The Story of Clark: The Incredible Shrinking Insanity Defense

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The Story of *Clark v. Arizona*: The Incredible Shrinking Insanity Defense

In the early morning hours of June 21, 2000 in Flagstaff, Arizona, seventeen year-old Eric Michael Clark shot and killed Officer Jeffrey Moritz, possibly under the delusion that the officer was a space alien out to capture and kill him. Three years later, Clark would be convicted of first-degree murder, and three years after that, the Supreme Court of the United States would affirm his life sentence. But the story of *Clark v. Arizona* properly begins in 1981, when John Hinckley attempted to kill President Ronald Reagan in order to impress actress Jodie Foster. Hinckley’s acquittal by reason of insanity began the aggressive process of shrinking the insanity defense across the United States, eventually prompting the Justices of the U.S. Supreme Court in the *Clark* case to wonder: Is it wrong to kill a Martian? The oddness of this inquiry, taking place in the dignified chamber of the highest court in the land, rather colorfully illustrates the highs and lows of the endless American quandary over insanity and crime, and the role that psychiatry may play in making the distinction. Despite the fantastical quality of some of the facts and questions raised in *Clark*, the case offered some measure of clarity on the status of the insanity defense since John Hinckley’s controversial trial. Moreover, it implicated just about all of the various doctrines that address criminal responsibility, including mens rea, diminished capacity, and the guilty-but-mentally-ill verdict.

**Legal Background**

The current state of the insanity defense in the United States traces back to the 1981 presidential assassination attempt by a mentally disturbed man named John W. Hinckley, Jr. After watching the film *Taxi Driver* repeatedly, Hinckley became obsessed with Jodie Foster, the actress who played a child prostitute in the film.\(^1\) Hinckley stalked Foster, phoning her and leaving her letters and poems in failed attempts to gain her attention. Hinckley then decided that a presidential assassination would finally move her to take notice of him. (In *Taxi Driver*, the protagonist attempts an assassination on a presidential candidate after being rejected by a woman.) Although Hinckley first targeted President Jimmy Carter, he was arrested on a firearms charge and temporarily gave up his plan.\(^2\) Then on March 30, 1981, Hinckley fired at President Ronald Reagan outside a Hilton in Washington, D.C., wounding him and several others.

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2. Ironically, during this period Hinckley went to New York to grieve for John Lennon, who had been shot and killed by a mentally disturbed fan who identified with the protagonist of J.D. Salinger’s *A Catcher in the Rye*. See Peter W. Low et al., *The Trial of John W. Hinckley, Jr.* 26 (1986).
Hinckley’s trial lasted six weeks and involved teams of expert witnesses that evaluated his mental state. All of the experts agreed that Hinckley was mentally disturbed, but they differed as to the severity of his condition. The defense argued that Hinckley’s mental illness left him totally incapable of intellectually or emotionally appreciating the wrongfulness of his conduct or to conform his conduct to the requirements of law. The government countered that Hinckley’s act was premeditated (“Hinckley had bought a gun; followed President Carter; traveled to Washington; left a note stating his intentions; selected Devastator bullets from among the ammunition he had on hand; waited for President Reagan to leave the hotel; and fired six shots at the President.”), suggesting a man functional enough to make a plan and follow through.

There was, indeed, no doubt that Hinckley intended to kill a human being, the mental state (or “mens rea”) required for the crime of attempted murder. Hinckley himself never claimed otherwise. Rather, his defense was that although he intended to kill, he should be acquitted because he possessed an additional mental state or condition that qualified him for an affirmative defense: legal insanity. The defense of insanity, like other affirmative defenses, exonerates a defendant even if the prosecution proves all of the elements of the offense beyond a reasonable doubt. Viewed another way, however, the insanity defense does undermine the government’s case on mens rea. A finding of insanity negates a defendant’s responsibility for his criminal act based on his lack of mens rea in the broader sense of that term, i.e., of being culpable or having a guilty mind. A person who shoots at the President with the intent to kill is usually viewed as acting culpably. But the law says that an insane person who engages in the same act with the same intent is not culpable but ill, and should not be condemned. “Intent to kill” is thus an imperfect marker for what the law requires to convict a person for attempted murder. This conceptual link between mens rea and insanity suggests that the prosecutor and defense in the Hinckley case were simultaneously talking past and talking to each other in the debate over Hinckley’s premeditation. Evidence of premeditation helped to establish Hinckley’s intent to kill, which was not in dispute, and his clear-headedness, which was. Both of these states of mind were relevant to determine the ultimate issue: Hinckley’s culpability for his acts.

In June 1982, after deliberating from Friday afternoon to Monday evening, the jury returned a not guilty by reason of insanity (NGRI) verdict. A surprised Hinckley was committed to St. Elizabeth’s Hospital. Hinckley’s acquittal provoked widespread outrage, including from President Reagan, who himself later went before the Senate Judiciary Committee to propose

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3 See id. at 27.
4 See Vincent J. Fuller, United States v. John W. Hinckley, Jr., 33 Loyola L.A. L. Rev. 699, 701 (2000). Vincent Fuller was lead counsel for Hinckley’s defense.
6 According to Lincoln Caplan, Hinckley expected to be convicted and had written a statement to be read at his sentencing. See Lincoln Caplan, The Insanity Defense and the Trial of John W. Hinckley, Jr. 101 (1984). The verdict also developed an unexpected racial dimension. The Hinckley jury happened to be all black, except for one member who was white. When the public furor erupted after the verdict, one juror responded “that she and the others had understood their job, and had done it with particular fairness, as only a black jury…could.” See id. at 102.
restricting the insanity defense. Even more anomalously, some of the Hinckley jurors themselves also appeared before the Senate Subcommittee on Criminal Law to explain the verdict. After numerous hearings on the issue, Congress passed the Insanity Defense Reform Act of 1984, which states that a person is legally insane if “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.” This was, in essence, a return to the M’Naghten rule, which had been the prevailing standard for insanity in American jurisdictions until the 1960s, but which, as I will discuss below, then temporarily receded from American law.

The M’Naghten rule itself originates from a botched assassination attempt in 1843 on the Prime Minister of England by Daniel M’Naghten, a Scottish woodcutter, who mistakenly killed the Prime Minister’s secretary instead. M’Naghten was allegedly suffering from paranoid delusions and believed that he was being stalked and persecuted by the Tory government. He pleaded not guilty. M’Naghten called several witnesses to describe his state of mind around the time of the murder. Nine medical experts also testified on behalf of M’Naghten, two pronouncing their conclusions based solely on evidence they heard over the course of the trial without prior examination. The prosecution offered no medical evidence to counter and eventually withdrew the case. The jury returned a not guilty verdict, and M’Naghten was committed to an insane asylum where he died 22 years later.

Paralleling the Hinckley case, an outraged House of Lords summoned the Justices of the Court of Common Pleas to answer questions on the law of insanity and excuse. Chief Justice Tindal (who had presided over M’Naghten’s trial) spoke for all but one of the judges when he answered as follows:

[T]he jurors ought to be told …that to 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 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.

Chief Justice Tindal went on to clarify that the knowledge of right and wrong must not be merely abstract but in reference to “the very act with which he is charged.”

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8 See Caplan, *supra* note __, at 102.
10 There is some evidence to believe that M’Naghten may not have been delusional in his fear of Tory spies. See Finkel, *supra* note __, at 17-18 (describing Richard Moran’s research revealing that Prime Minister Robert Peel did in fact send a number of agents to Glasgow to undermine the growing Chartist movement and that these agents engaged in bribery, assault, harassment, and kidnapping).
11 *Id.* at 18-19. Finkel also describes how the experts were allowed to make legal conclusions about M’Naghten’s culpability. *Id.* at 18.
Unlike Congress in the aftermath of *Hinckley*, the House of Lords did not take it upon itself to revise the law of insanity in England. But the *M’Naghten* case signified the “formalization of the insanity plea.” And whereas before *M’Naghten* judges gave varied instructions and constructions on what constitutes legal insanity (e.g., describing the insane accused as a “wild beast” or a “mere instrument in the hands of Providence,” or one who does not know “what he is about” or the difference between right and wrong), the judges before the House of Lords in *Daniel M’Naghten’s Case* spoke with one voice to define the applicable law.

This did not mean, however, that the law of insanity had suddenly become settled and clear. Even in 1843, there were concerns that the *M’Naghten* rule might lead to too many acquittals, that doctors would supplant the jury, and that the definition of legal insanity was too narrow to account for the varied manifestations of mental illness that were being studied by the “medical men” of the day. These basic disagreements continue to dog the defense to the present time.

The *M’Naghten* rule was also criticized for failing to clarify what it means to be legally insane and therefore not responsible for one’s actions. The words “know” and “wrong,” in particular, have been subject to great debate. From the announcement of the rule onward, commentators have also disagreed on its basic composition. Some describe it as excusing those afflicted with at least one of two different types of incapacity: cognitive (“as not to know the nature and quality of the act”) and moral (“did not know he was doing what was wrong”). Under this view, the two prongs of the rule work independently; a person who does not understand the nature and quality of his act will be deemed insane even if he knew that his act was wrong. Others, however, have suggested that the question of insanity as a practical matter turns on the moral prong of the rule, either because the cognitively incapacitated will (almost) always be morally incapacitated also, or because the moral issue is what really lies at the heart of the defense. Indeed, courts and commentators have long been in the practice of referring to the *M’Naghten* rule as the “right-wrong test.”

In the United States, the *M’Naghten* rule was the predominant test of legal insanity but it was not the only one. As early as 1869, New Hampshire articulated the broadly-worded product test, which required only that the criminal act was “the offspring or product of mental disease in the defendant.” From 1954 to 1972, the District of Columbia also used the product test to determine the insanity of defendants. Other jurisdictions began supplementing the *M’Naghten* rule with the control test, deeming a defendant insane if he does not know right from wrong or if he cannot choose right from wrong. To those who would excuse defendants unable to control so-called “irresistible impulses,” the *M’Naghten* rule was overly strict, expressing an already outdated understanding about madness and its effect on human behavior.

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14 See id. at 40-46.

