offensive language, and threatened the officer by saying, "You son of a [expletive]; you [expletive] can't do this to me; I'm a doctor. I hope you [expletive] get shot and come to my hospital so I can refuse to treat you . . . ."[389]

At her trial for driving under the influence, the defendant's attorney successfully used a dual line of defense. First, the defense argued the results of the breathalyzer test, which yielded a 0.13% blood alcohol concentration, were invalid.[390] The defense then attempted to explain her hostile conduct was due to PMS, not intoxication.[391] The defendant was found not guilty.[392] Given the unique facts of this case, it is important to note that the PMS defense was not specifically accepted or rejected in *Richter*. Rather, it was used to explain the defendant's hostile and combative behavior, thereby assisting in the creation of reasonable doubt with respect to whether she had been driving while intoxicated.

In the years since *Richter*, PMDD was officially recognized in the DSM-IV. Whether it will be accepted as a qualifying mental disease or defect for insanity or for diminished capacity purposes has not yet been

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384. Grose, *supra* note 379, at 215 (citing People v. Santos, No. 1KO46229 (Crim. Ct. Kings. County, N.Y. 1982) (unpublished opinion)).

385. *See* Lovato v. Irvin, 31 B.R. 251 (Bankr. D. Colo. 1983) (refusing to accept PMS, due to its questionable scientific validity and reliability, as a means of discharging a debt in a bankruptcy proceeding when the debt was a judgment obtained in an intentional tort action); State v. Lashwood, 384 N.W.2d 319 (S.D. 1986) (refusing to set aside a plea entered into while the defendant was suffering from PMS).

386. *See* Solomon, *supra* note 371, at 586 (citing DeNeen L. Brown, *PMS Defense Successful in Va. Drunken Driving Case*, WASH. POST, June 7, 1991, at A1).

387. Grose, *supra* note 379, at 216.

388. *Id.*

389. Solomon, *supra* note 371, at 586 n.146 (alterations and omission in original).

390. *Id.* at 586 n.147.

391. *Id.* at 586-87.

392. Grose, *supra* note 379, at 217.

determined. Critics argue that medical disagreement about its cause, symptoms, and treatment makes it very difficult for PMS to gain legal recognition as a complete defense.[393] Even if allowed, using the defense successfully might prove very difficult in light of the fact that the diagnosis is almost completely dependent on self-reported data from an obviously interested party (i.e., a criminal defendant) and other biased witnesses who are close to her.[394]

Other critics of the PMS defense argue that it is a dangerous precedent that can be used to encroach upon women's rights. Its use could lead to the societal labeling of women as "deficient" or being "mentally and physically unstable."[395] Such arguments, if accepted, could be used to justify keeping women out of certain executive and military roles and could even be used against women in divorce or custody proceedings.[396] In spite of these concerns, supporters of the defense feel it should be used as a tool to mitigate punishment and to provide for therapeutic sentencing.[397] Whatever its future, it is clear that forensic behavioral scientists will play an important role in the evolution of the PMS defense.

E. *Media Intoxication*

A number of cases have asserted claims of insanity based on "media intoxication" from television, movies, pornography, and music. These cases have all been unsuccessful in their quests to do so. For example, in the case of *Florida v. Zamora*, a fifteen-year-old boy was accused of killing an eighty-two-year-old woman after breaking into her house and stealing a gun and money.[398] Zamora's attorney pled insanity on his behalf.[399] In support of the insanity claim, the defense offered evidence

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393. *Id.* at 220 (citing Robert Mark Carney & Brian D. Williams, *Premenstrual Syndrome: A Criminal Defense*, 59 NOTRE DAME L. REV. 253, 267 (1983).

394. Elizabeth Holtzman, *Premenstrual Symptoms: No Legal Defense*, 60 ST. JOHN'S L. REV. 712, 714-15 (1986); Kay A. Heggestad, *The Devil Made Me Do It: The Case Against Using Premenstrual Syndrome as a Defense in a Court of Law*, 9 HAMLINE L. REV. 155, 161 (1986).

395. Grose, *supra* note 379, at 224 (citing, inter alia, Holtzman, *supra* note 394, at 715; Linda L. Castle, *PMS as a Defense in Criminal Cases*, 70 A.B.A. J. 211 (1984)).

396. *Id.* at 225 (citing Candy Pahl-Smith, *Premenstrual Syndrome as a Criminal Defense: The Need for a Medico-Legal Understanding*, 15 N.C. CENT. L.J. 246, 256 (1984); Carney & Williams, *supra* note 393, at 268).

397. *Id.* at 220-30; Solomon, *supra* note 371, at 598-99; Ruth Macklin, *The Premenstrual Syndrome (PMS) Label: Benefit or Burden*, *in* PREMENSTRUAL SYNDROME 17, 23 (Benson E. Ginsberg & Bonnie Frank Carter eds., 1987).

398. Zamora v. State (Dade County Cir. Ct. 1977), *aff'd*, 361 So. 2d 776 (Fla. Dist. Ct. App. 1978), *cert. denied*, 372 So. 2d 472 (Fla. 1979).

