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Fear and Loathing in Insanity Law: Explaining the Otherwise Inexplicable *Clark v. Arizona*

Susan D. Rozelle

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ARTICLES

FEAR AND LOATHING IN INSANITY LAW: EXPLAINING THE OTHERWISE INEXPLICABLE *CLARK V. ARIZONA*

Susan D. Rozelle[†]

*Just because you're paranoid doesn't mean they aren't really
out to get you.*¹

INTRODUCTION.....	20
I. BACKGROUND.....	23
A. <i>A Brief History of the Insanity Defense</i>	23
B. <i>A Brief Survey of the Justifications for the Insanity Defense</i>	24
C. <i>A Brief Reality Check</i>	27
II. THE CLARK STORY.....	29
A. <i>Everyone Agreed on Everything</i> . . .	29
B. . . . <i>Almost</i>	31
III. THE IRRATIONALITY OF CLARK V. ARIZONA.....	33
A. <i>The Insanity Defense: Now Even Shorter!</i>	33
1. <i>The Definitions</i>	34
2. <i>The Holding</i>	36
3. <i>The Otherwise Inexplicable</i>	36

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¹ As Henry Kissinger put it, “Even a paranoid can have real enemies.” *Henry Kissinger, Odd Man Out*, NEWSWEEK, June 29, 1981, at 51.

B.	<i>Mental Illness and Mens Rea: Can This Marriage Be Saved?</i>	40
1.	<i>The Definitions</i>	41
2.	<i>The Holding</i>	42
3.	<i>The Otherwise Inexplicable</i>	44
a.	<i>Observational, Mental-Illness, and Capacity Evidence</i>	44
b.	<i>Burden Shift</i>	47
c.	<i>Expert Testimony</i>	54
CONCLUSION	57

INTRODUCTION

Eric Clark was suffering from paranoid schizophrenia when he shot and killed a police officer in Flagstaff, Arizona.² Although Eric no longer fears the space aliens he was battling back then—since his treatment, he has realized that they are not dangerous, but came to Earth “to do trades for stuff, maybe like sugar and broccoli”³—he would be wise to remain on his guard. Society’s emotional reaction to the mentally ill has made people like Eric a target, if not for conscious animus (though sadly, often for that, too⁴), then for unconscious discrimination.

Lawmakers are not immune from this effect. When the context is the insanity defense, everyone goes a little crazy. Indeed, the United States Supreme Court’s recent decision in *Clark v. Arizona*⁵ is otherwise inexplicable, with its unacknowledged undermining of one of the hallmarks of society’s civility: the insanity defense.⁶

² *Clark v. Arizona*, 126 S. Ct. 2709, 2716 (2006) (describing Clark’s “undisputed” paranoid schizophrenia).

³ 2 J.A. at 120, *Clark v. Arizona*, 126 S. Ct. 2709 (2006) (No. 05-5966). Perhaps further treatment has helped Eric even more, though as of yet, there is still no cure for schizophrenia. See, e.g., National Institute of Mental Health, Schizophrenia, NIH Publication No. 06-3517, at 1 (Jan. 2007), available at <http://www.nimh.nih.gov/publicat/nimhschizophrenia.pdf> (“Available treatments can relieve many of the disorder’s symptoms, but most people who have schizophrenia must cope with some residual symptoms as long as they live.”).

⁴ Rael D. Strous, *Nazi Euthanasia of the Mentally Ill at Hadamar*, 163 AM. J. PSYCHIATRY 27, 27 (2006) (describing Nazi plan to euthanize “life unworthy of life”—*Leben unwertes Leben*—including mentally ill); Linda A. Teplin et al., *Crime Victimization in Adults with Severe Mental Illness: Comparison with the National Crime Victimization Survey*, 62:8 ARCHIVES OF GEN. PSYCHIATRY 911, 911 (2005) (finding severely mentally ill almost 12 times more likely to be victims of rape, robbery, and assault than general population); Shirley Leung, *Man Is Accused in Torture Case; Raynham Police Say Mentally Ill Victims Were Lured to Home*, BOSTON GLOBE, Feb. 21, 1997, at B3.

⁵ *Clark*, 126 S. Ct. 2709.

⁶ Others have attacked the defense outright. For example, four states currently reject an insanity defense: Idaho, IDAHO CODE ANN. § 18-207(1) (2004), Kansas, KAN. STAT. ANN. § 22-3219(1) (1995), Montana, MONT. CODE ANN. § 16-14-102 (2005), and Utah, UTAH CODE

Clark should have been an electrifying case, “the first major ruling by the U.S. Supreme Court on insanity defense laws since . . . John Hinckley’s acquittal by reason of insanity in the 1981 shooting of President Ronald Reagan.”⁷ Instead, it was greeted with a collective yawn by the professoriate: “much ado about nothing very much really.”⁸ This lackadaisical response defies explanation. The Court clearly mishandled *Clark*, and this mishandling contributes to a growing confusion about the insanity defense.⁹

Unfortunately for Eric and those like him, our inability to think clearly in this arena means that they will continue to suffer. This Article is an effort to clarify the role of the insanity defense and its relationship to the mens rea requirement in the criminal law. We cannot protect Eric from his aliens, but we could do a much better job of protecting him from our own delusional thinking about insanity.¹⁰

Part I briefly sketches the history of the insanity defense and its justifications, and then explores society’s emotional reaction to mental illness. Fear and loathing have come to replace not only care and compassion, but even logic. Because Arizona, like so many other jurisdictions, misunderstands the insanity defense and its relationship

ANN. § 76-2-305 (2003). Each of these states’ courts of last resort has upheld the constitutionality of the abolition. See *State v. Searcy*, 798 P.2d 914, 919 (Idaho 1990); *State v. Bethel*, 66 P.3d 840, 851 (Kan. 2003); *State v. Korell*, 690 P.2d 992, 1002 (Mont. 1984); *State v. Herrera*, 895 P.2d 359, 366 (Utah 1995) (all holding that the state constitution does not guarantee the availability of the insanity defense). Although Nevada also abolished the defense in NEV. REV. STAT. § 193.220 (2006), its Supreme Court found that statute unconstitutional. *Finger v. State*, 27 P.3d 66, 84 (Nev. 2001). For a thoughtful discussion of the constitutionality of abolition, see, e.g., Stephen J. Morse & Morris B. Hoffman, *The Uneasy Entente Between Insanity and Mens Rea: Beyond Clark v. Arizona*, 1, 58 (February 12, 2007) (unpublished manuscript, available at <http://ssrn.com/abstract=962945>). See also *infra* note 189 and accompanying text (discussing “mens rea approach,” in which states permit mental illness evidence only as to mens rea).

⁷ *U.S. Supreme Court Upholds Arizona’s Insanity Defense Law*, U.S. STATE NEWS, June 29, 2006, 2006 WLNR 11315031.

⁸ Ron Allen, *Clark v. Arizona: Much (Confused) Ado About Nothing*, 4 OHIO ST. J. CRIM. L. 135, 135 (2006). But see Morse & Hoffman, *supra* note 6, at 2 (expressing concern that Clark “clarified little, and may in fact have further muddled the conceptual and practical waters”).

⁹ The lack of guidance from the nation’s highest court in this context has been noted before. See, e.g., Michael L. Perlin, “*The Borderline Which Separated You from Me*”: *The Insanity Defense, the Authoritarian Spirit, the Fear of Faking, and the Culture of Punishment*, 82 IOWA L. REV. 1375, 1379 (“We must also explore why the judiciary—and especially the United States Supreme Court—can offer us ‘no direction home’ in our efforts to bring coherence to this most incoherent area of [insanity] law.”).

¹⁰ “Only when we acknowledge these psychic and physical realities—and the anthropology of insanity defense attitudes—can we expect to make sense of the underlying jurisprudence.” *Id.* at 1378 (examining “[w]hy . . . we feel the way we do about . . . insanity pleaders, and how . . . the answer to that question preordain[s] our answers to almost all of the legal and behavioral questions that are posed in this area . . .”).

to the criminal law's mens rea¹¹ requirement, Eric is labeled a cold-blooded killer deserving of blame and punishment, rather than a mentally-ill patient deserving of sympathy and treatment. Many people would disagree with this characterization, of course. They do not find the mentally ill, especially those whose illnesses led them to commit horrifying acts, to be particularly sympathetic. The law is right to make the distinction, however, and decisions like *Clark* only muddy the waters.

Part II tells the *Clark* story. It sounds like the second half of a bad science fiction double feature, something that would play late at night on a poorly funded television station. At 2 A.M., "Motel Hell,"¹² a film about a motel owner fond of repeating, "Meat's meat, and a man's gotta eat."¹³ He plants stranded motorists in the garden, then harvests them for dinner.¹⁴ At 4 A.M., "Aliens in Arizona," in which aliens from outer space invade Flagstaff, Arizona, poisoning everything in their path. The hero keeps a bird in his car to warn him of poisoned air; the aliens give the bird a robotic lung. Unfortunately for Eric, his victim, and their families, "Aliens in Arizona" was no B movie. Eric thought these events were real, and because he did not get the help he needed, Officer Jeffrey Moritz is dead.

Part III first describes and then unpacks the irrationality of the Court's reasoning in *Clark*. Two issues were raised: the constitutionality of an insanity statute that differs from the traditional formulation, and the constitutionality of prohibiting evidence regarding mental illness to be introduced on the question of mens rea. In addressing the insanity statute, the Court perpetuated a long-standing confusion about the scope of the definition. In addressing the relationship between insanity and mens rea, the Court spawned a whole new generation of confusions.

The conclusion urges a reexamination of insanity law. Because the criminal justice system is the first and only intervention society provides many deeply disturbed individuals,¹⁵ enlightened self-

¹¹ Literally "guilty mind," or the actor's mental attitude towards the prohibited act. BLACK'S LAW DICTIONARY 1006 (8th ed. 2004). See also *infra* notes 163 and 173-81 and accompanying text (further explaining mens rea).

¹² MOTEL HELL (United Artists 1980).

¹³ *Id.* Memorable quotes and plot summaries are available at <http://www.imdb.com/title/tt0081184/quotes>.

¹⁴ *Id.*

¹⁵ See, e.g., AM. PSYCHIATRIC ASS'N, MENTAL ILLNESS AND THE CRIMINAL JUSTICE SYSTEM: REDIRECTING RESOURCES TOWARD TREATMENT, NOT CONTAINMENT 2 (2004), available at <http://www.psych.org/downloads/MentalIllness.pdf>. In 1955, the state mental hospital population was 559,000; by 1999, it was less than 80,000. *Id.* Only three years later, "there [were] fewer than 60,000." E. FULLER TORREY, SURVIVING SCHIZOPHRENIA: A MANUAL

interest dictates we move past our fear, and begin to see the law more clearly. Because society is measured by its treatment of the most vulnerable,¹⁶ compassion dictates we do likewise.

I. BACKGROUND

A. A Brief History of the Insanity Defense

The insanity defense is among the oldest of the defenses known to criminal law. Plato taught that the penalty for murder should be death;¹⁷ if the actor were insane, however, the penalty should be exile for one year.¹⁸ In the sixth century B.C., Hebrew commentaries explained that the insane were without fault.¹⁹ Both church and state “routinely exonerated” the insane in the Middle Ages,²⁰ and the English common law continued this tradition. As Sir Edward Coke put it in 1629, “the act and wrong of a mad man shall not be imputed to him.”²¹ William Blackstone in the eighteenth century wrote, “idiots and lunatics are not chargeable for their own acts.”²² *M’Naghten’s Case*²³ in 1843 gave famous form to this lasting concept.

FOR FAMILIES, CONSUMERS, AND PROVIDERS 20 (4th ed. 2001). *See also id.* at 19–24 (describing “disaster” of deinstitutionalization).

¹⁶ “The moral test of government is how that government treats those who are in the dawn of life, the children; those who are in the twilight of life, the elderly; and those who are in the shadows of life—the sick, the needy and the handicapped.” DANIEL B. BAKER, POLITICAL QUOTATIONS 213 (Daniel B. Baker ed., Gale Research Inc., 1990) (quoting Senator Hubert H. Humphrey, addressing the 1976 Democratic National Convention).

¹⁷ PLATO, THE LAWS OF PLATO 266, 871d (Thomas L. Pangle, trans. Univ. of Chicago Press, 1988) (1980) (“He who is convicted is to be given the death penalty.”).

¹⁸ *Id.* at 258, 864d–e.

[H]e is to go away into another country and place, and dwell away from home for a year; if he comes back prior to the time which the law has ordained, or sets foot at all in his own country, he is to be incarcerated in the public prison by the Guardians of the Laws for two years, and then released from prison.

Id.

¹⁹ Platt & Diamond, *The Origins and Development of the “Wild Beast” Concept of Mental Illness and Its Relation to Theories of Criminal Responsibility*, 1 J. HIST. BEHAV. SCI. 335, 366 (1965).

²⁰ DANIEL N. ROBINSON, WILD BEASTS AND IDLE HUMOURS: THE INSANITY DEFENSE FROM ANTIQUITY TO THE PRESENT 71 (Harvard Univ. Press, 1996) (1937).

²¹ EDWARD COKE, INSTITUTES OF THE LAWS OF ENGLAND 247b (London, John More, 1629) (translated in Brief for the Treatment Advocacy Center as *Amicus Curiae* in Support of Neither Party, *Clark v. Arizona*, 126 S. Ct. 2709, 2716 (2006) (No. 05-5966)).

²² WILLIAM BLACKSTONE, 4 COMMENTARIES ON THE LAWS OF ENGLAND 24.