15 State v. Pike, 49 N.H. 399 (1870).

In 1955, the American Law Institute (ALI) offered its own formulation of the insanity test, one that combined and rephrased both the *M’Naghten* rule and the control test. The ALI test described the insane defendant as one who lacks “substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law.”17 This was clearly a more lenient standard than the *M’Naghten* rule, not only because of the addition of a control component (“capacity…to conform his conduct to the requirements of law”) but also because it (1) required appreciation rather than mere knowledge of criminal wrongdoing, and (2) accepted substantial incapacity in place of total incapacity. In proposing this new standard, the ALI rejected the product test that had been favored by the D.C. Circuit a year earlier. The ALI definition of legal insanity was soon adopted by a majority of the states and the federal circuit courts. It was also the test that acquitted Hinckley.

The liberalization of the insanity defense that occurred during the 1950s-70s reflected a shift in the public’s perception of the mentally ill. The early 1950s saw “an abrupt upsurge of interest and faith in psychiatry and related fields.”18 This was in part due to large numbers of World War II veterans returning home with psychological damage, and also to pharmacological innovation that promised new avenues of treatment and even cure.19 Within the criminal law, this cultural shift led to policies that assimilated the latest in social science and psychology, emphasizing treatment and rehabilitation rather than crude punishment of the criminal. The ALI’s Model Penal Code, published in 1962 and containing the insanity test described above, exemplified the jurisprudence of its time. Its adoption in so many American jurisdictions was testament to the then-current belief that science could provide a neutral, universally-applicable test that could bring order to the legal chaos that had developed around mental illness and crime.

Ironically, while the 1950s may have marked the beginning of this progressive movement, it also foreshadowed its end. It was a time when juvenile delinquency became a source of growing public concern and even fear.20 (The two competing cultural strains are depicted in the popular 1961 musical, *West Side Story*, which tells the story of rival gangs in New York City and features a comical song called “Gee, Officer Krupke” sung by gang members blaming poor upbringing – “Our mothers all are junkies/ Our fathers all are drunks” – for their criminal ways – “Golly Moses, natcherly we’re punks!” The “judge” in the number declares, “This boy don’t need a judge, he needs an analyst’s care!”21) By the late 1960s, rising crime rates and urban riots placed crime control at the top of the political agenda,22 as public sentiment shifted again. Some states had already changed, or were in the process of changing, their insanity defense laws by the time John Hinckley was facing trial, but it was his 1982 acquittal that served as the catalyst for broad and immediate reform.

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17 MPC §4.01 (1962). The bracketed term “wrongfulness” could substitute for “criminality” to designate more clearly appreciation of moral, as opposed to legal, wrong.
19 See id. at 73-74.
21 *West Side Story* (United Artists 1961).
22 See Friedman, *supra* note __, at 450-51.
Like the federal government, the states responded to the public outrage by tightening their insanity laws. Many jurisdictions followed the federal example and reverted back to the traditional M’Naghten rule. Some also shifted to the defendant the burden to prove insanity, in contrast to the Hinckley trial where the burden lay on the government to prove beyond a reasonable doubt that the defendant was not legally insane. Others modified their commitment procedures in an effort to make the defense a less attractive option for the accused, reversing reforms that took place during the mental health advocacy movement of the 1960s and 70s.23

Perhaps most controversially, a significant number of states adopted a “guilty but mentally ill” (GBMI) verdict, supplementing the “not guilty by reason of insanity” (NGRI) verdict which is the traditional means for the jury to recognize the impact of severe mental illness on criminal responsibility. The GBMI verdict was designed to reduce the number of insanity acquittals by offering the jury an alternative verdict that promises both longer confinement of the offender and treatment for mental disease.24 A person found GBMI is likely to receive psychiatric care in a prison setting and must complete serving the sentence even after he is cured of the illness. This outcome contrasts with a person found NGRI, who is committed to a mental facility only until he is deemed no longer a danger to himself or society.

All of these measures to limit the insanity defense existed before 1982, but the Hinckley case brought them into focus as viable methods to curb the “abuses” that were occurring in insanity trials. It did not matter to this very public and emotional debate that insanity trials were rare, and successes rarer still.

Finally, four states – Idaho, Kansas, Montana (in 1979), and Utah – abolished the insanity defense entirely, allowing defendants to offer mental illness evidence only to disprove the existence of the requisite mens rea element in the offense charged. The Nevada legislature similarly attempted to abolish the defense in 1995, but its highest court struck down the law and declared the insanity defense to be “a well-established and fundamental principle of the law of the United States.”25 Relying on both the federal and state constitutions, the Nevada Supreme Court found that the insanity defense is necessary to give defendants due process of law and reinstated the law prior to 1995, the M’Naghten rule.

Notably, Arizona, the home venue of the Clark case, was one of the states that amended its insanity statute after the Hinckley case. Unlike the majority of states, Arizona had never expanded its law beyond the basic M’Naghten rule so it was already considered to be one of the most restrictive jurisdictions on the issue. Nonetheless, the public uproar over Hinckley, as well as two other notorious local cases involving the insanity defense, led the state to amend its law in

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1983 to shift the burden of proof to the defendant to prove insanity by clear and convincing
evidence.\textsuperscript{26}

A decade later, another unpopular insanity verdict prompted Arizona to change its law once
again. A Tucson man by the name of Mark Austin was tried and acquitted for the 1989 stabbing
death of his estranged wife, Laura Griffin-Austin. Even though evidence suggested that he
bought materials for the murder, watched her from outside her home, and then surprised her at
the door, Austin argued that he did not possess the requisite cognitive capacity under the
\textit{M’Naghten} rule to be found legally sane and responsible for the crime. The jury acquitted him
and Austin spent six months in a psychiatric hospital before being conditionally released.\textsuperscript{27}

Shortly thereafter, the legislature passed “Laura’s Law,” named after Mark Austin’s victim
and championed by her grieving parents. “Laura’s Law” made two noteworthy changes in
Arizona’s insanity law. First, it narrowed the definition of legal insanity by eliminating the
cognitive prong of that rule. Thus, Arizona recognized a defendant as insane only “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.”\textsuperscript{28}

Second, “Laura’s Law” replaced the NGRI verdict with a “guilty except insane” (GEI)
verdict. Although Arizona’s GEI verdict may sound similar to the GBMI verdict other states
adopted post-\textit{Hinckley}, Arizona’s law is arguably unique in the sense that GEI replaced, rather
than supplemented, the NGRI verdict. Recall that in jurisdictions with the GBMI verdict, the
jury typically has the option to find a mentally ill defendant \textit{guilty} but mentally ill or \textit{not guilty}
by reason of insanity. In Arizona, however, a mentally ill defendant could not be acquitted of the
crime because the law no longer recognized an NGRI verdict. Instead, a defendant who
managed to prove himself insane under the narrowed redefinition of “Laura’s Law” nonetheless
would be found guilty of the crime. Put another way, while GBMI reduced insanity acquittals,
Arizona’s GEI law effectively eliminated them.

The passage of “Laura’s Law” undoubtedly suggests that Arizona may have one of the
toughest laws in the nation when it comes to the criminally insane. Whether there is any
substance behind this suggestion is debatable. The shift from NGRI to GEI appears largely
symbolic, a means to label an insane defendant “guilty” but preserving essentially the same
outcome: commitment for mental health treatment until such time as the defendant is no longer
dangerous.\textsuperscript{29}

\textsuperscript{26} See Ariz. Rev. Stat. §13-502(C); Renée Melançon, \textit{Arizona’s Insane Response to Insanity}, 40
\textsuperscript{27} See Kim Smith, \textit{Mental Health Will Be a Tough Issue in Cop-Killing Case}, Ariz. Daily Star,
\textsuperscript{28} Arizona Rev. Stat. §13-502(A). This section of the statute also excludes a number of mental
disorders – for example, psychosexual disorders and impulse control disorders – from satisfying
the requirements for legal insanity.
\textsuperscript{29} See Melançon, supra note __, at 314-15. This refers, naturally, to a defendant who has
committed a violent crime. Such individual remains “under the jurisdiction of the psychiatric
security review board” after release for the term of the sentence he would have received had he
Regarding Arizona’s redefinition of legal insanity, whether it works a substantive change depends on one’s view of how the full M’Naghten rule separates the sane from the insane. As described above, many believe that the moral prong forms the “heart” of M’Naghten while the cognitive prong is merely redundant or superfluous. This would indicate that “Laura’s Law” did nothing more than eliminate verbiage in the traditional formulation of the rule. On the other hand, to those who argue that the two prongs of the M’Naghten rule are independent, Arizona’s redefinition effects a significant change to the detriment of mentally ill defendants. These conflicting interpretations would be a key issue in Eric Clark’s case.

If its revised insanity law fails to distinguish Arizona as especially harsh toward mentally ill defendants, the state’s restrictions on the use of mental illness evidence helps to push it over the top. In State v. Mott, the Arizona Supreme Court affirmed a trial court’s decision to exclude expert testimony on battered woman’s syndrome in the case of a woman accused of child abuse and first-degree felony murder. In that case, Shelly Mott claimed that the reason she failed to take her dying daughter to the hospital was that she “lacked the capacity to act” otherwise and therefore was unable to form the intent (i.e., purpose or knowledge) required for child abuse, which served as the predicate offense for her first-degree felony murder conviction. Although Mott’s defense depended on her mental illness, she was not asserting the insanity defense. Instead, Mott was arguing that she was not guilty of the crime in the first place – and therefore would not need any affirmative defense such as insanity – because she lacked the mens rea required for guilt.

The defense strategy of negating an element of the offense is both common and commonsensical. Take the case of a person accused of theft, which requires that the offender intend to permanently deprive the possessor of the property at issue. The defendant could defend himself against the charge by, for example, explaining that he mistakenly believed that the property was his or that he was going to return it within the hour. A successful defense of this kind would mean acquittal through a “not guilty” verdict, obviously the best possible outcome for a criminal defendant at trial. Broadly viewed, Mott was pursuing this very ordinary strategy of disproving mens rea when she claimed that her mental illness caused her to be unaware of her daughter’s dire need for medical care.