399. *Zamora*, 361 So. 2d at 778.

that Zamora acted under a state of pseudo-intoxication resulting from watching hours of violent television programs which, in turn, drove the boy to kill the woman.[400] The trial court refused to allow testimony on television intoxication, finding it to be irrelevant to the question of Zamora's insanity.[401]

Media intoxication, however, could meet with more success in the diminished capacity realm, although to date, such attempts have been generally unsuccessful. In a provocative article, Patricia Falk reviewed the extensive body of literature addressing the nature and effects of media intoxication and addiction.[402] She noted: "[t]he primary, and almost unanimous, finding common to this extensive body of research is that a positive correlation exists between viewing violent television programs and subsequent aggressive behavior."[403] Similar research findings have linked violence against women to the viewing of pornography.[404] Serial killer Bobby Joe Long asserted in the sentencing phase of his murder trial that his addiction to violent pornography should have constituted a mitigating factor against the death penalty.[405] This argument was rejected by the jury and he was sentenced him to death.[406]

In *Schiro v. Clark*,[407] the defendant "argued that he was a sexual sadist and that his extensive viewing of rape pornography and snuff films rendered him unable to distinguish right from wrong."[408] The defendant produced the testimony of two leading experts on the link between violence and pornography and sought to have it used as evidence of insanity and as a type of intoxication which the applicable state law recognized as a mitigating factor.[409] The defendant was convicted and his

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400. *Id.* at 778-79.

401. *Id.* at 780-81. In *State v. Quillen*, the Court specifically stated that evidence of television intoxication did not support a plea of insanity. *See also* Falk, *supra* note 282, at 745 (citing State v. Quillen, No. S-87-08-0118, 1989 Del. Super. LEXIS 129 (Del. Super. Ct. Mar. 28, 1989)); *see also* State v. Molina, No. 84-2314B (11th Judicial Dist., Fla. 1984) (discussed in Juliet Lughbough Dee, *Media Accountability for Real-Life Violence: A Case of Negligence or Free Speech?*, 37 J. COMM. 106 (1987)).

402. Falk, *supra* note 282, at 758-81.

403. *Id.* at 767.

404. *See, e.g.*, CATHARINE A. MACKINNON, TOWARDS A FEMINIST THEORY OF THE STATE 195-214 (1989); *see* Ron Hayes, *Attorney Knows How to Represent Himself*, CHI. TRIB., Sept. 9, 1991, at C1.

405. Hayes, *supra* note 404, at C1.

406. Long v. State, 517 So. 2d 664 (Fla. 1987), *cert. denied*, 486 U.S. 1017 (1988); Long v. State, 610 So. 2d 1276 (Fla. 1992).

407. Schiro v. Clark, 963 F.2d 962 (7th Cir. 1992), *aff'd*, 510 U.S. 222 (1994).

408. *Id.* at 971.

409. *Id.* at 971-72.

subsequent appeals were all denied on the rationale that allowing a criminal defense based on exposure to materials protected by the First Amendment would be incongruous.[410] Similar reasoning resulted in the unsuccessful assertion of an analogous argument using music lyrics in the case of Ronald Ray Howard.[411] The nineteen-year-old defendant killed a police officer and sought to avoid the death penalty by arguing that his addiction to "gangsta rap" was a mitigating factor.[412] The argument was rejected by the jury who sentenced Howard to death.[413]

The link between violence depicted in different media forms and actual violence will continue to be an important part of expert testimony in both civil and criminal cases. Whether media intoxication is eventually is accepted as a form or either diminished capacity or diminished responsibility remains to be seen. Either way, defense attorneys will undoubtedly call upon forensic mental health clinicians to assess defendants who assert the defense in guilt and sentencing phases of criminal trials.

F. *Summary of Diminished Capacity Evidence*

Part III should make clear that criminal defendants have attempted to expand the notion of diminished capacity into a multitude of defenses with varying degrees of success. Diminished capacity arguments based on bona fide mental illnesses that interfere with sensation, perception, and cognition tend to fare well. In contrast, attempts to cast defendants as less culpable because they were victims of abuse or neglect generally do not succeed.[414] This ever-increasing trend towards disease-based explanations for criminal behavior has clearly taken a toll on public attitudes towards excuse defenses based on mental illness.[415] While defendants and their

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410. *Id.*

411. Falk, *supra* note 282, at 747-48 (citing Michele Munn, Note, *The Effects of Free Speech: Mass Communication Theory and the Criminal Punishment of Speech*, 21 AM. J. CRIM. L. 433, 476-78 (1994); Janet Elliott, *Slain Trooper's Family Seeks Damages From Rapper: Round 2 in Gangsta Rap Case*, LEGAL TIMES, July 26, 1993, at 10; Chuck Phillips, *Rap Defense Doesn't Stop Death Penalty*, L.A. TIMES, July 15, 1993, at F1; Pamela Ward & Scott W. Wright, *Howard Gets Death Sentence*, AUSTIN AM.-STATESMAN, July 15, 1993, at B1).

412. Ward & Wright, *supra* note 411, at B1.

413. *Id.*

414. *See, e.g.*, Richard J. Bonnie, *Excusing and Punishing in Criminal Adjudication: A Reality Check*, 5 CORNELL J.L. & PUB. POL'Y 1 (1995); Stephanie B. Goldberg, *Fault Lines*, 80 A.B.A. J., 40 (1994).

415. ALAN M. DERSHOWITZ, THE ABUSE EXCUSE AND OTHER COP-OUTS, SOB STORIES, AND EVASIONS OF RESPONSIBILITY 3 (1994); JAMES Q. WILSON, MORAL JUDGMENT (1997).

lawyers who seek to avoid punishment are partially to blame, behavioral scientists also share in the responsibility for this trend.

