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The Insanity of Mens Rea: Due Process and the Abolition of the Insanity Defense

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The Insanity of the Mens Rea Model:

Due Process and the Abolition of the Insanity Defense.

Jean K. Gilles Phillips and Rebecca E. Woodman

Abstract

In the last 15 years a flurry of legislative activity has taken place as states have attempted to redefine the insanity defense. This article focuses on those states who chose not just to refine the definition of insanity, but to completely abolish it as an affirmative defense.

During the 2006 Supreme Court term many believed that the Court would answer the question of whether the Due Process Clause protects the right of the accused to present an affirmative defense of insanity. Unfortunately, the Court chose to not to answer the question. Although scholars have poured over the Clark v. Arizona decision, there is very little discussion about whether the abolition of the insanity defense does in fact violate the Due Process Clause. This article addresses that question.

The article argues that mens rea includes not just the intent to act, but moral blameworthiness. As such, an affirmative defense of insanity cannot be constitutionally abolished. The article traces the history of mens rea and establishes that blameworthiness has been a component of mens rea since the 12th century and certainly exited at common law. As common law is the basis for defining due process protections, moral blameworthiness, as a component of mens rea, is constitutionally protected. The article examines the state court opinions that have addressed the abolition of the affirmative defense of insanity and explains how they fail to either understand the duality of mens rea or apply it in a helpful way. The next section addresses the Supreme Court opinion in Clark. Despite the Court passing on the opportunity to rule on the issue, the opinion establishes that the Court is open to the idea that an insanity defense is constitutionally required. Finally, the article provides the analysis of mens rea and due process that the Court should have made and concludes that an affirmative defense of insanity cannot be constitutionally abolished.
The Insanity of the Mens Rea Model: 
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Jean K. Gilles Phillips1 and Rebecca E. Woodman2

I. Introduction

Andrea Yates, a former nurse and high school valedictorian, lived in Houston with her
husband and five children ranging in age from six months to seven years.3 She suffered from
long term severe depression and tried to commit suicide.4 In March of 2001 Yates was
hospitalized where she was observed as catatonic and delusional.5 Upon her discharge doctors
advised that she not be left alone.6

On June 10, 2001, while left alone with her five children, Yates systematically drowned

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5 Id., at 217.

6 Id., at 217.
them one by one. She then called 911. When the police arrived she explained that she had to kill her children because she was a bad mother and had damaged her children. According to Yates, the only way to protect the children from Satan and ensure their place in Heaven was to kill them.

Yates was charged with capital murder. There was no dispute that Yates had killed her children and she went to trial on an insanity defense. After the reversal of her first trial, she was found not guilty by reason of insanity. Texas statutes provide an affirmative defense to criminal activity if the defendant, “as a result of severe mental disease or defect, did not know that his conduct was wrong.” Jury foreman, Todd Frank, explained “[w]e understand that she knew it was legally wrong. But in her delusional mind, in her severely mentally ill mind, we believe that she thought what she did was right.” Yates was committed to a maximum-security state hospital where she will reside until a court decides that she does not pose a danger to herself or others.

In June 21, 2000, 17 year old Eric Clark shot and killed a police officer in Flagstaff,

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7 Id., 218.
9 Yates, 171 S.W.3d at 222.
10 V.T.C.A. § 8.01(a).
Arizona.\textsuperscript{13} It was undisputed that Clark suffered from paranoid schizophrenia. At trial classmates, school officials and family described Clark's increasingly bizarre behavior and paranoid conduct. Lay and expert testimony revealed that Clark believed that Flagstaff was populated by aliens who were trying to kill him and that bullets were the only way to stop them.\textsuperscript{14} On June 21, 2000, Clark, in a delusional state, shot and killed Officer Jeffrey Moritz, believing him to be an alien.\textsuperscript{15}

Clark was charged with first degree murder. Clark did not contest the shooting, but argued that he was insane at the time of the shooting. Like Texas, Arizona statutes provide an affirmative defense if the accused established that he was “afflicted with a mental disease or defect of such severity that the person did not know the criminal act was wrong.”\textsuperscript{16} Clark waived his right to a jury trial and the case was tried to the bench. The judge issued a special verdict expressly finding that Clark had failed to show that he was insane at the time of the shooting. Although the trial judge concluded that Clark was suffering from paranoid schizophrenia, the court determined that Clark's mental illness “did not . . . distort his perception of reality so severely that he did not know his actions were wrong.”\textsuperscript{17} Clark was sentenced to life in prison.\textsuperscript{18}


\textsuperscript{14} \textit{Id}. at 2717.

\textsuperscript{15} \textit{Id}. at 2717-18.

\textsuperscript{16} A.R.S. § 13-502(A).

The different results in *Yates* and *Clark* turned on the evidence presented and the ability of trial counsel to convince the trier of fact that the individual charged did not understand their conduct to be wrong. The case of Michael Bethel, however, is dramatically different. Unlike Yates and Clark, Bethel was not even given the opportunity to present his defense as Bethel’s crime occurred in Kansas, one of the four states to have abolished the insanity defense.

On February 7, 2000, in Girard, Kansas, Michael Bethel shot and killed his father, stepmother, and the home-healthcare nurse. Bethel, who began to experience the onset of mental illness in 1995, had been diagnosed as paranoid schizophrenic. After five years of continual mental deterioration, Bethel believed that God had told him to kill the three people and that “a stage' was set in which the three individuals would soon metamorphosis [sic] into a new level of existence.” According to psychiatric testimony, Bethel was mentally impaired and lacked the substantial capacity for judgment at the time of the shootings.

Like Yates and Clark, Bethel did not contest that he shot and killed three people. Like Yates and Clark, there was no dispute that Bethel suffered from severe mental illness that caused his delusions. In Bethel’s case, he believed that God told him to kill the three people to rid them of evil and that his father and the other victims would then be reincarnated as younger,

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18 *Id.* at 2718.
19 District Court Transcripts, Volume IV of the Record on Appeal.
21 District Court Transcripts, Volume XV, p. 7 of the Record on Appeal.
22 *See*, Stipulated Facts, Volume XIV of the Record on Appeal.
good, versions of themselves. Consequently, like Yates and Clark, Bethel's sole defense was that his conduct was the result of sever mental illness. Unlike Yates and Clark, however, Bethel was prohibited from arguing his mental state as an affirmative defense to the crimes charged.

As Kansas abolished the affirmative defense of insanity in 1996, the sole question for the trier of fact was whether Bethel intended to shoot the three victims. The defense that Bethel's intent was the result of his illness was irrelevant. Bethel was charged with capital murder and proceeded to a bench trial on stipulated facts in exchange for a life sentence. At sentencing, the court found that, while Bethel was a dangerous person, he was not an evil person.

Despite significant debate over the appropriate legal and medical standards for insanity,

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23 District Court Transcripts, Volume V, p. 947 of the Record on Appeal.

24 See, Stipulated Facts, Volume XIV of the Record on Appeal.

25 See, Stipulated Facts, Volume XIV of the Record on Appeal.

26 275 Kan. at 461.

27 District Court Transcripts Volume XV, p. 24 of the Record on Appeal. Interestingly enough, although Bethel could have been convicted of capital murder, as insanity is no longer an affirmative defense in Kansas, the State may not have been able to carry out the execution. The United States Supreme Court recently reaffirmed “[T]he Eighth Amendment prohibits a State from carrying out a sentence of death upon a prisoner who is insane.” Ford v. Wainwright, 477 U.S. 399, 409-410, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986). The prohibition applies despite a prisoner's earlier competency to be held responsible for committing a crime and to be tried for it. Panetti v. Quarterman, 127 S.Ct 2842, 2847-48 (2007).”

the majority of jurisdictions, and even the United States Supreme Court, seem to accept that
mental capacity or moral blameworthiness, in some form, is constitutionally mandated as an
affirmative defense to criminal liability. They hold that due process requires some type of avenue for
the consideration of mental illness as a factor in assessing criminal reliability. Those states to have abolished the affirmative defense of insanity merely determined, for reasons that will be
addressed in Part III, that relegating insanity to a pure elements notion of mens rea comports with
Herrera, 895 P.2d 359, 364 (1995); State v. Searcy, 118 Idaho 632, 635, 798 P.2d 914, 917
Arizona, 126 S.Ct. 2729 (20060) held that the ability of Clark to present his defense of insanity
was provided for. 126 S.Ct. at 2722. And while the Court denied the invitation to resolve the
constitutional mandate of an extrinsic insanity defense, the Court also declined to hold that such
a defense was not constitutionally required. 126 S.Ct. at 2722, fn. 20. The court in Finger
specifically held that an affirmative defense of insanity is constitutionally required. Finger v.

As many as sixteen states use the M'Naghten test, wherein the accused is not responsible for
his or her conduct if, as a result of mental illness, the accused did not know the nature and
quality of his actions or did not know that what he was doing was wrong. State v. Korell, 213 Mont.
316, 328, 690 P.2d 992, 999 (1984). Some states have broadened the scope of the M'Naghten rule to include those who knew that their actions were wrong but who, as a result of a
"disease of the mind," were unable to exercise control over their actions. This "irresistible
impulse" test, or volitional standard, is used to supplement the M'Naghten rule in approximately
five states. Many states follow a variation of the American Law Institute (ALI) test which is a
combination of the M'Naghten Rule and the "irresistible impulse" test. The ALI standard state
that a person is not responsible for criminal conduct if at the time of such conduct as a result of
mental disease or defect, he lacks substantial capacity either to appreciate the criminality
(wrongfulness) of his conduct or to conform his conduct to the requirements of the law.
Among those states which follow the ALI test, some favor the word "wrongfulness" instead of
"criminality." Still others remove the word "substantial." New Hampshire is the only state which
follows the Durham rule or "product" test. As set forth in Durham v. United States, 214 F.2d 862,
it is the complete abolition of insanity as an extrinsic, affirmative defense that is the focus of this article.

Montana, Idaho, Utah, and Kansas have replaced their respective insanity defense

874875 (D.C.1954), "a defendant is not criminally responsible if his unlawful act was a product of mental disease or defect." Three other states have adopted unique standards drawing in part from the cognitive right-wrong language of the M’Naghten rule and the "irresistible impulse" test while adding other considerations, such as "prevailing community standards" and "legal and moral aspects of responsibility." State v. Searcy, 118 Idaho 632, fn 3, 798 P.2d 914 (1990). See also, Clark v. Arizona, 126 S.Ct. at 2720-21. See, generally, I. Keilitz & J.P. Fulton, The Insanity Defense and its Alternatives: A Guide for Policymakers, Institute on Mental Disability and the Law, National Center for State Courts (October 1983). See also, Clark v. Arizona, 126 S.Ct. at 2720-21.