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been judged sane. See Ariz. Rev. Stat. §13-502(D). The significance of the board’s continued jurisdiction over the GEI defendant appears to lie in its power to return the defendant to the mental health facility should his condition deteriorate after release but before the “term of the sentence” ends. See Ariz. Rev. Stat. §13-3994(M). If the individual no longer needs treatment but is determined to be dangerous or likely to reoffend, he is required to serve out his “sentence” in a state corrections facility. See Ariz. Rev. Stat. §13-3994(F)(4). A GEI defendant who remains insane and dangerous beyond the term of his sentence may be re-committed under the state’s civil commitment statute. See Ariz. Rev. Stat. §13-3994(J). Arizona has separate procedures for GEI defendants whose crimes are non-violent. See Ariz. Rev. Stat. §13-3994(B-C).

The Arizona Supreme Court did not, however, take this broad view of Mott’s defense. The court instead construed her argument to be rooted in the specific defense of “diminished capacity.” The diminished capacity defense is yet another way – alongside the doctrines of insanity (NGRI or GEI), guilty-but-mentally-ill, and mens rea – the law accounts for mental illness in determining criminal responsibility. It is also, perhaps, the least understood among these doctrines in the sense that no consensus has developed around its basic structure and operation. Some jurisdictions recognize diminished capacity as an affirmative defense, often limited to homicide, where the defendant’s mental illness is not severe enough to meet the definition of insanity. Unlike insanity, which obliterates criminal responsibility, diminished capacity ascribes partial responsibility to the defendant. A successful diminished capacity defense of this kind usually would lead to conviction of a lesser offense (e.g., manslaughter instead of murder).

The partial responsibility form of diminished capacity contrasts with the mens rea form of diminished capacity, which is a special way of negating mens rea. It is special in that diminished capacity is limited to considerations of mental illness as opposed to other reasons for why a defendant may not have acted with the requisite mens rea of the charged offense. It is, however, decidedly not special in any other way. That is to say, diminished capacity in these jurisdictions is just a descriptive term for one of many ways a defendant can try to negate the existence of mens rea and secure an acquittal. When Arizona affirmed the exclusion of Mott’s psychiatric evidence, it had both forms of diminished capacity in mind when observing that the state legislature had “declined to adopt the defense of diminished capacity when presented with the opportunity to do so.”31 The court went on to declare that “Arizona does not allow evidence of a defendant’s mental disorder short of insanity either as an affirmative defense or to negate the mens rea element of a crime.”32

The combination of Arizona’s insanity redefinition and the Mott rule has potentially harsh consequences for a mentally ill defendant. To the extent that fewer defendants are eligible to be found insane under the truncated definition, one would expect that diminished capacity (of either form) would naturally have a greater role in the system in accounting for mental illness. Mott seemingly forecloses this outlet by denying an affirmative defense of partial responsibility and restricting the defendant’s use of mental illness evidence to rebut the state’s case on mens rea. This latter move has two important and related consequences for the mentally ill defendant. First, he is left with a limited or no defense because the most salient fact relating to his culpability has been banned from consideration. And second, the prosecution in turn is able to prove its case more easily because the defendant has fewer grounds to challenge the state’s evidence. This leaves mentally ill defendants in the worst possible condition: convicted of the most serious charge without the promise of psychiatric care during incarceration.

31 187 Ariz. at 540.
32 187 Ariz. at 541. Mott’s conviction was overturned by a federal district court judge on the grounds that the exclusion of the battered woman’s syndrome evidence was a denial of due process. See 2002 WL 31017646 (unpublished decision). Arizona declined to retry her on the murder charge and accepted a guilty plea on child abuse. See John Gibeaut, A Matter Over Mind, ABA Journal, April 2006.
Such was the legal landscape when Eric Clark, a teenager suffering from paranoid schizophrenia and a belief in alien invasion, faced first-degree murder charges in the courts of Arizona.

**People v. Eric Michael Clark**

Eric Michael Clark appeared to be an ordinary middle-class teenager with a promising future. He had good grades, played running back for the varsity football team at Flagstaff High School, and was popular enough to be voted to the homecoming court in his freshman and sophomore years. He was easy-going, a good sport on and off the field. He dreamed of becoming a professional athlete, but believed that a college education was more important for his long-term goals. He had a loving family and many friends.\(^33\)

But in late 1998, when he was 16 years old, Clark began to show signs of mental disturbance. After a house fire that temporarily displaced the family to an apartment building, he refused to drink tap water for fear of lead poisoning and drank only from bottles that he bought and opened himself. He became moody, angry one minute and sobbing the next. He began expressing suicidal thoughts and stated that he would not live past the age of 20. Alarmed by Clark’s increasingly erratic behavior, his parents admitted him to a mental health center for three days in June of 1999 and arranged for counseling thereafter. Although doctors at the center suggested that Eric might be displaying symptoms of schizophrenia, David and Terry Clark were not prepared to accept the possibility that their son was experiencing anything more serious or permanent than teenage angst and drug abuse (Clark tested positive for marijuana at the center). By fall 1999, the once popular athlete no longer received calls from friends and sat alone at lunchtime. Even his brother and sister avoided him. Clark quit football, stopped going to school, and took correspondence courses from home. He also obsessed about Y2K and even purchased $1700 worth of survival gear with his father’s debit card.

When New Year’s Day passed without incident, Clark seemed to return to his old self and went back to school. But soon, he began to express other, stranger fears – this time, about aliens taking over his town of Flagstaff. He told his surprised parents that he believed they were aliens, too, and he could prove it if they brought him some tools. He thought that his food, water, and clothes were poisoned, so he refused to eat or wash at home, and he would wear multiple layers of protective clothing without changing them. His appearance and hygiene suffered. Clark also believed that his air was poisoned, and he eventually kept a bird in his car as a warning system. He would later say that the bird became useless because the aliens had replaced its lungs with robotic ones. He hung beads and chimes attached to fishing line around his room to alert him of intruders. He also became increasingly child-like, clinging to his mother in public and decorating his room with Disney posters. He was once found sleeping with a machete under his pillow, and later, with a gun.

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\(^{33}\) Terry Clark’s log of Eric Clark’s incarceration history and observed behavior (on file with author); Pauline Arrillaga, *Arizona Justice and Mental Illness; High Court to Hear Insanity Case Debate*, The Journal Gazette, Apr. 16, 2006, at A7; Gibeaut, *supra* note ___.

In April 2000, Clark was arrested on drunk-driving and drug charges when he was found with 42 tabs of LSD. The county deferred the prosecution, however, to later that year when Clark would turn 18 and be eligible for a harsher sentence. Then several weeks after this incident, he approached some people at a local park and boasted how he would lure the police by firing off his pistol and “start picking them off like a sniper” with rifles. He had become so odd by this point that hardly anyone believed what he said.

Although his parents tried to get him into treatment centers and counseling, Clark insisted there was nothing wrong with him. Terry Clark even consulted her lawyer to have her son immediately prosecuted for the April 2000 incident so that he would be forced to obtain help, and she also called numerous treatment facilities during this period of time. On the day before the shooting, Terry Clark again talked to her lawyer, this time about having Clark involuntarily committed. That night, Clark and his parents went to dinner at a Sizzler restaurant – one of the few places where he would eat – and saw the movie Shaft. He seemed to be doing well, and Clark’s parents allowed him to stay for a second film while they returned home. At some point later that night, Clark went home, got the keys to his brother’s truck, and left again.

At about 4:30am on June 21, 2000, Jeffrey Moritz, a 30 year-old officer for the Flagstaff Police Department, was called to the University Heights area of southwest Flagstaff after residents called to complain about a pickup truck playing loud music. One resident recalled that Clark circled the block over 20 times. As the prosecution would point out during the trial, Clark’s music of choice that morning was Dr. Dre’s 2001 – “a rap CD…contain[ing] many antisocial attitudes as part of the lyrics.” Officer Moritz pulled Clark over and told the dispatcher that he was approaching the driver. Less than a minute later, Clark fired several shots from his .22-caliber revolver, hitting Officer Moritz through the armhole of his bulletproof vest and severing his aorta. Officer Moritz managed to return fire as Clark fled on foot, but the officer died at the scene. He was the first police officer in the city of Flagstaff to be killed in the line of duty. He had a two year-old son, and shortly after his death his wife learned that she was pregnant with their second child.

An intensive 16-hour manhunt ended the next evening when Clark was found close to his home. He attempted to run, but he surrendered when he saw the laser sight of an officer’s gun aimed at his chest. Clark’s gun was discovered in a nearby yard, hidden inside a knit cap. After his arrest and while alone in an interview room, Clark sang to himself and mumbled incoherently.

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34 Jeffrey Moritz’s widow later unsuccessfully sued the county, claiming that it was “grossly negligent” for forgoing immediate prosecution. Widow of Slain Officer Suing Coconino County, The Ariz. Republic, Jan. 9, 2001, at B2. Because of the potential conflict of interest between the civil suit and Clark’s prosecution, Clark was prosecuted by the Arizona Attorney General’s office. Id.
35 Respondent’s Brief, p. 3.
36 2 Joint Appendix, at 115-16. The movie Shaft was also portrayed during trial as a movie about violence and corrupt police.
37 According to newspaper accounts at the time, thousands of people attended Moritz’s funeral and lined the streets during the motorcade. Slain Officer Honored, The Ariz. Republic, June 27, 2000, at B1.
repeating phrases like “take me to heaven” and “end this torment” and saying that he did not want to be poisoned anymore.\(^{38}\) While in the Flagstaff jail, Clark also bit his jailer and “just started flailing like he was out of it.”\(^{39}\) Although Clark generally refused to talk about the events of June 21 and about the aliens he thought were trying to poison him, he did tell his parents two months after the shooting that Flagstaff was a “platinum city” inhabited by over 50,000 aliens and only bullets could stop them.\(^{40}\)

Unsurprisingly, in light of his April arrest, the police and media initially portrayed Clark as a drug-addled delinquent.\(^{41}\) But it quickly became clear that Clark was suffering from serious mental illness. Indeed, soon after his arrest, Clark was committed to the Arizona State Hospital because he was deemed to be “gravely disabled and a danger to himself and others.”\(^{42}\) In a separate hearing, Judge H. Jeffrey Coker determined that Clark was incompetent to stand trial.\(^{43}\) He was hospitalized for almost three years before Judge Coker found him fit to stand trial—with the help of antipsychotic drugs—in 2003. Over time, Clark became less fearful of aliens and, in one interview, explained that they came to Earth for the benign purpose of interplanetary trade in broccoli and sugar.