²³ *M’Naghten’s Case*, 8 Eng. Rep. 718, 722 (1843) (holding that a person may claim the insanity defense if “at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know what he was doing was

B. A Brief Survey of the Justifications for the Insanity Defense

The reason for the defense's longevity, through different times and different cultures, rests in its universal philosophical principle. As the United States Congress noted in 1983 (parochially, given the insanity defense's ancient roots), to abolish the defense "would alter that fundamental basis of Anglo-American criminal law: the existence of moral culpability as a prerequisite for punishment."²⁴

As many others have eloquently explained, the insanity defense is a necessary corollary to the foundational theories²⁵ supporting the concept of punishment.²⁶ Theories of punishment²⁷ can be roughly reduced to two primary classes²⁸: (1) utilitarianism, or ends-based reasoning, classically encompassing deterrence, rehabilitation, and incapacitation;²⁹ and (2) retribution, or backward-looking reasoning, focused on the defendant's desert.³⁰ The insanity defense follows necessarily from both of these theories.

For the utilitarian, punishment is justified by the good it can accomplish. Individual offenders are deterred from reoffending when they suffer the consequences of their actions; potential criminals are deterred through witnessing that offender's suffering; the incorrigible are physically prevented from reoffending by virtue of the prison walls that separate them from society; and those who can be saved are taught to walk the straight and narrow, not for fear of punishment, but for love of doing what is right. For the retributivist, on the other hand,

wrong.").

²⁴ H.R. Rep. No. 98-577, at 7-8 (1983).

²⁵ For a full exposition of the foundational theories of utilitarianism and retribution, see the variety of philosophers' works collected in *WHAT IS JUSTICE? CLASSIC AND CONTEMPORARY READINGS* (Robert C. Solomon & Mark C. Murphy eds., 2000).

²⁶ See generally NORVAL MORRIS, *MADNESS AND THE CRIMINAL LAW* (1982); MICHAEL L. PERLIN, *THE JURISPRUDENCE OF THE INSANITY DEFENSE* (1994); Stephen J. Morse, *Excusing the Crazy: The Insanity Defense Reconsidered*, 58 S. CAL. L. REV. 777, 788-89 (1985).

²⁷ But see Kyron Huigens, *Homicide in Archaic Terms*, 6 BUFF. CRIM. L. REV. 97, 97 (2002). Professor Huigens demonstrates and argues against the common conflation of theories of punishment (i.e., justifications for punishment) with the functions of punishment (i.e., what punishment accomplishes).

²⁸ Jurisprudence scholars also are increasingly developing hybrid theories of punishment, attempting to blend and harmonize utilitarian with retributive theories. See, e.g., Aaron Rappaport, *The Logic of Legal Theory: Reflections on the Purpose and Methodology of Jurisprudence*, 73 MISS. L.J. 559, 594 (2004).

²⁹ "[A] utilitarian believes that justification lies in the useful purpose the punishment serves." Kent Greenawalt, *Punishment*, in 3 *ENCYCLOPEDIA CRIME & JUST.* 1282, 1282 (Joshua Dressler ed., 2d ed. 2002).

³⁰ See, e.g., LEO KATZ ET AL., *FOUNDATIONS OF CRIMINAL LAW* 62-63 (1999).

punishment is fundamentally founded on desert.³¹ An offender who is not responsible is fundamentally not deserving of punishment.³²

Punishing the insane serves these purposes only in the smallest amount.³³ Incapacitation and rehabilitation are better served by the civil commitment process than by a criminal conviction. A civil commitment is capable of even greater incapacitation than a sentence resulting from a criminal conviction,³⁴ and stands a better chance of rehabilitation; many barriers to wellness and reintegration into society are imposed by the existence of a criminal record.³⁵ Individual deterrence will not work on insane defendants. Those who do not know what they are doing, or that certain prohibited conduct is

³¹ Under retributivism, "punishment is justified because people deserve it." Greenawalt, *supra* note 29, at 347 (1981). See also John Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 3, 4–5 (1955) ("What we may call the retributive view is that punishment is justified on the grounds that wrongdoing merits punishment. It is morally fitting that a person who does wrong should suffer in proportion to his wrongdoing."). "For a retributivist, the moral culpability of an offender also gives society the duty to punish." Michael Moore, *The Moral Worth of Retribution*, in RESPONSIBILITY, CHARACTER, AND THE EMOTIONS 179, 182 (Ferdinand Schoeman ed., 1987). Classical philosopher Immanuel Kant was a great retributivist, arguing for punishment, not because of any good it would accomplish, but because it was deserved:

Even if a Civil Society resolved to dissolve itself with the consent of all its members—as might be supposed in the case of a People inhabiting an island resolving to separate and scatter themselves throughout the whole world—the last Murderer lying in the prison ought to be executed before the resolution was carried out.

IMMANUEL KANT, *THE PHILOSOPHY OF LAW* 198 (W. Hastie trans., 1887) (1796–1797).

³² See Stephen J. Morse, *Addiction, Genetics, and Criminal Responsibility*, 69 LAW & CONTEMP. PROBS. 165, 172–73 (2006) ("tightly link[ing]" criminal responsibility to retributive justifications of punishment). "Thus, if a person, because of a severe mental illness, does not possess the requisite capacity for rationality, she cannot be considered . . . deserving of criminal blame and punishment. The insanity defense properly reflects the notion that a defendant whose mental disorder renders her irresponsible is not in fact culpable." Maura Caffrey, Comment, *A New Approach to Insanity Acquittee Recidivism: Redefining the Class of Truly Responsible Recidivists*, 154 U. PA. L. REV. 399, 423 (2005–06). See also Daniel R. Williams, *Mitigation and the Capital Defendant Who Wants to Die: A Study in the Rhetoric of Autonomy and the Hidden Discourse of Collective Responsibility*, 57 HASTINGS L.J. 693, 719 (2005–06) (characterizing individual responsibility and autonomy as "crucial to the retributive underpinnings of capital punishment").

³³ See JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 25.03 (4th ed. 2006) (finding no purpose furthered through punishing insane persons, but not discussing general deterrence).

³⁴ One is criminally incarcerated for a statutorily prescribed and judicially determined fixed term, but civilly committed indefinitely or until "cured." See *Powell v. Texas*, 392 U.S. 514, 529 (1968) (explaining why defendants may find criminal incarceration preferable to civil commitment).

³⁵ See, e.g., Sabra Micah Barnett, Commentary, *Collateral Sanctions and Civil Disabilities: The Secret Barrier to True Sentencing Reform for Legislatures and Sentencing Commissions*, 55 ALA. L. REV. 375, 375 (2004) (noting that civil disabilities collateral to criminal conviction "can act as barriers to reintegration and rehabilitation and can serve as enablers for high recidivism rates.").

wrong, are simply not in a position to understand why they are being punished, and will not be able to predict what would trigger similar punishment in the future. As mental health *amici* to the Court in *Clark* pointedly explained, "Nor can exclusion of evidence of the effect of a defendant's disabling condition somehow create a disincentive to have the disability."³⁶ Finally, punishing the insane could have only a slight general deterrent effect. It cannot affect other insane people, of course, for the same reasons that specific deterrence is ineffective on insane persons. Its effects would be limited, then, to non-insane potential defendants who may be emboldened to commit crimes by the thought that they will escape punishment by pretending insanity, and who are not deterred by the knowledge of a civil commitment alternative.³⁷ Thus, utilitarians are unlikely to be persuaded that the harm imposed by punishing the mentally ill is outweighed by the very little good it might do.

Nor are retributivists likely to jump on this bandwagon. Defendants who do not know what they are doing or that it is wrong cannot fairly be called responsible moral agents. Without awareness, they do not choose to do evil in the same way that people with awareness do. Not having chosen to do evil in the same way as those without impairment, the insane do not merit punishment the way others do.³⁸ This, at heart, is the sense behind that Congressional declaration that to abolish the defense "would alter that fundamental basis of Anglo-American criminal law: the existence of moral culpability as a prerequisite for punishment."³⁹

³⁶ Brief of Am. Ass'n on Mental Retardation, et al. as Amici Curiae Supporting Petitioner Eric Michael Clark at 17 n. 28, *Clark v. Arizona*, 126 S. Ct. 2709 (2006) (No. 05-5966), 2006 WL 247276.

³⁷ Of course, the most persuasive point militating against general deterrence theory is the pervasiveness of the belief that "I'll never get caught." See Tom R. Tyler, *Public Mistrust of the Law*, 66 U. CIN. L. REV. 847, 857 (1998) ("What makes deterrence strategies especially prohibitive is that their viability depends upon being able to change people's estimates of the likelihood of being caught and punished for wrongdoing.").

³⁸ Professor Morse and Justice Hoffman provide a pointed illustration:

We do not expect other animals to understand the reason for a rule or the deterrent value of punishment because other animals are not capable of the same degree of rationality as homo sapiens. There are no chimp legislatures or avian police. It is simply unfair to hold responsible, to blame and punish, mentally disordered wrongdoers who are not morally responsible because they were not capable of being rational at the time of the crime.

Morse & Hoffman, *supra* note 6, at 61.

³⁹ H.R. Rep. No. 98-577, at 7-8 (1983).

C. A Brief Reality Check

Sadly, such noble sentiments about that fundamental basis of Anglo-American criminal law are not our only feelings on the matter. Representing our “better selves,” these thoughtful justifications reflect only our conscious intentions. Our unconscious minds are often less generous.⁴⁰ With our high-minded rhetorical intentions, we simultaneously engage in an unconscious struggle to distance ourselves from the mentally ill, resulting in less compassion for them, and less-favorable interpretations of the criminal law.⁴¹ We feel “profound ambivalence On one hand, we are especially punitive toward the mentally disabled, ‘the most despised and feared group in society’; on the other, we recognize that in some narrow and carefully circumscribed circumstances, exculpation is—and historically has been—proper and necessary.”⁴²

That fear is the guiding emotion behind society’s crazy reaction to the mentally ill is hardly controversial.⁴³ We fear the unknown, and the land of mental illness is almost entirely unexplored. We fear insanity’s sufferers. We walk past the ranting figures bundled in rags

⁴⁰ The very act of placing an individual into a group—identifying him or her with that group—can alter one’s perception of the individual. For an excellent discussion of this phenomenon and a review of the relevant legal and psychological literature, see Antony Page, Batson’s *Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge*, 85 B.U. L. REV. 155, 193–98 (2005). See also Nilanjana Dasgupta, *Implicit Ingroup Favoritism, Outgroup Favoritism, and Their Behavioral Manifestations*, 17 SOC. JUST. RES. 143, 146 (2004) (noting that “a hundred studies have documented people’s tendency. . . to associate negative characteristics with outgroups more easily than ingroups”); Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CAL. L. REV. 945, 952 (2006) (“[A] positive attitude toward any ingroup necessarily implies a relative negativity toward a complementary outgroup. In some circumstances, this relative favoring of the ingroup puts members of other groups at a discriminatory disadvantage”). Indeed, it may be that we humans must struggle daily to overcome some innately programmed fear of the “other.” *Id.* at 961–62 (citing studies showing that implicit biases produce discriminatory behavior). See, e.g., Susan Stefan, *Delusions of Rights: Americans with Psychiatric Disabilities, Employment Discrimination and the Americans with Disabilities Act*, 52 ALA. L. REV. 271 (2000) (noting less favorable treatment of those with psychiatric disabilities under the Americans with Disabilities Act).

⁴¹ See Greenwald & Krieger, *supra* note 40, at 952. See also Richard Delgado, *Campus Antiracism Rules: Constitutional Narratives in Collision*, 85 NW. U. L. REV. 343, 373 (1991) (“The dislike increases the distance between the individual and the outgroup, so that the attitude becomes self-reinforcing.”) (citing G. ALLPORT, *THE NATURE OF PREJUDICE* 29, 39–41, 78 (25th Anniversary ed. 1979); M. SHERIF & C. SHERIF, *GROUPS IN HARMONY AND TENSION* 218 (1966)).

⁴² Perlin, *supra* note 9, at 1378–79.

⁴³ See generally STIGMA AND MENTAL ILLNESS (Paul Jay Fink & Allan Tasman eds., 1992) (exploring historical and contemporary fear and resulting stigmatization of people with mental illness); Michael L. Perlin, *Competency, Deinstitutionalization, and Homelessness: A Story of Marginalization*, 28 HOUS. L. REV. 63, 107–8 (1991) (noting society’s fears of people with mental disabilities).

on our city's sidewalks, and try to avoid eye contact. Our hearts beat a little faster. We fear: what if they hurt me? More than that, we fear insanity's implications for ourselves and our loved ones. What if we had to face these demons? How would we manage? What would it say about us?

Our reaction to these fears is a natural one, albeit unflattering. We blame the victim.⁴⁴ A well-known example of this type of thinking appears in rape contexts.⁴⁵ Many people instinctively believe that a woman wearing a short skirt (or even jeans, revealing of a woman's shape as they are)⁴⁶ is at least partially to blame for her victimization.⁴⁷ Like a tourist counting his money on the subway, the victim was "asking for it" by flaunting her body so openly. Those who think this way are not being intentionally cruel; they are protecting their emotional vulnerability. If the victim had done nothing wrong, nothing to bring it on herself, why then, it could happen to us. There is nothing we can do. Rather than feeling vulnerable, we prefer to imagine that the victim is to blame. If she brought it on herself by wearing such a short skirt, then there is something the rest of us can do: we can dress demurely. We right-dressing women will be safe.⁴⁸

⁴⁴ See generally Jon Hanson & Kathleen Hanson, *The Blame Frame: Justifying (Racial) Injustice in America*, 41 HARV. C.R.-C.L. L. REV. 413, 418-29 (2006) (summarizing evidence from social psychology and related fields to explain how people who imagine themselves fair and just routinely blame the victims of inequities and excuse the perpetrators).

⁴⁵ See Deborah L. Rhode, *SPEAKING OF SEX: THE DENIAL OF GENDER INEQUALITY* 11 (1997) ("Our tendency to fault women is apparent in virtually every systematic study of rape."). The phenomenon is equally well-known as a response to accusations of sex discrimination. *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 69 (1986) (holding that a victim's "sexually provocative speech or dress" is "obviously relevant" to whether "she found particular sexual advances unwelcome"). See also Julie Hatfield, *Defining Appropriate Dress in the Workplace*, BOSTON GLOBE, Jan. 16, 1992, at 31 ("[A] recent survey of 1,769 psychiatrists suggests that many of them . . . believe in a link between 'provocative' clothing and sexual harassment and sex crimes.").