31 “Evidence that the defendant suffered from a mental disease or defect or developmental disability is admissible to prove that the defendant did or did not have a state of mind that is an element of the offense.” MONT. CODE .ANN. § 46-14-102 (2003).

32 “(1) Mental condition shall not be a defense to any charge of criminal conduct.
“(2) If by the provisions of section 19-2523, Idaho Code, the court finds that one convicted of crime suffers from any mental condition requiring treatment, such person shall be committed to the board of correction or such city or county official as provided by law for placement in an appropriate facility for treatment, having regard for such conditions of security as the case may require. In the event a sentence of incarceration has been imposed, the defendant shall receive treatment in a facility which provides for incarceration or less restrictive confinement. In the event that a course of treatment thus commenced shall be concluded prior to the expiration of the sentence imposed, the offender shall remain liable for the remainder of such sentence, but shall have credit for time incarcerated for treatment.
“(3) Nothing herein is intended to prevent the admission of expert evidence on the issue of any state of mind which is an element of the offense, subject to the rules of evidence.” IDAHO CODE § 18-207 (Michie 2004).

33 “(1) (a) It is a defense to a prosecution under any statute or ordinance that the defendant as a result of mental illness, lacked the mental state required as an element of the offense charged.
(b) Mental illness is not otherwise a defense, but may be evidence in mitigation of the penalty in a capital felony under Section 76-3-207 and may be evidence of special mitigation reducing the level of a criminal homicide or attempted criminal homicide
statutes with what has been termed the Mens Rea Model evidentiary rule. Under this model, evidence of mental disease or defect is admissible only to prove that the defendant lacked the mental state required as an element of the offense charged. By definition, the Mens Rea Model limits its application to specific intent crimes and is more akin to diminished capacity. The question is not why a person acted, but whether the person intended to act. The position taken in this article is that by replacing the extrinsic defense of insanity with an evidentiary rule, which asks only whether the specific intent element of the crime has been met, the Mens Rea Model unconstitutionally abolishes an essential component of mens rea, that of moral blameworthiness.

A (2) The defense defined in this section includes the defenses known as "insanity" and "diminished mental capacity." UTAH CODE ANN. § 76-2-305 (2003).


Diminished capacity, as discussed in Part V, is the denial of the requisite intent to commit the crime and should not be confused with the affirmative defense of insanity. Under the insanity defense, as extrinsic to the elements, the accused admits to the commission of the crime, but argues that mental illness deprived them of moral blameworthiness. Under diminished capacity, however, the accused denies the commission of the crime as mental illness prevented them from forming the intent sent out in the elements of the offense. To this end, it mirrors the Mens Rea Evidentiary model.
In arguing the Mens Rea Model is unconstitutional, Part II of the article examines the history of *mens rea* and establishes that, in addition to the intent to act, moral blameworthiness is a deeply rooted principle in criminal jurisprudence. Against the historical backdrop, Part III of the article analyzes the state rulings to have addressed the Mens Rea Model and concludes that the state courts fundamentally misunderstand *mens rea* by defining it as solely one's intent to act.

The state court discussion is followed in Part IV by an analysis of the issue in light of the United States Supreme Court decision in *Clark v. Arizona*. Although the Court in *Clark* failed to resolve the issue, the majority opinion implicitly acknowledges that an affirmative defense of insanity may be required by the Due Process Clause. Additionally, Justice Kennedy's dissent in *Clark*, which correctly notes the erroneous “conflating [of] the insanity defense and the question of intent,” also reads with an affirmation that evidence of moral blameworthiness must be admitted. By drawing on such firmly rooted principles and current Supreme Court analysis, Part V of the article maintains that because *mens rea* has two components, the specific *mens rea*, defined through the elements of the crime and includes the intent to act, and general *mens rea*, defined as moral blameworthiness, both are constitutionally protected by the Due Process Clause.

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39 126 S.Ct. at 2746.
40 126 S.Ct. at 2746 (“Criminal responsibility involves an inquiry into whether the defendant knew right from wrong, not whether he had the *mens rea* elements of the offense. While there may be overlap between the two issues, the existence or nonexistence of legal insanity bears no necessary relationship to the existence or nonexistence of the required mental elements of the crime. *Mullaney v. Wilbur*, 421 U.S. 684, 706, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975) (Rehnquist, J., concurring).”)
As the Mens Rea Model eliminates the general, or moral blameworthiness, component of *mens rea*, it is unconstitutional.

I. History of *Mens Rea*

The component of *mens Rea* that addresses the offense elements of the crime, or what is termed specific *mens rea*, is without question constitutionally required.\(^{41}\) The broader question is whether the component of *mens rea* that addresses moral blameworthiness, or general *mens rea*, is also constitutionally required. In other words, does the constitution require that an accused, who because of mental illness, is unable to appreciate his conduct, be able to present that affirmative defense to the trier of fact?

The Constitution provides that the states cannot deprive an individual of life, liberty, and the pursuit of happiness without due process of law.\(^{42}\) A legislative enactment violates the Due Process Clause if it “offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.”\(^{43}\) The Supreme Court has consistently held that

\(^{41}\) H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 132 (1968). See Morissette v. United States, 342 U.S. 246, 250 (1952) (stating that the concept of *mens rea* “is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil”).

\(^{42}\) Fourteenth Amendment to the United States Constitution

\(^{43}\) Clark v. Arizona, 126 S.Ct. at 2719 (applies the test to the question of insanity standards) Patterson v. New York, 432 U.S. 197, 201-202 (1977)(power of the states to regulate procedures under which its laws are carried must comport with due process); Duncan v. Louisiana, 391 U.S. 145, 149 (1968) (state law denying a defendant of the right to a trial before incarceration on a misdemeanor offense violates due process).
history and common law are directive in assessing fundamental rights.\textsuperscript{44} Our analysis begins, then, with an examination of the history of the \textit{mens rea} doctrine.

The \textit{mens rea} doctrine is most commonly associated with the Latin maxim "\textit{actus non facit reum nisi mens sit rea}" – an act does not make one guilty unless his mind is guilty.\textsuperscript{45} As far back as the Anglo-Saxon period ending around 1100 A.D., moral liability was entrenched in the criminal law.\textsuperscript{46} The \textit{mens rea} term likely originated in 597 A.D. with St. Augustine and his writings of evil motive.\textsuperscript{47} St. Augustine discussed the necessity of a "guilty mind" in relation to perjury by stating, "Nothing makes the tongue guilty, but a guilty mind"\textsuperscript{48} Although St. Augustine’s sermon focused on perjury, the phrase in Latin, "\textit{Reum linguam non facit nisi mens rea}," provided the basis for the evil motive application to all crimes with the mere removal of the word \textit{linguam}.\textsuperscript{49}

\textsuperscript{44} See \textit{Ford v. Wainwright}, 477 U.S. (based, in part, on common law, violation of the Eighth Amendment to execute a prisoner who is insane).


\textsuperscript{49} \textit{Id.} at 110-11.
The basis for the *mens rea* term originated with church teachings, which for many years remained isolated from secular laws.\(^{50}\) While the law provided for criminal liability without criminal intent or fault, it was the church that taught the intent of the person was the most important factor.\(^{51}\) Penance was determined largely on the moral blameworthiness of the “sinner.”\(^{52}\) Not surprisingly, the early Anglo-Saxon church eventually influenced the laws of the time.\(^{53}\) Anglo-Saxon judges found difficulty in punishing those who were guilty of killing another by accident or in self-defense.\(^{54}\) Although the laws concerning guilt in these instances did not change at this point in time, the church’s influence sparked a procedural solution to problems of blameworthiness: a king’s pardon.\(^{55}\)

By the thirteenth century, the notion of “malice” as a component of *mens rea* began to emerge.\(^{56}\) Henry Bracton, a cleric and judge of the time, influenced the direction of the common

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\(^{50}\) *Id.*


\(^{52}\) *Id.*


\(^{55}\) *Id.*

law. Bracton's writings displayed not only a strong roman and canonist influence that “a crime is not committed unless the intention to injure exists,” but suggested a blameworthiness component as well:

we must consider with what mind (animo) or with what intent (voluntate) a thing is done, in fact or in judgment, in order that it may be determined accordingly what action should follow and what punishment. For take away the will and every act will be indifferent, because your state of mind gives meaning to your act, and a crime is not committed unless the intent to injure (nocendi voluntas) intervene, nor is a theft committed except with the intent to steal.

In his writings on arson, Bracton relayed the importance of evil designs, or mala conscientia. This element of moral blameworthiness was evidenced by the use of the words “premeditated," "madness," wickedly," “in felony," and “misadventure in pleas before the crown" during the first part of the thirteenth century.

Bracton also provided the basis for the excuse doctrine with his writings on children and the insane. In at least one translation, Bracton writes that the insane should not be held

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57 Id. at 655. See also Francis Bowes Sayre, Mens Rea, 45 HARV. L. REV. 974, 984 (1932).


60 J. LL. J. EDWARDS, MENS REA IN STATUTORY OFFENCES 2 (1955).

criminally liable because they lack mental capacity or reason. Similarly, children cannot be held criminally liable because they lack evil designs. According to one legal scholar, Bracton’s view of *mens rea* “constituted a normative judgment of subjective wickedness, requiring not simply that the actor intend to commit the offense, but also that the offense be committed by a responsible moral agent for wicked purposes.” Thus developed the component of moral blameworthiness and insanity as a defense to criminal liability.

After the thirteenth century, moral blameworthiness helped to distinguish between criminal and civil responsibility. In the years following Bracton, there grew a “differentiation between the crime and the tort, for the allowance of damages continued in the main independent of considerations of moral blameworthiness.” Moral blameworthiness and “malice aforethought,” however, mirrored the general *mens rea* requirement requiring an evil motive or intent.