Clark’s 11-day bench trial for first-degree murder finally began on August 5, 2003 before Judge Coker. Bryon Middlebrook, one of Clark’s trial attorneys, publicly explained that a bench trial was favored because of the “complexity of the evidence.”\(^{44}\) The notion that expert testimony can confuse the jury is hardly new, and courts have by turns both doubted and vouched for the jury’s ability to sort through complex and conflicting evidence. Perhaps more important from a trial lawyer’s perspective, however, is the statistic that the vast majority of insanity acquittals occur through prosecutor stipulations and bench trials.\(^{45}\) Juries are the most skeptical adjudicators of insanity claims, and there would have been additional concerns about going to the jury in a highly publicized and emotionally charged case like Eric Clark’s.

At trial, the prosecutor, David A. Powell, painted a picture of a mentally ill and drug-addicted teenager who boasted to his friends that he would lure and shoot a police officer, and

\(^{38}\) Joint Appendix, at 27, 42-43.
\(^{40}\) According to Flagstaff’s official website, the city had a population of 52,894 in 2000. See City of Flagstaff (government website), Census Facts, available at http://www.flagstaff.az.gov/index.aspx?NID=1095. It would appear, then, that Clark believed the overwhelming majority of the people in Flagstaff were actually aliens.
\(^{42}\) Petitioner’s Opening Brief, at 7 n. 17.
\(^{43}\) A person is incompetent to stand trial if “as a result of a mental illness, defect, or disability, the person is unable to understand the proceedings against him or her or to assist in his or her own defense.” Ariz. R. Crim. Pro. 11.1.
then carried out his plan two weeks later by creating a noise disturbance that called Officer Moritz to the scene. Powell demonstrated that at the time of the shooting, Officer Moritz was in uniform, drove a marked patrol car, and turned on his lights and siren to pull Clark over to the side of the road. He also called witnesses who testified that on the night before the shooting at dinner and at the movie theater, Clark looked lucid—relatively speaking. A crucial element of the case was that the prosecution was perfectly willing to stipulate from the start that Clark suffered from paranoid schizophrenia and was psychotic before, during, and after the shooting. But the state nevertheless argued that it did not stop him from orchestrating a deadly ambush on a police officer.\textsuperscript{46} The state’s expert testified that Clark “knew that he was committing a criminal act” and was probably intoxicated when he shot Officer Moritz.\textsuperscript{47} Indeed, during his closing argument, Powell urged the judge to picture Clark “with a joint in [his] mouth, … a bottle of something in [his] hand, and … a gun in the other hand.”\textsuperscript{48}

The defense strategy, on the other hand, was almost entirely based on Clark’s history of mental illness, which was presented through lay and expert witnesses who had observed the defendant at various times during the preceding five years.\textsuperscript{49} Clark sought to use evidence of his mental illness to (1) negate the mens rea required for first-degree murder, and (2) prove by clear and convincing evidence that he was “guilty except insane.” Arizona’s first-degree murder statute required proof that Clark intentionally or knowingly killed a law enforcement officer who was acting in the line of duty. Clark contended that at the time of the shooting, his paranoid schizophrenia led him to believe that he was killing an alien and not a police officer. Clark’s GEI defense required that he prove that he suffered from a “mental disease…of such severity that [he] did not know the criminal act was wrong.”\textsuperscript{50} Clark attempted to show that his paranoid delusions about aliens undermined his judgment to such a degree that he did not know right from wrong when he killed Officer Moritz. It should be noted that Clark’s objective was never acquittal; he conceded from the first that he was guilty, except insane, of a lesser form of homicide.

\textsuperscript{46} Powell did not seek the death penalty in light of Clark’s age and acknowledged mental illness. After Clark’s trial, the Supreme Court held in \textit{Roper v. Simmons}, 543 U.S. 551 (2005), that capital punishment may not be applied to murderers who killed when they were under 18 years of age.
\textsuperscript{47} 2 Joint Appendix, at 159, 163.
\textsuperscript{48} 2 Joint Appendix, at 304. The defense expert attempted to explain Clark’s drug abuse by testifying that schizophrenics often use drugs as a way to quell their symptoms. 1 Joint Appendix, at 25. The prosecutor, on the other hand, suggested that Clark’s substance abuse may have caused his mental illness. 2 Joint Appendix, at 306.
\textsuperscript{49} Accordingly, the defense never argued that Clark did not commit the shooting, although he had told one of his doctors that he was at Lake Powell (located about 140 miles north of Flagstaff) with a girl he met at the movies when the shooting occurred. 1 Joint Appendix, at 55. The defense did explore, however, the theory that the shooting was the accidental result of a struggle over Clark’s weapon. Memorandum Decision (unpublished), CR 2000-0538, at 5-6 n.4 (Ariz. Ct. App. 2005).
\textsuperscript{50} Ariz. Stat. §13-502(A).
As the prosecution pointed out at trial, Clark’s attempt to negate mens rea using mental illness evidence clearly ran up against the Mott rule of exclusion. Clark’s defense attorney responded by objecting to the rule, arguing that it unconstitutionally prevented Clark from presenting a complete defense. Judge Coker ultimately allowed the defense to present mental illness evidence related to Clark’s capacity to form intent because, he explained, there was no jury to confuse and such evidence “goes to the insanity issue” for which it was admissible. He stressed, however, that he was bound by the law of Mott to restrict its consideration to the insanity determination.\(^{51}\) The defense expert testified that Clark genuinely believed that aliens were in Flagstaff impersonating humans and that he was incapable of planning an ambush; indeed, the psychiatrist did not believe Clark was capable of planning much of anything at that period of his life.

On September 3, 2003, Clark was found guilty of first-degree murder. Judge Coker did not revisit the Mott issue, and simply concluded that although Clark suffered from a mental disease, “it did not…distort his perception of reality so severely that he did not know his actions were wrong.”\(^{52}\) The judge also explained that his decision to convict rested on a number of facts presented at trial, including the statements Clark had made about shooting police officers at the park, his act of driving around with music blaring, the fact that he avoided capture for 16 hours despite an intense manhunt, and his ability to comply with instructions after his arrest. A month later, Clark was sentenced to life imprisonment with no possibility of release for 25 years, the minimum sentence for the offense. During much of his trial and sentencing, Eric Clark slept, possibly because of his medications.

On state appeal, Clark argued, inter alia, that Arizona’s insanity statute violated due process by omitting the cognitive prong of the M’Naghten rule.\(^{53}\) In an unpublished opinion authored by Judge G. Murray Snow, the Arizona Court of Appeals rejected this argument, stating that there is no constitutional requirement to recognize the insanity defense and, in any case, the states are free to define the defense in any way they choose. Judge Snow went on to observe that the cognitive prong adds little to the M’Naghten rule, since anyone who is cognitively impaired under the traditional test would suffer the requisite moral impairment as a matter of course. Judge Snow also ruled that the trial court was bound by Mott to reject mental illness evidence as it relates to mens rea and that he lacked the authority to overturn the decision of the Arizona Supreme Court.

The Arizona Supreme Court denied discretionary review without comment. The stage was set for an appeal to the Supreme Court of the United States. Clark’s petition for certiorari raised two questions about the relationship between criminal guilt and mental illness. The first asked whether the United States Constitution requires Arizona to recognize, at a minimum, the two-
pronged *M’Naghten* rule of insanity in its GEI statute. The second asked whether Arizona may exclude mental health evidence in determining a defendant’s mens rea and still comply with the demands of due process.

**The Supreme Court Decision**

*Certiorari* was granted in the case of *Clark v. Arizona* on December 5, 2005, and it created a media stir. One could say that murder and insanity were in the air but not because of Eric Clark’s wild beliefs about aliens in Flagstaff. By bizarre coincidence, at that very time, media outlets were commemorating the 25th anniversary of John Lennon’s murder at the hands of Mark Chapman, a deranged fan who believed the novel *A Catcher in the Rye* held the answers to his actions. In addition, some commentators anticipated that a Supreme Court decision on the insanity defense may affect the retrial of Andrea Yates, the notorious Texas woman who – exactly a year and a day after Clark shot Moritz – drowned her five children in the bathtub of their home and claimed she suffered from schizophrenia and postpartum psychosis.

But the *Clark* case was notable on its own. After all, Clark was asking the Supreme Court to constitutionalize the much-maligned insanity defense, and a decision in his favor would, in the view of many, have a significant effect on the criminal laws of the states. The *Clark* case presented the type of substantive criminal law question that the Court had studiously avoided for decades under the leadership of the late Chief Justice William Rehnquist, who championed federalism principles and states’ rights. There was no reason to think that much would change under new Chief Justice John Roberts, who seemed to be cut from the same conservative cloth. On the other hand, the two justices who were most openly skeptical about the constitutional status of the insanity defense – Justices Rehnquist and Sandra Day O’Connor – were no longer on the bench.

Clark’s petition for review was ambitious for another reason. It threatened to define legal insanity as the negation of mens rea. As discussed above, the relationship between mens rea and insanity is anything but clear. Legal academics have long struggled with the question, with no resolution in sight. And although Justice William Brennan, in his dissenting opinion in *Jones v.*

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54 Although Chapman’s lawyers believed that he would be acquitted of the murder by reason of insanity and initially asserted the defense, Chapman later changed his mind and pleaded guilty to second-degree murder. *See* Sally Frank, *Eve Was Right to Eat the “Apple”: The Importance of Narrative in the Art of Lawyering*, 8 Yale J. L. & Feminism 79, 99-100 (1996).

55 Yates was convicted in 2002 and sentenced to life imprisonment, but in December 2005, she was waiting to be retried because of false testimony given by Dr. Park Dietz, an expert witness who had also testified for the prosecution in the *Hinckley* case. *See* Caplan, *supra* note __, at 75. At the retrial, she was found not guilty by reason of insanity. *See* Peggy O’Hare & Mary Flood, *Decade Brought Infamous Cases We Can’t Forget*, Houston Chronicle, Jan. 1, 2010.