"The abuse excuse," "battered woman syndrome," "child sexual abuse accommodation syndrome," "false memory syndrome," "television intoxication," "urban survival syndrome," "XYY chromosome abnormality"—"these are just a few of the colorful appellations used to describe claims that mental health professionals have bolstered with their testimony over the years."[416] "From reading the popular press, one could easily come to the conclusion that such testimony is spurious 'psychobabble' that will eventually swallow up our justice system."[417]

An overwhelming number of psychologists and psychiatrists do not take part in sensational trials that attempt to extend diminished capacity into the realm of questionable scientific practice.[418] Media attention on the few cases that are the exception to this rule, however, has had real and palpable effects on the jurisprudence of defenses of excuse.[419] The perception that these defenses undermine legal notions of autonomy, free-will, and personal responsibility has led legislatures, judges, and juries to "define the grounds of excuse too narrowly."[420] The abolition of the insanity defense in favor of the mens rea approach is one of the best examples of the efforts to narrow legitimate criminal excuse. Other examples include the move towards "guilty except insane" formulations of the insanity defense and the elimination of diminished capacity evidence altogether, even when offered to challenge the defendant's alleged formation of mens rea.[421]

Sadly, the Supreme Court's decision in *Arizona v. Clark* upheld this last approach over a schizophrenic defendant's due process challenge.[422] While Part V of this Article is devoted to critiquing the decision in that case, the true tragedy of *Arizona v. Clark* lies in the majority's distrust of forensic psychiatric and psychological evidence and the effects that

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416. Christopher Slobogin, *Psychiatric Evidence in Criminal Trials: To Junk or Not to Junk?*, 40 WM. & MARY L. REV. 1, 1-2 (1998).

417. *Id.* at 2.

418. *Id.* at 7.

419. *Id.* at 2 n.9 (citing, inter alia, Niko Price, *The "Abuse Excuse": Threat to Justice?; More and More Lawyers Using Trauma as Defense to Crimes*, LEGAL INTELLIGENCER, May 31, 1994, at 3 (referring to "two decades of pop psychology and afternoon talk shows that have convinced society . . . that there is an explanation—and possibly a justification—for almost any act").

420. Donald A. Dripps, *Fundamental Retribution Error: Criminal Justice and the Social Psychology of Blame*, 56 VAND. L. REV. 1383, 1389 (2003).

421. *See, e.g.*, State v. Mott, 931 P.2d 1046 (Ariz. 1997), *cert. denied*, 520 U.S. 1234 (1997), *holding reaff'd by* Clark v. Arizona, 126 S. Ct. 2709 (2006).

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

mistrust caused not only to the defendant in that case, but also to our notions of criminal responsibility. The Court's distrust of forensic psychiatric and psychological evidence is no doubt due, in part, to the behavioral sciences' complicity in supporting empirically and clinically questionable criminal defenses that seek to displace responsibility from a criminal actor onto a victim or society at large.[423]

V. *ARIZONA V. CLARK*

A. *Factual Background*

In the summer of 2000, seventeen-year-old Eric Clark killed a police officer in the line of duty.[424] Clark had been driving his pickup truck around a residential neighborhood with the radio "blaring" loud music.[425] A police officer pulled-over Clark's truck in response to complaints.[426] Less than a minute after having approached Clark and having told him to "stay where he was," Clark shot the officer and ran away.[427] Before he died, the officer contacted the police dispatcher to help. Clark was apprehended later that day "with gunpowder residue on his hands."[428] The gun used to kill the officer was subsequently found close to where Clark had been arrested.[429]

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423. *See generally* Henry F. Fradella, *A Content Analysis of Federal Judicial Views of the Social Science "Researcher's Black Arts,"* 35 RUTGERS L.J. 103, 169 (2003).

> Abuse excuses run counter to retributive and deterrence based sentencing ideals. Testimony of sociologists and psychologists in particular that seek to justify criminal behavior or mitigate its seriousness on the basis of diminished capacity, other than that stemming from a bona-fide DSM-IV Axis I mental disorder, serves to alienate judges (and perhaps juries) from these disciplines. Moreover, since these excuses are premised on a deterministic view of human nature (i.e., something in someone's past caused someone to break the law), it is at odds with the law's assumption that behavior is a product of free will.

Id.

424. *Clark*, 126 S. Ct. at 2716.
425. *Id.*
426. *Id.*
427. *Id.*
428. *Id.*
429. *Clark*, 126 S. Ct. at 2716.

At Clark's trial, friends, family, classmates, and school officials all testified about his "increasingly bizarre behavior over the year before the shooting."[430]

> 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).[431]

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."[432] Clark, however, was sentenced to twenty-five years to life in prison.[433] 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 both violated his due process rights.[434] The trial court denied this motion; the Arizona Court of Appeals affirmed in an unpublished disposition; and the Arizona Supreme Court denied discretionary review.[435] The U.S. Supreme Court granted Clark's petition for certiorari on two separate due process issues, each of which will now be separately explored.