During this time, defenses continued to evolve around the concept of *mens rea*, due in


63 *Id.*


66 *Id.* at 988-89.

large part to the idea that a “free, voluntary, and rational choice to do evil” was required for
criminal liability. 68 Like insanity and infancy, self-defense and compulsion emerged as defenses
on the grounds that the accused was not morally blameworthy. “While coerced offenders no
doubt ‘intend’ their criminal acts, they are excused because their capacity to function as free and
responsible moral agents has been so compromised by the pressure of the situation that to punish
them would be unfair.”69 Consequently, courts began to excuse defendants who committed
certain acts under extreme duress. This evolution cemented the notion of moral blameworthiness
and that the offender must be in a position to make a free and voluntary choice to commit an evil
act.70 By the eighteenth century, moral blameworthiness as an essential component of mens rea
was firmly rooted in English criminal law as evidenced by Blackstone's statement: “So that to
constitute a crime against human laws, there must be, first, a vicious will; and, secondly, an

68 Id. at 664-65.
69 Id. at 665. Although defenses such as infancy, insanity, and self-defense were recognized,
other excuse defenses such as religious obligation, lack of knowledge, and euthanasia were
punished in the usual manner. Id, at 666-67. Additionally, in the seventeenth century, Eduardo
Coke expounded upon Bracton's ideas concerning malice and arson, “‘If it be done by mischance,
or negligence,’ says Coke, ‘it is no felony.’” J. LL. J. EDWARDS, MENS REA IN STATUTORY
OFFENCES 2 (1955) (citing THIRD INSTITUTE, f. 67). While Coke repeated Bracton in
regards to express malice, he greatly expanded the idea to include malice implied by the law. For
example, Coke believed that the “killing of robbers while in commission of their robberies” or a
killing that occurs during an accident while in the process of an illegal act were committed with a
type of malice aforethought and the accused should be held accountable. Martin R. Gardner,
The Mens Rea Enigma: Observations on the Role of Motive in the Criminal Law Past and
Present, 1993 UTAH L. REV. 635, 669-70 (1993). Consequently, Coke's writings formed the
basis for the modern day felony murder rule while greatly expanding the notion of malice at the
time.

70 Martin R. Gardner, The Mens Rea Enigma: Observations on the Role of Motive in the
unlawful act consequent upon such vicious will.\(^{71}\)

A strict use of evil motive or vicious will did produce some unpredictable and unjust results. When persons who acted with an evil motive but achieved an unexpected result were sometimes declared not guilty of the unintended consequences of the intended act, the judiciary, in an effort to correct this strict application of evil motive, began to struggle with identifying a notion of mens rea that became part of the element of the offense.\(^{72}\) For the defendant who acted intentionally, mens rea would exist even if the result of the action was not what was


\(^{72}\) As courts attempted to clarify the mens rea elements of various offenses, they often specifically rejected the original evil motive approach in favor of describing particular states of mind as essential for criminal liability. Thus, in Regina v. Pembliton, (1874) L.R.-Cr. Cas. Res. 119, the court quashed Pembliton's conviction for the statutory offense of "unlawfully and maliciously committing damage ... to the property of another." Id. Pembliton, while drunk, got into a fight with a group of people in a street lined with houses. In the course of the fight, Pembliton picked up a large stone and hurled it at the group. The stone flew over their heads and struck and shattered a plate glass window of one of the homes along the street. While the government argued, seemingly correctly under the facts, that Pembliton's motive in throwing the stone (a desire to injure his fellow combatants) was "malicious," Id. at 120, the court nevertheless found that because he did not "intend" to break the window, he did not "maliciously commit damage" under the statute. Id. The court intimated, however, that had the jury found that Pembliton recklessly had thrown the stone, in light of the nearness of the windows, he would have maliciously committed damage under the statute. However, there were still several members of the court who determined that because Pembliton did not "intend" to break the window he was necessarily precluded from a finding of reckless. Id. at 122-23. Martin R. Gardner, The Mens Rea Enigma: Observations on the Role of Motive in the Criminal Law Past and Present, 1993 UTAH L. REV. 635, 673-74 (1993).
intended.\textsuperscript{73}

Despite this divergent approach to \textit{mens rea}, the concept of evil motive – moral blameworthiness – as a prerequisite to criminal responsibility was not abandoned in law. Rather, this aspect of \textit{mens rea} was preserved in doctrines of excuse. If conduct was intentional, but for reasons of duress, infancy or insanity the defendant did not possess the capacity for moral blameworthiness, a defense existed to the otherwise criminal conduct.\textsuperscript{74}

This \textit{mens rea} duality was ultimately adopted by English common law courts. In 1796 Blackstone explained that lunatics suffered a deficiency in will that rendered them unable to tell right from wrong.\textsuperscript{75} It is this lack of free will that prevents a finding of criminal liability. According to Blackstone, it is a person's free will and ability to choose to act that renders their conduct either “praiseworthy or culpable.”\textsuperscript{76}

\textsuperscript{73} It is this theory of guilt that eventually took hold in the Model Penal Code in the form of reckless involuntary manslaughter and in felony-murder doctrine wherein the defendant is still held accountable for an unintentional killing during the commission of inherently dangerous felony. \textit{See}, Martin R. Gardner, \textit{The Mens Rea Enigma: Observations on the Role of Motive in the Criminal Law Past and Present}, 1993 UTAH L. REV. 635, 682-684 (1993)


Perhaps the most famous English common law case is the 1843 *M Naughten’s Case*. In *M Naughten’s Case* the English Court determined that while the prosecution held the burden of establishing that the conduct of the defendant was intentional, it was a defense if the defendant could prove that he or she did not possess the mental state necessary to appreciate the

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S. Goddard, *CASE OF INJUSTICE? THE TRIAL OF JOHN BELLINGHAM*, American Journal of Legal History, January, 2004, wherein the author discusses that although Hawkins and Blackstone did not deal with insanity in detail. Hawkins took the view that a person must be able to understand the law and be capable of conforming to it; a person of unsound mind who could not distinguish between good and evil was therefore not culpable. Blackstone also took the view that a lunatic could not be guilty of a crime in that his understanding was defective, and therefore he lacked the necessary mental element.

The belief that a person must have moral culpability is further reflected in death penalty jurisprudence. In 1986 the Court held that it is a violation of the Eighth Amendment to execute a prisoner who is insane. *Ford v. Wainwright*, 477 U.S. 399, 409-410, 106 S.Ct. 2595, 91 L.Ed.2d 35 (1986). After reviewing the values as laid down by Balckstone and Coke, Justice Marshall reasoned that:

> The various reasons put forth in support of the common-law restriction have no less logical, moral, and practical force than they did when first voiced. For today, no less than before, we may seriously question the retributive value of executing a person who has no comprehension of why he has been singled out and stripped of his fundamental right to life. Similarly, the natural abhorrence civilized societies feel at killing one who has no capacity to come to grips with his own conscience or deity is still vivid today. And the intuition that such an execution simply offends humanity is evidently shared across this Nation. Faced with such widespread evidence of a restriction upon sovereign power, this Court is compelled to conclude that the Eighth Amendment prohibits a State from carrying out a sentence of death upon a prisoner who is insane. Whether its aim be to protect the condemned from fear and pain without comfort of understanding, or to protect the dignity of society itself from the barbarity of exacting mindless vengeance, the restriction finds enforcement in the Eighth Amendment." [citations omitted]. 477 U.S. at 409.

And just this term, the Court held such a prohibition applies even if the defendant is deemed competent to stand trial. *Panetti v. Quartermann*, 127 S.Ct. 2842, 2847-48 (2007).
wrongfulness of his or her conduct. According to the *M'Naughten* test, the accused is not responsible for his or her conduct if, as a result of mental illness, the accused did not know the nature and quality of his actions or did not know that what he was doing was wrong. Since its passage in 1843, the M'Naughten test, or variations of it, have been utilized to determine the criminal responsibility, i.e., moral blameworthiness, of persons whose mental illness deprived them of the ability to rationally choose between right and wrong. This dual approach to *mens rea* thus preserved the historical requirement of moral blameworthiness, while at the same time it remedied the unpredictable results of a strict application of evil motive.

The duality of *mens rea* that is rooted in long standing common law was clearly adopted by the United States Supreme Court. It was the absence of free will, which lies at the heart of criminal non-responsibility of insane persons, that was acknowledged by the Court over 100

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77 *M'Naughten's Case*, 8 Eng. Rep. 718, 722 (1843)(M'Naughten believed that there was a conspiracy by the Prime Minister to kill him. M'Naughten, intending to kill the Prime Minister, actually killed the secretary to the Prime Minister. His defense was that he was suffering from persecutory delusions).


79 *See*, footnote __, *supra*.


In order to constitute a crime, a person must have intelligence and capacity enough to have a criminal intent and purpose; and if his reason and mental powers are either so deficient that he has no will, no conscience, or controlling mental power, or if, through the overwhelming violence of mental disease, his intellectual power is for the time obliterated, he is not a responsible moral agent, and is not punishable for his criminal acts... neither in the adjudged cases nor in the elementary treatises upon criminal law is there to be found any dissent from these general propositions. All admit that the crime of murder necessarily involves the possession by the accused of such mental capacity as will render him criminally responsible for his acts.82

And more recently, the Court reflected in Morissette v. United States, that the “relation between some mental element and punishment for a harmful act is almost as instinctive as the child's familiar exculpatory ‘But I didn't mean to.’ ... Unqualified acceptance of this doctrine by English common law ... was indicated by Blackstone's sweeping statement that to constitute any crime there must first be a ‘vicious will.’”83

Unfortunately, the attempts by several courts to address the insanity issue have confused the dual nature of mens rea. Rather than recognize the existence of two necessary but distinct components of mens rea, specific and general, courts have tended to collapse the two into a

82 Davis v. United States, 160 U.S. 469, 485 (1895) (on a prosecution for murder, where the defense is insanity, and the fact of the killing with a deadly weapon is clearly established, defendant is entitled to an acquittal of the specific crime charged if, upon all the evidence, there is reasonable doubt whether he was capable in law of committing crime).