56 *See* Ake v. Oklahoma, 470 U.S. 68, 91 (1985) (Rehnquist, J. dissenting) (observing that “[i]t is highly doubtful that due process requires a State to make available an insanity defense to a criminal defendant”); Foucha v. Louisiana, 504 U.S. 71, 88 (1992) (O’Connor, concurring) (suggesting that states are free “to determine whether, and to what extent, mental illness should excuse criminal behavior”).
United States,\textsuperscript{57} observed that legal insanity and mens rea “stand in close relationship” to one another, that relationship had yet to be explored by the Court when Clark filed his petition.\textsuperscript{58}

With respect to the substance of the insanity rule Clark was urging on the Supreme Court, his position could be described as decidedly modest. He was fighting to preserve the M’Naghten rule, which had historically been the go-to standard whenever the insanity defense seemed to stray too far in protecting the criminally insane. Accordingly, Clark was hardly trying to break new ground; he was arguing instead for what had been widely viewed as the stingiest definition of legal insanity available at common law. The fact that the M’Naghten rule was both narrow and enduring helped Clark’s case since it was his contention that the test had acquired fundamental status\textsuperscript{59} and, thus, formed part of the Constitution’s due process guarantee. Clark also was not challenging Arizona’s decision to hold insane defendants guilty under the GEI verdict. Thus, a victory before the Supreme Court would only mean that Clark would be afforded a chance to be found guilty except insane and committed to a mental facility under the full M’Naghten rule. Acquittal and freedom were never on the table.

Clark put his insanity defense claim first in order in his petition to the Supreme Court, but the order of argument changed by the time he submitted his opening brief. Perhaps because his lawyer realized that the Supreme Court was unlikely to define insanity (no matter how narrow the definition) for the states,\textsuperscript{60} Clark led his opening brief with the claim that the exclusion of mental illness evidence relevant to his state of mind at the time of the shooting prevented him from presenting a complete defense, the effect of which was to impermissibly lift the state’s burden to prove the mens rea required for first-degree murder. This claim was based on principles enunciated in Chambers v. Mississippi,\textsuperscript{61} which held that the exclusion of exculpatory evidence may violate due process, and In re Winship,\textsuperscript{62} which imposed the beyond-a-reasonable-doubt burden of proof on the state.

Clark argued that at trial, Arizona used both the ambush theory and Officer Moritz’s displays of authority (uniform, patrol car, sirens, and lights) to prove that Clark intentionally or knowingly killed a law enforcement officer in the line of duty. Clark was unable to provide an alternative version of the facts – that he had the music blaring to drown out the voices in his head, that he was not functional enough to plan an ambush, that he believed aliens sometimes

\textsuperscript{57} 463 U.S. 354, 374 & n.4 (1983).
\textsuperscript{58} The Supreme Court declined to grapple with this question in Clark, but it did reject Arizona’s argument that there is no relationship between mens rea and insanity. 548 U.S. 735, 768 n. 38 (2006).
\textsuperscript{59} A doctrine or principle becomes part of the due process guarantee under the U.S. Constitution when it is “so rooted in the traditions and conscience of our people as to be ranked as fundamental.” Patterson v. New York, 432 U.S. 197, 201-02 (1977). To determine whether fundamental status has been acquired, courts primarily look to historical practice. See Montana v. Egelhoff, 518 U.S. 37, 43 (1996).
\textsuperscript{60} Clark conceded in his opening brief that “[t]he Court justifiably gives great deference to state legislative judgment in defining crimes and their elements when challenged as violations of substantive Due Process.” Petitioner’s Opening Brief at 26 (emphasis added).
\textsuperscript{61} 410 U.S. 284 (1973).
disguised themselves as the police – because it was rooted in his mental illness. Without considering mental illness, therefore, the trier of fact was left with only one explanation of the events: that of the prosecution.

Clark’s brief ended with a third due process claim. He argued that even if Arizona could constitutionally truncate the *M’Naghten* rule or exclude mental illness evidence that goes to mens rea, it could not do both at the same time because the two laws in combination constrain the defense too much. Noting that even those states that have completely abolished the insanity defense allow mental illness evidence to rebut the prosecution’s case on criminal intent (thereby subjecting the prosecution’s case to full adversarial testing), Clark suggested that Arizona was extreme in its treatment of mentally ill defendants.

Multiple *amicus* briefs were filed in support of Clark, including by the American Psychiatric Association, American Psychological Association, and the American Academy of Psychiatry and the Law, which filed a joint brief (APA joint brief) addressing both the procedural and substantive due process issues. The APA joint brief expressed serious concerns about the application of the *Mott* rule, and argued that it precludes consideration of evidence that is perhaps more reliable than most given that it is the result of “expert study and experience.” Interestingly, the APA joint brief did not aggressively pursue the revival of *M’Naghten*’s cognitive prong; instead, it broadly referred to the common law’s tradition of excusing a mentally ill defendant who “lacks rational appreciation of the wrongfulness of his conduct.” Distinguishing the law’s “formulation” from its “core,” the APA joint brief urged the Court to recognize a “natural interdependence of the ‘wrong’ and ‘nature and quality’ components” of the *M’Naghten* rule.

Arizona’s position, which had the support of the United States and several other states as *amici curiae*, could be summed up in one sentence: the insanity statute and the *Mott* rule both reflect policy decisions within the discretion of the state. In response to Clark’s attack on its insanity statute, Arizona argued that not only does a state have the discretion to define insanity as it sees fit, it also has the discretion not to recognize an insanity defense at all. In addition, Arizona pressed the state appellate court’s reasoning that the moral prong constitutes the “heart” of the *M’Naghten* rule, rendering the cognitive prong superfluous to the inquiry and confusing to the jury.

Arizona’s decision to restrict the use of mental illness evidence, too, was a policy decision within the province of the states. This argument rested on *Montana v. Egelhoff*, in which the Court upheld the murder conviction of a defendant who was not permitted to negate the requisite mens rea with evidence of his voluntary intoxication. In the concurring opinion by Justice Ruth Bader Ginsburg that decided the case, Montana’s exclusionary statute was viewed as a constitutionally permissible decision by the state legislature to redefine the mens rea element of the state’s criminal offenses “to eliminate the exculpatory value of voluntary intoxication.”

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63 Amicus Brief for the APA et al., at 17.
65 Id. at 58-59; see also Patterson v. New York, 432 U.S. at 201 (“It goes without saying that preventing and dealing with crime is much more the business of the States than it is of the
Exclusion was therefore valid because the evidence was no longer relevant to disproving the crime. According to Arizona, the Mott rule did no more than what the Montana statute accomplished in Egelhoff.

It was hardly a surprise when the Supreme Court ruled against Eric Clark, because the Court had too consistently declared that state legislatures have broad discretion to define both crimes and defenses. Justice Souter wrote the majority opinion, joined by Chief Justice Roberts and Justices Antonin Scalia, Clarence Thomas, and Samuel Alito. It was joined in part by Justice Stephen Breyer, who wrote a separate concurring opinion recommending remand.66 First, the majority concluded that Clark failed to establish that the M’Naghten rule represents a fundamental principle of justice. In doing so, the opinion referred to the diversity of definitions found in American jurisdictions and held that “no particular formulation has evolved into a baseline for due process.”67 It then went on to affirm Judge Snow’s ruling that Arizona’s insanity statute did not differ materially from the M’Naghten rule since “a defendant can … make out moral incapacity by demonstrating cognitive incapacity.”68 Accordingly, Clark was not legally “shortchanged,” as evidenced by the fact that the trial court admitted all of his mental illness evidence – including testimony bearing on his cognitive incapacity.69

The equivalency asserted by the majority between a one-pronged and two-pronged rule depended on a broad reading of Arizona’s insanity statute: one that required the defendant to “have understood that he was committing the act charged and that it was wrongful.”70 Thus, under Arizona law, a man squeezing his sister’s neck would be found legally insane if he believed he was squeezing a lemon, for his cognitive incapacity rendered him unable to recognize his action as morally wrong. In addition, according to the majority’s reading, a man who shot his sister believing he was shooting a dog would also have an insanity defense even though he might have known shooting a dog was wrong. This is because although he knew that he was doing something wrong, he did not also “[understand] that he was committing the act charged” – here, the murder of his sister. The moral prong completely subsumes the cognitive prong only because the Court recognized that a precondition to the knowledge of right and wrong is knowledge of what one is actually doing.71 Thus, neither abstract knowledge that killing a human being is wrong, nor more specific knowledge that what one irrationally thinks

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66 Although the decision did not elicit surprise, some found it remarkable that the majority opinion was penned by Justice Souter, who was known to be protective of criminal defendants’ rights. See Scott P. Johnson, The Judicial Behavior of Justice Souter in Criminal Cases and the Denial of a Conservative Counterrevolution, 7 Pierce L. Rev. 1, 3 (2008).
68 Id. at 753.
69 Id. at 753-757.
70 Id. at 754 n.23.
71 This may be a broader interpretation of the statute than Arizona urged at oral arguments. There, Arizona conceded that there may be a tiny number of cases affected by the absence of the cognitive prong, but argued that the legislature is entitled to disregard such anomalies in drafting the law. See Oral Arg. at. 29, 30.
one is doing is wrong, suffices to defeat an insanity claim. Whatever the Arizona legislature may have intended with its revisions to the state insanity law, the Supreme Court’s integrated interpretation brought it in line with the *M’Naghten* rule as Chief Justice Tindal explained it in 1843.

The Court also rejected Clark’s second due process claim on the mens rea issue. The majority offered its own reading of Arizona law here as well, construing the *Mott* decision as restricting only expert psychiatric evidence as opposed to all evidence of mental illness. Moreover, the majority read *Mott* to limit only expert *opinion* evidence about mental illness (e.g., diagnosis) and its effect on capacity, leaving experts free to offer so-called “observation” evidence – that is, testimony about what the defendant did or said, his behavior and tendencies, etc. These distinctions may have come as a surprise to the parties. Although some mention of expert versus lay, as well as fact versus opinion testimony came up during oral arguments, it was made in passing and no distinction among observation, mental-illness, and capacity evidence was ever argued by the parties or the many amici. The Court’s evidentiary restriction also raised questions about the role of the psychiatrist at trial since the majority seemed to exclude precisely that which makes the psychiatrist’s testimony unique and important: her expertise in diagnosis and the effects of mental illness. After all, lay witnesses arguably could offer observation evidence just as effectively and render the expert, in this context, superfluous.