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430. *Id.* at 2717.
431. *Id.* at 2717-18.
432. *Id.* at 2718.
433. *Id.*
434. *Clark*, 126 S.C. at 2718.
435. *Id.*

B. *Issue 1: The Narrowing of* M'Naghten

Clark asserted that Arizona's GEI formulation of the insanity defense violated due process because it lacked the first prong of the *M'Naghten* test, which evaluated the cognitive capacity to know the nature and quality of one's acts.[436] While Arizona had used the true *M'Naghten* test in the past, the state omitted inclusion of the cognitive incapacity prong when it enacted its GEI formulation.[437] It appears, however, that the statutory change was not intended to alter substantively the test for insanity, but rather that the state legislature determined that "a streamlined standard with only the moral capacity part would be easier for the jury to apply."[438]

Clark argued that the new statutory language deprived him of his due process rights because the *M'Naghten* test for insanity represented a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."[439] Indeed, such an argument had worked before the Nevada Supreme Court in *Finger v. State*,[440] although it had been rejected in Utah, Idaho, and Montana.[441] The U.S. Supreme Court sided with the weight of state authority on the issue. The Court dismissed Clark's fundamental right argument outright, stating that "[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."[442] In support of this conclusion, the Court pointed to the many variations in the

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436. *Id.*

437. *Id.* at 2719 (citing 1993 Ariz. Sess. Laws ch. 256, §§ 2-3).

438. *Clark*, 126 S. Ct. at 2723 (citing Ariz. House of Rep. Judiciary Comm. notes 3 (Mar. 18, 1993); 1 R. GERBER, CRIMINAL LAW OF ARIZONA 502-11 (2d ed. 1993 & Supp. 2000)).

439. *Id.* at 2737 (citing Patterson v. New York, 432 U.S. 197 (1977)).

440. Finger v. State, 27 P.3d 66, 80 (Nev. 2001).

> [R]ecognition 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.

Id. (quoting State v. Herrera, 845 P.2d 359, 372 (Utah 1995) (Stewart, J., dissenting)).

441. *Herrera*, 895 P.2d at 365-66; State v. Searcy, 798 P.2d 914, 919 (Idaho 1990); State v. Korell, 690 P.2d 992, 1002 (Mont. 1984).

442. *Clark*, 126 S. Ct. at 2719.

insanity defense discussed above.[443] States are therefore free to define insanity as they see fit without running afoul the Due Process Clause of the Fourteenth Amendment.[444]

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.[445]

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.[446]

C. *Issue 2: Due Process Challenge to Arizona's* Mott *Rule*

The second of Clark's due process challenges concerned the rule set forth by the Arizona Supreme Court in *State v. Mott*.[447] *Mott* involved the conviction of a woman for "child abuse under circumstances likely to produce death or serious bodily injury" for the murder of her daughter.[448] The mother 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 she failed to take her daughter for necessary medical care after her boyfriend severely injured her daughter.[449] At her trial, the mother sought to introduce evidence through expert testimony

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443. *See supra* Part II.
444. *See supra* Part II.
445. *Clark*, 126 S. Ct. at 2722.
446. *Id.* at 2723-24.
447. State v. Mott, 931 P.2d 1046, 1054-55 (Ariz. 1997), *cert. denied*, 520 U.S. 1234 (1997).
448. *Id.* at 1049.
449. *Id.* at 1048-49.

that she lacked the capacity to have acted to save her daughter because her own mental status was significantly impaired due to the Battered Woman Syndrome.[450] The defense tried to use such evidence to rebut the prosecution's argument that the child abuse via omission had been either purposeful or knowing within the meaning of these terms as mens rea for criminal liability.[451] 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.[452] The defendant was convicted and appealed.[453] The Arizona Court of Appeals reversed, holding that "trial court's preclusion of defendant's proffered testimony regarding battered-woman syndrome violated due process."[454] The Arizona Supreme Court vacated the decision of the intermediate appellate court and reinstated the defendant's conviction and sentence.[455] 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."[456] But, the *Mott* court's board holding was not required by state law. The *Mott* 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 defense[457] without having barred the admissibility of psychological testimony shy of insanity to negate mens rea.[458] The dissent

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450. *Id.* at 1049.

451. *Id.*

452. *Mott*, 931 P.2d at 1049.

453. *Id.*

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

455. *Id.* at 1057.

456. *Id.* at 1051 (citing A.R.S. § 13-502(A)).

457. *See, e.g.*, *Mott*, 931 P.2d 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), *cert. denied*, 382 U.S. 1015 (1966) (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]").

458. *See Mott*, 931 P.2d at 1058 (Zlacket, 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.

in *Mott* explained this critical distinction as follows:

> 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 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.[459]

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.[460] 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 the *Mott* rule's reach prevented Eric Clark from introducing evidence tending to show that he did not entertain the mens rea for murder.[461]

In spite of *Mott*'s significant impingement on the criminal defendant's ability to demonstrate that his mental illness interfered with the ability to form a culpable mens rea, *Clark* upheld *Mott*'s limitation on diminished capacity evidence over Clark's due process challenge.[462]

The 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 "observational evidence" by the Court.[463] 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."[464] 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.[465] The testimony of Clark's family and schoolmates about his bizarre behavior in the year

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Id.

459. *Id.* at 1061 (Feldman, J., dissenting) (internal citations omitted).
460. *Id.* at 1054.
461. *Id.*
462. Clark v. Arizona, 126 S. Ct. 2709, 2737 (2006).
463. *Id.* at 2724.
464. *Id.*
465. *Id.*

leading up to the shooting falls under this category of evidence.[466] The second type of relevant 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.[467] The testimony of mental health professionals stating that Clark suffered from paranoid schizophrenia is an example of such evidence.[468]

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)."[469] The Court explained that such evidence, like mental disease evidence, is usually offered in the form of expert opinion testimony.[470] In *Clark*, the mental health experts proffered by the defense opined that Clark lacked the capacity to know his actions were wrong, while the opinions of the prosecution's experts were that Clark had such capacity in spite of his psychotic state.[471]

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 Clark's due process challenge.[472] *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

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466. *See id.* at 2717-18.