83 Morissette v. United States, 342 U.S. 246, 250-51 (1952) (footnotes omitted) (in prosecution under statute providing that whoever embezzles, steals, purloins or knowingly converts government property is punishable by fine and imprisonment, the mere fact that defendant's removal of property was a conscious and intentional act did not give rise to presumption of criminal intent).
single notion of *mens rea* which focuses solely on the intent element of a particular offense. By failing to understand and give weight to the component of *mens rea* that addresses legal capacity for criminal responsibility, which is extrinsic to offense elements, courts have erroneously abandoned a deeply rooted principle of law that is fundamental to our scheme of criminal justice.84

**II. Constitutional Analysis of the Mens Rea Model by State Courts.**

The distinction between the affirmative defense of insanity, which encompasses moral blameworthiness as a necessary component to *mens rea*, and the Mens Rea Model evidentiary rule “can be complex and somewhat overlapping.”85 This is particularly true as the term “Mens Rea Model” is really a misnomer. To illustrate the difference the following hypothetical is frequently used: A is severely mentally ill. If because of his mental illness, A kills B thinking he is cutting a grapefruit, A is not guilty under either the affirmative defense of insanity or under the Mens Rea Model as A did not intend to kill B.86 If, however, A shoots B, believing in an acute state of mental illness that B is an enemy soldier and that he must kill or be killed, evidence

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84 In determining that evil motive remains central to the defenses of infancy, insanity, duress, and mistaken claim of right, Professor Gardner examined the theoretical status of these defenses and distinguished them from concepts relating to mens rea requirements for prima facie guilt. Professor Gardner then concluded that the failure to appreciate the offense/defense distinction can result in confusion leading to two doctrinally undesirable manifestations: (1) restricted application or outright rejection of the defenses; and (2) stifling of judicially created “new” defenses. Martin R. Gardner, *The Mens Rea Enigma: Observations on the Role of Motive in the Criminal Law Past and Present*, 1993 UTAH L. REV. 635, 737 (1993).

85 *Clark v. Arizona*, 126 S.Ct. at 2742 (Kennedy, J., dissenting).

of mental illness would be admissible under the affirmative defense doctrine, but would not be an admissible defense under the Mens Rea Model. Under an affirmative insanity defense, A’s mental capacity would be taken into account in assessing criminal liability. Under the Mens Rea Model, however, because A knew B was a human being and clearly intended to kill him, the elements of the offense would be proven and a guilty verdict would follow. That the conduct was the result of A's mental illness and a belief that B was an enemy soldier would be irrelevant.

As the vast majority of mentally ill people are capable of forming intent, and because most mental illness is not so extreme that A believes he is cutting a grapefruit when in fact A is killing B, the Mens Rea Model effectively abolishes a person's ability to argue lack of criminal responsibility due to mental disease or defect. Despite such harsh results, the Mens Rea Model has withstood constitutional challenges in four of the five states to have adopted it.

While the five courts to consider the Mens Rea Model agree that mens rea is

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PUB. POL'Y, 253, 261; State v. Herrera, 895 P.2d 359, 362.

87 Stephen J. Morse, Undiminished Confusion in Diminished Capacity, 75 J.CRIM. L. & CRIMINOLOGY 1, 41 (1984) (“Craziness seems to affect impulses, controls, and motivations for actions, but it does not stop persons from intending to do what they do or from narrowly knowing factually what they are doing.”)


constitutionally required, the courts are in disagreement over exactly what the *mens rea* concept itself requires. Much of the confusion is the result of the courts' failure to appreciate in any meaningful manner the duality of *mens rea*. Despite the clear historical mandate that *mens rea* requires not just intent, but moral blameworthiness, courts misunderstand the duality of *mens rea* and simply conclude that the Mens Rea Model is constitutional.

This confusion resulted in four state supreme courts upholding the Mens Rea Model as constitutional. In finding that the Mens Rea Model was consistent with Due Process and the Constitution, these four courts relied on essentially three arguments: 1) the Due Process Clause does not bind the states to any one test for insanity; 2) the Mens Rea Model still requires the existence of *mens rea*; and 3) the Mens Rea Model is in keeping with the medical field.

The most prevalent argument offered by the state courts was that a test for insanity has not been constitutionally mandated. First the state courts pointed to the longstanding precedent that defining criminal conduct and defenses is within the sole province of the state. Relying on *Powell v. Texas*, the state courts conclude that they are free to relegate mental illness evidence for the purposes of refuting the elements of the crime charged. In *Powell*, the Supreme Court

90 See note ___, supra.
91 See note ___, supra.
94 *State v. Korell*, 213 Mont. 316, 328, 690 P.2d 992, 999 (1984); *State v. Herrera*, 895 P.2d 359,
upheld the state's right to criminalize and punish public drunkenness. Writing for the plurality, Justice Marshall found that the shifting moral views of society gave the states the right to adjust their laws accordingly.\(^95\)

Second, and more specifically, the state courts relied on the United States Supreme Court decision in *Leland v. Oregon*\(^96\) wherein the Court declined to adopt any specific insanity test as required by the Due Process Clause.\(^97\) In *Leland*, the Supreme Court upheld an Oregon statute that placed the burden of proving insanity beyond a reasonable doubt on the defendant. The Supreme Court, in refusing to adopt a specific test for insanity, determined a specific test would be unwarranted given the uncertainty in the psychiatric community and the erratic history of the insanity defense.\(^98\) Based on the Supreme Court's failure to squarely address the extrinsic component of *mens rea* and whether due process requires an affirmative defense of insanity, the state courts at issue asserted that *Leland* established that no constitutional due process right exists

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95 *Powell v. Texas*, 392 U.S. at 536 (the doctrines of actus reus, mens rea, insanity, mistake, justification, and duress have historically provided the tools for a constantly shifting adjustment of the tension between the evolving aims of the criminal law and changing religious, moral, philosophical, and medical views of the nature of man. This process of adjustment has always been thought to be the province of the States).

96 *Leland v. Oregon*, 343 U.S. 790, 72 S.Ct.1002, 96 L.Ed.1302 (1952) (adoption of the irresistible impulse test is not implicit in the concept of ordered liberty).


as to any particular insanity test.  

Based on the premise that no particular insanity test is required, the state courts used *Leland* and *Powell* as springboards to label the Mens Rea Model simply another variant of the insanity defense. By claiming that the Mens Rea Model does not altogether abolish a defendant's ability to argue his or her insanity, in that a defendant could still argue to the jury that as a result of a mental disease or defect he did not possess the requisite offense element of intent, state courts concluded the Mens Rea Model did not offend the Due Process Clause. Implicit in these decisions is the clear rejection that a defendant's moral blameworthiness or mental capacity is a necessary component of *mens rea*.

Finally, the state courts parsed out the language of several United States Supreme Court

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101 *State v. Korell*, 213 Mont. 316, 329, 690 P.2d 992, 999 (1984) (we reject appellant's contention that from the earliest period of the common law, insanity has been recognized as a defense. What we recognize is that one who lacks the requisite criminal state of mind may not be convicted or punished). What the Court in *Korell* failed to acknowledge is that simply because the standard for legal insanity has evolved over time does not equate to the lack of firmly rooted principles that some form of affirmative insanity defense be provided.
decisions that discuss the history and debate in the psychiatric community over the definitions of insanity and mental illnesses. Again, picking up on the failure to adopt a specific test in *Leland*, the state courts focused on “the uncertainty in the psychiatric community” and the “erratic history of the insanity defense.”

To buttress the claim, the courts often cited to the now familiar passage in *Powell* that the doctrines of actus reus, *mens rea*, insanity, mistake, justification, and duress has historically provided the tools for a constantly shifting adjustment of the tension between evolving aims of the criminal law and changing religious, moral, philosophical, and medical views of the nature of man. This process of adjustment has always been thought to be the province of the states.

Emphasizing that the *Powell* Court held that casting a particular test would “freeze the developing productive dialogue between law and psychiatry into a rigid constitutional mold,” the state courts held that the Mens Rea Model better fit with the psychiatric view.

While one reason for the collapse of the two components of *mens rea* is the failure of the

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102 *State v. Herrera*, 895 P.2d 359, 364 (1984). Again, the courts seem to simply accept that because psychiatry and medical standard have evolved, the affirmative defense is not constitutionally required.


Supreme Court to set out a definition of mens rea, the state courts make a fatal mistake in assuming they have the ultimate authority to define crimes, and defenses and the marshaling of evidence in criminal trials. It is true that the Supreme Court has held very loose reins on the states passage and application of their statutes, state law must still comport with the Constitution. Justice Kennedy, in his dissent in Clark v. Arizona explained that the Court, as the final arbiter of the Constitution, still retains some control over state laws:

States have substantial latitude under the Constitution to define rules for the exclusion of evidence and to apply those rules to criminal defendants. This authority, however, has constitutional limits. Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense. This right is abridged by evidence rules that infringe upon a weighty interest of the accused and are arbitrary or disproportionate to the purposes they are designed to serve.

Second, the state courts' focus on Powell's concern that any given test would "freeze the mold" is antithetical. The basis for the current tension between psychiatric diagnosis and legal insanity is the need to take psychiatric tests and classify them by a legal standard that is not

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106 See, Holmes v. South Carolina, 547 U.S. 319, ___, 126 S.Ct. 1727, 1731, 164 L.Ed.2d 503 (2006)(defendant has right to present evidence of third party guilt as a defense); Crane v. Kentucky, 476 U.S. 683, 690, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986)(defendant has a right to present evidence that his confession, ruled admissible for Fifth Amendment purposes, is unreliable); Chambers v. Mississippi, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973)(state court not apply hearsay rules in manner to deprive defendant of ability to present his defense).

107 126 S.Ct. at 2738

108 126 S.Ct. at 2743 [citations omitted].
concerned with psychology, but with the accused's intent. Such tension is not the result of the
insanity. If fact, it is just the opposite. An affirmative defense of insanity does not stop the
evolution or dialogue between the law and psychiatry, but enhances and encourages further
development. As the psychiatric community evolves and changes so will the presentation of
evidence to the trier of fact. It is the complete abolition of the defense that prevents the
introduction and evolution of mental illness and criminal responsibility. Thus, for the
schizophrenic who believes that his next door neighbor is an enemy soldier or for the person who
suffers from Alzheimer's and does not remember what he did or why, the punishment is equal to
that of the person who, with full understanding of their conduct, made a conscious decision to
break the law.109 By failing to understand the relationship between moral culpability and mens
re a the state court have simply looked at the centuries-old principle of criminal responsibility,

109 An example of the injustice of the Utah statute was set out by Justice Stewart's dissenting
opinion in State v. Herrera: Judge John M. Wajert, 51, stepped down from the bench after eight
years as a Pennsylvania judge. Two years later, he was arrested for embezzling $125,000 from
clients. It was found that the former judge was suffering from Alzheimer's. He wore rumpled
clothes, and he no longer shaved. During the seven-day trial, he slumped in a chair and stared
vacantly at the floor. His defense counsel claimed that Wajert was unable to assist in his own
defense, that Alzheimer's so impaired his client that the only thing the former judge could
understand was that he needed money and so he took it, and that he was not able to exercise any
kind of rational judgment. Wajert did not know of his degenerated condition, although his wife
said: "He has been told repeatedly (about his affliction), and he doesn't remember. Why he said
just the other day 'What do you suppose is the matter with me?' " A Mind Undermined, When Did
a Chesco Judge Accused of Embezzlement Become Ill?, Philadelphia Inquirer, April 4, 1983, at
B01. Because the judge knew that he was taking money, that knowledge was sufficient under
Utah law to convict him of a crime, even though he lacked the mental capacity to understand the
nature and consequences of his acts. His disinhibited urge to take the money was not unlike that
of a child who grabs candy at the store without paying. State v. Herrera, 895 P.2d 359, 381, fn
which evolved from Judeo-Christian and Anglo-Saxon moral and ethical concepts, and dismissed it as “erratic history.”