The majority’s novel evidentiary classification proved significant in two ways. First, although the trial court appeared to have misinterpreted *Mott* to exclude observation evidence, the majority concluded that Clark failed to make his objection clear in the state courts because his arguments were generally worded to encompass all three types of evidence. Based on this finding, the majority decided that the question was not properly before the Court.

Second, the Court reframed the issue as one of restricting (rather than wholly excluding) expert opinion evidence into the insanity inquiry. In other words, the fact finder could use expert opinion evidence to determine whether the defendant met his burden to prove GEI, but could not use the same evidence to determine whether the state carried its burden to prove the mens rea for first degree murder. Accordingly, *Mott*’s effect, if not intent, was to ensure that a criminal defendant is held to the statutory requirements of Arizona’s insanity law, which places on the defendant the burden of proving, by clear and convincing evidence, that he lacked the capacity to distinguish right from wrong. If Arizona were to be forced to allow broad expert opinion evidence, observed the majority, the defendant would be able to avoid shouldering this heavy statutory burden by using the same evidence simply to cast reasonable doubt on the prosecution’s case on mens rea. As for the objection that a defendant does not need the insanity defense when

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72 This appears to be contrary to Arizona’s position during oral arguments that *Mott* restricts all mental illness evidence, whether from expert or lay witnesses. Oral Arg. at 34-35.

73 Justice Breyer dissented in part, preferring to remand the case to determine whether the majority’s reading of *Mott* accords with Arizona’s understanding of that decision and whether the trial court properly applied it.

74 The Court had previously decided that a state may require the defendant to carry the burden of proof on an affirmative defense. *See* Leland v. Oregon, 343 U.S. 790, 797-99 (1952). Clark did not challenge this point of law.
mental illness evidence demonstrates that he does not possess the requisite mens rea to be guilty of the crime, the majority answered that as a general matter, not all exculpatory evidence is admissible. Because expert opinion evidence is a matter of debate and judgment, as opposed to fact, its potential to mislead and confuse the jury justified Arizona’s decision to limit its admissibility to a context in which the defendant carried the burden of persuasion. In a footnote, the majority emphasized further the political nature of the insanity defense by observing that a state may justifiably be concerned that mentally ill criminals will avoid treatment and incapacitation by disproving mens rea in the manner Clark proposed to secure an outright acquittal.\textsuperscript{75}

The majority never addressed Clark’s final argument that the two rules combined violated due process; as the majority was untroubled by either, it seemingly remained untroubled by both.

Justice Anthony Kennedy, joined by Justices John Paul Stevens and Ruth Bader Ginsburg, wrote a spirited dissent over the \textit{Mott} issue. The dissent began by attacking the evidentiary categories established by the majority as “the Court’s own invention,” stating that it was “unrealistic, and most unfair, to hold that Clark’s counsel erred in failing to anticipate so novel an approach.”\textsuperscript{76} The new categories, moreover, were both artificial and unsustainable since observation evidence about what a mentally ill defendant did or said often becomes explicable and relevant through expert opinion testimony.

Justice Kennedy’s dissent also pointed out that expert testimony relevant to the mens rea determination goes to a factual matter – that is, whether Clark knew he was killing a police officer – rather than to a judgment about criminal responsibility which lies at the heart of the insanity defense.\textsuperscript{77} Thus, according to the dissent, the fact/judgment distinction drawn by the majority operates with less force in this context. In addition, the dissent agreed with Clark that Arizona’s exclusionary rule impermissibly lifted the prosecution’s burden of proving mens rea, since “the right [to have evidence considered on an element of the offense] is not respected by allowing the evidence to come in only on an issue for which the defendant bears the burden of proof.”\textsuperscript{78}

The dissenting opinion did not discuss the constitutionality of Arizona’s insanity statute since the dissenter would have reversed on the \textit{Mott} issue. It was clear during oral arguments, however, that Justice Kennedy agreed with Arizona’s position on its insanity law. While questioning the state attorney general, Justice Kennedy indicated that he was struggling to imagine a scenario where the omission of the cognitive prong would make a difference in the

\textsuperscript{75} 548 U.S. at 778 n. 45.
\textsuperscript{76} 548 U.S. at 782.
\textsuperscript{77} In the \textit{M’Naghten} case, where the role of the psychiatrist was also questioned, Chief Justice Tindal assured the House of Lords that “the medical man…cannot in strictness be asked his opinion [as to the defendant’s state of mind at the time of the commission of the crime] because [the question] involves the determination of the truth of the facts deposed to, which is for the jury to decide, and the [question is] not merely [a question] upon a matter of science, in which case such evidence is admissible.”
\textsuperscript{78} \textit{Id.} at 797.
outcome of an insanity case, and observed that all of the evidence Clark wanted to introduce had come in under the moral prong of the M’Naghten rule.

Reactions and Analyses

The Clark decision was not well-received by legal commentators. The majority opinion has been called “inexplicable,”79 “tortured,”80 and “gummy.”81 The justices of the majority have been accused of, at best, insensitivity, and, at worst, animus, toward the mentally ill.82 Although some, like Arizona’s attorney general, celebrated the outcome as “a victory for states’ rights and for the victim’s family,”83 critics have been decidedly more numerous and vocal. Two communities – mental health experts and lawyers – were particularly interested, and ultimately disappointed, in the case.

Given the Supreme Court’s characterization of mental health testimony as misleading and unreliable, it is no wonder that the Clark ruling dismayed members of the mental health community. Indeed, one commentator described Justice Souter’s opinion as a “kick in the stomach” to the writers of the APA joint brief.84 Others have suggested that the decision is infected with bias against psychiatry, criminal defendants, or both.85 The idea that a young man could be locked up for first-degree murder when everyone agreed he was a schizophrenic who was actively psychotic at the time of the killing surely struck many in the profession as, at the very least, odd.86

The legal profession was no less critical of both the outcome and the reasoning behind the Court’s ruling. Some saw the decision as condoning unequal treatment of mentally ill defendants. As Professor Susan Rozelle put it, “defendants who did not know that their victims were police officers will be acquitted – unless the reason they did not know was a mental

83 Smith, supra note __ (quoting Arizona’s Attorney General, Terry Goddard).
85 See, e.g., Paul S. Applebaum, Law & Psychiatry: Insanity, Guilty Minds, and Psychiatric Testimony, 57 Psychiatric Serv. 1370-1372 (Oct. 2006). Critics were quick to cite to Barefoot v. Estelle, 463 U.S. 880 (1983), where the Supreme Court held that expert testimony about future dangerousness at capital sentencing was admissible even if likely to be inaccurate because it will undergo adversarial testing.
86 The only person who seemed to express doubts about Eric Clark’s mental illness was Dan Moritz, the victim’s father and a psychologist. See Pauline Arrillaga, Arizona Justice and Mental Illness, Ft. Wayne J.-Gazette at A7 (Apr. 16, 2006).
illness.” Chief Justice Roberts inadvertently illustrated this point during oral arguments when he suggested that Clark could have explained the loud music “by showing that ... he was in a rock band, and wanted to play the music ... to advertise the concert, not to lure the police.” Of course, Clark could not have defended his case that way because those were not the facts; he did not have an explanation of his behavior other than mental illness and because of that, he was effectively forbidden from offering any (truthful) explanation.

Legal commentators also anticipated that Justice Souter’s categories of mental illness evidence would sow confusion and eventually break down. The line between observation and opinion can be vanishingly thin, especially when the observation is made by an expert. And as Professor Peter Westen pointed out, the attempt to restrict observation and opinion testimony is likely to lead to complications in jury instructions. Moreover, the Clark case may encourage more misleading and unreliable testimony from behavioral experts because it forces them to give evidence that is divorced from their expertise, which lies in diagnosis and explanation of aberrant behavior. If indeed Arizona and the Supreme Court aimed to exclude opinion evidence because of the purportedly speculative nature of that evidence, Clark may well exacerbate the problem.

But the fiercest criticism was saved for the majority’s reasoning on the Mott rule’s effect on the relative burdens of proof at trial. Commentators have almost been universal in condemning Justice Souter’s justification of Mott’s exclusionary rule as a permissible way of effectuating the state’s decision to place on the defendant the burden to prove insanity. Justice Souter was not wrong when he explained that allowing mental illness evidence to negate the requisite mens rea would lighten the mentally ill defendant’s statutory burden to exculpate himself only by proving insanity by clear and convincing evidence. (Indeed, if the defendant were successful on the mens rea element, it is possible that he would not need to prove insanity at all since there would

87 Rozelle, supra note __, at 51-52; see also Sherry F. Colb, At the End of its Term, the Supreme Court Denies Mentally Ill Defendants’ Right to a Fair Trial, FindLaw, Jul. 12, 2006, available at http://writ.news.findlaw.com/colb/20060712.html (observing that Clark “singles out the mentally ill for treatment that is worse”).

88 Oral Arg. at 19.


91 See Steven K. Erickson, Mind Over Morality, 54 Buff. L. Rev. 1555, 1581-82 (2007). Of course, it is debatable whether exclusion of unreliable or misleading evidence is indeed Arizona’s primary aim. There is no question that the post-Hinckley period of legal development in insanity law has been more focused on securing convictions than on improving the integrity of the trial process.
be no crime for the insanity defense to excuse.\(^{92}\) But Justice Souter seemed rather indifferent to the fact that *disallowing* mental illness evidence to negate the requisite mens rea would lighten the prosecution’s burden to prove every element of the charged offense beyond a reasonable doubt.\(^{93}\) While the former outcome may be problematic in terms of construing legislative intent, the latter triggers a due process violation under *Winship* and its progeny, which squarely placed the burden of proof on the state to prove the existence of mens rea beyond a reasonable doubt.