⁴⁶ *Nation at a Glance*, THE TELEGRAPH (Calcutta, India), Sept. 2, 2005, available at http://www.telegraphindia.com/1050902/asp/nation/story_5187132.asp (announcing ban on jeans, along with t-shirts and sleeveless tops, for women at Anna University, India's largest technological university); Gajinder Singh, *Girls in Jeans No-Go at Gurdwaras*, THE TELEGRAPH (Calcutta, India), Jan. 10, 2005, available at http://www.telegraphindia.com/1050110/asp/nation/story_4234692.asp (reporting on banning of women wearing jeans in Sikh temples).

⁴⁷ For a thorough discussion of the complex relationship between sexual abuse, women's dress, and societal norms, see Duncan Kennedy, *Sexual Abuse, Sexy Dressing and the Eroticization of Domination*, 26 NEW ENG. L. REV. 1309 (1992).

⁴⁸ See, e.g., Alinor C. Sterling, *Undressing the Victim: The Intersection of Evidentiary and Semiotic Meanings of Women's Clothing in Rape Trials*, 7 YALE J.L. & FEMINISM 87 (1995) (discussing how women's clothing acquires meaning in the context of a rape trial); *Dressing Begins at Home*, TIMES OF INDIA, June 23, 2005, available at <http://timesofindia.indiatimes.com/articleshow/1150922.cms> (reporting on student dress code for women proposed by Mumbai University Vice-Chancellor Vijay Khole, who stated that the

This same phenomenon appears in mental illness contexts. We prefer to think that the mentally ill are faking, or perhaps that they brought their illness on themselves, for example with drug addiction.⁴⁹ Whatever the mechanism, we distance ourselves.⁵⁰ Our desire to make ourselves feel both “sane” and “normal” manifests through differentiation of and hostility toward those whom society labels mentally ill.⁵¹ Conceiving of the mentally ill as irremediably “other,” surely somehow responsible for their own difficulties, we can rest secure in our own mental health. We right-acting persons will be safe.

This phenomenon might explain the bizarre reasoning of the Supreme Court in *Clark v. Arizona*. The Court analyzed Arizona’s insanity statute and its relationship to the mens rea requirement, and managed to take a wrong turn at every juncture. Taking the Justices’ intelligence and conscious goodwill as a given, this unconscious animus toward the mentally ill, resulting from an effort to see them as “other” and thereby protect ourselves from vulnerability, may be the only explanation for the Court’s irrational reasoning.

II. THE CLARK STORY

A. Everyone Agreed on Everything . . .

Everyone agreed that Eric Clark was a paranoid schizophrenic, and everyone agreed that he was suffering from his disease when he shot Officer Moritz. There is no dispute that Eric had been a happy, well-adjusted child.⁵² He played football,⁵³ had a girlfriend,⁵⁴ and tested at or above his grade level academically.⁵⁵ About the time he turned

code was in reaction to a recent rape caused by “revealing clothes”).

⁴⁹ Drug use is common among persons with mental illness, but not as a precipitate to their illness. In *Clark*, for example, even the prosecution expert had ruled out drug use as a cause of the schizophrenia. 2 J.A., *supra* note 3, at 204, *Clark v. Arizona*, 126 S. Ct. 2709 (2006) (No. 05-5966). Instead, the causal relationship runs the other way: the mentally ill often turn to drugs in an effort to self-medicate. *See, e.g.*, 1 J.A. at 25, *Clark v. Arizona*, 126 S. Ct. 2709 (2006) (No. 05-5966). As defense expert Dr. Morenz explained in *Clark*, “the sedating effects help quell [or] . . . diminish some of their symptoms.” *Id.*

⁵⁰ Perlin, *supra* note 9, at 1425–26.

⁵¹ Clark Freshman, *Whatever Happened to Anti-Semitism? How Social Science Theories Identify Discrimination and Promote Coalitions Between “Different” Minorities*, 85 CORNELL L. REV. 313, 436 (2000).

⁵² Brief of Petitioner at 4, *Clark v. Arizona*, 126 S. Ct. 2709 (2006) (No. 05-5966), 2006 WL 282168.

⁵³ 2 J.A., *supra* note 3, at 197–98.

⁵⁴ 1 J.A., *supra* note 49, at 40.

⁵⁵ 2 J.A., *supra* note 3, at 285.

fifteen, though, something happened, and no one disputes that, either. He quit football⁵⁶ and became a loner.⁵⁷ Standardized tests placed him at the 4th or 5th grade level.⁵⁸ He started to dress in multiple layers of clothing, which he did not change for days at a time.⁵⁹ His personal hygiene suffered.⁶⁰ He would scream, wild-eyed, at no apparent provocation, or whisper gibberish.⁶¹

There is no dispute that Eric believed aliens from outer space had invaded Flagstaff, nor that Eric believed the aliens wanted to kill him.⁶² He strung fishing line around his bedroom and computer room, booby-trapped with wind chimes and glassware to alert him against intruders.⁶³ Convinced that his parents, brother, and sister were aliens, too,⁶⁴ he refused to eat anything in his home that was not pre-packaged.⁶⁵ And he really did keep a bird in his car to test the air, only to resign himself to its uselessness when the aliens implanted it with a robotic lung.⁶⁶

There is no dispute about the Clark family's love for Eric. In one desperate attempt to get him the help he so clearly needed, his parents even arranged for him to be arrested.⁶⁷ This got Eric transferred to a psychiatric hospital, but he soon returned home, against medical advice.⁶⁸ His parents were "frantic."⁶⁹ For months they tried to get Eric recommitted, eventually culminating in a two-day frenzy of phone calls to their lawyer's office and five different treatment facilities.⁷⁰ They pleaded with their lawyer; he "had to see [them] that day and Eric was deteriorating so fast that [he] had to figure out a way to get him some help."⁷¹

Eric did not get help that day.⁷² Instead, at about four o'clock the next morning, he began driving his brother's truck around and around

⁵⁶ *Id.* at 197–98.

⁵⁷ *Id.* at 248; Brief of Petitioner, *supra* note 52, at 5.

⁵⁸ 2 J.A., *supra* note 3, at 285.

⁵⁹ *Id.* at 212.

⁶⁰ *Id.*

⁶¹ Brief of Petitioner, *supra* note 52, at 4.

⁶² 2 J.A., *supra* note 3, at 119–20.

⁶³ Brief of Petitioner, *supra* note 52, at 5.

⁶⁴ 2 J.A., *supra* note 3, at 119.

⁶⁵ *Id.* at 223.

⁶⁶ *Id.* at 197, 289–90.

⁶⁷ Brief of Petitioner, *supra* note 52, at 4.

⁶⁸ *Id.*

⁶⁹ *Id.* at 6.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² The plight of families trying to navigate our nation's mental health "system" (inaptly named, as no functional organizational system appears) merits attention in its own right. For an excellent, comprehensive treatment on the subject, see *generally* TORREY, *supra* note 15. The

the neighborhood, stereo blasting.⁷³ There is no dispute that ever since his deterioration, Eric had often played the television or stereo “real loud.”⁷⁴

B. . . . Almost

It is here, in the explanations offered for Eric’s behavior that morning, that the stories diverge. The State’s theory was that Eric had the stereo blasting as a way to lure a police officer to the scene. He had bragged to a friend a few weeks earlier that he would shoot a cop with a .22,⁷⁵ and early in the morning on June 21, 2000, that is exactly what he did.⁷⁶ The State said Eric knew very well that he had killed a police officer; they argued that he ran away to avoid getting caught. After all, the prosecutor argued, Eric stayed hidden for 16 hours,⁷⁷ he had thrown away the murder weapon,⁷⁸ and he gave up only when he saw the laser sight of the police officer’s gun trained on his chest.⁷⁹

The defense offered a different explanation. Dr. Morenz, the defense expert, dismissed the idea that Eric was playing music loudly because he planned to lure police to the scene. Dr. Morenz said bluntly, “[Eric] couldn’t plan anything.” Instead, he explained, it is common for schizophrenics to turn the sound on televisions and stereos to high volumes; they are trying to drown out the voices in their heads.⁸⁰ Although unwilling to ascribe that motive to Eric, the

press also has tried to raise awareness:

The public health and legal systems prevent desperately sick people from getting treatment before they commit crimes and then treat them as criminals after they do But getting someone committed is hard—way too hard—and before [Clark’s parents] could do it, [Clark] had shot and killed police officer Jeffrey Moritz. Now an upstanding law enforcement officer is dead, and someone who should have been a patient is a criminal The real question should be why people like Clark’s parents so often cannot get help before it’s too late.

Editorial, *Insanity Offense*, WASH. POST, April 22, 2006, at A20, 2006 available at WLNR 6756721.

⁷³ 1 J.A., *supra* note 49, at 32.

⁷⁴ Brief of Petitioner, *supra* note 52, at 5.

⁷⁵ Brief of Respondent at 3, *Clark*, 126 S. Ct. 2709 (No. 05-5966), 2006 WL 565617 (citing R.T. 8/7/03, at 8–11 & 16–17).

⁷⁶ *Clark*, 126 S. Ct. at 2716; Brief of Respondent, *supra* note 75, at 5 (citing R.T. 8/7/03, at 94, 114–15; R.T. 8/8/03, at 33).

⁷⁷ Brief of Respondent, *supra* note 75, at 3–4 (noting that the shooting occurred at approximately 5:00 A.M., and that the police apprehended Eric at approximately 9:00 P.M.).

⁷⁸ *Clark*, 126 S. Ct. at 2716.

⁷⁹ Brief of Respondent, *supra* note 75, at 5 (citing R.T. 8/7/03, at 107, 112) (describing Eric as running from pursuing officers until the laser sight of one officer’s weapon “alighted on Clark’s chest”).

⁸⁰ 1 J.A., *supra* note 49, at 32.

State's expert agreed it was common schizophrenic behavior, and therefore a possibility.⁸¹ The defense maintained that Eric believed Officer Moritz was an alien. The defense characterized Eric's flight from the scene as the fear of a paranoid schizophrenic, desperate to save himself from alien invaders. It pointed to the fact that Eric spent the day in a neighbor's shed, and was on a route leading toward home when the police found him. The murder weapon was found on the ground next to the shed, with no apparent effort having been made to conceal it—hardly the act of a criminal trying to evade arrest. Eric was afraid, the defense explained, but of aliens, not law enforcement.

Once arrested, the two sides' stories reconverge. In jail, Eric called his guards aliens, and hollered his arrest was "all part of the conspiracy." He stopped eating and drinking,⁸² not as part of a hunger strike,⁸³ but out of fear that his alien captors would poison him. In March 2001, he was found incompetent to stand trial.⁸⁴ For readers unfamiliar with that standard, the amount of competence required to stand trial is terrifically low—famously described as the ability to "tell the difference between a judge and a grapefruit."⁸⁵

Eric was civilly committed and treated for two years before competency was restored enough to try him.⁸⁶ Still, Eric's belief in aliens was unshaken, though his therapy (which included Haldol, an antipsychotic medication)⁸⁷ had succeeded in weakening his paranoia somewhat. As mentioned earlier, rather than feeling that the aliens were out to kill him, Eric now believed they were on Earth to further interplanetary commerce—that "sugar and broccoli" mission.⁸⁸

Whose version of what Eric was thinking during the disputed events—while he circled the block with the stereo blaring, when he shot Officer Moritz, and as he was running away—mattered for two reasons. First, it mattered because Eric raised an insanity defense. Second, it mattered because he claims he did not have the mens rea necessary for guilt in the first place.

⁸¹ 2 J.A., *supra* note 3, at 253.

⁸² *Id.* at 268.

⁸³ *Id.*

⁸⁴ *Clark*, 126 S. Ct. at 2716.

⁸⁵ Ronald L. Kuby & William M. Kunstler, *So Crazy He Thinks He Is Sane: The Colin Ferguson Trial and the Competency Standard*, 5 CORNELL J.L. & PUB. POL'Y 19, 25 (1995).

⁸⁶ Clark's competence was restored in 2003. *Clark*, 126 S. Ct. at 2716.

⁸⁷ Nat'l Inst. of Mental Health, *Schizophrenia*, NIH Publication No. 06-3517, at 9 (Jan. 2007), available at <http://www.nimh.nih.gov/publicat/nimhschizophrenia.pdf>.

⁸⁸ *Supra* text accompanying note 3 (citing 2 J.A., *supra* note 3, at 120).

III. THE IRRATIONALITY OF *CLARK V. ARIZONA*

A. *The Insanity Defense: Now Even Shorter!*

The first issue addressed in *Clark* was the constitutional adequacy of Arizona's insanity defense, which trimmed the traditional two-pronged formulation down to one prong. Clark asserted that this failure to conform to tradition deprived him of due process. The Court held that it did not.⁸⁹ This Article leaves for others to debate the ultimate constitutional question,⁹⁰ and focuses instead on the reasoning the Court used to arrive at its destination. Following the conventional wisdom on the matter,⁹¹ the Court averred that although Arizona's statute is a truncated version of the traditional formula linguistically, the shortened form in fact equals the lengthier one in meaning.⁹²

This misreading of the statute is the Court's first misstep. The truncated version of the insanity defense in fact excuses fewer defendants than the lengthier version does, and the defendant in *Clark*

⁸⁹ *Clark*, 126 S. Ct. at 2737.