Nevada, the only state to hold the Mens Rea Model unconstitutional, did not dismiss the history of mens rea, it just did not fully appreciate, and therefore clearly articulate, the duality of the concept. The Nevada Supreme Court in Finger court aptly noted that for hundreds of years society has recognized that mentally ill individuals may be incapable of understanding the consequences of their conduct, and that when their conduct violated a legal or moral standard, those persons were institutionalized rather sent to penal institutions. While the Finger court acknowledged Leland and Powell and the significant debate over the definition of legal insanity, Finger ultimately determined that the debate only highlighted the right of the states to determine the details of how to implement a legal insanity defense, not that the defense could be

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112 Specifically, the Court stated:
    For hundreds of years, societies recognized that insane individuals are incapable of understanding when their conduct violates a legal or moral standard, and they were therefore relieved of criminal liability for their actions. Such individuals did not escape responsibility for their actions; they were still locked away, but in asylums, not prisons.
    This concept of treating individuals differently based upon their mental capacity is called legal insanity. It recognizes that a crime involves something more than just the commission of a particular act, it also involves a certain mental component. This mental component is usually referred to as the mens rea of a crime, or criminal intent. The term "mens rea" refers to the mental state of a person at the time of the commission of the criminal act. Id. at 71.
abolished.\textsuperscript{113}

Once \textit{Finger} concluded that the Supreme Court did not opt for the abolition of insanity, it determined the insanity defense was so rooted in our notions of justice as to be a fundamental right protected by the constitution.\textsuperscript{114} By holding that criminal responsibility has historically been tied to an understanding of right and wrong, the \textit{Finger} Court reasoned that the Mens Rea Model made the fatal assumption that crimes simply require the intent to act and ignored that most crimes also require an element of knowledge or willfulness.\textsuperscript{115} In the end the \textit{Finger} Court held legal insanity is a necessary corollary to \textit{mens rea} and that as the legal defense of insanity consists of a conscious knowledge of right and wrong, its abolition contravened the requirement of \textit{mens rea}.\textsuperscript{116}

What the court in \textit{Finger} failed to fully grasp is the duality of \textit{mens rea}. The focus of the \textit{Finger} court was that, in addition to intent, it was constitutionally required that the defendant know the consequences of his or her conduct or understand the difference between right and

\textsuperscript{113} \textit{Id.} at 81-82..(When read in context, the comments in \textit{Powell} support the Supreme Court's longstanding policy to generally permit the states to determine the details of how to implement well-established doctrines. In other words, how a state chooses to present the issue of legal insanity is left up to state law. \textit{Powell} cannot be read to stand for the proposition that the concept of legal insanity, \textit{i.e.}, an inability to form the requisite \textit{mens rea}, is not a fundamental principle of our jurisprudence entitled to protection under the Due Process Clause).

\textsuperscript{114} \textit{Id.} at 80 (Historical practice overwhelmingly supports the conclusion that legal insanity is a fundamental principle).

\textsuperscript{115} \textit{Id.} at 79. (The State's assertion that knowledge that one's actions are "wrong" is not generally an element of a crime, even a specific intent crime, and it is not a requirement of murder means that the argument must fail).

\textsuperscript{116} \textit{Id.} at 81. \textit{See also} note ___, supra.
wrong.\textsuperscript{117} This analysis, however, did nothing more that reaffirm the M'Naughten test, thereby defeating any precedential value of the opinion. By failing to clearly acknowledge that legal capacity for criminal responsibility is a component of \textit{mens rea} external to offense elements, the \textit{Finger} court missed an opportunity to fully consider the Due Process implications of abolishing the insanity defense.\textsuperscript{118}

III. Constitutional Analysis of Insanity by the United States Supreme Court: \textit{Clark v. Arizona}

\textit{Arizona}

Not only did the \textit{Finger} Court miss the opportunity to clarify and define the debate as to \textit{mens rea} and insanity, but so too did the Supreme Court in \textit{Clark v. Arizona}.\textsuperscript{119} Despite being

\textsuperscript{117} \textit{Id.} at 84. Ultimately, the Court in \textit{Finger} held: Historically, the \textit{mens rea} of most crimes, particularly specific intent crimes, incorporates some element of wrongfulness as that term is used in \textit{Lewis} and \textit{M'Naughten}. The Legislature can only eliminate this concept of wrongfulness if it redefines the crime itself, in other words, if it chooses to make the act, regardless of the mental state, the crime. Thus murder could simply be defined as the killing of a human being. But so long as a crime requires some additional mental intent, then legal insanity must be a complete defense to that crime.

\textsuperscript{118} A close examination of \textit{State v. Bethel}, 275 Kan. 456 66 P.3d 840, 844 (2003), demonstrates that while the Kansas Supreme Court was presented with the duality of \textit{mens rea} it was not forced to address it. Despite Mr. Bethel’s heavy reliance on the decision in \textit{Finger}, the Kansas Court dismissed the analysis and merely reiterated that mens rea is embodied within the elements of the crime. Noting that malice is not an element of the offense of murder, as it is in Nevada, the Kansas Court held that the analysis in \textit{Finger} was inapplicable. Had the \textit{Finger} Court clearly articulated the distinction between positive and negative mens rea, rather than simply rehashing the fairness of \textit{M Naughten}, the Kansas Court would have been faced with a much different proposition.

\textsuperscript{119} 126 S.Ct. 2709 (2006).
given the opportunity to resolve the debate over the constitutionality of the insanity defense, the Court declined the invitation and chose to resolve the case on unnecessarily complicated analysis of moral capacity and the use of evidence. Consequently, the Supreme Court still has not answered the question of whether a state court can abolish insanity as an extrinsic, affirmative defense to the crime charged.

Even though the Court in Clark failed to provide the hoped for resolution to the debate, the opinions of Justices Souter and Kennedy do provide insight into the Court's predispositions on the issue. What could be termed the boldest statement issued by the Court on the question is found in footnote 20 of the Clark opinion:

We have never held that the Constitution mandates an insanity defense, *nor have we held that the Constitution does not so require.* This case does not call upon us to decide the matter.120

While it is true that the Court reiterated that it has never held the Constitution mandates an insanity defense, the statement is the first time in the Court's history that it has even opened the door to a debate on whether an affirmative defense of insanity is constitutionally required.

A thorough analysis of what the Court did decide in Clark is not necessary for the purpose of this article. However, in leaving behind the quibbling over which issue was ripe for review and the categorizing of evidentiary standards that consume much of the Court's attention in Clark, the overriding sense is that the opinions in the case suggest that an extrinsic insanity defense

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120 126 S.Ct. at 2722, fn 20. The authors are particularly intrigued by the statement given that it was stated in conjunction with the majority's citation to the four states that abolished the affirmative defense of insanity and replaced it with the Mens Rea Model. Had the majority believed, as a number of states and scholars do, that the Court clearly believes an affirmative defense of insanity is not constitutionally required, the statement would have been unnecessary.
defense, in some form, is required by the Due Process Clause. Not only does the majority opinion implicitly find that moral blameworthiness is essential to criminal responsibility, but Justice Kennedy, in his dissent, expressly states that mens rea, which addresses only the offense elements, is separate and distinct from the extrinsic question of insanity. According to Justice Kennedy, to properly analyze the issues of mens rea and insanity, courts must understand that each concept addresses very distinct legal questions and that if the two concepts are melded, unworkable and unconstitutional standards are created.

At issue in Clark was the standard for insanity adopted in Arizona and in what capacity mental illness evidence could be used by a defendant. Prior to 1993, Arizona utilized the M Naughten test for insanity. If the accused did not understand the nature and consequences of his conduct or if the accused did not understand the conduct to be wrong, the accused was not held criminally liable. In 1993 the Arizona legislature eliminated the question of cognitive incapacity, or the first prong of M Naughten, and limited the insanity defense to a question of

121 See generally, 126 S.Ct. at 2722 wherein the majority discusses that moral and cognitive capacity evidence is intertwined to the extent that Clark fails to establish that Arizona law violates due process.

122 126 S.Ct. at 2747 (the existence or non-existence of legal insanity bears no necessary relationship to the existence or non-existence of offense elements).


124 See, 126 S.Ct. at 2720, fn 7 wherein the Court defines "capacity," with respect to the requirements addressed by the various forms of the insanity defense, to mean the ability to form a certain state of mind or motive, or to understand or evaluate one's actions, or control them.
moral incapacity – did the accused know the conduct was wrong. Additionally, under State v. Mott, evidence of mental disease or defect could only be used to establish the affirmative defense of insanity; it could not be used to negate the specific intent elements, or mens rea, of the crime charged. Clark challenged the limiting of insanity to a question of moral incapacity and the prohibition of evidence of mental disease or defect to negate intent as violations of the Due Process Clause.

While the Court ultimately concluded that the Due Process Clause was not violated, the discussion surrounding the holding offers some insight into the leanings of the Court. Justice Souter, writing for the majority, accepted that the appropriate standard by which to measure a Due Process violation is whether the Arizona statute “offends a principle of justice so rooted in the traditions and conscience of our people as to be ranked fundamental.” In upholding Arizona's abandonment of mental capacity as a part of the affirmative defense of insanity, the Court did not state that an affirmative defense of insanity is not constitutionally required. Justice Souter simply accepted the idea that extrinsic evidence of the lack of criminal culpability was a

125 A.R.S. § 13-502(A)
necessary component of due process, and concluded that in determining moral blameworthiness, evidence of capacity is necessarily evaluated. According to the Court:

cognitive incapacity is itself enough to demonstrate moral incapacity. . . As a defendant can therefore make out moral incapacity by demonstrating cognitive incapacity, evidence bearing on whether the defendant knew the nature and quality of his actions is both relevant and admissible.128

As evidence going to both cognitive and moral capacity was admissible under Arizona law, the Court held that the statute did not contravene the Due Process Clause. Although the decision is not dispositive of the issue, it is a significant indicator that the legal capacity for general criminal responsibility, or “blameworthiness” is so “firmly rooted a principle as to be ranked as fundamental.”129

The bigger issue in Clark was whether capacity and mental disease evidence could be excluded to negate mens rea, or the elements of the offense. In upholding the Mott rule, that evidence of insanity can only be used to establish the affirmative defense of insanity and not to negate the elements of the offense, the majority looked to two main presumptions in any criminal trial: the presumption of innocence and the presumption of sanity.130 In finding Mott constitutional, the Court created a tripartite structure, breaking down insanity evidence into observation evidence, which is typically presented in through lay testimony, and mental disease

128 126 S.Ct. at 2722.