It is more than a little perplexing that Justice Souter and the rest of the justices in the majority did not recognize the apparent conflict between the due process demands of *Winship* and Arizona’s *Mott* rule, or if they did, why they did not earnestly address it. Moreover, it is clear that the Court had a plausible opportunity to avoid the conflict entirely by relying on Arizona’s *Egelhoff* argument that the state legislature had defined mens rea to be unaffected by mental illness. As Justice Ginsburg stated in *Egelhoff*, such a decision “does not lighte[n] the prosecution’s burden to prove [the] mental-state element beyond a reasonable doubt … for [t]he applicability of the reasonable-doubt standard … has always been dependent on how a State defines the offense that is charged.”\(^{94}\) Of course, the argument for a permissible redefinition is weaker in *Clark* than in *Egelhoff*; whereas voluntary intoxication has long been thought irrelevant to finding a “guilty mind” in the common law, mental illness has long been considered significant and may have achieved fundamental status. This would have been a hard, but not impossible, argument for the Court to make, especially if they had framed the evidence as going to a diminished capacity defense (more on this below).\(^{95}\) But the majority did not follow this route.

Although at least one scholar has criticized the Court for forgoing *Egelhoff*’s reasoning,\(^{96}\) following *Egelhoff* probably would have had broader implications for the mens rea inquiry. As critics of *Egelhoff* have noted, redefining the offense of murder to exclude consideration of facts such as intoxication that negate mens rea essentially transforms murder into a strict liability offense for defendants affected by the relevant condition.\(^{97}\) Justice Ginsburg said as much when she wrote that Montana’s statute allows conviction for murder if the prosecution can prove “that the defendant killed ‘under circumstances that would otherwise establish knowledge or purpose “but for” [the defendant’s] voluntary intoxication.’”\(^{98}\) Under *Egelhoff*, the prosecution’s burden to prove every element beyond a reasonable doubt remains untouched in only a technical sense—that is, only because the statute purports to reduce the burden of proof on the mens rea element to zero by eliminating the element altogether.\(^{99}\) This move may superficially avoid the *Winship*

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\(^{92}\) In Eric Clark’s case, however, the defendant sought to negate only the specific intent required for first-degree murder and argued that he would have accepted a second-degree murder conviction. See Oral Arg. at 20.

\(^{93}\) See Westen, supra note __, at 143 (articulating the issue in *Clark* this way).

\(^{94}\) 518 U.S. 58 (internal quotations omitted).

\(^{95}\) Professor Christopher Slobogin makes this point. See Slobogin, supra note __, at 12.

\(^{96}\) See id.


\(^{98}\) 518 U.S. at 58.

\(^{99}\) See Allen, supra note __, at 640.
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problem since Montana’s redefinition “extract[s] the entire subject of voluntary intoxication from the mens rea inquiry,” rendering the disputed evidence logically irrelevant.\(^\text{100}\) But it raises a host of other concerns, especially since the decision plunges into doubt the well-established assumption that a serious crime carrying a significant penalty, such as murder, requires a guilty mind.\(^\text{101}\)

It is one thing to eliminate the subjective mens rea inquiry where the defense is based upon the voluntarily induced condition of intoxication. It is quite another to apply this kind of reasoning to a mental illness that is involuntarily suffered, and a Clark decision that followed the Egelhoff reasoning would have been radical indeed. Instead, Justice Souter’s opinion in Clark approached Mott’s restriction as an evidentiary rule and thereby preserved the element of subjective mens rea and the admission of “observation” evidence, specifically described as:

testimony from those who observed what Clark did and heard what he said; … testimony that an expert witness might give about Clark’s tendency to think in a certain way and his behavioral characteristics. This evidence may support a professional diagnosis of mental disease and in any event is the kind of evidence that can be relevant to show what in fact was on Clark’s mind when he fired the gun.\(^\text{102}\)

By reading Mott narrowly and treating the issue as an evidentiary question, Justice Souter retained the possibility for mentally ill defendants in future cases to present evidence that goes directly to what was or was not actually on their minds when they acted – which is, in the end, all that proof and negation of mens rea mean. Justice Souter appears to have assumed (or allowed that it is reasonable to assume) that evidence limited to what Clark did and said, and to Clark’s own tendencies and characteristics, is more closely linked to his subjective state of mind than so-called “opinion” evidence, which at best speculates on what Clark may have been thinking based on what others like him experience. Thus, Justice Souter justified the exclusion of opinion evidence, not because it cannot negate mens rea (since a person who is not capable of intending \(x\) could not have actually intended \(x\)) but because a state is permitted to reasonably conclude that such evidence is suspect.

Clark’s argument for the admissibility of mental illness evidence on the issue of mens rea naturally implicates the aforementioned defense of diminished capacity, and this defense may also help to explain Justice Souter’s unwillingness to recognize the seriousness of the Winship problem. Just as the Arizona Supreme Court rejected Shelly Mott’s offer of battered woman’s syndrome evidence as an effort to mount a diminished capacity defense, the majority construed Clark’s evidence of his schizophrenia as a similar attempt. One can see this especially in the oral arguments, where both Justice Souter and Chief Justice Roberts suggest that by relying on “diminished-capacity evidence,” Clark attempted to do “by the front door” – rebutting mens rea – what he was not allowed to do “by the back door” – forcing Arizona to recognize a diminished capacity defense.\(^\text{103}\) Indeed, at one point, Justice Souter asked Clark’s attorney whether it would

\(^{100}\) 518 U.S. at 58.\(^\text{Id.}\)

\(^{101}\) See Morrisette v. United States, 342 U.S. 246 (1952).

\(^{102}\) 548 U.S. at 757.

\(^{103}\) Oral Arg. at 17, 19
be permissible for a state to conclude that mental illness evidence short of insanity is not relevant to criminal responsibility because otherwise, “everybody’s going to have an excuse, and there isn’t going to be any criminal law.” This exchange seemed to suggest that Justice Souter was skeptical not only of Clark’s attempt to constrain Arizona’s power to define its criminal laws, but also of the diminished capacity doctrine itself.

As Professor Alan Stone has observed, the diminished capacity defense has an inglorious history involving such infamous cases as the murder trial of Dan White, who asserted the successful but largely mythic “Twinkie” defense to excuse his killing of San Francisco Mayor George Moscone and Supervisor Harvey Milk. Professor Stone also describes the defense as largely the product of one forensic psychiatrist’s “exploitation” of a “loophole.” Diminished capacity is most closely associated with the California Supreme Court’s 1966 decision in People v. Conley, where it was held that evidence of mental disorder is admissible to disprove the mens rea required for murder. Professor Joshua Dressler has characterized Conley as adopting the partial responsibility form of diminished capacity because the court there reversed a premeditated murder conviction by a jury that had already heard and considered psychiatric evidence. In response to the jury verdict in Dan White’s trial, the legislature overruled Conley and attempted to abolish the defense. California retains, however, diminished capacity in its mens rea form, allowing evidence of mental illness to rebut the prosecution’s case on the defendant’s mental state.

104 Oral Arg. at 17-18. Justice Souter’s question is reminiscent of Mark Twain’s comment that “[i]nsanity certainly is on the increase in the world, and crime is dying out.” See Mark Twain, “A New Crime,” from Sketches, New and Old (1875), available at http://www.gutenberg.org/files/3189/3189-h/p4.htm#newcrime.

105 In truth, Dan White argued that he shot Moscone and Milk in the heat of passion and that he suffered from clinical depression over the loss of his job. He also claimed that this led to his consumption of a lot of junk food, which caused a chemical imbalance that prevented him from premeditating on the murders. Contrary to popular belief, twinkies served a minor role in White’s defense. He also was not acquitted, but convicted of the lesser charge of voluntary manslaughter. See Suzanne Mounts, Malice Aforethought in California: A History of Legislative Abdication and Judicial Vacillation, 33 U.S.F. L. Rev. 313, 354 (1999).

106 See Stone, supra note __. By “loophole,” Stone is referring to the American Law Institute’s position that “[e]vidence that the defendant suffered from a mental disease or defect is admissible whenever it is relevant to prove that the defendant did or did not have a state of mind which is an element of the offense.” See Model Penal Code §4.02(1). The Model Penal Code also recognized voluntary intoxication as a defense that negates some forms of mens rea. See Model Penal Code §§2.08(1-2).

107 64 Cal. 2d. 310 (1966).

108 According to Dressler, the court did this by adopting an unusually robust interpretation of the “malice aforethought” required for murder. Joshua Dressler, Understanding Criminal Law 399-400 (4th ed. 2006).

Before the Supreme Court, there was apparent confusion about the contours of this defense and its ramifications on the Clark case. At one point during oral arguments, Justice Breyer requested a definition and never really got one, although he later speculated that insanity “shows lack of intent” and diminished capacity constitutes an excuse.\(^{110}\) Many legal scholars would probably disagree with these definitions, and even say that Justice Breyer had it backwards.\(^{111}\) It did not help clarify matters when Clark’s attorney tried to distinguish between diminished capacity evidence and diminished capacity defense, presumably in an attempt to describe and differentiate the two forms of the defense. Perhaps, then, Justice Souter was simply creating room for the states to finally be rid of this relatively new, confusing, and unpopular defense (and along the way, chastening the profession of forensic psychiatry for its role in promoting it\(^{112}\)), and this singular policy focus overrode the practical conflict that arose between the Court’s rulings in Clark and Winship.