467. *Clark*, 126 S. Ct. at 2725.

468. *See id.* at 2717-18.

469. *Id.* at 2725.

470. *Id.*

471. *Id.* at 2725. It should be noted that although Arizona permits testimony on capacity evidence as defined by the Supreme Court, many jurisdictions do not allow testimony on the "ultimate issue" to be decided in a case. *See* ARIZ. R. EVID. 704 (allowing otherwise admissible evidence on testimony "embrac[ing] 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.

Id.

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

disorder short of insanity either as an affirmative defense or to negate the *mens rea* element of a crime."[473]

It was precisely the exclusion of mental illness evidence from being used to determine whether Clark had acted with the requisite underlying mens rea of purpose or knowledge that formed the basis of his second due process challenge. His defense at trial centered on his diagnosis of paranoid schizophrenia.[474] Separate and apart from whether this debilitating psychotic disorder rendered him legally insane, he asserted that his mental illness made him delusional.[475] Of particular relevance was his belief that governmental workers, including municipal personnel in Flagstaff like Officer Moritz, were aliens.[476] If he delusionally thought Officer Mortiz 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.[477] He would therefore not be guilty under the Arizona first-degree murder statute, an important point that the majority failed to comprehend.

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*:[478]

> *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.[479]

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473. *Id.* (quoting *Mott*, 931 P.2d, at 1051 ("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)).

474. *Id.* at 2716.

475. *Id.* at 2717. Part of his delusional belief system was that his town was inhabited by aliens. *Id.*

476. *Id.* at 2717, 2724-25.

477. *Clark*, 126 S. Ct. at 2743.

478. State v. Christensen, 628 P.2d 580, 583-84 (Ariz. 1981).

479. *Mott*, 931 P.2d at 1054.

The distinction made by the *Mott* court was plainly wrong. Evidence of a "character trait" that causes someone's "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."[480]

In fact, testimony concerning "character traits" and "behavioral tendencies" may well fall under the *Clark* majority's definition of "observational evidence," because labeling such traits and behaviors with the appropriate clinical diagnosis would be "mental disease evidence" under *Clark*'s evidentiary rubric. The admissibility of the evidence, however, should not turn on such a definitional distinction, as both work together to help jurors understand human behavior. Regardless of the definitional label, nothing changes the fact that both the observed behaviors and the diagnosis which flows from them are, in fact, evidence of diminished capacity as attested to by the facts of *Christensen*.[481]

In *Christensen*, the defendant's impulse control disorder led him to commit a murder under stress.[482] The Arizona Supreme Court reversed the defendant's conviction because he was not permitted to offer the testimony of a psychologist that his killing under stressful circumstances was more "reflexive" than "reflective."[483] The outcome in *Christensen* is surprising, since impulse control disorders, both historically and today, do not qualify as the basis for excusing criminal conduct.[484] 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 purposes,[485] a change not mentioned in *Mott* or *Clark*. Thus, the fact that *Mott* relied upon *Christensen* is somewhat befuddling.

Moreover, like the defendant in *Christensen*, the defendant in *Mott* offered diminished capacity evidence not as an affirmative defense, but as evidence to negate mens rea. Yet, such evidence was permitted in *Christensen* and not in *Mott*, apparently because the Arizona Supreme Court simply decided not to label the evidence proffered by the defense in

480. DSM-IV-TR, *supra* note 83, at 663.

481. *Christensen*, 628 P.2d at 581-82.

482. *Id.* at 582.

483. *Id.* at 583.

484. *See supra* Part III.A; *infra* Part IV.D.

485. ARIZ. REV. STAT. ANN. § 13-502(A) (1997) ("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.").

Christensen diminished capacity evidence, while it decided that the evidence proffered in *Mott* was diminished capacity evidence. Specifically, the defendant in *Mott* sought to introduce BWS evidence, not to excuse her conduct, but to show that she did not neglect her children knowingly, intentionally, recklessly, or with criminal negligence.[486]

The inconsistency in *Christensen* and *Mott* appears to be due, in part, to the confusing nature of diminished capacity evidence. Some jurisdictions permit diminished capacity to be an affirmative defense, which excuses a defendant's conduct based on mental incapacity that does not rise to the level of insanity.[487] Other jurisdictions, like Arizona, do not recognize diminished capacity as its own affirmative defense.[488] Regardless of whether diminished capacity evidence is accepted as a complete or partial defense of excuse, the separate factual question of whether a defendant actually entertained a 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*[489] and Justice Kennedy's dissent in *Clark* both make this distinction clear.[490] The majority opinions in both cases, however, conflate the issue.

Mott's flawed understanding of both the psychological evidence at issue in *Christensen* and the nature of diminished capacity evidence

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486. The defense in *Mott* wanted its 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 take action to protect her children from her boyfriend who physically abused both her and her children. State v. Mott, 931 P.2d 1046, 1050 (Ariz. 1997). She was denied the ability to do so. *Id.*

487. *See infra* Part IV.C.

488. *See, e.g.*, State v. Schantz, 403 P.2d 521, 529 (Ariz. 1965), *cert. denied*, 382 U.S. 1015 (1966) (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.]").

489. *Mott*, 931 P.2d at 1060, *cert. denied*, 520 U.S. 1234 (1997) (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 Defendant acted knowingly, intentionally, recklessly, or with criminal negligence—the only real issues in the case.