129 Patterson v. New York, 432 U.S. 197 (1977)(despite power of the states to regulate procedures under which its laws are carried, laws must comport with due process)

130 126 S.Ct. 2729 (whether state regulation of evidence violates the Fourteenth Amendment turns on the application of the presumption of innocence and the presumption of sanity).
evidence and mental capacity evidence, both of which are typically presented through expert testimony. 131 After concluding that observation evidence is always admissible to negate mens rea, the majority held that Arizona was justified in funneling mental disease and capacity evidence, or expert testimony, through an affirmative insanity defense. 132

While the discussion of the breakdown of evidence that can be used to rebut the presumption of sanity versus the negation of offense elements has been heavily criticized, 133 there is no disagreement that based on such a presumption, an accused must be sane to be criminally culpable. Moreover, what the majority opinion implicitly recognizes is that the presumption of sanity is best rebutted by an affirmative defense of insanity and the use of mental disease and capacity evidence. 134

Even the dissent implies that mental disease and capacity evidence should be addressed

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131 126 S.Ct. at 2724-25.

132 See, 126 S.Ct. at 2732 (during the discussion of the three types of evidence, the Court finds that Arizona is justified in channeling mental disease and capacity evidence through an affirmative insanity defense. During this discussion, the Court implies that an affirmative defense is the best way to present the evidence).

133 See generally, 126 S.Ct. 2738 (Kennedy, J., dissenting); Peter Westen, The Supreme Court's Bout with Insanity: Clark v. Arizona, Ohio State Journal of Criminal Law, Fall, 2006

134 See, 126 S.Ct. at 2730, fn 38 where in the Court rejects the State's argument that mens rea and insanity are distinguishable and evidence of one is not relevant to the other. Specifically, the Court states that "Not only does evidence accepted as showing insanity trump mens rea, but evidence of behavior close to the time of the act charged may indicate both the actual state of mind at that time and also an enduring incapacity to form the criminal state of mind necessary to the offense charged."
by an affirmative defense of insanity.\textsuperscript{135} What Justice Kennedy takes issue with is the majority's tripartite classification of evidence and its holding that only observation evidence can be used to negate the offense elements.\textsuperscript{136} Justice Kennedy reasoned that expert testimony is essential to lending credibility to observation evidence and the factual determination of whether the offense elements are met.\textsuperscript{137}

In rejecting the majority's classification of evidence, Justice Kennedy highlighted the most important issue, and the one that the majority failed to recognize: that by “conflating the insanity defense and the question of intent,” confusion over \textit{mens rea} is created.\textsuperscript{138} Justice Kennedy understood the intent to commit the crime as a \textit{mens rea} element of the offense, and the capacity for criminal responsibility, are separate legal concepts.

\[\text{Mental illness evidence addresses different issues in the two instances. Criminal responsibility involves an inquiry into whether the defendant knew right from wrong, not whether he had the} \textit{mens rea} \text{elements of the offense. While there may be overlap between the two issues, ‘the existence or nonexistence of legal insanity bears no necessary relationship to the existence or nonexistence of}\]

\textsuperscript{135} 126 S.Ct. at 2738 (while Kennedy finds it unnecessary to address whether the Arizona test violates due process, he clearly delineates between offense elements and an affirmative defense and strongly advocates for the admission of expert testimony).

\textsuperscript{136} 126 S.Ct. at 2738 -39 (the evidentiary framework adopted will be unworkable and that the test is especially in appropriate in this case as the mental disease evidence was so intertwined with the observation evidence as to lend it the needed credibility).

\textsuperscript{137} 126 S.Ct. at 2739. (“The psychiatrist’s explanation of Clark’s condition was essential to understanding how he processes sensory data and therefore to deciding what information was in his mind at the time of the shooting. Simply put, knowledge relied on cognition, and cognition can be affected by schizophrenia.”)

\textsuperscript{138} 126 S.Ct. at 2746.
the required mental elements of the crime."\footnote{139}

In light of the trend of states to re-evaluate their insanity statutes, the failure of the Court to acknowledge the distinction between offense elements and \textit{mens rea} is unfortunate. After \textit{Clark}, the lack of a workable standard will undoubtedly lead to increased litigation as the issue peculates though the state courts. Eventually, the Court will again be asked to resolve the insanity issue, at which time it will be necessary for the Court to resolve the duality of \textit{mens rea} and the constitutionality of the Mens Rea Model.

\section*{IV. Due Process and the Duality of Mens Rea}

Having established that moral blameworthiness is a component of \textit{mens rea} which is deeply rooted in our system of justice, the question becomes whether the Mens Rea Model violates the moral blameworthiness component. The analysis of the state court opinions to address the issue and the Supreme Court decision in \textit{Clark} demonstrate that the courts have, to date, failed to bring any meaningful dialogue to the debate. By failing to acknowledge the duality of \textit{mens rea}, the opinions are of little analytical value. What remains, then, is to analyze the constitutionality of the Mens Rea Model utilizing the proper understanding of \textit{mens rea} and the affirmative defense of insanity.

The concept of *mens rea* is rooted in the notion of human free will, which has always been the “chief paradigm” of our criminal law.\(^{140}\) In other words, individuals are assumed to be autonomous, rational beings who are possessed with a minimum ability to choose whether to violate or abide by the law’s dictates, and are therefore blameworthy and fully responsible for making the wrong choice.\(^{141}\)

The Mens Rea Model claims consistency with the principle of *mens rea*, even though it admits to abolishing the insanity defense and replacing it with an evidentiary rule relating only to

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\(^{140}\) See note ___, supra.

There are those, primarily in the psychiatric and behavioral science communities, who subscribe to the view – known as the “behaviorist” position – that there is no such thing as free will because all human behavior is determined by forces which the individual is powerless to change. Therefore, any notion of moral “blameworthiness” for acts considered by law to be criminal is illusory and, as a product of an outdated emphasis on retribution as punishment for past evil acts, should be abandoned. Instead, the behaviorists argue, criminal law should focus, not on assessing blame for past conduct or on the nature of the offense, but on modifying behavior through treatment, or on confinement, to prevent the commission of such acts in the future. See PACKER, *supra*, at 12-15 (discussing behaviorist position). As Packer notes, because the insanity defense represents a crystallization of the notion of criminal responsibility which “universally characterizes the criminal law”, and which the behaviorists flatly reject, the behaviorist position is that the insanity defense should be abolished. *Id.*, at 15. The behaviorist position in its most pure form would discard *mens rea* altogether from the definition of legal accountability, in essence reducing all crimes to strict liability. See B. WOOTTON, CRIME AND THE CRIMINAL LAW: REFLECTIONS OF A MAGISTRATE AND SOCIAL SCIENTIST, 51-57 (1963). However, [u]nless one wishes the law to stop treating persons as persons – as beings deserving of praise and blame – and wishes the law, instead, to treat them as machines that need only be adjusted, criticism of the law's assessment of mental states is misguided.” S. Morse, *Excusing the Crazy: The Insanity Defense Reconsidered*, 58 S. CAL. L. REV. 777, 801 (1985).

the mental element of a particular offense. Historically, early proponents of the Mens Rea Model argued that an insanity acquittal was tantamount to a finding that the defendant lacked the purpose, knowledge, recklessness or negligence requisite to conviction, and thus lacked the mens rea of the crime. The result, these proponents argued, is that the defendant must be discharged because he is not guilty, rather than indefinitely committed to a mental institution because he is insane.\^142 Later proponents took a less benevolent approach, and pushed for abolition of the


It seems to be no coincidence that initial proposals to abolish the insanity defense coincided with the 1960's movement to de-institutionalize the mentally ill. \textit{See generally}, M. Perlin, \textit{Competency, Deinstitutionalization, and Homelessness: A Story of Marginalization}, 28 HOUS. L. REV. 63, 80-108 (1991)(discussing history and consequences of deinstitutionalization of the mentally ill). Of particular concern to these abolitionists was the belief that the insanity defense was little more than a cruel device to indefinitely restrain the mentally ill in state mental hospitals, "mega-asylums" where treatment was inadequate, and which, by linking insanity and violence, stigmatized the mentally ill. \textit{See Morris, supra} at 521-523.

But, whatever the historical merit of deinstitutionalization, and whatever insufficiencies exist in providing institutionalized treatment for mentally ill persons in the context of the insanity defense, it is common knowledge that today, America's prisons are filled to the brim with mentally ill persons who are receiving little treatment, if any at all. \textit{See Report of Human Rights Watch, Ill Equipped: U.S. Prisons and Offenders with Mental Illness} (2003), \textit{available at} http://www.hrw.org/reports/2003/usa1003/1.htm (noting that the current, and growing, number of mentally ill persons incarcerated in the United States is, in part, an unintended consequence of the failure to provide adequate support, funding and direction for community mental health services that were supposed to replace the mental hospitals shut down as part of the deinstitutionalization effort of the 1960s); D. Nusbaum, Note, \textit{The Craziest Reform of Them All: A Critical Analysis of the Constitutional Implications of ‘Abolishing ‘the Insanity Defense}, 87 CORNELL L. REV. 1509, 1565 (2002)("It has become relatively clear that since the mid-1970s, the emphasis on rehabilitation as a central purpose of punishment has fallen into strong disfavor, and has been almost completely replaced by a focus upon retribution. And while most prisons usually have some treatment programs available to offenders, it can hardly be gainsaid that the focus of prisons in today's society is not on treatment. Therefore, to assert that a mentally ill individual is more likely to receive treatment in a state prison than he would if placed in a state
insanity defense, in part as a matter of "public safety" in the wake of John Hinckley's insanity acquittal following his attempted assassination of President Reagan.\textsuperscript{143} They, like the earlier proponents, treated the concept of \textit{mens rea} as synonymous with the mental state required as an element of a particular crime, and argued that abolishing the insanity defense and replacing it with the Mens Rea Model evidentiary rule would alleviate alleged jury confusion in dealing with instructions on a separate insanity defense.\textsuperscript{144} But these arguments expose a fundamental conceptual flaw in the Mens Rea Model, which violates due process and thus renders it unconstitutional. By confusing two different categories of \textit{mens rea}, the Mens Rea Model completely eliminates that category of \textit{mens rea} which addresses general criminal responsibility, not at the offense level through elements of the crime, but at the defense level through the affirmative defense of insanity.\textsuperscript{145}