⁹⁰ Thus far, commentators are uniform in their conclusion that the *Clark* Court was wrong, and Arizona's law does in fact work an unconstitutional denial of due process. See, e.g., Allen, *supra* note 8, at 140; Peter Westen, *The Supreme Court's Bout with Insanity: Clark v. Arizona*, 4 OHIO ST. J. CRIM. L. 143 (2006); Jennifer Gibbons, Note, *Clark v. Arizona: Affirming Arizona's Narrow Approach to Mental Disease Evidence*, 48 ARIZ. L. REV. 1155, 1167 (2006).

Nor is this uniformity limited to bleeding-heart, ivory-tower types. As then-Attorney General William French Smith told the Senate Judiciary Committee:

Under any approach, the Government will always be required to prove every element of the statutory offense that is charged. This includes any specific intent or knowledge required by statute. In the rare case, therefore, in which a defendant is so deranged that, for example, he did not know that he was shooting a human being, one of the elements of the offense could not be proved—the mental element of *mens rea*—and he could not be convicted under current law or under any constitutionally supportable change in the law.

Hearings on Bills to Amend Title 18 to Limit the Insanity Defense Before the S. Judiciary Comm., 97th Cong., 2d Sess. 30 (1982) (statement of William French Smith, Att'y Gen. of the United States).

⁹¹ See, e.g., ABRAHAM S. GOLDSTEIN, *THE INSANITY DEFENSE* 50–51 (1967); 1 W. LAFAYE, *SUBSTANTIVE CRIMINAL LAW* § 7.2(b)(3), at 536 & § 7.2(b)(4), at 537 (2d ed. 2003).

⁹² *Clark*, 126 S. Ct. at 2722. As the Court put it:

Clark's argument of course assumes that Arizona's former statement of the *M'Naghten* rule, with its express alternative of cognitive incapacity, was constitutionally adequate (as we agree). That being so, the abbreviated rule is no less so, for cognitive incapacity is relevant under that statement, just as it was under the more extended formulation, and evidence going to cognitive incapacity has the same significance under the short form as it had under the long.

Id.

is a good example of someone who is left uncovered by the shorter version.

1. The Definitions

*M'Naghten's Case*⁹³ is the venerable English judicial opinion commonly cited as codifying the insanity defense as it existed in Victorian times.⁹⁴ Under *M'Naghten*:

[T]o establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong.⁹⁵

To be found insane under *M'Naghten*, then, a defendant must have been suffering from a mental illness that caused either one of two outcomes. First, he can prove⁹⁶ that it caused him not to know “the nature and quality” of his acts. In other words, the defendant’s illness meant he did not know what he was doing. This is commonly called the “cognitive” prong of *M'Naghten*, referring as it does to what defendants know intellectually.⁹⁷ Second, the *M'Naghten* formulation

⁹³ *M'Naghten's Case*, (1843) 8 Eng. Rep. 718 (H.L.).

⁹⁴ See Anthony Platt & Bernard L. Diamond, *The Origins of the “Right and Wrong” Test of Criminal Responsibility and Its Subsequent Development in the United States: An Historical Survey*, 54 CAL. L. REV. 1227, 1250–57 (1966).

⁹⁵ *M'Naghten*, 8 Eng. Rep. at 719.

⁹⁶ In many jurisdictions, insanity is an affirmative defense that must be proved by the defendant. The Insanity Defense Reform Act (codified at 18 U.S.C. § 17 (2000)), established insanity as an affirmative defense in federal court:

It is an affirmative defense to a prosecution under any Federal statute that, at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts.

See also *Clark*, 126 S. Ct. at 2731 (describing various legislatively defined burdens of coming forward with evidence and burdens of proof concerning the insanity defense). The legislature also, of course, can require affirmative proof by the State of sanity, for example by the way it describes a criminal offense. *Dixon v. United States*, 126 S. Ct. 2437, 2443–44 (2006).

⁹⁷ See, e.g., JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL LAW* 375 (4th ed. 2006). The cognitive prong of the *M'Naghten* formula is incorporated, along with a volitional prong that is absent from *M'Naghten*, into the Model Penal Code: “A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law.” MODEL PENAL CODE § 4.01(1) (1962). According to the Model Penal Code’s explanatory notes, “An individual’s failure to appreciate the criminality of his conduct may consist in a lack of awareness of what he is doing or a misapprehension of material circumstances, or a failure to apprehend the significance of his actions in some deeper

allows, even if the defendant did know what he was doing, that he can still establish insanity by proving that his illness caused him not to know that what he was doing was wrong. This is commonly called the "moral" prong of *M'Naghten*, referring as it does to a defendant's capacity to distinguish right and wrong.⁹⁸

The Arizona statute used to mirror *M'Naghten* quite closely.⁹⁹ After public outcry over the case of one Mark Austin, however, in which the killer's acquittal by reason of insanity was followed by a six-month hospitalization and then release into the community,¹⁰⁰ the Arizona Legislature passed "Laura's Law,"¹⁰¹ altering Arizona's insanity defense.¹⁰² The resulting Arizona statute reads in relevant part, "[a] person may be found guilty except insane if at the time of the commission of the criminal act the person was afflicted with a mental disease or defect of such severity that the person did not know the criminal act was wrong."¹⁰³ Whereas under *M'Naghten* and the former Arizona law either cognitive or moral incapacity would excuse, this revised Arizona law excuses moral incapacity alone. It is

sense." *Id.*

⁹⁸ Platt & Diamond, *supra* note 94, at 1250–57. The "wrong" in *M'Naghten* is more commonly understood to be a moral, rather than a legal, wrong. See Grant H. Morris & Ansar Haroun, "God Told Me to Kill": Religion or Delusion?, 38 SAN DIEGO L. REV. 973, 1013 & n. 247 (2001) (cataloguing jurisdictions that interpret the *M'Naghten* "wrong" as either a moral or a legal transgression). But see State v. Crenshaw, 659 P.2d 488, 493 (Wash. 1983) ("If wrong [in *M'Naghten*] meant moral wrong judged by the individual's own conscience, this would seriously undermine the criminal law, for it would allow one who violated the law to be excused from criminal responsibility solely because, in his own conscience, his act was not morally wrong."). The Model Penal Code, *supra* note 97, permits jurisdictions to opt for either formulation, in choosing between "criminality" (a legal wrong) and "wrongfulness" (a moral wrong).

⁹⁹ The former Arizona Revised Code stated:

A person is not responsible for criminal conduct if at the time of such conduct the person was suffering from such a mental disease or defect as not to know the nature and quality of the act or, if such person did know, that such person did not know that what he was doing was wrong.

ARIZ. REV. STAT. ANN. § 13-502 (West 1978). See also State v. Schantz, 403 P.2d 521, 525 (Ariz. 1965) (describing Arizona law as following *M'Naghten*'s two-part test).

¹⁰⁰ Renée Melançon, Note, *Arizona's Insane Response to Insanity*, 40 ARIZ. L. REV. 287, 290 (1998) (citing Kim Kelliher, *Austin, Acquitted in Killing by Reason of Insanity, to Be Freed*, ARIZ. DAILY STAR, Aug. 23, 1991, at 1A).

¹⁰¹ Named for Austin's wife and victim, Laura Griffin-Austin. See *id.*

¹⁰² *Man Acquitted in Wife's Killing Wants Insanity-Case Rules Lifted*, DALLAS MORNING NEWS, Mar. 14, 1995, at 18D.

¹⁰³ ARIZ. REV. STAT. ANN. § 13-502(A) (West 2001). If the defense is successful, the judge will order the defendant committed to a mental health facility for the same amount of time the defendant would have served in prison in the absence of a successful insanity defense. See ARIZ. REV. STAT. § 13-502(D).

this pruning of the cognitive prong to which Clark objected, as it is that prong that could have excused him.

2. The Holding

In rebuffing Clark's objection, the Court explained that the single-pronged statute only seems to offer less shelter than the traditional, two-pronged formulation.¹⁰⁴ The Court wrote: "evidence going to cognitive incapacity has the same significance under the short form as it had under the long"¹⁰⁵ because "cognitive incapacity is itself enough to demonstrate moral incapacity."¹⁰⁶ For support, the Court quoted a variety of sources asserting, in essence, that where defendants do not know the nature and quality of their acts, they cannot know their acts were wrong.¹⁰⁷

In a footnote, the Court explains that an insanity defendant "must have understood that he was committing the act charged and that it was wrongful,"¹⁰⁸ citing the statutory language in support: "[a] person may be found guilty except insane if . . . the person did not know the criminal act was wrong." It is here that the Court, like the others it cites, goes astray. The statutory language does not actually require understanding that he was committing the act charged. The statute requires that the person did not know "the criminal act" was wrong. This is different from knowing that one was doing the criminal act.

3. The Otherwise Inexplicable

Conventional wisdom holds that the core of the *M'Naghten* test is its moral prong, and that the cognitive prong is redundant.¹⁰⁹ As with so many things, the conventional wisdom here is wrong. A functional moral compass does not substitute for a functional cognitive one.

¹⁰⁴ *Clark*, 126 S. Ct. at 2722-23.

¹⁰⁵ *Id.* at 2722.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 2722-23 (citing *State v. Chavez*, 693 P.2d 893, 894 (Ariz. 1984)). The Court also quoted from the Court of Appeals opinion in *Clark*, 2 J.A., *supra* note 3, at 350, and from ABRAHAM S. GOLDSTEIN, *THE INSANITY DEFENSE* 50-51 (1967); 1 W. LAFAVE, *SUBSTANTIVE CRIMINAL LAW* § 7.2(b)(3), at 536 & § 7.2(b)(4), at 537 (2d ed. 2003); and 1 R. GERBER, *CRIMINAL LAW OF ARIZONA* 502-07, n.1 (2d ed. 1993).

¹⁰⁸ *Clark*, 126 S. Ct. at 2723 n.23.

¹⁰⁹ See, e.g., DRESSLER, *supra* note 97, at 375 ("[A]nyone who does not know what she is doing . . . will also 'fail' the right-and-wrong test . . ."); GOLDSTEIN, *supra* note 107, at 50 ("[I]f the accused did not know the nature and quality of his act, he would have been incapable of knowing it was wrong."). See also Judd F. Sneirson, Comment, *Black Rage and the Criminal Law: A Principled Approach to a Polarized Debate*, 143 U. PA. L. REV. 2251, 2268 (1995) (observing redundancy in the two *M'Naghten* prongs).

The *M'Naghten* standard reads: "the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong."¹¹⁰ In fact, this test lays out two distinct prongs. First, did the defendant not know what he was doing? To use that hoary old chestnut of Criminal Law professors, did the defendant, while squeezing the victim's neck, think he was squeezing a lemon?¹¹¹ To use the facts of *Clark*, did the defendant, while shooting a police officer, think he was shooting an alien? If what the defendant believed himself to be doing differs from what the defendant actually did, then *M'Naghten* calls him legally insane.

M'Naghten's second prong applies only if the defendant did know what he was doing. In these cases, defendants know they are killing people; in *Clark*'s case, that would mean knowing he was killing a person who was police officer. In these situations, where the defendants did know the nature and quality of their acts, *M'Naghten* raises the question for which it has become famous: did they know what they were doing was wrong? Perhaps the defendant, knowing he is killing a person (even a person who is a police officer), believes that God has commanded him to do it,¹¹² or that he must do so to

¹¹⁰ *M'Naghten's Case*, 8 Eng. Rep. 718, 722 (1843).

¹¹¹ MODEL PENAL CODE § 4.01 cmt. at 166 (1962). This far-fetched example's first appearance in print may have been in an early draft of the Model Penal Code. Heathcoate Wales, *An Analysis of the Proposal to "Abolish" the Insanity Defense in S. 1: Squeezing a Lemon*, 124 U. PA. L. REV. 687, 712 (1976) (crediting illustration to § 4.01 cmt. 2, tentative draft No. 4, 1955).

¹¹² For example, deific decree has been enshrined into Washington's insanity law:

A narrow exception to the societal standard of moral wrong has been drawn for instances wherein a party performs a criminal act, knowing it is morally and legally wrong, but believing, because of a mental defect, that the act is ordained by God: such would be the situation with a mother who kills her infant child to whom she is devotedly attached, believing that God has spoken to her and decreed the act. Although the woman knows that the law and society condemn the act, it would be unrealistic to hold her responsible for the crime, since her free will has been subsumed by her belief in the deific decree.

State v. Crenshaw, 659 P.2d 488, 494 (Wash. 1983) (citations omitted).

For primers on the deific decree, or divine command, defense, see Andrew J. Demko, Note, *Abraham's Deific Defense: Problems with Insanity, Faith, and Knowing Right from Wrong*, 80 NOTRE DAME L. REV. 1961 (2005), Jeanine Girgenti, *Bridging the Gap Between Law and Psychology: The Deific Decree*, 3 RUTGERS J. L. & RELIGION 10 (2001), Christopher Hawthorne, Note, "Deific Decree": *The Short, Happy Life of a Pseudo-Doctrine*, 33 LOY. L.A. L. REV. 1755 (2000), and Morris & Haroun, *supra* note 98. See also Margaret E. Clark, Comment, *The Immutable Command Meets the Unknowable Mind: Deific Decree Claims and the Insanity Defense After People v. Serravo*, 70 DENV. U. L. REV. 161 (1992) (commenting on Colorado case limiting the defense).

prevent a holocaust,¹¹³ or simply to protect himself¹¹⁴ or another¹¹⁵ from harm. Under these circumstances, a defendant knows the nature and quality of his acts, but not their wrongfulness. He rightly comprehends the *what*; his error lies in the *why*.¹¹⁶

These are two separate prongs, not collapsible into the one that so many learned commentators have suggested. Their separateness is demonstrated by the fact that each can exist without the other. First, one can know what one is doing but fail to understand that it is a wrong thing. For example, one might know that one is killing a police officer but believe it is the right thing to do, perhaps because God commanded it or because doing so would save the world. This defendant qualifies under *M'Naghten* despite failing the first prong. He understands what he is doing: he is killing a police officer. He qualifies under *M'Naghten* because he meets the second prong. He fails to understand that killing a police officer, at least under the circumstances as he believes them to be,¹¹⁷ is wrong.