Id.

490. Clark v. Arizona, 126 S. Ct. 2709, 2738–39, 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.").

notwithstanding, the Supreme 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. 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 due process.[491] 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 U.S. Supreme 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 arguments that Eric Clark advanced. Moreover, the majority in *Clark* distilled a triad of types of evidence tending to establish mens rea from the illogical web of strained reasoning evidenced in both *Christensen* and *Mott*. These evidentiary distinctions were unnecessary. Moreover, they are so misleading that Justice Kennedy called them an "evidentiary framework that . . . will be unworkable in many cases."[492]

The U.S. Supreme Court is undoubtedly correct that laymen and 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.[493] Presumably, this led the Court to interpret *Mott* as having no effect on "observational evidence" regardless of whether it was offered by a layperson or a qualified expert.[494] In contrast, the Court viewed *Mott* as limiting expert testimony with regard to both "mental disease evidence" and "capacity evidence."[495] But mental disease evidence is not a distinct construct from either observational evidence or capacity evidence.

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491. *Christensen*, 628 P.2d at 584 ("[I]t is inconsistent with fundamental justice to prevent a defendant from offering evidence to dispute the charge against him.").

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

493. *See, e.g.*, State v. Bay, 722 P.2d 280, 284 (Ariz. 1986).

494. *Clark*, 126 S. Ct. 2726.

495. *Id.*

Forensic clinical assessment involves not only the administration of cognitive and personality tests, but also observations of human behavior.[496] 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 from observation of the patient. Thus, the Court's evidentiary triad creates a false trichotomy, as all three types of evidence are intertwined with each other. Justice Kennedy points out this truism 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 from the explanation that makes it comprehensible.[497]

Having unnecessarily created these three confusing and misleading categories of behavioral evidence, the Court construed Clark's due process challenge to *Mott* as being one limited to its prohibition on mental disease evidence from being used to establish diminished capacity.[498] The Court held that such a prohibition does not violate due process.[499] But, the majority is wrong on two counts. Not only did Clark argue that barring diminished capacity evidence was a due process violation, but 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.[500] Thus, by construing Clark's claim so narrowly, the majority missed the gravamen of his second issue. To compound matters, the majority's substantive holding on its narrow interpretation of Clark's challenge to *Mott* is critically flawed for a number of other reasons. Justice Souter's opinion offers several bases for the Court's upholding of the *Mott* rule. All of them are related to the possible effects of confusion over mental illness expert testimony. First, the Court

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496. *See generally* DAVID L. SHAPIRO, FORENSIC PSYCHOLOGICAL ASSESSMENT: AN INTEGRATIVE APPROACH (1991).

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

498. *Id.* at 2729 (majority opinion).

499. *Id.* at 2737.

500. *Id.* at 2739 (Kennedy, J., dissenting).

reasoned that by confining such evidence to the ultimate question of insanity, it preserves the full force of a state's allocation of the burden of persuasion to overcome the presumption of sanity.[501]

> [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 and incapacity to the insanity defense.[502]

Thus, when a state 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 of persuasion by allowing such evidence to cast reasonable doubt on the defendant's mens rea. 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 defendant to introduce diminished capacity evidence.[503] 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 the law to excuse the criminal conduct of someone who commits a criminal act due to significant mental

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501. *Id.* at 2732 (majority opinion).

502. *Id.* at 2732-33.

503. *Clark*, 126 S. Ct. at 2733 (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)).

impairment. Thus, the insanity defense separates "nonblameworthy from blameworthy offenders."[504] The insanity defense does not, however, have any effect on a determination of the actor's underlying guilt, a question which turns on whether the government can prove all elements of a criminal offense, including mens rea, beyond a reasonable doubt.[505]

A defendant, like M'Naghten, may well have formed specific intent to commit a crime, but did so under 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.[506]

While states have latitude to exclude relevant evidence offered by a criminal defendant,[507] they are constrained from doing so when it interferes with a criminal defendant's "meaningful opportunity to present a complete defense."[508] 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 efficiently unreliable to warrant a rule of evidence excluding it in spite of its relevance, much like is done for hearsay evidence:

> 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.[509]

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

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

506. *Cf.* Sandstrom v. Montana, 442 U.S. 510, 524 (1979) (holding 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).

507. *See, e.g.*, United States v. Scheffer, 523 U.S. 303, 308 (1998).

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

509. *Clark*, 126 S. Ct. at 2731-32 (quoting Holmes v. South Carolina, 126 S. Ct. 1727, 1732 (2006) (citing Crane v. Kentucky, 476 U.S. 683 (1986); Montana v. Egelhoff, 518 U.S. 37 (1996);

The *Clark* Court found that mental disorder evidence and moral capacity evidence both suffer from sufficient reliability issues and that Arizona was justified in limiting such evidence exclusively to the question of insanity.[510] 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*[511] that its diagnostic 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.[512] The Court construed the APA's admission that consensus regarding diagnoses may change over time masked "vigorous debate" within the psychiatric community.[513] 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."[514]

Second, the Court cautioned 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."[515] 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."[516] But, this is an absurd line of reasoning since forensic psychological/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, competency to waive *Miranda* rights, to act as his/her own attorney, to a defendant's competency to be sentenced and punished.[517]

Chambers v. Mississippi, 410 U.S. 284 (1973)).

510. *Id.* at 2734-35.

511. DSM-IV-TR, *supra* note 83, at xxxiii.

512. *Clark*, 126 S. Ct. at 2734 (citing DSM-IV-TR, *supra* note 83, at xxxiii).