Many scholars have noted that the question of insanity is not intrinsic to the mental health institution, which exists for the very purpose of treatment, is not even minutely logical\textsuperscript{143}.

\begin{itemize}
\item S. Morse, \textit{supra} note ___, 58 S. CAL. L. REV. at 779; R. Spring, \textit{Farewell to Insanity: A Return to Mens Rea}, 66 J.K.B.A. 38, 43 (1997). If "public safety" from insanity acquittals was a primary moving force for these abolitionists, it suggests that they were more interested in increasing criminal convictions of the mentally ill, rather than legal clarity. \textit{See} G. Platt, \textit{The Proposal to Abolish the Federal Insanity Defense: A Critique}, 10 CAL. W. L. REV. 449, 470 (1974)(noting the proposal to abolish the federal insanity defense was made during Nixon's "law and order" administration, and "[i]f the motivation for abolition of the defense is to achieve greater conviction rates by stripping from unbalanced defendants the opportunity to prove themselves not guilty by reason of insanity, the proposal can only be described as odious").
\item Platt, \textit{supra}, at 452; Spring, \textit{supra}, at 45.
\item Kennedy's dissent
\end{itemize}
element required by the definition of a criminal offense. While most crimes do define a particular mens rea element, this is only one category of mens rea, referred to as "positive," or "special," mens rea, which is primarily concerned with offense grading. The other category of mens rea is legal capacity, termed "negative" or "general" mens rea, which is a precondition for criminal liability, quite apart from the elements of the crime. Since general mens rea is concerned with legal capacity for criminal responsibility, or "blameworthiness," it is not an element of a crime that the prosecution must prove, but rather is addressed through the doctrine of excuses.


147 Id.

148 Id. See also State v. Searcy, 798 P.2d 914, 922-935 (Idaho 1990) (McDevitt, J., dissenting) (pointing out this distinction, and concluding that the insanity defense is required by due process) and the discussion of Blackstone's position that "lunatics" cannot be held criminally liable, note ___, supra.

149 See Morse, supra, at 8 ("Court and commentators consistently fall prey to confusing 'special' mens rea, the specific mental state element that is part of the definition of the crime and thus part of the prosecution's prima facie case, and 'general' mens rea, a generic term for lack of responsibility that might be produced in whole or in part by factors such as legal insanity, duress, or partial responsibility...A defendant who lacks special mens rea is acquitted because his conduct fails to satisfy the state's definition of the offense, not because he lacks responsibility. The conduct of a defendant who lacks general mens rea almost always satisfies the elements of the prima facie case including special mens rea, but he is acquitted because he is not considered responsible for his conduct"). See also Packer, supra, at 112 ("[T]he case for excuses in the criminal law rests most securely on claims for the protection of human autonomy that quite transcend the calculus of crime prevention"); S. Morse, Rationality and Responsibility, 74 S. CAL. L. REV. 251, 258 (2000) ("[T]he general capacity for rationality is the precondition for
The Supreme Court implicitly recognized this mens rea duality when it held in Leland v. Oregon\textsuperscript{150} that it was constitutionally permissible to require the defendant to prove that he did not have the capacity to be criminally responsible for his acts. By rejecting the defendant's argument that requiring him to prove insanity violated due process because it required him to disprove the elements of the crime, the court in Leland clearly acknowledged the distinction between the question of guilt or innocence on the elements of the crime and the question of general criminal responsibility.\textsuperscript{151} The Court recognized that there is a difference between evidence which creates a reasonable doubt about the state's proof of offense elements, and evidence which establishes the defendant's lack of criminal responsibility.\textsuperscript{152} Indeed, if there is no evidence that the defendant suffers from a mental abnormality, the defendant's general mens liberty and autonomy. A lack of this capacity explains virtually all cases of criminal law excuses and virtually all the mental health laws that treat some people with mental disorders differently from people without disorders\textsuperscript{150}). As Professor Gardner has pointed out, "at the defense level, the evil motive concept provides vital doctrinal footing for theories of excuse that protect against unfair punishment." Gardner, \textit{supra} note 23, at 640-641.

\textsuperscript{150} 343 U.S. 790 (1952). See also, Clark v. Arizona, 126 S.Ct. 2709 (2006)(rather than simply finding affirmative defense of insanity is not constitutionally required, the Court construed the state law in a manner that enabled it to conclude the statute was constitutional).

\textsuperscript{151} This appears to be the same idea the Supreme Court of Nevada was getting at in Finger v. State, 27 P.3d at 79-85 (analyzing issue of criminal responsibility as person's legal capacity to appreciate the "wrongfulness" of his or her actions, which can only be addressed by affirmative insanity defense, and further stating: "Evidence that does not rise to the level of legal insanity may, of course, be considered in evaluating whether or not the prosecution has proven each element of an offense beyond a reasonable doubt, for example in determining whether a killing is first or second-degree murder or manslaughter or some other argument regarding diminished capacity").

\textsuperscript{152} As did Justice Kennedy in his dissent
rea is not in question, whether or not the elements of the crime can be proven beyond a reasonable doubt. Likewise, if there is evidence of a mental abnormality, such evidence may negate general mens rea even if it does not create reasonable doubt on the elements of the crime.\(^{153}\)

Since insanity is addressed to that category of mens rea relating to legal capacity for criminal responsibility, an insane defendant is not criminally responsible, regardless of whether the elements of the offense are otherwise met. In other words, insanity excuses a person from criminal responsibility, not because he did not commit the act in question, but because his general mental condition robbed him of his free will, rendering him incapable of making a meaningful choice when he acted.\(^{154}\) The Mens Rea Model simply casts aside this fundamental

\(^{153}\) See, e.g., Martin v. Ohio, 480 U.S. 228, 234 (1987) (“Evidence creating a reasonable doubt could easily fall far short of proving self-defense by a preponderance of the evidence. Of course, if such doubt is not raised in the jury's mind and each juror is convinced that the defendant purposely and with prior calculation and design took life, the killing will still be excused if the elements of the defense are satisfactorily established”). Both Leland and Martin refute the very argument put forward by the proponents of the Mens Rea Model to justify abolition of the insanity defense.

\(^{154}\) In this sense, “free will” does not equate with psychiatric determinism, as the behaviorists would assert. See supra note ___. As Professor Morse argues, in a causal universe it makes no sense to say that the lack of free will means that the person's behavior is “uncaused.” But, “[i]f free will means that the person is not compelled, then it is a reasonable synonym for one criterion of responsibility – as long as compulsion is not simply the equivalent of 'caused.'” S Morse, supra note ___, 58 S. CAL. L. REV. 777, n. 31 (1985) (citing H. FINGARETTE, THE MEANING OF CRIMINAL INSANITY 71-81 (1972)). Morse states elsewhere that “free will,” if unpacked, “collapses into a theory about rationality and hard choice.” S. Morse, "Rationality and Responsibility," 74 S. CAL. L. REV. 251, 258 (2000). It is the general capacity for rationality, and the absence of compulsion, that are the conditions of responsibility. Id., 74 S. CAL. L. REV. at 256-258.
category of mens rea, and by doing so turns a basic, founding principle of our criminal justice system on its head: Under the Mens Rea Model, an insane person – one who was irrational and compelled by his mental abnormality to act; in short, one who is deprived of his or her free will – is held criminally responsible for that act.155

The constitutional infirmity of the Mens Rea Model becomes even clearer when the doctrine of diminished capacity is examined. By limiting evidence of mental impairment to that which negates the mental element of a particular offense, the Mens Rea Model substituted the insanity defense with what is known as the “mens rea variant”156 or “mens rea model”157 of

155 See Packer, supra note ___ at 132 (“We must put up with the bother of the insanity defense because to exclude it is to deprive the criminal law of its chief paradigm of free will”). As Professor Packer states: “We excuse a man who does not understand not because he does not understand but because his lack of understanding renders him incapable of making a meaningful choice. Cognition is not the complement of volition; it is its precursor.” Id. at 134. Professor Morse puts it in a slightly different way, but the principle is the same: “Actors, such as small children, who lack reasonable cognitive or volitional capacity through no fault of their own may be dangerous, but are not considered fully responsible as moral agents. This basic intuition about the way cognitive and volitional capacity relate to responsibility is tracked by the insanity defense tests, which all focus on the actor’s irrationality (e.g., lacks substantial capacity to appreciate the criminality of his actions) and/or lack of self-control (e.g., lacks substantial capacity to conform his actions to the requirements of law).” S. Morse, Undiminished Confusion in Diminished Capacity, 75 J. CRIM. L. & CRIMINOLOGY 1, 20 (1984). Morse makes an important point here. It is not the purpose of this article to get into a discussion of various insanity tests, and Morse shows why they are not important to the discussion. The well-documented confusion over legal tests and definitions of insanity does not deter from the central underpinning of our understanding of insanity: If an actor is irrational and not in control of his actions because of mental illness, he is not blameworthy, in both the moral and legal sense. It is this core notion of blameworthiness to which the United States Supreme Court referred in Davis. See supra, text at ___.

diminished capacity doctrine. Proponents of the Mens Rea Model as a substitute for the insanity defense have always claimed that its evidentiary rule addresses the same issue as insanity, but in a way which is less confusing to the jury.\textsuperscript{158} But again, this claim is conceptually flawed. The diminished capacity doctrine only addresses the “positive,” or elements, category of \textit{mens rea} discussed earlier, and involves no claim about general \textit{mens rea}, i.e., criminal responsibility, which transcends the elements of the crime and is only addressed at the defense level through the affirmative defense of insanity.\textsuperscript{159}

The \textit{mens rea} variant of diminished capacity doctrine was developed to allow a jury to consider whether a \textit{sane} person's mental abnormality at the time of the crime prevented him or her from entertaining the specific mental state required by the statutory elements of the crime.\textsuperscript{160} But, as Professor Stephen Morse notes, a person who lacks elements \textit{mens rea} “is acquitted because his conduct fails to satisfy the state's definition of the offense, not because he lacks

\begin{itemize}
\item \textsuperscript{157} P. Aranella, \textit{The Diminished Capacity and Diminished Responsibility Defenses: Two Children of a Doomed Marriage}, 77 COLUM. L. REV. 827 (1977).
\item \textsuperscript{158} See, e.g., Spring, \textit{Farewell to Insanity: A Return to Mens Rea}, 66 J.K.B.A. 38, 45 (1977).
\item \textsuperscript{159} Packer, \textit{supra} note \underline{___}.
\item \textsuperscript{160} Legal analysis of diminished capacity doctrine has often confused the \textit{mens rea} variant with the concept of partial responsibility. \textit{See} Aranella, \textit{supra} n. \underline{___}; Morse, \textit{supra} n. \underline{___} at 7-8. Unlike partial responsibility, which asks whether the defendant was less capable than an ordinary person of entertaining the relevant mental state and thus deserves a lesser punishment, the \textit{mens rea} variant asks only whether the defendant in fact possessed the \textit{mens rea} element of the crime. If the prosecution fails to prove the \textit{mens rea} element beyond a reasonable doubt, the defendant is acquitted. \textit{Id.}
\end{itemize}
Thus, the *mens rea* variant created no defense which was not already constitutionally required, as every accused has a due process right to present relevant, competent evidence to refute the prosecution's prima facie case.