Second, one can fail to know what one is doing while still knowing that what one is doing is wrong. This sounds more convoluted than it is. Many commentators assert the contrary, simply stating some variation of "one can't know what one is doing is wrong unless one

¹¹³ See, e.g., *B.C. v. State*, 40 S.W.3d 315, 316 (Ark. 2001) (juvenile defendant believed God had directed him to save the world).

¹¹⁴ See, e.g., *People v. Duckett*, 209 Cal. Rptr. 96, 98–99, 104 (Cal. Ct. App. 1984) (defendant believed one victim was the devil and the other a witch, and heard auditory command hallucinations telling him one victim was going to kill him or have him killed).

¹¹⁵ See, e.g., *Trial of Texas Mother Begins Third Week*, CNN.com, Mar. 4, 2002, http://www.courttv.com/trials/yates/030402_cnn.html (Andrea Yates believed that by drowning her children she would save them from hell, and send them to heaven instead).

¹¹⁶ See *Morse & Hoffman*, *supra* note 6, at 19 ("[M]ental disorder produces crazy desires or crazy reasons for action, but it virtually never prevents a defendant from meeting the law's criteria for . . . mens rea"). See also *id.* at 22–23 (illustrating the point that *M'Naghten*, *Andrea Yates*, and a person who hallucinates that God commanded a killing all *intended* to kill). *Id.* at 37 (noting that both "cognitive" and "moral" prongs of *M'Naghten* "are cognitive questions [that] differ only in the object of the knowledge required").

¹¹⁷ Although the Model Penal Code takes the circumstances as the actor believes them to be in providing defenses, e.g., MODEL PENAL CODE § 3.05 (1962), unreasonable beliefs will not exculpate for recklessness or negligence crimes.

When the actor believes that the use of force upon or toward the person of another is necessary for any of the purposes for which such belief would establish a justification under Sections 3.03 to 3.08, but the actor is reckless or negligent in having such belief or in acquiring or failing to acquire any knowledge or belief that is material to the justifiability of his use of force, the justification afforded by those Sections is unavailable in a prosecution for an offense for which recklessness or negligence, as the case may be, suffices to establish culpability.

knows what one is doing” as a self-evident truth before moving on to their next point.¹¹⁸ They are wrong.

One can know very well that *x* is wrong without realizing that what one is doing is *x*. For example, Clark might know very well that it is wrong to kill police officers. Hence, he knows that what he is *in fact* doing is wrong. Unfortunately for him, he did not know that was what he was doing; he thought he was killing a space alien. His perfectly accurate knowledge of the wrongfulness of “the criminal act” (here, killing a police officer) could not help him, because under the circumstances as he believed them to be, that knowledge was not relevant. He might also know that it is wrong to steal, or to lie, or to disrespect one’s parents; but since he was not facing any of those situations, his knowledge of their wrongfulness could not guide him. Similarly, his knowledge that it is wrong to kill police officers could not help him, because he did not know he was facing that very situation. He did not realize he was committing “the criminal act,” but instead believed himself to be doing something else entirely—in this case, shooting an alien. This defendant qualifies under *M’Naghten* despite failing the second prong. He knows what he is doing is wrong: killing a police officer is wrong. He qualifies under *M’Naghten* because he meets the first prong. He fails to understand that what he is doing is killing a police officer.

States and commentators who have truncated their preferred insanity tests into a single prong, believing the truncation to make no difference, have conflated two pieces of knowledge. Fundamentally, knowledge that what one is *actually* doing is wrong is different from knowledge that what one *thinks* one is doing is wrong.

This is precisely the error at play in *Clark*. The relevant Arizona statute reads: “A person may be found guilty except insane if at the time of the commission of the criminal act the person was afflicted with a mental disease or defect of such severity that the person did not know the criminal act was wrong.”¹¹⁹ In this truncated statute, the only question is whether the defendant knew “the criminal act” was wrong. If the mental illness is the kind that impairs reality testing, however, this is hardly a relevant question. While the defendant may know all sorts of moral truths (*e.g.*, it is wrong to lie, cheat, steal, kill, and so on), his mental illness prevents him from relating these truths to what is actually happening.

¹¹⁸ See, *e.g.*, GOLDSTEIN, *supra* note 91, at 50–51; LAFAYE, *supra* note 91, § 7.2(b)(3), at 536 & § 7.2(b)(4), at 537; Morse & Hoffman, *supra* note 6, at 38.

¹¹⁹ ARIZ. REV. STAT. § 13-502(A) (2005).

Such truncation leads to truly anomalous results. The defendant who believes he is squeezing lemons may know full well the wrongfulness of the criminal act. He knows that killing is wrong. Since he does not realize that is what he is doing, however, his abstract moral knowledge condemns him. Him the truncated statute convicts. The defendant who knows he is killing a police officer, on the other hand, might not know that it is wrong. Maybe he believes God commanded it, or that it will save the human race from extinction. In any event, if he does not know the act of killing a police officer is wrong, then his lack of moral grasp saves him. Him the truncated statute acquits. Thus, the truncated single-prong formulation of insanity means punishing the defendant who believes he is squeezing lemons, while excusing the one who knows he is killing a police officer.¹²⁰

The point of demonstrating this absurdity is not to argue that we are wrong to excuse defendants who have cognitive, but not moral, understanding of their actions. The defendant who kills a police officer believing God commanded it, or that his action would save the world, is not a responsible moral agent deserving of punishment.¹²¹ Instead, the point is that if we are right to excuse these defendants—and indeed we are—then surely we must excuse the defendant who does not even realize he is killing anyone. The *Clark* Court has perpetuated a mistake in validating the idea that *M’Naghten’s* two prongs are redundant. Unfortunately for Eric and others like him, and unfortunately for the philosophical grounding of our criminal justice system, this mistake denies legal protection to precisely that class of insane defendants who are the least culpable.

B. Mental Illness and Mens Rea: Can This Marriage Be Saved?

The second issue addressed in *Clark* is the relationship between the insanity defense and the mens rea requirement. The trial judge in *Clark* announced that he would not consider evidence of Clark’s mental illness on the issue of mens rea because the Arizona Supreme Court case, *Arizona v. Mott*,¹²² forbade it.¹²³ Under *Mott*, the trial

¹²⁰ To the extent that this is not the result, and that both kinds of defendants are equally likely to be acquitted by reason of insanity, it only means that jurors and judges have fallen victim to the same conflation as the commentators. The statute’s plain meaning calls for the absurd result.

¹²¹ See Elizabeth S. Scott & Laurence Steinberg, *Blaming Youth*, 81 TEX. L. REV. 799, 822 (2003) (“Only a blameworthy moral agent deserves punishment at all . . .”).

¹²² 931 P.2d 1046 (Ariz. 1997) (en banc) *habeas corpus granted sub nom.* *Mott v. Stewart*, 2002 WL 31017646 (D. Ariz. 2002)).

¹²³ *Clark*, 126 S. Ct. at 2717 (quoting *State v. Mott*, 931 P.2d 1046, 1051).

judge said, "Arizona does not allow evidence of a defendant's mental disorder short of insanity . . . to negate the mens rea element of a crime."¹²⁴ The trial judge permitted this evidence to go to the affirmative defense of insanity, but not to disprove mens rea.¹²⁵ In his second assignment of error on appeal, Clark claimed that this rule denied him the right to present a defense.

1. The Definitions

Clark was convicted under a statute reading: "A person commits first degree murder if . . . [i]ntending or knowing that the person's conduct will cause death to a law enforcement officer, the person causes the death of a law enforcement officer who is in the line of duty."¹²⁶ Two elements thus turn a run-of-the-mill murder into a first-degree murder: the death must occur while the officer is on duty, and the killer must know that the victim is a police officer. No doubt Officer Moritz was on duty when Clark killed him. The officer had arrived in Clark's neighborhood in response to 911 calls reporting the blaring stereo in the wee hours of the morning. Officer Moritz was in uniform and the lights on his patrol car were flashing. The fact that the officer was on duty is not in dispute. Instead, Clark claims he did not know it was a police officer. Thus, Clark wanted to offer evidence of his mental illness to support his claim that he lacked one of the elements of the statute: the mens rea of knowledge that the victim was a police officer.

The reasons Clark would offer on this point depend on evidence of his mental illness. Although a normal person would have recognized that Officer Moritz was a police officer—again, the uniform, patrol car, and flashing lights—Clark's paranoid schizophrenia meant that he believed those things were all part of an elaborate ruse. Aliens had taken over Flagstaff, impersonating government agents and other authority figures, and Clark believed Officer Moritz was just another alien.

Given that self-same uniform and patrol car, the fact-finder may have found this difficult to believe, but the Supreme Court's ruling in *Clark* means Clark properly was prevented even from making the argument. In other words, the statute requires knowledge that the victim was a police officer, and this case denies the defendant the

¹²⁴ *Id.*

¹²⁵ *Id.* at 2717 n.3 (permitting the evidence to be introduced at all only because "it goes to the insanity issue and because we're not in front of a jury").

¹²⁶ ARIZ. REV. STAT. ANN. § 13-1105(A)(3) (2005).

opportunity to show he did not have that knowledge. The government put on its evidence to that effect (uniform, patrol car, flashing lights), but the defendant (whose evidence would explain how although a normal person would have known it was a police officer under those circumstances, he did not) may not offer his. Clark claimed this violates due process by denying him the opportunity to present a defense.

2. The Holding

The Court disagreed, explaining that the rule articulated in *Mott* is a constitutional one.¹²⁷ First, the Court described three "categories of evidence with a potential bearing on mens rea."¹²⁸ "Observational evidence," as one might guess, refers to a witness's observations.¹²⁹ These might include testimony that a witness saw Clark string the fishing line around his room, or heard him talk about aliens or play the stereo at disturbingly loud volumes. This kind of evidence, the Court said, is not restricted to proving insanity, and also may be offered on the issue of mens rea.¹³⁰

Next, the Court described "mental-disease evidence," or a witness's opinion that the defendant suffered from a particular mental disease.¹³¹ Lastly, the Court described "capacity evidence," referring to testimony about a defendant's "capacity for cognition and moral judgment (and ultimately also his capacity to form mens rea)."¹³² These two, "mental-disease evidence" and "capacity evidence," are both opinion evidence.¹³³ Rather than reporting facts observed, these last two offer interpretations of those facts: the first determining that, in light of the symptoms observed, the defendant suffers from a

¹²⁷ *Clark*, 126 S. Ct. at 2716, 2724.

¹²⁸ *Id.* at 2724.

¹²⁹ *Id.* ("testimony from those who observed what Clark did and heard what he said"). Oddly, the *Clark* majority wrote that "this category would also include testimony that an expert witness might give about Clark's tendency to think in a certain way and his behavioral characteristics." *Id.*

¹³⁰ *Id.* at 2724-25 ("This evidence . . . is the kind of evidence that can be relevant to show what in fact was on Clark's mind when he fired the gun.").

¹³¹ *Id.* at 2725.

¹³² *Id.* As Professor Morse and Judge Hoffman rightly point out, the focus on a defendant's "capacity" is puzzling from the beginning:

If an agent lacks the capacity to do something, it follows that the agent did not do it in fact. . . . But asking about a defendant's capacity to form a mental state never provides better information than inquiring directly whether the requisite mens rea was formed in fact, which is the ultimate legal question.

Morse & Hoffman, *supra* note 6, at 20.

¹³³ *Clark*, 126 S. Ct. at 2725.

particular mental illness, and the second commenting on what effect this had on the defendant's mental state.¹³⁴ In Clark's case, that would be the experts' testimony that Clark was suffering from paranoid schizophrenia ("mental disease evidence") and what effect that disease had on Clark's capacity to stay in touch with reality, to know what was going on and what he was doing, and his capacity to know right from wrong ("capacity evidence").¹³⁵ Mental-disease evidence and capacity evidence, the Court concluded, were restricted by *Mott* to proving insanity, and may not be used to show a lack of mens rea.¹³⁶

The Court gave two reasons why *Mott*'s restriction is permissible. First, the Court explained, while the State bears the burden of proving the elements of the crime beyond a reasonable doubt, including mens rea,¹³⁷ legislatures can require defendants to bear the burden of proving insanity.¹³⁸ When mental disease and capacity evidence are admitted on mens rea, the Court said, the effect is to erase the difference. Instead of requiring that the defendant establish insanity by clear and convincing evidence, a difficult hurdle to leap, the same evidence in a mens rea context need only establish reasonable doubt.¹³⁹ States have a right to require that their chosen burden of proof be met without subversion,¹⁴⁰ the Court said, and permitting evidence about mental illness to go to mens rea would subvert that choice. Second, the Court explained, "well-established rules of evidence permit trial judges to exclude evidence if its probative value is outweighed by . . . confusion of the issues, or potential to mislead

¹³⁴ *Id.*

¹³⁵ The *Clark* majority asserts that mental disease and capacity evidence will come from experts "characteristically but not always." *Id.* at 2725 & nn. 28–29. It certainly would be unusual for a lay witness to be in a position to offer this sort of evidence, given the evidentiary requirements:

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702 [Testimony by Experts].

FED R. EVID. 701.

¹³⁶ *Clark*, 126 S. Ct. at 2726.

¹³⁷ *Id.* at 2729 (citing *Patterson v. New York*, 432 U.S. 197, 210–11 (1977); *In re Winship*, 397 U.S. 358, 361–64 (1970)).

¹³⁸ *Id.* at 2731 ("Or a jurisdiction may place the burden of persuasion on a defendant to prove insanity . . .").

¹³⁹ *Id.* at 2725–29, 31.