513. *Id.*

514. *Id.*

515. *Id.*

516. *Id.* at 2735.

517. *See generally* HENRY F.FRADELLA, FORENSIC PSYCHOLOGY: THE USE OF BEHAVIORAL SCIENCE IN CIVIL AND CRIMINAL JUSTICE (2006); RALPH REISNER ET AL., LAW AND THE MENTAL HEALTH SYSTEM, CIVIL AND CRIMINAL ASPECTS (4th ed., West 2004).

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":[518]

> 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 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.[519]

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.[520] While an arguable position, it nonetheless misses the point in *Clark*, as the evidence was not being restricted in the consideration of insanity; such "ultimate issue" evidence is permissible under Arizona law.[521] Rather, the evidence was being restricted under *Mott* for the purposes of establishing mens rea—an entirely different line of analysis.[522]

All three arguments offered by the majority 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 and psychological clinical assessment. Do laypeople understand that clinical depression can

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518. *Clark*, 126 S. Ct. at 2735.

519. *Id.* at 2735-36.

520. *Id.* at 2736 (citing DSM-IV-TR, *supra* note 83, at xxxii-xxxiii; PAUL GIANNELLI & EDWARD IMWINKELRIED, SCIENTIFIC EVIDENCE § 9-3(B), at 286 (1986); RALPH SLOVENKO, PSYCHIATRY AND CRIMINAL CULPABILITY 55 (1995)).

521. State v. Sanchez, 573 P.2d 60, 64 (Ariz. 1977); ARIZ. R. EVID. 704 (2006) (allowing otherwise admissible evidence on testimony "embrac[ing] an ultimate issue to be decided by the trier of fact").

522. 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.").

be so severe as to cause psychotic breaks with reality?[523] 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 *Clark*?[524] Who, if not mental health professionals, are 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's dissent makes this point quite eloquently:

> The existence of . . . functional psychosis [in this case] is beyond dispute, but that does not mean the lay witness understands it or 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.[525]

Justice Kennedy's assessment is thoughtful and displays an understanding of the often complicated nuances of human behavior. His point that mental disease evidence works hand-in-hand with observational evidence demonstrates why the Court's tripartite evidentiary structure is nonsensical.

Not being able to offer all relevant evidence of the defendant's inability to have knowingly killed Officer Mortiz interfered with Clark's due process right to present evidence that could have cast significant doubt on the state's ability to meet its burden to prove mens rea beyond a reasonable doubt.[526] While states are free to shift the burden of proof to the defendant to prove his own insanity,[527] the *Mott* rule has the practical

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523. *See* DSM-IV-TR, *supra* note 83, at 369-76.

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

525. *Id.*

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

527. *See* Leland v. Oregon, 343 U.S. 790 (1952).

effect of unconstitutionally placing a burden of disproving mens rea on the defendant while simultaneously limiting the defendant's ability to do so.[528]

Having shown why the exclusion of forensic psychiatric and 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 arguments about the propriety of the exclusion of such evidence 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."[529] 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.[530]

These rules have been held by state courts to allow a variety of types of psychological evidence to be used in cases varying from "the psychological characteristics of molestation victims"[531] to "psychiatric testimony regarding neurological deficits."[532] Courts across the nation apply similar rules of evidence to behavioral science testimony with surprising consistency.[533] Thus, having a per se rule against all forms of

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528. *Clark*, 126 S. Ct. at 2747 (citing Sandstrom v. Montana, 442 U.S. 510, 524 (1979) ("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")); Cool v. United States, 409 U.S. 100, 103 (1972) (per curiam) (jury instruction that allowed jury to consider accomplice's testimony only 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"); Martin v. Ohio, 480 U.S. 228, 233-34 (1987) (State 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")). Arizona attempted to justify doing so by relying on *Montana v. Egelhoff*, which upheld Montana's statutory ban on presenting evidence of voluntary intoxication to rebut mens rea. Montana v. Egelhoff, 518 U.S. 37 (1996). 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, as Egelhoff's purposeful decision to become intoxicated can serve as the basis of criminal liability, while Clark is devoid of any responsibility for having a mental state that renders him unable to distinguish reality from a world filled with delusions and hallucinations. *Id.* at 44 (citing 1 M. HALE, PLEAS OF THE CROWN, at *32-33 ("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'"); 4 W. BLACKSTONE, COMMENTARIES, at *25-26 (the law viewed intoxication "as an aggravation of the offence, rather than as an excuse for any criminal misbehaviour")).

529. *Clark*, 126 S. Ct. at 2744-45 (citing Rock v. Arkansas, 483 U.S. 44, 61 (1987)).

530. *Id.* at 2745 (citing ARIZ. R. EVID. 403, 702 (West 2005)).

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

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

533. *See* Fradella et al., *supra* note 370, at 443 ("First, although critics of *Daubert* have suggested that having judges evaluating scientific methodologies would lead to inconsistent results, it appears that inconsistencies are the exceptions, rather than the rule.").

forensic psychological testimony other than "observational evidence" is unnecessary.