Indeed, the *mens rea* variant was a recognition by courts that evidence of mental disease or defect, though it does not establish insanity and therefore does not negate criminal responsibility, is nevertheless relevant to negate the specific intent element of a crime. Since specific intent crimes require proof of a particular mental state beyond the mere intent to engage in the proscribed conduct, whether such a mental state was present at the time of the conduct

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161 Morse, *supra*, at 8.

162 *See, e.g.*, Mott v. Stewart, 2002 WL 31017646 (D.Ariz. 2002) (holding that the exclusion of evidence of mental disease or defect (in this case, battered women's syndrome), offered to negate the specific intent element of an offense, infringed on defendant's ability to present a complete defense and was unconstitutional). *C.f.* State v. Mott, 187 Ariz. 536, 931 P.2d 1046 (*en banc*), cert. denied, 520 U.S. 1234 (1997).

In substituting the insanity defense with its version of the Mens Rea Model, the Kansas statute treats this evidentiary rule as a separate defense which excludes criminal responsibility. KAN. STAT. ANN. § 21-3219 (1996). In this way, the Kansas statute confuses elements *mens rea* with general *mens rea*, in what Professor Morse calls a "slight of hand that tries to have it both ways," the result of which is simply confusion. See Morse, *supra* note ___, at 18 n. 57. This confusion is plainly apparent in the fact that the Kansas statute authorizes automatic commitment of a person found not guilty because of mental disease or defect. KAN. STAT. ANN. § 22-3428(a) (1996) ("When a defendant is acquitted and the jury answers in the affirmative to the special question asked pursuant to K.S.A. 22-3221 [that defendant is found not guilty because of mental disease or defect], the defendant shall be committed to the state security hospital for safekeeping and treatment"). This appears to be a due process violation in its own right, since a defendant found not guilty because of mental disease or defect in Kansas is acquitted because the state failed prove the elements of the crime beyond a reasonable doubt. *See supra* note ___. Cf., State v. Van Hoet, 89 P.3d 606 (Kan. 2004) (though acknowledging abolition of insanity defense in Kansas, court upheld constitutionality of automatic commitment provision after acquittal under substitute Mens Rea Model evidentiary rule).
necessarily involves a subjective, individualized inquiry into the defendant's actual state of mind. Psychiatric testimony which shows that the defendant, because of mental disease or defect, did not in fact possess the required specific intent is relevant to that inquiry.\textsuperscript{163} Because such evidence will revolve around who the defendant is and why he did what he did, the prosecution, in order to prove that the defendant actually possessed the required intent, will necessarily be required to prove that the defendant had the capacity to form the specific intent.\textsuperscript{164}

The Mens Rea Model simply takes the \textit{mens rea} variant of diminished capacity doctrine, expands it to include general intent crimes, and calls it an adequate and less confusing substitute for the insanity defense. This raises an additional constitutional problem, however, above and beyond the wholesale elimination of the fundamental category of \textit{mens rea} relating to general criminal responsibility.

Unlike specific intent crimes, general intent crimes only require proof that the individual voluntarily committed the prohibited act. Because intent may be inferred from the doing of the act, based upon the legal presumption that all persons intend the natural and probable

\begin{footnotes}
\item[163] Aranella, \textit{supra} note ___, at 833.
\item[164] To the extent that a mental abnormality which renders a person incapable of forming specific intent may also establish insanity (see Aranella, \textit{supra}, at 830-831), elements \textit{mens rea} and insanity do intersect each other. However, as Aranella points out, a person may be legally insane yet still be capable of forming specific intent. \textit{Id.} at 831 n. 20. That is because capacity to form specific intent, which goes to the elements of the crime, and capacity for criminal responsibility, which the prosecution is not required to prove, are two different things, a distinction lost on the Clark majority. See notes ___, \textit{supra}, and accompanying text. See also Packer, \textit{supra}, at 135 ("[The diminished capacity] defense bears no relation to the insanity defense, which is not at all addressed to particular elements of the offense but rather to the actor's general mental condition").
\end{footnotes}
consequences of their actions, the standard of liability for general intent crimes is an objective one. This objective standard only asks what the defendant did, not who he is or why he did what he did. The defendant’s capacity to form intent is not a fact necessary to constitute a general intent crime, and thus the prosecution has no burden to prove that fact. On the contrary, once the prosecution proves that the defendant committed the act, his intent will be inferred from the commission of that act. Arguably, then, evidence of mental disease or defect is not even relevant to general intent crimes under the Mens Rea Model, because capacity to form intent is not an issue. But if it is relevant, then the effect of the Mens Rea Model as applied to general intent crimes is to presume the defendant guilty, and to shift the burden to the defendant to disprove the _mens rea_ element of the crime by proving that, as a subjective matter, he lacked the capacity to form it. Such burden shifting is unconstitutional under _Mullaney v. Wilbur_.

The _mens rea_ variant of diminished capacity doctrine was always limited to specific intent crimes, based on the idea that even if evidence of mental abnormality negates the specific intent element of a crime, the defendant will still be convicted of a lesser included offense. But this is not necessarily true, and it is most certainly not true with general intent crimes. Indeed,

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165 As long as the presumption of intent is permissive rather than mandatory. See generally, Sandstrom v. Montana, 442 U.S. 510 (1979).

166 Aranella, supra note ___, at 833 n. 33 (quoting Silving, _Psychoanalysis and the Criminal Law_, 51 J. CRIM. L.C. & P.S. 19, 24 (1990)).


168 Aranella, supra note ___, at n. 25 (noting that successful application of diminished capacity
if public safety was a motivating force in abolishing the insanity defense and adopting the Mens Rea Model, then it makes no sense. Under the Mens Rea Model, a potentially dangerous mentally ill person, if that person's mental illness negates the elements mens rea of a crime and there is no lesser included offense, will be acquitted and entitled to discharge because the prosecution failed to prove the elements of the crime. Under the Mens Rea Model, absence of elements mens rea may well result in the outright discharge of a potentially dangerous mentally ill person, who is unlikely to be treated for his or her illness. With the insanity defense, such a person, even if he or she is found to lack general mens rea and thus cannot be held criminally responsible, will nevertheless be subject to commitment for care and treatment.169

On the other side of the equation, constitutional due process does not allow the elimination of a fundamental legal principle of mens rea that is the very foundation of our criminal law system: That those who lack the legal capacity for criminal responsibility lack

169 See Platt, supra note ___, at 465.
general *mens rea*, a precondition for criminal liability. Negation of criminal responsibility can only be captured as an excuse grounded in considerations of general blameworthiness, which are external to the elements of the crime. Because the Mens Rea Model removes any mechanism for negating general *mens rea*, which is not an element of the crime that the prosecution must prove, it denies a defendant the ability to establish as a defense that, because of mental illness, he or she lacked the legal capacity for criminal responsibility.

IV. Conclusion

The historical development of *mens rea* in Anglo-American law demonstrates an evolution of the concept into dual categories: “Negative” or general *mens rea*, which is concerned with legal capacity for criminal responsibility, or “moral blameworthiness”; and “positive” or elements *mens rea*, the mental state required as an element of a particular crime. The insanity defense, because it is addressed to general *mens rea*, is extrinsic to the elements of the crime. Since the prosecution has no burden to prove, as an element of the crime, that a defendant possessed the legal capacity for criminal responsibility at the time of the act, general *mens rea* can only be negated at the defense level through the affirmative defense of insanity. Courts which have upheld the constitutionality of the Mens Rea Model evidentiary rule have done so based upon a conceptually flawed analysis which fails to recognized this fundamental *mens rea* duality.

With the abolition of the insanity defense and its replacement with the Mens Rea Model evidentiary rule, a person whose act was a function of a mental illness is no longer able to defend based on his or her lack of legal capacity for criminal responsibility. Revisiting our hypothetical
from the introduction, consider the case of A, who shot and killed B because, in an acute state of psychosis, he believed that B was an enemy soldier. In contrast to one who believed he was “squeezing a grapefruit,” A knew B was a human being, and clearly intended to kill him. Thus, the *mens rea* element of the offense of murder was present, and A would have no defense under the Mens Rea Model. Nor could A invoke a self-defense claim, despite his belief that he would be killed if he did not act, because self-defense requires a *rational* belief that the force was necessary. A’s belief that B was an enemy soldier who had to be gunned down was not rational; rather, it was an irrational act compelled by his mental illness. A is thus relegated to a legal no man’s land, with no defense, even though, because of his mental illness, he was irrational and unable to make a meaningful choice when he shot and killed B. A is deemed guilty and will be punished the same as a rational person who, with full understanding of his or her conduct, consciously chooses to shoot and kill another. Not only is such a result the antithesis of centuries-old principles of criminal liability, but it should be an intolerable result in a modern civilized society that acknowledges mental illness as a disease that renders it victims incapable of rational choice.

Legal capacity for criminal responsibility, or moral blameworthiness, is, and always has been, a precondition for criminal liability in American jurisprudence. It is a principle deeply rooted in the notion of human free will which lay at the heart of our criminal law, and is therefore protected by the Due Process Clause. The Mens Rea Model evidentiary rule eliminates this fundamental principle of *mens rea* which is preserved in the doctrine of excuses, and, in a case such as A’s, must be addressed through the affirmative defense of insanity.