¹⁴⁰ *Id.* at 2732–33.

the jury.”¹⁴¹ “And if evidence may be kept out entirely, its consideration may be subject to limitation”¹⁴² This limitation is justified, the Court reasoned, because mental-disease evidence and capacity evidence are both suspect.¹⁴³

This section explores several additional confusions perpetuated by the Court in its analysis of the relationship between the mens rea requirement and the insanity defense. The Court disserves future insanity law in three ways: (a) by cataloging relevant evidence into observational, mental-illness, and capacity evidence, (b) by imagining a burden shift, and (c) by casting aspersions on expert testimony in insanity cases.

3. *The Otherwise Inexplicable*

a. *Observational, Mental-Illness, and Capacity Evidence*

First, the Court’s breakdown of relevant evidence into observational, mental-disease, and capacity categories has no basis in anything that has come before.¹⁴⁴ The Court claims Clark failed to “apprise the Arizona courts that he believed the trial judge had erroneously limited the consideration of observation evidence. . . . This sort of evidence was not covered by the *Mott* restriction, and confining it to the insanity issue would have been an erroneous application of *Mott* as a matter of Arizona law.”¹⁴⁵ This is quite a statement, since no division of evidence into “observational,” “mental-disease,” and “capacity” types existed until the Court conjured those terms into being in *Clark*. As Justice Kennedy wrote in dissent:

[T]he Court’s tripartite structure is something not addressed by the state trial court, the state appellate court, counsel on either side in those proceedings, or the briefs the parties filed with us. *The Court refuses to consider the key part of Clark’s claim because his counsel did not predict the Court’s own invention.* It is unrealistic, and most unfair, to hold that Clark’s counsel erred in failing to anticipate so novel an approach.¹⁴⁶

¹⁴¹ *Id.* at 2732 (quoting *Holmes v. South Carolina*, 126 S. Ct. 1727, 1732 (2006)).

¹⁴² *Id.*

¹⁴³ *Id.* at 2734 (noting the risks that accompany both types of evidence).

¹⁴⁴ *Id.* at 2738 (Kennedy, J., dissenting).

¹⁴⁵ *Id.* at 2727.

¹⁴⁶ *Id.* at 2738 (Kennedy, J., dissenting) (emphasis added).

Indeed, it may be overly demanding to expect Clark to have anticipated this novel taxonomy and crafted his objections and appeal around it. For the Court to fault defense counsel for failing to object, not to the wholesale exclusion of evidence about his client's mental illness, but specifically to the exclusion of "observation" evidence, as opposed to "mental disease and capacity" evidence, takes real chutzpah: these categories did not exist until the Court birthed them in its opinion, nearly three years after the trial counsel would have had to object.¹⁴⁷

In addition, the distinctions the Court draws among these types of evidence is elusive at best. Fundamentally, the Court's unrestricted "observation" evidence differs from its restricted-use "mental disease" and "capacity" evidence in the same way that evidence based on personal knowledge¹⁴⁸ differs from evidence of "opinion or inference"—which is to say, it does not differ much.¹⁴⁹

The drafters of the Federal Rules of Evidence (as well as those of every other jurisdiction with analogous rules of evidence) addressed this very distinction in 1972.¹⁵⁰ When the witness is a layperson,¹⁵¹ evidence rules permit opinion and inference to the same extent as any other testimony, so long as there is a rational basis in personal knowledge for the opinion and it will be helpful to explain the witness's testimony.¹⁵²

¹⁴⁷ The Supreme Court released its opinion in *Clark* on June 29, 2006; Clark's trial occurred in August 2003. See 1 J.A., *supra* note 49, at 1 (noting relevant docket entries).

¹⁴⁸ FED. R. EVID. 602 ("Lack of Personal Knowledge. A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony. This rule is subject to the provisions of rule 703, relating to opinion testimony by expert witnesses.").

¹⁴⁹ *Cf.* Morse & Hoffman, *supra* note 6, at 43 ("All clinical judgments are, by their very nature, informed not just by the clinician's observation of the particular patient being seen, but by the accumulated wisdom of observations of other patients by themselves and other clinicians and by the findings from empirical studies.").

¹⁵⁰ The United States Supreme Court submitted the proposed Rules to Congress on November 20, 1972. Paul R. Rice & Neals-Erik William Delker, *Federal Rules of Evidence Advisory Committee: A Short History of Too Little Consequence*, 191 F.R.D. 678, 684 & n.55 (2000).

¹⁵¹ When the witness is an expert, opinions are again permitted, so long as they are based on sufficient facts using good science applied soundly. FED. R. EVID. 702 ("Testimony by Experts. If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case."). See discussion of expert witness opinions *infra* at Part III.B.3.c.

¹⁵² FED. R. EVID. 701 ("Opinion Testimony by Lay Witnesses. If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to

The reasons for this are common-sense. First, the difference between personally observed facts and opinions or inferences is perhaps less clear than one might imagine. A witness who testifies "I saw Dick Clark in Times Square on New Year's Eve," might think she is only reporting what she saw—"just the facts, ma'am" as Sergeant Friday might have implored on *Dragnet*.¹⁵³ But if we were to examine her closely, what did she really personally observe? She saw what looked like a human being, about the same height, weight, facial structure, coloring, mannerisms, and so on, as she associates with Dick Clark. In her opinion (or according to her inference), what she was observing was the man himself, rather than someone who looked like Dick Clark, a hallucination, or a hologram. And of course this exercise can be repeated with any "fact" observed. Anything a witness "saw" is in fact nothing more than a combination of physical input to her nervous system and interpretation of those inputs.¹⁵⁴ So the difference between observations and opinions or inferences is not so clear as it might seem.

Furthermore, even if we could identify a stopping point where witnesses truly were simply relating their unmediated observations, such testimony by witnesses would not make terribly useful evidence. To take the stand and say, "I saw what looked like a man, of x height and y weight with z facial structure" will only bewilder the jury tasked with deciding whether Dick Clark was in Times Square on New Year's Eve. To put it bluntly, "just the facts, ma'am" does a lousy job of explaining what the witness observed. To meaningfully communicate, we must constantly relate our inferences and opinions to mediate and explain our observations.¹⁵⁵

those opinions or inferences which are (a) rationally based on the perception of the witness, and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.").

¹⁵³ This famous truncated form of the interrogation actually comes from a *Dragnet* spoof, not from the famous television series. STAN FREBERG, *Little Blue Riding Hood*, on ST. GEORGE AND THE DRAGONET (Capitol Records 1953).

¹⁵⁴ A. DAVID MILNER & MELVYN A. GOODALE, *THE VISUAL BRAIN IN ACTION* 1-3 (1996).

¹⁵⁵ "It makes little sense to divorce the observation evidence from the explanation that makes it comprehensible—namely, expert psychiatric testimony." *Clark*, 126 S. Ct. at 2739 (Kennedy, J., dissenting). For the Court to resurrect a distinction between what is observed and what is inferred in the case of mental illness is odd, but not unheard of. A similar unworkable distinction, done away with by the Rules drafters and later resurrected by Congress, is that concerning testimony by witnesses on the "ultimate issue." See FED. R. EVID. 704 & discussion *infra* at Part III.B.3.c.

Since observations of the mentally ill will make more sense when mediated by opinion testimony, mental disease evidence and capacity evidence should be permitted. This is particularly true when the subject matter is appropriate for an expert, as mental disease and capacity evidence commonly will be.¹⁵⁶ For example, testimony that Eric Clark listened to the stereo, television, and so on at loud volumes presumably would be admissible as "observation" evidence. Its potential significance would be lost on the jury, however, in the absence of an expert who could explain that persons suffering from paranoid schizophrenia often do these things to drown out the voices they hear.¹⁵⁷ When attempting to divine what mental state a defendant had, especially, expert opinions and inferences mediating observations will be most helpful to a fact-finder, and should be permitted.

b. Burden Shift

Regardless, the Court went on to hold that Arizona (and other states that do likewise) is constitutionally permitted to restrict use of mental disease and capacity evidence to the affirmative defense of insanity, not allowing it to be used to disprove mens rea. The Court reasoned that to permit the evidence on mens rea effectively changes the burden of proof on an insanity defense. To show insanity in Arizona, the defendant must provide clear and convincing evidence. To defeat the prosecution's burden on mens rea, the defendant needs to raise only a reasonable doubt. Thus, the Court fretted in *Clark*, allowing evidence of mental illness on mens rea effectively allows the defendant to substitute the easier burden of raising reasonable doubt for the harder one of establishing clear and convincing evidence.

Here, too, the Court sows confusion. Allowing evidence of mental illness on mens rea does not change the burden of proof on insanity at all.¹⁵⁸ The difficulty arises from a misunderstanding of the relationship between insanity and mens rea. These are two different

¹⁵⁶ See *supra* note 135 and accompanying text.

¹⁵⁷ See 1 J.A., *supra* note 49, at 32. Analogously, what looks to police or prosecution like consciousness of guilt regarding a crime might in fact be a paranoid schizophrenic's reaction to seeing anyone approach at any time. Professor Morse and Judge Hoffman provide yet another example. "[A] psychotically disorganized person gets lost . . . and cannot find his way home. To escape the cold, he breaks into a building . . . and is charged with burglary on the theory that he intended to steal." Morse & Hoffman, *supra* note 6, at 24. An expert's testimony regarding the defendant's mental state in such a case could assist the jury in understanding that what might otherwise look like a burglary is really only a lost person trying to stay warm. *Id.*

¹⁵⁸ But see Allen, *supra* note 8, at 137–39 (agreeing to "potential conflict" in burdens of proof, though ultimately concluding such conflict "is entirely beside the point"); Westen, *supra* note 90, at 159 (asserting necessary contradiction in requiring such burdens of proof).

things. Although both might be at issue at trial, and although the same evidence might go to prove both, they are not interchangeable.¹⁵⁹ The *Clark* majority, in rejecting the argument that mens rea and insanity are entirely distinguishable,¹⁶⁰ misunderstands. In fact, the prosecution must prove mens rea beyond a reasonable doubt, and the defendant in Arizona who wishes to raise an insanity defense must prove insanity by clear and convincing evidence. These are two different points.

To illustrate the separateness of these inquiries, some background is helpful. To be guilty of a crime, an actor must satisfy three elements: actus reus, mens rea, and a lack of defenses.¹⁶¹ In other words, the actor must have committed the prohibited act¹⁶² with the prohibited mental state¹⁶³ and it must also be true that no defenses apply.

The first task of the prosecutor is to demonstrate that the actor committed the prohibited act.¹⁶⁴ The defendant charged with murder must have killed a human being,¹⁶⁵ the defendant charged with arson must have started a fire;¹⁶⁶ and so on for any other enumerated¹⁶⁷ criminal behavior. If the defendant did not commit the prohibited act, there can be no conviction.¹⁶⁸ Needless to say, caveats and counter-examples abound: whether possession is properly considered an "act" or a "status",¹⁶⁹ the sufficiency of the small amount of act required for

¹⁵⁹ "[T]he mens rea issue is entirely distinct from the legal insanity issue, even if precisely the same evidence would be relevant to adjudicating both claims." Morse & Hoffman, *supra* note 6, at 32.

¹⁶⁰ *Clark*, 126 S. Ct. at 2731 n.38 (2006).

¹⁶¹ See, e.g., DRESSLER, *supra* note 97, at 91 (discussing actus reus and mens rea), 217 (discussing defenses).

¹⁶² The actus reus is conduct that "includes a voluntary act or the omission to perform an act of which he is physically capable." MODEL PENAL CODE § 2.01(1) (2001).

¹⁶³ See, e.g., MODEL PENAL CODE § 2.02(1) (2001) ("[A] person is not guilty of an offense unless he acted purposely, knowingly, recklessly or negligently, as the law may require, with respect to each material element of the offense.").

¹⁶⁴ Note, though, that the jury need not agree on what prohibited act the defendant committed. *Schad v. Arizona*, 501 U.S. 624, 632 (1991).

¹⁶⁵ For example, the murder statute at issue in *Clark* requires that a murder defendant "cause[] the death of another person, including an unborn child . . ." ARIZ. REV. STAT. ANN. § 13-1105(A) (2005).

¹⁶⁶ See, e.g., 18 U.S.C. § 844(i) ("Whoever maliciously damages or destroys, or attempts to damage or destroy, by means of fire or an explosive . . .").

¹⁶⁷ The prohibited behavior must be previously enumerated to satisfy principles of legality. HERBERT L. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 72 (1968) ("[N]o one may be convicted of or punished for an offense unless the conduct constituting the offense has been authoritatively defined by an institution having the duly allocated competence to do so.").

¹⁶⁸ Even for strict liability offenses, a defendant can raise as a defense the failure of the prima facie case—i.e., that he did not do the act or acts constituting the crime. Sanford H. Kadish, *Excusing Crime*, 75 CAL. L. REV. 257, 258 (1987).

¹⁶⁹ See, e.g., Douglas N. Husak, *The Relevance of the Concept of Action to the Criminal*

the inchoate crimes of solicitation, conspiracy, and attempt;¹⁷⁰ and those circumstances under which the act of becoming an accomplice or a co-conspirator will suffice to hold one person accountable for additional, un contemplated and unassisted acts of another,¹⁷¹ to name just a few. Generally speaking, however, the criminal law requires an act.¹⁷²

The second task of the prosecutor is to demonstrate that the actor committed the prohibited act with the prohibited mental state.¹⁷³ There are four generally accepted levels of mens rea: purpose, knowledge, recklessness, and negligence.¹⁷⁴ For example, the actor charged with murder must have *intentionally* killed;¹⁷⁵ the actor charged with murdering a police officer must have *known* the victim to be a police officer;¹⁷⁶ and so on for any other mens rea requirements. As with the actus reus, there are caveats and counter-examples: some offenses, like traffic violations¹⁷⁷ and regulatory infractions¹⁷⁸—and, interestingly, the transmission of sexual

Law, 6 CRIM. L.F. 327, 333 (1995).