One could say that with so much attention being paid to the evidentiary issue, Clark’s substantive due process claim attacking Arizona’s single-pronged insanity test has been overlooked. With respect to this issue, the Clark court held that “no particular formulation has evolved into a baseline for due process, and … the insanity rule, like the conceptualization of criminal offenses, is substantially open to state choice.”\(^{113}\) This ruling apparently struck observers as not only unsurprising, but unremarkable. The proposition that states have broad powers to define the criminal law is, indeed, so familiar to lawyers that it has become banal. The mental health profession also seemed mostly unconcerned; for example, the American Psychiatric Association declared in its most recent position statement on the insanity defense that it does not favor any particular formulation “so long as the standard is broad enough to allow meaningful consideration of the impact of serious mental disorders on individual culpability.”\(^{114}\)

The few, and sometimes only passing, commentaries on this issue reflect varied perspectives on the Court’s ruling. Indeed, it is unclear whether the Court focused on the wording or the substance of the M’Naghten rule when it decided that it had not achieved fundamental status.\(^{115}\) It seems implausible, however, to conclude that Clark was urging the Supreme Court to bind

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\(^{110}\) Oral Arg. at 47.
\(^{111}\) See, e.g., Dressler, upra note __, at 219, 393.
\(^{112}\) The Clark case probably did have some effect on professional discussions of ethical standards in forensic psychiatry. See, e.g., Stephen J. Morse, The Ethics of Forensic Practice: Reclaiming the Wasteland, 36 J. Am. Acad. Psychiatry & L. 206 (2008) (discussing the limits of psychiatric contribution to legal questions on mental states). In this article, Professor Morse recommends that forensic psychiatrists refrain from giving diagnoses because it is “potentially misleading and confusing [to] the jury.” See id. at 215.
\(^{113}\) 548 U.S. at 752.
\(^{115}\) See Westen, supra note __, at 147-48 (noting the difference between form and substance in the Court’s M’Naghten analysis).
states and the federal government to the exact wording of *M'Naghten*. But if his claim goes to substance – namely, that due process requires consideration of at least cognitive and moral incapacity when a defendant’s sanity is in question – then the Court’s description of the “significant differences” among U.S. jurisdictions is simply wrong. By the majority’s count, as of 2006, 17 states and the federal government employed a “recognizable version” of *M'Naghten*, 14 followed the ALI version (which explicitly accounts for “lack of awareness of what [the defendant] is doing” via explanatory notes), and 3 combined *M'Naghten* with the control test. That means that 34 states plus the federal government considered both cognitive and moral incapacity to determine legal insanity. If the Court’s secondary argument that cognitive incapacity is subsumed by moral incapacity is accepted, then the number swells to 44. Moreover, one can easily argue that cognitive and moral incapacity is subsumed by New Hampshire’s broad product test. That leaves only Alaska, which adopted only *M'Naghten*’s cognitive prong, and the four states that abolished the defense altogether. To be sure, adherence to the *M'Naghten* rule is not universal but this tally hardly describes significant variety in criminal insanity laws away from *M'Naghten*. By setting up a straw claim that places form before substance, the Supreme Court avoided having to decide whether due process requires both prongs of the *M'Naghten* rule.

The Court’s assertion that the moral capacity prong “in practical terms” excuses the cognitively incapacitated is also vulnerable to challenge, depending as it does on a disputed reading of the Arizona statute. Some commentators have argued that the “plain language” of the statute belies the Supreme Court’s interpretation and suggest that the statute’s reference to moral incapacity requires only abstract knowledge of right and wrong. This was Clark’s interpretation of the statute as well. Of course, the Supreme Court’s integrated reading may in fact be correct, but there is some reason to question it. Arizona truncated the *M'Naghten* rule in response to Mark Austin’s acquittal, which was believed to have been grounded on the rule’s cognitive prong. This, together with the general trend toward restricting the insanity defense to favor the prosecution, suggests that the Arizona legislature may have been doing more than merely “streamlining” the law to ease jury deliberation.

Even if the Court has the correct reading, it does not mean that a jury will apply the law as the Court read it in the *Clark* case. Some of Arizona’s recent insanity cases reveal that the jury hears only the wording of the statute with no supplementary explanation about how a defendant’s moral capacity to judge right from wrong necessarily depends on his cognitive capacity to understand his actions. Meanwhile, at least one post-*Clark* conviction seems to have been based on testimony regarding the defendant’s abstract knowledge of right and wrong. Practically

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116 Nonetheless, the amicus brief of the States of Massachusetts, Alabama, Arkansas, Colorado, Delaware, Hawaii, Indiana, Michigan, Montana, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, and Texas, in support of Arizona, frame Clark’s argument in just this way. See *Amicus Brief of the States*, at 7-8.

117 548 U.S. at 749-52.

118 548 U.S. at 753-54.

119 See Rozelle, *supra* note __, at 39-40 & n. 120; Melançon, *supra* note __, at 304-05.

120 See Melançon, *supra* note __, at 304.

speaking, then, these cases suggest that the jury may be more confused than ever about the law they must apply. Notwithstanding the Court’s assertion that Arizona’s statute does not materially differ from the *M’Naghten* rule, the state’s one-pronged formulation creates greater risk that cognitive incapacity will be disregarded.

**Conclusion**

Much like *The Incredible Shrinking Man* who, though becoming ever-smaller, remains an intact and whole human being, so does, apparently, the shrunken insanity rule of *Daniel M’Naghten’s Case*. Despite the Supreme Court’s pronouncements, the *Clark* decision demonstrates how fundamental that rule is to our understanding of responsibility and sanity. After all, the whole survived even when halved. Still, it is hard not to feel that the rule has been diminished, or at least changed, in some meaningful way.

The Supreme Court’s interpretation reduces Arizona’s amendment to a symbolic gesture, but symbols matter greatly in an area of law as expressive as the criminal law. The abandonment of *M’Naghten*’s cognitive prong, together with the rejection of “opinion” evidence in determining mens rea, signals the law’s turn toward the moral and away from the scientific in answering one of its most basic questions: identifying responsible agents who may be subject to condemnation and punishment. This may be as it should be; Professor Stephen Morse has argued that

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122 See, e.g., State v. McGee, unpublished decision, 2009 WL 223117 (Ariz. App. Div. 1, January 29, 2009); State v. Roque, 213 Ariz. 193 (2006). The McGee case, especially, reveals continued confusion about what it is the defendant needs to know as wrongful under the test. The court, affirming the defendant’s conviction, found noteworthy the following exchange between the prosecutor and an expert witness for the defense:

Q. But Jack McGee did know that killing a person or a human being was wrong.
A. Maybe – In an intellectual sense, I’d say he probably did; but in this case – And again, we may be dealing with – with a mental illness where the logic is being distorted – he did not believe this action was wrong.
Q. But he knew that killing a person would be wrong.
A. Yes, I would say so.

2009 WL 223117. In *Roque*, one of defendant’s arguments was that the jury should have been instructed that Arizona’s insanity statute includes the first prong of the *M’Naghten* rule. In rejecting that claim, the Arizona Supreme Court held that “Arizona’s definition encompasses only the second prong” and cited *Clark*. 213 Ariz. at 214.

123 Universal International Pictures (1957).

124 See Erickson, supra note __, at 1577-78 (“Since moral capacity is not a construct of science, but rather, a convention of law, the newly designed *M’Naghten* standard has less to do with psychology and much more to do with normative judgments.”). This move was also recognized in the amicus brief of the Citizens Commission on Human Rights (CCHR), an organization, partly founded by the Church of Scientology, “dedicated to investigation and exposing psychiatric violations of human rights.” Amicus Brief of CCHR, at 2. The CCHR argued that by amending its insanity defense law, Arizona sought to “avoid the current parade of irrelevant
criminal responsibility is based upon “folk psychology,” which is unscientific but no less legitimate for its critical role in our understanding of ourselves as persons that act according to reasons and, thus, according to law. But so long as our definition of legal insanity encompasses mental illness, as it must, the law will have to create space for science to inform even this most normative of judgments. Arizona v. Clark represents one effort to map this fraught terrain.

It is worth noting that the Supreme Court’s reticence to define a constitutional minimum definition of insanity does not necessarily extend to other areas of criminal law. One year after the Clark case, the Supreme Court confronted the issue of legal insanity again in Panetti v. Quarterman. Panetti involved a Texas death row inmate who claimed that he was insane and therefore ineligible for execution according to the Eighth Amendment’s prohibition against cruel and unusual punishment. Expert testimony indicated that Panetti, a schizophrenic, understood that the state was about to execute him for the murders he committed but he also “believe[d] in earnest that the stated reason is a ‘sham’ and the State in truth wants to execute him ‘to stop him from preaching.’” Panetti’s claim relied on Ford v. Wainwright, which set forth a substantive standard of insanity for purposes of capital punishment as lack of comprehension, because of mental illness, of “the reasons for the penalty or its implications.” In Panetti, the Court held that comprehension embraces more than mere knowledge of the fact of execution and its causal relation to the underlying conviction; it requires a level of understanding that allows “the offender [to] recognize at last the gravity of his crime” by dint of the severest punishment. Panetti demonstrates that in the death penalty context, at least, the Court was willing to acknowledge that an appreciation of the nature and quality of one’s actions and circumstances was indeed crucial to the condition of sanity.

As for Eric Clark, he did not give up. After the Supreme Court’s decision against him, he filed for post-conviction relief. One of his claims was that he had ineffective assistance of counsel because his defense attorney failed to object to the trial court’s exclusion of “observation” evidence. Ironically, it was the dissenting opinion in Clark’s case that would come back to thwart him again. The Superior Court of Arizona denied his petition because an attorney cannot be faulted for failing to “predict the [Supreme] Court’s own invention.” The judge was quoting Justice Kennedy.

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psychiatric testimony confusing to juries and unnecessary to the determination of mens rea.” Id. at 3.

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125 See Morse, supra note __, at 209.
127 551 U.S. at 954-55.
129 551 U.S. at 958.
130 U.S. State News, Mar. 15, 2007 (2007 WLNR 5070321). Clark also claimed that counsel was ineffective for failing to raise the issue of Clark’s competency once counsel realized that Clark was sleeping during the trial. Clark’s trial attorney testified that his performance was indeed deficient in this regard, but the judge attributed the admission to the bond that counsel had formed with his client. Order, Case No. CR 2000-0538, at 8 (Ariz. Sup. Ct. 2007).
Clark remains incarcerated in state prison in Arizona. For most of his period of imprisonment, he was housed in the maximum-security unit but he has since been moved to the mental health unit. He has trouble handling interactions with other inmates and has often been placed in isolation. Although Clark is currently receiving some treatment, he still exhibits odd behaviors and bizarre beliefs. For example, he sometimes hallucinates and an adverse reaction to one of his medications has caused him to believe that he is turning into a woman. Nonetheless, his continued stay in the mental health unit is uncertain.