Moreover, even if it were not unnecessary, a state's interest in excluding potentially unreliable evidence in courts of law must be balanced against an individual defendant's due process rights.[534] Ironically, it is observational 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–the basis for forming an opinion with regard to "mental disease evidence"—has been validated to varying degrees,[535] while the individual observations of a layperson or a particular clinician cannot be validated empirically. 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."[536]

Justice Kennedy's dissent also criticizes the majority's contention that forensic behavioral science runs too high a risk of jury confusion. He begins his attack on this faulty premise by noting that "[w]e have always trusted juries to sort through complex facts in various areas of law."[537] Justice Kennedy concedes that there are numerous psychiatric diagnoses that might be confusing or misleading to a jury.[538] The one at issue in *Clark*, however, is not one such diagnosis. Schizophrenia "is a well-documented mental illness, and no one seriously disputes either its definition or its most prominent clinical manifestations."[539] The experts proffered both by 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."[540] Kennedy therefore concludes that if there were any jury confusion issue at all in the case, it

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534. *Clark*, 126 S. Ct. at 2744 (citing Holmes v. South Carolina, 126 S. Ct. 1727, 1734 (2006) ("rule excluding, 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'")); *Rock*, 483 U.S. at 56 (rule excluding all hypnotically refreshed testimony "operates 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"); Washington v. Texas, 388 U.S. 14, 226 (1967) (rule excluding accomplice testimony "prevent[s] whole categories of defense witnesses from testifying on the basis of a priori categories that presume them unworthy of belief").

535. *See generally* ALLEN FRANCES ET AL., DSM-IV-TR GUIDEBOOK 3-85 (2004).

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

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

538. *Id.*

539. *Id.* at 2746.

540. *Id.*

was "the result of the Court's own insistence on conflating the insanity defense and the question of intent."[541] 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.[542]

VII. CONCLUSION

Defining and applying the parameters of diminished capacity evidence is difficult due to the amorphous nature of the doctrine and its ever changing boundaries. As defendants have attempted to extend diminished capacity to cover PMS, media intoxication, and the like, there has clearly been a corresponding backlash against the use of diminished capacity evidence. Consider the following commentary:

> The acceptance of abuse defenses has transformed America into a nation of victims. This victimization has led to increased assertions of novel abuse defenses. America's new culture asserts an instinctive readiness to blame someone for every misfortune. Explanations for disadvantages are based on theories of sexism, racism, illness, rotten childhood, poor education, or anything else which can project guilt onto others.[543]

Even when diminished capacity is not extended into the realm of an abuse excuse, courts still dislike the doctrine. Judicial hostility to diminished capacity evidence may "reflect the traditional judicial distrust of the vagaries, uncertainties, and mysteries of psychiatric explanations, particularly when invoked to assess varying shades of capacity to perform such basic functions as intending and believing."[544]

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541. *Clark*, 126 S. Ct. at 2746.

542. *Id.*

543. Copp, *supra* note 351, at 221-22 (citing CHARLES J. SYKES, A NATION OF VICTIMS: THE DECAY OF AMERICAN CULTURE 11-12 (1992); DERSHOWITZ, *supra* note 415, at 339).

544. Sanford H. Kadish, *Fifty Years of Criminal Law: An Opinionated Review*, 87 CAL. L. REV. 943, 956 (1999).

In spite of this backlash, diminished capacity receives very little media coverage unless the case is exceptional.[545] Outrage over the *Hinckley* verdict led to massive curtailment of the insanity defense, yet insanity is used very rarely and, even when asserted, is unsuccessful nearly three-quarters of the time.[546] In contrast, the ease with which diminished capacity can be used in most jurisdictions makes it much more appealing than insanity, with the added benefit of what ought to be a much higher likelihood of success.[547]

We must consider the impact of the continued narrowing of the insanity defense and our growing reliance on diminished capacity evidence, whether offered to disprove mens rea or as a mitigating factor at sentencing.[548] As the insanity defense grows narrower (or, in some jurisdictions, nonexistent), there has been a sharp increase in the number of mentally ill people in prisons.[549] Given how the *Clark* Court further limited criminal defendants' ability to argue excuse defenses, there is every reason to believe the sad trend of increasingly incarcerating mentally ill people in prisons, rather than hospitals, will continue.

In 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 Clark committed murder, the prosecution in the *Clark* case introduced evidence that the defendant spoke of 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

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545. *See supra* notes 20-25 and accompanying text.

546. *See supra* notes 20-25 and accompanying text.

547. *But see* Neil P. Cohen et al., *The Prevalence and Use of Criminal Defenses: A Preliminary Study*, 60 TENN. L. REV. 957, 972-73 (1993) (reporting use in only 0.01% of cases with 25% success rate).

548. *See, e.g.*, Gilbert Geis, *Pathological Gambling and Insanity, Diminished Capacity, Dischargeability, and Downward Sentencing Departures*, 8 GAMING L. REV. 347 (2004).

549. *See generally* Jennifer S. Bard, *Re-Arranging Deck Chairs on the Titanic: Why the Incarceration of Individuals with Serious Mental Illness Violates Public Health, Ethical, and Constitutional Principles and Therefore Cannot Be Made Right by Piecemeal Changes to the Insanity Defense*, 5 HOUS. J. HEALTH L. & POL'Y 1 (2005).

> 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 proved first-degree murder.[550]

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. But, 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, or weight to be accorded to, forensic behavioral science evidence. And 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. With such a sorry state of affairs being the sad reality in present times, mentally ill inmates who do not belong in prisons will likely continue to burden the correctional system, inmates who instead should be treated and cared for in secure mental hospitals. Worse yet, more defendants like 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.[551] If that is not a due process violation, what is?

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

551. Clark v. Arizona, 126 S. Ct. 2709, 2749 (2006) (Kennedy, J., dissenting).