¹⁷⁰ Dressler, *supra* note 97, at § 27.01 (describing de-emphasized role of actus reus in inchoate crimes). See also PAUL H. ROBINSON, CRIMINAL LAW § V.1, at 612 (1997) (describing minimal actus reus requirement as demarking “the outer limits of the reach of criminal law”).

¹⁷¹ *Pinkerton v. United States*, 328 U.S. 640 (1946) (affirming liability of co-conspirator in tax fraud by principal, despite co-conspirator’s residence in federal penitentiary when principal committed fraud); *People v. Durham*, 449 P.2d 198, 201–02, 207 (Cal. 1969) (affirming accomplice liability for killing committed by principal, despite accomplice’s cowering with hands up while principal shot victim).

¹⁷² But see Douglas Husak, *Does Criminal Liability Require an Act?*, in PHILOSOPHY AND THE CRIMINAL LAW: PRINCIPLE AND CRITIQUE 60 (Antony Duff ed., 1998); Husak, *supra* note 169 (reviewing MICHAEL S. MOORE, ACT AND CRIME: THE PHILOSOPHY OF ACTION AND ITS IMPLICATIONS FOR CRIMINAL LAW (1993)).

¹⁷³ See, e.g., *Regina v. Faulkner*, 13 Cox C.C. 550 (Ir. Cr. Cas. Res. 1877) (holding that to convict a sailor for starting a fire aboard his ship, prosecution must show intent to set fire, illustrating now-conventional sentiment against convicting defendants who lack the necessary mens rea).

¹⁷⁴ E.g., *United States v. United States Gypsum Co.*, 438 U.S. 422, 444–46 (1978).

¹⁷⁵ E.g., ARIZ. REV. STAT. ANN. § 13-1105(A)(1) (2005) (“A person commits first degree murder if: Intending . . . that the person’s conduct will cause death . . .”).

¹⁷⁶ E.g., *id.* § 13-1105(A)(3) (providing that first-degree murder is committed if “knowing that the person’s conduct will cause death to a law enforcement officer, the person causes the death of a law enforcement officer who is in the line of duty.”).

¹⁷⁷ E.g., S.D. *Codified Laws* § 32-23-1 (2006) (“No person may drive or be in actual physical control of any vehicle while . . . [t]here is 0.08 percent or more by weight of alcohol in that person’s blood as shown by chemical analysis of that person’s breath, blood, or other bodily substance . . .”). See also Douglas Husak, *The Nature and Justifiability of Nonconsummate Offenses*, 37 ARIZ. L. REV. 151, 176 (1995) (suggesting that moving violations are generally treated as strict liability offenses).

¹⁷⁸ E.g., CAL. PENAL CODE § 12303 (2000) (“Any person, firm, or corporation who, within this state, possesses any destructive device, other than fixed ammunition of a caliber greater than .60 caliber, except as provided by this chapter, is guilty of a public offense and upon conviction thereof shall be punished by imprisonment in the county jail for a term not to exceed

diseases¹⁷⁹—are committed when the prohibited act is committed in the absence of any defense, regardless of the mental state of the actor.¹⁸⁰ Generally speaking, however, the criminal law also requires a mental state.¹⁸¹

If either of these two elements is missing, there has been no crime at all.¹⁸² The presence of both, however, does not guarantee a conviction. Only when these two elements of a crime are present does the inquiry move on to whether the defendant had any defenses. In other words, the fact that a defense is relevant at all means that both the *actus reus* and the *mens rea* elements have been satisfied.¹⁸³

The burden is on the prosecution to establish *actus reus* and *mens rea* beyond a reasonable doubt.¹⁸⁴ Thus, the prosecution in *Clark* must establish not only that Clark killed Officer Moritz, but that he killed him “intending or knowing that [his] conduct will cause death to a

one year, or in state prison, or by a fine not to exceed ten thousand dollars (\$10,000) or by both such fine and imprisonment.”). Environmental law is rife with examples of strict criminal liability. See generally Charles J. Babbitt, et al., *Discretion and the Criminalization of Environmental Law*, 15 DUKE ENVTL. L. & POL’Y F. 1 (2004).

¹⁷⁹ E.g., OKLA. STAT. tit. 63 § 1-519 (2004) (“It shall be unlawful and a felony for any person, after becoming an infected person and before being discharged and pronounced cured by a physician in writing, to marry any other person, or to expose any other person by the act of copulation or sexual intercourse to such venereal disease or to liability to contract the venereal disease.”).

¹⁸⁰ “Such legislation dispenses with the conventional requirement for criminal conduct—awareness of some wrongdoing. In the interest of the larger good it puts the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger.” *United States v. Dotterweich*, 320 U.S. 277, 281 (1943).

¹⁸¹ E.g., *United States v. Spy Factory, Inc.*, 960 F. Supp. 684, 687 (S.D.N.Y. 1997) (stating that “*mens rea* is an essential element of any criminal offense”). But see *Dotterweich*, 320 U.S. at 281 (concerning strict liability criminal offenses).

¹⁸² As Justice Kennedy put it, if Clark did not know he was killing a police officer, he “need[ed] no excuse, as then he did not commit the crime as Arizona defines it.” *Clark*, 126 S. Ct. at 2743 (Kennedy, J., dissenting).

¹⁸³ Of course, one can speak accurately enough of the lack of proof of either *actus reus* or *mens rea* as a “defense,” in the sense that lack of proof of either element will defeat conviction. E.g., PAUL H. ROBINSON, *CRIMINAL LAW DEFENSES* § 21 (2007). For present purposes, however, the word “defense” denotes either a justification or an excuse.

Justifications include situations wherein although the actor committed the *actus reus* with the requisite *mens rea*, accompanying circumstances were such that society would agree the actor did the right thing. MICHAEL S. MOORE, *PLACING BLAME* 483 (1997). An example of a justification defense would be necessity, or the lesser-of-two-evils defense. DRESSLER, *supra* note 97, at § 22.01. Excuses include situations where, although the actor committed the *actus reus* with the requisite *mens rea*, something about the circumstances or the actor were such that society would not feel it appropriate to blame the actor. George P. Fletcher, *The Right and the Reasonable*, 98 HARV. L. REV. 949, 958 (1985). An example of an excuse defense would be infancy, where the actor is too young to be considered a fair object of blame. But see Mitchell N. Berman, *Justification and Excuse, Law and Morality*, 53 DUKE L.J. 1, 4 (2003) (arguing that this consensus among academics concerning the difference between justification and excuse is wrong).

¹⁸⁴ *In re Winship*, 397 U.S. at 364, 368; *Martin v. Ohio*, 480 U.S. 228, 234 (1987).

law enforcement officer.” Only after the government meets this burden is the question posed: but is the defendant a “moral agent”?¹⁸⁵ Perhaps, despite having both *actus reus* and *mens rea*, this defendant does not deserve punishment. Perhaps something about this defendant makes it unfair, or inhumane, to punish him.

That something is left to the States to define and Arizona, like many others, includes insanity among its excusing conditions.¹⁸⁶ Should a defendant wish to claim insanity, the burden lies with him to raise the issue and prove by clear and convincing evidence that he meets the test for insanity.¹⁸⁷ Here is where the confusion arises. The same mental illness or capacity evidence can go to prove both the lack of *mens rea* and the presence of an insanity defense, and the different burdens of proof for each rings alarm bells for the Court.¹⁸⁸ The alarm is unnecessary.

This concern regarding dual-purpose evidence leads the Court to conclude that mental-illness and capacity evidence may be properly banned from consideration of *mens rea*. Oddly enough, if the evidence can only be admissible on the ground of either *mens rea* or insanity but not both, it makes more sense to declare it inadmissible as to insanity. If Arizona’s insanity statute really lacks a cognitive prong, then the fact that Clark did not know what he was doing is irrelevant to his insanity claim. Only if Clark does not know that killing a police officer is wrong should he have a defense under the truncated statute; and it is unclear that his symptoms meant that. He may very well have known it was wrong to kill police officers; his defense is that he did not know that was what he was doing. Therefore, the *Clark* Court has it exactly backwards. If the Arizona insanity statute is to be given its natural reading, evidence about Eric Clark’s mental state should not have been admitted on it, but only on the issue of *mens rea*.¹⁸⁹ As the law stands in Arizona, defendants who did not know that their victims were police officers will be

¹⁸⁵ *E.g.*, *Commonwealth v. Rogers*, 48 Mass. (7 Met.) 500, 501 (1844) (explaining that to be the subject of criminal conviction, “a person must have [sufficient] intelligence and capacity . . . to have a criminal intent and purpose . . . a conscious or controlling mental power[, that is, one must be a] responsible moral agent”).

¹⁸⁶ ARIZ. REV. STAT. ANN. § 13-502(A) (West 2001).

¹⁸⁷ *See, e.g., id.* § 13-502(C).

¹⁸⁸ *Clark*, 126 S. Ct. at 2732–35.

¹⁸⁹ There is some support for this approach. *See, e.g.*, *State v. Bethel*, 66 P.3d 840 (Kan. 2003) (collecting cases and literature on *mens rea* approach); BONNIE ET AL., CRIMINAL LAW 624 (2d ed. 2004) (describing efforts to abolish the insanity defense on the ground that evidence of mental illness should be admitted only on the issue of *mens rea*). *See also* Morse & Hoffman, *supra* note 6, at 51 (arguing that since *mens rea* question is one of “empirical fact” rather than insanity’s question of “moral responsibility,” expert testimony is more appropriate and less likely to mislead in *mens rea* context).

acquitted—unless the reason they did not know was a mental illness, in which case we convict.¹⁹⁰

More to the point, of course, is that the dual-purpose nature of the evidence in *Clark* should ring no alarm bells at all. The fact that the same evidence might prove two different points in a trial is not unique to insanity. For example, testimony that the defendant in an automobile accident told a friend, "My brakes are bad," is evidence of two different points, both of which must be proven. First, the fact that the defendant said "My brakes are bad" goes to prove that the defendant *knew* her brakes were bad. This knowledge will allow the plaintiff to satisfy the burden of proving that the defendant breached her duty: a reasonable person who knew her brakes were bad would have had them fixed. Because the defendant knew her brakes were bad and did not fix them, she breached her duty in a way she might not have if she did not know about the problem.¹⁹¹ Second, the fact that the defendant said "My brakes are bad" goes to prove that her brakes were, in fact, bad. As an admission by a party opponent,¹⁹² this statement will be admissible for "the truth of the matter asserted."¹⁹³ This fact allows the plaintiff to satisfy the burden of proving that the defendant caused the accident: the reason the cars collided was the defendant's bad brakes. Thus, the same evidence can be used to prove two different points in a case, breach and causation. Should the plaintiff convince the fact-finder that the plaintiff uttered these words, both breach and causation would be supported by the evidence. If the fact-finder rejects the plaintiff's version, both issues remain unproven. In neither case does the dual-use nature of the evidence offered change the burden of proof required. The fact that both issues need to be shown, and that the same evidence might be used to prove each, does not change the burden of proof.

Evidence of mental illness or capacity is no different. Testimony that Clark is a paranoid schizophrenic, and what that means for his understanding regarding the people around him, is evidence of two

¹⁹⁰ *Clark*, 126 S. Ct. at 2747-48 (Kennedy, J., dissenting).

¹⁹¹ Compare *Louis v. Youngren*, 138 N.E.2d 696, 702 (Ill. App. Ct. 1956) (holding admission that, "My brakes were defective; they wouldn't hold and I couldn't stop the truck" creates a jury question on whether truck's owner is liable to injured party in negligence), with *Hackett v. Perron*, 402 A.2d 193, 194 (N.H. 1979) (affirming defense verdict on theory of "sudden and unexpected brake failure" where defendant neither knew nor had reason to know of his defective brakes). See also *People v. Contreras*, 31 Cal. Rptr. 2d 757, 763 (Cal. Ct. App. 1994) (affirming murder conviction based on finding of implied malice where tow-truck driver with numerous citations who knew his truck had bad brakes killed his victim as he raced his truck, at times becoming airborne, to beat another towing operator to a tow job).

¹⁹² FED. R. EVID. 801(d)(2).

¹⁹³ FED. R. EVID. 801(c).

different points, both of which must be proven. First, the fact that Clark is a paranoid schizophrenic who does not know the difference between people and aliens goes to prove he did not have the required mens rea—he did not know Officer Moritz was a police officer. Second, the schizophrenia goes to prove that even if he had the mens rea, he is not a moral agent deserving of punishment.

In the bad brakes case, both breach and causation are established at once if the fact-finder accepts the defendant's story. Similarly in *Clark*, both lack of mens rea and presence of insanity are established at once if the fact-finder accepts the defendant's story. Why this should trouble the Court in an insanity context but not in any other context is unclear.

The proffered explanation—that this effectively removes the burden of proving insanity from the defendant to show by clear and convincing evidence, and places it on the prosecution to prove sanity beyond a reasonable doubt—witheres under scrutiny. It makes equal sense to describe the *Clark* scenario as effectively removing the burden of proving mens rea from the prosecution beyond a reasonable doubt, and placing it on the defendant to show by clear and convincing evidence. Were this the perspective adopted by the Court, the unconstitutionality of the maneuver would be clear.¹⁹⁴ There is no difference in the analysis. Both must be shown, and each can be proven by the same evidence. The Court casts this as an either-or, and chooses the perspective that again criminalizes the non-culpable. Either the status of the defendant's knowledge that Officer Moritz was a police officer must be shown by the prosecution beyond a reasonable doubt for all purposes or it must be shown by the defendant by clear and convincing evidence for all purposes. As between these two options, the Court unblinkingly requires the latter without seeming to realize the options are two sides of the same coin. Requiring the defendant to prove his lack of knowledge effectively removes the burden of proving knowledge from the prosecution. This the Constitution does not allow. For the Court to fail to see that its

¹⁹⁴ "Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. at 364, *conforming to sub nom.* *W.v. Family Court*, 262 N.E.2d 675 (N.Y. 1970). Differentiating between the elements of the crime and affirmative defenses, the Court has permitted burden-shifting only for the latter. *E.g.*, *Martin v. Ohio*, 480 U.S. 228, 233 (1987) (no violation of due process to place burden of proving self-defense by a preponderance on defendant); *Patterson v. New York*, 432 U.S. 197, 200, 202 (1977), *denying reh'g*, 481 U.S. 1024 (1986) (State can require murder defendant to prove by preponderance affirmative defense of extreme emotional disturbance).

analysis precisely mirrors the analysis it wholeheartedly rejects in other contexts can be explained only by the emotional clouding that comes from consideration of insanity.

c. Expert Testimony

Lastly, the Court does a disservice to the mentally ill and to society as a whole when it rests its decision so heavily on its disdain for mental health experts' testimony.¹⁹⁵ Once again, the concern alarming the Court is hardly unique to insanity. "Battles of the experts" are phenomena broadly known throughout different aspects of American legal culture,¹⁹⁶ and the phrase "hired gun" has been applied to opposing experts in any number of contexts.¹⁹⁷ But this image is uniquely inapposite to insanity cases:

Contrary to popular impressions, the bulk of expert psychiatric evidence presented at criminal trials does not concern novel, controversial theories, but is routine testimony on more common and generally accepted mental diseases such as schizophrenia. For example, paranoid schizophrenia, the disease at issue in *Clark*, ranks among the least controversial and best understood of mental diseases, and it was uncontested that Clark suffered from the disease at the time of the killing.¹⁹⁸

¹⁹⁵ See Allen, *supra* note 8, at 140. See also *The Supreme Court, 2005 Term Leading Cases, Constitutional Law, Due Process, Required Scope of Insanity Defense*, 120 HARV. L. REV. 223, 232 (2006) ("Ultimately, Arizona's rule, and the Court's endorsement of it, are understandable only through recognition of the judiciary's deep skepticism of psychiatry.").

¹⁹⁶ E.g., *Lake v. Clark*, 533 So. 2d 797, 799 (Fl. Dist. Ct. App. 1988) ("A medical malpractice case is always necessarily a battle of expert witnesses."); Jason S. Kirwan, Note, *Appraising a Presumption: A Modern Look at the Doctrine of Specific Performance in Real Estate Contracts*, 47 WM. & MARY L. REV. 697, 711–12 (2005) (real estate appraisals); Eifion Phillips, Comment, *Phillips v. AWH Corp.: Reemphasizing Context in Patent Claim Construction*, 31 DEL. J. CORP. L. 957, 985–86 (2006) (patent infringements).

¹⁹⁷ DAVID H. KAYE ET AL., *THE NEW WIGMORE: A TREATISE ON EVIDENCE* § 10.3.1 (2004) (collecting and summarizing criticism of party-retained expert witnesses). See also FED. R. EVID. 706 Advisory Committee Note ("The practice of shopping for experts . . . [has] been [a] matter[] of deep concern."). As Judge Posner claimed, "many experts are willing for a generous (and sometimes for a modest) fee to bend their science in the direction from which their fee is coming." *Indianapolis Colts, Inc. v. Metropolitan Baltimore Football Club Ltd. P'ship*, 34 F.3d 410, 415 (7th Cir. 1994) (trademark case). See generally Stephen D. Easton, *Ammunition for the Shoot-out with the Hired Gun's Hired Gun: A Proposal for Full Expert Witness Disclosure*, 32 ARIZ. ST. L.J. 465 (2000); Jennifer A. Turner, *Going After the "Hired Guns": Is Improper Expert Witness Testimony Unprofessional Conduct or the Negligent Practice of Medicine?*, 33 PEPP. L. REV. 275 (2006).

¹⁹⁸ *The Supreme Court, 2005 Term Leading Cases, Constitutional Law, Due Process, Required Scope of Insanity Defense*, 120 HARV. L. REV. 223, 229 (2006) (citations omitted).

As Professor Michael Perlin pointed out a decade ago, there is incredible unanimity among defense and prosecution experts with respect to a defendant's mental illness:¹⁹⁹ "[o]n the average, there is examiner agreement in eighty-eight percent of all insanity cases."²⁰⁰ It also bears mention that the incentive to malingering is questionable. Verdicts of not guilty by reason of insanity can result in longer sentences than criminal convictions,²⁰¹ and readily-understandable psychological and sociological forces discourage persons with mental illness from acknowledging that they are sick.²⁰²

This would not be the first time special rules were crafted for mental illness. Courts used to forbid testimony going to the "ultimate issue" on the grounds that that was for the fact-finder.²⁰³

¹⁹⁹ Perlin, *supra* note 9, at 1405 n.195 (citing Joseph H. Rodriguez et al., *The Insanity Defense Under Siege: Legislative Assaults and Legal Rejoinders*, 14 RUTGERS L.J. 397, 404 (1983), and Michael R. Hawkins & Richard A. Pasewark, *Characteristics of Persons Utilizing the Insanity Plea*, 53 PSYCHOL. REP. 191, 194 (1983) (citing studies)).

²⁰⁰ *Id.* at 1405 n.196 (citing Jeffrey L. Rogers et al., *Insanity Defenses: Contested or Conceded?*, 141 AM. J. PSYCHIATRY 885, 885-86 (1984), and Kenneth Fukunaga et al., *Insanity Plea: Interexaminer Agreement and Concordance of Psychiatric Opinion and Court Verdict*, 5 LAW & HUM. BEHAV. 325, 326 (1981)). Professor Fukunaga reported that there was unanimous agreement in 92% of the cases concerning the mental state of the defendant. *Id.* The American Psychiatric Association claims that the diagnostic concurrence rate among psychiatrists is approximately 80%. *American Psychiatric Association, Statement on the Insanity Defense* 7 (1983), reprinted in 140 AM. J. PSYCHIATRY 681, 683 (1983). Still others estimate the rate at 90%. See, e.g., *Reform of the Federal Insanity Defense: Hearings Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 98th Cong., 1st Sess. 109 (1983) (statement of Melvin Sabshin, M.D., chief executive officer of the American Psychiatric Association). But see George J. Alexander, *International Human Rights Protection Against Psychiatric Political Abuses*, 37 SANTA CLARA L. REV. 387, 392-93 & n. 20 (1997) (citing studies showing diagnostic concurrence rate among psychiatrists to be quite low—in the neighborhood of 30%—and claiming mental illness is generally "over-predict[ed]"). Whatever the true concurrence rate, one wonders:

why, when psychiatrists disagree, [is it] proof positive that they don't know what they're talking about and it demeans the profession; while, when our Supreme Court decides the law of the land by a disagreement of 5-4, they are scholars dealing with profound, difficult, and complicated issues and one must respect their differences in judgment[?]

JACQUES M. QUEN ET AL., RESPONSIBILITY AND JUSTICE, IN LAW AND THE MENTAL HEALTH PROFESSIONS 235, 247 (Walter E. Barton & Charlotte J. Sanborn eds., 1978).

²⁰¹ See *supra* note 34 and accompanying text.

²⁰² Perlin, *supra* note 9, at 1412 (stating much greater likelihood of "feign[ing] sanity in an effort not to be seen as mentally ill, even where such evidence might serve as powerful mitigating evidence[, as] in death penalty cases"). In addition to the urge to protect one's self-image and societal reputation against the threat of being labeled "insane," refusal to acknowledge that one is mentally ill is a symptom of mental illness itself, called anosognosia. For a highly readable and compassionate discussion of the subject, see generally XAVIER F. AMADOR, *I AM NOT SICK I DON'T NEED HELP! HOW TO HELP SOMEONE WITH MENTAL ILLNESS ACCEPT TREATMENT* (2007).

²⁰³ See FED. R. EVID. 704 Advisory Committee Note ("The older cases often contained strictures against allowing witnesses to express opinions upon ultimate issues, as a particular

In 1972,²⁰⁴ Federal Rule of Evidence 704 codified the better position: "testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact."²⁰⁵ Following John Hinckley's acquittal by reason of insanity on charges of attempting to assassinate President Reagan, however, Congress amended Rule 704.²⁰⁶ The new section reads:

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.²⁰⁷

Nor is the majority's objection that experts cannot really ever know what is in another person's mind²⁰⁸ persuasive, nor unique to the insanity defense. Of course, what is inside another person's head is difficult to ascertain, especially when we are trying to reconstruct a past mental state from the testimony of witnesses doing their best (one hopes) to remember what might have happened years ago. But we do this all the time—in will contests,²⁰⁹ tort cases,²¹⁰ claims on contracts,²¹¹ child support cases,²¹² and of course, run-of-the-mill

aspect of the rule against opinions. The rule was unduly restrictive, difficult of application, and generally served only to deprive the trier of fact of useful information.").

²⁰⁴ See *supra* note 140.

²⁰⁵ FED. R. EVID. 704(a).

²⁰⁶ Subdivision (b) of Rule 704 was added in 1984. Pub. L. No. 98-473, 98 Stat. 1837 (1984).

²⁰⁷ FED. R. EVID. 704(b).

²⁰⁸ *Clark*, 126 S. Ct. at 2734–35.

²⁰⁹ See, e.g., *In re Supervised Estate of Scholz*, 859 N.E.2d 731, 735 (Ind. App. 2007) ("When construing the language of a will, our primary objective is to determine the intent of the testator."). "Where a latent ambiguity exists, the court may resort to parol evidence (such as testimony of the scrivener) to determine the decedent's true intent." *In re Estate of Schultheis*, 747 A.2d 918, 923 (Pa. Super. Ct. 2000).

²¹⁰ See, e.g., *Jones v. Livingston*, 416 S.E.2d 142, 145 (Ga. Ct. App. 1992) (noting in wrongful death case that jury could infer both plaintiff-decedent's intent to become intoxicated on the day of the accident and his knowledge that defendant would probably become intoxicated as well from his sharing a 12-pack of beer with him).

²¹¹ See, e.g., *Belle Pass Terminal, Inc. v. Jolin, Inc.*, 634 So. 2d 466, 480 (La. Ct. App. 1994) (noting that "the evidence presented at trial to establish the true intent of the parties as to whether the leases were sold and whether the contract should be reformed consisted of the testimony of the parties to the transaction . . . as well as the attorneys and secretaries who drafted the documents and the accountants and other financial assistants who participated in the confection of the agreement.").

²¹² See, e.g., *Inman v. Inman*, 607 S.E.2d 55 (N.C. Ct. App. 2005) (table) (noting that on

criminal cases not involving an insanity defense, but only mens rea.²¹³ The need to “get inside someone’s head,” and the difficulty of doing that, is the primary reason we have juries.

Finally, to the extent that the Court is concerned about over-reliance on expert witnesses,²¹⁴ the concern is misplaced. “The expert who believes that her testimony will be revered by the jury based upon the dazzle of her credentials, the glitter of her academic appointments, and the sophistication of her analysis would be in for a rude shock if she could hear the jury deliberate. . . . [T]he jury is far more likely to tune the expert out rather than defer to her purported expertise.”²¹⁵

The Court’s disdain for mental health experts above all others is perplexing. It may be, though, that the explanation lies in our instinctive attempts to protect ourselves from the threat to our equanimity the mentally ill pose simply by existing. If we deride the mental health experts, then perhaps we unconsciously comfort ourselves that we are not at risk: mental illness is probably all in their heads.

CONCLUSION

Our unwillingness to reexamine the way that fear and loathing have clouded our jurisprudence has more than theoretical results. Eric Clark, once a bright, young football player, later a tormented sufferer of paranoid schizophrenia, is now a first-degree murderer. It is shameful enough that we turned our backs on the Clark family before Eric shot Officer Moritz. By continuing to indulge our unconscious reaction to mental illness, the Supreme Court’s decisions in *Clark v. Arizona* mean we have abandoned Eric all over again.

The rhetoric is strong, but with good reason:

Future generations will look back on us and our treatment of people with mental illness much as we look back on the Spanish Inquisitors who burned Jews at the stake for not

remand “the trial court may hear any testimony and receive any evidence necessary to determine whether defendant sought decreased wages with the intent to avoid his reasonable support obligations”).

²¹³ See, e.g., *State v. Craven*, 324 S.E.2d 599, 602 (N.C. 1985) (upholding admission of “evidence of defendant’s intentional sexual molestation of [witness as] relevant to the question of whether defendant had intentionally, as opposed to inadvertently,” molested victim).

²¹⁴ See *Clark*, 126 S. Ct. at 2734.

²¹⁵ Scott E. Sundby, *The Jury as Critic: An Empirical Look at How Capital Juries Perceive Expert and Lay Testimony*, 83 VA. L. REV. 1109, 1139–40 (1997).

recanting their religion, or on the white racists who lynched African Americans for being insubordinate. Future generations will see us through the lens of history and ask how we dared to be so ignorant.²¹⁶

It is not daring that motivates us. As with the blood-boiling comparisons above, the motivator is fear. Fear of the unknown. Fear of difference. The most plausible explanation for our irrationality in this realm is unconscious animus towards the mentally ill, arising from a deep-seated need to distance ourselves from the frightening possibility that we, too, are vulnerable. Although the phenomenon is understandable, its effect is to deny the mentally ill, who are already so disadvantaged, one of the few protections our society claims to offer them.

The inexplicable decisions of *Clark v. Arizona*—finding no semiotic truncation of Arizona's insanity statute, and upholding its refusal to admit evidence of mental illness on the question of mens rea—can be explained only by reference to our unconscious selves. The mentally ill frighten us, and when we are frightened, we do not think clearly. But the decisions in *Clark* serve only to stigmatize and marginalize even further a group that needs our help as well as our compassion. We must reexamine the criminal law's insanity jurisprudence. Our unconscious animus toward the mentally ill ill-serves them, and ill-becomes us.

²¹⁶ Jim Randall, *Mental Illness Is Not a Crime*, L.A. TIMES, July 16, 2006, at 5, available at 2006 WLNR 12238681.